ABOLISHING CITIZENSHIP: RESOLVING THE IRRECONCILABILITY BETWEEN "SOIL" AND "BLOOD" POLITICAL MEMBERSHIP AND ANTI-RACIST DEMOCRACY

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I. INTRODUCTION

Real democracy requires an end to the law's sanctioning of hierarchy and inequity. But democratic ideas will always face opposition from those with power or without imagination.[1] This is certainly the case with regards to the laws governing the liberty and dignity of people who move between nation states. Arguments for open borders,[2] no borders,[3] the abolition of deportation,[4] or the end of citizenship as we know it[5] are too easily dismissed by their opponents with the question: "How would that work?"[6] The inquiry is really a claim disguised as a question; it asserts that if a political idea cannot be

1. *See, e.g.*, Jason DeParle, *The Open Borders Trap*, N.Y. TIMES (Mar. 5, 2020), https://perma.cc/45M9-8TWP ("[I]t's impossible to let them all in. Hence, the need to set limits and enforce them humanely."); Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), https://perma.cc/4R3T-MG73 (quoting critics of prison and police abolition: "there is always going to be some role for prisons"); Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), https://perma.cc/KUR3-RRHT ("Prison abolition is an idea, when first encountered, that can feel incredibly radical and infeasible.").

2. See, e.g., Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 212–27 (1971); Jesús Huerta de Soto, *A Libertarian Theory of Free Immigration*, 13 J. LIBERTARIAN STUD. 187 (1998); Kevin R. Johnson, Open Borders?, 51 UCLA L. REV. 193 (2003); TERESA HAYTER, OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS (2d ed. 2004); Antonia Darder, *Radicalizing the Immigrant Debate in the United States: A Call for Open Borders and Global Human Rights*, 29 NEW POL. SCI. 3 (2007); JOSEPH CARENS, THE ETHICS OF IMMIGRATION (2013); BRYAN KAPLAN & ZACH WEINERSMITH, OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION (2019); Beth Caldwell, *Reflections on the Right to Move Freely Across Borders*, 50 SW. L. REV. 359 (2021).

3. *See, e.g.*, Bridget Anderson, Nandita Sharma & Cynthia Wright, *Editorial: Why No Borders?,* 26 REFUGE 5, 5–11 (2009); NATASHA KING, NO BORDERS: THE POLITICS OF IMMIGRATION CONTROL AND RESISTANCE (2016); HARSHA WALIA, UNDOING BORDER IMPERIALISM (2013) [hereinafter UNDOING BORDER IMPERIALISM]; Daniel Bier, *Open Borders or No Borders?*, FOUND. FOR ECON. EDUC. (Oct. 15, 2015), https://perma.cc/U3T5-7EWW; HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 213 (2021) [hereinafter BORDER & RULE].

4. *See, e.g.*, Tina Vasquez, *Abolish ICE: Beyond a Slogan*, REWIRE NEWS GRP. (Oct. 10, 2018, 7:00 AM), https://perma.cc/37TQ-SGCQ; Natascha Elena Uhlmann, ABOLISH ICE: A PASSIONATE PLEA FOR A MORE HUMANE IMMIGRATION SYSTEM (2021).

5. *See, e.g.*, JACQUELINE STEVENS, STATES WITHOUT NATIONS (2009); NANDITA SHARMA, HOME RULE: NATIONAL SOVEREIGNTY AND THE SEPARATION OF NATIVES AND MIGRANTS (2020).

6. *See, e.g.*, MICHAEL BLAKE, JUSTICE, MIGRATION, AND MERCY 17–47 (2020) (arguing that open borders will not work); Daniel Molina, *Rubio Question's Biden's Deportation Freeze*, FLORIDIAN PRESS (Jan. 25, 2021), https://perma.cc/TRT6-SRKH (quoting Florida Senator Rick Scott saying "open borders . . . won't work"); Stu Bykofsky, *The Pope Gets Us Wrong on Immigration*, PHILA. INQUIRER (Sept. 28, 2015), https://perma.cc/2QHQ-UKZU ("As a politician who heads a state . . . the pope knows open borders won't work."); Richard Epstein, *Immigration Without Open Borders*, RICHOCHET (Feb. 9, 2022), https://perma.cc/UE7H-69BR ("There are many permutations that work, but open border isn't one of them").

imagined under current law, then it must be neither possible nor legitimate. This question also implies that the status quo *does* "work." This Article attempts to confront criticisms of this kind and challenge the thinking and power behind them. Here, I argue the status quo does not "work" because it is anti-democratic and then provide a legal blueprint for how the abolition of citizenship—including borders and deportation—would, and should, work under the law.

Citizenship is "an exclusive status that confers on the individual rights and privileges within national boundaries."[7] It is "an instrument and object of closure"[8] that makes political membership an exclusive club and limits rights and liberties to its members.[9] I consider here all immigration rules and regulations as part of that law, including border enforcement, and even non-immigration laws that distinguish between citizen and noncitizen such as voting or public benefits laws.[10] Together these legal constructs constitute the rules for inclusion in and exclusion from political membership.[11] Citizenship and immigration laws police this membership and guard its exclusivity.[12] These laws are enforced through "legal violence" [13] of borders, prison camps, surveillance, and deportation. This vast infrastructure of violence is necessary to enforce rules of belonging. Exclusion is inherently violent, or to say it in fewer words, citizenship *is* violence.

Almost every nation state in the world assigns political membership by one of two criteria: ancestry or birthplace, or some combination of the two.[14] The former is referred to as "*jus sanguinis*," or "right of blood," citizenship[15] and the latter as "*jus soli*," or "right of soil," citizenship.[16] Together they are sometimes called "birthright citizenship," or simply "soil and blood,"[17] or "blood and soil."[18] The invocation of the same words and phrase used to spread genocidal ideology in Nazi Germany is neither an accident nor

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7. YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 120 (1994).

8. ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 23 (1992).

9. AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 14 (2009).

10. SHARMA, *supra* note 5, at 202.

11. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 5 (2004).

12. SOYSAL, *supra* note 7, at 120.

13. *See* Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380, 1380 (2012).

14. *See, e.g.*, Yasmeen Serhan & Uri Friedman, *America Isn't the 'Only Country' with Birthright Citizenship*, ATLANTIC (Oct. 31, 2018), https://perma.cc/5NKH-H6J5.

15. DIMITRY KOCHENOV, CITIZENSHIP 61 (2019).

16. Polly Price, *Jus Soli and Statelessness: A Comparative Perspective from the Americas*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 27 (Benjamin N. Lawrence & Jaqueline Stevens eds., 2017) [hereinafter CITIZENSHIP IN QUESTION].

17. *See, e.g.*, Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2527 (2007); Peter Wade, *Race, Ethnicity, and Nation: Perspectives from Kinship and Genetics*, *in* RACE, ETHNICITY, AND NATION: PERSPECTIVES FROM KINSHIP AND GENETICS 1,11–12 (Peter Wade ed., 2007).

18. *See, e.g.*, Riva Kastoryano, *Citizenship and Belonging: Beyond Blood and Soil*, *in* THE POSTNATIONAL SELF: BELONGING AND IDENTITY 120, 120–36 (Ulf Hedetoft & Mette Hjort eds., 2002); David S. Law, *Alternatives to Liberal Constitutional Democracy*, 77 MD. L. REV. 223, 228 (2017); Shachar, *supra* note 9, at 127.

coincidence.[19] Rather, it reflects what all citizenship rules share with even the most barbaric and genocidal of ideologies—identity rooted in racism and territorial exclusivity.[20]

Aside from birth, a relatively tiny minority of people will, through the process of naturalization, become citizens of a nation state where they were not born or do not share ancestry. In many naturalization laws, there is also the principle that extended periods of time of residence, employment, or education within a state merit citizenship,[21] sometimes called "*jus temporis*"[22] or "*jus nexi*."[23] This Article rejects all of these models of political membership.

The use of terminology hereafter requires some explanation. I borrow the term "illegalized" from Harold Bauder[24] to describe anyone assigned fewer rights and liberties than those afforded citizens. This includes someone whose very presence or life in the United States has been illegalized (colloquially called "undocumented") but also a noncitizen for whom some rights have been illegalized even if their presence or life has not (such as a permanent resident prohibited from voting). I want to remind the reader that citizenship is something *done to* people, rather than something descriptive of a person. I try to avoid the words "immigrant" or "migrant" or "refugee"[25] because these words normalize citizenship in our minds,[26] and I intend to do the opposite here. For purposes of clarity about the law, I also sometimes refer to illegalized people as noncitizens, to contrast their current legal status with citizens.[27] I refer to "immigration detention," the daily incarceration of thousands of noncitizens for the offense of being noncitizens, as internment.

It is useful to explain here what I do not argue and why. First, I do not advance capitalist or nationalist reasons for abolishing citizenship, such as,

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19. BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR 416–54 (2007).

20. *Id.*; *see also infra* Section II.

21. *See, e.g.*, CARENS, *supra* note 2, at 103–04; 8 U.S.C. § 1427(a)–(c) (requiring, inter alia, continuous presence for five years as a Legal Permanent Resident, to qualify for naturalization).

22. Elizabeth Cohen, *Citizenship and the Law of Time in the United States*, 8 DUKE J. CONST. L & PUB. POL'Y 53, 55 (2013).

23. SHACHAR, *supra* note 9, at 16.

24. Harold Bauder, *Why We Should Use the Term 'Illegalized' Refugee or Immigrant: A Commentary*, 26 INT'L J. REFUGEE L. 327, 327–32 (2014); *see also* ALEX SAGER, AGAINST BORDERS: WHY THE WORLD NEEDS FREE MOVEMENT OF PEOPLE 13 (2020).

25. *See, e.g.*, Andrea Smith, *Preface*, *in* UNDOING BORDER IMPERIALISM, *supra* note 3, at ix, x ("[*I*]*mmigrant* . . . presumes that people must naturally be bound to one place, and if they travel, then they are where they do not belong."); REECE JONES, OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT 14 (Reece Jones ed., 2019) [hereinafter OPEN BORDERS] ("The authors generally refrain from using 'immigrant' because it gives primacy to a line between inside and outside that must be crossed. Similarly, we [the authors] rarely use 'refugee' because it is a state-defined category that legitimates some movements (for fear of political persecution) at the expense of all others (e.g., economic, familial, or environmental).").

26. *See, e.g.*, SHACHAR, *supra* note 9, at 16.

27. Since the scope of this Article is limited to law, I address citizenship, and not nationalism, directly. Nevertheless, because one is the codification of the other, the reader can presume that what can be said here about citizenship, can also be said about nationalism. *See* Nandita Sharma, *Dispossessing Citizenship: In Defense of Free Movement*, in OPEN BORDERS, *supra* note 25, at 77, 78–80; LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 24, 81 (2008); SHARMA, *supra* note 5, at 202.

"it's good for business," or "it's good for America." These arguments have been made elsewhere in abundance.[28] Nor do I focus on the most violent, barbaric forms of citizenship enforcement as others have,[29] because I regard all citizenship enforcement as oppressive. As the abolitionist scholars Mariame Kaba and Tamara Nopper once put it, "[w]e must accept that the ordinary is fair, for an extreme to be the problem."[30] Instead, I foreground what are often considered the most ordinary and least atrocious rules—the notion that law should distinguish between foreigner and national at all—so as to highlight the "terror of the mundane and quotidian," in the words of author Saidiya Hartman.[31] I do not focus on the naming of new rights[32] as much as I do on identifying anti-racist democracy and how abolition and new law might fortify and protect it. I begin by naming the foreigner/national distinction as the root problem because "a problem well put is half-solved."[33]

Throughout this work, I draw extensively upon the work of Critical Legal Theory, Critical Race Theory ("CRT"),[34] including critical whiteness studies, and abolitionist scholars. I rely particularly on the CRT scholarship that shows how race shapes the law and how law shapes ideas about race. I draw upon the radical democratic ideas of others to interrogate the assumptions that undergird citizenship. I take direction from the anti-racist and CRT literature arguing that real equity requires the deliberate redistribution of power—through abolition and reparations. Finally, I look to prison industrial complex ("PIC") abolitionist activists and scholars to help think through what it means to advocate for and achieve a world where the abolition of citizenship is realized. I am in debt to these ideas for any insight expressed below into why and how citizenship should be abolished.

The first part of this Article argues that citizenship law is categorically racist and anti-democratic. Using the United States as an example, it explains how racism constructed citizenship law, how citizenship law continues to construct race, and how racist citizenship law harms U.S. citizens of color as

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28. *See, e.g.*, Johnson, *supra* note 2, at 233–43, 260; JASON RILEY, LET THEM IN: THE CASE FOR OPEN BORDERS 49–90, 187–216 (2009); Chandran Kukathas, *The Case for Open Immigration*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 207 (Andrew I. Cohen & Christopher Heath Wellman eds. 2005); BAS VAN DER VOSSEN & JASON BRENNAN, IN DEFENSE OF OPENNESS: WHY GLOBAL FREEDOM IS THE HUMANE SOLUTION TO GLOBAL POVERTY (2018).

29. *See, e.g.*, NIGEL HARRIS, THE NEW UNTOUCHABLES: IMMIGRATION AND THE NEW WORLD WORKER (1995); HAYTER, *supra* note 2, at 64–123; MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004); AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL (2014); ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS (2020).

30. Tamara K. Nopper & Mariame Kaba, *Itemizing Atrocity*, JACOBIN MAG. (Aug. 15, 2014), https://perma.cc/4MWZ-ESQV.

31. *Id.*

32. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 28–29 (3d ed., 2017) (discussing the limitations of framing social justice problems with "rights" language).

33. John Dewey, *Logic: The Theory of Inquiry*, in JOHN DEWEY: THE LATER WORKS, 1925–1953, at 112 (Jo Ann Boydston ed., 1986).

34. See Kimberlé Crenshaw, Neil T. Gotanda, Gary Peller & Kendall Thomas, *Introduction*, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED A MOVEMENT xiii, xviii, xxv (Kimberlé Crenshaw, Neil T. Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRITICAL RACE THEORY].

well as U.S. noncitizens. The Article then explains that citizenship law is anti-democratic for further reasons, namely, that it is antithetical to equality and liberty, and it authorizes authoritarianism.

The second part of this Article argues that a new law of political membership based on one's physical location or residence (termed "*jus locus*") should replace the violent "blood" and "soil" citizenship rules. I consider the law of state political membership within the United States as just one model for how *jus locus* membership might be applied across nation states. Arguing that reparations are a necessary component of any abolitionist project, I further make the case that a reparations program should accompany a *jus locus* membership. I suggest a few ways in which a *jus locus* membership law might be written and explain why it would be anti-racist and democratic. Finally, I conclude by reflecting on how we might build citizenship abolition from the bottom-up.

II. CITIZENSHIP AS RACISM AND ANTI-DEMOCRACY

Only a few (non-anarchists[35]) have explicitly or impliedly called for the abolition of citizenship. These include sociologist Nandita Sharma,[36] political scientist Jaqueline Stevens,[37] lawyers Monique Chemillier-Gendreau[38] and Dimitry Kochenov,[39] and arguably, philosopher Etienne Balibar.[40] While these authors have addressed citizenship's racist[41] and antidemocratic[42] character, I follow their lead and attempt to build upon their insightful work by explaining why citizenship itself amounts to the codification of race and anti-democracy.

A. *Citizenship as Race*

This section is entitled "citizenship as race," rather than "citizenship is rac*ist*," because I argue citizenship status is merely a synonym[43] for race. Both racism[44] and citizenship[45] consolidate power for some at the expense of

35. *See, e.g.*, DAVID GRAEBER, FRAGMENTS OF AN ANARCHIST ANTHROPOLOGY (2004).
36. *See* SHARMA, *supra* note 5, at 87.
37. STEVENS, *supra* note 5, at 73–103.
38. Monique Chemillier-Gendreau, L'introuvable statut de réfugié, révélateur de la crise de l'État moderne, 1240 HOMMES & MIGRATIONS 94 (2002).
39. KOCHENOV, *supra* note 15, at 249.
40. *See* Etienne Balibar, *Racism and Nationalism*, *in* RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 37 (Etienne Balibar & Immanuel Wallerstein, eds., Chris Turner, trans., 1991).
41. *See, e.g.*, SHARMA, *supra* note 5, at 89, 117–68, 279; STEVENS, *supra* note 5, at 77; KOCHENOV, *supra* note 15, at 96.
42. *See, e.g.*, SHARMA, *supra* note 5, at 117–68; STEVENS, *supra* note 5, at 75; KOCHENOV, *supra* note 15, at 72, 204–05.
43. *See* SHARMA, *supra* note 5, at 89 ("In this way the ideas of nation and race became interchangeable . . . .").
44. For definitions of racism, see RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (2007) and Balibar, *supra* note 40, at 48–50.
45. *See* I AM NOT YOUR NEGRO (Netflix 2016), at 1:26:32–1:27:15 ("White is a metaphor for power, and that is simply a way of describing Chase Manhattan Bank."); THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL 18, 28 (1994) (describing the objective

others to create hierarchy.[46] Like whiteness, it is the exclusivity of citizenship that preserves its power.[47] Both are motivated by perceived self-interest rather than mere hate or ignorance.[48] By one definition, racism is "the theory and the practice of applying a social, civic, or legal double standard based on ancestry."[49] This doubles as a description of the two-tiered set of rights and privileges imposed upon citizens and noncitizens based on their ancestry or birthplace.

Both are also socially constructed. Racism "takes for granted the objective reality of *race*,"[50] and race is a mythology "that nature produced humankind in distinct groups, each defined by inborn traits."[51] This mirrors citizenship's presumption of naturally and objectively distinct categories of people ("nationalities") and its use of this taxonomy to justify segregation (territorial "nations"). Both citizenship and racism hold themselves out as biological institutions dictating the assignment of privilege.[52] Racism and citizenship use mythology to organize support for their respective double standards, that is, to consolidate power,[53] and both employ mythology in the service of power. Thus, a citizenship is a form of race. They are two words to describe the same motivation for violence. Accordingly, it misses the mark to say that citizenship and immigration law are "influenced by"[54] or "partially" animated by racist ideas.[55] Instead, citizenship and immigration laws are categorically racist ideas synonymous with race itself.

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of whiteness as "social control") [hereinafter RACIAL OPPRESSION AND SOCIAL CONTROL]; THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO AMERICA 32 (1997) (same) [hereinafter THE ORIGIN OF RACIAL OPPRESSION IN ANGLO AMERICA]; IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xvi (2006) ("Race and racism are centrally about seeking, or contesting, power."); KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 152 (2012) ("[T]he essence of the situation was power, and the contest over it . .) ."); *id*. at 162 ("Woodward understands segregation to be an act of political power . . . ."); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS 506 (2016) (arguing that racism is a product of self-interest and power, not ignorance or lack of education).

46. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 62 (2019).

47. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1744 (1993), reprinted *in* CRITICAL RACE THEORY, *supra* note 34, at 276, 285.

48. *See* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1035 (1989); KENDI, *supra* note 46, at 230; ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 327 (2020). Just as with whiteness, if everyone was a citizen, the citizens would lose their advantages. *See infra* Part II(b)(i).

49. FIELDS & FIELDS, *supra* note 45, at 17.

50. *Id*.

51. *Id*. at 16.

52. SHARMA, *supra* note 5, at 210.

53. *See* KENDI, *supra* note 46, at 129–30.

54. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1119 (1998) ("Racism . . . has unquestionably influenced the evolution of immigration law and policy in the United States.").

55. *See, e.g*., Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 119 (1995); Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1226 (1997); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11"?*, 7 J. GENDER RACE & JUST. 315, 321 (2003).

This is not the first writing to observe the interchangeable nature of race and citizenship. Philosopher Etienne Balibar asks what the difference is between "race" and "nation" when both hurt people in the same way.[56] Nandita Sharma put it more succinctly: "Nationhood became the new racist typology and Nationals the new 'superior race.'"[57] Others have argued that citizenship and immigration laws are categorically racist to support their arguments for the abolition of borders, if not citizenship.[58] Curiously, while many scholars have applied the work of critical race theorists to conclude that citizenship or immigration law is inherently racist, they have tended not to call for their total abolition.[59] Those scholars who *have* called for the abolition of immigration laws on account of their inherent racism have tended not to apply the work of critical race theorists.[60] Here, I draw upon the insight of both CRT and abolitionist traditions to examine the history of American citizenship and to argue that citizenship and racism are one in the same, which forces the conclusion that anti-racist democracy is impossible without the abolition of citizenship.

1. *Race Becomes Citizenship*

The history of U.S. naturalization and immigration law grossly illustrates that its citizenship is merely a synonym for whiteness.[61] This history proves that race becomes codified as citizenship.

U.S. citizenship rules have the effect of excluding nonwhites from political membership, and admitting nonwhites into that membership or its physical territory only when it serves the interests of white power, such as by providing a source of exploitable labor.[62] Consistent with white nationalism,[63] citizenship therefore enforces a racial hierarchy in which white people[64]

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56. Balibar, *supra* note 40, at 37 ("[T]he organization of nationalism into individual political movements inevitably has racism underlying it.").

57. SHARMA, *supra* note 5, at 279.

58. HAYTER, *supra* note 2, at xxvi, 174; STEVE COHEN, NO ONE IS ILLEGAL: ASYLUM AND IMMIGRATION CONTROL PAST AND PRESENT 4, 48–49, 244 (2003); UNDOING BORDER IMPERIALISM, *supra* note 3, at 2, 61, 66; Balibar, *supra* note 40, at 37; KOCHENOV, *supra* note 15, at 96–97, 101–04; Nicholas De Genova, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, *in* THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 33, 55 (Nicholas De Genova & Nathalie Peutz, eds., 2010) [hereinafter DEPORTATION REGIME]; SAGER, *supra* note 24, at 2, 32.

59. *See, e.g.*, Johnson, *supra* note 54, at 1119, 1158; NGAI, *supra* note 11, at 38, 264; DAS, *supra* note 29, at 27–58, 198–203; HANEY LÓPEZ, *supra* note 45, at 13.

60. *See, e.g.*, Nett, *supra* note 2, at 220–21; HAYTER, *supra* note 2, at 174; CARENS, *supra* note 2, at 33, 228; KOCHENOV, *supra* note 15, at 12.

61. I leave to others to interpret the ways in which citizenship and immigration law racializes nonmembers elsewhere in the world. *See, e.g.*, COHEN, *supra* note 58, at 49 (demonstrating how the origin of British immigration controls have their roots in anti-Semitism); Oluyemi Fayomi, Felix Chidozie & Charles Ayo, *A Retrospective Study of the Effects of Xenophobia on South Africa-Nigeria Relations*, WORLD ACAD. SCI., ENG'G & TECH (2015) (discussing xenophobia and racism against Nigerians in South Africa).

62. *See infra* note 165.

63. *See* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019) (defining white nationalism).

64. The definition of whiteness has changed over time. *See* James Baldwin, *On Being "White" . . . and Other Lies*, *in* BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE 177, 178

consolidate resources, power and privilege through the subordination, exclusion, and "unfreedom"[65] of nonwhite people.[66] Below, I explain why American naturalization and immigration law were invented to enforce[67] a "white republic,"[68] and continue to do so. These laws are the codification of racial social engineering and, specifically in the United States, amount to white nationalist regulatory law.[69] Ultimately, as Nobel laureate Toni Morrison once wrote, "American means white."[70]

The origin of American naturalization and immigration policy is properly located in the forced migration of the slave trade and settler colonialism.[71] Law Professor Rhonda V. Magee describes slavery as "our nation's first

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(David R. Roediger ed., 1998) ("No one was white before he/she came to America. It took generations, and a vast amount of coercion, before this became a white country."); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 128–30 (Routledge Classics 2009) (1995) (describing the changing nature of "white man's work" and how it has changed the definition of whiteness over time); HANEY LÓPEZ, *supra* note 45, at 150 ("Only in the first half of the twentieth century was 'White' transformed into a relatively monolithic and undifferentiated group encompassing all persons of European descent in the United States."); NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 201 (2010) ("Rather than a single, enduring definition of whiteness, we find multiple enlargements occurring against a backdrop of the black/white dichotomy.").

65. Literally the state of being unfree, "unfreedom" describes the general conditions of oppression and subordination through naming what is actively taken away by hegemonic forces, to wit, liberty. *See e.g.*, Yarran Hominh, The Problem of Unfreedom 9–15 (2021) (Ph.D. dissertation, Columbia University) (Columbia Academic Commons); Andreas T. Schmidt, *Abilities and the Sources of Unfreedom*, 127 ETHICS 179, 181, 207 (2016).

66. *See, e.g.*, Plessy v. Fergusson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country."); Daniel Kanstroom, *Dangerous Undertones of the New Nativism*, *in* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 300, 302 (Juan F. Perea, ed. 1997) [hereinafter "Immigrants Out!"] (quoting U.S. President Calvin Coolidge, "America must be kept American. Biological laws show . . . that Nordics deteriorate when mixed with other races."); NGAI, supra note 11, at 117 (quoting California State Attorney General Ulysses S. Webb, "This Government as founded . . . was then a Government of and for the white race . . . ."); Michael H. LeRoy, *The Labor Origins of Birthright Citizenship*, 37 HOFSTRA LAB. & EMP. L. J. 39, 82 (2019) (quoting Kentucky Senator Garret Davis in 1866, "That the fundamental, original, and universal principle upon which our system of government rests, is that it was founded by and for white men . . . ."); Srikantiah & Sinnar, *supra* note 63 (arguing that the latter is guided by the former); Juan F. Perea, *Immigration Policy as a Defense of White Nationhood*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1, 4 (2020) (explaining that the founders of the United States "imagined and engineered a nation by and for white people."); WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 177 (2020) (quoting President Andrew Johnson, "This is a country for white men . . .").

67. David Theo Goldberg, *States of Whiteness*, *in* BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES 181 (David Theo Goldberg, Michael Musheno & Lisa C. Rower eds., 2001) ("[w]hiteness became not just a racial but the national identity . . . ."); Kitty Calavita, *Immigration Law, Race and Identity*, 3 ANN. REV. L. & SOC. SCI. 1, 7 (2007) ("Americanness itself was constituted as white.").

68. *See* ALEXANDER SAXTON, THE RISE AND FALL OF THE WHITE REPUBLIC: CLASS, POLITICS AND MASS CULTURE IN NINETEENTH-CENTURY AMERICA (2003).

69. *See* NGAI, *supra* note 11, at 42 ("[I]n the mid-nineteenth century, American nationalism revived the mythology of Anglo-Saxonism, ascribing a racial origin to (and thus exclusive ownership of) the democratic foundations of the nation."); HANEY LÓPEZ, *supra* note 45, at 13 ("[T]he notion of a white nation is used to justify arguments for restrictive immigration laws designed to preserve this supposed national identity."); Srikantiah & Sinnar, *supra* note 63, at 197; Perea, *supra* note 66, at 11.

70. TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 47 (1992).

71. Rhonda V. Magee, *Slavery as Immigration?,* 44 U.S.F. L. REV. 273, 274 (2009); *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 63–90 (2007) (describing the fugitive slave laws and Trail of Tears as "antecedents" of the modern deportation of noncitizens); *id.* at 30–46 (even noting pre-United States colonial laws the enforced the deportation of subordinate races and classes).

system of 'immigration law'"[72] because it "laid a foundation for both a racially segmented, labor-based immigration system . . . and a racially hierarchical[] 'nation of immigrants.'"[73] It was under slavery that anti-Black laws restricted the movement of Black people between and within states through curfews, "slave patrols," and segregated roads, excluding their entry into, [74] and deporting them from,[75] many states. The enslaved were even forced to carry metal tags which performed some of the same function as visas and work permits.[76]

The mass banishment of Indigenous people westward[77] and the illegalization of Black movement between states established the precedent for deportation. For example, in 1829 Ohio compelled all "illegal[s]," meaning Black people, to leave the state.[78] In 1832 Maryland pronounced free Black people who left the state "aliens."[79] After slavery's legal abolition, the forced labor of Black people survived under "black codes"[80] and convict leasing[81] that continued to illegalize their "'moving around' and 'standing still,'"[82] through vagrancy laws, segregated transportation, and other methods.[83] Indeed, the only mention of "migration" in the U.S. Constitution refers to the control or enslavement of Black people.[84]

The subordinate status of Black people was legally enforced by control over their movement[85] as well their exclusion from voting, holding public office, or testifying in court.[86] The deportation of Black people and their replacement as laborers with white migrants was advocated by Thomas Jefferson.[87] Citizenship

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72. *See* Magee, *supra* note 71, at 274–77; *see also* SHANNON SPEED, INCARCERATED STORIES: INDIGENOUS WOMEN MIGRANTS AND VIOLENCE IN THE SETTLER-CAPITALIST STATE 90 (2019) (quoting historian David Chang, "Slave trade. Chinese exclusion. Bracero Programs. Mass deportation. These, too, are immigration policy.").

73. Magee, *supra* note 71, at 298; *see also* PETER H. WOOD, STRANGE NEW LAND: AFRICANS IN COLONIAL AMERICA 37, 44 (2003) (describing the mass kidnapping and human trafficking of Black people to be enslaved in the Americas as "deportation" from Africa).

74. *See* Das, *supra* note 29, at 27–58; ALLAN COLBERN & S. KARTHICK RAMAKRISHNAN, CITIZENSHIP REIMAGINED: A NEW FRAMEWORK FOR STATE RIGHTS IN THE UNITED STATES 43, 92–94, 151–54 (2021).

75. *See* WOOD, *supra* note 73, at 39 (explaining that in 1699 Virginia required free Black people to leave the commonwealth within six months of acquiring their freedom).

76. *See* COLBERN & RAMAKRISHNAN, *supra* note 74 at 43.

77. *See* KANSTROOM, *supra* note 71 at 64–73.

78. *Id*. at 143.

79. *Id*. at 151.

80. GILMORE, *supra* note 44, at 12.

81. DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 34–37 (1996).

82. Gilmore, *supra* note 44, at 12.

83. *Id*.; COLBERN & RAMAKRISHNAN, *supra* note 74, at 166–67; KANSTROOM, *supra* note 71, at 74–77.

84. U.S. CONST. art. I, § 9, cl. 1; New York v. Compagnie Generale Transatlantique, 107 U.S. 59, 62 (1883).

85. DARITY JR. & MULLEN, *supra* note 66, at 187.

86. COLBERN & RAMAKRISHNAN, *supra* note 74, at 88.

87. ELLIS COSE, A NATION OF STRANGERS: PREJUDICE, POLITICS AND THE POPULATING OF AMERICA 20 (1992).

law inherited from these laws[88] these same restrictions, and with them racialized labor exploitation,[89] settler colonialism,[90] and apartheid.[91] Immigration Law Professor Alina Das explains, "the states' desire to control Black people . . . legitimated the concept of borders and the regulation of undesirable presence in the United States."[92] Thus "alien" and "illegal" became synonyms for nonwhite[93] and thus foundational concepts in "immigration" law.

From the beginning, U.S. citizenship was a synonym for whiteness. Federal law passed in 1790 defined a citizen as a "free white person,"[94] and decades later the Supreme Court affirmed the exclusion of Black people, enslaved or free, from citizenship because "[the negro] had no rights which the white man was bound to respect."[95] The post-abolition constitutional amendments extended *jus soli* citizenship to white and Black people but to no other racialized group until 1898.[96] Native Americans could not acquire citizenship through birth[97] until the last such restrictions were removed from the law in 1940.[98]

Naturalization was expanded from whites to also include only Black people in 1870,[99] and effectively remained that way[100] until explicit references to the "white race" were removed from the naturalization law in 1952.[101] During the nineteenth and early twentieth century, federal courts referenced both pseudo-science[102] as well as "commonly known"[103] contemporary

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88. WOOD, *supra* note 73, at 37–38 (describing the slave codes).

89. *See* Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548, 557–58 (2019); DAS, *supra* note 29, at 39.

90. Kashyap, *supra* note 89, at 557−58 (describing the slave trade as a "foundational process of settler colonialism," and identifying ways the current deportation and immigrant exclusion system perpetuates settler colonialism).

91. *See* BORDER & RULE, *supra* note 3, at 7; *see also* Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing*, *in* THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 66 (INCITE! Women of Color Against Violence ed., 2016); Andrea Smith, *Indigeneity, Settler Colonialism, White Supremacy*, *in* RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 68 (Daniel Martinez HoSang, Oneka LaBennet & Laura Pulido eds., 2012).

92. DAS, *supra* note 29, at 39.

93. *See* FIELDS & FIELDS, *supra* note 45, at 1, 107.

94. *See* Expert Report of Eric Foner, Coalition to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F.Supp 2d 924 (E.D. Mich. 2008) (No. 06-15024), ECF No. 222.

95. Scott v. Sandford, 60 U.S. 393, 407 (1857).

96. United States v. Wong Kim Ark, 169 U.S. 649, 704 (1898) (holding that the Fourteenth Amendment confers citizenship upon those born in the United States).

97. Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that Native Americans were not U.S. citizens, despite being born in the United States).

98. *See* Means v. Wilson 522 F.2d 833, 839 (8th Cir. 1975) ("In 1924, Congress granted citizenship to all American Indians who had not previously enjoyed that status . . . Act of June 2, 1924, ch. 233, 43 Stat. 253."); AVIVA CHOMSKY, "THEY TAKE OUR JOBS!": AND 20 OTHER MYTHS ABOUT IMMIGRATION 83 (2007) (noting that the last of such restrictions were not removed until 1940).

99. NGAI, *supra* note 11, at 38 (discussing the Nationality Act of 1870 which extended the right of naturalization from whites to white and Black people only).

100. *See* Note, *The Nationality Act of 1940*, 54 HARV. L. REV. 860, 865 (1941) ("The right to become a naturalized citizen is extended to 'descendants of races indigenous to the Western Hemisphere.'").

101. *See* Immigration and Nationality Act of 1952, 8 U.S.C. § 1422.

102. *See, e.g.*, *In re* Ah Yup, 1 F. Cas. 223, 223–24 (C.C.D. Cal. 1878) (discussing the various racial classifications of people as though they were scientific and concluding therefrom that "white" excludes the "Mongolian race").

103. *See, e.g.*, Ex parte Dow, 211 F. 486, 488−89 (E.D.S.C. 1914) ("'[W]hite' was used in the sense of European . . . understandable by the multitude as well as by the learned . . . .").

beliefs about race to decide who was white, and thus eligible to naturalize.[104] Laws regulating the migration of enslaved people served as a model for the Chinese exclusion laws[105] of the 1870s[106] and 1880s, which barred entry and naturalization to Chinese people based on race, not merely nationality.[107] These laws were expanded in 1917 to include most of the Asian continent.[108] It would remain the law for Chinese people until 1943, and for Indian and Filipino nationals until 1946.[109] In 1917, the Senate attempted to also exclude "all members of the African or Black race" from entry and naturalization, but that bill failed in the House.[110] Judges and lawmakers routinely lamented that Black people could naturalize while other "races" could not.[111]

Every U.S. immigration law has prioritized the exclusion and subordination of nonwhite people. In 1924, eugenics-inspired[112] laws were passed to enforce "national origins" numerical limitations (called "quotas") for each country.[113] Their goal, as U.S. Senator David Reed explained, was that "[t]he racial composition of America at the present time [] is made permanent,"[114] by keeping out[115] people then racialized as nonwhite. [116] Various pretextual conditions like English literacy tests[117] and one's future likelihood of

104. Fifty-two such cases were heard by courts between 1878 and 1952, two of which went before the Supreme Court. *See* HANEY LÓPEZ, *supra* note 45, at 3; *see, e.g.*, United States v. Bhagat Singh Thind, 261 U.S. 204, 215 (1923); *In re* Ellis, 179 F. 1002, 1002 (D. Or. 1910); Ozawa v. United States, 260 U.S. 178, 197 (1922).

105. Johnson, *supra* note 54, at 1123; DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS 203–05 (2008).

106. Here, I am referring to the 1875 Page Act, Pub. L. No. 43-141, 18 Stat. 477, which excluded "prostitutes," for the purpose of excluding Chinese women from entry. *See* NGAI, *supra* note 11, at 59.

107. *See* Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 214; Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 280 (2016).

108. Calavita, *supra* note 67, at 5; NGAI, *supra* note 11, at 37.

109. HANEY LÓPEZ, *supra* note 45, at 32.

110. *Id.* at 27.

111. *See, e.g.*, *In re* Po, 28 N.Y.S. 383, 384 (City Ct. 1894) ("A Congo negro but five years removed from barbarism can become a citizen of the United States, but his more intelligent fellowmen . . . of the yellow races . . . are denied the privilege."); *In re* Camille, 6 F. 256, 257–58 (C.C.D. Or. 1880) ("[C]ongress . . . opened the door, not only to persons of African descent, but to all those of 'African nativity'—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the 'dark continent,' while withholding it from the intermediate and much-better-qualified red and yellow races."); Munshi, *supra* note 107, at 274 (quoting a Mississippi senator in 1914, "you cannot consistently stand before the American people and tell them you vote for Chinese exclusion while you vote for African admission, when you and I know that the Chinaman is a very superior race to the African.").

112. NGAI, *supra* note 11, at 24; Calavita, *supra* note 67, at 3.

113. NGAI, *supra* note 11, at 24–29.

114. Johnson, *supra* note 54, at 1128; *see* TYLER ANBINDER, CITY OF DREAMS: THE 400-YEAR EPIC HISTORY OF IMMIGRANT NEW YORK 466 (2016).

115. NGAI, *supra* note 11, at 27 ("Thus the national origins quota system proceeded from the conviction that the American nation was, and should remain, a white nation . . . ."); Boswell, *supra* note 55, at 325 ("The clear purpose of the . . . national origin quota was to 'confine immigration as much as possible to western and northern European stock.'").

116. *See* PAINTER, *supra* note 64, at 323; Johnson, *supra* note 54, at 1130; Munshi, *supra* note 107, at 279.

117. Munshi, *supra* note 107, at 265; KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965, at 132–33 (2017); ANBINDER, *supra* note 114, at 350.

dependency on public assistance (becoming a "public charge"),[118] as well as border-crossing without a visa,[119] were deployed with the intention of further winnowing down nonwhite entry.[120]

The 1965 Immigration and Nationality Act replaced the "quota" system with equal numerical limits of visas for each country.[121] This had the intended effect of continuing to exclude nonwhite people[122] by creating years-long waiting lists for global south countries that send many people, and much shorter or nonexistent lines from wealthier, whiter countries that send far fewer.[123] "The ethnic mix of this country will not be upset," promised one of the law's champion's, Senator Edward Kennedy.[124] 1990 brought what one scholar called "affirmative action for white immigrants,"[125] the inaptly named "diversity visa lottery," which provides extra visas to countries sending fewer people, particularly white countries, such as Ireland.[126] Indeed, the entire modern family-based visa scheme, whereby visas are available only to those with family members already in possession of permanent resident or U.S. citizen status[127] only furthers the racial demographics of the status quo, just as the 1924 laws did.[128]

In 1996[129] and 2005,[130] about two dozen additional grounds of exclusion, deportation, and internment, particularly for those with criminal convictions, were added to the law. These exclusionary grounds predictably increased the number of nonwhites who were deported or interned in immigration prisons.[131] One cannot draw a straight enough line between this history and

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118. A term adopted by the Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214. It has remained the law ever since. *See* 8 U.S.C. § 1182(a)(4).

119. Brief for Professors Kelly Lytle Hernández, Mae Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent, United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021) (20-437), 2021 WL 1298527, at *13–17.

120. Johnson, *supra* note 54, at 1127; Munshi, *supra* note 107, at 268; PAINTER, *supra* note 64, at 280; Kanstroom, *supra* note 66, at 162, 166 (while the justification for many deportation and exclusion laws was ostensibly "criminality," eugenics made non-whiteness and criminality synonymous).

121. Specially, these were family-based visas. *See* Johnson, *supra* note 54, at 1133.

122. NGAI, *supra* note 11, at 237, 238, 265; Kevin Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 15 (Fall 2009).

123. Johnson, *supra* note 54, at 1133; Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 308 (1995).

124. ANBINDER, *supra* note 114, at 514.

125. Johnson, *supra* note 54, at 1135; *see also* Ting, *supra* note 123, at 315; Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375, 386 (2003).

126. Ting, *supra* note 123, at 308–09.

127. *See generally* 8 U.S.C. § 1255 et seq. ("Adjustment of Status of nonimmigrant to that of person admitted for permanent residence").

128. NGAI, *supra* note 11, at 26 (each county's allotted numerical limit was based on earlier census data, so as to preserve the racial status quo).

129. DAS, *supra* note 29, at 19.

130. Jared Hatch, *Requiring a Nexus to National Security: Immigration, "Terrorist Activities," and Statutory Reform*, 2014 B.Y.U. L. REV. 697, 707 (2014).

131. Randy Capps, Muzaffar Chishti, Julia Gelatt, Jessica Bolter & Ariel G. Ruiz Soto, *Revving Up the Deportation Machinery: Enforcement and Pushback Under Trump*, MIGRATION POL'Y INST. 12 (May 2018), https://perma.cc/P2R2-FUXP; Juliana Morgan-Trostle, Kexin Zheng & Carl Lipscombe, *The State of Black Immigrants*, BLACK ALL. FOR JUST IMMIGR. & NYU SCH. OF L. IMMIGRANT RTS. CLINIC 21

Donald Trump's call for more Norwegians and fewer Haitians.[132] The Trump regime's moratoriums on visas[133] and its imposition of harsher "public charge" criteria,[134] among its more infamous atrocities,[135] were designed to reassure white people that he was "defending the privileged status of white identity."[136] President Biden's policies differ only in degree, not in kind.[137] The same visa and family-based restrictions and criminalization of movement, such as those made law in 1965, 1996, and 2005 remain in force, as do some Trump regime policies,[138] even if a smaller number of people face banishment than has been the case in recent years.[139]

Today's racist citizenship laws wear a "race neutral" mask that makes them more effective at accomplishing racist goals.[140] The "race-neutral language of racism,"[141] as Geography Professor Ruth Wilson Gilmore has explained, insulates the law from legal or political criticism as racist, thereby concealing and fortifying the continued racial subordination of nonwhites.[142] Law Professor Patricia J. Williams identifies this as the race-neutral law's source of (white) power: ". . . the idea that an egalitarian society can be achieved or maintained through the mechanism of blind neutrality is

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(2016), https://perma.cc/SF54-QFR3 [hereinafter *The State of Black Immigrants*]; NGAI, *supra* note 11, at 86–88.

132. Jen Kirby, *Trump Wants Fewer Immigrants from "Shithole Countries" and More from Places like Norway*, Vox (Jan. 11, 2018, 5:55 PM), https://perma.cc/F78R-XZFV.

133. *See, e.g.*, Suspension of Entry of Aliens Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, Proclamation No. 19, 952, 85 Fed. Reg. 38,263 (June 22, 2020)*;* Suspension of Entry as Nonimmigrants of Certain Students and Researchers from the People's Republic of China, Proclamation No. 10,043, 85 Fed. Reg. 34, 353 (June 4, 2020); 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, Proclamation 10,014, 85 Fed. Reg. 23,441 (Apr. 22, 2020); Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, Proclamation 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019).

134. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019); CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 234 (5th Cir. 2020).

135. *See, e.g.*, Lisa Riordan Seville and Hannah Rappleye, *Trump Admin Ran 'Pilot Program' for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018, 4:30 AM), https://perma.cc/5MAK-7RNQ; Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020).

136. Perea, *supra* note 66, at 12; s*ee also* Semillas Autónomas, *Comunicados Desde Chicagoiguala*, in OPEN BORDERS, *supra* note 25, at 241, 247.

137. Felipe De La Hoz, *Biden's New Orders Seem Bold. For Most Immigrants, They Don't Change Much*, WASH. POST (Feb. 5, 2021, 9:11 AM), https://perma.cc/B7JJ-9XD5.

138. Anita Kumar, *Biden Mulls 'Lite' Version of Trump's 'Remain in Mexico' Policy*, POLITICO (Sept. 6, 2021, 4:31 AM), https://perma.cc/H794-73G2; Joel Rose & Scott Neuman, *The Biden Administration Is Fighting in Court to Keep a Trump-Era Immigration Policy,* NPR (Sept. 20, 2021, 3:31 PM), https://perma.cc/AA69-QBD2.

139. Geneva Sands, *Arrests and Deportations of Immigrants in U.S. Illegally Drop under Biden with Shifts in Priorities*, CNN (Apr. 6, 2021, 10:40 PM), https://perma.cc/EP6D-RG7Y.

140. *See* DE GENOVA, s*upra* note 58, at 55.

141. GILMORE, *supra* note 44, at 118.

142. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1382–3 (1988), *reprinted in* CRITICAL RACE THEORY, *supra* note 34, at 103, 117; FIELDS & FIELDS, *supra* note 45, at 261; HANEY LÓPEZ, *supra* note 45, at 125.

fallacious. Racial discrimination is powerful precisely because of its frequent invisibility, its felt neutrality."[143] Moreover, a "colorblind" naturalization and immigration law erases its own white nationalist history and purpose,[144] further cloaking its goals from challenge.[145] The law's history must be explained here precisely because today's law conceals it.

Rather than by its "colorblind" words, citizenship must be measured by its racist effect. As Professor Alan David Freeman has instructed, comprehending a law's racism requires us to view it not from the perpetrator's perspective of whether it is intended to be racist, but from the target's perspective of whether it disadvantages them.[146] For example, numerical limits maintain a white republic in that they disadvantage noncitizens of color. [147] The law retains exclusions based on one's conviction for a "crime . . . involving moral turpitude,"[148] or their likelihood of becoming a "public charge," [149] or their lack of "good moral character,"[150] rules first introduced to exclude and racialize Black people,[151] then Asian people,[152] and finally, Latinx people.[153] Eugenically-inspired proxies for race like mental illness[154] and addiction[155] remain disqualifying for permanent resident status,[156] just as English literacy tests do for naturalization.[157] Professor Gilmore defined racism as "the state sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death."[158] Per Gilmore's definition, it is citizenship laws' facilitation of the exploitation and premature death of noncitizens in deserts, seas, factories, cages, and through deportation and poverty that make it racist.

Ostensible exceptions to white nationalist regulatory law, such as the increase in the number of people of color to the United States after 1965[159] or

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143. Patricia J. Williams, Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 544 (1990), *reprinted in* CRITICAL RACE THEORY, *supra* note 34, at 191, 198.

144. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 44–46 (1991), *reprinted in* CRITICAL RACE THEORY, *supra* note 34, at 257, 266.

145. HANEY LÓPEZ, *supra* note 45, at 125.

146. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–53 (1978), reprinted *in* CRITICAL RACE THEORY, *supra* note 34, at 29.

147. *See* Garcia, *supra* note 55, at 145.

148. A term adopted by the Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084.

149. A term adopted by the Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214.

150. *See* 8 U.S.C. § 1101(f).

151. *See* DAS, *supra* note 29, at 50; DARITY JR. & MULLEN, *supra* note 66, at 188.

152. NGAI, *supra* note 11, at 59.

153. Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissability and Deportation*, 108 GEO. L.J. 1363, 1396 (2018).

154. Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law,* 51 HOUS. L. REV. 781, 805 (2014).

155. *Id.*

156. *See* 8 U.S.C. § 1101(f)(1) (excluding "habitual drunkards"); 8 U.S.C. § 1182(a)(1)(A)(iii)(I) (excluding anyone with a "mental disorder . . . that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others").

157. Educational Requirements for Naturalization, 8 C.F.R. § 312.1(a).

158. GILMORE, *supra* note 44, at 28.

159. NGAI, *supra* note 11, at 262.

asylum law itself[160] do not reflect anti-racist policy. Rather they are explained by the late Law Professor Derek Bell's interest convergence theory, whereby seemingly racially equitable reforms pass only when the interests of a racialized population converges with the interests of the white supremacist hegemony.[161] Some scholars have pointed out that policies which increase or allow the immigration of nonwhite people are explained by Bell's theory[162]—for example, when the noncitizen's interest in entering and remaining in the United States has converged with the white nationalist demand for exploitable labor,[163] or its political self-interests.[164] When those interests change, mass deportation and exclusion quickly follow.[165] The "Bracero" programs of the 1940s and 1950s provide the most quintessential example: the federal government imported rightless Mexican workers when their exploitable labor was needed, and deported them en masse when the need evaporated.[166]

Bell himself wrote that the Supreme Court's decision in *Brown v. Board of Education*, in which American educational apartheid was held unconstitutional, was motivated in part by foreign policy interests: the United States sought to appear more humane in its competition with the Soviet Union for hearts and minds.[167] The 1965 amendments to U.S. immigration law furthered precisely this same interest.[168] It is probably no coincidence that,[169] as Law Professor Richard Delgado has suggested,[170] while the Cold War brought

160. *See* 8 U.S.C. § 1158; *see* Brief for Professors Kelly Lytle Hernández, Mae Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent, 2021 WL 1298527, at *22.

161. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980), *reprinted in* CRITICAL RACE THEORY, *supra* note 34, at 20.

162. *See* Freddy Funes, *Beyond the Plenary Power Doctrine: How Critical Race Theory Can Help Move Us Past the Chinese Exclusion Case*, 11 SCHOLAR 341, 345–47 (2009).

163. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 297 (1997); NGAI, *supra* note 11, at 58; Funes, *supra* note 162, at 341, 345; Gilbert Paul Carrasco, *Latinos in the United States*, *in* IMMIGRANTS OUT!, *supra* note 66, at 190, 193, 193–197.

164. NGAI, *supra* note 11, at 233 (explaining that Chinese exclusion only came to an end in 1943 because it was in American interests to do so during World War II, when China was a U.S. ally); Munshi, *supra* note 107, at 263 (explaining that the reason an "Indian Exclusion Act" was never passed by Congress was out of the government's interest in not offending Japan and the British empire).

165. Carrasco, s*upra* note 163, at 193–97 (discussing the mass deportations that followed the "Bracero" programs after the need for cheap Mexican labor evaporated); Natsu Taylor Saito*, The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justifications for On-going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003) (noting that the completion of the transcontinental railroad created pressure to exclude and deport Chinese noncitizens).

166. Carrasco, *supra* note 163, at 193–97 (discussing the mass deportations that followed the "Bracero" programs after the need for cheap Mexican labor evaporated); Hernández, *supra* note 117, at 134; KANSTROOM, *supra* note 71, at 220–23.

167. Bell, Jr., *supra* note 161, at 23; *See also* A. NAOMI PAIK, RIGHTLESSNESS: TESTIMONY AND REDRESS IN U.S. PRISON CAMPS SINCE WORLD WAR II 11 (2016) ("The advance of civil rights not only furthered U.S. interest abroad but also worked to defuse radical movements for racial and social justice within its own borders.").

168. NGAI, *supra* note 11, at 212; George A. Martínez, *Arizona, Immigration and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 195–98 (2012).

169. NGAI, *supra* note 11, at 156.

170. Richard Delgado, *Citizenship*, in IMMIGRANTS OUT!, *supra* note 66, at 318, 320.

the ostensibly benevolent[171] 1965 amendments, the IRCA amnesty of 1986, and the entire asylum law framework,[172] the fall of the Soviet Union was followed by harsher laws of exclusion in 1996, 2005, and the Trump regime. One author has suggested that *jus soli* (birthright) citizenship itself was motivated by the need for laborers and settlers to conquer and build for the United States.[173]

The process of enforcing these white nationalist regulations through exclusion, deportation, and incarceration provides labor, ethnic cleansing, segregation, surveillance, and colonial power for the white republic.

All numerical limits on visas and entry, be they for family, "guest work,"[174] or anything else, manufacture a population of exploitable workers of color[175] by arming employers with the leverage of deportation.[176] Like chattel slavery before it,[177] citizenship too is motivated by the economic interests of furnishing the white republic with a lower caste[178] of what activist and author Harsha Walia calls "unfree, indentured laborers."[179]

Visas and work permits double as forms of racial surveillance. Like the metal tags the enslaved were once forced to carry, today's "papers" similarly control and curtail nonwhite liberty through state monitoring of noncitizens' personal relationships,[180] trauma history,[181] physical and mental health,[182]

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171. Boswell, *supra* note 55, at 332.

172. Kevin R. Johnson, *The New Nativism*, in IMMIGRANTS OUT!, *supra* note 66, at 165, 174 (noting that asylum was motivated "in part by the desire to end the Executive Branch's ad hoc admission of sizeable numbers of refugees from Southeast Asia.").

173. *See* LeRoy, *supra* note 66, at 41; *see also* DELGADO & STEFANCIC, *supra* note 32, at 23–24.

174. Carrasco, *supra* note 163, at 198.

175. SHARMA, *supra* note 5, at 151 (noting that noncitizens are shunted into "3D" work, for "dirty, dangerous and demeaning); Néstor P. Rodríguez, The *Social Construction of the U.S.-Mexico Border*, *in* IMMIGRANTS OUT!, *supra* note 66, at 223, 236; *see also* JUSTIN AKERS CHACÓN & MIKE DAVIS, NO ONE IS ILLEGAL 275 (2006); Brief for Professors Kelly Lytle Hernández, Mae Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent, 2021 WL 1298527, at *18–19; SPEED, *supra* note 72, at 20–22; Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, From 1943 to Present*, 29 GEO. IMMIGR. L.J. 391, 394–95, 399 (2015); Wong Wing v. United States, 163 U.S. 228, 233–37 (1896) (holding unconstitutional the law which then provided, that "any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year").

176. Leo R. Chavez, *Immigration Reform and Nativism*, *in* IMMIGRANTS OUT!, *supra* note 66, at 61, 72.

177. *See, e.g.*, PAINTER, *supra* note 64, at 39–42; RACIAL OPPRESSION AND SOCIAL CONTROL, *supra* note 45, at 204 ("Eminent American historians . . . ascribed the establishment of slavery to economic laws."); KENDI, *supra* note 45, at 40–41 (explaining the economic incentive of free agricultural labor drove seventeenth century Virginia lawmakers to distinguish between 'white' and 'black' races).

178. SHARMA, *supra* note 5, at 67, 87; *see* Garcia, *supra* note 55 at 123, 128.

179. BORDER & RULE, *supra* note 3, at 7.

180. *See* Matter of Laureano, 19 I&N Dec. 1 (BIA 1983).

181. *See, e.g.,* 8 U.S.C § 1361 (placing the burden of proof on the noncitizen generally to show eligibility for relief); 8 C.F.R. §§ 1208.13(a)–(b) (requiring asylum applicants to prove past persecution and likelihood of future persecution); 8 C.F.R. § 214.14(b)(1) (requiring U-visa applicants to prove they were the victim of a crime and suffered "substantial physical or emotional abuse"); 8 C.F.R. § 214.11(f)(1) (requiring T-visa applicants to prove they were trafficked).

182. *See, e.g.*, 8 U.S.C. § 1182(a)(1)(A)(i); Matter of Vallejos, 14 I&N Dec. 68 (BIA 1972); Lauren Anselowitz & Daniel L. Weiss, *Immigration and Mental Health Forensics*, 304 N.J. LAW. 37 (2017) (noting the many situations in which psychologist and psychiatrist forensic analysis is necessary to prove status eligibility).

fingerprints and photographs,[183] addresses,[184] employment, and public assistance use.[185] The humiliating gaze of a white supremacist panopticon enforces the inferior legal status of noncitizens.

Deportation is also ethnic cleansing and segregation. It is "a gigantic antimiscegenation program"[186] sorting people by race to whiten the United States.[187] The resulting "global apartheid"[188] separates nonwhite people from economic opportunity,[189] monopolizing citizens' access to work, healthcare, education, and more. That is why forced relocation has its roots in the genocidal and anti-Black policies discussed earlier.[190]

Exclusion and deportation also sustain colonialism.[191] They reinforce colonial control over poorer states of color by wealthier whiter states,[192] ensuring what historian Mae Ngai calls an "'imported colonialism, which created a migratory agricultural proletariat outside the polity."[193] The legacy of political and economic wreckage wrought from centuries[194] of colonial "exploitation and wealth extraction targeted at the global south"[195] completes this cycle[196]

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183. *See, e.g.*, 8 C.F.R. § 1236.5; 8 C.F.R. § 1240.68(b); 8 C.F.R. § 264.1(g).

184. *See, e.g.,* 8 C.F.R. § 213a.3; 8 C.F.R. § 265.1.

185. Anil Kalhan, *Immigration Surveillance,* 74 MD. L. REV. 1, 34, 50–52 (2014) (discussing systems like "E-verify" and others used to track noncitizen employment and public assistance use); *see also Who's Behind ICE? The Tech and Data Companies Fueling Deportations*, MIJENTE, NAT'L IMMIGR. PROJECT & IMMIGRANT DEF. PROJECT 3, 44, 61–62 (Aug. 2018), https://perma.cc/FV5T-BMMF (describing the technology used by immigration enforcement to track noncitizen license plates and cell phones, deploy face recognition, etc.).

186. SHARMA, *supra* note 5, at 101.

187. *See, e.g.*, BORDER & RULE, *supra* note 3, at 79–92; KANSTROOM, *supra* note 71, at 219; *The State of Black Immigrants, supra* note 131.

188. Many have used this term. *See* JOSEPH NEVINS, DYING TO LIVE: A STORY OF U.S. IMMIGRATION IN AN AGE OF GLOBAL APARTHEID 184–85 (2008); UNDOING BORDER IMPERIALISM, *supra* note 3, at 2; IYKO DAY, ALIEN CAPITAL: ASIAN RACIALIZATION AND THE LOGIC OF SETTLER COLONIAL CAPITALISM 33 (2016); PHILIPPE LEGRAIN, IMMIGRANTS: YOUR COUNTRY NEEDS THEM 18 (2014); KOCHENOV, *supra* note 15, at 12; Charles Heller, Lorenzo Pezzani & Maurice Stierl, *Toward a Politics of Freedom of Movement*, *in* OPEN BORDERS, *supra* note 25, at 51, 67; SHARMA, *supra* note 5, at 28. Others have implied as much. *See, e.g.*, Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985)); Bruce R. Scott, *The Great Divide in the Global Village*, 80 Foreign Affs. 160 (2001); JONATHON W. MOSES, INTERNATIONAL MIGRATION: GLOBALIZATION'S LAST FRONTIER 85 (2006); CARENS, *supra* note 2, at 228.

189. *See* CHACÓN & DAVIS, *supra* note 175, at 96; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844–45 (1994); FIELDS & FIELDS, *supra* note 45, at 86.

190. *See supra* note 87–90, 149–51.

191. UNDOING BORDER IMPERIALISM, *supra* note 3, at xiii.

192. *See* KOCHENOV, *supra* note 15, at 97; Branko Milanovic, *Global Inequality: From Class to Location, from Proletarians to Migrants*, (World Bank Development Research Group, Poverty and Inequality Team, Working Paper 5820, 2011), https://perma.cc/LS2H-WHAZ (noting that as much as three-quarters of global economic inequality may be a consequence of the world's migration restrictions).

193. NGAI, *supra* note 11, at 13, 95, 136; *see also* SPEED, *supra* note 72, at 19.

194. Joe R. Feagin, *Old Poison in New Bottles*, *in* IMMIGRANTS OUT!, *supra* note 66, at 13, 28–30; Antonia Darder, *Radicalizing the Immigrant Debate in the United States: A Call for Open Borders and Global Human Rights*, 29 NEW POL. SCI. 369, 376 (2007); Kathleen Newland, *Climate Change and Migration Dynamics*, MIGRATION POL'Y INST. 2–3 (Sept. 2011), https://perma.cc/BQQ6-QYM2.

195. UNDOING BORDER IMPERIALISM at xii; *see also* BORDER & RULE, *supra* note 3, at 60.

196. Climate change also feeds this cycle, driven as it has been primarily by the fossil fuel consumption of wealthier and whiter states at the greater cost of the safety and wellbeing of people of color in poorer states, each rendered wealthier and less vulnerable, or poorer and thus especially vulnerable, to

by driving people from the global south into the global north in search of survival. This is what journalist Juan Gonzalez eerily called "the harvest of empire."[197]

Finally, deportation and internment are also acts of conquest. They are, as anthropologist Shannon Speed observes, how a settler state like the United States "assert[s] its right to be and to rule in this territory,"[198] or what sociologist Monisha Das Gupta calls "territorial control by dispossession."[199] Thus, forcibly removing and warehousing unwanted people sustains the United States as a conquering power.

For these reasons, we are remiss when we fail to identify American naturalization and immigration law as a regulatory scheme for racial engineering. These bodies of law regulate race and power in the United States in defense of white supremacy. While outside the scope of this Article, citizenship laws elsewhere in the world accomplish the same.[200]

2. *Citizenship Becomes Race*

Citizenship law itself manufactures and modifies racist ideas.[201] By cleaving populations into an 'us' in-group (citizens) and a 'them' out-group (noncitizens),[202] our citizenship laws create new categories of people[203] which the law purports to merely recognize but actually reifies into existence by naming and enforcing invented distinctions[204] (what philosopher Ian Hacking calls "making up people").[205] As Jacqueline Stevens explains:

> Our citizenship rules convey who we are as if we were born this way . . . [but] we are not citizens in the ways we often imagine we are, as if we

climate change by imperialism itself. *See* HENRY SHUE, CLIMATE JUSTICE: VULNERABILITY AND PROTECTION 128 (2014).

197. *See* JUAN GONZALEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA (rev. ed. 2011).

198. SPEED, *supra* note 72, at 91; s*ee also* KIERNAN, *supra* note 19, at 330 (discussing the 1830 Indian Removal Act, which authorized the mass forced relocation of Native people, killing thousands and confining the survivors to reservations).

199. SPEED, *supra* note 72, at 103; s*ee also* HERNÁNDEZ, *supra* note 117, at 8 (noting that it is a traditionally common settler-colonial practice to "remove racialized outsiders from their claimed territory"); SHARMA, *supra* note 5, at 36, 46, 59; BORDER & RULE, *supra* note 3, at 77 (noting that deportation and exclusion continue the forced migration of indigenous people across their own lands); Kashyap, *supra* note 89, at 552–53; Josue Lopez, *CRT and Immigration: Settler Colonialism, Foreign Indigeneity, and the Education of Racial Perception*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 134, 139 (2019).

200. *See, e.g.*, SHARMA, *supra* note 5, at 82–86 (discussing the white-supremacist/nationalist origins and design of citizenship and immigration laws in Latin American nation states); *id.* at 168–76 (discussing the same in Asian nation states); *id.* at 176–85 (discussing the same in African nation states); Kim Rubenstein & Jacqueline Field, *What is a "Real" Australian Citizen?: Insights from Papua New Guinea and Mr. Amos Ame*, *in* CITIZENSHIP IN QUESTION, *supra* note 16, at 100, 106–07, 111 (explaining the same in Australia).

201. *See* FIELDS & FIELDS, *supra* note 45, at 130; HANEY LÓPEZ, *supra* note 45, at 7; STEVENS, *supra* note 5, at 50.

202. KING, *supra* note 3, at 46.

203. STEVENS, *supra* note 5, at 50; HANEY LÓPEZ, *supra* note 45, at 91; FIELDS & FIELDS, *supra* note 45, at 247–48.

204. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 814, 838 (1987); Garcia, *supra* note 55, at 141; STEVENS, *supra* note 5, at 50.

205. IAN HACKING, HISTORICAL ONTOLOGY 99 (2004).

> were born this way without the state, as though being born Portuguese or Pakistani is the same as being born with brown or green eyes.[206]

What is in truth merely a legal taxonomy invented by a state, we come to believe is a racial-biological category of nature, because there is an assumption that law reflects the natural order. [207] Convinced that nature drew a line between Portuguese and Pakistanis before the law did, a race is thusly born, and racism forged.[208]

In the United States, the immigration and nationality laws forged in white nationalism have and continue to racialize and invent races. Fifty-two federal cases between 1878 and 1952, that attempted to determine who was and was not "white" for purposes of naturalization eligibility, contributed to the construction of race.[209] Professor Ian Haney Lopez argues that the courts shaped the literal physical features of Americans, by naming categories like "Mongolians" and "Hindus" and attaching racial meaning to arbitrary physical features.[210] Mai Ngai notes that these cases shaped into being the racial category of "Asian" in the United States.[211] Professor Laura Gomez has written two books explaining how the law essentially invented Mexican and Latinx "races" through a similar process.[212] Southern and Eastern Europeans were never subjected to the blanket bars[213] that Asians were, for instance, which contributed to the construction of Italians and Slavs as white in American racial hierarchy.[214] And of course whiteness and Blackness were crafted into shape by political membership laws enforcing white legal superiority dating back to the seventeenth century.[215]

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206. Jaqueline Stevens & Benjamin N. Lawrence, *Introduction, in* CITIZENSHIP IN QUESTION, *supra* note 16, at 1, 7.

207. STEVENS, *supra* note 5, at 50, 77; FIELDS & FIELDS, *supra* note 45, at 231.

208. TA-NEHISI COATES, BETWEEN THE WORLD AND ME 7 (2015) ("[R]ace is the child of racism, not the father."); FIELDS & FIELDS, *supra* note 45, at 261 (racism "transforms racism into race"); FRANTZ FANON, BLACK SKIN, WHITE MASKS 69 (1952) ("It is the racist who creates his inferior."); KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 45 (1992) (Racism "works as an attempt at metonym for culture, and it does so only at the price of biologizing what *is* culture, ideology."); CHOMSKY, *supra* note 29, at 77 ("In most of the world, the concepts of race and nation are very closely connected.").

209. HANEY LÓPEZ, *supra* note 45, at 12; *see also* Laura F. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 491, 498 (2010).

210. HANEY LÓPEZ, *supra* note 45, at 82, 87; *see also* JULIE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865–1954 (2008).

211. NGAI, *supra* note 11, at 38.

212. *See generally* LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007); LAURA E. GÓMEZ, INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM (2020).

213. *See* ANBINDER, *supra* note 114, at 344–45 (noting that certain Anti-Semitic rules were designed to reduce Jewish immigration, but not ban it altogether).

214. NGAI, *supra* note 11, at 89.

215. THE ORIGIN OF RACIAL OPPRESSION IN ANGLO AMERICA, *supra* note 45, at 162, 228, 248–51.

Through this process of shaping nonwhite races, citizenship law simultaneously shapes whiteness. Just as the privileges and benefits of whiteness[216] have been described as a form of property, [217] so have the privileges and benefit of citizenship.[218] The exclusivity of citizenship, like the exclusivity of whiteness,[219] manufactures these benefits and their value.[220] There are wages of citizenship just as there are "wages of whiteness."[221] As the courts declared nonwhites unfit for citizenship,[222] they were simultaneously defining whiteness as ideal for it, as Professor Haney Lopez points out.[223] When the courts slandered Asian people as "incapable of progress or intellectual development,"[224] they characterized white people as smart, civilized, and ideal democratic subjects. As nonwhites became associated with lacking a right to vote, work, travel freely, and other rights under the law, whites became more presumptively entitled to the same.[225] By legally enforcing these differences, depriving nonwhites of liberty and protecting it among whites, notions of inferiority and superiority are reinforced and normalized.

The law continues to perform this race-building function every time it criminalizes, deports, incarcerates, or impugns the character of noncitizen nonwhites. Every nonwhite person deported or excluded affirms the inclusivity and nativity of white people and the foreignness of nonwhites. Every time an immigration judge slanders a noncitizen as lacking "good moral character," it affirms the "good moral character" of white people. Cages for noncitizens affirm the dangerousness of nonwhite captives and the innocence of whites.[226] The law's use of the word "alien" alone (which should be read with its original meaning, "alien to whiteness") contributes to the construction of nonwhite people as perpetually foreign and whites as perpetually native; nonwhites as subhuman and whites as the only authentically human people.[227] In this way, citizenship and immigration law increase the value and power of whiteness, just as they cheapen nonwhiteness.

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216. *See* PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES (1988) (identifying forty-six distinct privileges that come with being identified as white).

217. Harris, *supra* note 47, at 277.

218. *See e.g.*, Ayelet Shachar, *Against Birthright Privilege: Redefining Citizenship as Inherited Property*, *in* IDENTITIES, AFFILIATIONS, AND ALLEGIANCES 257 (Seyla Benhabib, Ian Shapiro & Danilo Petranović eds., 2007); SHACHAR, *supra* note 9, at 2–3, 34; Jenna M. Lloyd, *Prison Abolitionist Perspectives on No Borders,* in OPEN BORDERS, *supr*a note 25, at 89, 97.

219. Harris, *supra* note 47, at 285; *see also* HANEY LÓPEZ, *supr*a note 45, at 140.

220. *See* Lloyd, s*upra* note 218, at 97–98.

221. DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 55 (rev. ed. 1999).

222. *See, e.g.*, Terrace v. Thompson, 274 F. 841, 849 (W.D. Wash. 1921) ("The yellow or brown racial color is the hallmark of Oriental despotisms . . . .").

223. Haney López, *supra* note 45, at 20; *see also* Crenshaw, *supra* note 142, at 113.

224. People v. Hall, 4 Cal. 399, 405 (1854).

225. Harris, *supra* note 47, at 283.

226. *See* HANEY LÓPEZ, *supra* note 45, at 132.

227. Rodriguez, *supra* note 175, at 230–32.

Citizenship law, by enforcing disparate treatment of people based on whether they are "citizens" or "noncitizens," encourages us to see the value and character of the two groups as innately different. This divide encourages us to attribute the character of the individual to the character of the group, and vice versa. [228] For example, the criminalization of noncitizen's mobility, work, or their very presence, or their deportation for unrelated criminal offenses, reinforces the perceived innate dangerousness of noncitizens as a group.[229] Thus, the law's citizen/noncitizen dichotomy itself becomes a racializing force.

Finally, citizenship law entrenches racism by manufacturing the evidence and justification for noncitizen marginalization.[230] The criminality and poverty created by illegalization, exclusion, deportation, and incarceration become proof of nonwhite inferiority that justify further impoverishment and criminalization.[231] The status quo becomes cause to believe that citizens deserve the privileges they enjoy, and noncitizens deserve the marginalization they suffer. The interest in subjugated, exploitable, and illegalized Mexican labor, for instance,[232] contributes to the racialization of Mexicans as inferior, law-breaking outsiders.[233] This in turn allows citizens to feel justified in caging and deporting them. Karen and Barbara Fields call this transformative power of racism "racecraft," because it is a kind of magical thinking that allows racist ideas to "act[] upon the reality of the imagined thing; the real action creates evidence for the thing imagined," such that belief in race "constantly dumps factitious evidence for itself into the real world."[234] Thus, citizenship law uses violence to manufacture evidence to justify more violence.[235] Just as the effects of segregation appeared to be "a property of [B]lack people," rather than "something white people imposed on them,"[236] so citizenship likewise makes poverty or criminality appear as a property of noncitizens rather than a condition citizenship imposes upon them. The law conceals the fact that citizenship is violence, done by citizens *to* noncitizens.[237]

3. *Citizenship Racializes Citizens*

To say that American citizenship law is codified white nationalist regulatory law is also to say that this law racializes and subordinates citizens of color.[238]

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228. *See* KENDI, *supra* note 46, at 94.
229. KENDI, *supra* note 46, at 94. This is what Professor Ibram Kendi calls "behavioral racism." *Id.*
230. HANEY LÓPEZ, *supra* note 45, at 91.
231. FIELDS & FIELDS, *supra* note 45, at 128; SHARMA, *supra* note 5, at 4.
232. *See* Chavez, *supra* note 176, at 72; Boswell, *supra* note 55, at 332.
233. NGAI, *supra* note 11, at 58; KANSTROOM, *supra* note 71, at 214 (quoting the 1911 Dillingham Commission, "[T]he Mexican . . . is less desirable as a citizen than as a laborer").
234. FIELDS & FIELDS, *supra* note 45, at 22.
235. *Id.* at 198.
236. *Id.* at 26.
237. *Id.* at 96–97.
238. Johnson, *supra* note 54, at 1148.

It is a product of citizenship that many of those who enjoy *de jure* citizenship often do not enjoy the rights of citizenship in practice.[239] Authors have described such oppressed citizens as "second-class" citizens, [240] "alien citizens,"[241] "conditional citizens,"[242] and "anticitizens."[243] Scholars like anthropologist Arjun Appadurai,[244] political theorist Engin F. Isin, [245] and philosopher Etienne Balibar[246] have argued convincingly that citizenship is an ethnic purification project that inspires contempt for anyone perceived as deviating from that project's goal of imagined ethnic or racial homogeneity. This contempt motivates violence against ethnic others who, in their difference, are seen as threats to homogeneity, whether they are citizens or not.[247] Since a "pure" nation state is impossible,[248] citizenship law will always construct some internal group into a target for violence.

In the United States, this means that citizenship law racializes and subordinates nonwhite citizens as well as nonwhite noncitizens. Sociologist Mary Romero explains that immigration laws do not just attack Black or Latinx noncitizens; for example: they attack Blackness or Latinxness itself,[249] assigning all people of color a badge of inferiority, criminality, and foreignness.[250] Denied the presumption of nativity that whites are afforded,[251] noncitizens of color suffer state violence and racist exclusion in employment, education, housing, and elsewhere. Law Professor Kevin Johnson has called the law's brutalization of noncitizens of color a "magic mirror" that reveals how the dominant society would treat nonwhite citizens if they were unprotected by the law of citizenship.[252] Thus, the treatment of migrating people from Mexico reveals how the white republic wants to treat Mexican

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239. *See* Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2498, 2510 (2007); BORDER & RULE, *supra* note 3, at 171 ("Legal but subjugated citizen from Muslim, Dalit, Indigenous, Black, Roma, and urban poor communities are characterized a 'undesirables' and 'aliens' . . . ."); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 541 (2000).

240. BOSNIAK, *supra* note 27, at 87.

241. Ngai, *supra* note 17, at 251–52.

242. LAILA LALAMI, CONDITIONAL CITIZENS: ON BELONGING IN AMERICA (2020).

243. ROEDIGER, *supra* note 221, at 57, 100; *see also* Price, *supra* note 16, at 28 (referring to the mistreatment of citizens of color as "effective statelessness").

244. ARJUN APPADURAI, FEAR OF SMALL NUMBERS: AN ESSAY ON THE GEOGRAPHY OF ANGER 3–4, 45 (2006).

245. ENGIN F. ISIN, CITIZENS WITHOUT FRONTIERS 57 (2012).

246. Balibar, *supra* note 40, at 60.

247. APPADURAI, *supra* note 244, at 51; s*ee also* Balibar, *supra* note 40, at 59–62.

248. SHARMA, *supra* note 5, at 266.

249. Mary Romero, *Crossing the Immigration and Race Border: A Critical Race Theory Approach to Immigration Studies*, 11 CONTEMP. JUST. REV. 23, 28–29 (2008).

250. Johnson, *supra* note 54, at 1151–53; *see also* Johnson, *supra* note 2, at 217.

251. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome*," *in* ASIAN AMERICANS AND THE SUPREME COURT 1087, 1096 (Hyung-chan Kim ed., 1992); Saito, *supra* note 163, at 262–64; Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1414 (1997).

252. Johnson, *supra* note 54, at 1114.

Americans, and the intercepting and turning around of boats of people from Haiti tells us what it thinks of Black citizens, to give but two examples.[253]

But we do not need to look into Johnson's mirror to know how nonwhite citizens *would* be treated because *in practice* they are often treated with an impunity that defies the *de jure* rights allegedly afforded all citizens. Frederick Douglass observed in 1880 that the post-abolition amendments that granted Black people *de jure* citizenship and equality "are virtually nullified. The rights which they were intended to guarantee are denied and held in contempt."[254] Or as W.E.B. Du Bois put it later, "the Negro is something less than an American."[255] A de facto legacy of white supremacist terror, torture, mass murder, and apartheid followed,[256] such that economic racism,[257] mass incarceration,[258] and police and vigilante terrorism[259] keep Douglass's and Du Bois's statements true today.

But the criminalization of Black noncitizens contributes to this racialization of Black citizens, as it does with other citizens and noncitizens of color.[260] The criminalization of both citizens and noncitizens of color allows citizenship to construct all people of color as falling outside of and undeserving of the rights of citizens.[261] Citizenship's construction of Latinx and Asian "races" and criminalization of the same noncitizens likewise feeds the mythology of the foreign[262] or criminal[263] nature of Latinx, Asian, and Indigenous citizens. It shares the blame for the violence,[264] poverty,[265]

253. *Id.*

254. Juan F. Perea, *The Statue of Liberty*, *in* IMMIGRANTS OUT!, *supra* note 66, at 44, 52.

255. W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 284 (Univ. of Pa. Press 1995) (1899).

256. *See supra* notes 244–455; DARITY JR. & MULLEN, *supra* note 66, at 166.

257. *See generally* ROBERT H. ZEIGER, FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865 (2007); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

258. *See generally* OSHINSKY, *supra* note 81; GILMORE, *supra* note 44; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

259. *See generally* ALEX S. VITALE, THE END OF POLICING (2017); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER (2019).

260. Calavita, *supra* note 67, at 10.

261. Kelly Lytle Hernández, *Amnesty or Abolition?: Felons, Illegals, and the Case for a New Abolition Movement*, 1 BOOM 54, 54–55, 65 (2011); *see also* GILMORE, *supra* note 44, at 230.

262. Romero, *supra* note 249, at 28; Saito, *supra* note 163, at 304–05; s*ee generally* ROBERT WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); *see also* PAIK, *supra* note 167, at 52–55 (explaining how the "model minority" stereotype projected onto Asian American is a source of othering and oppression).

263. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that "Mexican appearance" constitutes a legitimate consideration under the Fourth Amendment for making an immigration enforcement stop, essentially legalizing racial profiling); s*ee generally* WILLIAMS, *supra* note 262.

264. *See, e.g.*, Saito, *supra* note 164, at 275, 281–82; STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); Munshi, *supra* note 107, at 262; SPEED, *supra* note 72, at 16.

265. *See, e.g.*, Johnson, *supra* note 239, at 541; SPEED, *supra* note 72, at 16.

surveillance,[266] segregation,[267] voter disenfranchisement,[268] and illegal deportation[269] (twenty thousand citizens deported since 2003[270]) inflicted upon such citizens, decades after becoming eligible for birthright and naturalized citizenship.[271] Few examples are more notorious than the 120,000 Japanese-American citizens who were interned in concentration camps during World War II.[272] The constant threat of oppression also has a chilling effect on the liberty[273] and cultural expression[274] of citizens of color. Together these affronts constitute de facto revocation of the political membership that citizenship is supposed to grant.

This violence against citizens of color does not represent a failure or misapplication of citizenship law, but its operation as designed. Citizenship law is not racist merely in the way it is written or executed; it is racist because the exclusion from rights is itself a racist idea. Nowhere is this clearer than in the United States, where the existence of a political membership system that was created to exclude and subjugate nonwhites necessarily undermines the membership of nonwhite citizens as well. Bounded political membership strives for its mythic ethnic homogeneity (in the United States, white nationalism) by attacking anyone who fails its impossible definition of purity (in the United States, nonwhites), citizen or not.

Anti-racist reform of citizenship and naturalization law, as some have advocated,[275] is simply not possible. Citizenship can never permit equality. To make these laws anti-racist is to abolish them altogether.

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266. *See, e.g.*, CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR 14 (2003); SAHER SELOD, FOREVER SUSPECT: RACIALIZED SURVEILLANCE OF MUSLIM AMERICANS IN THE WAR ON TERROR (2018).

267. *See* Mendez v. Westminster, 161 F.2d 774 (9th Cir. 1947) (striking down the de jure segregation of Mexicans from whites in California schools); NGAI, *supra* note 11, at 132, 147; NATALIE Y. MOORE, THE SOUTH SIDE: A PORTRAIT OF CHICAGO AND AMERICAN SEGREGATION (2016).

268. *See, e.g.*, NGAI, *supra* note 11, at 132; BERNARD L. FRAGA, THE TURNOUT GAP: RACE, ETHNICITY, AND POLITICAL INEQUALITY IN A DIVERSIFYING AMERICA (2018); LAWRENCE GOLDSTONE, ON ACCOUNT OF RACE: THE SUPREME COURT, WHITE SUPREMACY, AND THE RAVAGING OF AFRICAN AMERICAN VOTING RIGHTS (2020).

269. *See, e.g.*, NGAI, *supra* note 11, at 74–75, 135 (describing the mass deportation of Mexican American citizens); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 640 (2011).

270. Price, *supra* note 16, at 36.

271. *See supra* notes 86–94.

272. *See generally* RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE-AMERICAN INTERNMENT IN WORLD WAR II (2015).

273. Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, *in* CITIZENSHIP IN QUESTION, *supra* note 16, at 117, 128; Ngai, *supra* note 17, at 252.

274. Garcia, *supra* note 55, at 142.

275. *See, e.g.*, SARAH SPENCER, STRANGERS AND CITIZENS: A POSITIVE APPROACH TO MIGRANTS AND REFUGEES 309 (Sarah Spencer ed., 1994); Boswell, *supra* note 55, at 316; Peter L. Markowitz, *After ICE: A New Humane* & Effective Immigration Enforcement Paradigm, 55 WAKE FOREST L. REV. 89 (2020).

B. *Citizenship as Anti-Democracy*

Many have argued that democratic values of equality and liberty are incompatible with borders,[276] but few have explicitly argued they are incompatible with citizenship itself.[277] Citizenship (as racism) is the opposite of democracy; it is anti-democracy. But, in addition to being and becoming race, citizenship is also anti-democratic in that it is incompatible with democratic principles of equality and individual liberty, even beyond race.

1. *Citizenship Is Anti-Egalitarian*

Egalitarianism, or "equal personhood,"[278] is generally regarded as a foundational principle of democracy.[279] Rather than ensuring equality among its members, as many have insisted,[280] the chief function of citizenship is to enforce inequality against non-members. Citizenship, again like race,[281] creates an illusory bond and a false unity among its members by contrasting them with otherized outsiders, in this case, noncitizens. Despite its emphasis on the "equality" or "freedom" between and among citizens,[282] citizenship law's real purpose is exclusion and unfreedom.[283]

a. Citizenship Is a Caste System

It is the exclusion from citizenship that creates a caste system[284]—that is, two sets of laws and rights, one inferior to the other. The non-U.S. citizen caste is itself stratified into a hierarchy of sub-castes, with "Legal Permanent Residents" at the top, the most illegalized at the bottom, and in-between countless levels of visa-holders, refugees, and conditional workers of varying subjugation. We even casually and routinely use the word "status" to describe this blatant stratification.[285] As writer Joseph Carens asked when comparing

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276. *See, e.g.*, CARENS, *supra* note 2, at 11–13; Chandran Kukathas, *In Defense of Free Immigration*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS, *supra* note 28, at 210; Arash Abizideh, *Closed Borders, Human Rights, and Democratic Legitimation*, *in* DRIVEN FROM HOME: PROTECTING THE RIGHTS OF FORCED MIGRANTS, 147, 158–59 (David Hollenbach, ed., 2010).

277. *See, e.g.*, KOCHENOV, *supra* note 15, at 249; SHARMA, *supra* note 5, at 87; STEVENS, *supra* note 5, at 73–103.

278. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PENN. L. REV. 561, 564 (1984), reprinted *in* CRITICAL RACE THEORY, *supra* note 34, at 46, 47.

279. *See, e.g.*, ROBERT A. DAHL, ON DEMOCRACY 37–38, 65 (2000).

280. *See, e.g.*, Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 251 (1989); Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. 963, 970 (2000); KOCHENOV, *supra* note 15, at 41–42.

281. *See* Crenshaw, *supra* note 142, at 112–13.

282. *See* KOCHENOV, *supra* note 15, at 198.

283. *See* Imogen Tyler, *Designed to Fail: A Biopolitics of British Citizenship*, 14 CITIZENSHIP STUD. 61 (2010); Peter Nyers, *Migrant Citizenships and Autonomous Mobilities*, 1 MIGRATION, MOBILITY & DISPLACEMENT 23, 31 (2015) ("Citizenship is a famously exclusionary concept, and its exclusionary force is there by design. The exclusions of citizenship are immanent to its logic, and not at all accidental."); KOCHENOV, *supra* note 15, at 23.

284. *See* KOCHENOV, *supra* note 15, at 72; UNDOING BORDER IMPERIALISM, *supra* note 3, at 76.

285. *See* 8 U.S.C. § 1101.

citizenship to another caste system,[286] "[i]f the feudal practices protecting birthright privileges were wrong, what justifies the modern ones?"[287] Like other caste systems, it affords some people (citizens) power and privilege over others (noncitizens).[288]

Caste is violence and power, and citizenship is similarly preserved by "a panoply of partitions, segregations, and striations."[289] Citizens enjoy power —privileged movement, work, freedom—that is furnished by noncitizen subjugation[290]—the violence of deportation, criminalization, incarceration, and vulnerable labor[291] discussed in the previous section.[292] This power is justified with socially constructed, arbitrary, and invented criteria. Arbitrary because they "draw[] a line . . . through society"[293] to condition membership on non-meritorious bases (e.g., birthplace and ancestry);[294] invented because one's nationality is an imagined community[295] without basis in nature.[296] Professor Ayelet Shachar notes the irony that "such arbitrary criteria as one's birthplace or bloodline is discredited in virtually all fields of public life" except citizenship.[297] Long-abolished legal doctrines in family,[298] property, and estate law[299] are notable examples. Thus, citizenship has no inherent value or justification in and of itself beyond securing power and privilege for some at the expense of others.[300] It is power and caste for the sake of power and caste.

American citizenship law enforces caste on its face. The U.S. Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."[301] *De jure* exclusion from citizenship carves out an extra-constitutional space

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286. *See* Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251–52 (1987).

287. CARENS, *supra* note 2, at 226.

288. *See* SOYSAL, *supra* note 7, at 37; Dimitris Papadopoulos & Vassilis S. Tsianos, *After Citizenship: Autonomy of Migration, Organisational Ontology and Mobile Commons*, 17 CITIZENSHIP STUD. 178, 178–183 (2013).

289. William Walters, *Deportation, Expulsion, and the International Police of Aliens*, *in* DEPORTATION REGIME, *supra* note 58, at 69, 94.

290. *See* BOSNIAK, *supra* note 27, at 37.

291. *See* Nyers, *supra* note 283, at 24.

292. *See supra* Section II(a).

293. KOCHENOV, *supra* note 15, at 59.

294. *See id*. at 53.

295. *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 2006).

296. STEVENS, *supra* note 5, at 56.

297. SHACHAR, *supra* note 9, at ix.

298. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 346–48 (2008) (describing the abolition of traditional patriarchal and "tender years doctrine" rules that assigned parents full control over custody by virtue of their biological role as parents alone).

299. Max Stier, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 729 (1992) (describing the origins and abolition of the "corruption of blood" principle, or the notion that children can be made to pay for the misconduct of their parents).

300. *See* KOCHENOV, *supra* note 15, at 214.

301. Demore v. Kim, 538 U.S. 510, 522 (2003).

for noncitizens legalizing—or mandating—discrimination against them,[302] denying them public assistance,[303] employment,[304] suffrage,[305] and even backpay if their employer underpays them.[306] Their right to free speech is more limited than citizens;[307] they have diminished freedom from unreasonable search or seizure[308] and arrest,[309] and of course, can be deported.[310] In "deportation proceedings," they do not share with criminal defendants[311] the rights to appointed counsel,[312] speedy trial,[313] or in some cases any trial at all,[314] or the

302. Generally, and practically, the law prohibits the States from discriminating against Legal Permanent Residents (LPRs), but the federal government may do so, and the States may discriminate against noncitizens without legal permanent residence. *See* Graham v. Richardson, 403 U.S. 365, 382 (1971) (applying strict scrutiny to a State law that discriminated against LPRs); Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1048–49 (9th Cir. 2017) (holding that federal law denying access to legal permanent residence to "habitual drunkards" does not violate equal protection under rational basis test); Plyler v. Doe, 457 U.S. 202, 203 (1982) (applying rational basis scrutiny to a State law discriminating against illegalized people, and refusing to find them a class in need of strict scrutiny protection); Fiallo v. Bell, 430 U.S. 787, 799–800 (1977) (upholding a federal immigration law that afforded citizen fathers unequal rights compared to citizen mothers to petition for their "illegitimate" noncitizen children); Tuan Anh Nguyen v. INS, 533 U.S. 53, 73 (2001) (upholding a federal law that compels citizen fathers, but not citizen mothers, to demonstrate paternity to petition for their noncitizen children).

303. Mathews v. Diaz, 426 U.S. 67, 86 (1976) (upholding a federal law that denied public medical benefits to certain Legal Permanent Residents).

304. Sugarman v. Dougall, 413 U.S. 634, 646–47 (1973) (holding that state governments may deny employment to noncitizens on account of their citizenship status, under certain circumstances).

305. *Id.* at 649 ("[I]mplicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.").

306. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002) (holding that noncitizens without status are not entitled to back pay under federal law).

307. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (upholding the denial of an application that would have allowed a noncitizen to come to the United States to speak at a University because they were "Marxist"); Pham v. Ragbir, 141 S. Ct. 227 (2020) (vacating Second Circuit decision that found noncitizen "plausibly stated" that ICE violated his first amendment rights by attempting to deport him because of his political speech, on the grounds that ICE's decision to deport him was essentially nonreviewable).

308. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (holding that a noncitizen in deportation proceedings does not enjoy the same right to preclude illegally obtained evidence, as a criminal defendant does in a criminal proceedings).

309. Unlike an arrest warrant for a person suspected of committing a crime, "arrest warrants" for persons suspected of violating the immigration laws are not issued by a judge, but by an "immigration official[]." *See* 8 C.F.R. § 287.5I(2).

310. Carlson v. Landon, 342 U.S. 524, 534 (1952) (authorizing deportation under the so-called "plenary power" doctrine).

311. Because all immigration and citizenship restrictions in the United States are considered "civil" rather than "criminal" matters, deportation is not legally considered punishment, no matter how harsh or lethal, and thus the Constitutional provisions protecting criminal defendants do not apply in "deportation proceedings." *See Lopez-Mendoza*, 468 U.S. at 1032; s*ee also* AM. IMMIGR. COUNCIL, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals* (Mar. 2013), https://perma.cc/VB2C-9GHZ.

312. Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002) (stating "there is no Sixth Amendment right to counsel in deportation hearings").

313. Agriz v. U.S. Immigr., 704 F.2d 384, 387 (7th Cir. 1983) (finding noncitizen had no right to a speedy deportation hearing under the U.S. Constitution).

314. *See* 8 USC § 1225(b)(1) (authorizing "expedited" deportation without a hearing); AILA v. Reno, 18 F. Supp. 2d 38, 39 (D.D.C. 1998) (holding that noncitizens "had no due process rights that could have been violated by expedited removal"); 42 U.S.C. § 265 (permitting the exclusion or deportation of noncitizens without any trial or adjudication under a public health provision).

same protections from their opponent's burden of proof,[315] the same right to appeal,[316] or rules of evidence.[317] In some ways, their freedom from cruel and unusual punishment is narrower than that of citizens,[318] and they may be imprisoned indefinitely without a sentence.[319] Drawing a straight line from the enslavement and segregation of Black U.S. citizens to the noncitizen's loss of "a right to have rights," historian Kelly Lyttle Hernandez notes that "[f]or the first time since slavery, an entire category of people in the United States could be imprisoned without a trial by jury. Their homes could be searched without warrants, they could be detained without being arrested, and punished by Americans in ways Americans could not be."[320] "Whatever the procedure authorized by Congress is," the Supreme Court once said of the legally inferior noncitizen castes, "it is due process as far as an alien denied entry is concerned."[321] The law's construction of noncitizens lays bare its contempt for them as subhuman inferiors.[322]

b. Citizenship Is Anti-Feminist, Anti-Queer and Anti-Worker

Citizenship reinforces caste and exclusion at the site of multiple intersections of power and subjugation.

The racist caste system of citizenship is also a cis-male-supremacist one. Women of color endure a unique "double subordination" of racism and heterosexism simultaneously.[323] In the United States, citizenship laws (which, of course, excluded all women from suffrage for a century and a half[324]) were

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315. Woodby v. INS, 385 U.S. 276, 285 (1966) (holding that a person may be deported upon "clear and convincing" evidence that they are deportable, a lower standard than the "beyond a reasonable doubt" standard for violation of a criminal law).

316. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (prohibiting the noncitizen's appeal of "discretionary" decisions); 8 U.S.C. § 1252(a)(2)(C) (barring judicial review of "any final order of removal" against certain noncitizens); 8 U.S.C. § 1252(d) (limiting judicial review of "a final order of removal" only if person exhausted administrative remedies); 8 U.S.C. § 1252(f)(2) (limiting court's ability to "enjoin removal of any alien pursuant to a final order").

317. Wadud, 19 I&N Dec. 182, 188 (BIA 1984) ("It is well established that the strict rules of evidence are not applicable in deportation proceedings").

318. *See* Michael Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?*, AM. IMM. COUNCIL 10 (2012), https://perma.cc/8L36-U4BC; Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring).

319. Demore v. Kim, 538 U.S. 510, 521 (2003) (upholding the "mandatory" imprisonment of a noncitizen (LPR) pending their deportation proceeding); *see also* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (holding that neither the INA nor the constitution places any limit on the time a noncitizen may be imprisoned prior to their final "deportation hearing").

320. Lytle Hernández, s*upra* note 261.

321. Shaughnessy v. United States, 345 U.S. 206, 212 (1953); s*ee also* Jean v. Nelson 727 F.2d 957, 968 (11th Cir. 1984) (finding that noncitizens who have not been admitted to the United States "have no constitutional rights with regard to their applications, and must be content to accept whatever statutory rights they are granted by Congress.").

322. Delgado, s*upra* note 170, at 322.

323. Kimberlé Williams Crenshaw, *Mapping the Margins Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1247–48 (1991); s*ee also The Combahee River Collective, The Combahee River Collective Statement*, YALE UNIV. AM. STUDIES (1977), https://perma.cc/75W9-D7GU ("We also often find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously.").

324. U.S. CONST. Amend. XIX.

designed to exclude nonwhite women who did not meet a patriarchal definition of "good" women. One of the first U.S. immigration laws, passed in 1875, excluded noncitizen "prostitutes" from the United States, which was intended to exclude unmarried Chinese women imagined as sexually deviant.[325] Many queer noncitizens were barred under a "sexual deviancy" ground intended to exclude "homosexuals or sex perverts" from 1952 until 1990.[326] Early immigration laws were premised on the doctrine of "coverture," that a woman was controlled by and had her identity subsumed into that of her husband.[327] In 1868 the Supreme Court said that only white women could gain citizenship through marriage,[328] and only marriage to a white man could confer that citizenship.[329] A noncitizen woman's marriage to a noncitizen, nonwhite man who was himself racially ineligible for citizenship also barred her from naturalizing, even if she was white and otherwise eligible.[330] Between 1907 and 1931, a citizen woman would actually *lose* her citizenship if she married a noncitizen.[331] This occurred automatically, without even the trial then afforded to someone accused of treason.[332]

The cis-male supremacy is also served by the control and power that citizenship law gives men over women. Law Professor Lisa C. Ikemoto, noting that most noncitizens who obtain status through a spouse are female,[333] observes that such petitions requiring noncitizen spouses to be dependent on their citizen partner for access to rights and liberties consequently reaffirm their subordinate status to men.[334] Moreover, the law permits most women to immigrate only through family-based visas, thereby reducing women to merely their relationships to men and alleging that they are "worthy only by virtue of [their] status as mother, daughter or wife."[335]

Additionally, the lower-caste status of noncitizen women makes them even more vulnerable to domestic violence and sexual assault than citizen

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325. *See* NGAI, *supra* note 11, at 58–59; SHARMA, *supra* note 5, at 78.

326. Boutilier v. INS, 387 U.S. 118, 121 (1967); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Criminalization's Past Can Tell Us about Its Present and Its Future*, 104 CAL. L. REV. 149, 157 n.31 (2016).

327. *See generally* Janet Calvo, *Spouse-Based Immigration Law, the Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 595 (1993); Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise*, 24 N. ILL. UNIV. L. REV. 153, 188 (2004).

328. Kelly v. Owen, 74 U.S. 496, 498 (1868).

329. Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 148 (1996).

330. HANEY LÓPEZ, *supra* note 45, at 11.

331. Johnson, *supra* note 329, at 144; s*ee* Mackenzie v. Hare, 239 U.S. 299, 311–12 (1915) (finding that a woman born in the United States was no longer a U.S. citizen because she married a citizen of the United Kingdom under the law which then stated "any American woman who marries a foreigner shall take the nationality of her husband").

332. HANEY LÓPEZ, *supra* note 45, at 34.

333. Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER RACE & JUST. 511, 535 (2000) ("Most of the immigrants who obtain resident status by marriage to a citizen or legal permanent resident are women"); s*ee also* Calvo, *supra* note 327, at 156 (explaining the majority of people who adjust through a spouse or apply for a fiancé visa are women).

334. Ikemoto, *supra* note 333, at 534; s*ee also* Calvo, *supra* note 327, at 156; Nancy Ann Root & Sharyn A. Tejani, *Undocumented: The Role of Women in Immigration Law*, 83 GEO. L.J. 605, 609 (1994).

335. Root & Tejani, *supra* note 334, at 613.

women.[336] Indeed, citizenship empowers abusers to weaponize their higher caste status by using the threat of deportation as a means of control.[337] Citizenship is just one way that state violence generates domestic and sexual violence, to draw on the analysis of sociologist Shannon Speed.[338] Even more broadly, all exclusion, deportation, and internment of noncitizens, not to mention all exploitative and coercive labor practices,[339] target women more than men simply because the majority of people crossing the border that separates the United States from the world are women.[340] Women die trying to cross the U.S.-Mexico border disproportionately more often than men, by one measure 2.67 times more often, and of course face sexual violence more often in their attempts to cross;[341] Trans-women face it even more often than cis-women.[342] All citizenship and immigration law, therefore, enhances these structures of cis-male oppression.[343]

The caste of citizenship is also incompatible with reproductive justice.[344] The "birth" in "birthright citizenship" telegraphs that citizenship is a source of male control over women's reproductive rights. Since noncitizen women are more likely than men to use social services, such as healthcare,[345] denying healthcare to illegalized people is also the denial of reproductive justice to illegalized women.[346] The denial of healthcare and other benefits to nonwhite noncitizen women and their children, such as those made law in 1996,[347] are properly located, as Law Professor Dorothy Roberts argues, along the historical continuum of eugenics which has justified the punishment of women of

336. *See* Sarah M. Wood, *VAWA's Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL'Y 141, 142 (2004); SPEED, *supra* note 72, at 101–02.

337. Calvo, *supra* note 327, 182.

338. SPEED, *supra* note 72, at 30–31 (citing Philippe Bourgois, *The Power of Violence in War & Peace: Post-Cold War Lessons from El Salvador*, 2 ETHNOGRAPHY 5–34 (2001) (arguing that state violence is itself a form of domestic violence)).

339. *See* Johnson, *supra* note 329, at 163; Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U.J. GENDER & L 407 (1997).

340. *See* Jeanne Batalova, *Immigrant Women and Girls in the United States*, MIGRATION POL'Y INST. (Mar. 4, 2020), https://perma.cc/486U-8XGK (women do not compose a large majority of noncitizens in the United States, but a majority nonetheless).

341. SPEED, *supra* note 72, at 13.

342. Jack Herrera, *Why are Trans Women Dying in ICE Detention?*, PACIFIC STANDARD (June 4, 2019), https://perma.cc/5S3H-T8DG.

343. Jaqueline Bhabha, *Demography and Rights: Women, Children, and Access to Asylum*, INT'L J. OF REFUGEE L. 227, 235 (2004).

344. LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 55–56 (2017) (defining reproductive justice as the right to choose when to become or not become pregnant, the right to give birth, the right to abortion, and the right to parent one's children, as well as the right to have one's biological needs met, such as healthcare and housing).

345. Chavez, s*upra* note 176, at 71.

346. Dorothy E. Roberts, *Who May Give Birth to Citizens?*, *in* IMMIGRANTS OUT! 205–07 (Juan F. Perea, ed., 1997); s*ee also* Chavez, s*upra* note 176, at 69; s*ee also* Berta Esperanza Hernandez-Truyol, *Reconciling Rights in Collision*, *in* IMMIGRANTS OUT! 267 (Juan F. Perea ed., 1997).

347. Katherine Anne Paddock Betcher, *Revisiting the Personal Responsibility and Work Opportunity Reconciliation Act and Calling for Equality: Problematic Moral Regulations and the Changing Legal Status of LGBT Families in a New Obama Administration*, 31 WOMEN'S RTS. L. REP. 104, 104–05 (2009).

color for their reproduction.[348] For example, efforts in recent decades to end *jus soli* citizenship in the United States altogether[349] only "den[ies] dark-skinned immigrants the right to give birth to citizens [and] perpetuates the racist ideal of a white American identity."[350] This is why a white nationalist *jus soli* citizenship incentivizes violence against pregnant noncitizens, to cage and deport them before they can give birth to more citizens of color.[351] Immigration enforcement in the United States has a long history of targeting pregnant women for this reason.[352] Put simply, the bodies of nonwhite women are a threat to the white republic. As long as women have the ability to produce outsiders, they will be punished for it. More broadly, this is just an example of what geographer Jenna Loyd means when she describes citizenship as merely a way to eject "racialized, gendered and sexualized 'threats.'"[353]

For these reasons, a caste system of rights and privileges for insiders as against outsiders will always impact women and queer people more than cis-hetero-men. The review of historical anti-feminist and anti-queer laws in the first paragraph of this section reveals a feature, not a bug, of the citizen/noncitizen partition.[354] Thus, citizenship is irredeemably cis-male supremacist.

Citizenship's caste is also inherently anti-worker. As described above in the context of U.S. citizenship, the law creates a caste of exploitable, vulnerable[355] workers because they are subject to deportation and incarceration[356]—essentially a system of legalized human trafficking.[357] This divide-and-conquer of the world's workers into two tiers of rights pits "citizen" workers against "noncitizen" workers, limiting labor's capacity for bargaining power and solidarity.[358] Capital must dispose of workers when their labor is not profitable and acquire them when it is,[359] and a rightless workforce subject to deportation meets this need with swift and devastating effects. This intersection of capital's exploitation in the service of the white republic is aptly termed racial capitalism.[360] It is exclusion itself that manufactures

348. Roberts, *supra* note 346, at 212; DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 59–76, 246–93 (2d ed. 2017).

349. *See* Allison S. Hartey, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U . REV. L. & SOC. CHANGE 57, 72–73 (2012).

350. Roberts, *supra* note 346, at 215.

351. *See* Hartey, *supra* note 349, at 62.

352. *Id*. at 87, 94–100.

353. *See* Lloyd, *supra* note 218, at 97.

354. *See supra* notes 321–28.

355. *See* CHACON & DAVIS, *supra* note 165, at 193.

356. BORDER & RULE, *supra* note 3, at 85, 138–40.

357. Indeed, the extraction of labor through coercion is the definition of human trafficking, that is, when it is not sanctioned by law. *See* 22 U.S.C.A. § 7101(b)(13).

358. *See, e.g*., CHACON & DAVIS, *supra* note 165, at 119; Heller, Pezzani & Stierl, *supra* note 188, at 65; BORDER & RULE, *supra* note 3, at 14.

359. *See* GILMORE, *supra* note 44, at 71, 77 (explaining how immigrant prisons and deportation perform this function).

360. *See* CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (1983); BORDER & RULE, *supra* note 3, at 137.

exploitability and thus racial capitalism that relies on exclusion.[361] The citizen-noncitizen caste system will always weaken the strength of workers—citizen and noncitizen alike—by empowering capital to impose its will upon them. Citizenship is by its nature complicit with capital and antagonistic toward labor.

Ultimately, as a system for sequestering power, citizenship always sits at other intersections of power and disadvantage. It augments the power of those who already possess it and the disadvantage of those who do not. Thus, white supremacy, patriarchy, and capital all find within citizenship a new cudgel in their already powerful hands.

2. *Citizenship Is Anti-Libertarian*[362]

If equality is one half of democracy, liberty is the other. Freedom in a democratic society requires representative government and personal autonomy.[363] A representative government is one in which all adults are included in the electorate.[364] Without personal self-determination—the liberty to act, speak and think freely—it cannot be said that people "live under laws of their own choosing."[365] But in both these respects, citizenship is anti-civil libertarian.

A democracy derives its legitimacy from the consent of the governed,[366] such that a truly representative government coerces only those whom it represents. This idea was captured by the popular eighteenth-century American rhetoric "no taxation without representation."[367] Citizenship's closed membership requires that a government coerce people without their consent—that is, control the movement and limit the freedom of people legally prohibited from voting. But as political philosopher Arash Abizideh argues, doing so means that the government is coercing people from whom it derives no legitimacy since a government's monopoly on violence is derived only from democratic participation.[368] Thus, bounded political membership requires democracies to violate "their own account of political legitimacy."[369] Journalist and author Nicole Hannah Jones echoes Abizideh on this point in her essay, arguing that the United States was not a democracy at all until Black Americans fought for and achieved their legal inclusion into the

361. *See* AUDRE LORDE, SISTER OUTSIDER 115 (rev'd ed. 2007).

362. I use "libertarian" here not to describe the political party or the colloquial American understanding of the word as someone who believes in minimal government. Rather, I use it in the classical sense, as someone who is pro-liberty generally, as in, a "civil libertarian."

363. *See, e.g.*, DAHL, *supra* note 278, at 45, 53–54.

364. *Id.* at 78.

365. *Id.* at 53.

366. Bosniak, *supra* note 279, at 970–74; SHACHAR, *supra* note 9, at 41 (tracing the principle that legitimate authority is derived from the consent of the government to the philosopher John Locke).

367. *See* JOHN PHILIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 156 (1989).

368. Arash Abizedeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37, 37 (2008); Abizideh, *supra* note 275, at 158–59.

369. Abizideh, *supra* note 275, at 37; s*ee also* ROBERT DAHL, AFTER THE REVOLUTION: AUTHORITY IN GOOD SOCIETY 64–67 (1970); s*ee also* DAHL, *supra* note 278, at 47.

American electorate.[370] She also argues that a system of government is not democratic at all until its laws regard with equal humanity every person and every vote.[371] This freedom for the hegemonic group with tyranny for the subordinate one is what David Roediger called a "Herrenvolk democracy."[372] Noncitizens present in U.S. territory, or intending to enter it, "are thus not (and cannot be) 'free' as long as citizenship remains an indispensable condition of political participation."[373] A bounded democracy, therefore, has jettisoned its own democratic principles of representative government.

Personal autonomy is the keystone of liberty. Freedom to make choices for oneself follows a general principle: If it does not infringe on another person's liberty, then your right to do it should not be limited by the state.[374] Citizenship, by prohibiting free movement and settlement, illegalizes an entire population's non-harmful[375] free will. Joseph Carens points out that this ordinary understanding of personal autonomy is reversed for the noncitizen,[376] that is, immigration and citizenship law presumes this group has no freedom, and then asks members of the group to justify why they should be free to move or remain, rather than the state having to justify its restrictions.[377] Citizenship is the criminalization of the liberty to make decisions for oneself.

But citizenship, and the closed borders and restrictions it demands, illegalizes more than just the freedom to move. Citizenship also curbs the moving person's freedom of religion, association, and political speech. Attorney Ilya Somin has emphasized that free movement across borders is the only way many people have to access freedom of speech, religion, and association that may be denied to them in their state of origin but would be accessible only on the other side of a border.[378] Similarly, when a border is placed between them and opportunity, they are denied their freedom from poverty. Freedom of movement is, therefore, a threshold right, without which other rights are not possible to realize.[379] But one is locked into one's citizenship and thus locked out of the rights and freedoms enjoyed by citizenship in other nation

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370. *See, e.g.*, Nicole Hannah Jones, *America Wasn't a Democracy, until Black Americans Made It One*, N.Y. TIMES MAG. (Aug. 15, 2019), https://perma.cc/54VE-N8VL.

371. *Id.*; s*ee also* Michael Huemer, *In Defense of Illegal Immigration*, *in* OPEN BORDERS, *supra* note 25, at 34, 48; s*ee also* DAHL, *supra* note 278, at 90 (describing a similar concept as "polyarchy").

372. *See also* ROEDIGER, *supra* note 220, at 59, 172.

373. KOCHENOV, *supra* note 15, at 200.

374. CARENS, *supra* note 2, at 75.

375. *See infra* Part III(B)(3); *see also* Daniel Sharpe, *Why Citizenship Tests Are Necessarily Illiberal: A Reply to Blake,* 15 ETHICS & GLOB. POL. 1 (2022).

376. CARENS, *supra* note 2, at 237.

377. *Id.* at 236.

378. *See generally* ILLYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION AND POLITICAL FREEDOM (2020).

379. *See* CARENS, *supra* note 2, at 227; AYTEN GUNDOGDU, RIGHTLESSNESS IN THE AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS 165 (2015); SAGER, *supra* note 24, at 22; COLBERN & RAMAKRISHNAN, *supra* note 74, at 30, 42; HANNAH ARENDT, MEN IN DARK TIMES 9 (1968) ("Of all the specific liberties which may come into our minds when we hear the word 'freedom,' freedom of movement is historically the oldest and also the most elementary.").

states.[380] For these reasons, citizenship also eliminates the freedom to access political and economic rights.

There is no greater violence against a person's personal autonomy than their murder. It is estimated that forty thousand people were killed attempting to cross a border from 2006 to 2015.[381] People die when the fences and laws guarding citizenship compel them to cross deserts, oceans, and other dangerous avenues to survive or access greater economic and political wellbeing.[382] These barriers manufacture other collateral violence as well, such as human trafficking.[383] The dead and maimed are then blamed for their own killing or abuse. Latinx Studies Professor Mary Pat Brady compared death-by-border to capital punishment,[384] and activist Harsha Walia compared blaming the dead to rape culture.[385] Citizenship's exclusivity is necessarily guarded behind guns and razor wire and will therefore always be incompatible with peoples' freedom from violence and their right to live.

A republic that forcibly excludes some from rights and liberties lacks representative government, unjustifiably limits personal autonomy, and oppresses other political freedoms by stifling the threshold right to move. For all these reasons, citizenship is incompatible with liberty itself. A bounded freedom is no such thing.

3. *Citizenship Is Doublethink*

Citizenship law is grounded in an authoritarian notion of sovereignty that compels us to believe two contradictory ideas at once without recognizing the contradiction. In other words, citizenship requires doublethink. International and U.S. law[386] justify citizenship by relying on a nation state's "sovereignty" or "self-determination."[387] Self-determination is alleged to be a nation states' authority to define their membership by excluding some from rights or territory.[388] Allegedly to protect a free democracy, the law makes

380. KOCHENOV, *supra* note 15, at 39; Susan Willis McFadden & Kathleen Kavanagh, *Adios, Uncle Sam: Renouncing U.S. Citizenship*, 49 DEC. ARIZ. ATT'Y 12, 15–16 (2012).

381. *See* Jones, s*upra* note 25, at 3.

382. *See generally* REECE JONES, VIOLENT BORDERS: REFUGEES AND THE RIGHT TO MOVE (2016).

383. Jennifer K. Lobasz, *Beyond Border Security: Feminist Approaches to Human Trafficking*, 18 SEC. STUD. 319, 322 (2009).

384. Mary Pat Brady, *The Homoerotics of Immigration Control*, SCHOLAR & FEMINIST ONLINE (2008), https://perma.cc/6LL5-3GK4.

385. BORDER & RULE, *supra* note 3, at 107.

386. *See, e.g.*, BOSNIAK, *supra* note 27, at 40, 99; Shelley Wilcox, *The Open Borders Debate in Immigration*, 4 PHIL. COMPASS 813, 814 (2009) (discussing prominent political theorist Michael Walzer as one of the most well-known defenders of sovereignty's internal contradictions); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 52–63 (1983).

387. KOCHENOV, *supra* note 15, at 51, 207–11; SOYSAL, *supra* note 7, at 142; SHACHAR, *supra* note 9, at 35.

388. *See* BRUBAKER, *supra* note 8, at 21 (describing citizenship as "internally inclusive," but "externally exclusive"); SHARMA, *supra* note 5, at 4; Abizideh, *supra* note 275, at 157; KOCHENOV, *supra* note 15, at 123.

that freedom exclusive to insiders. Thus, citizenship requires us to believe that protecting free society depends upon the unfreedom of others.[389]

The purpose of doublethink is to authorize brutality that would otherwise be regarded as intolerable by allowing us "to tell deliberate lies while genuinely believing in them."[390] Thus, doublethink permits authoritarianism by a government otherwise ascribed to democratic principles. It licenses power for power's sake where democracy would otherwise abhor it. All "sovereignty" and "self-determination" mean in practice is the power to limit who is equal under the law, and to enforce that inequality.[391] It is the right of one group to have power over another.

This inherent contradiction between citizenship's justifications and democracy has been observed by many,[392] defended by most,[393] and challenged by a relative few.[394] Critics of sovereignty's doublethink make a more compelling case that equality for the few is not equality at all.[395] The political philosopher Hannah Arendt in *The Origins of Totalitarianism* famously described an (allegedly) democratic state's ability to carve noncitizens out of equal rights protections altogether as depriving outsiders of "the right to have rights,"[396] a phrase the U.S. Supreme Court also once used to describe citizenship,[397] and which political theorist Ayten Gundogdu has applied to contemporary citizenship law to show that it carves noncitizens out of humanity itself.[398] Indeed, defenses of today's doublethink democracy are not unlike other historical defenses of allegedly democratic orders, which were nonetheless egregiously anti-egalitarian.[399] Just as whites once called a slavery-based economy democratic, so citizens describe deportation and internment-based economy the same way.

Again, the history of citizenship in the United States elucidates this point. The 1854 law that created the states of Kansas and Nebraska introduced the idea of "popular Sovereignty," defined as the right of white state residents to

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389. KOCHENOV, *supra* note 15, at 35; SHACHAR, *supra* note 9, at 13; Abizideh, *supra* note 275, at 157.

390. GEORGE ORWELL, 1984 (1949) at 270.

391. SHARMA, *supra* note 5, at 14, 273.

392. *See, e.g.*, CARENS, *supra* note 2, at 6; Johnson, *supra* note 2, at 212; NGAI, *supra* note 11, at 81; Abizideh, *supra* note 275, at 157; HIROSHI MOTOMURA, OUTSIDE THE LAW 89 (2014); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 63 (2004) (discussing the ostensible contradictory or paradoxical views Arendt sometimes appeared to take, in that she seemed to both reject and accept bounded citizenship simultaneously); CHRISTOPHER BERTRAM, DO STATES HAVE THE RIGHT TO EXCLUDE IMMIGRANTS? 27–29 (2018).

393. *See, e.g.*, T. H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT (1977); Wilcox, *supra* note 386, at 814; BOSNIAK, *supra* note 27, at 97; Bosniak, *supra* note 279, at 965; WALZER, *supra* note 386, at 52–63; BERTRAM, *supra* note 390, at 77 (discussing Christopher Heath Wellman's defense of this contradiction).

394. *See, e.g.*, STEVENS, *supra* note 5, at 54; CARENS, *supra* note 2, at 225; SHARMA, *supra* note 5, at 157.

395. *See, e.g.*, SHARMA, *supra* note 5, at 14, 273.

396. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296–98 (1951).

397. Perez v. Brownell, 356 U.S. 44, 64, 78 (1958) (Warren, C.J., dissenting).

398. GUNDOGDU, *supra* note 379, at 19.

399. Jones, s*upra* note 354.

decide whether or not theirs would be a slave state.[400] Decades later, in order to enforce the Chinese and Asian exclusion laws, the same Supreme Court that sanctioned apartheid in *Plessy v. Ferguson*[401] declared that the federal government possesses judicially non-reviewable and "exclusive and absolute"[402] or "plenary" power[403] over noncitizens' movement to enter and remain within the territory of the United States or possess rights therein.[404] "Sovereignty," the Court said, meant that if Congress "considers the presence of foreigners of a difference race in this country . . . to be dangerous to peace and security . . . its determination is conclusive upon the judiciary."[405] In other words, "sovereignty" is the inherent authority of a white republic to keep itself white.[406] It did not matter that these decisions had little basis in the Constitution,[407] or in international law,[408] because, as the Court observed in a later case, "there are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect."[409] Much like the "sovereignty" arguments used to defend slavery and later Jim Crow, sovereign "plenary power" was "forged [] out of whole cloth"[410] to justify the power of white people to exclude, subordinate, and exploit nonwhite people.[411] "Sovereignty"[412] allowed the law,

400. DARITY JR. & MULLEN, *supra* note 66, at 147.

401. The Supreme Court from October 8, 1888 through July 4, 1910 is known as the "Fuller Court," as it presided under Chief Justice Melville Weston Fuller. *See* JAMES W. ELY JR., THE FULLER COURT: JUSTICES, RULINGS, AND LEGACY (2003); s*ee* a*lso* Plessy v. Fergusson, 163 U.S. 537, 540 (1896); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

402. *Chae Chan Ping*, 130 U.S. at 600.

403. Saito, *supra* note 165, at 14–16; s*ee, e.g.*, *Chae Chan Ping*, 130 U.S. at 581; Nishimura Ekiu v. United States, 142 U.S 651, 662 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

404. Saito, *supra* note 165, at 14–16; *Chae Chan Ping*, 130 U.S. at 606; Boutilier v. INS, 387 U.S. 118, 123 (1967).

405. *Chae Chan Ping*, 130 U.S. at 606; s*ee also* Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("No limits can be put by the courts upon the power of Congress to protect . . . the country from the advent of aliens whose race or habits render them undesirable as citizens . . .").

406. Garcia, s*upra* note 51, at 133; Leti Volpp, *American Mestizo: Filipinos and Antimiscegination Laws in California*, 33 U.C. DAVIS L. REV. 795, 815 (2000) (quoting a state judge in 1925: "The dominant race of this country has a perfect right to exclude all other races from equal rights with its own people . . .").

407. *Chae Chan Ping*, 130 U.S. at 609 (finding that the power to exclude noncitizens is "an incident of sovereignty" rather than constitutional authority); *Nishimura Ekiu*, 142 U.S. at 659 ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners within its dominions"); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not from legislative power alone but is inherent in the executive power to control the foreign affairs of the nation."); Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953) (upholding the indefinite detention of Mezei stating that "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Governm'nt's political departments largely immune from judicial control").

408. Munshi, *supra* note 107, at 259 (explaining that international law had not described the power to exclude noncitizens as absolute, as the court said).

409. Downes v. Bidwell, 182 U.S. 244, 280 (1901).

410. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 7 (2009).

411. In fact, while the statute generally prohibits it (8 U.S.C. § 1152(a)(1)(A)), it has not yet been declared unconstitutional to exclude people from the U.S. explicitly based on race. *See* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (upholding regulations that affected Iranian citizens only); Panas

then and today,[413] to hide behind the "race-neutral language of racism."[414]

As a foil for white supremacy, this definition of sovereignty has been used in the United States to license much of the wanton violence inflicted against nonwhites since it became law. It is to this day invoked to exclude (from U.S. territory and citizenship[415]), deport,[416] and intern[417] indefinitely[418] to enforce citizenship law. The plenary "power to exclude" was relied upon to intern Japanese Americans,[419] license the conquest, dispossession, and genocide of Indigenous Americans under so-called Indian law,[420] and authorize American colonialism in the Philippines, Guam, and Puerto Rico.[421] When the courts initially authorized these atrocities, they did so for the unambiguous purpose of whitening the United States and subjugating nonwhites.[422]

The Court's definition of sovereignty accomplishes self-determination only for the powerful.[423] Its objective is to remove the constitutional or other legal limits upon white supremacy. It was given a "race-neutral" name—"plenary

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v. Reno, 114 F. Supp. 2d 283, 288 (S.D.N.Y. 2000) (upholding a regulation that favored Guatemalans and Salvadoran citizens over the citizens of other countries); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1427–29 (11th Cir. 1995) (upholding the discrimination on the basis of nationality for purposes of immigration relief known as "parole").

412. NGAI, *supra* note 11, at 11.

413. Nakeswaran v. I.N.S., 23 F.3d 394 (1st Cir. 1994) (quoting Kleindienst v. Mandel, 408 U.S. 753, 769–70 (citing the Chinese Exclusion Act for the authority to decide that "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.").

414. GILMORE, *supra* note 44, at 118.

415. *See, e.g.*, Sing v. United States, 158 U.S. 538, 547 (1895).

416. *See* Carlson v. Landon, 342 U.S. 524, 534 (1952).

417. *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896); Reno v. Flores, 507 U.S. 292, 306 (1993).

418. *See* Shaughnessy v. United States, 345 U.S. 206, 217 (1953) (Black, J., dissenting) ("Now this Court orders Mezei to leave his home and go back to his island prison to stay indefinitely, maybe for life."); Jennings v. Rodriguez, 138 S. Ct. 830, 874 (2018) (Breyer, J., dissenting) (explaining that the effect of the majority's decision is that "[t]hose whose removal is legally or factually questionable could be imprisoned indefinitely while the matter is being decided."). B*ut see* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001).

419. *See* Korematsu v. United States., 323 U.S. 214, 223 (1944) (relying on the war power of Congress and the Executive branches to conclude that "[t]he power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected."); S*ee also* NGAI, *supra* note 11, at 175.

420. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Kagama, 118 U.S. 375 (1886); WILLIAMS, *supra* note 262, at 71–83.

421. *See* Downes v. Bidwell, 182 U.S. 244 (1901); Efron Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922),* 65 REV. JUR. U.P.R. 225, 246–47 (1996); NGAI, *supra* note 11, at 100; Sarah H. Cleveland, *Powers, Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origin of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

422. *See Wong Wing*, 163 U.S. at 229 (holding that Wong Wing could be deported because he was here in violation of the Chinese Exclusion Acts, which is to say, he could be deported because he was not white); *Korematsu*, 323 U.S. at 234–35 (Murphy, J., dissenting) (" . . . this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity"); *Hitchcock*, 187 U.S. at 567 ("The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection"); *Downes*, 182 U.S. at 287 ("If those possessions are inhabited by alien races . . . the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.").

423. States retain self-determination even without the power to exclude or deport. *See* SAGER, *supra* note 24, at 18.

power" and "sovereignty"—to hide its contradictions.[424] Ordinarily, the law governing the rights of citizens is bound by constitutional principles of equal protection or due process, but with noncitizens, courts can take authoritarianism out of the closet and forget the democratic ideals that are supposed to disallow it.[425] Then, when the noncitizen is gone, the state can put authoritarianism back in the closet and deliberately forget about it. Lawyers, judges, and academics who fail to name and decry these contradictions simply apply doublethink to the process itself.[426] They do so by pretending that race has nothing to do with "sovereignty."

Of course, these contradictory ideas are only contradictory to a system that is genuinely premised upon equality and liberty. The phrase "all men are created equal," written into a Constitution that enshrined enslavement, also looks like doublethink until one realizes that it presupposed the inhumanity of Black humanity. Like this example, "sovereignty" is only a contradiction until we place racist ideas like white supremacy at the center of the critical analysis of citizenship. The belief that white and nonwhite people exist and that the former is superior to the latter explains the ability to hold two *ostensibly* contradictory convictions at the same time: the equality and freedom of whites (or citizens) and the subordination and unfreedom of nonwhites (or noncitizens). Either citizenship is doublethink, or it is the entirely consistent shape of any legal system built upon the mythology of superior and inferior peoples. Another way to say that sovereignty law is doublethink is that it is unintelligible until we understand it as race itself.

III. ABOLISHING CITIZENSHIP

Proponents for the end of other carceral, racist institutions such as prisons and policing have pioneered the meaning of abolition in our time.[427] Activist and philosopher Angela Davis has explained that abolition is only minimally about tearing down oppressive structures and more about building new institutions to replace them and solve the problems the old structure only claimed to address.[428] Mariame Kaba describes police abolition as making policing obsolete by re-directing police funding to health care, housing, education, employment, and alternative institutions that resolve problems and create the safety that police do not.[429] This is what W.E.B. Du Bois called "abolition democracy," or the collective movement to abolish systems of racial and

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424. Kanstroom, *supra* note 66, at 229 (providing one glaring example of the U.S. Supreme Court contradicting itself on the plenary power doctrine within a single opinion).

425. ORWELL, *supra* note 390, at 44–45; RACIAL OPPRESSION AND SOCIAL CONTROL, *supra* note 45, at 52 ("Normally protected rights or customs could be disregarded in the case of the racially oppressed").

426. RACIAL OPPRESSION AND SOCIAL CONTROL, *supra* note 45, at 45.

427. *See* Lloyd, s*upra* note 218, at 91.

428. ANGELA DAVIS, THE MEANING OF FREEDOM: AND OTHER DIFFICULT DIALOGUES 114 (2012); s*ee also* ANGELA DAVIS, ARE PRISONS OBSOLETE? 107 (2003).

429. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://perma.cc/S7VL-PGAV.

economic oppression.[430] As Jenna Loyd has advocated, the lessons of prison and police abolitionists should be applied to citizenship and immigration law to build the conditions for freedom.[431] To abolish citizenship is to build a world without it.

But we must be able to imagine a post-citizenship world before we can build one. Davis has framed the challenge of furthering abolitionist agendas as a problem of imagination because of the mentally herculean task of picturing alternatives to carceral institutions (be they prisons or borders) that are regarded as natural to society and law.[432] Davis explains:

> Slavery, lynching, and segregation . . . like the prison, were once considered to be as everlasting as the sun. Yet in the case of all three examples, we can point to movements that assumed the radical stance of announcing the obsolescence of these institutions.[433]

Toni Morrison made a similar observation of racism generally, which is also true of citizenship:

> [i]t is not gravity or ocean tides. It is the invention of our minor thinkers, our minor leaders, minor scholars, and our major entrepreneurs. It can be uninvented, deconstructed, and its annihilation begins with visualizing its absence. [434]

Having argued citizenship an obsolete invention, below I try to visualize a post-citizenship legal regime to replace it.

Several authors have implied[435] or explicitly proposed political membership based not on citizenship but on residence. Etienne Balibar describes a "nomadic" or "diasporic" membership that would not be tied to territory but would include the right to freedom of movement and the right to residence.[436] Political philosopher Alex Sager[437] and sociologist Antoine Pecoud[438] advocate explicitly for political membership based on "residence" instead of nationality. Jacqueline Stevens suggests replacing citizenship with membership "based on residence in the context of a world with open borders, along the lines of state residence acquired in the federated United States of

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430. *See* Lloyd, s*upra* note 218, at 94.
431. *Id*. at. 104.
432. DAVIS, *supra* note 428, at 10, 19.
433. *Id*. at 24.
434. TONI MORRISON, THE SOURCE OF SELF-REGARD: SELECTED ESSAYS, SPEECHES, AND MEDITATIONS 72 (2019).
435. *See, e.g*., KOCHENOV, *supra* note 15, at 250; GUNDOGDU, *supra* note 379, at 22.
436. ETIENNE BALIBAR, EQUALIBERTY: POLITICAL ESSAYS 273 (2014).
437. SAGER, *supra* note 24, at 15.
438. Antoine Pécoud & Paul de Guchteneire, *Introduction: The Migration Without Borders Scenario*, *in* MIGRATION WITHOUT BORDERS: ESSAYS ON THE FREE MOVEMENT OF PEOPLE 1, 19 (Antoine Pécoud & Paul de Guchteneire eds. 2009).

America."[439] Segar,[440] sociologist Roger Nett,[441] historian Aviva Chomsky,[442] political theorist Javier Hidalgo,[443] and attorney David Bennion[444] have also analogized the way the law should change to the freedom with which one can move and settle between U.S. states. Others, like sociologist Nandita Sharma, call upon us to "disidentify" with being national citizens[445] and instead build a society "in common."[446] Below, I attempt to articulate a legal blueprint that does justice to these bold suggestions for non-national, residence-based membership. My goal is to arm these and other advocates with express policy.

Here, I will provide a legal framework for residence-based membership by offering as a model the "right to travel" under U.S. federal constitutional law, as some have suggested. I argue that there is no practical reason that right—today guaranteed only to U.S. citizens—cannot instead be attached by law to everyone in the world. Doing so would create a political membership based on physical presence, abolishing modern citizenship. To distinguish this membership criteria from the *jus soli,* and *jus sanguinis* of citizenship, or even the *jus nexus* of membership based on so-called "social ties" to a community,[447] I refer to membership based on physical presence only, as *jus locus,* that is, membership by location, rather than blood or soil.

A. *Jus Locus Political Membership*

Far from being new or novel, *jus locus,* or membership by location, is a common model of political membership within and between the political subdivisions of federated nation states,[448] between counties and cities,[449] and within them.[450] It is the equal enjoyment of all the rights of full political membership within a given jurisdiction based solely on one's choosing physical presence within that jurisdiction. Essentially, wherever you go, there you

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439. Jacqueline Stevens, *Habeas Corpus and the New Abolitionism*, *in* OPEN BORDERS, *supra* note 25, at 110, 113.

440. SAGER, *supra* note 24, at 16–17.

441. Nett, *supra* note 2, at 220-21.

442. CHOMSKY, *supra* note 29, at 190.

443. Javier Hidalgo, *Open Borders*, *in* LIVING ETHICS: AN INTRODUCTION WITH READINGS (Russ Shafer-Landau ed., 2d ed. 2018).

444. David Bennion, *What Does Abolition Mean for Immigration Law and Policy?*, FREE MIGRATION PROJECT (Mar. 16, 2021), https://perma.cc/DZ3K-WSGK.

445. SHARMA, *supra* note 5, at 282.

446. Carlos Fernandez, Meredith Gill, Imre Szeman, & Jessica Whyte, *Erasing the Line, or, the Politics of the Border*, 6 EPHEMERA 466, 467 (2006); Anderson, Sharma & Wright, *supra* note 3, at 12.

447. *See* SHACHAR, *supra* note 9, at 16, 112, 133.

448. *See infra* note 452.

449. *See infra* note 464.

450. Eggert v. City of Seattle, 505 P.2d. 801 (Wash. 1973) (holding that Seattle's one-year durational residency requirement for civil service jobs infringes upon applicants' constitutionally protected right to travel); State v. Burnett, 75 N.E.2d 857, 865 (Ohio 2001) ("the right of intrastate travel we contemplate is the right to travel locally through public spaces and roadways of this state . . . Every citizen of this state . . . enjoys the freedom . . . to roam about innocently in the wide-open spaces of our state parks or through the streets and sidewalks of our most populous cities.").

belong. Generally, international law[451] and the constitutions of many nation states[452] recognize this right to travel freely between political subdivisions *within* the nation state. Conversely, restrictions on internal mobility, such as internal passports for members of the same political community, are associated with totalitarian and anti-democratic regimes, like the Soviet Union or Apartheid South Africa.[453]

What we may call "jus locus membership" for U.S. citizens moving between the fifty states is what American federal law calls the "right to travel."[454] The "right to travel" contains within it three separate sets of liberties:[455] "free ingress and egress" into and out of neighboring states (essentially open borders between states),[456] the right to be treated as an equal when passing through another state where one does not reside (*i.e.*, equality between visitors and residents),[457] and the right to establish new residence in a state and enjoy rights equal to established residents (what some might call "the right to remain"), which states enforce through law that is termed "state citizenship."[458] We can think of these sets of liberties as 1) equal passage, 2) equal visitation, and 3) equal residence.

The first of these components of the right to travel is relatively straightforward—equal passage:[459] a U.S. citizen has a right to travel from New York to New Jersey, that is, "to pass and repass through every part of it [the United States] without interruption."[460] This means the government may not even require citizens to carry identification documents to do so[461] and, without

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451. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (Article 13: "Everyone has the right to freedom of movement and residence within the borders of each State"); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (Article 12: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

452. *See, e.g.*, Constitución Política De Los Estatos Unidos Mexicanos, art. 11, Feb. 5, 1917 [hereinafter C.P.] (Art. 11: "Every person has the right to enter and depart the Republic, to travel through its territory and to change his residence without necessitating a letter of safe passage, a passport, safe-conduct or any other similar requirement"); Art. 16 COSTITUZIONE DELLA REPUBBLICA ITALIANA, Dec. 22, 1947 [hereinafter Constitution] (Art. 16: "Every citizen has the right to reside and travel freely in any part of the country . . ."); S. AFR. CONST., art. 21 § 3, 1996 (Art. 21(3): "Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic"); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 14, July 12, 1948 (Art. 14: "All citizens shall enjoy freedom of residence and the right to move at will.").

453. Rachel E. Rosenbloom, *From the Outside Looking in: U.S. Passports in the Borderlands*, *in* CITIZENSHIP IN QUESTION, supra note 16, at 132, 140; GERALD L. HOUSEMAN, THE RIGHT OF MOBILITY 17 (1979).

454. *See* Saenz v. Roe, 526 U.S. 489, 490 (1999); Shapiro v. Thompson, 394 U.S. 618, 630 (1969), *overruled in part on other grounds*; Edelman v. Jordan, 415 U.S. 651 (1974).

455. *See Saenz,* 526 U.S. at 490.

456. United States v. Guest, 383 U.S. 745, 767 (1966); Kent v. Dulles, 357 U.S. 116, 125 (1958).

457. Doe v. Bolton, 410 U.S. 179, 200 (1973); Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

458. *See* The Slaughterhouse Cases, 83 U.S. 36 (1872); *Saenz*, 526 U.S. at 490.

459. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1823) (holding that the constitution protects the "right of a citizen of one state to pass through, or to reside in any other state.").

460. Passenger Cases, 48 U.S. 283, 492 (1849).

461. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (finding that a statute allowing police to "stop-and-identify" people by examining their identification violates, *inter alia*, the constitutional right to free movement under *Kent v. Dulles*).

reasonable suspicion of a crime, may not require them to identify themselves when passing between states.[462] It constitutes a virtually unconditional right to migrate.

Equal visitation means the right of nonresident visitors to generally enjoy the same liberties under the law as residents of the state. For example, the federal courts have said that it means nonresident visitors have an equal right to employment,[463] equal right to medical care,[464] and an equal right to do business in the state they are visiting.[465] In one 1978 case, the U.S. Supreme Court said the law must not treat residents and nonresidents of the state "with unnecessary distinctions."[466] Thus, those visiting a state and those residing there are politically indistinguishable, except for those rights necessarily tied to chosen residence in a given jurisdiction, such as voting.[467]

Finally, there is equal residence. "State citizenship"[468] is a doctrine that essentially protects the right to become a new and equal resident of any state,[469] without condition, and which insists that "the States . . . do not have any right to choose their citizens."[470] While the law uses the term "citizenship" here, its rules of membership differ radically from the word's meaning under any immigration or federal naturalization law. Any U.S. citizen can become a full and equal political member (or "citizen") of a given state, as long as they reside there,[471] that is, are present and intend to remain[472] in the jurisdiction.[473] New residents are entitled to equal rights with all other

462. Hibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 185 (2004).

463. Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

464. Doe v. Bolton, 410 U.S. 179, 200 (1973).

465. Toomer v. Witsell, 334 U.S. 385, 406 (1948) (holding that South Carolina may not impose a tax and other burdens upon non-residents which it does not also impose upon residents, regarding the trawling of shrimp within the state).

466. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 387 (1978).

467. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 6–7 (1944).

468. U.S. CONST. amend. XIV, § 1, cl. 1 ("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*.") (emphasis added); Pierro v. Kugel, 386 Fed. Appx. 308, 309 (3d Cir. 2010); Saenz v. Roe, 526 U.S. 489, 505 (1999).

469. Halaby v. Bd. of Dirs., 123 N.E.2d 3, 6 (Ohio 1954) ("Thus, we speak of a person as a citizen of a particular place, when we mean nothing more by it than that he is a resident of that place."); Coury v. Prot, 85 F.3d 244, 249 (5th Cir. 1996) ("with few exceptions, state citizenship for diversity purposes is regarded as synonymous with domicile").

470. Saenz v. Roe, 526 U.S. 489, 511 (1999).

471. *Id.* at 490 ("The Fourteenth Amendment's Citizenship Clause expressly equates [State] citizenship with residence"). Sometimes *residence* (having one's address within a state) and *domicile* (mere physical presence, even without an address) are treated interchangeably; *cf. Pierro*, 386 Fed. Appx. at 309 (noting that for purposes of diversity jurisdiction, citizenship means domicile, not even residence, and domicile is merely physical presence in a state *and* intent to remain there); Von Dunser v. Aronoff, 915 F.2d 1071, 1072 (6th Cir. 1990) ("State citizenship for the purpose of the diversity requirement is equated with domicile"); s*ee* Vachikinas v. Vachikinas, 112 S.E. 316, 318 (W. Va. 1922) (defining state citizenship for purposes of accessing the courts as "bona fide residence" in the state); CAL. GOV. CODE § 241 (defining citizens of California as those U.S. citizens residing in the state). *But see* Martinez v. Bynum, 461 U.S. 321, 331 (1983) (generally treating "residence" and "domicile" as synonymous with physical, permanent address).

472. *Martinez*, 461 U.S. at 330.

473. *See, e.g.*, *Coury,* 85 F.3d at 244, 248; *Halaby*, 123 N.E.2d at 1; Dupuy v. Wurtz, 53 N.Y. 556–57 (N.Y. 1873); Ball v. Cross, 231 N.Y. 329, 333 (N.Y. 1921).

established residents,[474] ensuring them equal access to state courts[475] and the right to vote in state elections,[476] hold public office,[477] sit on a jury,[478] or enjoy in-state college tuition.[479] All United States citizens are "citizens" of the state in which they reside, in addition to being citizens of the United States.[480] In fact, even non-U.S. citizens were historically considered "citizens" of the state in which they reside,[481] although no state explicitly treats them this way any longer.[482] Under this doctrine, one's locative choice alone entitles them to full political membership.

This *jus locus* right even protects intrastate travel—it attaches to individuals moving between municipalities and cities within the same state. Some, though not all, federal[483] and state[484] courts have said that the right to travel protects this intrastate movement, while some states protect these same

474. *See* Paul v. Virginia, 75 U.S. 168, 170 (1868); *see also* Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 269 (1974); Zobel v. Williams, 457 U.S. 55, 80 (1982).

475. *See Vachikinas*, 112 S.E. at 318–19 (defining state citizenship for purposes of accessing the courts as "bona fide residence" in the state).

476. Snowden v. Hughes, 321 U.S. 1, 7 (1944) ("The right to become a candidate for state office, like the right to vote for the election of state officers . . . is a right or privilege of state citizenship, not of national citizenship . . . ."), although some states do impose brief length-of-stay requirements on voting rights, *see Slaughterhouse Cases*, 83 U.S. 36, 112–113 (1875).

477. See *Snowden*, 321 U.S. at 6. *But see* Chimento v. Stark, 353 F. Supp. 1211, 1218 (1973), *aff'g* 414 U.S. 802 (1973) (upholding 7-year residence to run for governor).

478. *See* People v. Guzman, 76 N.Y.2d 1, 10 (N.Y. 1990) ("[C]itizens of this State [of New York] have a civil right to serve as jurors." (citing People v. Kern, 75 N.Y.2d 638 (N.Y. 1990)).

479. *See* Halaby v. Bd. of Dirs. of Univ. of Cincinnati, 123 N.E.2d 3, 5 (Ohio 1954) (holding that non-U.S. citizen residents of Ohio could be deemed local citizens for purposes of in-state tuition criteria under state law).

480. *See* U.S. CONST. amend. XIV, § 1; Sugarman *v.* Dougall, 413 U.S. 634, 643 (1973) (recognizing "the State's broad power to define its political community"); *Slaughterhouse Cases*, 83 U.S. at 73–74; United States v. Cruikshank, 92 U.S. 542, 549 (1875).

481. *See, e.g.*, *In re* Wehlitz, 16 Wis. 443, 446 (Wis. 1863) ("Under our complex system of government there may be a citizen of a state who is not a citizen of the United States in the full sense of the term."). *But see* Coury v. Prot, 85 F.3d 244, 249 (5th Cir. 1996) ("A person cannot be a citizen of a state unless she is also a citizen of the United States.").

482. See Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 880 (2015).

483. King v. New Rochelle Mun. Hous. Anth., 442 F.2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."); Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002) ("[W]e hold that the Constitution protects a right to travel locally [intrastate] through public spaces and roadways."); Lutz v. City of York, 899 F.2d 255, 261 (3rd Cir 1990) (following the Second Circuit in *King* to recognize a right of intrastate travel). *But see* Wardwell v. Bd. of Educ. of City Sch. Dist. of City of Cincinnati, 529 F.2d 625, 627 (6th Cir. 1976) (rejecting a fundamental right to intrastate as opposed to interstate travel); Wright v. City of Jackson, 506 F.2d 900, 902 (5th Cir. 1975).

484. *See In re* May Barcomb, 315 A.2d 476, 482 (Vt. 1974) ("It may be that that right [to travel] extends to intrastate travel, and it may include a correlative right to live in the place of one's choice." (citing *Shapiro*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969)); Eggert v. City of Seattle, 505 P.2d. 801, 845–47 (Wash. 1973) (holding that Seattle's one year durational residency requirement for civil service jobs infringes upon applicants' constitutionally protected right to intrastate travel); Treacy v. Mun. of Anchorage, 91 P.3d 252, 265 (Alaska 2004) (assuming that the right to intrastate travel, which court had previously recognized, is fundamental); State v. Burnett, 755 N.E.2d 857, 865 (Ohio 2001) ("[T]he right of intrastate travel we contemplate is the right to travel locally through public spaces and roadways of this state . . . the right to travel within a state is no less fundamental than the right to travel between the states.").

freedoms under their state constitutions.[485] Thus, our resident of Albany, New York enjoys the right to ingress and egress into other New York cities and counties, equal visitation there, and the same freedoms and equality when changing their residence from Albany, New York, to New York City.

Together, this bundle of rights stands for the proposition that there is equal personhood across and between state boundaries. The U.S. Supreme Court has said that the purpose of the Constitution's protection of the right to travel is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[486] This is *jus locus* membership: the right to have rights wherever you go, no matter what.[487] Membership through presence alone is membership based on one's personhood alone.

These rights are treated as fundamental[488] and regarded by the courts as worthy of the highest protection under the law.[489] "We will construe narrowly," the Supreme Court said in 1958, "all delegated powers that curtail or dilute [the right to travel],"[490] and in 1969 referred to it as "a virtually unconditional personal right."[491] The Supreme Court has found the three component liberties of the right to travel are protected under half a dozen sections of the U.S. Constitution.[492] The court regards the *jus locus* "right to travel" so highly in part because it recognizes it as a threshold right without which other

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485. *See* Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1100 (Cal. 1995) ("The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution."); Com v. Weston W., 913 N.E.2d 832, 840 (Mass. 2009) ("We do, however, reach the following conclusion: the Massachusetts Declaration of Rights guarantees a fundamental right to move freely within the Commonwealth."); Watt v. Watt, 971 P.2d 608, 615 (Wyo. 1999) (implying that Wyoming's State Constitution (art. 1, § 36) protects the right of intrastate travel in Wyoming), *overruled on other grounds in* Arnott v. Arnott, 293 P.3d 440, 458 (Wyo. 2012).

486. Paul v. Virginia, 75 U.S. 168, 180 (1868).

487. There was a time, however, when a Texan could be expelled from California for taking work perceived as reserved for other Californians. *See* Francis J. Conte, *Sink or Swim Together: Citizenship, Sovereignty, and Free Movement in the European Union and the United States*, 31 UNIV. MIAMI L. REV. 331, 365–75 (2007). *But see* Edwards v California, 314 U.S. 160, 174 (1941) (ruling a California statute making it illegal to knowingly transport a non-resident into the state unconstitutional and protecting equal visitation).

488. Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (referring to the "fundamental right of interstate movement," and treating with strict scrutiny a law that violates that right); United States v. Guest, 383 U.S. 745, 757 (1966) ("The Constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union.").

489. The government must demonstrate that a law that violates the right to travel is necessary to protect a compelling government interest, known as "strict scrutiny." *See Shapiro,* 394 U.S. at 638; s*ee also* United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973).

490. Kent v. Dulles, 357 U.S. 116, 129 (1958).

491. *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring); s*ee also* Califano v. Aznavorian, 439 U.S. 170, 176 (1978) ("[T]he constitutional right of interstate travel is virtually unqualified.").

492. *See*, *e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (finding some of these rights protected under the Article IV Privileges and Immunities Clause); *Edwards*, 314 U.S. at 176 (finding some of these rights protected under the Commerce Clause); *Guest* at 758–59 (same); *Kent*, 357 U.S. at 128–29 (finding some of these rights protected under the Fifth Amendment Due Process Clause); Williams v. Fears, 179 U.S. 270, 275 (1900) (finding some of these rights protected under the Fourteenth Amendment's Equal Protections Clause); *Edwards*, 314 U.S. at 178 (finding some of these rights protected under the ForteenthAmendment's Privileges and Immunities Clause). *But see Shapiro*, 394 U.S. at 630–31 (finding that the right is protected by no particular provision but is merely "fundamental to the concept of our Federal Union").

rights cannot be realized.[493] Free movement is bound up with the freedom to associate, to petition one's government for redress of grievances, to equal opportunity, and the right to privacy inherent in anonymous travel.[494] The conservative justice Sandra Day O'Connor once wrote, "it is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new state."[495] It is even one of only two rights in the Constitution that are enforceable against private individuals and not just against the state, the other being the prohibition against slavery.[496] While the first two components of the right to travel have some minor exceptions[497] (in-state tuition, for example[498]), there is no exception to the third component, equal treatment for new residents.[499] In other words, the importance of *jus locus* membership to democratic society cannot be overstated.

Many illegalized people are demanding the same rights and liberties to move across the world, which the law today affords U.S. citizens moving across the fifty states. The "right to remain, the freedom to move, and the right to return" is how the *No One Is Illegal* group, a movement with chapters across Europe and Canada, puts it.[500] *No Borders Morocco* demands "freedom of movement for everybody . . ."[501] In addition to *Sans Papiers*' demand for "papers" in France in the 1990s,[502] other groups of illegalized people organizing alongside them produced leaflets and literature declaring "freedom of movement is a principle on which there can be no compromise," and demanding "the ability to travel and to settle, wherever we wish to, without hinderance."[503] That region's more recent "Black Vests" movement proclaims "We are the freedom to move. To settle down to act. We will take it as

493. *See Kent*, 357 U.S. at 126, 129 ("Freedom of movement . . . was part of our heritage" and "may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears or reads" and "necessary to the wellbeing of an American citizen."); *Shapiro*, 394 U.S. at 630–31 (finding that the right is "fundamental to the concept of our Federal Union"); *Edwards*, 314 U.S. at 183 (Jackson, J., concurring) ("[I]f national citizenship means less than [the right to move interstate] it means nothing."); s*ee also* Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 639, 647 (2014).

494. *See* Sobel, *supra* note 493, at 647–53; HOUSEMAN, *supra* note 453, at 7.

495. Zobel v. Williams, 457 U.S. 55, 76–77 (1982) (O'Connor, J., concurring).

496. *Shapiro*, 394 U.S. at 643.

497. For example, under the so-called "single mode doctrine," whereby the state may restrict a single mode of transportation, such as flight, but no more, between states. *See* Town of Southold v. Town of East Hampton, 477 F.3d 38, 54 (2d Cir. 2007); Gilmore v. Gonzales, 435 F.3d 1125, 1137 (9th Cir. 2006); Duncan v. Cone, 2000 U.S. App. LEXIS 33221, at *5 (6th Cir. Dec. 7, 2000); *see also* Bagley v. Harvey, 718 F.2d 921, at 924 (9th Cir. 1983) ("[A]n individual's constitutional right to travel . . . [is] legally extinguished by a valid conviction followed by imprisonment, [and] is not revived by the change in status from prisoner to parolee.").

498. *See* Vlandis v. Kline, 412 U.S. 441, 452–53, n.9 (1973).

499. Saenz v. Roe, 526 U.S. 489, 502 (". . . [O]ur cases have not identified any acceptable reason for qualifying the protection afforded by the Clause 'the citizen of the State A who ventures into state B' to settle there and establish a home.'"); although some states do impose brief length-of-stay requirements on voting rights. *See infra* at note 530.

500. UNDOING BORDER IMPERIALISM, *supra* note 3, at 13; s*ee also* HAYTER, *supra* note 2, at 173–83.

501. No Borders Morocco, Violence, Resistance, and Bozas at the Spanish-Moroccan Border, in OPEN BORDERS, *supra* note 25, at 228.

502. HAYTER, *supra* note 2, at 177.

503. *Id*. at 146.

our right."[504] The U.S.-based organization *Mijente* demands "Freedom of Movement, No Exceptions,"[505] and *Frontieres Ouvertes* (Open Frontiers) in Belgium demand equal rights to work and live freely.[506] *Organized Communities Against Deportations* in Chicago,[507] the "Not1More" social media campaign,[508] and the *Oranienplatz* campaign in Germany[509] call for an end to all deportation and thus implicitly for abolishing control over movement.[510] None of these demands seek a freedom any different than the right to travel for U.S. citizens that has been established law for nearly two centuries.

It is not a coincidence that the rights afforded to U.S. citizens moving between the fifty states are the same rights that noncitizens are demanding in their movement between nation states. Both are guided by the principle that the law should treat its subjects with equal personhood. In the case of the U.S. "right to travel," the subjects of the law are U.S. citizens, and in the case of noncitizens demanding the same rights between nation states, those subjects include everyone. The latter merely applies the former's rule to a larger group—but both are speaking about the same liberty. In one of the earliest 'right to travel' cases, the so-called *Passenger Cases* of 1849, the U.S. Supreme Court partly justified the right in this way: ". . . we are one people . . . We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states."[511] The position of illegalized noncitizens demanding the same freedom globally could hardly be better expressed than to replace "citizens of the United States" with "human beings" and "community" with "world" in the Court's statement above.

Both illegalized noncitizens and the "right to travel" also reject caste. American law seems to recognize about the U.S. citizen's "right to travel" precisely what it refuses to recognize about the noncitizen's legal inferiority: without *jus locus*, there is only caste. One of the earliest precedents for the right to travel, the 1872 *Slaughterhouse Cases*, held that:

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504. BORDER & RULE, *supra* note 3, at 124.

505. See Lush, a company supporting *Mijente*. *See Freedom of Movement. No Exceptions.*, LUSH, https://perma.cc/HL99-E268 (last visited May 10, 2021); *Organizing with Mijente*, LUSH, https://perma.cc/P3MP-YWKF (last visited May 10, 2021).

506. HAYTER, *supra* note 2, at 147.

507. ORGANIZED COMMUNITIES AGAINST DEPORTATION, https://perma.cc/5M8K-LBF3 (last visited May 10, 2021) ("We envision a future without displacement and borders, without incarceration, and without deportations.").

508. Tina Vasquez, *Abolish ICE: Beyond a Slogan*, REWIRE NEWS GRP. (Oct. 10, 2018), https://perma.cc/USE9-RTAF.

509. BORDER & RULE, *supra* note 3, at 122.

510. *See also*, *Free to Move, Free to Stay*, UNITED WE DREAM (May 10, 2021), https://perma.cc/P9RK-J5QS; MIGRANT JUSTICE PLATFORM (May 10, 2021), https://perma.cc/JT36-86VS. For advocates of abolishing noncitizen internment, *see Why Abolition?*, FREEDOM FOR IMMIGRANTS, https://perma.cc/C4HD-YN4E (last visited May 15, 2021) (demanding the abolition of noncitizen internment); DAS, *supra* note 29, at 204.

511. *The Passenger Cases*, 48 U.S. 283, 492 (1849).

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons . . . A citizen of the United States has a perfect constitutional right to . . . an equality of rights with every other citizen . . . He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.[512]

The principle remains settled law for citizens. In 1969, the Court struck down a Washington D.C. law that created a one year waiting period for new residents to access public assistance in the District because its effect was "to create two classes of needy resident."[513] In a 1982 decision, the Supreme Court struck down a similar law in Alaska, because the statute in that case "create[d] fixed, permanent distinctions between an ever-increasing number of classes."[514] The law abhors two sets of laws for people when it recognizes their equal personhood. It is, as Arendt explained, the principle that "the right of every individual to belong to humanity, should be guaranteed by humanity itself."[515]

The shared liberties between "the right to travel" and noncitizen demands for the same freedom reveal the rights that citizenship abolition must guarantee. Indeed, noncitizen demands alone reveal them. Professor Gondogdu locates the authority for these rights in the "founding" efforts of those crossing and challenging borders.[516] Some are demanding these rights explicitly, such as groups like *No One is Illegal* or *Sans Papier*,[517] or the young noncitizens whose civil disobedience forced DACA into U.S. law.[518] Others do so tacitly through their actions,[519] be they as bold as hunger strikes[520] and self-mutilation,[521] or as conventional as the quiet defiance of living and working in the United States without permission. Law Professor Tendayi Achiume describes the latter as "a high form of political agency"[522] that wordlessly asserts these rights,[523] or the "radical political action of Third World persons

512. *The Slaughterhouse Cases*, 83 U.S. 36, 112–13.
513. Shapiro v. Thompson, 394 U.S. 618, 627 (1969).
514. Zobel v. Williams, 457 U.S. 55, 55 (1982).
515. ARENDT, *supra* note 396, at 298.
516. AYTEN GÜNDOĞDU, RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLE OF MIGRANTS (2015) at 165-66.
517. *See also* UNDOING BORDER IMPERIALISM, *supra* note 3, at xii.
518. *See* Mark Engler, *When Undocumented Activists Infiltrated ICE*, NATION (May 1, 2020), https://perma.cc/YL9T-NL5K.
519. *See* Heller, Pezzani & Stierl, s*upra* note 188, at 61.
520. John Washington, *The Epidemic of Hunger Strikes in Immigration Detention Centers*, NATION (Feb. 13, 2020), https://perma.cc/2ZHU-KE8W.
521. Kyli Hedrick, Gregory Armstrong, & Rohan Borschmann, *Self-Harm Among Asylum Seekers in Australian Immigration Detention*, 4 LANCET 12 (2019); Pedro Oliver Olmo, *The Corporal Repertoire of Prison Protest in Spain and Latin America*, 9 OPEN J. SOCIOPOLITICAL STUD. 667, 683 (2016).
522. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1567 (2019).
523. SAGER, *supra* note 24, at 94; Basil Davidson, *On Revolutionary Nationalism: The Legacy of Cabral*, 11 LATIN AM. PERSP. 15, 21–25 (1984).

seeking to formalize their status as co-sovereigns of the First World."[524] In migrating, noncitizens demand equal passage,[525] equal visitation,[526] and equal residence,[527] for equal people. They also do so by living as though they have these rights, and in the process face the violent, lethal consequences of the laws that deny them the same. To live thusly amounts to a perpetual act of civil disobediance. It is on the authority of their courage and vision that these rights must be protected and enshrined in new rules of political membership. Assumed membership wherever you are and wherever you go, no matter who you are, is the right to have rights—the real birthright of every human being—realized.

B. *Replacing Citizenship*

Some authors have proposed some forms of political membership or basis for rights that replaces the current *jus soli*/*jus sanguinis* model.[528] Unfortunately, many of these frameworks retain some form of stratification indicative of citizenship caste.[529] The few who do argue for the end of citizenship altogether do so without a legal blueprint for the same.[530] This section attempts to fortify and amplify those arguments with just such a blueprint.

1. *Implementing Jus Locus Law*

While federal law protects the right to travel, it is also at the state level that *jus locus* membership is observed and protected. To comply with this doctrine, state law, or else the absence of laws, protects the right to travel.[531] For example, in New York, the state courts enforce equal visitation between

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524. Achiume, *supra* note 522, at 1567.

525. *See*, *e.g.*, Natasha King, *Radical Migrant Solidarity in Calais*, *in* OPEN BORDERS, *supra* note 25, at 213, 215; No Borders Morocco, s*upra* note 501, at 228; KARLA CORNEJO VILLAVICENCIO, THE UNDOCUMENTED AMERICANS 138 (2020).

526. *See*, *e.g.*, Thomas Nail, *Sanctuary, Solidarity, Status!, in* OPEN BORDERS, *supra* note 25, at 23, 31; Orla Berry, *We Cannot Continue to Live Like This: Migrants Desperate to Work Occupy Brussels Church*, WORLD (Mar. 1, 2021), https://perma.cc/3AM7-HSSH.

527. *See*, *e.g.*, Nail, s*upra* note 526, at 31.

528. *See*, *e.g.*, Richard Falk, *The Making of Global Citizenship*, *in* GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER 39–50 (J. Brecher ed., 1993); William Rogers Brubaker, *Immigration, Citizenship and the Nation State in France and Germany*, *in* THE CITIZENSHIP DEBATES: A READER 131–33 (Gershon Shafir ed., 1998); Andrew Linklater, *Cosmopolitan Citizenship*, 2 CITIZENSHIP STUD. 23 (1998); NIGEL DOWER, AN INTRODUCTION TO GLOBAL CITIZENSHIP (2003); SOYSAL, *supra* note 7, at 141.

529. *See* SHARMA, *supra* note 5, at 87.

530. *See id.*; Stevens, *supra* note 439, at 123; KOCHENOV, *supra* note 15, at 250; Balibar, *supra* note 40, at 37; Thomas Pogge, *Cosmopolitanism and Sovereignty,*103 ETHICS 48, 49 (1992); Chemillier-Gendreau, *supra* note 38, at 94–106.

531. *See, e.g.*, Lemmon v. People, 20 N.Y. 562, 563 (App. Div. 1860) ("The [privileges and immunities clause] . . . secures to a citizen of Virginia, irrespective of his presence or absence, the same rights, and no others, pertaining to a citizen of this State in that quality . . . . Its effect is simply to relieve him from any disabilities of alienage which would otherwise attach, and to prevent any legislation discriminating against him to the advantage of natural citizens . . ."); Atkin v. Onondaga Cty. Bd. of Elections, 30 N.Y.2d 401, 334 (N.Y. 1972) (holding that a 90-day residency requirement violated the Equal Protection Clause of the Fourteenth Amendment); S. Karthick Ramakrishnan and Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 1, 11 (2015).

residents and nonresidents in their right to access employment,[532] while voting eligibility is based only on residence in the state.[533] In fact, the New York state legislature once considered applying its *jus locus* political membership to all its residents, regardless of whether they were even citizens of the United States. In 2015, the state legislature debated the New York is Home Act, which would have afforded noncitizen residents the right to vote in state elections, among other freedoms.[534] Some authors have argued that the extension of equal rights to illegalized non-U.S. citizens in California—in everything from in-state college tuition to driver's licenses—has created a set of *de facto* equal residence rights in that state.[535] These are just examples of how *jus locus* membership can and does operate under the laws of a given state.

Any nation state can choose to impose *jus locus* membership rules upon itself, just as New York state almost did with the New York is Home Act. In fact, there was a six month period in 2008 when the country of Ecuador operated under a partial *jus locus* law (i.e., equal passage), in that anyone enjoyed ingress and egress, without visas or conditions, in and out of the country.[536] And of course, the European Union member states once enjoyed some equal passage and visitation rights between them.[537] Indeed, even the United States applies *jus locus* eligibility (i.e., equal residence) for a few discrete rights, such as access to public primary and secondary education,[538] and emergency medical care.[539] But nothing stops Ecuador, the EU, or other states from taking further steps and entitling every person to equal visitation and equal residence. A universally *jus locus* membership state would be an "unbound demos," as Abizadeh puts it, or "states without nations," as Stevens describes them. [540] Such a state would abolish citizenship, and yet, its laws would be no more novel than those which millions of Americans take for granted every time they move between the fifty U.S. states.

A concrete example provides further illustration. Consider a person born in Dakar, Senegal (we will call her "A") who moves to a post-citizenship-

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532. *See* Salla v. County of Monroe, 48 N.Y.2d 514, 525 (1979) (holding unconstitutional a statute that gave "preference in employment" to citizens of the state of New York in public works project because "It does not outweigh the constitutional concern for the right of a citizen of one State to pursue his vocation in another").

533. *See* N.Y. Const. art. II, § 1 (Enfranchising all state residents over eighteen who "shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election"); *but see* Cal. Elec. Code § 321(a) (2019) (California residents need only show residence "on or before the day of an election.").

534. S. Bill S7879, 2014 Leg., 200th Sess. (N.Y. 2014).

535. Ramakrishnan & Colbern, *supra* note 531, at 10–13.

536. *See* Luisa Feline Freier, *Open Doors (for almost all): Visa Policies and Ethnic Selectivity in Ecuador* 7 (Ctr. for Compar. Immigr. Stud., Working Paper No. 188, 2013), https://perma.cc/QP5E-GPW9.

537. *See* Sean M. Topping, *Defying Schengen Through Internal Border Controls: Acts of National Risk-Taking or Violations of International Law at the Heart of Europe?* 48 GEO. J. INT'L L. 331, 334–38 (2016).

538. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982).

539. 42 U.S.C. § 1396b(v)(2)(A).

540. STEVENS, *supra* note 37, at 77.

U.S. New York City. First, no visa or passport burdens A's free movement when she arrives in JFK Airport—just as no border officer greets a born-and-raised Philadelphian (we will call him "B") when he crosses from Pennsylvania into New York state today. A arrives in New York City with the same right to work and remain there as B enjoys if he makes the same journey from Philadelphia. A could find work in Manhattan or register to vote there, just as B can today. We might envision a voting law requiring A and B to demonstrate residence in New York[541] (such as by proof of address or by signing an affidavit to that effect[542]), but whatever the rule, it would apply equally to A and B. There is no right which B enjoys which A does not also enjoy. There would no longer be two sets of laws or rights, only one. A enjoys membership in the American polity for the same reason B does—living there. "Moving from Sri Lanka to Canada would be akin to moving from Washington to Oregon," Segar similarly explains.[543]

The change in the written law to create such *jus locus* membership would constitute an extraordinary simplification over current rules. The Immigration and Nationality Act ("INA") would be struck in its entirety, from the first letter to the last, all sections of it,[544] as would of course all of the relevant regulations that interpret these statutes.[545] Every arm of the U.S. Departments of Homeland Security, Justice and Labor that police migration and "status" would be dissolved. No more passports, visas, or immigration courts—no more "papers." Birthplace loses all legal relevance. Words like "immigrant" and "citizen" become anachronisms—like "serf" and "lord."

In the INA's place, here are a few examples of the way in which a new *jus locus* federal statute might read: "Every person has the right to travel to and within the United States." On its face, the phrase "right to travel" in the above would incorporate the case law that protects the same three-pronged right for U.S. citizens today, effectively attaching that right to every person in the world. Alternatively, a longer version might read: Every person residing in the United States shall not be deprived of equal rights and full privileges thereof for as long as they reside there, including the right to so reside.[546] This wording centers a *jus locus* membership around residence, but also entitles every person to enter and choose that residence without condition.

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541. *Guide to New York State Voter Registration*, N.Y.C. CAMPAIGN FINANCE BD., https://perma.cc/5LG9-R5DS (noting that "proof of address" can be demonstrated by showing a document with your name and address, such as "an electric or gas bill.").

542. *See* N.Y. Const. art. II, § 1 (enfranchising all state residents over eighteen who "shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election"); California used to require residence for fifteen days (*See*, *e.g.*, Chula Vista Citizens for Jobs and Fair Competition v. Norris, 782 F.3d 520, 527 (9th Cir. 2015)), but a January 1, 2019 amendment required voters to show residence only "on or before the day of an election." Cal. Elec. Code § 321(a) (2019).

543. SAGER, *supra* note 24, at 18.

544. *See* Immigration and Nationality Act of 1952 § 101-507, 8 U.S.C. § 1101-1537 (1952).

545. *See*, *e.g.,* 8 C.F.R. §§ 1.1-3.0, 204.1-204.314, 205, 207-217.

546. This is more comprehensive than the Constitutional Amendment once proposed by the Wall Street Journal. *See In Praise of Huddled Masses*, WALL ST. J. (Jul. 3, 1984) ("There shall be open borders.").

Alternatively, if one wishes to keep the word 'citizenship' while radically changing its meaning, as "state citizenship" does today under today's law, the provision could read: Every person residing in the United States is a citizen of the United States for as long as they shall reside there, and Congress shall make no law abridging their right to so reside there. Of course, one can replace "United States" in that sentence with any other country in the world to apply *jus locus* in other jurisdictions.

Practically, some of these changes, if sought under U.S. federal law, may require amendment of the U.S. Constitution, while some would not. Arguably, the first two examples of the sample language above, which abolish the concept of citizenship from the law, would be incompatible with those constitutional provisions which condition eligibility in the House of Representatives and Senate upon citizenship,[547] as well as the requirement that the President be born in the United States.[548] Of course, it is entirely possible to write the laws as they are above whilst maintaining the Presidential birthright provision as the sole legal exception. For example, something like this:

> Every person residing in the United States shall not be deprived of equal rights and full privileges thereof for as long as they reside there, including the right to so reside, except that candidates for the office of President of the United States must show birth within the territory of the United States as a necessary condition for eligibility for that office.

The arguments in this Article would classify this kind of exception as inherently undemocratic and racist, but it is nonetheless conceivable.

The third sample language requires the least constitutional tinkering. It is arguably entirely constitutional with respect to the congressional citizenship restrictions because it could still be carried out without contradicting those restrictions. The Constitution does not define citizenship, so the legislature is free to radically redefine it. Conversely, no form of citizenship abolition can be squared with the provision limiting presidential eligibility to birthplace, making this provision a sticking point requiring abolition or exception.

With respect to abolishing citizenship generally, there is nothing unconstitutional about doing so under the provision assigning to Congress the power to make rules of naturalization. That is because Congress, having the naturalization power,[549] likewise has the power to abolish naturalization, just as it

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547. *See* U.S. Const. art. 1, § 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . .); U.S. Const. art. 1, § 3 ("No Person shall be a Senator who shall not have . . . been Nine years a citizen of the United States . . . ").

548. U.S. Const. art. 2, § 1 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.").

549. U.S. Const. art. 1, § 8, cl. 4 (granting Congress the power to establish a "uniform Rule of Naturalization").

may use the Tax Power to abolish federal taxes,[550] or the power to create lower courts to abolish those, too.[551] Ultimately, however, like many radical changes to the law, the barriers are not legal, but political.

2. *Jus Locus Is Anti-Racist*

Angela Davis famously instructed that "in a racist society, it is not enough to be non-racist, we must be anti-racist."[552] Professor of African American studies Ibram Kendi[553] argues that institutions are either actively racist, or actively anti-racist, but one that does not actively challenge racist ideas—one that is "race neutral" or "color blind"[554]—is inevitably racist in its principles and effect.[555] One scholar defines anti-racism as any practice that "alleviates subordination."[556] That is, the law must be changed so that it is actively involved in the redistribution of power and changes the real conditions of people's lives.[557] The defining question is whether it creates equity or inequity.[558] For the following reasons, *jus locus* membership redistributes power and alleviates subordination between today's citizen and today's noncitizen, and is thus anti-racist.

Jus locus political membership is anti-racist because it does not taxonomize and segregate people into invented categories. It does not condition rights and liberties on ancestry or place of birth. It does not make any assumption about the character of an individual based on their identification with a nationality or race. It does not identify any character trait with any invented categories of people. *Jus locus* reinforces the notion that each person is representative only of themselves.[559] This is probably why "the right to travel" in the United States has been used historically to protect the equal humanity of oppressed groups excluded from federal citizenship laws, such as formerly enslaved people in the nineteenth century,[560] or illegalized people today.[561] *Jus locus* membership recognizes people as people only.

Jus locus does not contribute to the construction and reification of race. Recognizing no categories of people, *jus locus* law cannot be used to reinforce race or whiteness. It cannot be used to further economic inequality between former citizens and former noncitizens. It cannot be used to

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550. *See* McCulloch v. Maryland, 17 U.S. 316, 394 (1819) ("[F]or a power to impose a tax *ad libitum* . . . is a power to repeal the law.").

551. Michael M. Baylson, Elizabeth Coyne, Martha Guarnieri, & Samantha Weiss, *Judicial Independence Under Attack: A Theory of Necessity*, 168 U. PA. L. REV. ONLINE 1, 14, n. 53 (2019).

552. See Rose Whitehorn, *Review: A Triad of Dominion That Must Be Fought Simultaneously*, 86 SOCIALIST LAWYER 52, 52 (2020).

553. KENDI, *supra* note 46, at 20, 201–02.

554. Gotanda, *supra* note 144, at 272; *see* KENDI, *supra* note 45, at 201–02.

555. KENDI, *supra* note 45, at 20.

556. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 779 (1994).

557. *See* Crenshaw, *supra* note 142, at 1341 (Crenshaw calls this the "expansive view" of antidiscrimination law).

558. *See* KENDI, *supra* note 45, at 19.

559. *See* KENDI, *supra* note 45, at 95, 104–05.

560. Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865, 891–94 (2018).

561. Markowitz, *supra* note 275, at 904–11.

criminalize or deport or incarcerate, or indeed to license any violence at all. It does not police. It does not contribute to mass incarceration. Neither will it, therefore, contribute to racist violence against citizens of color. Because *jus locus* law cannot be used to widen or maintain the gap in life conditions between white and nonwhite people, it therefore cannot be used to dump "evidence" into reality for the inferior status of nonwhite people or the superior status of white people. It is not a source of racist lies or a vehicle for their distribution; it discredits these lies instead. It contributes to the deconstruction of race.

Further, it does not contribute to the maintenance of a nonwhite exploitable labor force or deepen nonwhite poverty. Drawing no line between workers, it produces no vulnerability for capital to exploit. It ends the global apartheid enforced by deportation and borders. It facilitates integration instead. It reduces economic inequality by reuniting the poor with economic opportunity abroad, increases remittances and narrowing global wealth gaps.[562] Thus, *jus locus* membership is not a source of colonialism or the perpetuation of colonial relationships. Conversely, it reduces the political and economic power disparity that wealthy states hold over poorer ones.[563] That is why Professor Achiume describes free migration as decolonization.[564] *Jus locus* membership does not manufacture disadvantaged conditions indicative of racial oppression; it dismantles them.

"A world without nations and the borders," Nandita Sharma reminds us, "is essential to realizing a world without racism(s)."[565] Ending citizenship will not end racism, but fighting racism will surely require citizenship's demise.

3. *Jus Locus Is Democratic*

Jus locus abolishes the citizen/noncitizen caste system. It articulates one set of rights only, not two. It does not preserve power and privilege for some at the cost of others' subjugation. It enforces political equality and bans political inequality. It is not a source of male-supremacist violence. It is feminist in that it manufactures no disadvantage against women of color—cis, queer, or otherwise. It has as its aim no ethnic purity project, so it does not incentivize control over women's reproduction. It affords no difference in entitlement to healthcare, public assistance, or child education. It cannot be used to reaffirm patriarchy. It is also pro-worker, in that it does not undermine class solidarity.[566] *Jus locus* represents one less wedge capital can use to undermine the collective strength of a united labor force.

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562. *See* Heller, Pezzani & Stierl, *supra* note 188, at 58 (". . . allowing migrants from the Global South to come live and work in the Global North would operate as a means of redistribution, both through the increased income of these individual migrants and through the sending of remittances . . .").

563. Achiume, *supra* note 522, at 1552, 1573.

564. *See id*. at 1509.

565. SHARMA, *supra* note 5, at 279.

566. Fernandez, Gill, Szeman, & Whyte, *supra* note 446, at 467.

Jus locus establishes an open membership democracy. It is entirely consistent with principles of representative government in that everyone subject to the state's coercive power has an equal vote and equal representation by that state. *Jus locus* restricts no one's personal autonomy because "[a]bolition does not tell people how to live their lives," as activist and writer Patrisse Cullors reminds us.[567] *Jus locus* does not maim or kill, because the right to free ingress and egress obviates the need to travel along dangerous routes to reach other nation states.[568] *Jus locus* rejects the doublethink that made sovereignty a shield for power by ensuring a meaningful self-determination that does not undermine equality or liberty. *Jus locus* is what democracy looks like.

Questions may naturally arise about the timetable of citizenship abolition. That is, am I advocating for abolition overnight or gradually over time? An argument for gradual change might be rooted in anxiety over what will happen if people move to the United States suddenly or in large numbers. I will not address these concerns because my arguments reject the premise that freedom in sudden or large numbers is a problem that needs solving.[569] Fears of sudden or mass migrations, expressed as they often are as anxieties around job scarcity,[570] rising crime,[571] or public assistance demand,[572] are really just proxy arguments against losing privilege. Confronting these anxieties with facts about how "immigration" improves the economy[573] or reduces crime[574] does not speak to the purpose of citizenship: preserving power for the privileged. Showing someone how migration makes them wealthier or healthier is no match for telling them the ways it will cost them privilege.[575] Some will always choose power over equality. This piece was not written for the reader that does not value anti-racist democracy.

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567. Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1692 (2019).

568. JONES, *supra* note 382, at *Preface*.

569. There is nothing anti-racist or democratic about asking those suffering injustice to wait for a just society. *See* Martin Luther King, Jr., *Letter From a Birmingham Jail* (Apr. 16, 1963), https://perma.cc/7VLJ-NMV4 (". . . the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice . . . who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season.").

570. *See, e.g.*, George Borjas, *The Economics of Immigration*, 32 J. ECON. LITERATURE 1667, 1713–14 (1994); CHOMSKY, *supra* note 98, at 3–10.

571. *See*, *e.g.*, Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men*, AM. IMM. COUNCIL, IMM. POL'Y CTR. 3 (2007), https://perma.cc/HKL9-V58S\.

572. *See*, *e.g.*, Borjas, *supra* note 570, at 1713–14; CHOMSKY, *supra* note 98, at 39–45.

573. *See*, *e.g.*, *How Immigrants Contribute to Developing Countries' Economies*, OECD DEV. CTR. (2018), https://perma.cc/YRZ3-BN5X.

574. *See*, *e.g.*, Rumbaut & Ewing, *supra* note 571, at 14.

575. *See*, *e.g.*, ROEDIGER, *supra* note 221, at 13 ("Race feeling and the benefits conferred by whiteness made white Southern workers . . . accept stunted lives for themselves and for those more oppressed than themselves."); JONATHAN M. METZL, DYING OF WHITENESS (2019) (documenting how some white people in the U.S. choose their own death or poverty, by refusing health or gun safety policies that would protect themselves and people of color collectively, rather than sacrifice the privileged political and economic position ensured to them by whiteness).

C. *Post-Citizenship Reparations*

Further, replacing citizenship with *jus locus* law is not by itself justice without a robust reparations program. Without reparations, the subjugation of the past will continue to shape the future, just as the subjugation of U.S. citizens of color keeps oppression alive today despite anti-discrimination and equal protection law.[576]

An abolitionist project requires restitution and healing for the crimes committed by the system being abolished.[577] Reparations programs, defined broadly as anything from money to apologies aimed at compensating people for land, labor, life, or liberty taken from them[578] or providing acknowledgement, closure, or atonement thereafter,[579] have a long history. Some reparations efforts, like those compensating survivors of Japanese American internment,[580] or Jews killed in the Holocaust,[581] have met with more success.[582] Others, like the movement to compensate Black Americans for centuries of stolen labor, mass murder, and economic terrorism, have met with less.[583] Outside the United States, successful reparations campaigns were waged in Chile, South Africa, East Timor, and Korea.[584] Outside of an apology issued by Congress in 2012 for the Chinese Exclusion Act and related legislation,[585] no compensation or restoration has ever been made to survivors of citizenship and immigration law.

Freedom for former noncitizens will demand more than new law; it will require making resources available to survivors of noncitizenship to overcome the legacy of economic and political disadvantage which exclusion and deportation have burdened them with;[586] it will require equity.[587] While some have advocated for free migration or equal status with citizens as a form of

576. Gotanda, *supra* note 144, at 272.

577. Cullors, *supra* note 567, at 1686–87 (2019); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L.L. REV. 323, 362 (1987) (suggesting reparations as a viable normative framework for social justice).

578. BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 131 (1972); CHARLES OGLETREE & RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 107–08 (2000).

579. *See* Cullors, *supra* note 567, at 1686–87; KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION 140 (2019); Christopher C. Jones, *Redemption Song: An Analysis of the Reparations Movement*, 33 U. MEM. L. REV. 449, 456–57 (2003); DARITY JR. & MULLENS, *supra* note 66, at 2–3.

580. Jones, *supra* note 579, at 456.

581. *Id*. at 449, 458.

582. *See also* Eric C. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holdeo, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 10–15 (2007).

583. *See* Jones, *supra* note 579, at 454–56; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC MONTHLY, June 2014, at 5–10; DARITY JR. & MULLEN, *supra* note 66, at 95–103, 239–55.

584. *See* Yamamoto, *supra* note 582, at 78–81.

585. COLBERN & RAMAKRISHNAN, *supra* note 74, at 53 (House resolution 683, passed on June 18, 2012).

586. *See* ETIENNE BALIBAR, WE THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 176 (2004).

587. FRANKE, *supra* note 579, at 136.

reparations for the violence of borders,[588] merely "stopping an unjust practice is not compensation for the unjust practice."[589] Proper reparations should be decided or steered by a commission or other organized body of affected people and survivors of citizenship. Below I offer only suggestions to that future body.

First, there must be compensation. Every person who has had the citizen/noncitizen caste system enforced against them has had something stolen from them. Philosopher Michael Huemer has argued, for example, that when citizenship law denies employment to noncitizens, it is the citizen who steals the noncitizen's job, rather than the other way around.[590] Like the right to work, those denied access to economic opportunity of all kinds in wealthier parts of the world have likewise had brighter futures for them and their children stolen from them. Indeed, a property interest in one's potential employment is something recognized by U.S. law.[591] It follows that those prohibited from work or from public welfare programs had money taken out of their pockets and deserve compensation. Those caged and deported had their liberty taken from them and deserve compensation for these harms as well. These are debts which must be paid.

Some moral arguments for reparations have drawn analogies with the principles underlying basic tort law:[592] The injurer owes a debt to the injured.[593] At a bare minimum, the U.S. government should compensate those forced into exile from the United States for the cost of travel back to the United States. Likewise, those who have been denied entry or turned away at borders and ports should be compensated. In the language of tort law, the United States should also compensate the millions of people who were subjected to the battery, false imprisonment, and intentional infliction of emotional distress[594] of arrests, internment, deportation—and those who lost loved ones to the same.[595] We can add noncitizens who had jobs and job opportunities stolen from them by the law's prohibition of their employment in the United States. Likewise, those denied public welfare or voting rights. These offenses would be easy to prove because of how well state surveillance documents

588. Joseph Nevins, *Migration as Reparations*, *in* OPEN BORDERS, *supra* note 25, at 129, 129–30; s*ee generally* SUKETU MEHTA, THIS LAND IS OUR LAND: AN IMMIGRANT'S MANIFESTO (2019); Rafaida Al Hashmi, *Historical Injustice in Immigration Policy,* Pol. Studies 1–16 (2021).

589. DARITY JR. & MULLEN, *supra* note 66, at 249.

590. Huemer, s*upra* note 371, at 36.

591. *See* Greene v. McElroy, 360 U.S. 474, 492 (1959) (finding that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property'" interest protected by the U.S. Constitution).

592. *See*, *e.g.*, ALFRED BROPHY, REPARATIONS PRO & CON 122–26, n.94 (2006); Jones, *supra* note 579, 466–70 (2003); *see generally*, Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B. U. L. REV. 1443 (2004).

593. John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L.J. 513, 525 (2003).

594. Jones, *supra* note 579, at 467–70.

595. *See* Somin, *supra* note 378; Sophie Terp, Sameer Ahmed, Elizabeth Burner, Madeline Ross, Molly Grassini, Briah Fischer & Parveen Parmar, *Deaths in Immigration and Customs Enforcement (ICE) Detention: FY2018–2020*, 8 AIMS PUB. HEALTH 2021 1, 81–89 (2021).

arrests, internment, and deportations,[596] but also employment ineligibility and public assistance use.[597] Establishing the amount of compensation can draw upon long established tort precedent for the monetary quantification of physical and emotional pain and loss of liberty and opportunity.[598] The citizen beneficiaries of the unjust enrichment[599] of citizenship, owe this to their debtors.

Additionally, beyond those directly wronged by citizenship and immigration laws and borders, there is a larger number of people who never came or tried to come to the United States, but who have been negatively affected by its citizenship rules nonetheless. Of these, perhaps the most directly harmed are the families who lost loved ones to the deserts and seas while they were attempting to enter the United States against its unjust laws to seek their freedom. Less directly impacted are those people who would have benefited from remittances had their loved ones been allowed to come to the United States for work or allowed to work once they arrived.

There are also the many millions of people around the world who have suffered the widespread poverty that global apartheid citizenship has sustained. They represent the majority—those who will never have the resources to migrate. They deserve a global fund that subsidizes their travel and resettlement in economically wealthier parts of the world or offsets their poverty if they do not wish to travel. Moreover, special or additional compensation could be provided to former noncitizens who are women or women of color, recognizing their unique double burden under citizenship. Such a program would go a long way to deploying migration as an anti-poverty and anti-economic inequality intervention.

Ultimately, the goal of compensation should be building equity between former citizens and former noncitizens rather than merely finding the correct monetary restitution.

Second, there must be healing. Socio-political repair and reconciliation are necessary components of reparations work.[600] An apology from the government, or a new holiday to commemorate the end of citizenship, for example, may help change some societal attitudes toward equal passage, equal visitation, and equal settlement. A peace and reconciliation commission could give

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596. *See generally* Kalhan, *supra* note 185, at 50–52; *see also TRAC FOIA Activities*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://perma.cc/Y55W-Q2CA (last visited May 4, 2021). Under the Freedom of Information Act, TRAC procures and publishes data on immigration law enforcement in the United States, and TRAC's copious reports demonstrate the enormous amount of data in the government's possession that documents and records much of that enforcement. *Id.*

597. Kalhan, *supra* note 185, at 50–52.

598. *See*, *e.g.*, Narbeh Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J.L. & MED. 401, 416–20 (discussing the legal standards used for the quantification of damages in "negligent infliction of emotional distress" cases); MALIA MCLAUGHLIN, COMPENSATORY DAMAGES FOR FALSE IMPRISONMENT 111–27 (13 Am. Jur. Proof of Facts, 3d. 1991).

599. *See generally* 66 Am. Jur. 2d Restitution and Implied Contracts § 11.

600. *See* Yamamoto, *supra* note 582, at 3; *see generally* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL OF BLACK REPARATIONS (2006).

the deported and their loved ones the opportunity to publicly confront their deporters as legal and social equals. This could validate the experiences of the former and shame the actions of the latter. So could lustration, or the practice of forbidding from future government employment all former enforcers of the deportation and internment laws. Finally, passing laws illegalizing deportation or explicitly banning caste based on birthplace or ancestry could accomplish the same and help normalize a post-citizenship world.

Citizenship's contribution to the racialization and oppression of citizens of color likewise demands reparation. Thus, calls for reparations for the descendants of slavery, and other white supremacist violence, are necessarily and inseparably part of the project of abolishing citizenship.

Finally, it is worth noting that there is no shortage of ideas proposed to fund reparations. For example, there are many suggestions for funding reparations for the descendants of the enslaved in the United States,[601] or funding global programs that can repair harm to the world[602] which would furnish the billions or trillions needed for the reparations proposed. Most obviously, there are the hundreds of billions of dollars[603] (one-third of one trillion dollars in just the last seventeen years in the United States[604]) now spent guarding and implementing the walls, cages, and restrictions inflicted on "noncitizens," or the $204 million in "bond" money paid in ransom to ICE.[605] In short, we have the money to make the survivors of citizenship whole, and it is only the political will that is missing.

IV. CONCLUSION

Citizenship and the rules that regulate and enforce it, are inherently and irredeemably racist and anti-democratic. I have used the history of citizenship law in the United States as an example which epitomizes and illustrates the racist and anti-democratic character of citizenship. The origins and execution of citizenship throughout U.S. history reveal it to be white nationalist social engineering. It was created and designed for an anti-democratic purpose: to enforce a caste system built upon doublethink. This caste system is incompatible with the principles of equal personhood and personal autonomy that are the keystones of a democratic society. By excluding some human beings from political membership, citizenship fails to derive its legitimacy from the will of the people. By requiring the creation of "outsiders," citizenship is

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601. *See, e.g.,* FRANKE, *supra* note 579, at 16, 131; Cornel West & Roberto Mangabeira Unger, *American Progressivism Reoriented*, *in* THE CORNEL WEST READER 328 (Cornell West ed., 1999).

602. *See*, *e.g.*, SHACHAR, *supra* note 9, at 96, 106; Nadia F. Piffaretti, *Reshaping the International Monetary Architecture: Lessons from Keynes' Plan 9* (The World Bank: Policy Research, Working Paper 5034, 2009), https://perma.cc/2UKF-EEGG; Neil McCulloch, *It's Time to Take the Tobin Tax Seriously*, GUARDIAN (Jun. 14, 2011), https://perma.cc/M7TV-AQPR.

603. *See The Cost of Immigration Enforcement and Border Security*, AM. IMM. COUNCIL (July 2020), https://perma.cc/WF4A-6ACJ.

604. *See id.*

605. Meagan Flynn, *ICE Is Holding $204 Million in Bond Money, and Some Immigrants Might Never Get It Back*, WASH. POST (Apr. 26, 2019), https://perma.cc/F236-TP3F.

inherently cis-male-supremacist and anti-worker. Citizenship is the law of anti-democracy, and it is neither just nor inevitable.

Furthermore, reconciling citizenship with anti-racist democracy requires the abolition of the former to save the latter. Abolition requires not just the end of injustice, but the building of just institutions. People whom the law makes into 'noncitizens' today are demanding the right to move freely between nation states, live freely in the states to which they move, and enjoy equal treatment under the law where they settle. These are the same rights which nation states, such as the United States, afford their "citizens" when moving and settling within the nation state in which they enjoy citizenship. Political membership based on physical presence within a given jurisdiction, *jus locus* membership, affords and protects these rights. By way of example, I have suggested how the law in the United States might be changed to abolish the legal distinction between "national" and "foreigner" by replacing it with *jus locus* membership for all people. I argued further that we need a robust reparations program to compensate former noncitizens —and citizens of color—for what citizenship has stolen from them, to repair some of the racial and economic inequalities that citizenship produced, and to heal some of the scars citizenship has left upon the world.

Radical change in the law requires extraordinary political will to make that change a reality. That political will requires cultural momentum that only grassroots and mutual aid social movements can build. Such a movement is already underway, of course, and it is led by the people who challenge citizenship every day by violating its arcane rules and borders with their very bodies and everyday choices to live as though they were free to travel. Today's noncitizens are the pioneers of *jus locus* liberty and the architects of open democracy. This piece was written in the hope that it may provide some support to that movement.

Until such social forces can move the governments of nation states, *jus locus* must be built from the ground up within states, provinces, and municipalities. This happens through what Ruth Wilson Gilmore termed "non-reformist reforms," those changes to the law that "unravel rather than widen the net of social control through criminalization."[606] These are changes that dismantle bad institutions and rules rather than creating new ones that our goals would require us to undo in the future.[607] There are many examples of reforms consistent with *jus locus* membership, like the New York is Home Act. Six states and the District of Columbia provide free public healthcare to children regardless of their citizenship.[608] City ID cards available to all residents in many cities, regardless of citizen/noncitizen caste, afford equal access to city institutions.[609] Universal suffrage for noncitizens[610] has been

606. GILMORE, *supra* note 44, at 242.
607. *Id.*
608. COLBERN & RAMAKRISHNAN, *supra* note 74, at 291–92.
609. *See, e.g.*, Heather Knight, *Hundreds Wait for Hours to Buy S.F. ID Cards,* S.F. GATE (Jan. 16, 2009), https://perma.cc/9ME2-KL6X; Miriam Jordan, *Phoenix Approves City Identification Card for*

implemented in a number of cities in Europe and North America, including the Chicago and New York City school boards.[611] Other municipalities have passed laws creating barriers to immigration law enforcement in their jurisdictions.[612] Such laws, anthropologist Peter Mancina notes, provide a model for how government can operate in a world without citizenship or borders.[613] Abolition, Mariame Kaba writes, is not just a lofty goal, but a "practical organizing strategy,"[614] directing our energy toward non-reformist reforms consistent with *jus locus*. In doing so, we will create a path toward our ultimate goal.[615]

What community organizer Paula X. Rojas said of police is also true of citizenship and borders: that they are in our heads and hearts.[616] Proponents of *jus locus* membership must fight centuries of normalization of citizenship's legal and social dogma and indoctrination of the racism and nationalism which undergirds them. These ideas have hardened into a shell around our political and moral imaginations. Breaking through that shell—normalizing a post-citizenship world—will require as many voices as possible challenging these mythologies and demanding just alternatives. It is critical to remind each other that citizenship laws are neither natural nor inevitable, [617] and that, like race, citizenship is only as real as the violence we inflict to enforce its mythology. Ending citizenship will, as Jaqueline Stevens puts it, "help liberate us from the craziness of repressing the open secret that differences attributed to birth are impossible and ludicrous."[618] The contradictions are there in the open for us to call out and challenge, if only we are willing to commit to the unpopular alternatives—abolition and reparations. The good news is that *jus locus* has a long history within political subdivisions of nation states, making the effort to normalize new rules and expand our political and moral imaginations that much simpler. My hope is that this Article facilitates discussion that makes it easier for all of us to do this.

Undocumented Immigrants, Others, WALL ST. J. (Aug. 31, 2016), https://perma.cc/US3L-5YAS; *IDNYC Reaches More Than 1 Million Cardholders*, AMSTERDAM NEWS (Apr. 6, 2017), https://perma.cc/32D9-3QPV.

610. *See* 18 U.S.C. § 611(a)(2) (allowing states and their political subdivisions to permit noncitizen voting in state and local elections).

611. *See* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 87–107 (2006).

612. COLBERN & RAMAKRISHNAN, *supra* note 74, at 3 (listing eight states with laws that prohibit or limit cooperation with federal immigration law enforcement authorities).

613. Peter Mancina, *Sanctuary Cities and Sanctuary Power*, in OPEN BORDERS, *supra* note 25, at 250, 259–260.

614. MARIAME KABA, WE DO THIS 'TILL WE FREE US 128 (2021).

615. *See also* the hyper local examples of successful reparations campaigns. Rachel L. Swarns, *Is Georgetown's $400,000-a-Year Plan to Aid Slave Descendants Enough?,* N.Y. TIMES (Oct. 30, 2019), https://perma.cc/F2SG-HSVU; Logan Laffe, *The Nation's First Reparations Package to Survivors of Police Torture Included a Public Memorial. Survivors are Still Waiting*, PRO PUBLICA (Jul. 3, 2020), https://perma.cc/884E-WYUU.

616. Paula X. Rojas, *Are the Cops in our Heads and Hearts?*, SCHOLAR & FEMINIST ONLINE (2016), https://perma.cc/B8A5-BB6C.

617. KOCHENOV, *supra* note 15, at 27.

618. STEVENS, *supra* note 269, at 78.

Finally, I hope that others—activists, scholars, survivors, artists—will expand and improve upon the proposals and arguments made here. Because this Article covered broad ground to make its points while staying under book-length, deeper exploration was not always possible. Those who are fluent in the history and law of citizenship and immigration rules in other nation states, and who can show how they too are categorically racist and anti-democratic, should explain and draw upon that knowledge to argue for citizenship abolition in their jurisdictions. Those who can speak to other ways in which citizenship is racist or anti-democratic that I may have altogether failed to address here should do the same. The world will be that much closer to moving past the tyranny of citizenship the more voices are writing and speaking for these democratic ideas.