Fordham Law Review

Volume 85 | Issue 4 Article 7

2017

American Nationals and Interstitial Citizenship

Rose Cuison Villazor
UC Davis King Hall School of Law

AMERICAN NATIONALS AND INTERSTITIAL CITIZENSHIP

*Rose Cuison Villazor**

Citizenship scholarship is pervasively organized around a binary concept: there is citizenship (which is acquired at birth or through naturalization) and there is noncitizenship (which accounts for everyone else). This Article argues that this understanding is woefully incomplete. In making this argument, I tell the story of noncitizen nationals, a group referred to by this Article as American nationals. Judicially constructed in the 1900s, and codified by Congress in 1940, American nationals possess some of the rights inherent to citizenship, such as the right to enter and reside in the United States without a visa. Yet, they do not have the right to vote or to serve on a jury. Thus, contrary to the usual binary framing of citizenship, the category of American nationals suggests that many people qualify as neither citizens nor aliens.

Although American national status has existed for over a century, very little is known about how this status became part of U.S. nationality law. This Article aims to reverse this oversight by exploring the legal construction of noncitizen national status and its implications for our understanding of citizenship. In so doing, this Article makes two contributions. The first and primary goal of this Article is to complete our legal historical knowledge about how law has conferred and denied citizenship. Specifically, this Article examines key congressional, judicial,

* Professor of Law, UC Davis King Hall School of Law. I am grateful for comments and feedback I received about this project from Christina Duffy Ponsa, Kevin Johnson, Gabriel "Jack" Chin, Michelle Adams, Elise Boddie, Jennifer Chacon, Veena Dubal, Andrew Gilden, Rachel Godsil, Pratheepan Gulasekaram, Angela Harris, David Horton, Courtney Joslin, Joseph Landau, Carlton Larson, Stephen Lee, Robin Lenhardt, Henry Monahan, Hiroshi Motomura, Melissa Murray, David Pozen, Andrea Roth, Brian Soucek, and attendees of the Association for American Law Schools Annual Conference (January 2012), Association of Asian American Studies Conference (2014), Columbia Law School Faculty Workshop, Rutgers University School of Law, Law & Society (2015), Santa Clara School of Law, UC Berkeley School of Law Asian Pacific American Law Students Spring 2014 Symposium, UC Davis School of Law Aoki Critical Perspectives Workshop, and UCLA Whiteness as Property Conference (Fall 2014) where I presented an earlier version of this Article. An earlier version of this Article was selected from a call for papers for a panel on birthright citizenship at the 2012 AALS Constitutional Law Section. I am grateful to UC Davis School of Law reference librarian Elisabeth McKechnie for outstanding archival research assistance, Noel Abcede ('14), Andrew Alfonso ('15), Sarah Chi ('15), Jamie Knauer ('17), Jose Mafnas ('16), Anna Pifer-Foote ('16), Chanpreet Singh ('15), Steven Vong ('16), and Vicky Yau ('17) for their excellent research assistance and to Miranda Lievsay and the staff of the *Fordham Law Review* for their helpful technical and editorial assistance.

and executive actions between 1898 and 1940 that led to the creation of this liminal form of political membership for Americans living in the U.S. territories. Second, this Article introduces two conceptual frameworks that flow from noncitizen national status: interstitial citizenship and unbundling citizenship. That is, American nationals disrupt the binary framing of citizenship by occupying the space between the citizen and the alien. This liminal status, which this Article calls interstitial citizenship, reveals that citizenship is far more fluid than previously appreciated. Moreover, this flexible form of citizenship suggests that the rights of citizenship may be unbundled. Notably, both interstitial citizenship and unbundling citizenship have legal and policy implications for immigration reform.

INTRODUCTION

The law of citizenship[1] is typically framed as a binary concept. There is citizenship (which is acquired at birth[2] or by naturalization[3]) and there is noncitizenship (which accounts for everyone else). Along this bright-line division, citizenship is typically considered the ideal status because of its attendant rights and benefits, including the right to vote,[4] the right to run for office,[5] the right to serve on a jury,[6] the right to enter the United States,[7] and the right to remain in the United States without fear of deportation.[8]

This dichotomous framing of citizenship, however, is woefully incomplete. What has been overlooked is a different type of political category that, like U.S. citizenship, is also acquired at birth: the noncitizen

---

1. The meaning and substance of citizenship is highly contested. *See generally* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006); ELIZABETH COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS (2014). In this Article, I use the term "citizenship" to refer to formal citizenship or membership in a political community and the rights that flow to the individual based on this membership. *See* BOSNIAK, *supra*, at 19 (stating that citizenship "designates formal, juridical membership in an organized political community").

2. *See* U.S. CONST. amend. XIV, § 1 (stating that persons born in the United States and subject to its jurisdiction obtain citizenship); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (noting that the Fourteenth Amendment, "in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States"). Individuals who are born abroad may also acquire citizenship at birth provided they satisfy the requirements set forth by statute. *See* 8 U.S.C. § 1401(c) (2012) (a child born abroad to two U.S. citizen parents acquires U.S. citizenship provided that one of the parents had a residence in the United States or one of its outlying possessions prior to the child's birth); *id.* § 1401(g) (a child born abroad to one U.S. citizen parent and one alien parent acquires U.S. citizenship at birth); *id.* § 1409(a)(1)–(4) (a child born abroad out of wedlock to a U.S. citizen father acquires citizenship if the child meets the conditions provided); *id.* § 1409(c) (a child born abroad out of wedlock to a U.S. citizen mother acquires citizenship if the mother was a U.S. citizen at the time of the child's birth and if the mother was previously physically present in the United States or its territories for a continuous period of one year).

3. *See id.* § 1427 (outlining the requirements for naturalization).

4. *See* 52 U.S.C. § 10101(a)(1) (granting all qualified citizens of the United States the right to vote); *see also* Reynolds v. Sims, 377 U.S. 533, 554 (1964) (recognizing that all qualified citizens have a right to vote).

5. *See* U.S. CONST. art. II, § 1, cl. 5 (stating that the President of the United States must be a "natural born Citizen"); *id.* art. I, § 2, cl. 2 (stating that a member of the House of Representatives must be "seven Years a Citizen of the United States"); *id.* art. I, § 3, cl. 3 (stating that a Senator must be "nine Years a Citizen of the United States").

6. *See* Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973) ("This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights."); *see also* Foley v. Connelie, 435 U.S. 291, 296 (1978) ("[A] State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. Similar considerations support a legislative determination to exclude aliens from jury service.") (citations omitted).

7. *See* Nguyen v. INS, 533 U.S. 53, 67 (2001) (recognizing that a citizen of the United States is entitled to "the absolute right to enter its borders").

8. *See* 8 U.S.C. § 1227(a) (identifying the categories of noncitizens who are subject to removal from the United States); Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) (stating that citizens have the right to remain in the United States).

national ("the American national"). As this Article explains, American national status occupies the space between citizenship and alienage and, thus, is a distinct category. On the one hand, the law treats its holders, in some ways, as if they are U.S. citizens. Having acquired American national status based on birth in a U.S. territory, American nationals owe allegiance to the United States and thus are recognized as members of the American polity.[9] Indeed, the Immigration and Nationality Act (INA) does not apply to them because they are not "aliens"[10]: they have U.S. passports and accordingly do not need visas to enter the United States.[11] Additionally, American nationals are not subject to the deportation laws because U.S. territories are part of the United States.

Yet, on the other hand, the law treats American nationals as noncitizens. By virtue of their alienage, they are ineligible to vote in federal, state, and local elections.[12] They are unable to serve on a jury[13] and bear arms.[14] Moreover, they are excluded from certain federal and state jobs.[15]

Although millions of people who were born in U.S. territories acquired after the Spanish-American War of 1898—Guam, the Philippines, Puerto Rico, American Samoa, and the Virgin Islands—have held this status, very little is known about it.[16] Far from a historical relic, noncitizen national remains the status of people who are born in American Samoa today.[17] The 2016 case of *Tuaua v. United States*,[18] which upheld the constitutionality of

9. *See* 8 U.S.C. § 1101(a)(22) (defining a national of the United States as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States"); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 72 (2013) ("Like citizens, nationals are part of the American polity, but they do not have all of the same rights and privileges."); *see also* Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D.D.C. 2013).

10. *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States").

11. U.S. nationals may apply for "certificates of non-citizen national status." *See id.* § 1452(b). However, the U.S. Department of State has since declared that those eligible for a certificate should instead apply for a U.S. passport. *See Certificates of Non Citizen Nationality*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/legal–considerations/us–citizenship–laws–policies/certificates–of–non–citizen–nationality.html (last visited Feb. 16, 2017) [https://perma.cc/CBE3-DUZC]. Nationals of the United States "shall not be issued a visa or other documentation as an alien for entry into the United States." Documentation of Nationals, 22 C.F.R. § 40.2(a) (2011).

12. *See* Foley v. Connelie, 435 U.S. 291, 296 (1978) (stating that "it is clear that a State may deny aliens the right to vote").

13. *See* Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976).

14. For a discussion of noncitizens' ambiguous Second Amendment rights, see Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521 (2010).

15. Many public sector jobs require U.S. citizenship as a condition of employment, which has been found constitutional. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 444–47 (1982) (upholding a California statute requiring that all peace officers be U.S. citizens).

16. *See infra* Part II.

17. *See infra* Part I.

18. 788 F.3d 300 (D.C. Cir. 2015) (holding that the Citizenship Clause did not grant birthright citizenship to American Samoans). On June 13, 2016, the Supreme Court denied certiorari, thus affirming the D.C. Circuit's holding. Tuaua v. United States, 136 S. Ct. 2461 (2016).

American Samoans' noncitizen national status, brought attention to this largely ignored political category.[19] Media coverage of this case has shown extreme puzzlement over this unusual status,[20] highlighting the need to explore further the legal and historical factors that led to the inclusion of noncitizen nationals in federal law and how this status impacts our current understanding of citizenship.

This Article is the first of a three-part series that closely examines noncitizen national status and other liminal forms of membership and their potential to reframe our understanding of citizenship.[21] In this Article, I make two specific contributions. The first—which I intend to be this Article's primary contribution—is to complete the legal historical account of how noncitizen national status came to be part of U.S. citizenship law. In particular, I bring to light the key congressional, judicial, and executive actions between 1898 and 1940 that led to the invention and codification of American nationals in U.S. nationality law. Although scholars have examined the Supreme Court's role in the construction of American national status,[22] no one has examined how and why Congress codified the

19. Garrett Epps, *Can the Constitution Govern America's Sprawling Empire?*, ATLANTIC (Dec. 20, 2015), http://www.theatlantic.com/politics/archive/2015/12/can–the–constitution–govern–americas–sprawling–empire/421389/ [https://perma.cc/2PED-JHBT]; Noah Feldman, *People of American Samoa Aren't Fully American*, BLOOMBERG: VIEW (Mar. 13, 2016), http://www.bloomberg.com/view/articles/2016–03–13/people–of–american–samoa–aren–t–fully–american (discussing the *Tuaua* case) [https://perma.cc/9CLM-ZRL9].

20. *See, e.g.*, Ashby Jones, *Samoans' Lawsuit Seeks Automatic U.S. Citizenship*, WALL ST. J. (July 13, 2012), http://www.wsj.com/articles/SB10001424052702303644004577523291350498870 (discussing the *Tuaua* case and birthright citizenship in American Samoa) [https://perma.cc/L7G5-5PCL]; *Last Week Tonight with John Oliver: U.S. Territories* (HBO television broadcast Mar. 8, 2015) (bringing awareness to the status of American Samoans through satire); *see also Samoans Don't Have Right to U.S. Citizenship, Court Rules*, PBS (June 5, 2015), http://www.pbs.org/newshour/rundown/american-samoans-dont-right-u-s-citizenship-court-rules/ (discussing the holding in *Tuaua*) [https://perma.cc/A2E4-5H4S].

21. In embarking on this new research agenda, I aim to explore how law has constructed interstitial political categories such as American nationals, the implications of in-between lawful categories for our understanding of what it means to belong to the United States and whether law, as a normative matter, should continue to foster such intermediate categories or create a hard citizen/noncitizen line. This Article focuses primarily on the legal construction and codification of American national status. Other writing projects explore more deeply the contemporary implications of the concept of interstitiality and the various legal and social consequences of cultivating a nonbinary framework of citizenship law.

22. *See generally* Christina Duffy Burnett, *"They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659 (2008) (exploring how overlapping legal traditions shaped imperialistic ideas in the United States, particularly the notion of the U.S. national); Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals or Aliens*, 3 COLUM. L. REV. 13 (1903) (examining the noncitizen status of Puerto Ricans and Filipinos); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181 (2014) (exploring the history of U.S. national status as applied to Puerto Rico); Dudley O. McGovney, *Our Non-citizen Nationals, Who Are They?*, 22 CALIF. L. REV. 593 (1934) (explaining which people are considered noncitizen nationals and arguing that there is no reason to perpetuate the status); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 3 (1998) (describing the treatment of Puerto Ricans as inferior to U.S. citizens as the "alien-citizen paradox"); Donald S. Leeper, Recent Decisions, *International Law: Effect of Philippine Independence on Filipino Citizens Resident in the*

status in the federal nationality code in 1940.[23] Learning the codification process is important for gaining a fulsome appreciation of the contemporary statutory meaning of American national. Importantly, through this historical discussion, I show that the story of American nationals is an overlooked story about racial exclusion from citizenship. This history ought to serve as a guidepost for future discussion about varied forms of membership.

Second, I call attention to two interrelated descriptive and theoretical concepts about citizenship that may be gleaned from American national status. The first is a political category that I have coined "interstitial citizenship."[24] Analyzing cases involving American nationals, I describe the extent to which noncitizen nationals, as interstitial citizens, enjoy some rights of citizenship despite their technical noncitizen category.[25] By occupying the interstices of the line between citizens and aliens, noncitizen nationals disrupt the citizen/noncitizen binary. This disruption leads to the second theoretical concept. Specifically, noncitizen nationals reveal that citizenship rights may be disentangled from formal citizenship and that

United States, 50 MICH. L. REV. 159 (1950) (discussing the changing status of Filipinos). For further commentary on noncitizen national status, see Adam Clanton, *Born to Run: Can an American Samoan Become President?*, 29 UCLA PAC. BASIN L.J. 135 (2012) (discussing the unique citizenship status of American Samoans in the context of presidential eligibility), and Benjamin S. Morrell, *Some More for Samoa: The Case for Citizenship Uniformity*, 9 TENN. J.L. & POL'Y 475 (2014) (explaining that American Samoans are currently the only Americans born noncitizen nationals).

23. Only three (brief) articles have explored the Nationality Act of 1940. *See* Charles Cheney Hyde, *The Nationality Act of 1940*, 35 AM. J. INT'L L. 314 (1941); George S. Knight, *Nationality Act of 1940*, 26 A.B.A. J. 938 (1940); Note, *The Nationality Act of 1940*, 54 HARV. L. REV. 860 (1941).

24. In a current project, which is tentatively titled "Unbundling Citizenship," I more deeply explore the meaning of "interstitial citizenship" and "unbundling citizenship," as well as the implications of these terms for contemporary immigration reform. Another project, "Resisting Citizenship," further expands on the disaggregation of citizenship rights and considers what it means that certain noncitizens have opted to reject citizenship. Finally, in "Imposing Citizenship," I explore the extent to which citizenship was foisted upon individuals and the implications of the imposition of membership for our broader understanding of citizenship.

25. To be sure, one account that may be told about American nationals is that their differentiated rights demonstrate their subordinated and second-class citizenship status. Indeed, the plaintiffs in *Tuaua* contend precisely this point. *See* Petition for Writ of Certiorari at 2, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 15-981), 2016 WL 386730, at *18. It should be noted, however, that the American Samoan government, on behalf of the American Samoan people, have rejected citizenship and opted to maintain their American national status. *See* Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega, *Tuaua*, 788 F.3d 300 (No. 13-5272), 2014 WL 4199267, at *23–35. This Article does not quarrel with the *Tuaua* plaintiffs' claim that American national status relegates these people to second-class citizenship. Indeed, along with other constitutional law scholars, I submitted an amicus brief to the U.S. Supreme Court contending that American national status is an inferior political status that is questionable under the Fourteenth Amendment. *See* Brief of Citizenship Scholars as Amici Curiae in Support of Petitioners, *Tuaua*, 788 F.3d 300 (No. 15-981), 2016 WL 860971, at *2. However, in this Article, I am interested in examining a different way of looking at American nationals—as interstitial citizens. Further, I do not see this framing as inconsistent with the view that American national status is an inferior form of political membership.

citizenship is far more fluid and malleable than its conventional framing suggests. That is, citizenship may be unbundled. Invoking the bundle of sticks analogy in property law,[26] and drawing from legal scholarship on "unbundling,"[27] as well as political scientist Elizabeth Cohen's seminal work on "semi-citizenship,"[28] I lay the foundation for my claim that the rights of U.S. citizenship may also be disaggregated. I contend that this conception of citizenship has potential application to contemporary discussions on comprehensive immigration reform.

Beyond this scholarly contribution, this Article tells the story of American nationals for larger normative reasons. In particular, I contend that an examination of this neglected story deepens our understanding of the ways in which both Congress and the courts decided who should become full members of the American polity. Thus, on a larger scale, narrating their experience helps to complete our legal, historical, and doctrinal understanding of the ways in which the law decides how citizenship may be acquired and to whom it may be denied. I also show how American nationals navigated the terrain of their given citizenship status.

The normative question of membership and citizenship is an ongoing contemporary debate, particularly in the immigration context. Congress failed to enact comprehensive immigration reform in large part because political leaders could not decide whether to confer to undocumented immigrants a path to U.S. citizenship.[29] Political leaders will inevitably

---

26. *See, e.g.*, United States v. Craft, 535 U.S. 274, 274 (2002) (describing property rights as a "bundle of sticks"); Dow Corning Corp. v. Jie Xiao, 283 F.R.D. 353, 358 (E.D. Mich. 2012) (same); Hansen v. United States, 65 Fed. Cl. 76, 99 (2005) (same); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 39–40 (1998) (discussing bundle of rights in context of immigration law, citizenship law, and property law); David Bell & Jon Binnie, *Sexual Citizenship: Law, Theory and Politics*, *in* FEMINIST PERSPECTIVES ON LAW AND THEORY 167 (Janice Richardson & Ralph Sandland eds., 2000) (discussing citizenship as a "bundle of rights"); Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 385 (1998) (exploring bundled rights in an environmental context); Virginia Leary, *Citizenship, Human Rights, and Diversity*, *in* CITIZENSHIP DIVERSITY & PLURALISM: CANADIAN AND COMPARATIVE PERSPECTIVES 247 (Alan C. Cairns et al. eds., 1999) (discussing the notion of citizenship as a "bundle of rights"); Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 118 (2003) (applying property law's "bundle of sticks" analogy to sovereignty).

27. *See generally* Jessica Bulman-Pozen, *Unbundling Federalism: Colorado's Legalization of Marijuana and Federalism's Many Forms*, 85 U. COLO. L. REV. 1067 (2014); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013); John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2015).

28. *See* COHEN, *supra* note 1, at 6 (discussing the concept of "semi-citizens" as people who have some but not all rights of citizenship and that citizenship rights may be disentangled). Building on Elizabeth Cohen's theoretical and more broadly analyzed work on "semi-citizens," this Article shows how American nationals as "interstitial citizens" acquired certain rights typically associated with U.S. citizenship.

29. *Compare* Xavier Becerra, *Immigrants Deserve a Path to Citizenship: Opposing View*, USA TODAY (Dec. 15, 2013), http://www.usatoday.com/story/opinion/2013/12/15/immigration–reform–citizenship–editorials–debates/4034153/ (arguing that offering a path to citizenship "simply reflects our values") [https://perma.cc/US2Q-D57A], *and* Roberto Suro,

have to address this unsettled question. When they do, it would be useful to explore all existing lawful membership options and their potential application to the population of currently unauthorized immigrants. Ironically, emerging from the history of racial exclusion from citizenship is the potential for noncitizens to critically explore a form of membership that is short of citizenship, but one that might still work for them. Ultimately, an examination of interstitial citizenship for undocumented immigrants might not be feasible or desirable, particularly given the inferior status of such citizenship. Such conclusion might not be reached, however, without engaging in a comprehensive analysis of this possibility.

The Article proceeds in five parts. To understand the legal construction of the noncitizen national, it is important to situate it within the larger context of the framing of citizenship along the citizen/noncitizen binary. Part I emphasizes that this binary framing is itself a story about racial exclusion in which citizenship was historically primarily available to white individuals.

Parts II and III explore how, despite the understanding of political membership along a strict citizen/noncitizen binary, a third type of category—the noncitizen national—emerged. Part II examines the political and judicial decisions that inaugurated this novel status. Having acquired territories in the early twentieth century, the United States deviated from previous practice of conferring citizenship to territorial inhabitants and chose not to grant citizenship to American Samoans, Guamanians, Filipinos, and Puerto Ricans, after they became subject to U.S. rule. The U.S. Supreme Court subsequently handed down the *Insular Cases*,[30] strengthening the ambiguous status of these territorial residents as people

Where to Go for Real Immigration Reform, N.Y. TIMES (Sept. 15, 2015), http://www.nytimes.com/2015/09/16/opinion/where–to–go–for–real–immigration–reform.html (arguing that "[t]o remain united, the United States can have only one form of citizenship," but explaining that states are taking immigration reform into their own hands, offering different benefits for immigrants) [https://perma.cc/C7N6-9EHJ], *with* Aaron Blake, *Why the GOP Should Follow Jeb Bush's Lead on Immigration*, WASH. POST (July 9, 2015), https://www.washingtonpost.com/news/the–fix/wp/2015/07/09/why–jeb–bushs–new–immigration–stance–legalization–but–not–citizenship–is–a–smart–one/ (arguing that allowing legal status instead of a path to citizenship is the best option for the Republican Party) [https://perma.cc/F2NA-MBGF], *and* Editorial, *Offering Permanent Legal Status a Good Step: Our View*, USA TODAY (Dec. 15, 2013), http://www.usatoday.com/story/opinion/2013/12/15/immigration–reform–citizenship–republicans–editorials–debates/4034151/ (arguing that legal status without citizenship, while not ideal, gives many undocumented workers exactly what they desire) [https://perma.cc/HK2N-MHYC].

30. The Supreme Court examined the application of the Constitution in the newly acquired territories in a set of cases known as the *Insular Cases*. *See* Dorr v. United States, 195 U.S. 138 (1904); Armstrong v. United States, 182 U.S. 243 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Goetze v. United States, 182 U.S. 221 (1901). A recent case in Puerto Rico, in which the district judge rejected the application of the Supreme Court opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to Puerto Rico, has underscored the ongoing impact of the *Insular Cases*. *See* Conde Vidal v. Garcia-Padilla, 167 F. Supp. 3d 279, 283–87 (D.P.R. 2016).

subject to U.S. jurisdiction without obtaining the status of U.S. citizens.[31] Part III explains the push for the country's first comprehensive nationality law that culminated in the Immigration and Nationality Act of 1940—in which it codified the liminal American national status in federal law.[32] As this part reveals, the hearings preceding the adoption of national status highlight Congress's ongoing quest to restrict citizenship along racial lines.

Next, Part IV introduces two conceptual frameworks for understanding the law of citizenship, which I explore in greater detail in forthcoming work. Contending that noncitizen nationals unsettle the law's preoccupation with the citizen/alien binary, this part introduces the idea of interstitial citizenship. Through an analysis of cases involving Filipino Americans when they were American nationals, this part explores how this intermediary form of membership shaped the lives of those individuals who are neither citizens nor aliens. This part also explains how interstitial citizenship reframes our view of citizenship away from a binary citizen/alien paradigm toward a flexible conception of citizenship in which citizenship rights may be unbundled. Further, it considers how both interstitial citizenship and the concept of unbundling citizenship may be useful in the current immigration reform debate on whether to provide undocumented immigrants with a path to citizenship.

I. THE CITIZEN/NONCITIZEN BINARY: A STORY ABOUT RACIAL EXCLUSION

The traditional understanding of the law of citizenship divides individuals into two groups: citizens and noncitizens. In the United States, many sources contribute to this binary framework, including the common law, the Fourteenth Amendment, citizenship statutes, and naturalization laws. The broad implication of this binary is simple from a formal political membership standpoint: the citizen is one who belongs and the other one—the noncitizen—is the stranger, the alien, or one who does not belong.[33] The distinction is critical because various laws treat citizens more favorably than noncitizens.[34]

Given the more favorable status conferred upon citizens, it is important to understand the ways in which one may acquire U.S. citizenship. Current law provides that citizenship may be gained by naturalization[35] or at birth.[36]

---

31. *See* Toyota v. United States, 268 U.S. 402, 411–12 (1925) (holding that citizens of the Philippine Islands are neither citizens nor aliens); Gonzales v. Williams, 192 U.S. 1, 13 (1904) (holding that citizens of Puerto Rico are not "aliens").

32. Nationality Act of 1940, ch. 876, 54 Stat. 1137.

33. Despite this distinction, it is important to recognize, as Professor Hiroshi Motomura reminds us, that noncitizens should be treated as citizens in waiting. *See generally* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006).

34. *See infra* Part IV.

35. Congress first adopted a naturalization law with the Naturalization Act of 1790. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). The current statutory scheme for naturalization has its roots in the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1401 (2012)), and the Immigration and Nationality

Citizenship by birth may be acquired through jus sanguinis and jus soli. Jus sanguinis, "right of the blood," refers to the acquisition of citizenship based on the citizenship of one or both biological parents, regardless of the place where the child was born.[37] By contrast, jus soli, "right of the soil," refers to the acquisition of citizenship based on the place of birth—that is, being born within the nation or its territorial possessions.[38]

Importantly, the right to become a citizen, either by birth or by naturalization, is a story about racial exclusion from citizenship.[39] As this part explains, citizenship is a status that, for a greater part of U.S. history, was accorded to white individuals only. People of color, by contrast, were relegated to noncitizenship. This background, more fully described below, provides the setting for the legal construction of noncitizen national status that is examined in Part II.

A. Common Law (Jus Soli)

The concept of acquiring citizenship by birth stems from English common law. *Calvin v. Smith*,[40] a foundational case decided in 1608, held that persons born in Scotland—then within the sovereignty of the King of England—were English subjects.[41] Since this case was handed down, the common law has recognized that any person born in any place within the sovereignty of England was a subject of the King at birth.[42]

English settlers adopted the common law rule of jus soli in the colonies where it became the basis of territorial birthright citizenship for centuries until well after the founding.[43] Yet, although the Constitution included the

---

Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). For a thoughtful background of naturalization's place in American history, see generally ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE (2d ed. 2002).

36. *See* 8 U.S.C. § 1401(a)–(f).

37. *See Jus Sanguinis*, BLACK'S LAW DICTIONARY 868 (7th ed. 1999); *see also* 8 U.S.C. § 1401(g)–(h) (outlining the modern statutory conception of jus sanguinis).

38. *See Jus Soli*, BLACK'S LAW DICTIONARY 869 (7th ed, 1999); *see also* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (solidifying jus soli as the governing law in the United States while also describing the historical and legal underpinnings of both jus sanguinis and jus soli).

39. For an extensive exploration of racial exclusion from citizenship, see IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996), EDIBERTO ROMÁN, CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE (2010), Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 18 IMMIGR. & NAT'LITY L. REV. 3 (1998), 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, and Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011).

40. (1608) 77 Eng. Rep. 377.

41. *Id.* at 409–11. For a thorough historical analysis of *Calvin's Case*, see Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73 (1997).

42. *See* Price, *supra* note 41, at 73–74.

43. Both the federal and state governments conferred citizenship. *See id.* at 140 (explaining that state common law and federal legislation governed citizenship law); *see also*

word "Citizen,"[44] it did not specify how to acquire citizenship. Furthermore, Congress failed to pass legislation providing for territorial birthright citizenship. To be sure, in the Act of 1790, the first naturalization law of the United States, Congress specified that children of "citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens."[45] Yet, that law focused on jus sanguinis, not jus soli. Nevertheless, courts, including the Supreme Court, continued to rely on the common law rule to determine the status of persons born in the United States.[46] In the case of *Murray v. Schooner Charming Betsy*,[47] for example, the Supreme Court assumed that persons born in the United States were U.S. citizens.[48]

The common law rule of territorial birthright citizenship, however, proved to be a rule that did not apply to all persons born in the United States. In *Dred Scott v. Sandford*,[49] the Supreme Court held that Dred Scott, a slave born in Virginia who sued for his freedom, was not a citizen of the United States.[50] Specifically, Justice Roger Taney wrote that African Americans "were not intended to be included, under the word 'citizens.'"[51] Praising the "great men" who wrote the Declaration of Independence and the Constitution,[52] Justice Taney stated African Americans were considered "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges."[53] In so holding, the Supreme Court deviated from the well-settled common law practice of conferring citizenship to persons born on U.S. soil or territory and flamed legal and moral questions that brought the country to a Civil War.[54]

---

id. at 138–39 (discussing the impact the *Calvin* decision had on territorial birthright law in the United States's early history).

44. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.").

45. Act of Mar. 26, 1790, ch. 3, 1 Stat 103 (repealed 1795).

46. *See, e.g.*, Inglis v. Sailor's Snug Harbour, 28 U.S. 99, 155 (1830) (noting that citizenship may be conferred by "birth locally within the dominions of the sovereign"); Kilham v. Ward, 2 Mass (1 Tyng) 236, 246 n.13 (1806) (reproducing, in a footnote, the 1805 case of *Gardner v. Ward*, which stated that a "man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born"); *see also* Price, *supra* note 41 (examining cases utilizing the common law rule of territorial birthright citizenship).

47. 6 U.S. 64 (1804).

48. *Id.* at 120 (characterizing citizenship as available to one "born within the *United States*" or to one who "becom[es] a citizen according to the established laws of the country").

49. 60 U.S. 393 (1856).

50. *See id.* at 421–22, 426–27. Because Scott was not a citizen, he failed to satisfy the diversity requirement of a federal lawsuit and, thus, the Court lacked jurisdiction to hear the case. *See id.* at 426–27.

51. *Id.* at 404.

52. *Id.* at 410.

53. *Id.* at 404–05.

54. *See* Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255, 265 (2008) (discussing the impact of the *Dred Scott* decision).

The Court's holding was perhaps unsurprising given that the institution of slavery treated African Americans as property.[55] Additionally, the Supreme Court's holding in *Dred Scott*, limiting birthright citizenship to whites, was consistent with federal law that similarly restricted the right to become a naturalized citizen to white noncitizens. In particular, more than sixty years before *Dred Scott*, Congress passed the Act of 1790, which provided that a "free white person" who satisfies the residency and good moral character requirements, takes an oath, and swears to support the Constitution "shall be considered as a citizen of the United States."[56] Other than white immigrants, no other group of noncitizens was eligible for citizenship.

B. Fourteenth Amendment's Citizenship Clause

After Congress adopted the Reconstruction Amendments[57] following the Civil War, the U.S. Constitution for the first time specified how to acquire citizenship through the Fourteenth Amendment. Specifically, the Fourteenth Amendment's Citizenship Clause provided that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[58] In so doing, the Fourteenth Amendment overturned *Dred Scott* by affirming and constitutionalizing the common law principle of jus soli.[59]

Yet the passage of the Fourteenth Amendment did not resolve all disputes regarding birthright citizenship. In *Elk v. Wilkins*,[60] the Supreme Court held that members of American Indian tribes do not gain citizenship at birth.[61] John Elk, born in an Indian reservation, later left the reservation to live in a white community.[62] When Elk registered to vote, the registrar rejected his registration, contending that Elk "was an Indian, and not a citizen."[63] Elk contended that he was in fact a citizen by virtue of the newly passed Citizenship Clause.[64]

---

55. *See, e.g.*, The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (treating slaves as property of their owners and imposing criminal liability for failure to return escaped slaves).

56. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

57. U.S. CONST. amends. XIII–XV.

58. *Id*. amend. XIV, § 1.

59. *See* Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2153 (2014).

60. 112 U.S. 94 (1884).

61. *See id*. at 103. For a detailed overview and analysis of the case, see Saby Ghoshray, *Rescuing the Citizenship Clause from Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASHBURN L.J. 261, 302–04 (2012), William M. Stevens, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 372–73 (2008), and Ashley E. Mendoza, Note, *Anchors Aweigh: Redefining Birthright Citizenship in the 21st Century*, 13 J.L. & FAM. STUD. 203, 206–07 (2011).

62. *See* Ghoshray, *supra* note 61, at 302.

63. *Elk*, 112 U.S. at 96.

64. *Id.*

Finding Elk's arguments unpersuasive, the Supreme Court held that Elk was not a citizen, because, by nature of his birth on an Indian reservation, Elk was not born "subject to the jurisdiction thereof" of the United States.[65] Relying on Justice Taney's reasoning in *Dred Scott*, the Court articulated that the only ways to become a U.S. citizen are by birth or by naturalization.[66] Indian tribes were alien nations, in spite of being situated within the territorial limits of the United States.[67] Accordingly, members of the tribes born on the reservation "owed immediate allegiance to their several tribes, and were not part of the people of the United States."[68]

The Supreme Court later expanded on this connection between allegiance and citizenship in *Minor v. Happersett*.[69] Examining the Fourteenth Amendment, the Court acknowledged that the original Constitution did not "prescribe who should be citizens of the United States or of the several States."[70] Yet, the Court underscored that "there were necessarily such citizens" even without those provisions.[71] A nation "implies an association of persons for the promotion of their general welfare" and each one is considered a member of the nation.[72] Notably, the Court stated that "[each member] owes it allegiance and is entitled to its protection."[73] The Court noted that, for "convenience," the term "citizen" was used to describe this sort of membership.[74]

Although the term citizen began to be used more regularly, the Citizenship Clause's import, specifically as to people born in the United States, remained unclear. It was not until 1898—thirty years after the passage of the Fourteenth Amendment—that the Supreme Court settled the question of whether birth in the United States led to citizenship. In *United States v. Wong Kim Ark*,[75] the Supreme Court addressed whether Wong Kim Ark, a Chinese man who was born in California to Chinese immigrant parents, acquired citizenship at birth.[76] An immigration officer refused to

65. *Id.* at 102.
66. *Id.* at 101–02.
67. *Id.* at 99.
68. *Id.*
69. 88 U.S. 162 (1874).
70. *Id.* at 165.
71. *Id.*
72. *Id.* at 165–66.
73. *Id.*
74. *Id.* ("The object is to designate by a title the person and the relation he bears to the nation. . . . When used [to describe one living under a republican government] it is understood as conveying the idea of membership of a nation, and nothing more.").
75. 169 U.S. 649 (1898).
76. *Id.* at 652–53; *see also* Patrick J. Glen, Wong Kim Ark *and* Sentencia Que Declara Constitucional la Ley General de Migración 285-04 *in Comparative Perspective: Constitutional Interpretation, Jus Soli Principles, and Political Morality*, 39 U. MIAMI INTER-AM. L. REV. 67, 73–81 (2007) (discussing *Wong Kim Ark*'s lasting effect on immigration law); Hernández-López, *supra* note 54, at 266–74 (providing background information on *Wong Kim Ark* and describing its significance); Richard T. Middleton, IV & Sheridan Widdinton, *A Comparative Analysis of How the Framing of the* Jus Soli *Doctrine Affects Immigrant Inclusion into a National Identity*, 21 TEMP. POL. & C.R. L. REV. 521, 526–28 (2012) (discussing the significance of *Wong Kim Ark* for modern citizenship law).

allow Ark to enter the United States following a trip to China.[77] Claiming that his birth in California conferred U.S. citizenship upon him under the Citizenship Clause, Ark demanded entry.[78]

The Supreme Court agreed with Ark and affirmed that he was a U.S. citizen under the Citizenship Clause.[79] Acknowledging that prior to the Fourteenth Amendment, all white persons born in the United States, except for children of ambassadors or public ministers of foreign government,[80] acquired citizenship at birth, the Court explained that the Fourteenth Amendment's main purpose was to establish citizenship for African Americans and thus reverse *Dred Scott*.[81] Yet, the Court explained that the Fourteenth Amendment's "broad and clear" words provided that all persons born in the United States, including persons of Chinese descent, acquired citizenship at birth.[82] Thus, despite the passage of the Chinese Exclusion Act[83] and other laws designed to prevent Chinese noncitizens from entering and remaining in the United States,[84] Ark was a citizen and could not be excluded.[85]

Although the Fourteenth Amendment opened up citizenship by birth to all persons, federal naturalization law continued to be quite restrictive. After the passage of the Fourteenth Amendment, Congress amended the Naturalization Law in 1870 to explicitly apply to "aliens of African nativity and persons of African descent."[86] In so doing, it excluded all other noncitizens, particularly Chinese laborers who came to the United States during the Gold Rush to work on the transcontinental railroad during mid-nineteenth century,[87] from acquiring political membership. Indeed, Congress would not open up the naturalization law to immigrants who were not white or of African descent until the early 1940s. While Congress extended the right to naturalize to Chinese in 1943,[88] and to Filipinos and

77. *Wong Kim Ark*, 169 U.S. at 653.

78. *Id.* (indicating that Ark believed he should be allowed reentry due to his status as a U.S. citizen).

79. *Id.* at 704.

80. *See id.* at 674–75.

81. *Id.* at 676.

82. *Id.* at 704.

83. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

84. *See generally* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding the deportation of Chinese noncitizens).

85. *Wong Kim Ark*, 169 U.S. at 704.

86. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

87. *See generally Chinese Railroad Workers in North America Project at Stanford University*, STAN. U., http://web.stanford.edu/group/chineserailroad/cgi–bin/wordpress/ (last visited Feb. 16, 2017) (providing electronic access to a myriad of source material including primary sources, contemporary periodicals, and multimedia presentations in addition to scholarly commentary on the history of Chinese rail workers in the nineteenth and twentieth centuries) [https://perma.cc/NB4U-97M9].

88. Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601 (repealing the Chinese Exclusion Acts).

Indians in 1946,[89] it was not until 1952 that Congress lifted all racial restrictions on citizenship.[90]

Still, for those born in the United States, the Court's ruling in *Wong Kim Ark* was intended to erase doubts about their status: the Citizenship Clause mandated U.S. citizenship for this group. But, as Part II describes, courts and Congress deviated from the Citizenship Clause's command, as explained in *Wong Kimg Ark*, when they collectively created a new form of birthright membership status: the noncitizen national.

II. THE LEGAL CONSTRUCTION OF AMERICAN NATIONALS

The year 1898, unlike others that readily evoke key events in American history, such as 1776,[91] 1964,[92] or 2008,[93] is relatively unheard of.[94] Yet, it was a significant year for the United States because it marked the beginning of the American Empire.[95] After defeating Spain in the Spanish-American War,[96] the United States acquired several territories, including the Philippines, Puerto Rico, and Guam.[97] That same year, the United States annexed Hawaii.[98] Two years later, the United States expanded its borders

89. Act of July 2, 1946, ch. 534, §§ 2–5, 60 Stat. 416, 417.

90. Immigration and Nationality Act of 1952, ch. 477, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1401 (2012)).

91. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1789 (1998).

92. *See generally* ROBERT D. LOEVY, THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (1997).

93. *See* JOHNNY BERNARD HILL, THE FIRST BLACK PRESIDENT (2009).

94. *See generally* Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803–1898, at 181 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

95. *See id.* at 181–82; Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896–1900*, 78 DENV. U. L. REV. 921, 921–22 (2001). As scholars have noted, however, the United States had begun to acquire territories prior to 1898. *See, e.g.*, Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 287 (2007) (stating that the territories acquired beginning in 1898 marked the continuance of a nationalist expansion and manifest destiny period that began in 1783 after the Revolutionary War).

96. Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up with It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 209–10 (2010) ("The Treaty of Paris, signed on December 10, 1898, approved by the U.S. Senate, and ratified by the president in 1899, officially ended the Spanish-American War, with the island of Puerto Rico as the United States' prize.").

97. *See* Boumediene v. Bush, 553 U.S. 723, 756 (2008).

98. At the turn of the twentieth century, the "Native Hawaiian population had plummeted, its traditional . . . land structures had been replaced by Western models, the independent Kingdom of Hawai'i had been illegally overthrown, Hawaiian lands had been taken with neither compensation to nor the consent of the Hawaiian people, and Hawai'i had been annexed by the United States." Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 96 (1998). In 1993, Congress passed "[t]he Apology Resolution characterized the overthrow as 'illegal' and in violation of international law, and [it] acknowledge[d] that the United States had received the 1,800,000 acres of land 'without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government.'" *Id.* at 102–03 (quoting Apology Resolution, Pub. L. 103-150, 107 Stat. 1510, 1510 (1993)).

further by acquiring American Samoa through deeds of cession.[99] With the newly acquired territories of Puerto Rico, the Philippines, Guam, and American Samoa, the United States's population grew by more than eight million.[100] The extension of sovereignty over noncontiguous lands,[101] inhabited primarily by people of color,[102] stirred up novel constitutional questions, including whether these territorial residents acquired U.S. citizenship.

This part identifies some of the central events between 1898 and 1940 that led to the legal construction and federal codification of American national status. As this part emphasizes, noncitizen national status is part of a larger story about racial exclusion from citizenship on the same constitutional and statutory grounds that Part I analyzed. To be sure, today, American nationals who attain such status based on birth in American Samoa are now eligible for naturalization.[103] Yet, as the *Tuaua* plaintiffs' challenge to their American national status demonstrates, this status should still be viewed as the legacy of this forgotten part of our racial history.

---

99. *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Verses Political Identity Dilemma*, 96 CALIF. L. REV. 801, 826 (2008).

100. The population of the Philippines around 1900 was approximately 7,600,000. *See* Aurora E. Perez, *The Growth of Population*, *in* POPULATION OF THE PHILIPPINES 1, 5 (Mercedes B. Concepcion ed., 1977); *see also* Cesar J. Ayala & Laird W. Bergad, *Rural Puerto Rico in the Early Twentieth Century Reconsidered: Land and Society, 1899–1915*, 37 LATIN AM. RES. REV. 1, 75 (2002) (noting that the "population rose by 17 percent from 953,000 to 1,118,000" from 1899 to 1910). As for Guam, the population in 1901 was 9,676 people. *See* Gary J. Wiles, *The Status of Fruit Bats on Guam*, 41 PAC. SCI. 148, 149 (1987) ("Guam's human population has grown dramatically since the turn of the century, increasing from 9,700 residents in 1901."). American Samoa's population was approximately 5,000 people. *See* Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 169 (2011). The United States also acquired the Panama Canal Zone in 1903, *see* Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, U.S.-Pan., Nov. 18, 1903, 33 Stat. 2234, which had a population of 75,000. *See* NEW INTERNATIONAL YEARBOOK: A COMPENDIUM OF THE WORLD'S PROGRESS 530, 594 (Frank Moore Colby & Allen Leon Churchill eds., 1909). There were approximately 8.8 million African Americans in 1900, *see* U.S. DEP'T. OF COMMERCE ECON. AND STATISTICS ADMIN., BUREAU OF THE CENSUS, WE THE AMERICANS: BLACKS 2 (1993), 503,000 estimated Latinos, *see* Brian Gratton and Myron Gutmann, *Hispanics in the United States, 1850–1900, Estimates of Population Size and National Origin*, 33 HIST. METHODS 137, 142 tbl. 2 (2000), 114,000 Asians, *see* MICHAEL H. HUNT & STEVEN I. LEVINE, ARC OF EMPIRE: AMERICA'S WARS IN ASIA FROM THE PHILIPPINES TO VIETNAM 257 (2012), and 237,000 American Indians, *see* NANCY SHOEMAKER, AMERICAN INDIAN POPULATION RECOVERY IN THE TWENTIETH CENTURY 3–4 (1999).

101. *See* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 803 (2005) ("No sooner had the people of the United States managed to put the pieces of a shattered nation back together in a tense and fragile peace than a vocal constituency began to embrace an ambitious vision of overseas imperialism."); *see also* Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, 58 FED. LAW. 22, 22 (2011) ("In 1898, the United States became an overseas empire. With the signing of the Treaty of Paris ending the Spanish-American War, the former Spanish territories of Guam and the Philippines in the Pacific Ocean and Puerto Rico in the Atlantic Ocean came under the American flag.").

102. *See* Torruella, *supra* note 95, at 287–89.

103. *See* 8 U.S.C. § 1436 (2012) (providing that noncitizen nationals, upon obtaining residency in a state, may apply for naturalization).

From a normative perspective, uncovering this part of our citizenship history is important for filling in the holes in our American legal consciousness about how law determines who may receive political membership.

A. The American Empire: No Citizenship for U.S. Territorial Residents

Under Article IV of the U.S. Constitution, Congress has the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[104] Inhabitants of territories acquired by the United States, whether they liked it or not, were thus beholden to Congress for any rights acquired as a result of their territory's annexation. Through treaties formalizing the annexation of territories, Congress articulated what rights would be conferred onto territorial residents.[105]

Congress's treatment of the territories acquired at the turn of the twentieth century departed from how it had treated the territories obtained prior to 1898 in at least one way: Congress elected not to confer citizenship on the residents of the Spanish-American War conquests. The territories acquired prior to 1898 were viewed as those that would eventually become states, which resulted in Congress providing an opportunity for such residents to acquire citizenship either by treaty or congressional act.[106] For example, under the Treaty of Guadalupe-Hidalgo of 1848, which led to the annexation of New Mexico, Utah, and California, Congress provided the opportunity to the residents of those territories (and ensuing states) to either keep their Mexican citizenship or become U.S. citizens.[107] Similarly, when

104. U.S. CONST. art. IV.

105. *See* Boumediene v. Bush, 553 U.S. 723, 755–56 (2008) ("When Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute."); *see also* An Act to Establish a Territorial Government for Utah, ch. 51, § 17, 9 Stat. 453, 458 (1850) ("[T]he Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah . . . ."); Rev. Stat. § 1891 (1874) ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States"). *See generally* Burnett, *supra* note 101, at 825–27.

106. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 181 (2002) ("In the end, the specific question whether inhabitants of newly acquired territories must become citizens destined for statehood was indefinitely deferred by the fact that all the territories acquired between the Louisiana Purchase and 1898 were granted the privileges and immunities of citizenship and constitutional protections by treaty and statute.").

107. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 922, 929; *see also* LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN RACE 136 (2007); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 202 (1996).

the United States annexed Hawaii,[108] Congress ensured that residents would gain U.S. citizenship.[109]

In contrast, residents of the territories acquired through annexation in 1898 did not obtain U.S. citizenship. Under the Treaty of Paris that the United States signed with Spain, the United States provided that "the civil and political status of the native inhabitants . . . shall be determined by Congress."[110] It further made clear that territorial residents could not retain their Spanish citizenship and allegiance to Spain.[111] Instead, the treaty explained that the annexation of these territories meant that the people held allegiance to the United States and were under the country's protection.[112] Importantly, it stated that, "the nationality of the island became American instead of Spanish."[113] By not conferring U.S. citizenship on the territorial residents, but recognizing them as American nationals, the treaty left it to Congress to decide the precise membership status of the residents that were now under U.S. jurisdiction.

While Congress subsequently passed laws addressing this citizenship question, it did so in ways that left the status ambiguous. On April 12, 1900, it enacted legislation to define the citizenship of Puerto Ricans.[114] Yet, instead of conferring U.S. citizenship, the law stated that the "inhabitants of Porto Rico" were to be deemed "citizens of Porto Rico."[115] Congress followed the same approach with the Philippines when it passed the Act of July 1, 1902.[116] It provided that all inhabitants continuing to reside in the former Spanish colonies who had been Spanish subjects on April 11, 1899, and then resided in the Philippines with any children born subsequently, "shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States."[117] Although Congress did not pass legislation specifying Guamanians' citizenship status, these people were considered "citizens of Guam."[118]

---

108. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, H.R.J. Res. 55, 55th Cong., 30 Stat. 750 (1898). This annexation occurred under questionable circumstances, including the overthrow of Hawaii's monarchy. *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII 153 (2008) ("[I]n 1993, the U.S. Congress acknowledged that U.S. military and diplomatic officials had played an essential role in ensuring the success of the overthrow and that this role had been 'illegal' and in violation of international law and issued a formal apology for the activities of the United States.").

109. An Act to Provide for a Government for the Territory of Hawaii, ch. 339, § 4, 31 Stat. 141, 141 (1900) ("That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.").

110. Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, 1759.

111. *See id.*

112. *See id.*

113. *Id.*

114. Act of Apr. 12, 1900, ch. 191, 31 Stat. 77 (codified as amended in scattered sections of 48 U.S.C.).

115. *Id.*

116. Ch. 1369, 32 Stat. 691.

117. *Id.*

118. LAURA THOMPSON, GUAM AND ITS PEOPLE 56–57 (1941).

These laws, when combined with the Treaty of Paris, put forth a membership status distinct from U.S. citizenship. For the first time since the passage of the Fourteenth Amendment, Congress introduced a new type of political membership: American national status. The inhabitants of these territories now had American nationality but territorial, not U.S., citizenship, which left their status in between the citizen and the alien.[119]

B. The Insular Cases *and Territorial Residents as Not "Aliens"*

Territorial residents' new status as both American nationals and citizens of their territories marked the legal construction of noncitizen nationals, which culminated in the Supreme Court's recognition of this status in the *Insular Cases*. Previously underexplored in legal scholarship, the *Insular Cases* and their import in constitutional law and U.S. history have more recently received the attention that they deserve.[120] Decided between 1901 and 1922, the *Insular Cases* addressed the question of whether the Constitution applied to the newly acquired territories.[121] The question, which had not before surfaced in relation to other acquired territories, led to the "territorial incorporation doctrine."[122] Under this doctrine, the Constitution applied in full force only in territories headed for statehood.[123] By contrast, only fundamental rights were protected in territories that were not on a path to statehood.[124]

---

119. *See* Burnett, *supra* note 22, at 661 (commenting that American national status "for Puerto Ricans and inhabitants of the other new territories is an ambiguous status somewhere between alienage and citizenship").

120. *See, e.g.*, PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 38–42 (2004) (discussing the *Insular Cases* as applied to Puerto Rico); EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006); Torruella, *supra* note 95. However, it is unclear the extent to which the *Insular Cases* are taught in constitutional law in law schools. *See, e.g.*, BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 10 (2006) ("The purpose of this study . . . is to move the *Insular Cases* back into prominence . . . to add them to the list of recognized Supreme Court cases essential for and familiar to students of constitutional law and U.S. political history.").

121. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 249 (1901) (questioning whether the revenue clauses of the Constitution applied to the territories).

122. *See* Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 15, 20–21 (1998) (stating that the *Insular Cases* developed the "territorial incorporation doctrine").

123. *See* Boumediene v. United States, 553 U.S. 723, 757–58 (2008) ("[T]he doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.").

124. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1459 (1990) ("It is well established that the entire Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if that territory is 'incorporated.' Elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply in the territory.").

Scholars have long noted the racial underpinnings of the territorial incorporation doctrine.[125] For instance, in *Downes v. Bidwell*,[126] the Court addressed the question of whether Congress acted within its power when it provided a temporary civil government and revenue for Puerto Rico, a territory that had recently been acquired.[127] The Court recognized that the U.S. government's "Anglo-Saxon principles" may not be ideal for newly acquired territories.[128] Specifically, the Court reasoned that the administration of government and justice, according to Anglo-Saxon principles, "may for a time be impossible"[129] because newly acquired territories were inhabited by "alien races" whose perspectives differed from the U.S. government's Anglo-Saxon perspective.[130] Ultimately, the Court held that if Congress was not ready to construct a complete government for a newly acquired territory, then it may construct a temporary government unbound by the restrictions of the Constitution.[131]

Given Congress's failure to confer U.S. citizenship on territorial residents—instead according them with American nationality status while simultaneously recognizing their allegiance to the United States—it was inevitable that the question of their political status would reach the courts. In *Gonzales v. Williams*,[132] the Supreme Court examined the issue of whether Puerto Ricans were U.S. citizens but elected not to address it directly. More than two decades later, in *Toyota v. United States*,[133] the Court failed again to provide a definitive answer, thus solidifying the ambiguous status of American nationals.

1. *Gonzales v. Williams*

Isabella Gonzales, a Puerto Rican woman, arrived in New York on August 24, 1902.[134] Despite the United States annexing Puerto Rico a few years earlier,[135] immigration officers barred Gonzales from entering the United States.[136] Citing the Immigration Act of 1891, the immigration officers found Gonzales, an unwed pregnant woman, inadmissible on the grounds that she was an "alien immigrant" likely to be a public charge.[137] Although Gonzales insisted that the Immigration Act should not apply to her because of her status as a U.S. citizen,[138] the immigration officers

125. *See* Torruella, *supra* note 95 (contending that the Supreme Court endorsed "racist rhetoric" that underscored the nativist political environment of the Untied States during that period); *see also* Malavet, *supra* note 96, at 249–55; Román, *supra* note 122, at 20–21.
126. 182 U.S. 244 (1901).
127. *Id.* at 247.
128. *Id.* at 287.
129. *Id.*
130. *See id.*
131. *Id.* at 346–47.
132. 192 U.S. 1 (1904).
133. 268 U.S. 402 (1925).
134. *Gonzales*, 192 U.S. at 7.
135. Erman, *supra* note 22, at 1182.
136. *Gonzales*, 192 U.S. at 7.
137. *Id.*
138. *See id.*

nevertheless contended that Puerto Ricans were noncitizens and placed her in the custody of the Immigration Commissioner of the Port of New York.[139]

It is fitting that the question of Puerto Ricans' citizenship was addressed in the context of immigration law and, specifically, through the lens of an exclusion case. Immigration, after all, is the body of law that determines who may enter the United States, who may stay, and who may be excluded from the country. However, immigration law's ability to exclude applies only to noncitizens. Citizens, on the other hand, may not be denied entry from their country. This citizen/noncitizen distinction, when viewed in conjunction with the indeterminate space occupied by Puerto Ricans as American nationals, complicated the immigration officers' action in *Gonzales*; if American nationals were equivalent to U.S. citizens, then Gonzales would not need to seek "admission" to her home country and could not otherwise be denied entry. While Puerto Rico was already part of the United States, the immigration officers nevertheless treated Gonzales as if she were an immigrant seeking admission and thus denied her entry and detained her.[140]

As Professors Christina Duffy Ponsa and Sam Erman have examined,[141] the question in the *Gonzales* case pitted various groups against each other: those who wanted to consider Puerto Ricans noncitizens, those who sought citizenship for Puerto Ricans, and those who suggested that Puerto Ricans were neither citizens nor aliens.[142] Drawing from these camps, Gonzales's lawyer made two arguments contending that the Immigration Act of 1891 should not apply to her: Gonzales was a U.S. citizen or, in the alternative, Gonzales should not be considered an alien but rather a "national," a new form of status.[143] Relying on international law, Gonzales's lawyer contended that the term "national" also connoted that the individual was a "subject."[144] By contrast, the government argued that she was not a citizen and that even if the Court were to accept the term "national," Gonzales was still an alien subject to deportation.[145] The resident commissioner of Puerto Rico, Federico Degetau, submitted an amicus brief contending that Gonzales and all Puerto Ricans became U.S. citizens when Puerto Rico became a U.S. territory.[146]

Instead of directly addressing whether Gonzales, as a Puerto Rican, was a citizen, the Supreme Court analyzed whether Gonzales was an alien and thus subject to the deportation grounds.[147] In finding that Gonzales was not

139. *See id.*
140. *Id.*
141. *See* Burnett, *supra* note 22; Erman, *supra* note 22. It should be noted that this Article cites to work by Professor Christina Duffy Ponsa, which she published under her former name, Christina Duffy Burnett.
142. *See* Burnett, *supra* note 22.
143. *See id.* at 672.
144. *See id.*
145. *See id.* at 679.
146. *See id.* at 694.
147. Gonzales v. Williams, 192 U.S. 1, 12 (1904).

an alien, the Court articulated what it meant to be a noncitizen: the Court noted that Congress had not intended to render Puerto Ricans noncitizens, thus denying them the right of free access to their own country.[148] This emphasis on the right of Puerto Ricans to not be excluded is particularly evident when juxtaposed against the Court's reference to the right of the United States to exclude noncitizens, such as Chinese laborers.[149] Similarly, the Court distinguished Puerto Ricans, such as Gonzales, from "foreigners . . . owing allegiance to a foreign government."[150] Thus, although the Court did not address whether Gonzales was a U.S. citizen, it declared that she was not a noncitizen. With this holding, the Court avoided equating American national status with citizenship.

By focusing on Gonzales's noncitizen status and refusing to directly address whether Gonzales was a citizen, the Supreme Court's holding in *Gonzales* was consistent with the *Insular Cases*. Indeed, the Supreme Court explicitly relied on *Downes* in reaching its conclusion that Gonzales was not a noncitizen. Underscoring that the Court held in *Downes* that Puerto Rico "ceased to be a foreign country within the meaning of the tariff act"[151] and thus, the Customs Administrative Act was not implicated, the Court similarly held that the Commissioner did not have jurisdiction over Gonzales because, as someone who was not an alien, she was not subject to the immigration act.[152]

2. *Toyota v. United States*

More than twenty years later, the Supreme Court faced another case implicating noncitizen nationals. Unlike the *Gonzales* Court's focus on Gonzales's exclusion under immigration law, the Court in *Toyota* analyzed the denial of a noncitizen from acquiring U.S. citizenship.[153] While the citizenship claim in *Toyota* did not involve an American national, the Court's opinion included language that further indicated that American nationals were in fact not U.S. citizens.

As discussed in Part I, the right to naturalize was a privilege afforded to white immigrants in 1790,[154] and it was not until 1870[155] when Congress extended this right to "aliens of African nativity and to persons of African descent."[156] During this time, the Supreme Court solidified these racial restrictions in *Ozawa v. United States*[157] and *United States v. Bhagat Singh Thind*[158] when it held that a Japanese man and a "high-caste Hindu" were

148. *Id.*
149. *Id.* at 13.
150. *Id.*
151. *Id.* at 15.
152. *Id.*
153. Toyota v. United States, 268 U.S. 402, 404–05 (1925).
154. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).
155. *See* Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.
156. *Toyota*, 268 U.S. at 404–05.
157. 260 U.S. 178 (1922).
158. 261 U.S. 204 (1923).

not "white" for purposes of the naturalization laws.[159] Congress created an exception to this racially binary rule in 1918 when it afforded Filipinos who had served in the military the opportunity to naturalize.[160] It was not until 1943 that Congress began allowing immigrants from select Asian countries—Chinese, Indian, and Filipino citizens—to apply for citizenship.[161] Congress finally lifted all racial restrictions to naturalization in 1952.[162]

These naturalization restrictions, in conjunction with racially restrictive inadmissibility laws, were designed to limit Asians from immigrating to the United States.[163] Indeed, Congress's desire to exclude Asians first manifested in 1875 with the passage of the Page Act of 1875,[164] aimed at Chinese women,[165] and was thereafter extended to all Chinese laborers with the Chinese Exclusion Act of 1882.[166] Then Congress passed the Immigration Act of 1917 to widen the Chinese Exclusion Act's scope to include additional racial immigrant groups.[167] Japanese citizens were exempted from this exclusion under the "Gentlemen's Agreement," in which the Japanese government agreed to restrict Japanese nationals' ability to migrate out of Japan.[168] Yet, in 1924, Congress superseded the Gentlemen's Agreement by rendering inadmissible noncitizens who were ineligible for citizenship.[169] These racially restrictive naturalization laws, and the Immigration Act of 1924, meant that only noncitizens who were white or of African ancestry were eligible to enter the United States.[170]

Against this backdrop, the Court in *Toyota* faced the question of whether a Japanese man was entitled to naturalize. Hidemitsu Toyota, born in

159. LÓPEZ, *supra* note 39, at 61–64.

160. *See* Deenesh Sohoni & Amin Vafa, *The Fight to Be American: Military Naturalization and Asian Citizenship*, 17 ASIAN AM. L.J. 119, 142 (2010).

161. Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601 (repealing the Chinese Exclusion Acts).

162. *See* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1401 (2012)).

163. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996); Villazor, *supra* note 39.

164. Ch. 141, 18 Stat. 477 (repealed 1974).

165. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005); Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 242 (2015).

166. Ch. 126, 22 Stat. 58 (repealed 1943).

167. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875 (repealed 1952).

168. *See* Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 335–36 (2009) (explaining the informal agreement between Japan and the United States in which Japan agreed to restrict the outward migration of their citizens toward the United States).

169. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153 (providing that persons not eligible for citizenship were inadmissible).

170. *See, e.g.*, *The Immigration Act of 1924 (The Johnson Reed Act)*, OFF. HISTORIAN, http://history.state.gov/milestones/1921-1936/immigration-act (last visited Feb. 16, 2017) (stating that "the most basic purpose of the 1924 Immigration Act was to preserve the ideal of American homogeneity") [https://perma.cc/S58F-C7LC].

Japan, immigrated to the United States in 1913.[171] Unlike other Asians, Toyota, a Japanese national, was able to enter the United States because formal exclusions of Japanese nationals would not take place until over ten years later in 1924.[172] Between 1913 and 1923, Toyota served in the Coast Guard and served in World War I.[173] He received honorable discharges at least eight times.[174] Despite racial restrictions on naturalization,[175] Toyota applied for naturalization on May 14, 1921.[176] He did so under two laws that he argued made him eligible for citizenship. First, section 4 of the Immigration Act of 1918 allowed "any native-born Filipino" or "any alien" serving in the forces of the United States "during the time this country is engaged in the present war" to apply for naturalization.[177] Second, the Act of 1919 extended the benefits of section 4 of the 1918 Act to any person of foreign birth who had been honorably discharged.[178] Thus, Toyota, as a noncitizen who had served in the military during wartime, believed that he was eligible to apply for citizenship, and filed his application with the district court, which approved it.[179]

The federal government, however, submitted a petition to cancel his certificate.[180] Specifically, the government argued that Toyota was not eligible because the naturalization laws, with some exceptions for Filipinos who served in the military, only allowed whites and persons of African ancestry to naturalize.[181] Furthermore, the government contended that courts had held that the Japanese were racially ineligible for citizenship,[182] and thus Toyota's naturalization should be cancelled despite his military service. The district court agreed with the government and canceled Toyota's certificate of naturalization.[183]

The Supreme Court, affirming the revocation of Toyota's naturalization, held that he was not entitled to citizenship.[184] Engaging in statutory analysis, the Court recognized that Congress had passed laws that enabled noncitizens who had served in the military to apply for naturalization.[185] As the Court explained, "a principal purpose of [the 1918 and 1919 Acts] was to facilitate the naturalization of service men of the classes specified."[186] Yet, the Court also noted that the passage of these laws did not affect any of the racial restrictions to citizenship that had been in place

171. Toyota v. United States, 268 U.S. 402, 406 (1925).
172. *See id.*
173. *See id.*
174. *Id.*
175. *See* Ozawa v. United States, 260 U.S. 178, 178 (1922).
176. *Toyota*, 268 U.S. at 406.
177. *Id.* at 409; *see also* Immigration Act of 1918, ch. 186, 40 Stat. 1012 (repealed 1952).
178. Act of July 19, 1919, ch. 24, 41 Stat. 222.
179. *Toyota*, 268 U.S. at 406.
180. United States v. Toyota, 290 F. 971, 971 (D. Mass. 1923).
181. *Id.* at 972.
182. Ozawa v. United States, 260 U.S. 178, 198 (1922).
183. *Toyota*, 290 F. at 972.
184. *See Toyota*, 268 U.S. at 412.
185. *See id.* at 409.
186. *Id.*

under section 2169 of the Revised Statutes.[187] That is, the Immigration Act of 1918, according to the Court, explicitly stated that "nothing in the act shall repeal or in any way enlarge § 2169" except for the provisions allowing for Filipinos or Puerto Ricans who were eligible to apply for naturalization because of military service.[188] Although the Immigration Act of 1918 enlarged the class of noncitizens eligible for naturalization, the Court noted that it also "indicate[d] a purpose not to eliminate all distinctions based on color and race so long continued in the naturalization laws."[189] Indeed, the Court declared that only "native-born Filipinos of whatever color or race," who had the requisite military service qualifications, were eligible for naturalization under the Act of 1918.[190] Thus, Filipinos who did not satisfy the military requirements under the Immigration Act of 1918 continued to be ineligible for naturalization because of racial restrictions.[191] The fact that some Filipinos were eligible for naturalization demonstrated that they were not U.S. citizens.

Although the Supreme Court declared that Filipinos were not U.S. citizens, it explained that they were not aliens either. Indeed, the Court noted that their nonalienage was another reason why Filipinos who lacked military service were not eligible for naturalization. Specifically, the Court held that the naturalization statutes applied to noncitizens—"all persons not citizens who owe permanent allegiance to the United States" and thus not applicable to Filipinos because "the citizens of the Philippine Islands are not aliens."[192] Alienage presumes that an individual owes permanent allegiance to a foreign country.[193] As a territory of the United States, the Philippines, similar to Puerto Rico, was not a foreign territory and, indeed, fell under the "protection of the United States."[194] Thus, Filipinos "owe no allegiance to any foreign government."[195] Accordingly, the Court held that Filipinos are "not eligible for naturalization under § 2169 because [they are] not aliens."[196] Their nonalienage allowed them entry to the United States. However, they will continue to be barred from citizenship because of their race and American national status. Whereas the *Gonzales* Court had held that American nationals are not "aliens," the *Toyota* Court indicated that they are not citizens either. These two holdings judicially solidified the ambiguous status of American nationals as neither citizens nor aliens.

III. CODIFICATION OF NONCITIZEN NATIONAL STATUS

By the turn of the twentieth century, the ambiguous position of noncitizen national status was embedded in the country's citizenship law,

187. *Id.*; *see also* Rev. Stat. § 2169.
188. *Toyota*, 268 U.S. at 410.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 411.
193. *See id.*
194. *See id.*
195. *Id.*
196. *Id.*

primarily through the Supreme Court's holdings in *Gonzales* and *Toyota*. These opinions did more than launch a new form of political category. They also added to the body of citizenship law that invoked racial ideologies in determining citizenship eligibility, both descriptively and normatively. Further, the Court inserted yet another rule to a growing list of citizenship laws scattered in various parts of federal law. Congress, tasked with the power to establish a "uniform rule of naturalization,"[197] could have avoided these dispersed citizenship laws. Yet, between 1790—when Congress passed the first naturalization law[198]—and 1940, Congress enacted laws concerning citizenship, whether by birth or naturalization, that were dispersed throughout more than fifty different statutes.[199] Administrative officers and judges often experienced difficulty implementing and consistently interpreting these varied statutes.[200] The ambiguity concerning American nationality highlighted a larger problem of incongruous citizenship laws in need of legislative overhaul.

Congress responded to this turmoil with the Nationality Act of 1940,[201] which, for the first time, established a comprehensive nationality law, including the codification of American national status.[202] As the hearings on the 1940 Nationality Act reveal, the codification of noncitizen national status and other related laws reflect Congress's and political leaders' desire to maintain racial restrictions on citizenship. In other words, the formal inclusion of American nationals in the 1940 Nationality Act is part of an untold story about the exclusion of certain racial groups from permanent membership in the American polity.

To more deeply appreciate this story, Part III.A provides background context by explaining some of the underlying motivations that led to the passage of the Nationality Act of 1940. Part III.B next analyzes political leaders' efforts to avoid the unintended consequences of opening up citizenship to those who had been previously racially excluded from citizenship. Situated within this context, Part III.C maintains that the codification of "American national" demonstrates Congress's intent to deny U.S. territories full inclusion into the United States.

A. The Need for Comprehensive Nationality Law

The push for a comprehensive nationality law began in the early 1900s. In April of 1906, the Senate passed a joint resolution and appointed the House Committee on Foreign Affairs "to examine into the subjects of citizenship of the United States, expatriation, and protection abroad" and to

197. U.S. CONST. art. I, § 8, cl. 4.
198. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).
199. *See infra* Part III.A.
200. *See infra* Part III.A.
201. Ch. 876, 54 Stat. 1137 (repealed 1952).
202. *See id.*

recommend changes to the law.[203] Two months later, the Committee on Foreign Affairs expressed the overall motivation for passing a uniform law, including the need to "settle some of the embarrassing questions that arise in reference to citizenship, expatriation and the protection of American citizens abroad."[204] Surprisingly, however, the Committee on Foreign Affairs eschewed the opportunity to submit a proposed bill to Congress[205] and instead suggested "a more practical" solution: the Secretary of State would prepare a report and propose legislation.[206] In December of 1906, the Secretary of State submitted the State Department's report,[207] which recommended several changes to citizenship law, including laws providing for the revocation of an American woman's citizenship upon her marriage to a foreigner.[208]

Congress, however, ended up not passing comprehensive citizenship law. Instead, further adding to the list of scattered citizenship statutes, while also displaying gendered notions of citizenship, Congress adopted the State Department's recommendation to revoke an American woman's citizenship based on her marriage to a noncitizen. On March 2, 1907, Congress passed the Expatriation Act.[209]

Interestingly, the State Department's report was silent on the issue of noncitizen national status, despite its novel invention in the courts and glaring ambiguity. Yet, to the extent that the State Department recognized the need to address noncitizen national status, such acknowledgement may be gleaned from the appendix to the Committee on Foreign Affairs's report. Specifically, the appendix included a brief discussion of the "inhabitants of acquired territories" and gestured toward the administration and judicial perception of American nationals as neither citizens nor aliens.[210] In particular, suggesting that American nationality is similar to U.S. citizenship also acquired at birth, the report included noncitizen national status on the list of judicial opinions regarding the acquisition of birthright citizenship enumerated in chapter 1 of appendix I.[211] This list catalogued the cases where individuals acquired U.S. citizenship through either birth on U.S. soil or because their parents were citizens, suggesting that the State Department viewed those included on the list as part of the American polity. In fact, the same section refers to these people as "inhabitants not

203. H.R. REP. NO. 326, at 1 (1906). For a discussion of the 1940 Nationality Act, see Phillip Jessup, *Revising Our Nationality Laws*, 28 AM. J. INT'L L. 104, 104 (1934) (discussing earlier executive efforts to establish a comprehensive nationality law).

204. *See* H.R. REP. NO. 326, at 1.

205. *See id.* (stating that the Committee on Foreign Affairs "is not convinced of the necessity of having a commission to consider these questions").

206. *See id.*

207. *See id.* at 2.

208. *See id.* at 3 (recommending that "an American woman who marries a foreigner shall take, during coverture, the nationality of her husband; but upon termination of the marital relation by death or absolute divorce, she may revert to her American citizenship").

209. Act of Mar. 2, 1907, ch. 2534, 34 Stat. 1228 (repealed 1922).

210. *See* H.R. REP. NO. 326, app. 1, at 72.

211. *See id.* at 52–74.

aliens" and specifically focuses on "Porto Ricans and Filipinos."[212] Yet, the 1906 State Department report does not explicitly categorize these territorial residents as citizens either, despite their birth on U.S. soil. Indeed, the report acknowledged that the Supreme Court had addressed this citizenship question in *Gonzales* but stated that the issue "remains undecided."[213] Avoiding the opportunity to clarify this issue, the State Department did not recommend a change that would have defined the meaning of noncitizen national status.

The failure to pass a broader, more clear citizenship statute in 1907 did not stop Congress from passing further statutes touching on different aspects of citizenship. Adding more confusion to an already capricious set of laws, Congress extended citizenship to different groups on an inconsistent basis. In 1917, for example, Congress passed the Jones Act,[214] which conferred citizenship to people in Puerto Rico but did not pass similar legislation that would have extended citizenship to the other U.S. territorial residents in American Samoa, Guam, and the Philippines. Then, in 1922, Congress passed the Cable Act,[215] which partially repealed the Expatriation Act and allowed certain American women who had married noncitizens to keep their citizenship.[216] The law, however, did not include those American women who had married noncitizens who were Asian and not eligible for citizenship.[217] Congress also passed the Indian Citizenship Act of 1924,[218] which gave statutory citizenship to American Indians and, accordingly, addressed the Supreme Court's ruling in *Elk v. Wilkins*[219] that Native Americans did not acquire citizenship at birth under the Citizenship Clause.[220]

On the judicial end, courts continued to issue conflicting opinions regarding racial eligibility for citizenship. As Professor Ian Haney Lopez has explored, courts dealt with multiple cases in which individuals unsuccessfully sought to naturalize, contending that they were white.[221] For example, the Supreme Court had held that Japanese were not Caucasian and were accordingly ineligible for naturalization in *Ozawa v. United States*[222] and four months later, held in *United States v. Thind*[223] that a

212. *Id.* at 52, 72.
213. *Id.* at 73.
214. Act of Mar. 2, 1917, ch. 145, § 2, 39 Stat. 951, 951–52 (codified as amended at 48 U.S.C. § 737 (2012)).
215. Act of Sept. 22, 1922, ch. 411, 42 Stat. 1021.
216. *See id*.
217. For a fulsome examination of the racial dimension of the Cable Act, see Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 443–47 (2005) (discussing that the repeal of the Cable Act only annulled the portion of the Expatriation Act affecting women who married noncitizens and thus already eligible for naturalization, and not women who had married Asians, who remained racially excluded from citizenship).
218. Ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).
219. 112 U.S. 94 (1884).
220. *See supra* notes 61–74 and accompanying text.
221. *See* LÓPEZ, *supra* note 39, at 4–9.
222. 260 U.S. 178 (1922); *see also id.* at 198 (holding that only "white persons" were eligible for naturalization).

Punjabi man from the Caucus Mountains was also not white, as popularly understood.[224] These pronouncements as to who was not white for purposes of naturalization, however, failed to provide guidance to lower courts, which continued to issue inconsistent rulings on naturalization.

The impact of these dispersed laws and opinions renewed pleas to collect all the citizenship laws in one comprehensive document. In 1929, the Department of State once again studied the country's citizenship laws and submitted a report with recommendations to Congress.[225] Again, Congress failed to take any action.[226] Finally, in 1933, President Roosevelt issued Executive Order No. 6115 and directed the "Secretary of State, the Attorney General and the Secretary of Labor" to review the nationality laws of the United States and to recommend changes.[227] The committee, referred to as the Committee of Advisers,[228] sought to put together laws regarding five areas: acquisition of nationality through naturalization, acquisition of nationality at birth, loss of nationality, nationality in outlying possessions of the United States, and other miscellaneous areas.[229] The three departments met several times over the subsequent five years.[230]

Finally, on June 1, 1938, the Committee of Advisers submitted a report, which "contained about one-thousand-nine-hundred-and-some pages"[231] and included proposed legislation,[232] which became H.R. 9980.[233] The cover letter of the report underscored the administrative efficiency concerns of combining all the laws into one main document: "While the nationality laws of nearly all foreign states have in recent years been completely revised and codified, the laws of the United States on this subject are found scattered among a large number of statutes, and it is sometimes difficult to reconcile the provisions of different statutes."[234] Indeed, during one of the hearings on H.R. 9980, the State Department representative highlighted that the country's citizenship laws were in "approximately 50 different statutes,

---

223. 261 U.S. 204 (1923).

224. *See id.* at 215 (holding that a high caste Hindu does not fall under the category of "white persons" within the Naturalization Act).

225. *See* Jessup, *supra* note 203, at 104–05 (discussing the history of the establishment of the committee tasked with collating the country's nationality laws).

226. *See id.*

227. Exec. Order No. 6115 (Apr. 25, 1933).

228. *See* Jessup, *supra* note 203, at 104–05 (stating that the there were thirteen members of the committee: six from the Department of State, six from the Department of Labor, and one from the Department of Justice).

229. *See id.*

230. *See id.*

231. *See To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the Committee on Immigration and Naturalization*, 76th Cong. 28 (1948) [hereinafter *Hearings on H.R. 6127*].

232. *See* 86 CONG. REC. 11,939, 11,940 (1940).

233. *See id.* During the 1940 hearings, H.R. 9980 was entitled H.R. 6127. It was superseded by H.R. 9980, which substantively contained the same provisions. Thus, for purposes of the Article, the text will use H.R. 9980.

234. Letter of Submittal from Cordell Hull, Sec'y of State, Homer Cummings, Att'y Gen., & Frances Perkins, Sec'y of Labor, to President Roosevelt (June 1, 1938), *in* 86 CONG. REC. 11,940, 11,944 (1940) [hereinafter Letter of Submittal].

some of them running away back to the early days of the Republic, and many of them apparently inconsistent."[235] Accordingly, administrative officers had difficulty "constru[ing] these laws and say[ing] with any degree of confidence whether any individual born under certain circumstances is or is not an American national."[236]

Noting that the proposed legislation was arranged in a "systematic and orderly form"[237] that collated all the dispersed citizenship laws, the Committee of Advisers emphasized that the proposed law would promote a "fair and equitable government."[238] From the government's perspective, the law would help executive officers carry out their duties, including the issuance of U.S. passports, and would provide protection for American citizens or nationals.[239] It would also address ongoing conflicts regarding the status of children born in the U.S. territories who, at times, had been viewed as noncitizens at birth. The representative from the State Department, for example, shared an anecdotal story about a person born in an "outlying possession."[240] One representative noted that both of the child's parents were U.S. citizens who had lived in the United States for most of their lives, yet the citizenship status of the child was unclear. The representative commented that, without doubt, had the child been "born in the center of Asia, he would be a citizen."[241] Yet, although the State Department would consider the child an American citizen, others had a "differ[ent] opinion."[242] This is but one discrete example of a larger set of inconsistent opinions about citizenship that those advocating for the passage of a comprehensive citizenship statute hoped to address. By the late 1930s, there was consensus on the need to pass a uniform citizenship law.

B. Congressional Hearings on the Proposed Nationality Act

Congress held seventeen hearings before it passed the Nationality Act of 1940 and, in so doing, exposed some of the political leaders' ideologies about which racial groups were deserving of citizenship. The hearings are thus a window through which we can glean Congress's desire to maintain racial restrictions on citizenship, especially when they are viewed in conjunction with the fact that citizenship had been made available to select racial groups. In other words, the hearings echoed normative conceptions of who was worthy of citizenship and who should belong to the United States.

---

235. *Hearings on H.R. 6127*, at 36 (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State).

236. *Id.*

237. *Id.* at 31 (statement of Henry B. Hazard, Director of Research, Information, and Education, Immigration and Naturalization, Labor Department).

238. *Id.* at 28.

239. *Id.* at 36 (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State).

240. *Id.*

241. *Id.*

242. *Id.*

At the outset, witnesses at the hearing expressed concerns about diluting the value of citizenship because citizens have chosen to live outside the United States. Richard Flournoy, a State Department representative, noted this tension:

> [There are] thousands of persons living in foreign countries, usually in the foreign countries where they were born, or where their parents were born, having all their interests there, and their family connections, and yet they are citizens of the United States, and they may call on our Government for protection.[243]

This statement indicates the State Department's reluctance to provide protection for naturalized citizens who had chosen to disconnect themselves from the United States by residing outside the country. Crucially, underlying the State Department's criticism of providing protection for these citizens is the view that they, having chosen to return to their "native lands" or "other countries," were essentially "alien in all their characteristics and connections and interests."[244] Yet, despite their "foreignness," these individuals "have the right to enter the United States as citizens."[245]

The problem presented by such foreign citizens may be further underscored when viewed from the perspective of citizens born in the United States who have "alien parents and are taken by their parents to the countries from which the parents came and of which they are nationals."[246] Expressing skepticism about these individuals, Flournoy commented that although these children acquired "citizenship under the fourteenth amendment . . . they are in no true sense American[s]."[247] Flournoy stated that, problematically, these citizens may enter the country as citizens and "may marry aliens in those countries and have children and those children are born citizens."[248] The following exchange between Congressman Rees and Flournoy illustrates the foregoing point:

> *Mr. Rees*: Pardon me. Do I understand that a person born of alien parentage who goes abroad before he reaches the age of majority, lives in a foreign country for many, many years, marries a native of that country, can come to the United States and bring his family here?
>
> *Mr. Flournoy*: Yes, sir.
>
> *Mr. Rees*: As a citizen of the United States?
>
> *Mr. Flournoy*: Certainly. He can live all he pleases in his father's country, and if he does not take the oath of allegiance, if he avoids doing that, he remains a citizen of the United States. Furthermore, if he marries a woman of that country he breeds citizens of the United States. In reality they are no more citizens, in character, than all the other inhabitants of

243. *Id.* at 36–37.
244. *Id.*
245. *Id.* at 37.
246. *Id.*
247. *Id.*
248. *Id.*

> that country. There are not a few of these cases; there are hundreds of thousands of them.[249]

Indeed, in an exchange with another congressman remarking that it "seems to me we are spreading the mantle of protection awfully thin," Flournoy emphasized: "Not nearly so much as it is now. There are hundreds of thousands of people of the kind I have mentioned."[250] Passage of the Nationality Act of 1940 was thus crucial for addressing this gaping hole in citizenship law. Expressing his normative views as to who should benefit from this legislation, Representative William R. Poage remarked:

> I know the Constitution forces us to confer certain rights upon people born within our territory—but I don't see why anybody who does not live within the United States and who does not have the opportunity to take part in American institutions, who does not have opportunity to grow up to be what we look upon as an American and to speak the English language, who doesn't have any contact with our form of government—I don't see why that person, no matter what their birth, what their lineage, I don't see why we should confer citizenship upon them, no matter whether both their parents are American citizens by statute.[251]

To emphasize the point, Mr. Poage stated, "My idea is the minute they, by their own voluntary act, get out of the United States, kiss them good-bye and tell them 'Fare thee well, look to somebody else for your protection.'"[252]

In addition to critiquing the law that allowed birthright citizens to live elsewhere while still retaining citizenship rights, the political leaders behind this legislation discussed the impact that the proposed legislation would have on racial restrictions on naturalization. For example, Flournoy recognized at the outset that the right to naturalize was limited to those of the "white race" or persons of "African descent."[253] Expressing dissatisfaction, Flournoy commented that what made the law a "poor rule" was not because these restrictions were inherently wrong but rather because "the intermediate races, men of high class—Hindus, Japanese, Chinese—cannot get naturalized."[254] Interestingly, although acknowledging the unfairness of the law, the State Department believed it lacked authority to recommend overturning this rule.[255]

Indeed, the hearings displayed congressional leaders' anxiety about the extent to which exceptions to racial exclusion from citizenship had been made to members of certain racial groups. For example, it was revealed during the hearings that Congress had passed laws that allowed Filipinos

249. *Id.* at 37 (statements of Richard W. Flournoy, Assistant Legal Advisor, Department of State, and Rep. Edward Rees).

250. *Id.* at 40 (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State).

251. *Id.* at 48–49 (statement of Rep. William R. Poage).

252. *Id.* at 49.

253. *Id.* at 59.

254. *Id.* (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State).

255. *Id.*

and Japanese to gain citizenship in 1918 and 1935 despite citizenship law's prohibition on naturalization for Asian groups.[256] Such exceptional laws seemed to pacify speakers at the hearing when Henry Hazard of the Immigration and Naturalization Service explained that the laws were passed because the recipients served in the military.[257]

Congressional leaders expressed deep concerns, however, when Hazard explained that the proposed legislation would in fact open up citizenship to a new racial group: indigenous peoples from the Western Hemisphere would be permitted to apply for naturalization.

> *Mr. Rees*: Now, then, tell us in a few words how you are extending it.
>
> *Mr. Hazard*: By making eligible for naturalization descendants of the races indigenous to countries of North and South America.
>
> *Mr. Rees*: Who are they who are not at present racially eligible?
>
> *Mr. Hazard*: Well, there would be Peruvian Indians, for instance, the Indian races of British Columbia and of South America.[258]

Seeking to clarify that the bill would not broadly expand current citizenship laws, Rees inquired whether "natives of any country in the Western Hemisphere could become citizens who might not otherwise become citizens."[259] Hazard responded that this was "not the intention" and emphasized that the law would apply to those who were "principally Indians."[260] Noting that American Indians in the United States were "declared to be citizens by the act of June 2, 1924," Rees explained that the "Indians of British Columbia" and "Indians of South America" should be treated similarly.[261]

Likewise, Hazard inquired whether the bill would allow Asians or the "yellow or brown races" to naturalize.[262] The colloquy between the two reveals both legal and social conceptions regarding how to categorize people based on race and the ideology of the time that privileged some racial groups for citizenship.

> *Mr. Hazard*: Not of the yellow race. They are not indigenous—if you mean Orientals, and not the brown races, if by that is meant the Malay race from either the islands of the Pacific or Asia.
>
> *Mr. Rees*: It is your opinion then—to put it another way, what you really intended to do was to include the Indians of the Western Hemisphere?

---

256. *Id.* at 65–67 (statement of Henry B. Hazard, Director of Research, Information, and Education, Immigration and Naturalization, Labor Department) (discussing Filipino veterans acquiring citizenship in 1918 and Japanese veterans obtaining citizenship in 1935).

257. *Id.*

258. *Id.* at 66 (statements of Henry B. Hazard, Director of Research, Information, and Education, Immigration and Naturalization, Labor Department, and Rep. Edward Rees).

259. *Id.* at 66 (statement of Rep. Edward Rees).

260. *Id.* at 66–67 (statement of Henry B. Hazard, Director of Research, Information, and Education, Immigration and Naturalization, Labor Department).

261. *Id.* (statement of Rep. Edward Rees).

262. *Id.* (statement of Henry B. Hazard, Director of Research, Information, and Education, Immigration and Naturalization, Labor Department).

> *Mr. Hazard*: Because they are the predominant group that would be included.
>
> *Mr. Rees*: I am just wondering why you put it that way. . . . What happened to cause you to put that word "indigenous" in here—"people that are indigenous"?
>
> *Mr. Hazard*: Unless some words were used which would describe races which were native to these countries, it would let in all of the persons of races otherwise excluded, and which it was felt were not desirable to permit to be naturalized.[263]

As the foregoing shows, the speakers understood which racial groups, as a normative matter, should be entitled to become citizens and which racial groups should continue to be excluded. Indeed, Rees noted the role that the word "indigenous" played in limiting the right to apply for citizenship. In particular, by stating that the term "indigenous" did not include Chinese individuals, it ensured that those who were Asian and born in the Western Hemisphere would continue to be barred from naturalization.

> *Mr. Rees*: They are not natives, though, are they, to the Western Hemisphere?
>
> *Mr. Hazard*: Some of them are natives. I would not say "many," but some are born here. We have quite a number of Chinese who are natives of the United States, born here of Chinese parents who may have come from China.
>
> *Mr. Rees*: So you use this word "indigenous" because that differentiates from being a native?
>
> *Mr. Hazard*: Yes; because if Hindus, for instance, who have been held to be ineligible by the Supreme Court of the United States [under *Thind*]; [and] Japanese, who have also been held to be ineligible by the Supreme Court of the United States [under *Ozawa*]—if they were to go to some country of the Western Hemisphere and have children born there—unless this term or some term equally descriptive were used, they might become naturalized in spite of the fact that persons born in Japan or in British India would not be eligible.[264]

This statement, similar to others expressed during the hearing, indicates the tension that animated the nature of citizenship law at the time. The various dispersed laws had begun to dismantle some of the racial barriers to citizenship that both Congress and the Supreme Court had erected since the eighteenth century. The Nationality Act of 1940 may thus be viewed, in some respects, as Congress's efforts, despite the constitutional duty to create a uniform citizenship law, to ensure that certain racial groups would still be denied citizenship.

---

263. *Id.* (statements of Henry B. Hazard, Director of Research, Information, and Education, Immigration and Naturalization, Labor Department, and Rep. Edward Rees).

264. *Id.*

C. Defining and Codifying Noncitizen National Status

The foregoing exploration provides valuable context to the codification of noncitizen national status. At the outset, similar to other areas of citizenship law, the rules regarding American nationality tended to be interpreted inconsistently. Flournoy, for instance, explained that that when a person is born in one of the "outlying possessions, perhaps the Philippine Islands" and the father is a "citizen of the United States and had resided in this country," then the child would be considered a citizen.[265] As he explained, the opposing interpretation would lead to the conclusion that the child "would be [an] alien."[266] Emphasizing the problematic nature of such a conclusion, Flournoy noted that

> [i]t seems a manifest absurdity that a child should be an alien if born to one of our Army officers or civil servants in the Philippine Islands or in one of the other outlying unincorporated possessions, yet if the child were born in Tibet, he would be a citizen of the United States.[267]

Apparently, however, both the Department of Labor and the Immigration and Naturalization Service had different views about such a case.

Such conflicting opinions may perhaps have been influenced by the fact that by 1938, U.S. territorial residents had different citizenship and nationality status. By then, Puerto Ricans and Virgin Islanders had acquired U.S. citizenship.[268] By contrast, American Samoans and Guamanians, despite their ongoing quest for citizenship,[269] continued to have noncitizen national status. Although Filipinos also retained the status of American nationals, Congress had passed the Philippine Independence Act,[270] which upon the effective date of 1946, would lead to Filipinos losing their nationality.[271] Notably, nothing in the federal law at that time explicitly defined American national status, thus indicating strongly the need to clarify this status. Indeed, the Committee of Advisers[272] appointed to study the U.S. nationality law acknowledged the importance of resolving the political status of U.S. territorial residents when it submitted its report to Congress, explaining that "there are no statutory provisions fixing the nationality status of the inhabitants of certain outlying possessions of the United States, including American Samoa and Guam."[273]

The proposed code, which eventually became the Nationality Act of 1940, aimed to provide such clarification in a number of ways. First, it included a general definition of the term national. Indeed, the first

---

265. *Id.* at 55 (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State).
266. *Id.*
267. *Id.* at 55–56.
268. *See* Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–78 (repealed 1952).
269. *See, e.g.*, REUL S. MOORE & JOSEPH RIDER FARRINGTON, AMERICAN SAMOAN COMMISSIONS VISIT TO SAMOA (1931) (discussing the American Samoans testimony requesting citizenship).
270. Ch. 84, 48 Stat. 456 (1934).
271. *See id.*
272. *See supra* notes 227–30 and accompanying text.
273. Letter of Submittal, *supra* note 234, at 11,945.

provision of the proposed code presented during the hearings tackled this issue by stating that national "means a person owing permanent allegiance to a state."[274] Explaining that the term national had come into "common use in recent years," the Committee of Advisers stated that it refers to "individuals who together compose the people of a sovereign state" irrespective of the type of government that the state possesses.[275] Where the state has a democratic government, the Committee of Advisers's explanatory comments stated that the term "citizen" may also be used although the term "national" covers both contexts.[276]

In defining the term "national," the Committee cited international legal scholarship that referenced the term.[277] In general, these articles highlighted differing opinions among legal scholars as to the precise definition of "national." One commentator, Professor Dudley McGovney, contended that the term "nationality" is the "status of a person by virtue of which he belongs to a particular state."[278] To McGovney, a national was on equal footing as a citizen.[279] By contrast, other scholars, although recognizing the conventional equation of "citizen" with "national,"[280] maintained that there was a difference between the two. For instance, Professor Charles Mason noted that the "Malays of the Philippine Islands and Guam . . . are nationals of the United States," but they would not be considered citizens.[281] Another author, James Brown Scott, commented that "one may be a national of a country, and subject to its jurisdiction, without, however, being a citizen."[282] Scott pointed to Filipinos as an illustration of a group "subject to the Government of the United States and entitled to its protection abroad, although they are not citizens either in the sense of international, or of national law."[283]

The Committee of Advisers also took particular notice of treaties in an effort to explain the meaning of the term national. Specifically, the Committee of Advisers referred to the 1921 treaty between Germany and the United States in which the term had been employed.[284] This treaty, which articulated rights and privileges accorded to U.S. citizens and nationals, expressed the view that nationals were those "persons owing

---

274. *Hearings on H.R. 6127*, at 411 (sections of the proposed code with explanatory comments).

275. *Id.*

276. *Id.* By contrast, where the "state is represented by a personal sovereign," the term "national" may be used to refer to a "subject." *Id.*

277. *See id.*

278. Dudley O. McGovney, *American Citizenship*, 11 COLUM. L. REV. 231, 231 (1911).

279. *See id.* at 236 (contending that the Framers of the Constitution intended to use "citizen" as equivalent to "national").

280. *See* 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 372, at 273 (1906) (stating that the term "nationality" includes citizens and nationals).

281. *See* CHARLES HARTSHORN MAXSON, CITIZENSHIP 193 (1930).

282. James Brown Scott, *Nationality:* Jus Soli *or* Jus Sanguinis, 24 AM. J. INT'L L. 58, 58 (1930).

283. *Id.*

284. *See Hearings on H.R. 6127*, at 411–12 (sections of the proposed code with explanatory comments).

permanent allegiance to the respective states."[285] Underscoring the enduring allegiance that a national owes the state, the Committee cited *Carlisle v. United States*,[286] in which the Supreme Court distinguished between persons with "permanent" from those with "temporary" allegiance and referred to the people of the Philippines as having permanent allegiance to the United States, thus making them nationals.[287] Eventually, the concept of a person owing allegiance to the United States became the quintessential definition of the term "national."

Second, the Committee of Advisers clarified that the term "citizen" would not be analogous to "national." In particular, the proposed definition of "national" identified two distinct groups: proposed section 101(b) stated that the term "national of the United States" refers to "(1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[288] Distinguishing between the two, the explanatory comments stated that "[t]he corresponding term 'nationality' . . . is broader in scope than the term 'citizenship.'"[289] Indeed, the comments clarified that "[a]ll 'citizens of the United States' are also 'nationals of the United States,' but there are national[s] who are not citizens of the United States."[290]

The fact that the term "national" encompassed the term "citizen" but not vice versa was critical from an international law perspective. As the explanatory comments stated, "from the standpoint of international law noncitizen nationals have the same status and are entitled to the same protection abroad as nationals who are citizens of the United States."[291] Thus, outside of the United States, nationals would be treated as if they were citizens. However, "within the territory of the United States under the Constitution and laws thereof,"[292] nationals would be treated differently from, and indeed subordinate to, citizens.

Critically, the Committee of Advisers understood to whom the term "nationals" would be assigned. Specifically, the Committee of Advisers referenced the "inhabitants of the various outlying possessions who owe permanent allegiance to the United States but have not the status of citizens of the United States."[293] These included the "citizens of the Philippine Islands, natives of the Panama Canal Zone, and inhabitants of American Samoa and Guam owing permanent allegiance to the United States."[294] In

285. *Id.*
286. 83 U.S. 147 (1872).
287. *See id.* at 149. The link between allegiance and national status, of course, was not new by 1938, because the Supreme Court's opinions in both *Gonzales v. Williams*, 192 U.S. 1 (1904), and *Toyota v. United States*, 268 U.S. 402 (1925), had highlighted the relationship between the two. *See supra* Part II.
288. *Hearings on H.R. 6127*, at 412 (sections of the proposed code with explanatory comments).
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*

other words, the Committee of Advisers intended that the term "national," but not "citizen," would be equated with these territorial residents through the proposed code presented at the hearing.[295]

Third, the Committee of Advisers explained the method through which nationality and citizenship may be acquired. Proposed section 201(a) of the proposed code provided that a person is both a citizen and national of the United States if she was born in the United States subject to the jurisdiction thereof.[296] This shows the analogous meaning of citizenship and nationality when one is born in the United States. By contrast, proposed section 201(e) conferred citizenship and nationality upon a person born in an outlying possession of the United States if at least one parent is a U.S. citizen who has resided in the United States.[297] This demonstrates that what matters in this situation is both birth on U.S. soil and a parent's citizenship. Finally, proposed section 203(b) provided that a person acquires American nationality if born outside of the United States and its outlying possessions and both parents are nationals.[298] In this way, nationality was structured like citizenship, which may be passed down to children born abroad.

The Committee of Advisers's comments eventually culminated in the passage of the Nationality Act of 1940.[299] This act codified the concept of national status by both defining it and stating the means through which one acquires American nationality.[300] Specifically, proposed section 101(a) defined the status as a "person owing permanent allegiance to a state."[301] It then explained that "national of the United States" refers to "(1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[302] To clarify that the person holding national status is a member of the United States, proposed section 101(b) explicitly stated that the term U.S. national "does not include an alien."[303]

Adopting the Committee of Advisers's recommendations, the Nationality Act of 1940 identified the persons who

> shall be nationals, but not citizens, of the United States at birth: (a) A person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States; (b) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have

295. *Id.* Indeed, in discussing both terms, the explanatory comments cited *Downes v. Bidwell*, 182 U.S. 244 (1901), *De Lima v. Bidwell*, 182 U.S. 1 (1901), and *Gonzales v. Williams*, 192 U.S. 1 (1904).
296. *See Hearings on H.R.* 6127, at 419.
297. *See id.* at 423.
298. *Id.* at 430.
299. Ch. 876, 54 Stat. 1137 (repealed 1952).
300. *Id.* § 204, 54 Stat. at 1139.
301. *Id.* § 101(a), 54 Stat. at 1137.
302. *Id.* § 101(b), 54 Stat. at 1137.
303. *Id.*

> resided in the United States or one of its outlying possessions prior to the birth of such person.[304]

In sum, this part sought to explain the legal landscape from which American national status emerged and became embedded in citizenship law. Congress codified the ambiguous status created by the Supreme Court and, in so doing, formalized a secondary political category grounded on racial ideology. When situated against the backdrop of the passage of the Nationality Act of 1940, which sought to further limit citizenship to certain racial groups, the contemporary meaning of American national status may be further understood as part of the legacy of racial exclusion from citizenship.

IV. INTERSTITIAL CITIZENSHIP AND THE UNBUNDLING OF CITIZENSHIP RIGHTS

Having examined the invention and codification of American nationals, this part analyzes how the status shaped and continues to affect the lives of Americans nationals, as well as theorizes the legal ramifications of this intermediate category. The history I just narrated reveals the denial of citizenship on the basis of race and in furtherance of the American Empire and should thus continue to shape examinations of this liminal category. Nevertheless, as I contend in this part, it would be useful as a theoretical matter to explore the implications of American national status for our broader understanding of citizenship. Accordingly, in this part, I introduce two concepts that, going forward, have the potential to reframe our conception of citizenship. The first is the idea that the status of American nationals as neither citizens nor aliens led to a unique form of membership that I have coined "interstitial citizenship." As a descriptive matter, interstitial citizenship is an intermediate status in which its holders possess some rights that are limited to U.S. citizens, yet are still denied some citizenship rights because they are formally noncitizens. At a minimum, interstitial citizenship demonstrates that citizenship is more flexible than the traditional binary framing suggests. More broadly—which leads to the second conceptual idea—interstitial citizenship shows that U.S. citizenship rights may be disaggregated or unbundled.

A. Interstitial Citizenship

An individual's rights are defined by their citizenship status. Part IV.A.1 lays out the benefits of citizenship and the drawbacks of noncitizenship. Then, Part IV.A.2 provides the framework for a new term, which I call "interstitial citizenship."

304. *Id.* § 204, 54 Stat. at 1139. It also includes the following provision: "(c) A child of unknown parentage found in an outlying possession of the United States, until shown not to have been born in such outlying possession." *Id.*

1. Rights of Citizenship

Citizenship is valuable because of the package of rights that attend such status.[305] To be sure, there are certain rights that are enjoyed by all persons regardless of citizenship, and thus, rights and privileges need not and should not always be dependent on formal political membership.[306] Yet, both descriptively and normatively, there exists a set of rights that law has traditionally determined may be possessed only by citizens: the right to vote in federal, state, and local elections;[307] serve on a jury;[308] bear arms;[309] enter the United States (either for the first time or reentering upon absence from the country);[310] and the right to remain, without fear of deportation, in the United States.[311]

Of these set of rights, there are rights that are particularly significant because of their impact on the ability of citizens to travel freely in and out of the United States. First, the right to easily enter the United States is accorded to citizens because it enables those who had traveled or resided outside the country to come "home." This sense of coming home might also be felt by those citizens who were born abroad and had yet to reside in the United States. Regardless of the manner in which individuals acquired their citizenship or how long they have been away from the United States, because they are considered full members of the American polity, they cannot be turned away from their home country.[312]

To be sure, the right of citizens to enter or return to the United States has not been consistently recognized by administrative bodies or the courts. For instance, as Professor Erika Lee has pointed out, the Supreme Court

---

305. *See* BOSNIAK, *supra* note 1, at 20; COHEN, *supra* note 1, at 6. It should be noted, however, that not all U.S. citizens are treated equally and that not all rights should be based on citizenship. *See* KENNETH L. KARST, BELONGING TO AMERICA, EQUAL CITIZENSHIP AND THE CONSTITUTION 3 (1989) (discussing equal citizenship based on personhood). For a helpful, albeit simplistic, inventory of citizenship rights, see *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/citizenship/learners/citizenship–rights–and–responsibilities (last visited Feb. 16, 2017) (laying out the specific rights and responsibilities of citizens) [https://perma.cc/6DRZ-VAQQ].

306. *See* KARST, *supra* note 305, at 3–14. Furthermore, as Peter Spiro has commented, there are in fact "few important rights that hinge on citizenship status." PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 83 (2008).

307. However, the right to vote was not always limited to citizens. *See* Peter Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 879 (2015) (discussing that, in the early twentieth century, states and territories allowed noncitizens to vote in local, state, and federal elections).

308. *See* 18 U.S.C. § 243 (2012) (providing that no citizen shall be excluded from jury service because of race).

309. *See* Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) (exploring gun control laws that restrict noncitizens' ability to bear arms).

310. *See generally* Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008).

311. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011).

312. *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 375 (2004).

recognized in *Wong Kim Ark* that, though Ark acquired automatic citizenship based on his birth in the United States,[313] the federal government continued to restrict his right to enter the country.[314] More recently, as Professor Leti Volpp has explored, administrative actions to the War on Terror have shown that the executive and judicial branches have not consistently protected the right of certain citizens, particularly Muslim Americans, to return to the United States.[315] Moreover, cases have shown that some citizens have also been denied the right to enter the United States under suspicions that their claim to citizenship is fraudulent.[316] These cases demonstrate the pernicious consequences of refusing citizens their right to return and the importance of protecting this citizenship right.

Similarly, courts have held that citizens have the absolute right to remain in the United States without being subject to deportation. As the Supreme Court stated:

> The right to remain in the United States, in the enjoyment of all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor.[317]

Like the right to freely enter the United States, however, the federal government has also failed to fully recognize the citizen's right against being deported. In the 1930s, the federal government engaged in the removal of about one million people of Mexican descent who were then residing in the United States, where more than sixty percent of those removed were Mexican Americans who were U.S. citizens.[318] More recently, political scientist Jacqueline Stevens examined the extent to which immigration authorities unlawfully deported U.S. citizens from the United States.[319]

By contrast, noncitizens typically do not enjoy the right to freely enter, leave and return, or the right to remain in the United States. Under the current Immigration and Nationality Act, noncitizens must establish that they are admissible by showing that they meet one of the admissible categories under the INA.[320] Further, they must demonstrate that they are not inadmissible; that there is nothing in the INA that would otherwise

313. *See* United States v. Wong Kim Ark, 169 U.S. 649, 679 (1898).

314. *See* Erika Lee, *A History Lesson for Donald Trump and His Supporters*, N.Y. DAILY NEWS (Aug. 18, 2015), http://www.nydailynews.com/opinion/erika–lee–immigration–history–lesson–donald–trump–article–1.2329495 [https://perma.cc/QCJ4-E5MM].

315. *See* Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2583 (2007) (arguing that Muslim Americans possess a citizenship that is at risk of being "undone").

316. *See* Hernandez v. Cremer, 913 F.2d 230, 233 (5th Cir. 1990).

317. Fong Yue Ting v. United States, 149 U.S. 698, 762 (1893).

318. *See* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 1–3 (2005) (discussing the repatriation of almost one million Mexican Americans in the 1930s and that sixty percent of the deportees were U.S. citizens).

319. *See* Stevens, *supra* note 311.

320. *See generally* 8 U.S.C. § 1153 (2012).

preclude them from entering.[321] In addition, although noncitizens may freely leave the United States, they might not be admitted upon their return despite their length of residence in the country.[322] For those noncitizens who have been away from the United States for more than 180 days, they will be treated as if they are seeking to enter the country for the first time, instead of simply returning home.[323] Finally, in general, noncitizens may be subject to removal at any time.[324] Thus, even long-term lawful permanent residents of the United States have been deported despite their significant length of residence in the country.[325]

2. American Nationals and Disruption of the Citizen/Alien Binary

The line dividing citizens and noncitizens is not so clear when viewed from the perspective of American nationals. Historically and today, noncitizen nationals have freely entered the United States despite their alienage. As persons who pledge allegiance to the United States, American nationals are in this way treated as U.S. citizens.[326]

This right of entry despite their noncitizenship status underscores the unique nature of American nationals and points to a category that I refer to as "interstitial citizenship." As interstitial citizens, American nationals are functionally citizens, for they cannot be barred from crossing the borders of

---

321. *See id.* § 1182.

322. *See id.* § 1181(b) (granting the Attorney General discretion over admission of returning resident immigrants).

323. *See id.* § 1101(a)(13)(C)(ii); *see also* Landon v. Plasencia, 459 U.S. 21, 21 (1982) (discussing the rights of lawful permanent residents to return to the United States).

324. *See* 8 U.S.C. § 1227 (listing classes of deportable aliens).

325. *See* Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1303 (2013) (explaining that noncitizens are eligible for crime-based deportation and arguing that length of residence should help determine a noncitizen's right to remain); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 677–78 (2015) (analyzing the ability to remove a noncitizen with legal permanent resident status); Julianne Lee, Note, *Tortured Language: Lawful Permanent Residents and the 212(H) Waiver*, 84 FORDHAM L. REV. 1201, 1207–08 (2015) (discussing grounds for noncitizen removal). For empirical data on noncitizens who have been deported from the United States, see *Forced Apart (by the Numbers)*, HUM. RTS. WATCH (Apr. 15, 2009), https://www.hrw.org/report/2009/04/15/forced–apart–numbers/non–citizens–deported–mostly–nonviolent–offenses (estimating that 20 percent of deported noncitizens from 1997–2007 were living legally in the country, often for decades) [https://perma.cc/3XCW-73TK].

326. It should be noted, however, that there are other groups of noncitizens who also enjoy the right to be admitted to the United States, although unlike noncitizen nationals, their right to enter may not be guaranteed. *See* 48 U.S.C. § 1681 (providing that people from the Federated States of Micronesia and Republic of Marshall Islands have the right to enter the United States); U.S. DEP'T OF STATE, STATUS OF CITIZENS OF THE FREELY ASSOCIATED STATE OF THE REPUBLIC OF PALAU (1996), http://www.palauembassy.com/Documents/Citizenship Status.pdf (stating that people from the Republic of Palau have the right to apply to enter the United States without obtaining a nonimmigrant visa, although some inadmissibility grounds might prevent their entry) [https://perma.cc/HSS5-UAT4]; *see also* Treaty of Amity Commerce and Navigation, Between His Britannic Majesty; and the United States of America, by Their President, with the Advice and Consent of Their Senate, Gr. Brt.-U.S., art. III, Nov. 19, 1794, 8 Stat. 116 (providing Canadian Indians with the right to enter the United States).

the United States. This unfettered right to enter the United States was particularly important between 1900 and 1952, when various immigration laws made different groups of Asians racially inadmissible to the United States.[327] As discussed above, Congress prohibited persons who were then ineligible to become citizens from entering the United States, and by barring Japanese from immigrating,[328] Congress facilitated the virtual exclusion of Asians from the United States.

American nationality, however, enabled Filipinos and other Pacific Islanders who held this status to enter the United States despite their racial ineligibility for citizenship. Thus, beginning in 1898, after the Philippines became a U.S. territory, Filipinos began to enter the United States as American nationals.[329] Travel between the Philippines and the United States was considered insular travel, and thus the federal government did not keep track of how many nationals entered the United States. However, changes in the population of Filipinos in the United States generally demonstrate the role that the status of noncitizen nationals played in encouraging migration to this country. In 1903, approximately 100 Filipinos arrived in the United States, mainly to study.[330] In addition to arriving in the United States to study, many Filipinos migrated to work as farmers and to join the military.[331] In 1910, it was estimated that there were fewer than 3,000 Filipinos in the United States.[332] By 1920, however, there were nearly 27,000 Filipinos, and by 1930, that number grew to approximately 110,000.[333]

Race continued to play a role in American national status. The U.S. Court of Appeals for the Ninth Circuit highlighted this point in *Palo v.*

---

327. As explained above, the United States imposed racial restrictions to naturalization until 1952. *See* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1401). These racial barriers to citizenship impacted more than the ability of people to gain full membership to the American polity. It also affected the ability of people who were not eligible to become citizens to immigrate to the United States in the first instance. Under the Johnson-Reed Act of 1924, persons who were ineligible for citizenship were inadmissible to the United States. At that time, the law provided that only persons who are white or of African descent were eligible to become citizens. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153.

328. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153; *see also* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 154 (explaining that the Johnson-Reed Act made Japanese immigrants ineligible for citizenship); Jennifer M. Chacon, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 351–52 (explaining that the Johnson-Reed Act mandated the exclusion of immigrants, including Japanese); Villazor, *supra* note 39, at 1394–95 (discussing the Johnson-Reed Act, which was aimed at excluding Japanese).

329. For a valuable exploration of the migration of Filipinos to the United States during the mid-twentieth century, see RICK BALDOZ, THE THIRD ASIATIC INVASION: EMPIRE AND MIGRATION IN FILIPINO AMERICA 1898–1946 (2011).

330. *See* MIGRATION POLICY INST., THE FILIPINO DIASPORA IN THE UNITED STATES 3 (2014).

331. *See id.*

332. *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 61 (1993) (providing a chart on the number of Filipinos residing in the continental United States).

333. *See id.*

Weedin.[334] In that case, a Filipino, who was half Chinese, sought to enter the United States as a noncitizen national.[335] There, the Ninth Circuit noted that "we must concede, of course, that a citizen of the Philippine Islands owes allegiance to the United States and is not an alien."[336] Yet, the court upheld the noncitizen's exclusion because his father was Chinese, making Palo Chinese and thus excludable.[337] Despite Palo's birth in the Philippines when it was a U.S. territory, he was denied the status of American nationality, as well as the rights attendant to nationality.

Notwithstanding *Palo* and the continued racial exclusion of other Asian groups, immigration officers admitted thousands of Filipinos to the United States. It was not until the mid-1930s, after Congress passed the Philippine Independence Act of 1934[338] declaring the Philippines an independent country effective 1946, that the number of Filipinos entering the United States began to decrease. The Philippine Independence Act declared that Filipinos seeking entry to the United States would be considered "aliens."[339] Moreover, Congress provided that the Philippines would be subject to a quota of fifty immigrants per year.[340] This law had a drastic effect on the migration of Filipinos. In 1931, for instance, there were 36,535 Filipinos who entered the United States.[341] By 1937, the number of entrants dwindled to seventy-two.[342]

Another right enjoyed by American nationals is the right to remain in the United States. As noted earlier, this right is typically reserved for citizens. The absence of this right impacted the more than 2,500,000 noncitizens who were deported under President Obama's administration between 2009 and 2016.[343] By contrast, as interstitial citizens, American nationals have the benefit of staying in the United States, even if the federal government desired their removal. For example, in *Barber v. Gonzales*,[344] the Supreme Court addressed the issue of whether an American national may be deported. Gonzales was born in the Philippines in 1913 and moved to the continental United States in 1930, where he had lived ever since.[345] Gonzales was subsequently convicted of crimes in 1941 and 1950 and, in 1951, underwent an administrative hearing and was ordered deported to the Philippines.[346] Specifically, the government sought his deportation for

334. 8 F.2d 607 (9th Cir. 1925).
335. *Id.* at 608.
336. *Id.* at 607–08.
337. *Id.* at 608.
338. Ch. 84, 48 Stat. 456.
339. *See id.*
340. *See id.*
341. *See* James A. Tyner, *The Geopolitics of Eugenics and the Exclusion of Philippine Immigrants from the United States*, 89 GEOGRAPHICAL REV. 54, 70 (1999).
342. *See id*.
343. *See FY 2016 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/removal–statistics (last visited Feb. 16, 2017) [https://perma.cc/CE6D-QHBQ].
344. 347 U.S. 637 (1954).
345. *See id.* at 638.
346. *See id.*

committing a crime against moral turpitude after making an "entry" in the United States.[347]

The Supreme Court reversed, however, holding that Gonzales did not make an entry such that he was subject to the deportation grounds. The word "entry," according to the Court, signified "coming from the outside."[348] The Court further explained that "in order that there be some entry within the meaning of the act there must be an arrival from a foreign port or place."[349] The Court then stated that, at the time Gonzales came to the continental United States, he was not arriving from a foreign place, but instead was "moving from one of our insular possessions to the mainland."[350] Thus, although Gonzales was by the 1950s a noncitizen, having lost his American nationality status, his prior status insulated him from removal.

The importance of the right not to be removed is particularly significant when viewed from the perspective of noncitizens in "liminal" status or those who are in "temporally and socially uncertain transitional state of partial belonging."[351] As Professor Jennifer Chacon has examined, persons in "liminal status" have had to bear social and legal costs as a result of having to seek relief, which may always be available.[352] Individuals who have American nationality, however, are free from the burden of legal, social, and psychological costs of removal.

Another feature of interstitial citizenship is the ability to enjoy not only federal rights but also rights guaranteed to U.S. citizens under state law. At one point in U.S. history, one of the rights of citizenship was the right to own property as defined by state law.[353] Several states passed alien land laws to restrict the ability of noncitizens, who were then ineligible for naturalization, from owning property.[354] These laws were directed particularly at Japanese Americans.[355]

American nationals, however, were able to acquire property despite their alienage. For example, in *Alfafara v. Fross*,[356] the California Supreme Court held that Alfafara, although a noncitizen national, had the right to

347. *See id.* (discussing that he was deported under section 19(a) of the Immigration Act of 1917).

348. *Id.* at 641.

349. *Id.*

350. *Id.* at 642.

351. *See* Jennifer M. Chacon, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 710 (2015).

352. *See id.* at 713–30.

353. *See* Aoki, *supra* note 26, at 37; Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497 (2001). Today, although citizenship is no longer a requisite for land ownership, there are still statutes that restrict certain forms of ownership to U.S. citizens. *See* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1024–33 (2010).

354. *See* Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 170–76 (1999) (discussing state statutes limiting alien land rights).

355. *See* Villazor, *supra* note 353, at 984.

356. 159 P.2d 14 (Cal. 1945).

own land despite the state's alien land law.[357] Alfafara was born in the Philippines in 1899 and was thus a noncitizen national of the United States.[358] In 1929, he moved to California and purchased property in 1944.[359] After selling the property to Alfafara, however, the seller of the property refused to convey title, contending that the transaction violated California's alien land law.[360] Alfafara, however, maintained that the law did not apply to him because he was not an alien.[361]

The California Supreme Court agreed with Alfafara.[362] The court acknowledged at the outset that Filipinos were racially ineligible for citizenship. Citing the Nationality Act of 1940, the court explained that the right to naturalize extends only to "white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere."[363] Although the law allowed Filipinos who served in the military to apply for naturalization, Alfafara had not served in the military and thus was not eligible to naturalize. Nevertheless, the alien land law did not apply to Alfafara because he was not a noncitizen. Relying on *Toyota*, the court held that Filipinos "are not aliens"[364] because they did not owe allegiance to any foreign government.[365] Indeed, the court underscored that Filipinos, since 1898, "have owed allegiance only to the United States."[366]

Notably, the court addressed Alfafara's status itself and found that he was a national.[367] The court noted that prior to the Nationality Act of 1940, the status of Filipinos was unclear.[368] The passage of that law, however, clarified the status of Filipinos: they were thereafter nationals but not citizens of the United States who owe "permanent allegiance to the United States."[369] Accordingly, the court held that the state's alien land law could not include all categories of noncitizens, "whether alien or national."[370]

Although American nationals enjoy certain rights of citizenship, there is no doubt that they continue to be regarded as aliens. Specifically, the fact that they must naturalize to attain citizenship strongly indicates their alienage. The Supreme Court addressed this point in *Toyota*.[371] As discussed above, the Court analyzed whether an amendment to the naturalization laws, which made Filipinos who served in the military

357. *Id.* at 17.
358. *Id.* at 14.
359. *Id.*
360. *Id.*
361. *Id.* at 14–15.
362. *Id.* at 15.
363. *Id.*; *see also* Nationality Act of 1940, ch. 876, 54 Stat. 1137.
364. *Alfafara*, 159 P.2d at 15 (citing Toyota v. United States, 268 U.S. 402, 411 (1925)).
365. *See id.* at 16.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 17.
370. *See id.*; *see also* De Cano v. Washington, 110 P.2d 627, 635 (Wash. 1941) (upholding the right of an American national to purchase land despite the state's alien land law).
371. Toyota v. United States, 268 U.S. 402, 402 (1925).

eligible for citizenship, opened up citizenship to a Japanese man.[372] The Court underscored that the Japanese continued to be excluded from citizenship, which was then limited to free white persons and persons of African ancestry.[373] The Court further explained that Filipinos who did not serve in the military were also barred from citizenship.[374] Thus, although Filipinos could enter the United States and avoid immigration laws that applied to Asians, they were treated just like other Asian immigrants by being precluded from full membership. As the Court emphasized, "It has long been the national policy to maintain the distinction of color and race" in the context of citizenship laws.[375]

Second, unlike U.S. citizenship that is acquired at birth, Congress may voluntarily take away national status.[376] This congressional power was highlighted in *Rabang v. Boyd*.[377] Henry Rabang was born in the Philippines in 1910.[378] A U.S. national at birth, Rabang moved to the United States in 1930 and was admitted as a permanent resident.[379] Twenty-one years later, in 1951, Rabang pled guilty to violating federal drug laws.[380] He was then detained and ordered deported under immigration laws that made deportable "any alien" convicted of a federal narcotics law.[381] The federal government argued that Rabang, although a U.S. national at birth, had lost this status when Congress granted full independence to the Philippines in 1946.[382] Rabang, having entered as a national and resided in the United States for twenty-one years, actually became a noncitizen four years before he pled guilty to federal drug laws.

Rabang challenged this application of the immigration laws, contending that he was not a noncitizen.[383] Specifically, he argued that national status "bears such close relationship to the constitutionally secured birthright citizenship acquired by the American-born, that its divestiture should rest only upon the most explicit expression of congressional intention."[384] The Court disagreed, pointing out that when Congress granted "full and complete independence" to the Philippines, it also severed the "obligation of permanent allegiance owed by Filipinos who were nationals of the United States."[385]

Rabang contended, however, that the words of the immigration statute required that he had made an "entry" from a foreign country and that,

372. *Id.* at 407.
373. *See id.* at 408.
374. *See id.* at 410.
375. *See id.* at 412.
376. Note that citizenship acquired by naturalization may be revoked by Congress. *See* Immigration and Nationality Act § 340, 8 U.S.C. § 1451 (2012).
377. 353 U.S. 427 (1957).
378. *See id.* at 428.
379. *Id.*
380. *Id.*
381. *Id.* at 428–29.
382. *Id.* at 430–32.
383. *Id.*
384. *Id.*
385. *Id.*

contrarily, when he entered the United States in 1930, the Philippines was not then a foreign country.[386] Thus, the United States's power to deport did not apply to him because Filipinos had been held to be nonaliens, in light of *Gonzales*.[387] Rejecting Rabang's argument, the Court noted that Rabang had made the erroneous assumption that "Congress was without power to legislate the exclusion of Filipinos in the same manner as 'foreigners.'"[388] The Court explained that the power to "acquire territory by treaty" implies both the power to govern the territory but also to "prescribe upon what terms the United States will receive its inhabitants, and what their *status* should be."[389] Critically, the Court held that Congress not only had the power to exclude Filipinos but also chose to exercise such power when it passed the Independence Act, which recognizes "citizens of the Philippine Islands," who were not citizens of the United States, "as if they were aliens."[390]

The preceding discussion illustrates what it means to be an American national: an interstitial citizen who retains essential qualities of alien status. Within the interstices of the line between the citizen and the noncitizen, American nationals enjoy some rights of citizenship while at the same time experience the disabilities of alienage. As such, interstitial citizenship has challenged the binary construction of citizenship in which certain rights are restricted for citizens only.

B. Unbundling Citizenship

The foregoing section provides a descriptive assertion that American nationals illuminate the unique category of interstitial citizenship and the extent to which it challenges the dichotomous citizen/alien framing of citizenship. This section introduces a second conceptual framework emerging from the idea of interstitial citizenship: rights of citizenship may be delinked from formal citizenship. That is, as a theoretical matter, citizenship may be unbundled.

Professor Elizabeth Cohen, a political scientist, has invoked the idea of disaggregating and unbundling rights in her pivotal work on "semi-citizens." She explains at the outset that citizens have "access to an intertwining set or 'braid' of fundamental civil, political, and social rights, along with rights of nationality."[391] She then explains that "[s]emi-citizens are accorded only subsets of those rights."[392] Viewing the process of unbundling from the perspective of states, Cohen notes that "[b]ecause rights create political relationships it is crucial to states that they be able to disaggregate bundles of rights."[393] The ability to unbundle the "braid of

386. *See id.* at 431–32.
387. *See id.* at 432 (citing Gonzales v. Williams, 192 U.S. 1, 12–13 (1904)).
388. *Id.*
389. *Id.* (quoting Downes v. Bidwell, 182 U.S. 244, 279 (1902)).
390. *Id.* at 433.
391. *See* COHEN, *supra* note 1, at 6.
392. *Id.*
393. *Id.*

citizenship rights" facilitates the "shaping and managing" of populations with diverse elements that could not be "governed by a single set of rules."[394] Notably, using "unbraiding" as a framework, Cohen explains:

> Rights not only come unbraided from each other, but each individual strand can fray. Types of citizenship rights can become disaggregated from one another and from their own constituent parts. This suggests that citizenship rights are independent of, rather than contingent upon, each other; that is, each right exists because it is valuable in itself, not because it makes the exercise of other rights possible.[395]

A related framework for examining citizenship is the "bundle of sticks" metaphor. The image of a "bundle of sticks" has long been used as a metaphor for the set of property rights that individuals possess where each stick is independent of the others within the bundle, and together, they form the set of rights that an owner or possessor of property possesses. The possessor of property may convey any stick to another person or persons, either on a permanent or a temporary basis, which would then give that new holder of the stick certain rights to the property. By unbundling property rights, we gain a deeper understanding of the independent power of each right and how it relates to other rights. In his article on the alien land laws, the late Professor Keith Aoki, for example, invoked this analogy to explain the extent to which these laws that prevented Japanese nationals and Japanese Americans from acquiring land meant that they were denied different "sticks"—the "right to own" property, which is a "fundamental stick in the proverbial 'bundle of sticks' U.S. property regime," as well as the "right to rent" and "right to devise."[396]

Although the bundle of rights analogy is conventionally used in property law, the concept of "unbundling" has been recently deployed in other areas of law, including constitutional law,[397] federalism,[398] criminal law,[399] and copyright infringement.[400] This body of work has shown that, both descriptively and normatively, unbundling certain areas of law may be beneficial. Professor Jessica Bulman-Pozen's work on federalism, for instance, adopts the unbundling framework to argue that federalism may best be understood as a flexible concept that is constitutive of different autonomous parts, including the right of states to subvert federal laws.[401] Professor John Rappaport similarly adopts the framework in his work on the criminal law context by arguing against the guilty plea/jury trial binary and contending that defendants can unbundle their rights and trade them piecemeal to reduce sentencing exposure.[402] He contends that unbundling plea bargaining can be beneficial in some instances, such as when a

394. *Id.*
395. *Id.*
396. *See* Aoki, *supra* note 26, at 39–40.
397. *See* Primus, *supra* note 27, at 1079.
398. *See* Bulman-Pozen, *supra* note 27, at 1067.
399. *See* Rappaport, *supra* note 27, at 181.
400. *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).
401. *See* Bulman-Pozen, *supra* note 27, at 1072–74.
402. *See* Rappaport, *supra* note 27, at 184.

prosecutor is required to offer an unduly low sentence to a defendant who has pled guilty.[403]

The bundle of sticks approach is useful in the citizenship context as well. As American nationals and the rights that attend their interstitial status demonstrate, it is not necessarily the case that one has to have formal citizenship to enjoy rights that have been conventionally linked with this formal status. The cases discussed in Part IV.A have shown, for example, that some American nationals enjoyed the right to enter the United States freely even though they remained racially ineligible for naturalization. In addition, American nationals have demonstrated that there are instances where they might not be subject to deportation from the United States even though they are noncitizens.

Considering citizenship in this light might not only be descriptively useful but also valuable upon exploring the answers to a number of normative, doctrinal, and prescriptive questions that the concept raises. For example, what might be considered "sticks" that make up the bundle of citizenship? Indeed, what should be considered the "core" rights of citizenship? May each stick be conveyed or assigned to other citizens and noncitizens? If so, should there be term limitations on the conveyance as in a lease? Is the right inheritable? Can the government take away one stick, but not others? If it does, might it be considered a taking? By addressing these questions, we gain an appreciation for the individual value or worth of each stick within the bundle.

Unbundling citizenship has potential usefulness in debates surrounding immigration reform. Comprehensive immigration reform has been stalled in part because of legislators' resistance to creating a path to citizenship for the eleven million undocumented immigrants in the United States.[404] For some, providing undocumented immigrants with a guaranteed path to citizenship is akin to awarding those individuals who intentionally violated the rule of law. A number of undocumented immigrants have expressed that, for them, citizenship is not necessarily what they desire.[405] Instead, they want to be able to live and work in the United States and exit and enter the country without fear of removal.[406] Yet, advocates have countered that they would not support the passage of a new immigration law if it failed to

403. *Id.* at 192–93.

404. *See* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 339 (2012) (explaining that comprehensive immigration reform would include a path to legalization for millions of undocumented immigrants, which is politically controversial).

405. *See* Julia Preston, *Illegal Immigrants Are Divided over Importance of Citizenship*, N.Y. TIMES (Nov. 20, 2013), http://www.nytimes.com/2013/11/21/us/illegal–immigrants–divided–over–the–importance–of–citizenship.html [https://perma.cc/LAT2-Z2EL]. Indeed, a study shows that a majority of lawful permanent residents have not pursued citizenship. *See* Ana Gonazlez-Barrera et al., *The Path Not Taken: Two Thirds of Legal Mexican Immigrants Are Not U.S. Citizens*, PEW RES. CTR. (Feb. 4, 2013), http://www.pewhispanic.org/files/2013/02/Naturalizations_Jan_2013_FINAL.pdf [https://perma.cc/H8ZD-TAHB].

406. *See generally* Preston, *supra* note 405.

include some process for undocumented immigrants to acquire lawful status or citizenship. Ultimately, the tension between these two positions led, in part, to the failure to pass immigration reform.

The idea of the divisibility of citizenship rights may be particularly useful for the continuing discussions around this type of reform assuming, of course, that the current administration and Congress are willing to address the issue. Particularly, it may be beneficial to consider discussions centering on a type of status involving certain rights of citizenship that immigrants consider particularly valuable, such as the right to freely enter the United States and the right not to be deported. This is not to suggest that a path to citizenship need not be part of the discussion. To the contrary, it should, particularly in light of the history I explained above—but so should other possible statuses that create an intermediary category that would allow some noncitizens to enjoy certain rights of citizenship. To be clear, any intermediate category that noncitizens might desire should be such that noncitizens may later opt for full citizenship. In other words, the choice to become a U.S. citizen must remain available.

CONCLUSION

Under the conventional understanding of the Citizenship Clause,[407] a person automatically acquires U.S. citizenship when she is born on U.S. soil.[408] Ongoing discussions about "anchor babies"[409] and proposals to deny birthright citizenship to children who were born in the United States and whose parents are undocumented[410] animate this popular conception of birthright citizenship law. Yet, it is not always the case that birth on U.S. soil leads to U.S. citizenship. As this Article has contended, there is another, notably inferior, status acquired at birth: noncitizen national status. This Article aimed to provide a fuller legal historical account of how the American national status came to be part of federal citizenship law. But, it has also examined the broader implications of this status for the way in which we understand both citizenship and immigration law. First, it argued that the noncitizen national challenges the conception of a binary citizen/noncitizen framing of citizenship. Second, it has underscored the extent to which American national status constituted a form of interstitial citizenship or membership. This intermediate category enabled American nationals to navigate racially restrictive immigration laws, property, and

407. U.S. CONST. amend. XIV, § 1, cl. 1.

408. *See* Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 721–22 (2012) (outlining the "orthodox" interpretation of the Citizenship Clause).

409. For an example of the use of this term, see *Hannity: Ann Coulter Sounds Off on Immigration Polices in New Book 'Adios, America*,' (Fox News television broadcast June 2, 2015) (quoting Coulter as saying, "We need to end the insane policy of anchor babies, illegal aliens running across the border or arriving, flying in from China, and staying in immigration hotels, giving birth specifically to get American citizenship").

410. *See* Birthright Citizenship Act of 2015, H.R. 140, 114th Cong. (2015) (introduced by Rep. Steve King); Birthright Citizenship Act of 2015, S. 45, 114th Cong. (2015) (introduced by Sen. David Vitter).

naturalization laws. In so doing, noncitizen nationals reveal that citizenship is more fluid than previously thought and help to illustrate the argument that citizenship rights may be unbundled. Third, this Article has suggested the potential application of the concept of unbundling citizenship to immigration reform. In sum, by exploring both the legal history and contemporary significance of American nationals, this Article sought to deepen our conceptions of why citizenship both descriptively and normatively matters.