

2007

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Recommended Citation

Jennifer Gordon and Robin A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 Fordham L. Rev. 2493 (2007).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss5/9>

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Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives

Cover Page Footnote

* Associate Professor of Law, Fordham University School of Law. ** Associate Professor of Law, Fordham University School of Law. The authors would like to thank Linda Bosniak, Sheila Foster, and Kevin Johnson for their insightful comments on drafts of this essay, and would also like to acknowledge the important contributions to our thinking made by Muneer Ahmad, Devon Carbado, and Rachel Moran in presentations on a panel with the same title as this essay that we convened at the 2006 Law and Society Meetings. We are grateful to Larry Abraham, Larry Reeves, Jordan Goldberg, and Sana Maneshwar for research assistance, and to Emma Mercer for technical support on this essay.

CITIZENSHIP TALK: BRIDGING THE GAP BETWEEN IMMIGRATION AND RACE PERSPECTIVES

Jennifer Gordon* & R. A. Lenhardt**

INTRODUCTION

The breadth of “citizenship” as an analytical framework is amply demonstrated by the proceedings of this Symposium.¹ Its very richness, however, creates challenges for the scholars working within its ambit.

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1. The concept of “citizenship” has been given new life over the past twenty years, as scholars across fields have converged on it as both a descriptive and normative framework to encompass a wide range of ideas. As Judith Shklar, Linda Bosniak, and others have pointed out, national membership, political participation, a “good citizen’s” contributions to the community, the entitlement to rights and benefits, and identity and cultural belonging have all been described as manifestations of citizenship. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 3 (1991); Linda Bosniak, *Citizenship Denationalized*, 7 *Ind. J. Global Legal Stud.* 447, 455 (2000) [hereinafter Bosniak, *Citizenship Denationalized*]. The popularity of the term is in no small part due to its overwhelmingly positive connotations. Nancy Fraser & Linda Gordon, *Civil Citizenship Against Social Citizenship? On the Ideology of Contract-versus-Charity, in The Condition of Citizenship* 90, 90 (Bart van Steenberg ed., 1994) (“We find no pejorative uses.”).

But citizenship also has an exclusionary side. “By defining insiders, the concept of citizenship necessarily [also] defines outsiders . . .” T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 *Fordham L. Rev.* 1689, 1692 (2001); see also Linda Bosniak, *Critical Reflections on ‘Citizenship’ as a Progressive Aspiration, in Labour Law in an Era of Globalization* 339, 342-43 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) [hereinafter Bosniak, *Critical Reflections*]; Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *Yale L.J.* 1563, 1574-75 (1996); Ediberto Román, *The Citizenship Dialectic*, 20 *Geo. Immigr. L.J.* 557, 568-72, 573-75 (2006). For this reason, some have called for its abandonment as an aspirational marker. Rachel F. Moran, for example, argues that in light of social justice concerns, “personhood” would be a better category by which to assign rights. Rachel F. Moran, *Terms of Belonging, in The Constitution in 2020* (Jack Balkin & Reva Siegel eds., forthcoming) (on file with the Fordham Law Review); see also Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* 311 (1995); Donna Baines & Nandita Sharma, *Migrant Workers as Non-Citizens: The Case against Citizenship as a Social Policy Concept*, 69 *Stud. Pol. Econ.* 75, 75, 96 (2002).

Others have discussed the need for clarity in parsing the multiple meanings of the concept.² A different challenge, less explored, is that of balkanization. Because “citizenship” is used to mean so many things, explorations of citizenship in different fields may run on parallel tracks, never intersecting, even though each set of analyses might benefit greatly from interaction with the others. This essay addresses that issue within the context of legal scholarship.

Recently, two branches of legal scholarship have generated particularly illuminating insights through analyses of citizenship-related issues: scholars of Critical Race Theory (CRT), with their focus on the failure of the United States to fulfill the promises of full equality made to its citizens of color, and mainstream immigration legal theorists, with their exploration of the shifting parameters of national citizenship in the context of globalization and massive migration. We, an immigration scholar and a Critical Race scholar, have written this essay as a way of, first, mapping the citizenship-related contributions of these two fields; second, offering a preliminary explanation for why they have often proceeded on separate tracks; and third, launching a collaborative project that bridges the gap. Our contention is that discussions of citizenship in legal theory will be far richer when these branches merge.

Our collaboration grew out of a series of conversations about citizenship in which we were struck, as others have been, by the complementary forms of taken-for-grantedness that exist on the part of CRT scholars and mainstream immigration scholars where matters of citizenship are concerned.³ In CRT, while “race” has been thoroughly deconstructed and interrogated, the notion of “citizenship” has rarely been examined with a critical eye. Meanwhile, in mainstream immigration legal scholarship, “citizenship” is subject to rigorous interrogation, but the concept of “race” is rarely raised and its social construction is infrequently challenged.

Because citizenship has so many dimensions, it is important to be precise about which dimensions are under discussion at any given moment. While both of us have an interest in the granting and denial of formal citizenship (the legal status that distinguishes members of a society from outsiders), our primary concern is with citizenship as “belonging”⁴—that is, with the realization by individuals and groups of genuine participation in the larger political, social, economic, and cultural community—and with the ways

2. See, e.g., Linda Bosniak, *Varieties of Citizenship*, 75 *Fordham L. Rev.* 2449 (2007).

3. See generally 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; Rachel Moran, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, Comments at the Law & Society Association Annual Meeting (July 8, 2006).

4. Kenneth L. Karst advanced an important definition of “belonging” in a 1989 book on the subject. See Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (1989). For him, the concept relates to one’s inclusion and acceptance in a broader community of citizens. See Derrick Bell, *Preaching to the Choir: America as It Might Be*, 37 *UCLA L. Rev.* 1025, 1027 (1990) (book review).

that race, ethnicity, and immigration status complicate the full achievement of citizenship in this sense.

The urgent need to integrate race and immigration perspectives on these dimensions of citizenship was illustrated for us by the hidden subtexts of two very public events: Hurricane Katrina in the summer of 2005 and the immigrant protest marches in the spring of 2006.

The Hurricane Katrina story was widely and rightly depicted as a tale not just about destruction and suffering, but also of race and subordination. In it, poor, black residents of New Orleans—rendered effectively immobile by poverty—got caught in the path of a devastating storm while Whites with greater means largely escape to safety. Referred to most often as “refugees,” rather than as the citizens that they are, these black residents of New Orleans—left virtually alone in a deserted city—languished in storm waters and abandoned buildings for days without food or water. Eventually, efforts were made to begin evacuating them to other cities, some thousands of miles away. But television cameras captured their suffering and loss before this process was complete. And, in doing so, the media inadvertently conveyed a theretofore conveniently ignored fact: American society is divided by deeply entrenched lines of race and class that, over time, have erected a second-class citizenship effectively reserved for poor people of color.

This is a painful and utterly fundamental truth. Yet, at least one aspect of this tale deserves closer inspection. The protests of many that the African Americans left behind were not refugees, but citizens, calls forth the common intuition that *it is not acceptable for a government to abandon citizens to drown and starve*.⁵ But, the moral force behind that assertion derives from the rhetorical juxtaposition of citizens with some other class of people—e.g., noncitizens.⁶ Troublingly, the implication is that it would be acceptable to abandon noncitizens to their fate in the unforgiving waters of a massive flood.

We saw the immigrant protests of 2006 as a different kind of story, one marked by massive collective resistance. Millions of undocumented people, usually portrayed as “hidden” and “in the shadows,” took to the

5. For more on the debate in the immediate aftermath of the hurricane over whether Katrina’s survivors were best referred to as refugees or citizens, see Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 Cal. L. Rev. 907, 935 (2006) (book review); Maria Isabel Medina, *Confronting the Rights Deficit at Home: Is the Nation Prepared in the Aftermath of Katrina? Confronting the Myth of Efficiency*, 43 Cal. W. L. Rev. 9, 19 (2006); Robert E. Pierre & Paul Farhi, ‘Refugee’: *A Word of Trouble*, Wash. Post, Sept. 7, 2005, at C1; Donna Arzt, Op-Ed, *Sound and Fury: Katrina and the ‘Refugees’ Debate*, Jurist, Oct. 3, 2005, <http://jurist.law.pitt.edu/forumy/2005/10/sound-and-fury-katrina-and-refugees.php>; Jocelyn Noveck, *Use of the Word ‘Refugee’ Stirs Newsroom Debate*, Associated Press, Sept. 6, 2005, available at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1001055443.

6. See Harris, *supra* note 5, at 935 (discussing the devastating aftermath of Hurricane Katrina and “the notion that the nation’s neglect in the wake of Katrina violated the duty of care it owes to all citizens”).

streets to make their voices heard on matters relating to the future of this country's immigration policy. Leaders of the protests explicitly aligned their goals and their strategies with the civil rights marches of the 1960s; they carried banners reading "We have a dream too" and heralded the beginning of a "new civil rights movement."⁷ The protests were a moving testament to the immigrant community's courage, strength, and desire for recognition. And yet, the seemingly positive rhetoric of the signs that many carried through the streets of some of the nation's major cities had a painful double meaning. "We Are Not On Welfare." "We Are Workers Not Criminals."⁸ *As opposed to whom?* The signs seemed a not-so-subtle attempt by immigrant workers to make a case for their own inclusion by distinguishing themselves from stereotypes of African Americans, a group that enjoys formal citizenship but, in many ways, still exists on the margins of American society.⁹

To highlight the ways that immigrant marchers attempted to bolster their claim to citizenship, or at least their "belonging," by contrasting themselves with stereotypical notions of African Americans is not to deny the power of the immigrants' call. It is simply to underscore the extent to which the meaning of the newcomers' demands for inclusion cannot be comprehended without a serious effort to plumb the depths of the exclusion—social, economic, and political—of Blacks that is the backdrop to their message. A position that advocates greater government recognition of the contributions of immigrants is not, we think, in any way inconsistent with the contention that there must be room to talk openly about the role that racism plays in dividing communities and perpetuating inequality.

An understanding of the dimensions of American citizenship that most engage us depends upon a full exploration of the many ways in which questions of race and immigration are connected. Placed in proper perspective, the story of the immigrant marches, like that of Hurricane Katrina, provides a unique window into the United States' long, tortured

7. Dan La Botz, *Millions March for Immigrant Rights; Virtual Strikes in Some Cities*, Labor Notes, May 2006, at 1 (displaying a photograph of rally participant holding a sign declaring "We have a Dream too!!!"); *Thousands Rally for Immigrants' Rights*, CBS News Online, Mar. 24, 2006, <http://www.cbsnews.com/stories/2006/03/24/politics/main1438089.shtml> (describing the banners); Niko Kyriakou, *Organizers See 'New Civil Rights Movement' in Immigration Protests*, Oneworld.net, Mar. 29, 2006, <http://us.oneworld.net/article/view/129992/1> (describing the protests as a "new civil rights movement").

8. See e.g., Erin O'Donnell, *Latinos Nix Violence*, Harv. Mag., Sept.-Oct. 2006, at 15 (displaying a photograph of a participant at a Chicago immigrants' rally holding a sign reading "We are Workers Not Criminals!").

9. Rene P. Ciria-Cruz, *Activists Must Avoid Cultural Tripwires Over Immigration*, NewAmericaMedia.org, June 1, 2006, http://crm.ncmonline.com/news/view_article.html?article_id=c18d2713fa49471adc89cdb7cb0fb3b8 ("Protest signs such as 'We came here to work hard' or 'We're not criminals' or 'We're not on welfare' may be perceived as invoking negative black stereotypes as a way to distinguish Latinos. Unchecked, such statements will only deepen the divide between the communities.").

history regarding race, immigration, and citizenship. Both tales suggest the many levels on which discussions about citizenship and race (a mainstay of Critical Race Theory) and discussions about citizenship and nationality (a mainstay of immigration scholarship) are closely related. And yet, our sense is that, for the most part, mainstream legal scholars in the fields of immigration and Critical Race Theory have generally explored the topic of citizenship in inexplicably separate ways.

We enter the project introduced in the pages that follow with a humility born of the recognition that our own work to date also has not taken this connection into account in any deep way. We have set out to change that through this collaboration and more critical engagement with our subject.

The following essay provides a frame for our larger project. It reflects our preliminary thoughts and serves to introduce ideas that will be further elucidated in future articles. Part I provides a summary assessment of important insights from CRT and immigration scholarship that can be brought to bear on a critical analysis of American citizenship, and in particular on the idea of citizenship as belonging or full participation, drawing on the contributions of scholars such as Kevin Johnson, who has been a strong advocate for more nuanced understandings of citizenship.¹⁰ Part II considers why the synergy in work on citizenship we envision has not been more widely achieved, offering our still-evolving thoughts on the citizenship-related gaps in immigration and CRT scholarship, respectively, and speculating briefly about why they exist. Part III suggests an approach to conceptualizing citizenship (in the sense of belonging or participation) that is more uniformly attuned to dynamics of race and immigration, by identifying topics on which the multidimensional analysis we urge can readily be employed. And in Part IV, we offer a taste of our future project through a brief exploration of the way race and immigration converge in the setting of work as a path to citizenship.

I. CITIZENSHIP INSIGHTS FROM CRITICAL RACE AND IMMIGRATION SCHOLARSHIP

At this moment in legal scholarship, both immigration and Critical Race scholars are developing powerful interpretive tools that can be brought to bear in exploring the nature and meaning of citizenship today.¹¹ The part that follows identifies the tools and insights arising out of these two fields and briefly outlines how they might be employed to analyze questions pertaining to citizenship in the United States today.

Before plunging into a survey of these two fields, a brief word on the challenges of categorization is warranted. In writing this piece, we struggled with how to label the scholars whose work we discuss here. A

10. See Johnson, *supra* note 3.

11. Conferences such as "Citizenship Without Borders: Belonging and Exclusion in Immigrant America," organized at Boalt Hall School of Law by Rachel Moran in March of 2006, have provided important incubators for the production of these new ideas.

number of academics whose work has touched on race or immigration might not choose to label themselves as either “immigration scholars” or “Critical Race Theorists.” Others feel an affinity for both. And who is “mainstream,” anyway?¹² In the end, we chose to focus in this part on the foundational writers in both fields, those who established the fields’ current dimensions and whose work is most often cited (and contested) by others.¹³ Both immigration law and Critical Race Theory are still relatively new areas, and their initiators remain among the leading academics in their fields. We turn later in the essay to a discussion of newer scholars and to those whose writing crosses the boundaries between the two areas.

A. *Immigration Scholarship*

In the literature by mainstream legal scholars of immigration, citizenship-as-nationality has long been a central topic of discussion. Among other angles, these scholars have traced the foundations of citizenship,¹⁴ explored

12. As Linda Bosniak has pointed out to us, one also might ask, Why is there no such thing as a field called “Critical Immigration Scholarship?” Kevin Johnson suggests that Critical Race scholars writing on topics relating to immigration have recently played a role similar to that assumed by early Critical Race scholars such as Derrick Bell and Richard Delgado in critiquing the work of legal theorists more generally and the work of scholars identified with the Critical Legal Studies (CLS) movement in particular. E-mail from Kevin Johnson, Associate Dean for Academic Affairs & Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, U.C. Davis School of Law, to Jennifer Gordon, Associate Professor of Law, Fordham University School of Law (Oct. 26, 2006, 18:01:30 EST) (on file with the Fordham Law Review). That is, mainstream immigration scholarship already had a critical perspective on the law, but one that largely ignored the role of race in the field. Critical Race theorists brought race to the foreground in their scholarship on immigration topics. See text accompanying note 44. For more on the history of Critical Race Theory (CRT), see Sheila F. Foster & R. A. Lenhardt, *The Racial Subject in Legal Theory*, in *The Oxford Handbook of Law and Politics* (Keith Whittington ed., forthcoming 2007) (manuscript at 8-14, on file with the Fordham Law Review) (discussing the emergence of Critical Race Theory and the break of scholars of color with scholars from the Critical Legal Studies movement).

13. We appreciate that using “most often cited” as a measure has certain limitations, namely a risk of reinscribing the bias toward white (and frequently male) scholars in citations in the law review literature. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984) [hereinafter Delgado, *The Imperial Scholar*]; see also Richard Delgado, “*The Imperial Scholar Revisited*”: *How to Marginalize Outsider Writing, Ten Years Later*, in *Critical Race Theory: The Cutting Edge* 401, 401 (Richard Delgado ed., 1995) [hereinafter Delgado, *The Imperial Scholar Revisited*]. Our sense, nevertheless, is that doing so is important here, particularly in the context of immigration scholarship, where the marginalization of scholars of color has been a topic of discussion. See Johnson, *supra* note 3, at 527 (noting that “[t]he ‘imperial scholar’ phenomenon identified in civil rights scholarship is alive and well in immigration law scholarship, with a small cadre of elite, predominantly white scholars engaging each other while marginalizing the work of outsiders” (citations omitted)). Obviously this problem presents itself differently in the area of Critical Race Theory, where the vast majority of scholars are of color. We discuss that unique context in Part II.

14. For a sampling of the work by legal scholars on this issue, see T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (2002); Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (2006) [hereinafter Motomura, *Americans*

various routes to citizenship,¹⁵ mapped the proliferation of dual citizenship,¹⁶ and debated the emergence of “post-national” or “transnational” citizenship.¹⁷

The understandings of the meaning of formal citizenship that have emerged from this scholarship provide tremendously useful tools for comprehending the changing landscape in the United States and around the world today. On the most fundamental level, globalization and mass migration are very much present in immigration scholars’ accounts. Their

in Waiting]; Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996); Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 Colum. L. Rev. 1567 (1997) (reviewing Neuman, *supra*); Peter J. Spiro, *The Citizenship Dilemma*, 51 Stan. L. Rev. 597 (1999) (reviewing Rogers M. Smith, *Civic Ideals* (1997)).

15. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 Va. J. Int’l L. 237 (1994); see also Stephen H. Legomsky, *Why Citizenship?*, 35 Va. J. Int’l L. 279 (1994); David A. Martin, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 Va. J. Int’l L. 301 (1994); Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 Geo. Immigr. L.J. 1 (1997); Peter H. Schuck, *Whose Membership Is It, Anyway? Comments on Gerald Neuman*, 35 Va. J. Int’l L. 321 (1994) [hereinafter Schuck, *Whose Membership*]; Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 Geo. Immigr. L.J. 479 (1999). For a proposal to change the U.S. *jus soli* system of awarding citizenship by virtue of birthplace, see Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 118 (1985) (arguing for the abolishment of *jus soli* citizenship for children born in the United States to undocumented immigrants).

16. For just three examples among many, see *Rights and Duties of Dual Nationals: Evolution and Prospects* (David Martin & Kay Hailbronner eds., 2003); Peter H. Schuck, *Plural Citizenships*, in *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* 229-42 (1998) (discussing “An Assessment of Dual Citizenship”); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 Emory L.J. 1411 (1997).

17. There is a vast literature on transnational citizenship. Common themes in this work include the recent rise in countries that accept dual citizenship, the development of a form of supranational citizenship in the European Union, and the less formal but increasingly evident “transnationalization” of immigrants’ economic and political ties. Foundational works in the social sciences include *Towards a Transnational Perspective on Migration: Race, Class, Ethnicity, and Nationalism Reconsidered* (Nina Glick Schiller, Linda Basch & Cristina Blanc-Szanton eds., 1992), and *Yasemin Nuhoglu Soysal, Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994). These ideas entered legal scholarship through the work of T. Alexander Aleinikoff, Linda Bosniak, Peter Schuck, and Peter Spiro, among others. T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 Mich. J. Race & L. 241 (1999); Bosniak, *Citizenship Denationalized*, *supra* note 1; Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 Va. J. Int’l L. 979 (2002); Peter H. Schuck, *The Reevaluation of American Citizenship*, in *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* 202-05 (1998) (discussing “A Brief Note on ‘Post-National Citizenship’”); Spiro, *supra* note 16. The concept of immigrant transnationalism is now broadly diffused in legal scholarship. As just one example, in 2006, the New York University Law Review devoted a symposium volume to the topic, *A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context*, with articles by legal scholars Peter Schuck, Kim Barry, Anupam Chander, Ruth Rubio-Marín, Peter Spiro, and Michael Trebilcock, as well as contributions by social scientists. See Symposium, *A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. Rev. 1 (2006); see also Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. Cal. L. Rev. (forthcoming 2007) (on file with the Fordham Law Review) (proposing a transnationalization of “labor citizenship” that draws on the idea of transnationalism in the political and economic realms).

efforts to grapple with the impact of these world shifts on a rigid notion of citizenship have generated a rich critique of the accuracy and appropriateness of a nationally bounded concept of citizenship in a globalizing world.¹⁸

One element of this critique, as we note in the Introduction, is the recognition that the term “citizenship” is not a unitary concept.¹⁹ “Citizenship” is used to refer to such disparate ideas as immigration status or nationality, forms of political participation, entitlement to substantive benefits, and elements of individual or group identity.²⁰ Linda Bosniak and other scholars have further noted that these strands of citizenship—often assumed to be fully congruent—do not map neatly on each other. For example, in a context where many immigrants become politically involved in their new country before they are legal residents, and may maintain political involvement with their old country long after they have left, political participation does not correspond to citizenship as nationality.²¹

18. See, e.g., Bosniak, *Critical Reflections*, *supra* note 1.

19. See *supra* notes 1-4 and accompanying text.

20. Linda Bosniak has elaborated on this taxonomy throughout her scholarship on the topic of citizenship. Most recently, see Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 18-20 (2006). Others have mapped the strands of citizenship in somewhat different ways. See, e.g., Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 3 (1991) (discussing citizenship as standing, citizenship as nationality, the concept of being a “good citizen,” and “ideal republican citizenship”).

21. New immigrants may participate politically in the United States both through voting (where permitted) and through other forms of civic engagement. On noncitizen voting, see Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* (2006); Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 *Mich. J. Int’l L.* 259 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 *U. Pa. L. Rev.* 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 *Mich. L. Rev.* 1092 (1977). On other forms of civic and political participation, see Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* 237-80 (2005) (discussing the political participation of immigrants in campaigns to change New York State wage payment laws); Paul Johnston, *The Emergence of Transnational Citizenship Among Mexican Immigrants in California*, in *Citizenship Today: Global Perspectives and Practices* 253 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001); Paul Johnston, *Transnational Citizenries: Reflections from the Field in California*, 7 *Citizenship Stud.* 199 (2003); Monica W. Varsanyi, *The Paradox of Contemporary Immigrant Political Mobilization: Organized Labor, Undocumented Migrants, and Electoral Participation in Los Angeles*, 37 *Antipode* 775 (2005).

Many immigrants also continue to participate politically in the homelands they have left behind. The social science literature on the ongoing political engagement of immigrants with their home countries is extensive. Most of it focuses on various forms of voting from outside the home country, whether for candidates in general elections or for special legislative seats assigned to represent citizens in exile. See, e.g., Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism*, 37 *Int’l Migration Rev.* 700 (2003). For recent discussions in the legal scholarship, see Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 *N.Y.U. L. Rev.* 11 (2006); Anupam Chander, *Homeward Bound*, 81 *N.Y.U. L. Rev.* 60, 69-72 (2006); Ruth Rubio-Marín, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, 81 *N.Y.U. L. Rev.* 117 (2006); Peter J. Spiro, *Perfecting Political Diaspora*, 81 *N.Y.U. L. Rev.* 207 (2006).

Likewise, many of the elements generally understood to make up “substantive citizenship,” such as public education and public benefits, are available to noncitizens as well.²²

Beyond their descriptive value, these observations challenge the bedrock assumptions of theories such as communitarianism, which focuses on the need for hard borders in preserving and distributing benefits, in creating community, and in ensuring the legitimacy of community rules.²³ Immigration scholars have critiqued the communitarian argument on the grounds that it derives its legitimacy from the inaccurate assumption that all those who are present within the community are equal participants in its democracy, and that all those affected by the decisions made through its deliberations are likewise represented in them.²⁴ Neither holds true in the United States today, if indeed they do in any society. As immigration scholars note, millions of immigrants are physically present within our borders and governed by our laws but are ineligible for citizenship because they are undocumented or, if legally present, because they do not meet the requirements to apply.²⁵ Furthermore, literally billions of people outside of the community are deeply affected by the decisions made within it.

Immigration scholars’ accounts of the contributions of noncitizens, and of the way that certain rights and practices have become decoupled from formal citizenship, thus challenges the normative justification for a continued link between citizenship status and entitlement to benefits. They note that noncitizens are present among us, paying taxes, working, and contributing to their communities through religious organizations, parent-teacher associations, and other civil society groups, and suggest that this level of involvement, rather than a birth or naturalization certificate from the United States, could provide the most accurate measure of what

22. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court guaranteed undocumented children access to public education through high school. The National Immigration Law Center website on “Immigrants and Benefits” provides a regularly updated overview of immigrant eligibility for public benefits. See Nat’l Immigration Law Ctr., Immigration & Public Benefits, <http://www.nilc.org/immspbs/index.htm#immelig> (last visited Feb. 11, 2007). For an argument that the extension of so many of the privileges of citizenship to legal permanent residents has resulted in a devaluing of citizenship, see Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 *Geo. Immigr. L.J.* 1 (1989).

23. See generally Michael Walzer, *Spheres of Justice* (1983). Work explicitly grappling with communitarianism in relation to immigration policy includes Bosniak, *supra* note 20, at 37-76 (discussing “The Difference that Alienage Makes”); Legomsky, *supra* note 15; Martin, *supra* note 15; Neuman, *supra* note 15; Schuck, *Whose Membership*, *supra* note 15.

24. Walzer, *supra* note 23, at 31-63.

25. See, e.g., Bosniak, *supra* note 20, at 130. Walzer does recognize this as a possibility, and he rejects it, calling for the incorporation of such residents into full membership. Walzer, *supra* note 23, at 62-63; see also Bosniak, *supra* note 20, at 39-50 (crediting Walzer with a more complex analysis than his usual characterization as a proponent of firm boundaries allows). Nonetheless, Walzer does not seem to have imagined a presence of undocumented immigrants as large as that in the United States today, and it is not clear what his response to the current situation would be.

establishes a legitimate claim on rights (including the right to participate in local and state government decisions affecting their daily lives).²⁶

Mainstream immigration scholars are well aware of the tensions that their calls for greater inclusiveness highlight. At its core, much of the immigration scholarship grapples with versions of what Peter Spiro has termed the “Citizenship Dilemma”—on the one hand, the desire to expand status citizenship in order to avoid discrimination and to make the circle of those who have the status more accurately reflect those who live in and contribute to the country; and, on the other, the fear that the more widely status citizenship is available, the more diluted it will become, with negative effects on the apportionment of benefits, the construction of national identity and democracy, and the demands a nation can make from its members.²⁷

B. *Critical Race Scholarship*

Race scholars’ critical stance toward law and emphasis on racial liberation and change mean that CRT is also well-situated to engage in the rigorous analysis of American citizenship we envision. This is true even though CRT scholars, in contrast to those working in the area of immigration, have not always employed the term “citizenship” when analyzing questions of race and subordination. From CRT’s inception in the 1980s and early 1990s, however, race scholars have concerned themselves with matters that ultimately bear directly on equality and the nature of the substantive benefits that one’s status as a citizen affords.

Early CRT scholarship highlighted the elusiveness of the change in race relations promised by civil rights strategies and doctrine.²⁸ Scholars such as Derrick Bell decried the creation of what was effectively a second tier of citizenship reserved for racial minorities²⁹ and predicted that African Americans in particular could only hope to have “the[ir] interest . . . in

26. Bosniak, *supra* note 20; T. Alexander Aleinikoff, *The Geography of Citizenship, The Raven Lecture on Access to Justice at Georgetown University Law Center 2* (Mar. 16, 2006), available at http://issc.berkeley.edu/files/Aleinikoff_Lecture.pdf (arguing for “a reterritorialized conception [of citizenship], one that grounds membership rights on residence, not status”). Note a key distinction: Although Aleinikoff discusses ways that such a concept of citizenship would “put[] pressure on the legal/illegal immigrant line,” he ultimately would use legal admission to the country to divide those entitled to rights and benefits from those denied them. Aleinikoff, *supra*, at 6, 8. Bosniak, meanwhile, considers assigning rights and benefits to all territorially present noncitizens, without regard to legal status. She ultimately concludes, however, that extending benefits to all those territorially present would not resolve the tensions inherent in a scheme that labels some “citizens” and others “aliens.” Bosniak, *supra* note 20, at 140.

27. Spiro, *supra* note 14, at 599.

28. See generally Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (1992); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988); see also Derrick Bell, *And We Are Not Saved* (1987).

29. See Devon W. Carbado, *Racial Naturalization*, 57 Am. Q. 633, 634 (2005) (discussing the concept of second-class citizenship in CRT scholarship).

achieving racial equality . . . accommodated . . . when it converge[d] with the interests of whites.”³⁰ Others emphasized the limitations of the doctrinal requirement of intentionality in cases involving allegations of race discrimination, arguing that it embraced a narrow conception of racial injury that could never root out racialized policies and practices underlying the persistence of racial injustice in our society.³¹ The central message of these and other similar articles was that formal citizenship, without more, could not ensure equal treatment or belonging for Blacks within American society.

CRT scholars later built upon this important insight by extending its application to the lives and experiences of others at “the bottom.”³² Latino and Asian American scholars identifying with the “LatCrit” and Asian Pacific American (APA) Crit movements within CRT addressed themes and issues affecting not just African Americans, but also the lives and experiences of Latinos and Asian Americans.³³ More recently, scholars

30. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980).

31. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 Stan. L. Rev. 1 (1991); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); see also R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 878-931 (2004).

32. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 362 (1987) (discussing the need to go to “the bottom” or to explore the lives of marginalized racial minorities).

33. The body of LatCrit scholarship is extensive. Although LatCrit scholars publish widely, the symposium volumes that accompany the annual LatCrit conferences provide an overview of the range of scholarship being produced in that field. For a sampling across the years, see the articles collected in Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 Denv. U. L. Rev. 467 (2001); Symposium, *Countering Kulturkampf Politics Through Critique and Justice Pedagogy, Race, Kulturkampf, and Immigration*, 35 Seton Hall L. Rev. 1155 (2005); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 Harv. Latino L. Rev. 1 (1997); see also Pedro A. Malavet, *Outsider Citizenships and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 Clev. St. L. Rev. 321 (2005); Laura M. Padilla, *“But You’re Not a Dirty Mexican”: Internalized Oppression, Latinos and Law*, 7 Tex. Hisp. J.L. & Pol’y 59 (2001); Anita Tijerina Revilla, *Raza Womyn Mujerstoria*, 50 Vill. L. Rev. 799 (2005).

For examples of Asian Pacific American (APA) Crit scholarship, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1241 (1993); Neil Gotanda, *Critical Legal Studies, Critical Race Theory and Asian American Studies*, Amerasia J., 1995, at 127; Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 Colum. Hum. Rts. L. Rev. 47 (1997); Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. Rev. 1 (1998). For articles linking the two strands, see Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. Rev. 349, 358 (1998); Kris Song, *The Present Contours of Asian American Legal Scholarship: Its Themes, Objectives, and the Search for an Asian American Legal Perspective*, 9 Asian Pac. Am. L.J. 83, 94 (2004); John Hayakawa Török, *The Story of “Towards Asian American Jurisprudence” and Its Implications for Latinas/os in American Law Schools*, 13 Berkeley La Raza L.J. 271 (2002).

have interrogated the extent to which the denial of substantive citizenship benefits can simultaneously be based on race and factors such as gender or sexual orientation.³⁴ This work emphasizes notions of intersectionality³⁵ and multidimensionality,³⁶ and highlights the many levels on which identity can be experienced.

Significantly, the failure of citizenship status to ensure equality and certain basic benefits to racial minorities has not led CRT scholars to reject formal citizenship status or legal rights as mechanisms for achieving racial justice.³⁷ In fact, just the opposite is true.³⁸ CRT scholarship has made clear that, while formal citizenship rights cannot ensure racial equality, legal rights are an important prerequisite for “belonging” for racial minorities in American society.³⁹

34. See Foster & Lenhardt, *supra* note 12, at 16-18. Kimberlé Williams Crenshaw broke ground in the late 1980s by urging a focus on race and gender by legal theorists. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139. Darren Lenard Hutchinson has written more recently about the need for Critical Race scholars to extend their focus to issues of sexual orientation as well. See Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 Mich. J. Race & L. 285, 309-16 (2001); see also Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of “Sexual Orientation,”* 48 Hastings L.J. 1293 (1997).

35. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1265 (1991) (introducing “intersectionality” as a concept that “describe[s] . . . various relationships between race and gender,” including “the interaction of racism and patriarchy generally” and “the location of women of color both within overlapping systems of subordination and at the margins of feminism and antiracism”).

36. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 Buff. L. Rev. 1, 10 (1999) (explaining that “multidimensionality” serves as “a methodology by which to analyze the impact of racial and class oppression (or other sources of social inequality) upon sexual subordination and gay and lesbian experience and identity and to cease treating these forces as separable, mutually exclusive, or even conflicting phenomena” (quoting Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 Conn. L. Rev. 561, 640 (1997))). Scholars have also employed the term “multidimensionality” to discuss the relationship between issues of race, ethnicity, culture, alienage, and language. See, e.g., Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 Colum. Hum. Rts. L. Rev. 369, 429-33 (1994).

37. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 314-15 (1987) (discussing the importance of rights for racial minorities); see also Patricia J. Williams, *Alchemy of Race and Rights* (1991).

38. Indeed, Critical Race scholars parted ways with members of the CLS movement, in part, because they found them insufficiently attuned to the importance of rights to racial minorities in securing substantive equality. For more on this history, see Foster & Lenhardt, *supra* note 12, at 10-13.

39. For example, Patricia Williams has explained that

[w]hile rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values the guise of stability,

We believe that the careful balance between the critique and the embrace of formal citizenship status achieved by CRT scholars can inform the multilevel inquiry of citizenship we envision. We are also persuaded that the tools and understandings developed by CRT scholars in identifying obstacles to racial equality can be (and, to some extent, already have been) extremely useful in interrogating the way that issues of race and immigration bear on questions of citizenship. In addition to tools such as intersectionality and multidimensionality, consider CRT's long-standing emphasis on the role of the law in constructing racial identity and reinforcing racial subordination.⁴⁰ We believe that this political location, along with CRT's explicit rejection of the notion that "legal rationality could identify and eradicate the biases of race-consciousness in social decision-making,"⁴¹ could also be extremely useful in efforts to (re)consider the workings of law in constructing American citizenship.

Similarly, CRT's insights into social identity more generally—the ways in which it gets imposed, but also the ways in which it can be "worked" or manipulated—hold great promise for scholarship in this area.⁴² Finally, we think that CRT tools such as use of narrative will also go a long way toward both fostering a richer understanding of citizenship-related questions and highlighting the race-based obstacles—for citizens, as well as noncitizen immigrants—to the formal and substantive benefits of citizen status.⁴³

and from whom social change for the better must come (whether it is given, taken or smuggled). Change argued for in the sheep's clothing of stability (i.e., "rights") can be effective, even as it destabilizes certain other establishment values (i.e., segregation). The subtlety of rights' real instability thus does not render unusable their persona of stability.

Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 410 (1987). "What is needed," Williams has maintained, "is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of each others' rights-valuation." *Id.*

40. Ian Haney López is among those Critical Race scholars who have written extensively about the role of law in constructing race and social categories. In an influential 1994 article that laid the groundwork for his later work in this area, López explained that the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination. Judges and legislators, in their role as arbiters and violent creators of the social order, continue to concentrate and magnify the power of race in the field of law.

Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 3-4 (1994) (citation omitted) [hereinafter, López, *The Social Construction of Race*]; see also Ian Haney López, *White by Law: The Legal Construction of Race* (1996) [hereinafter López, *White by Law*].

41. Kimberlé Crenshaw et al., *Introduction to Critical Race Theory: The Key Writings That Formed the Movement*, at i, xvii (Kimberlé Crenshaw et al. eds., 1995).

42. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259 (2000).

43. Through narrative, CRT scholarship has succeeded in giving voice to the experiences and concerns of racial minorities whose lives and experiences have sometimes been overlooked by traditional legal scholarship. See Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 Iowa L. Rev. 803, 812-14 (1994).

These tools and insights have already been employed—particularly by CRT scholars sometimes identifying with the LatCrit or APA Crit movements⁴⁴—to address immigration-related issues as varied as racialized preference systems in immigration law;⁴⁵ assimilation;⁴⁶ racial profiling;⁴⁷ California's Proposition 187;⁴⁸ the sources of antiimmigrant sentiment;⁴⁹ the ways in which formal borders are informed by notions of race;⁵⁰ the intersection of race and gender in immigration law;⁵¹ the connection between domestic race relations and immigration;⁵² immigration and racial identity;⁵³ immigration and human rights law;⁵⁴ and the implications of undocumented status.⁵⁵

44. See, e.g., Chang, *supra* note 33, at 1243-50 (stressing the importance of an Asian American perspective on legal scholarship); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 Cal. L. Rev. 1395 (1997); Berta Esperanza Hernández-Truyol, *LatIndia II—Latinas/os, Natives, and Mestizajes—A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, and Nuevas Teorias*, 33 U.C. Davis L. Rev. 851 (2000); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 Ind. L.J. 1111, 1154 (1998). See generally Gerald P. López, *Learning About Latinos*, 19 Chicano-Latino L. Rev. 363 (1998); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 Harv. Women's L.J. 185 (1994); Rachel F. Moran, *Whatever Happened to Racism?*, 79 St. John's L. Rev. 899 (2005); Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 Cap. U. L. Rev. 13 (1998).

45. See, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998).

46. See, e.g., Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. Ill. L. Rev. 559; George A. Martínez, *Latinos, Assimilation, and the Law: A Philosophical Perspective*, 20 Chicano-Latino L. Rev. 1 (1999); Montoya, *supra* note 44.

47. See, e.g., Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 Wash. U. L.Q. 675 (2000).

48. See, e.g., Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 Wash. L. Rev. 629 (1995); see also Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 Chicano-Latino L. Rev. 118 (1995).

49. See, e.g., *Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States* (Juan F. Perea ed., 1997).

50. See, e.g., Chang & Aoki, *supra* note 44.

51. See, e.g., Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. Rev. 1509 (1995).

52. See, e.g., Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 La Raza L.J. 1 (1995); see also Johnson, *supra* note 44.

53. See, e.g., Kevin R. Johnson, *How Did You Get to Be Mexican? A White/Brown Man's Search for Identity* (1999).

54. See, e.g., Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 Fordham Urb. L.J. 1075 (1996); Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. Cal. L. Rev. 547 (1998); Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. Miami Inter-Am. L. Rev. 361 (1996-97).

55. See, e.g., Gerald P. Lopez, *Undocumented Mexican Migration, In Search of a Just Immigration Law and Policy*, 28 UCLA L. Rev. 615 (1981).

We note too that a few race scholars have begun to utilize these tools and insights in addressing more directly certain citizenship-related issues. For example, scholars such as Leti Volpp have used the tools described above in exploring the role of gender and notions such as “foreignness” in immigration and citizenship law.⁵⁶ Ian Haney López and others have also actively employed these tools in tracing the extent to which race has shaped legal doctrine and policies regarding retention of birthright citizenship and eligibility for naturalization.⁵⁷

Most recently, scholars have brought a CRT perspective to analyses of the dimensions of formal citizenship.⁵⁸ Devon Carbado has, for example, begun an exploration of the connection between American citizenship and racial identity.⁵⁹ Other scholars have concerned themselves with the meaning of race and citizenship in the aftermath of 9/11.⁶⁰ The treatment of Muslim citizens and noncitizens, for example, has been a frequent focus of scholars on this particular issue.⁶¹

II. GAPS IN CURRENT LEGAL SCHOLARSHIP ON CITIZENSHIP

What should be evident from the previous overview of mainstream immigration and CRT scholarship is that significant opportunities exist for collaboration between CRT and immigration scholars on citizenship matters. Without at all diminishing the breadth or richness of the

56. On issues of gender, see 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 (1996) (reviewing López, *White by Law*, *supra* note 40); Dorothy E. Roberts, *Who May Give Birth to Citizens? Reproduction, Eugenics, and Immigration, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States*, *supra* note 49, at 205; Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405 (2005). On the notion of foreignness, see Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261 (1997). See also Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People,”* 76 Or. L. Rev. 233 (1997) (book review); Romero, *supra* note 44. In Critical Race scholarship, the term “foreignness” has been used to describe the way that race has been employed to mark members of a certain group, such as Latinos or Asian Americans, as “outsiders,” individuals who do not “belong” to the common community. See Saito, *supra*.

57. See, e.g., Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 Or. L. Rev. 731 (1997); López, *White by Law*, *supra* note 40; Ian Haney López, *Racial Restrictions in the Law of Citizenship, in Racial Classification and History* 109 (Critical Race Theory: Essays on the Social Construction and Reproduction of “Race” Series No. 3, E. Nathaniel Gates ed., 1997).

58. See Leti Volpp, “*Obnoxious to Their Very Nature:*” *Asian Americans and Constitutional Citizenship*, 8 Asian L.J. 71 (2001).

59. See Carbado, *supra* note 29.

60. See Victor Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DePaul L. Rev. 871 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002); see also Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 20 Soc. Text 101 (2002); Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 Colum. Hum. Rts. L. Rev. 561 (2000).

61. See, e.g., Leti Volpp, *Citizenship Undone*, 75 Fordham L. Rev. 2579, (2007).

scholarship discussed in the previous section, our sense is that there is more to be done to bring together tools and insights from both immigration and CRT scholars productively to critique and explore questions of citizenship. In our view, a number of factors have prevented the synergy we envision from being fully achieved. We discuss a few of those factors in this part, and lay out our preliminary thoughts on approaches to bridging the gaps in the part that follows.

A. *Immigration Scholarship: The Gaps and What Accounts for Them*

One area where mainstream immigration legal scholars might have taken their work, but as yet most have not, is into an examination of various ways that race and citizenship interact. The tools and insights emerging from mainstream immigration scholarship are particularly well-suited to deepening our understanding of how race works in the context of citizenship. And race has long been a primary site for conflict about formal citizenship within the United States. From the debates about the status of Blacks that ensued in the wake of the Civil War; to the shameful history of race-based exclusions from naturalization in this country; to the recurring debate about whether the “new immigrants,” who are largely people of color, can be integrated into American society; to the concern that immigration has a particularly detrimental impact on poor and working class African Americans and other longtime citizens of color, the two concepts are intimately intertwined.

Nonetheless, whether they are delineating doctrine or laying out new theories of citizenship, the voices in legal academia most often heard addressing citizenship from an immigration perspective speak less about race than other dimensions of the concept. Mainstream immigration legal scholars recognize and critique the history of race-based restrictions on naturalization.⁶² But outside of this historical perspective, race is not prominent in their scholarship.⁶³ Another set of questions rarely addressed,

62. See, e.g., Aleinikoff, *supra* note 14, at 39-73; Motomura, *Americans in Waiting*, *supra* note 14, at 123-35; Spiro, *supra* note 14, at 602-04.

63. One exception is Peter Schuck, who has written on the question of the impact of immigrants on African Americans. See, e.g., Peter H. Schuck, *Reflections on the Effects of Immigrants on African Americans—and Vice Versa*, in *Help or Hindrance? The Economic Implications of Immigration for African-Americans* 361 (Daniel S. Hamermesh & Frank D. Bean eds., 1998). While race features less prominently as a theme in his scholarship, Hiroshi Motomura has characterized his own work as “think[ing] about issues of race and equality, but in the specific ways that the study of immigration and citizenship provoke.” Hiroshi Motomura, *Brown v. Board of Education, Immigrants, and the Meaning of Equality*, 49 N.Y.L. Sch. L. Rev. 1145, 1145 (2005). His recent book reflects these concerns. See Motomura, *Americans in Waiting*, *supra* note 14, at 123-35, 168-88. Other mainstream immigration scholars touch occasionally on issues of race, and in particular on either the racial dimensions of historical naturalization laws or the impact of immigration on African Americans. See, e.g., Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 Conn. L. Rev. 555, 560-61 (1996). Nevertheless, it is not a central or motivating concern in their immigration scholarship. Interestingly, this is so

although recently receiving attention from some Critical Race scholars as noted above, involves the way that race and racism interact with the formal citizenship regime, diminishing or distorting the value of status citizenship for people of color.⁶⁴

The sources of this relative silence are open to debate, but surely include a combination of the “lens of experience” through which immigration scholars, most of whom are white, view the topic of citizenship;⁶⁵ the historically doctrinal nature of immigration scholarship;⁶⁶ and the absence of tools within traditional immigration scholarship for exploring and interpreting the workings of race in citizenship policies. We also wonder whether part of the explanation lies with assumptions about who can properly be regarded as an “immigrant” and therefore what the appropriate subject of immigration scholarship is. On an intellectual level, immigration scholars are aware that large numbers of black people have immigrated to the United States from the Caribbean and, increasingly, from Africa.⁶⁷ But mainstream immigration scholarship to date arguably reflects the instinct that black people are not immigrants, and thus that the concerns of mainstream immigration scholarship are separate from those motivating “race” scholarship (often seen as the exploration of issues along a black/white binary).⁶⁸

B. *Critical Race Scholarship: The Gaps and What Accounts for Them*

While CRT scholars have engaged in important work on issues of race generally, the tools and insights enumerated above have not yet been brought to bear fully on questions of citizenship. As the previous section makes clear, it is by no means true that CRT scholars have not engaged citizenship issues at all. But our preliminary review of the literature suggests that CRT scholarship to date has most often focused on questions relating principally to substantive citizenship—e.g., the notion that there exists a second-class of citizens identifiable principally by race to whom

even when these scholars have addressed race directly when writing in other areas. See, e.g., T. Alexander Aleinikoff, *The Case for Race-Consciousness*, 91 Colum. L. Rev. 1060 (1991).

64. See *supra* notes 58-61 and accompanying text.

65. Kevin Johnson and others have attributed this phenomenon in the context of immigration scholarship generally to the “Imperial Scholar” problem first identified by Richard Delgado, where elite white scholars, who rarely engage explicitly with issues of race, are able to publish more prominently than scholars of color, and cite each other’s work to the exclusion of scholars of color, restricting the range of voices that are heard and respected on an issue. Johnson, *supra* note 3; see Delgado, *The Imperial Scholar*, *supra* note 13; Delgado, *The Imperial Scholar Revisited*, *supra* note 13.

66. *Id.*

67. See, e.g., Schuck, *supra* note 63, at 367.

68. See, e.g., Aleinikoff, *supra* note 63, at 1124. For an analysis of the use and limitations of the black-white paradigm often employed to discuss issues of race in the United States, see Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. Rev. 1283, 1305-1312 (2002); Foster & Lenhardt, *supra* note 12, at 15-16; Kevin R. Johnson, *Celebrating LatCrit Theory: What Do We Do When the Music Stops?*, 33 U.C. Davis L. Rev. 753, 758-59 (2002).

equality and certain basic entitlements, such as access to employment, adequate public schools, or housing, has been denied.⁶⁹ Citizenship as an organizing concept has rarely been interrogated by CRT scholars.

Without attempting to catalogue all of the reasons for this omission, it strikes us that part of it undoubtedly has to do with a recognition on the part of some scholars that, while legal rights have been important for racial minorities, the formal status of citizen has done relatively little to ensure belonging for racial minorities. Early efforts to curtail the substantive benefits of citizenship and the immediacy of persistent, race-based inequalities in core areas has arguably meant that inquiries into formal citizenship simply have not taken priority.⁷⁰

Additionally, our sense is that CRT's origins explain at least some part of its singular focus on substantive citizenship. Because CRT, in large part, originated as a response to the limitations of traditional civil rights scholarship, to the betrayal of modern race jurisprudence, and to the failure of legal movements such as Critical Legal Studies (CLS) to engage issues of race when offering a substantive alternative to liberalism in the law, the topics addressed in the early years of CRT focused closely on the failures of civil rights doctrine and on pointing out the problems inherent in the rights critique offered by CLS adherents.⁷¹

Finally, tracking the "lens of experience" view that we offered on immigration scholars, the phenomenon we describe might also be partially explained by the fact that the majority of scholars writing in the early years of CRT were U.S.-born African Americans who chose to concentrate on previously unexplored aspects of the experience of Blacks born in the United States.⁷² Latino/a and Asian scholars, as we indicated previously,

69. The literature bearing on notions of second-class citizenship is too vast to adequately summarize here. It arguably includes writing on topics as diverse as racial profiling, welfare rights, economic justice, and the persistence of racial inequalities in core areas such as education, employment, and housing. See generally Emma Coleman Jordan & Angela P. Harris, *Economic Justice: Race, Gender, Identity and Economics* (2005) (economic justice); Lenhardt, *supra* note 31, at 854 (persistent inequalities); López, *The Social Construction of Race*, *supra* note 40 (persistent stereotypes of race); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 Cal. L. Rev. 1647 (2005) (welfare and marriage); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775 (1999) (racial profiling).

70. Early cases in which attempts to limit the benefits of citizenship for groups such as African Americans are evident include *Strauder v. West Virginia*, 100 U.S. 303 (1879), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). For a discussion of efforts to undermine African Americans' economic and property rights during the Reconstruction period, see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 102-04, 136, 140 (1988).

71. See generally *Critical Race Theory: The Key Writings That Formed the Movement*, *supra* note 41.

72. Many of these scholars implicitly (some explicitly) embraced the black-essentialist view that race in the United States cannot be understood without first appreciating the experience and condition of African Americans. Angela Harris addressed this contention in a 1997 article with Leslie Espinoza. See Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar Baby—LatCrit Theory and the Sticky Mess of Race*, 85 Cal. L. Rev. 1585 (1997).

later expanded this focus by addressing topics, including immigration, relevant to their own unique experiences. But pressing immigration issues such as Proposition 187 and the harsh federal immigration reforms of 1996 initially took precedence, with more distant matters of citizenship taking a back seat until 9/11 gave them a similar immediacy.

III. TOWARD AN INTEGRATION OF THE RACE AND IMMIGRATION-RELATED DIMENSIONS OF CITIZENSHIP

In opening this essay, we used the stories of Hurricane Katrina and the immigrant protests to illustrate the ways that race and immigration hide behind each other—but are never absent or even fully concealed—in any account of American citizenship. We related those narratives as if they were distinct tales. But, in fact, in the aftermath of Katrina-struck New Orleans, the stories of African Americans as second-class citizens and of immigrants as exploitable noncitizens converged.

With housing stock diminished, schools in disarray, and decent work scarce, many black and white New Orleans residents declined to return to their native city in the months following the hurricane.⁷³ Meanwhile, workers of largely Latino descent arrived to take their place in rebuilding efforts led by private contractors.⁷⁴ What resulted from this convergence was a change in New Orleans almost as dramatic as that first effected by Katrina itself. With the influx of Latino/a workers, New Orleans, a city that had been 67% black and 28% white before the storm,⁷⁵ became one widely expected to be predominantly immigrant within the next few years.⁷⁶ Likewise, New Orleans, which had boasted one of the highest levels of union density in the South in 2000,⁷⁷ became a virtually nonunion town, as nonunionized contractors won bids on clean-up jobs.⁷⁸ In these

73. See Adam Nossiter, *New Orleans of Future May Stay Half Its Old Size*, N.Y. Times, Jan. 21, 2007, § 1, at 1 (“At the moment, the population [of New Orleans] is well below half [of its pre-storm population], and future gains are likely to be small.”).

74. Michael Kunzelman, *Katrina Catch-22: Labor Shortage Limits Rebuilding*, Chi. Trib., Oct. 8, 2006, § 16, at 73.

75. See U.S. Census Bureau, *New Orleans (City) QuickFacts*, <http://quickfacts.census.gov/qfd/states/22/2255000.html> (last visited Mar. 25, 2007).

76. See Bob Dart, *Forensic Experts Struggle to ID Katrina Victims: Federal Funds Now Pay for DNA Testing*, Atlanta J.-Const., Dec. 17, 2005, at A12; see also Arian Campo-Flores & T. Trent Gegax, *A New Spice in the Gumbo: Will Latino Day Laborers Locating in New Orleans Change Its Complexion?*, Newsweek, Dec. 5, 2005, at 46.

77. In 2000, New Orleans had an overall union density of 8.8%, placing it ahead of every Southern city except Louisville, Kentucky (14.6%) and Jacksonville, Tennessee (9.5%). Labor Research Ass’n, *Unions Have the Resources for Growth in Major Metropolitan Areas* (Sept. 9, 2001), available at <http://www.laborresearch.org/story2.php/12>.

78. Many union workers lost their jobs after Katrina. Other previously unionized work (such as garbage collection) was taken over by Federal Emergency Management Agency and is done on a nonunion basis. Mark Brenner, *Survival of the Fittest: Workers in the Aftermath of Katrina*, Counterpunch Online, Apr. 5, 2006, <http://www.counterpunch.org/brenner04052006.html>; see also Phillip Mattera, *Good Jobs First, Profiles of 12 Companies That Have Received Large Contracts for Cleanup and*

workplaces, terrible injuries, poor living conditions, and long hours of labor for minimal wages or less became commonplace.⁷⁹ New Orleans, never a workers' paradise, became a city in which worker exploitation was the norm.

In such a setting, it is difficult to avoid simultaneous consideration of the racial and the immigration dimensions of citizenship. In the real world, African Americans' and new immigrants' lives often converge. And they face intertwined and overlapping obstacles to the realization of citizenship as belonging. Obviously, one set of parallels emerges from the struggle of both groups to win the right to formal citizenship without distinctions based on race or ethnicity.⁸⁰ Of even greater interest to us, however, are the intersections between the two groups in their efforts to achieve participatory citizenship in all its dimensions (whether in the absence of formal citizenship status or after it has been granted). What is the impact of each group on the other, on the ways that their paths and lives intersect, and on how those experiences of intersection shed light on the challenges they face, both radically different and radically similar, in their efforts to live lives of full citizenship? Such questions are being asked with increasing frequency by social scientists working at the intersection of race and immigration.⁸¹

Reconstruction Work Related to Hurricanes Katrina and Rita 4 (2006), available at <http://www.goodjobsfirst.org/pdf/contractorprofiles.pdf>.

79. S. Poverty Law Ctr., *Broken Levees, Broken Promises: New Orleans' Migrant Workers in Their Own Words* (2006), available at http://www.splcenter.org/images/dynamic/legal/ijp_blbp.pdf. The problems have also been documented extensively in the press. See, e.g., Michael Martinez, *Big Easy Uneasy About Migrant Wave*, Chi. Trib., Nov. 3, 2005, § 1, at 1; Mary Lou Pickel, *Immigrant Workers Rile New Orleans*, Atlanta J.-Const., Oct. 19, 2005, at A1; Jonathan Tilove, *Cleanup Relies on Day Labor of Latinos*, Times-Picayune (New Orleans), Jan. 8, 2006, at A-1.

80. See *supra* Part II.A.

81. With regard to the intersection of African Americans and immigrants at work, social scientists have been primarily concerned with two issues: job competition between African Americans and immigrants, and employer attitudes toward race and ethnicity in hiring. For sources providing economic analyses of the degree of job competition between the two groups, see *infra* notes 96-97. Sociologist Roger Waldinger has been a leader in empirical research on employer attitudes toward black workers and immigrants. See, e.g., Roger Waldinger, *Still the Promised City? African Americans and New Immigrants in Postindustrial New York* (1996); Roger Waldinger & Michael I. Lichter, *How the Other Half Works* (2003); Michael Lichter & Roger Waldinger, *Producing Conflict: Immigration and the Management of Diversity in the Multiethnic Metropolis*, in *Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America* 147 (John David Skrentny ed., 2001). Legal scholar Leticia Saucedo explores these issues in depth in a recent article. See Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 Ohio St. L.J. 961 (2006).

Until recently, relatively few social scientists had focused in any depth on the interactions between the two groups within the workplace. For one exception, see Alex Stepick et al., *Brothers in Wood, in Newcomers in the Workplace* 145 (Louise Lamphere, Alex Stepick & Guillermo Grenier eds., 1994) (examining relationships between African Americans and immigrant workers of various ethnicities in the Miami construction industry). For sources evidencing a very recent surge in interest in the interaction question, see *infra* note 96.

What follows are our preliminary thoughts on how we and other legal scholars might engage more deeply in that conversation.⁸²

In her book *American Citizenship*, political scientist Judith Shklar offers a useful starting point from which to view these intersections.⁸³ Shklar argues for a conception of “citizenship as standing,” which she roots in two activities: voting and earning.⁸⁴ Shklar tracks the efforts of various groups—primarily African Americans, but also women, Native Americans, and others—to gain and to exercise these “most elementary and essential components” of citizenship,⁸⁵ through which full citizenship is earned and without which, she argues, it cannot be exercised.⁸⁶

We find Shklar’s concept of standing in relation to full citizenship particularly helpful in illuminating the histories of struggle that lie behind the current experiences of citizenship by new immigrants and African Americans. We would, however, build on Shklar’s framework in two ways. First, we would focus not merely on standing, but on the many formal and informal pathways that exist to the genuine possession and exercise of citizenship in the United States. In this connection, we would also broaden the list of activities Shklar identifies to include other aspects of citizenship, among them assimilation, a broader concept of political participation, public education, and work more generally.

It is interesting to note that immigration and Critical Race scholars have separately considered a number of the pathways just identified. For example, as noted above, immigration legal scholars have considered the varying forms of political participation by immigrants, both inside the United States⁸⁷ and in their home countries, and have argued both for and against the extension of the vote to noncitizens in state and local elections.⁸⁸ Critical Race theorists have noted and decried the disenfranchisement of African American citizens both historically and currently,⁸⁹ and have suggested various potential remedies.⁹⁰ But in neither field of legal scholarship has the intersection between the two been fully explored.⁹¹ Is

82. As we discuss above, in so doing we join scholars such as Devon Carbado and Leti Volpp, whose work explicitly addresses these issues. *See supra* notes 58-61 and accompanying text. Other legal scholars, less concerned with citizenship per se, have explored the workings of race and immigration status in the workplace from an employment law perspective. *See, e.g.,* Saucedo, *supra* note 81.

83. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (1991).

84. *Id.* at 101.

85. *Id.*

86. *Id.* at 100-01.

87. *See* Linda Bosniak, *Citizenship and Work*, 27 N.C. J. Int’l L. & Com. Reg. 497, 504-06 (2002).

88. For sources discussing noncitizen voting, *see supra* note 91.

89. *See, e.g.,* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 685, 699-700 (2004).

90. *See* Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 14-16 (1994) (discussing cumulative voting).

91. A number of LatCrit and APA Crit scholars have critiqued the disenfranchisement of Latinos and Asians as voters and offered perspectives on the possibility of coalition politics, using (among others) the CRT lenses developed in the African American context. *See, e.g.,*

political participation a zero sum game, so that the more active immigrants become, the less power African Americans have? Do the strategies of immigrants who are denied the formal right to participate politically, yet manage to do so nonetheless, offer new possibilities for African Americans and others who are technically full citizens but whose voices and votes often go unheard? Conversely, are there lessons for immigrants striving to win legal recognition of their rights, in the experience of African Americans and other groups in the ways that citizenship granted by law is limited by ongoing racial discrimination?

Shklar's idea of earning as a citizenship activity, which has been further elaborated by such legal scholars as Kenneth Karst, William Forbath, and Vicki Schultz, provides another example.⁹² Rights in the workplace have long preoccupied both immigration and Critical Race scholars. Race theorists have explored racial discrimination on the job, both structural and informal, and examined the way that racial minorities "work" their identities to succeed in their careers.⁹³ In the immigration field, the rights of undocumented immigrants as workers, and the issue of language rights in the workplace, have drawn particular attention.⁹⁴ But as with the other

Kathay Feng, Keith Aoki, & Bryan Ikegami, *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 Or. L. Rev. 849 (2002); Sylvia R. Lazos Vargas, *The Latina/o and APIA Vote Post-2000: What Does It Mean To Move Beyond "Black And White" Politics?*, 81 Or. L. Rev. 783 (2002); see also April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 Asian Pac. Am. L.J. 163 (1996); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 La. L. Rev. 759 (2003). Nonetheless, the questions we suggest for exploration in the remainder of this paragraph remain largely unaddressed in the legal literature.

92. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 Cornell L. Rev. 523 (1997); Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1886-88 (2000).

93. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365; Carbado & Gulati, *supra* note 42; Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 Afr.-Am. L. & Pol'y Rep. 1, 20-26 (2005); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 Iowa L. Rev. 931 (2005); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 Wis. L. Rev. 1283, 1293; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev. 1134 (2004); Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 779-81 (2002).

94. A small sampling of the burgeoning literature on undocumented workers rights would include Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L.J. 2179 (1994); Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. V. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context And Beyond*, 22 Hofstra Lab. & Emp. L.J. 473 (2005); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345 (2001); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 Geo. Immigr. L.J. 651 (2005). Examples

pathways to citizenship that we highlight, there is a hole in the middle. Few, if any, immigration or Critical Race scholars have turned to the interactions between new immigrants and long-standing citizens of color in the workplace, or explored the sources of the varying conflicts and solidarities that have developed over time between and across race and ethnicity at work.

In the next part, we offer a snapshot of the next stage of our larger collaborative project, which will both further develop the notion that there exist multiple formal and informal pathways to citizenship and explore in detail one of these pathways, that of work, from the perspectives of longtime citizens of color and new immigrants (most of whom are also people of color). The relationship between these groups, we contend, can be parsed and interpreted in ways that ultimately serve to make each group much more intelligible to the other, and that may ultimately open new possibilities for solidarity and coalition building both in the workplace and outside it.

Before suggesting how this might be done, however, we think it important first to identify the principles that might guide an effort to bridge the gaps between immigration and race scholarship about citizenship more generally. In our view, a constructive joint exploration that draws on the insights of both immigration and Critical Race scholarship would be conducted through a perspective that

- is committed to exploring citizenship in all of its dimensions and expressions, both as defined by formal state policy and as understood and expressed by human beings without government permission;
- is cognizant of globalization as a powerful force in the world today, of its impact on the countries in the Global South and its manifestation in increased migratory flows, and of the challenges that these phenomena pose to a nationally bounded, domestic concept of citizenship;
- is equally cognizant of the unique struggle of African Americans in U.S. history, and of the important and multidimensional role that a nationally bounded, domestic concept of citizenship has played in that struggle;
- is engaged at the intersection of these two pathways, asking questions like, “How would greater fluidity in our concept of citizenship affect African Americans and other citizens of color, who have long relied on formal citizenship as a leverage point to gain rights?” and “What is the price—and who pays it—when citizenship is defined in bounded ways

of scholarship on language rights in the workplace include Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 Cal. L. Rev. 1347 (1997); Juan F. Perea, *English-Only Rules and the Right To Speak One's Primary Language in the Workplace*, 23 U. Mich. J.L. Reform 265 (1990); Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 Nw. U. L. Rev. 1689 (2006).

that do not reflect the experiences and contributions of new immigrants?";

- understands the United States as multiracial and multiethnic and appreciates that its current context cannot be adequately understood without paying attention to the experiences of groups such as Latinos and Asian Americans;
- views race and ethnicity as aspects of identity that are both socially constructed and developed or “worked” from within;
- sees the intersection of identities (including not just race and ethnicity but gender, disability, and sexual orientation) and communities as particularly fruitful points for exploration;
- is interdisciplinary—using historical information, social science data, and oral history and narrative, among other things—to interpret the past, understand the present, and gain insight on future courses of action; and
- seeks to acknowledge and understand genuine conflicts and tensions between communities where they exist, but also to highlight commonalities and points of actual and potential collaboration.

IV. APPLYING THE INSIGHTS: WORK AS A PATH TO CITIZENSHIP FOR AFRICAN AMERICANS AND LATINO IMMIGRANTS

We identified *work* as the subject of the next stage of this project because, as scholarship by Judith Shklar and others confirms, *work is an important pathway to citizenship for all*.⁹⁵ At the same time, our strong sense is that the elements of work as a citizenship right—including, at a minimum, the right to work for pay (as opposed to laboring under a regime of slavery), access to decent work, and freedom from discrimination at work—have not been fully explored. Moreover, we are persuaded that the citizenship-promoting components of work are not necessarily experienced in the same way by all groups. The questions that engage us include, Are work and citizenship interrelated in similar or distinct ways for new immigrants and longtime citizens of color? Is work as a pathway to citizenship infinitely expandable, or must groups compete to get, and stay, on that road?

Work has often been the terrain on which the relationship between immigrants and African Americans has played out. In the popular press, the relationship is repeatedly portrayed as one of conflict, with a predictable outcome: Immigrants compete with black people for jobs, and immigrants win the competition, leaving African Americans evermore economically

95. See *supra* notes 83-86 and accompanying text.

disadvantaged.⁹⁶ Studies by social scientists tell a more complex and muddled tale, drawing varying conclusions about whether (and if so which, why, and how much) African Americans are harmed by job competition from new migrants.⁹⁷ But numbers tell only a relatively small part of the story, and do little to account for the enduring power of the conflict—real and imagined—between Blacks and new immigrants over work.

Our forthcoming exploration of work as a pathway to citizenship will, quite naturally, focus to some extent on case law relating to work and citizenship. For example, the treatment of work history and productivity in hearings bearing on one's moral character and fitness for naturalization purposes will be one point of inquiry. Our goal in this project, however, will be to paint a fuller picture than traditional doctrinal analyses typically produce on their own. We will thus use the tools of both immigration legal scholarship and Critical Race Theory to shed light on how the law—whether it be immigration law, antidiscrimination law, or labor law—has operated to construct and constrain the options that new immigrants and African Americans have in the workplace.

We will employ these tools not just to map the positions that new immigrants and African Americans have taken on matters of work, but also to understand more completely how and why they have done so. This will necessarily involve an historical inquiry into the different roads that African Americans and new immigrants have walked to the modern workplace. We

96. Andrew LePage, *Foreign Influx a Boon to Wages?*, Sacramento Bee, Mar. 6, 2006, at E1 (“There is no group that has benefited less from immigration [than African Americans]” (quoting a statement of Vernon Briggs, a labor economist at Cornell University)); Roger Lowenstein, *The Immigration Equation*, N.Y. Times, July 9, 2006, § 6 (Magazine), at 36 (paraphrasing the argument of George Borjas that “immigrants hurt the economic prospects of the Americans they compete with. And now that the biggest contingent of immigrants are poorly educated Mexicans, they hurt poorer Americans, especially African-Americans, the most”); Ed Morales, *When Friends Become Foes in the Immigration Fight*, Star-Ledger (N.J.), July 9, 2006, § 10, at 1 (“In recent months, many African-American leaders around the country have expressed concern that immigrant workers have driven down wages and reduced the number of unskilled and semi-skilled jobs available for their community’s workers.”); Rachel L. Swarns, *Bridging a Racial Rift That Isn’t Black and White*, N.Y. Times, Oct. 3, 2006, at A1.

97. In 1997, a study by a panel of demographers commissioned by the National Academy of Sciences concluded that immigration had substantial net positive effects in the United States, but that it placed measurable—although slight—downward pressure on the wages and work opportunities of low-skilled workers who compete with immigrants for jobs, particularly those who had not completed high school. See The New Americans: Economic, Demographic, and Fiscal Effects of Immigration (James P. Smith & Barry Edmonston eds., 1997). The debate flourished before that study and has continued unabated since. Among those economists recently concluding that job competition from new immigrants does not seriously harm U.S. workers, see George J. Borjas, Heaven’s Door: Immigration Policy and the American Economy 62-86 (1999); George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q.J. Econ. 1335 (2003). For recent scholarship reaching the opposite conclusion, see David Card, *Immigrant Inflows, Native Outflows and the Local Labor Market Impacts of Higher Immigration*, 19 J. Lab. Econ. 22 (2001); David Card, *Is the New Immigration Really So Bad?*, 115 Econ. J. 300 (2005). For an overview of the issues under debate, see Lowenstein, *supra* note 96.

know, for example, that contesting the terms and pace of work was viewed by Blacks during Reconstruction as an essential component of securing the benefits of citizenship.⁹⁸ We know too that many new immigrants understand whatever welcome they receive in this country to be contingent on their willingness to labor without complaint under difficult conditions.⁹⁹ In what other ways are the two groups' labor histories, both of which include experiences of migration for work, divergent, and in what ways are they similar? How have those similarities and differences influenced the positions in which new immigrants and African Americans find themselves in the modern workplace, and how do they shape their various options for acquiescence, solidarity, and resistance?

Further, we will employ the tools for critical engagement offered by CRT and immigration scholarship to understand the current work context for new immigrants and African Americans. To some extent, this will involve mining the existing literature about African American and immigrant experiences with discrimination in hiring and at work, as well as incorporating empirical data on the existence and effects of intergroup competition for work.¹⁰⁰ It will also involve considering scholarship on the general racial attitudes held by members of each group,¹⁰¹ and reviewing very recent studies by anthropologists, sociologists, political scientists, and economists (as yet largely unpublished) of relationships between black workers and new immigrant workers in a particular context: jobs in cities that represent new destinations for migrants, particularly in the American South.¹⁰² Our goal will be to understand from this research the degree to which conflict and solidarity have actually been manifested in workplaces where the two groups meet, and, among other things, to explore

98. Cf. Foner, *supra* note 70, at 102-04, 136, 140.

99. See, e.g., Gordon, *supra* 21.

100. See Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution In the Workforce and the Unfulfilled Promises That Remain*, 22 Hofstra Lab. & Emp. L.J. 627, 661-63 (2005); Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 Soc. Probs. 433, 433-47 (1991); Sam Fulwood III, *U.S. Blacks: A Divided Experience*, L.A. Times, Nov. 25, 1995, at A1.

101. See Paula D. McClain et al., *Racial Distancing in a Southern City: Latino Immigrants' Views of Black Americans*, 68 J. Pol. 571 (2006); Manuel Pastor, Jr. & Enrico Marcelli, *Somewhere Over the Rainbow?: African Americans, Unauthorized Mexican Immigration, and Coalition Building*, Rev. Black Pol. Econ., Summer-Fall 2003, at 125; Nat'l Conference, *Taking America's Pulse: The National Conference Survey on Inter-Group Relations* (1994), available at http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/84/59.pdf; cf. Bill Fletcher, Jr., *Blacks Should Embrace Immigrant Workers*, Sacramento Observer Online, May 11, 2006, http://www.sacobserver.com/news/commentary/062503/black_embrace_immigrants.shtml.

102. We have in mind here work in progress on the relationship of African American and Latino/a workers in the workplace by Barbara Ellen Smith (on Memphis, Tennessee), Helen Marrow (on eastern North Carolina), Jamie Winters (on Nashville, Tennessee), and others. Additional studies will be included in *New Faces in New Places: The Changing Geography of American Immigration* (Douglas S. Massey ed., forthcoming 2007).

how this might affect opportunities for coalition building on a larger scale between these two groups.

Although the idea of “work as a path to citizenship” is fundamentally appealing to us, we intend to interrogate the concept thoroughly in light of our findings. To what extent are the jobs most available to black and new immigrant workers of the quality that they can credibly be held up as stepping stones to full citizenship? In the case of immigrants, how useful is the theoretical construct of work as a pathway to citizenship if it is set against a background of the continued denial of status citizenship? Who is excluded from citizenship if work becomes one of its key hallmarks?

It is our belief that by considering the concept of work as a path to citizenship for new immigrants and African Americans together, we will be able to provide a far richer critique and reconstruction of the concept than the consideration of either group alone would permit.

CONCLUSION

Our goals in this essay were relatively modest. We set out first to echo calls for more nuanced approaches by immigration and CRT scholars to questions of citizenship by pointing out the race- and immigration-based dimensions of the story of post-Hurricane Katrina New Orleans. In this connection, we sought both to highlight the possibilities that the tools currently employed by immigration and CRT scholars hold for more in-depth understandings of citizenship and to identify the factors that have previously been a barrier to the kind of treatment of citizenship-related matters we advocate.

Second, we suggested how the tools and insights developed by immigration and CRT scholars might be applied together in interrogating questions of citizenship. We identified topics that could be productively explored by scholars from these two fields, and briefly described the collaborative project on which we have recently embarked, a project that seeks to shed light on a long-standing tension between African American and Latino/a workers in the workplace. We did this not by simply repeating the claims made by individuals from these groups, but by trying, however briefly, to illuminate how differences in experiences with work and its role as a path to citizenship—formal, but also substantive—might affect workplace relationships between African American and new immigrant workers.

We thus save for a later date a more fulsome explication of our project. Instead, in these pages, we have celebrated Fordham University School of Law’s Centennial in a way that feels particularly fitting, given the school’s historical commitment to training new immigrants and to serving the community: by arguing for the interweaving of two important strands of legal theory, with the goal of deepening our understanding of the new dimensions of citizenship in American society today.

Notes & Observations