
ARTICLE

CITIZENISM: RACIALIZED DISCRIMINATION BY DESIGN

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ABSTRACT

This Article advances the conceptual framework of “citizenism” to describe how citizenship is mobilized and weaponized to sustain structural racism. Citizenism transcends formal citizenship status because the construction of whiteness underwrites it as the only presumptively legitimate racial category for citizenship. A focus on citizenism provides a new framework for understanding an underlying layer of white supremacy that defines access to and shapes the civil and political rights of people of color.

Citizenism is premised on the normative presumption that noncitizens should be excluded from full legal protections. Although their labor sustains economies across the globe, they are criminalized and dehumanized. In a racial state like the United States, this constructed illegality, in turn, further diminishes the rights of citizens of color who are racialized as presumptively “illegal.”

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Citizenism functions as a legalized system of discrimination that uses citizenship status to perpetuate racialized outcomes for communities of color. Specifically, law and immigration enforcement make legally permissible presumptions about citizenship based on race, which delimits the fundamental rights of citizens of color. The legally constructed concepts of “speaking like an illegal” and “looking like an illegal” have reproduced a subordinate status that leads to unequal treatment under the law for both noncitizens and citizens of color. Citizenism, this Article posits, helps us understand how the intersection of race, Indigeneity, class, immigration, and citizenship status conspires to maintain and further exacerbate the existing racial order.

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The U.S.-Mexican border es una herida abierta [it is an open wound] where the Third World grates against the first and bleeds. And before a scab forms it hemorrhages again, the lifeblood of two worlds merging to form a third country — a border culture. Borders are set up to define the places that are safe and unsafe, to distinguish us from them. A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary. It is in a constant state of transition. The prohibited and forbidden are its inhabitants.

—Gloria Anzaldúa¹

Prologue: Dedicación [Dedication] I dedicate this writing to my maternal *abuelita* [grandmother], Aurora Medina Martínez. In the words of Maya Angelou, she is a “[p]henomenal woman.”² Aurora was born into extreme poverty in Fresnillo, Zacatecas, Mexico. She is the devout daughter of a family of seven sisters. Her sun-kissed skin gives away her indigenous ancestry, but to this day, she denies her Indigeneity.³ This denial is the product of colonial trauma.⁴ Like many others in her *ranchito* [village], her ancestors—my great-great-grandfather, great-grandfather, and great-uncles—worked as *braceros* [temporary guest workers].⁵ U.S. corporations recruited them along with four and a half million Mexican men through a bilateral agreement between Mexico and the United States to provide cheap sources of racialized labor.⁶

¹ GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 3 (1st ed. 1987).

² MAYA ANGELOU, *Phenomenal Woman*, in *AND STILL I RISE* 8, 8 (1978).

³ See Maylei Blackwell, Floridalma Boj Lopez & Luis Urrieta Jr., *Critical Latinx Indigeneities*, 15 *LATINO STUD.* 126, 126 (2017) [hereinafter Blackwell et al., *Critical Latinx Indigeneities*] (explaining “Critical Latinx Indigeneities as an interdisciplinary analytic that reflects how indigeneity is defined and constructed across multiple countries and at times, across overlapping colonialities” and considering, among other factors, “colonial legacies at play”).

⁴ Azucena Verdín, *E(race)ing Mexican Americans: Why Denying Racial Indigeneity Constitutes White Supremacy in Family Science*, in *DISMANTLING STRUCTURAL INEQUALITY AND RACISM* (NAT’L COUNCIL ON FAM. RELS., 2021).

⁵ My *abuelita*’s grandfather, José Martínez Guerra, worked as a *bracero* in the United States. His sons, Félix Martínez Montañez and Pablo Martínez Montañez, were *braceros* too. My great-uncle Pablo died in Texas while working as a *bracero*, and my family was not able to recover his body or any form of compensation for his death. He died at the age of eighteen from asphyxiation inside a tiny farmworker home provided by his employer when the stove’s gas leaked in the middle of the night. My *abuelita*’s father, Jesus Medina Gonzalez, and his brother, Braulio Medina Gonzalez, also worked as *braceros* in the United States. See RONALD L. MIZE & ALICIA C.S. SWORDS, *CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA 3-4* (2011) (“From 1942 to 1964, the federal governments of the US and Mexico arranged a set of accords that supplied US agricultural growers, and for a brief time the railroad industry, with a steady stream of Mexican labor.”).

⁶ See *id.*; see also 1942: *Bracero Program*, LIBR. OF CONG., <https://guides.loc.gov/latinx-civil-rights/bracero-program> [<https://perma.cc/7LMY-AFUY>] (last visited Apr. 3, 2024);

Aurora experienced at a very early age the vulnerability of poverty and gender-based violence. She began working as a domestic worker at the age of seven. She was forced to marry young by societal pressures even though she didn't aspire to get married. She was born to be free and autonomous. My *abuelita* often retells the story of how she had to work *en la vida de tú abuelito* [during your grandfather's life] to support her dying husband and to prepare for the inevitable. She suffered the tragic death of my magnanimous *abuelito*—J. Guadalupe Rangel Macias—when she was just thirty-two years old and he was only thirty-four years old. After my *abuelito* died, Aurora thought she had found her true love. But he betrayed her, and she never opened her heart to love again. She then lived a life of loveless uncertainty and economic displacement.

She was a young widow who worked twelve- to sixteen-hour shifts to sustain her children by making *tortillas*, washing dishes at a restaurant, cleaning houses, and *lavando ropa ajena* [washing other people's clothes]. She retells countless times how she did not have, nor could afford, shoes but had to walk to work; how she had to wash clothes bent over as her pregnant belly was wet, and my unborn *tío Chuy* [Uncle Chuy] jumped inside her body shivering; and how she and her courageous sisters migrated north and begged for money and sought shelter in a church to eventually cross the U.S.-Mexican border.

They worked as domestic workers for decades, more than half a century, in wealthy homes in Southern California. They navigated the world as "*ilegales*" ["illegal" people] and eventually attained U.S. citizenship in the late 1990s. I often reflect on their courage to leave their '*amá* [mom] and the world they knew to venture into an unknown world where they worked as live-in maids and nannies. My *abuelita* and her sisters only had the weekend to look forward to meeting each other. They met at Encino Park, California, and shared a meal—that is when they could pronounce the words on the menu. They lived in constant fear of deportation and in hiding from *la migra* [U.S. Immigration and Customs Enforcement ("ICE")]. At any point, they could be detected; they mastered the art of invisibility. This was a cruel and isolated world marred with legalized structural racism masked as immigration control. This is how the world still operates today for millions of people without an immigration or citizenship status living in this country and around the world.⁷

Aurora had to leave her children behind in Mexico under the care of her '*amá* for several years while she worked in the United States. She was separated from them in the vital formative years of their life until she was able to bring them to this country. This immense sacrifice continues to impact her relationship with

Douglas S. Massey & Zai Liang, *The Long-Term Consequences of a Temporary Worker Program: The US Bracero Experience*, 8 POPULATION RSCH. & POL'Y REV. 199, 199-201 (1989).

⁷ See, e.g., Mohamad Moslimani, *Around Four-in-Ten Latinos in U.S. Worry That They or Someone Close to Them Could Be Deported*, PEW RSCH. CTR. (Feb. 14, 2022), <https://www.pewresearch.org/short-reads/2022/02/14/around-four-in-ten-latinos-in-u-s-worry-that-they-or-someone-close-to-them-could-be-deported/> [https://perma.cc/W6WN-FHVK].

her children.⁸ In some ways, my family has not fully recovered emotionally from this rupture and our illegalization. I do not know if and when we ever will.

*Generational illegality*⁹ has impacted seven generations of my family, that is, over 120 years as of this writing. My great-aunt, Maria Medina Martínez, recounts that our ancestors first migrated to the United States in the early 1900s.¹⁰ Illegality also continues to shape how Aurora loves, how she is loved, and how she constantly feels like she does not belong in the world because we, the illegalized “*xs ilegales*,” in fact, do not belong in a world that benefits from our gifts and labor but denies us our humanity.¹¹ Like Aurora, we transcend borders and subvert racist structures for survival.

As of this writing, *mi abuelita* is eighty-eight years old. She worked most of her life as an undocumented migrant, often working two jobs simultaneously. She lives in Las Vegas, Nevada, surrounded by abject poverty and untreated psychological trauma.¹² She often dreams of returning to Fresno. But if she goes back, she will not have her family—her legacy and *corazón* [heart]—with her.

Aurora continues to pay a high price for the revolutionary act of transgressing the U.S.-Mexican border to survive economically. Racial borders, the resentment poverty inevitably cultivates in our hearts, and the complex trauma of illegality separate her family.¹³ She is also separated from her homeland, her food, her music, her bloodlines, her language, and her land. She wants to be buried in Mexico with her ‘*amá*. She often tells me I represent all of her dreams come true. I pray every day not to disappoint her or my ‘*amá*. The best way for me to honor their erasure is by sharing our stories and knowledge with the world. I aim to highlight the human cost and sacrifice of sustaining racial structures and colonial borders upon the most vulnerable.

⁸ See, e.g., KARLA CORNEJO VILLAVICENCIO, *THE UNDOCUMENTED AMERICANS* 60 (2020) (“Researchers have shown that the flooding of stress hormones resulting from a traumatic separation from your parents at a young age kills off so many dendrites and neurons in the brain that it results in permanent psychological and physical changes.”).

⁹ The author is currently developing a piece on the concept of “generational illegality,” in which she explores how illegality and race perpetuate cycles of trauma, poverty, and inequality within Latinx and immigrant families of color.

¹⁰ Photographs and records on file with the author’s family. Maria Medina Martínez was the first of the author’s *abuelita*’s sisters to migrate to the United States. She went searching for a better life for the family. She worked from 1965 through 2014 as a nanny and elder care provider.

¹¹ See The California Endowment, *Yosimar Reyes - We the Undocumented*, YOUTUBE (Sept. 12, 2022), <https://www.youtube.com/watch?v=5kaTwQQ6bIc>.

¹² See generally Raquel E. Aldana, *Taming Immigration Trauma*, 44 CARDOZO L. REV. 387 (2022).

¹³ *Id.*

My U.S. citizenship does not protect me as a Queer Brown man.

—Andrew “Drew” Tamez¹⁴

INTRODUCTION

In 2019, Francisco Erwin Galicia, a U.S.-born Latino¹⁵ teenager and rising senior at a public high school,¹⁶ traveled to Ranger College for a soccer tryout with his friends.¹⁷ Although Francisco hoped his soccer skills might earn him a college scholarship, his life changed when he was stopped at a Border Patrol checkpoint in Falfurrias, Texas.¹⁸ Francisco provided evidence of his U.S. citizenship, including his U.S.-issued birth certificate, social security card, and state-issued Texas identification card.¹⁹ Still, Customs and Border Protection

¹⁴ Andrew Tamez, Student, Response from Latinxs & the Law Seminar at University of California College of the Law, San Francisco (Sept. 14, 2021).

¹⁵ One of the most all-encompassing definitions of “Latino” in legal literature is articulated by Professor Laura Gómez. She defines the term as:

Latinos are people who currently live in the United States—whether or not they are American citizens and/or were born in this country—who are descendants of migrants or who themselves migrated from Latin America, and specifically from the former colonies of Spain in the Western Hemisphere. So defined, Latinos are the product [of] two successive waves of colonization, first by Spain [and other European nations] and then by the United States, which has significant implications for how they have experienced racism and racialization in the United States.

LAURA E. GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* 9 (2020) [hereinafter GÓMEZ, *INVENTING LATINOS*]. The term “Latino” started gaining popularity in the 1980s, though not without a critique of its erasure of Black and Indigenous ancestries. *See* TANYA KATERÍ HERNÁNDEZ, *RACIAL INNOCENCE: UNMASKING LATINO ANTI-BLACK BIAS AND THE STRUGGLE FOR EQUALITY* 139 (2022) (“[E]mbodiment Blackness within a Latino family can so deeply ground one in the materiality of Latino bias that fantasies of Latino color-blind unity are unable to interfere with a questioning of Latino racial attitudes.”); *see also* Blackwell et al., *Critical Latinx Indigeneities*, *supra* note 3, at 128 (“Examining the transnational movement of anti-Indian hatred allows us to delve into a deeper exploration of how the Latino category erases Indigenous difference.”); *infra* note 42 (defining the term “Latinx.”).

¹⁶ Manny Fernandez, *An American Citizen Is Released from Immigration Custody After Nearly a Month*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/texas-citizen-detained-immigration.html>.

¹⁷ Matt Howerton, *Dallas-Born Teen Who Was Wrongfully Detained in Border Detention Center Plans To Sue Government*, WFAA (July 25, 2019, 5:44 AM CDT), <https://www.wfaa.com/article/news/dallas-born-teen-who-was-wrongfully-detained-in-border-detention-center-plans-to-sue-government/287-035dfb2b-effc-41bd-9faa-f8b49818ed17> [<https://perma.cc/4GRJ-KM42>].

¹⁸ *See* Fernandez, *supra* note 16 (“The more than 30 permanent checkpoints across Arizona, California, Texas and New Mexico have instilled a quiet, widespread fear among many [Latinx] citizens and legal residents in border cities that they will be mistaken for someone who is without papers.”).

¹⁹ It is customary in border areas across the United States for Latinxs and other people of color who are racialized as foreign to carry such documentation to overcome the presumption of illegality imbued with their race, language skills, phenotype and class. *See id.*

(“CBP”) agents accused Francisco of using fake documents and falsely representing himself as a U.S. citizen.²⁰ This confusion arose because Francisco’s mother opted not to put her real name on his birth certificate due to her undocumented status.²¹ Despite this easily clarified confusion, he was arrested and incarcerated for nearly a month.²² During this ordeal, Francisco was detained in a room with up to seventy other people, some of whom were very sick, even though he was a minor.²³ He lost at least twenty pounds and likely suffered psychological trauma.²⁴ He was not always allowed to brush his teeth or use the bathroom.²⁵ Even though Francisco is a U.S. citizen by birth, he stated he almost signed an order of deportation because “I didn’t want to suffer anymore. I was at a breaking point.”²⁶

Cases like Francisco’s are not limited to relatively powerless Brown teenagers in Texas.²⁷ In 2008, the United States, a country founded on the enslavement of Black people, elected its first Black President.²⁸ However, efforts to question President Barack Obama’s constitutional qualifications for the Presidency persisted.²⁹ Despite clear evidence President Obama is a natural-born U.S. citizen, his eligibility to serve as President was critiqued primarily based on his race and presumed religion.³⁰

By comparison, President Obama’s white opponent in the 2008 election, Senator John McCain, faced genuine constitutional hurdles to his eligibility for

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Howerton, *supra* note 17.

²⁴ *See id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See* discussion *infra* Subsection III.B.2.

²⁸ *See* Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMANS. 413, 414 (2001) (noting “fundamental contradiction of the Founding: The constitution for a free people protected slavery”); Adam Nagourney, *Obama Wins Election*, N.Y. TIMES (Nov. 4, 2008), <https://www.nytimes.com/2008/11/05/us/politics/05campaign.html>; *cf.* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 (apportioning state representation in House of Representatives according to “Number of free Persons” and “three-fifths of all other Persons” before amendment).

²⁹ *See* Ashley Jardina & Michael Traugott, *The Genesis of the Birther Rumor: Partisanship, Racial Attitudes, and Political Knowledge*, 4 J. RACE, ETHNICITY & POL. 60, 61-62 (2019) (“During the period from 2004 to 2012, through his first term, there was extensive news coverage of Obama’s religious preference, birthplace, and of the individuals questioning his Christianity and citizenship . . .”); *see also* Leti Volpp, *Immigrants Outside the Law: President Obama, Discretionary Executive Power, and Regime Change*, 3 CRITICAL ANALYSIS L. 385, 388 (2016) (“A sizeable portion of the American electorate has never accepted ‘Barack Hussain Obama’ as a ‘natural born citizen’ or as a legitimately elected head of state in the first place.”).

³⁰ *See* SAHAR AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* 5 (2021) (“American race/racism, xenophobia, and religion interact to racialize immigrant Muslims in the post-9/11 era.”).

President.³¹ Evidence indicated Senator McCain did not possess birthright citizenship.³² However, the Senate immediately passed a resolution declaring retroactively that seventy-one-year-old John McCain was a natural-born U.S. citizen.³³ This issue received only a fraction of the public's attention compared to questions about President Obama's citizenship at birth, which persisted without merit throughout the two terms of his Presidency.³⁴

Francisco's case and the Obama-McCain dichotomy illustrate this country's construction of citizenship through racialized illegality.³⁵ Central to the legal and societal understanding of U.S. citizenship is a presumption that people of color,³⁶ particularly the poor and the darker-skinned, are inherently dangerous, unworthy of legal protection, and perpetually foreign.³⁷ This presumption is

³¹ See Adam Liptak, *A Hint of New Life to a McCain Birth Issue*, N.Y. TIMES (July 11, 2008), <http://www.nytimes.com/2008/07/11/us/politics/11mccain.html>.

³² *Id.* (discussing law professor's conclusions that neither McCain's place of birth nor his parents' citizenship status was enough to satisfy the "natural-born citizen" requirement).

³³ S. Res. 511, 110th Cong. (2008) (enacted) ("Resolved, That John Sidney McCain, III, is a 'natural born Citizen' under Article II, Section 1, of the Constitution of the United States.").

³⁴ See Editorial, *A Certificate of Embarrassment*, N.Y. TIMES (Apr. 27, 2011), <https://www.nytimes.com/2011/04/28/opinion/28thu1.html>; see also Aaron Blake, *There Was a Very Real 'Birther' Debate About John McCain*, WASH. POST (Jan. 7, 2016, 8:48 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/07/there-was-a-very-real-birther-debate-about-john-mccain/>; Brian Stelter, *A Dispute over Obama's Birth Lives on in the Media*, N.Y. TIMES (July 24, 2009), <https://www.nytimes.com/2009/07/25/business/media/25birther.html>; Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978> (tracing birtherism rumors).

³⁵ See Cecilia Menjivar, *The Racialization of "Illegality,"* DÆDALUS, Spring 2021, at 91, 98 ("Ostensibly neutral immigration laws that illegalize certain immigrant groups, enforcement practices that target the same immigrant groups, media discourses that reify notions of the group as 'quintessentially' undocumented, and social attitudes and perceptions that reinforce such narratives coalesce to produce the racialization of illegality."); see also Karla McKanders, *Immigration and Blackness: What's Race Got To Do with It?*, HUM. RTS., May 2019, at 20, 20 ("When we examine the history of immigration and its impact on immigrants of African descent, we learn how the law can amplify social norms and create a system that perpetuates tiered personhood—and how permitting discriminatory anti-immigrant laws and policies reinforces dangerous and divisive systems of oppression.").

³⁶ The term "people of color" denotes people who have been racialized and racially subordinated as non-white in the United States. The term is defined as "[A] person who is not white." *Person of Color*, DICTIONARY.COM, <https://www.dictionary.com/browse/person%20of%20color> [https://perma.cc/P973-WPG2] (last visited Apr. 3, 2024). But see E. Tammy Kim, *The Perils of "People of Color,"* NEW YORKER (July 29, 2020), <https://www.newyorker.com/news/annals-of-activism/the-perils-of-people-of-color> (discussing limitations of term "people of color," its origins, and need to use more specific identity labels when discussing structural racism).

³⁷ See discussion *infra* Parts I-III; see also Mary Romero, *Keeping Citizenship Rights White: Arizona's Racial Profiling Practices in Immigration Law Enforcement*, 1 LAW J. FOR SOC. JUST. 97, 111-12 (2011). See generally Jaya Ramji-Nogales, *This Border Called My*

operationalized in the everyday lives of people of color, including citizens of color who are racially profiled, detained, questioned, arrested, deported, and even restricted from voting because of their perceived fraudulence and illegality.³⁸ Thus, while explicit, racialized exclusion in immigration and naturalization law has diminished over time, the citizenship rights and privileges of citizens of color continue to be shaped and delimited by a structural system of discrimination—*citizenism*.³⁹

The need for a term that defines explicitly this legalized form of racial subordination first crystallized for me in 2006.⁴⁰ I was an undergraduate at the

Skin, in RACE AND NATIONAL SECURITY 109 (Matiangai V.S. Sirleaf, ed. 2023) (discussing the concept of “foreignness” and the role of immigration law in perpetuating racial, religious, and linguistic discrimination) [hereinafter Ramji-Nogales, *This Border Called My Skin*].

³⁸ For example, the dramatic increase in bills designed to restrict voting access is grounded in “baseless and racist allegations of voter fraud and election irregularities,” arguably fueled by anti-Black and anti-immigrant rhetoric. *Voting Laws Roundup: February 2021*, BRENNAN CTR. FOR JUST. (Feb. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021> [<https://perma.cc/BZ4H-MVA8>]; see also, e.g., Moustafa Bayoumi, *Racing Religion*, 6 CR: NEW CENTENNIAL REV. 267, 270 (2006) (“[T]oday’s post-September 11th state policies also teeter uncomfortably on race, religion, and contemporary politics, and the result has been mass exclusions and deportations of Arab and Muslim men from the United States in a strategy that . . . can properly be described as deliberate and racist.”); Eli Rosenberg, *A Latino Marine Veteran Was Detained for Deportation. Then ICE Realized He Was a Citizen*, WASH. POST (Jan. 16, 2019, 10:45 PM), <https://www.washingtonpost.com/national-security/2019/01/17/latino-marine-veteran-was-detained-deportation-then-ice-realized-he-was-citizen/> (“Ramos-Gomez’s story rocketed to national attention on Wednesday after the American Civil Liberties Union called for the county to investigate how an American citizen and decorated veteran was taken into ICE custody.”); Isaac Stanley-Becker, *Born in Philadelphia, U.S. Citizen Says He Was Held for Deportation to Jamaica at ICE’s Request*, WASH. POST (Dec. 4, 2018, 6:03 AM), <https://www.washingtonpost.com/nation/2018/12/04/born-philadelphia-us-citizen-says-he-was-held-deportation-jamaica-ices-request/> (“His case tests the relationship between federal immigration operations and local law enforcement, exposing the flip side of the Trump administration’s row with ‘sanctuary cities’”); Sam Dolnick, *U.S. Returns Young Girl, a Citizen, to Guatemala*, N.Y. TIMES (Mar. 22, 2011), <https://www.nytimes.com/2011/03/23/nyregion/23citizen.html> (“Today, Emily is in Guatemala, her parents are struggling to bring her home, and lawyers and federal officials are arguing over parental responsibility and citizenship rights.”).

³⁹ See Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795) (providing naturalization rules for any “free white person”); see also IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 84 (rev. ed. 2006) (“The ‘white person’ prerequisite to naturalization made citizenship a condition and code for [w]hite and non-[w]hite racial identity.”). This exclusion from naturalization almost exclusively remained in place until the enactment of the Immigration and Nationality Act. See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 239 (1952) (“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.”); Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237, 238-49 (1945) (sketching brief overview of naturalization laws through 1945).

⁴⁰ See Jennifer J. Lee, *Immigration Disobedience*, 111 CALIF. L. REV. 71, 102 (2023) (proposing immigration disobedience as possible approach to resisting racist, unfair immigration policies).

University of Nevada, Las Vegas. While I had lived as an undocumented immigrant most of my life, by then, I enjoyed the somewhat elusive privilege of Lawful Permanent Resident status.⁴¹ The largest civil rights mobilization of Latinxs⁴² and Asian Pacific Islanders (APIs)⁴³ and immigrant communities erupted that year in response to the Congressional proposal H.R. 4437.⁴⁴ This

⁴¹ See David J. Bier, *Why Legal Immigration Is Nearly Impossible: U.S. Legal Immigration Rules Explained*, CATO INST. (June 13, 2023), <https://www.cato.org/policy-analysis/why-legal-immigration-nearly-impossible#introduction> (“[A]dministrative data indicate that roughly 32 million immigrants—adults and children—were attempting to become U.S. legal permanent residents in 2018, and the United States granted legal permanent residence to only about 1 million people . . .”).

⁴² See *supra* note 15 defining the term “Latino.” In the relevant literature, the terms “Latinos,” “Latine,” “Latinxs,” and “Hispanic” are used to describe this same population. See Catalina (Kathleen) M. de Onís, *What’s in an “X”? An Exchange About the Politics of “Latinx,”* 1 CHIRICÚ J. 78, 79, 85-88 (2017). The use of the “x” is a signifier in Latinx identity among groups of Latinx scholars and its role in advancing intersectional social justice efforts, as well as limitations and controversies within this specific cultural community. *Id.* “Latinx” is a genderless term used to reference individuals who live in the United States and have Latin American heritage, including multiracial, Black, Indigenous, and Asian. This population is not a monolith; different segments are racialized differently, mainly depending on their race, class, linguistic abilities, languages spoken, immigration status, citizenship status, and mode of incorporation to the United States. “Latinx reflects the shifting terrain of identification and the ongoing commitment to building unity through embracing the diversity of Latinidad by not erasing difference and specificity.” Blackwell et al., *Critical Latinx Indigeneities*, *supra* note 3, at 129. The term highlights “the imposition of gender binaries and opens the possibility for recognizing the diversity of Indigenous sex gender systems in the Americas, many of which included more than two genders.” *Id.* However, there are limitations and critiques of the term. See *Hispanic, Latino, Latinx or Latine? 2 Professors Share Their Own Preferences*, GEORGETOWN UNIV. (Oct. 14, 2022), <https://www.georgetown.edu/news/hispanic-latino-latinx-or-latine-2-professors-share-their-own-preferences/> [<https://perma.cc/72EJ-P44J>] (“Because many words take on a binary-gendered (i.e., male or female) ending in Spanish, some have perceived the gender-neutral endings in Latinx and Latine as favoring the English language and representing a colonization not just of language but of culture.”).

⁴³ Asian and Pacific Islanders are defined as: “all people of Asian, Asian American or Pacific Islander ancestry who trace their origins to the countries, states, jurisdictions and/or the diasporic communities of these [specific] geographic regions.” *Census Data & API Identities*, ASIAN PAC. INST. ON GENDER-BASED VIOLENCE, <https://www.api-gbv.org/resources/census-data-api-identities/> [<https://perma.cc/J9XX-95TK>] (last visited Apr. 3, 2024).

⁴⁴ Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the “Gigante” (Giant) Wake up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780, 782 (2007) (“Never have Latina/os so convincingly taken the national stage in political action.”); see, e.g., Teresa Watanabe & Hector Becerra, *500,000 Pack Streets To Protest Immigration Bills*, L.A. TIMES (Mar. 26, 2006, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-2006-mar-26-me-immig26-story.html>.

draconian anti-immigration law sought to criminalize every single aspect of undocumented status and communities connected to undocumented people.⁴⁵

In Las Vegas, I co-led the largest grassroots mobilization in the history of Nevada, where between 80,000 and 100,000 people shut down the Las Vegas Strip, demanding immigration reform and the dismissal of H.R. 4437 in Congress.⁴⁶ As we planned our organizing strategy, which effectively stopped the passage of H.R. 4437, we understood this legislative proposal and the attacks on immigrant communities locally and nationally were driven by racism hidden by colorblindness.⁴⁷ We understood the root of the problem was illegalized people did not have access to a recognized immigration status or citizenship.⁴⁸ Thus, citizenism was organically born in organizing spaces to theorize the root of our subordination.

Citizenism provides a new framework for analyzing white supremacy to understand how structural racism operates more fully in the United States. This structure was operationalized out of the legalized illegality of racialized populations after the Civil War.⁴⁹ An extensive history of racialized exclusion has laid the foundation for the existing immigration system to function as a race-making apparatus through criminality and the advent of the “illegal other.”⁵⁰ Citizenism then reinscribes how race operates as a central organizing principle of U.S. citizenship. It is implemented and maintained through racialized law

⁴⁵ See H.R. 4437, 109th Cong. 2d Sess. (2005) (changing Immigration and Nationality Act “by inserting after ‘concealment of a material fact,’ the following: ‘or [] is otherwise present in the United States in violation of the immigration laws or the regulations prescribed thereunder,’” thus making undocumented immigration status a crime).

⁴⁶ Lazos Vargas, *supra* note 44, at 806 (“For those involved in the May 1 evening march, it was an electrical moment of common humanity, perhaps even life-changing. Evelyn [Rangel-Medina], one of the student leaders of Students Stand Up, said ‘I have never lived, felt, such intense emotions in my life.’”).

⁴⁷ See, e.g., Rick Su, *The First Anti-Sanctuary Law: Proposition 187 and the Transformation of Immigration Enforcement*, 53 U.C. DAVIS L. REV. 1983, 1987-90 (2020).

⁴⁸ See *infra* Table 1.

⁴⁹ See Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 14-16 (2010).

⁵⁰ In *Dred Scott v. Sandford*, Chief Justice Taney questioned whether a Negro, whose ancestors were imported into this country, and sold as slaves, [can] become a member of the political community formed and brought into existence by the Constitution . . . , and as such become entitled to all the rights, and privileges, and immunities, guaranteed [sic] by that instrument to a citizen? 60 U.S. (19 How.) 393, 403 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Subsequently, the Court held Black people were not entitled to citizenship, preserving such citizenship for white people. *Id.* at 404 (“[T]hey are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”). See generally Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (exploring contours of gender-and-race-based exclusion from citizenship in the United States).

enforcement and the legal fiction of the fraudulent, criminal—“illegal”—immigrant, which is a euphemism for race.⁵¹ Moreover, the court established plenary power doctrine almost entirely shields this permissible form of discrimination from judicial review in immigration law.⁵²

*Citizenism*⁵³:

- (1) is a racialized hierarchical system of advantages and privileges formally premised on citizenship status,⁵⁴
- (2) legally permits the suppression of precarious rights of citizens of color through legal and presumed racialized illegality,⁵⁵ and
- (3) mobilizes border and law enforcement to perpetuate structural racial subordination.⁵⁶

⁵¹ See Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 2, 32-33 (2018).

⁵² See *infra* note 162 and accompanying text; Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1184 (2018) (asserting *Chinese Exclusion Case* and *Korematsu* support this principle); see also Natsu Taylor Saito, *Why Xenophobia?*, 31 BERKELEY LA RAZA L.J. 1, 16 (2021) (“The plenary power doctrine is often traced to the Chinese exclusion cases of the 1880s.”). See generally Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455 (2022) (recounting origins of plenary power doctrine) [hereinafter Johnson, *Systemic Racism*].

⁵³ Citizenism has been used to denote pride in citizenship. See Steve Sailer, *Americans First*, AM. CONSERVATIVE (Feb. 13, 2006, 12:00 AM), <https://www.theamericanconservative.com/americans-first/> [<https://perma.cc/SA5X-UWHL>] (using “citizenism” to describe concepts similar to patriotism and affirming “true patriots and idealists are willing to make sacrifices for the overall good of their fellow American citizens rather than for the advantage of . . . six billion foreigners”). This Article introduces a new legal definition to the term showing the underside of this pride in citizenship, particularly its aspects as a racial project in the United States. See discussion *infra* Section I.B; see also E. Tendayi Achiume, *Race, Borders, and Jurisdiction*, 82 HEIDELBERG J. INT’L L. 465, 468 (2022) (“Borders are mechanisms of racialised exclusion and inclusion . . .”).

⁵⁴ Citizenship rights are an accepted legal norm. However, the problem with the U.S. construction of citizenship is that racist exclusion essentially impedes immigrants of color from becoming citizens. Additionally, the construction of U.S. citizenship perpetuates structural racism. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 1 (2006) (“Citizenship as an ideal is understood to embody a commitment against subordination, but citizenship can also represent an axis of subordination itself.”); see also Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 370 (2013) (explaining how the Equal Protection Clause’s limits have evolved to exclude the rights of noncitizens).

⁵⁵ See discussion *infra* Part II. See generally Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013) (arguing traditional immigration enforcement procedures have ultimately harmed rights of citizens and noncitizens).

⁵⁶ See discussion *infra* Part II. See generally César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23

Citizenism functions as a legalized system of discrimination that uses citizenship status to perpetuate racialized outcomes for communities of color. It uses the ostensibly race-neutral and purportedly normative legal category of “citizenship” to advance structural violence and subordination across race, Indigeneity, class, immigration, and citizenship status.⁵⁷ Citizenism operates through a complex interplay of racism, classism, xenophobia, and nativism.⁵⁸ Under citizenism, white citizenship is the standard for full rights under the law, rendering the status of people of color presumptively suspect.⁵⁹

As this Article subsequently profiles, citizenist discrimination impacts racial groups differently.⁶⁰ This Article specifically deploys Latinxs as a case study to showcase how law enforcement racializes people of color, with or without status, as well as U.S. citizens of color.⁶¹ Still, showcasing how citizenism impacts Latinxs sheds light on how this system of discrimination functions largely unscathed by legal limitations across racial categories.

Latinxs, including U.S. citizens, experience heightened forms of racial profiling and even deportation because they are racialized through illegalization.⁶² Latinxs, like Francisco, are stopped, detained, arrested, and

NOTRE DAME J.L., ETHICS & PUB. POL’Y 167 (2009) (highlighting use of race-based immigration policing along the Texas border to create a bifurcated population).

⁵⁷ See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER, RACE & JUST. 315, 315-16 (2003); see also Johnson, *Systemic Racism*, *supra* note 52.

⁵⁸ See discussion *infra* Section I.C.

⁵⁹ See *infra* Table 1; HANEY LÓPEZ, *supra* note 39, at 42, 61; Chacón, *supra* note 51, at 17 n.41 (asserting “non-whites are often constructed as ‘outsiders’ to citizenship regardless of formal citizenship status”); AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS 8 (2021) (capturing two centuries of “citizenship stripping” for certain “undesirable groups”).

⁶⁰ See discussion *infra* Part II.

⁶¹ See e.g., Yuning Wu, Brad W. Smith & Ivan Y. Sun, *Race/Ethnicity and Perceptions of Police Bias: The Case of Chinese Immigrants*, 11 J. ETHNICITY CRIM. JUST. 71, 74 (2013) (“Many Asian immigrants today still face various obstacles, including citizenship problems, anti-immigrant sentiment, and lack of necessary political resources and social capital to survive or realize social mobility . . . Asian immigrants tend to suffer from the perpetual foreigner stereotypes that portray them as ineradicably foreign regardless of their citizenship status or length of stay in the United States and the subsequent nativist arguments advocating limits on the rights of these ‘foreigners.’ . . . Facing these obstacles, a large portion of Asian immigrants . . . stay within self-isolated ethnic enclaves . . . and perform some of the most labor-intensive, exploitable work, with diminished political and civil rights . . .”).

⁶² See Caroline Holliday, *U.S. Citizens Detained and Deported? A Test of the Great Writ’s Reach in Protecting Due Process Rights in Removal Proceedings*, 60 B.C. L. REV. 217, 236 (2019) (“Each year, the U.S. government wrongly detains and seeks to remove a significant number of U.S. citizens. These grave errors stem from a number of sources, including racial bias . . .”); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 649 (2015) (“Across the country, local and state law enforcement agencies have been criticized for their use of racial profiling against Latinos in pursuit of ‘illegal aliens.’”); see also Jennifer M. Chacón, *Producing Liminal Legality*, 92

deported for “speaking and looking like an illegal.”⁶³ These forms of state-sanctioned discrimination are permissible under the law. Most notably, in *United States v. Brignoni-Ponce*,⁶⁴ CBP officers stopped a car on suspicion that undocumented immigrants were inside, relying solely on the fact that the car’s “three occupants appeared to be of Mexican descent.”⁶⁵ The Supreme Court held “Mexican appearance [to be] a relevant factor” in determining suspicion of undocumented status.⁶⁶ The Court failed to provide guidance or a definition of what constitutes “Mexican appearance.” Jurisdictions nationwide—with some exceptions in the Ninth Circuit—have followed suit over the last five decades.⁶⁷ In *Egbert v. Boule*,⁶⁸ the Supreme Court allowed CBP officials to continue conducting warrantless stops, searches, and arrests within one hundred miles of U.S. borders with mere reasonable suspicion.⁶⁹ Notably, over 70% of people of

DENV. U. L. REV. 709, 740 (2015) (“Increased border policing, interior workplace raids, and warrantless home entries by federal immigration officials and state and local police officers have not just affected unauthorized migrants, or even just their families, but entire communities where noncitizens live and work.”); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOWARD L.J. 639, 665 (2011) (“[C]riminalization has become the current mechanism used to extend the longstanding subordination and marginalization of Latinos in the United States . . .”).

⁶³ Chacón, *supra* note 51, at 67 (noting “being Latino or having limited English proficiency” begets differential treatment “because of their race, class, and language ability”); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 164 (2010) (“[A]nti-immigrant animus . . . targets all Latinos regardless of their immigration status. Further, when states and localities enact laws targeting immigrants, they are buying into a general anti-immigrant animus that does not differentiate between the diverse populations of Latinos that reside in our country.”).

⁶⁴ 422 U.S. 873 (1975).

⁶⁵ *Id.* at 887.

⁶⁶ *Id.* at 885-87 (“In this case the officers relied on a single factor to justify stopping respondent’s car: the apparent Mexican ancestry of the occupants.”).

⁶⁷ See David FitzGerald, Angela Y. McClean & Gustavo López, *Mexicans in US Routinely Confront Legal Abuse, Racial Profiling, ICE Targeting and Other Civil Rights Violations*, CONVERSATION (July 3, 2019, 9:04 AM), <https://theconversation.com/mexicans-in-us-routinely-confront-legal-abuse-racial-profiling-ice-targeting-and-other-civil-rights-violations-114479/> [<https://perma.cc/2US9-84NJ>]. See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) [hereinafter Johnson, *Racial Profiling*].

⁶⁸ 596 U.S. 482 (2022).

⁶⁹ *Id.* at 522 (Sotomayor, J., concurring in part, dissenting in part) (“Certain CBP agents exercise broad authority to make warrantless arrests and search vehicles up to 100 miles away from the border.” (citing 8 U.S.C. § 1357(a) (2021); 8 C.F.R. § 2897.1(a)(2) (2021)); *The Constitution in the 100-Mile Border Zone*, ACLU (Aug. 21, 2014), <https://www.aclu.org/other/constitution-100-mile-border-zone> [<https://perma.cc/ZC5L-XT5A>] [hereinafter ACLU, *Border*] (noting approximately two-thirds of the U.S. population lives within one hundred miles of U.S. border)).

color in the United States live within this region.⁷⁰ It is also home to approximately 75% of the Latinx population.⁷¹ The result of these holdings is unequal treatment under the law through heightened criminalization, erosion of civil rights, and legally permissible racial profiling of people of color, including citizens of color, premised on the racialized construct of the “illegal other.”⁷²

Part I of this Article contextualizes the concept of citizenship as a sanitized iteration of structural racism.⁷³ It briefly situates this concept within broader theoretical frameworks, primarily relying on Critical Race Theory and Critical Latinx Indigeneities.⁷⁴ Then, this Part expounds explicitly on the legal underpinnings that produce citizenship by delving into an extensive history of racialized exclusion that has operationalized race-making through immigration and law enforcement.⁷⁵ The *Intersections of Illegality Table* illustrates how the citizenship rights of citizens of color are presumptively suspect and precarious under citizenship.⁷⁶ The table also showcases how the fates of noncitizens and citizens of color are inextricably linked as the regime of immigration enforcement expands.⁷⁷ Lastly, it discusses how citizenship differentiates and operates through the interplay of racism, xenophobia, and nativism, laying out the foundation to explicate the remaining aspects of the concept.⁷⁸

⁷⁰ Tanvi Misra, *Inside the Massive U.S. “Border Zone,”* BLOOMBERG (May 14, 2018, 8:17 AM), <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone> [<https://perma.cc/MF44-6QHS>] (discussing how agents use a person’s race and ethnicity when conducting stops within the one-hundred-mile zone).

⁷¹ *Id.*

⁷² Donald Trump’s rhetoric, particularly around building a wall on the U.S.-Mexican border, created a sentiment of hatred and fear that has real effects on Latinx citizens. K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1930 (2019) (“These policy announcements . . . contribute . . . to the suffering, subordination, and self-deportation of both the people who are their clear targets and the citizens who are part of their networks.”); see also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 345 (2002) (“The federal government’s reaction to . . . [9/11] promises to have a deep and enduring impact on civil rights As the not-so-distant past demonstrates, immigration reforms and executive action . . . will remain with us long after the immediate terrorist threat has passed and adversely affect the rights of all immigrants and many citizens.”).

⁷³ See LAURA E. GÓMEZ, *INVENTING LATINOS*, *supra* note 15, at 5 (“Racialization is how society and the state assign individuals to racial groups and the relative position of groups to each other—and it is an important aspect of this story.”).

⁷⁴ “Critical Latinx Indigeneities exists at the intersections of the three interdisciplinary fields of Native American and Indigenous studies, Latinx studies, and Latin American studies. These fields are often conceptualized as separate and distinct, but the Latin American and Caribbean Indigenous diaspora pushes the boundaries of all three fields.” See Blackwell et al., *Critical Latinx Indigeneities*, *supra* note 3, at 129.

⁷⁵ See discussion *infra* Section I.B.

⁷⁶ See *infra* Table 1, Section I.B.

⁷⁷ See *id.*

⁷⁸ See discussion *infra* Section I.C.

Part II explores how the legal fiction of illegality is weaponized to delimit the civil and political rights of people of color, even when they possess U.S. citizenship. Specifically, it outlines how citizenism is mobilized within three mixed-status communities, comprised primarily of U.S. citizens, from the early 1900s until today. These examples concretize how citizenism operationalizes unjustified detention and indefinite imprisonment with minimal due process, unlawful deportations, property takings, racialized surveillance, loss of generational wealth, and racial profiling of mixed-status communities of color.⁷⁹

Part III deploys the case study of Latinxs as an apparatus of racialization. Building on Francisco's story,⁸⁰ it examines how the racially constructed concepts of "looking like an illegal"⁸¹ and "speaking like an illegal"⁸² function as proxies for race that effectively subordinate Latinxs and illegalize citizens of color.⁸³ This Part focuses on more recent Supreme Court interpretation of the Fourth Amendment (starting roughly in the 1970s), particularly in cases involving undocumented Latinxs.⁸⁴ It argues the erosion of constitutional protections against state action in precedent-setting cases involving undocumented people translates into the racial discrimination of Latinxs and other communities of color.⁸⁵

I. RACE IS A CENTRAL ORGANIZING PRINCIPLE OF U.S. CITIZENSHIP

This Article advances that citizenism is the racial strategy that constructs and maintains U.S. citizenship as whiteness.⁸⁶ The concept is situated within existing

⁷⁹ See discussion *infra* Part II.

⁸⁰ See *supra* notes 16-27.

⁸¹ See *infra* Subsection III.B.1.

⁸² See *infra* Subsection III.B.2.

⁸³ See *id.*; see also Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 187, 188 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) [hereinafter Johnson, *Immigration Laws*].

⁸⁴ See *infra* Section III.A.

⁸⁵ See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1547-48 (2011) (arguing contemporary Fourth Amendment jurisprudence has neglected to address the use of Latinx racial identity to determine if an individual is undocumented); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 967-68 (2002) (analyzing how "the Supreme Court's construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial inequality in the context of policing."); Johnson, *Immigration Laws*, *supra* note 83, at 187-98 (highlighting relationship between domestic ideologies of racial subordination and their influence on U.S. immigration policies); Jennifer M. Chacón & Susan Bibler Coutin, *Racialization Through Enforcement*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 159, 160 (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2018).

⁸⁶ For a fuller discussion of racial formation, see HANEY LÓPEZ, *supra* note 39, at 2, 27-28 ("Beyond simply issuing declarations in favor of or against a particular applicant, the courts,

intersectional theoretical frameworks. This Part substantively outlines a spectrum of rights granted and limited based on immigration and citizenship status connected to race. This spectrum, depicted in the *Intersections of Illegality Table*, is shaped by the construction of whiteness, which informs citizenship rights based on illegality. This construction is driven and informed by racial stratification, ultimately delimiting the rights of citizens of color and maintaining a racially subordinate class of people under legal limbo.

Building on the work of field experts, this Part contextualizes how the prolonged racialized exclusion to birthright and naturalized citizenship surreptitiously engrained this system of discrimination into the foundations of law and society.⁸⁷ It then outlines the bedrock of citizenism, the normative legal approach to providing different rights based on immigration and citizenship status. Lastly, this Part discusses how citizenism operates through the interplay of existing frameworks.⁸⁸

A. *Centering Critical Latinx Indigeneities Through Intersectionality*

This Article draws from and adds to a large body of scholarship.⁸⁹ Works in the Critical Race Theory, Critical Latinx Indigeneities, Chicanx and Black Feminist Theory, AsianCrit, and LatCrit traditions have used the concept of “intersectionality” to highlight the multiple and overlapping identities and pathways through which social hierarchy is enforced and legitimated.⁹⁰ Specifically, this Article relies on Critical Latinx Indigeneities.

[This] . . . lens pushes us to complicate theoretical frames such as illegality and to insist that, as powerful as this conceptual tool is, it must be understood from an intersectional approach that includes indigeneity. This more nuanced approach calls attention to how categories like illegality are compounded and multiplied by simultaneous intersecting oppressions like indigeneity. As such, Critical Latinx Indigeneities is a lens for understanding the ways indigeneity, gender, sexuality, ethnicity, race, class and other intersecting oppressions are produced over multiple contexts.⁹¹

as exponents of the applicable law, had to explain the basis on which they drew the boundaries of [w]hiteness. The courts had to establish by law whether, for example, a petitioner’s race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors.”).

⁸⁷ See *infra* Subsection I.B.1.

⁸⁸ See discussion *infra* Section II.C.

⁸⁹ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139, 167 (1989); see generally Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019).

⁹⁰ See *supra* note 89 and accompanying text.

⁹¹ Blackwell et al., *Critical Latinx Indigeneities*, *supra* note 3, at 130.

By centering Indigeneity, this Article is rooted in a global history of displacement and coloniality that continues to subordinate some of the most vulnerable people in the world. “A frame of Critical Latinx Indigeneities allows us to forge a hemispheric analysis capable of examining more than one racial structure and the multiple colonial forces (re)shaping indigeneity.”⁹² In the context of migration, there is a discernible pattern of how forced and “chosen” labor needs and racial resentment promulgate migration, as well as how race and class inform how people migrate with or without status.

Furthermore, an extensive body of work details the historical and contemporary connections among racialization, racism, and immigration control in the United States.⁹³ The erasure of legal protections for documented and undocumented persons is the subject of sustained critique.⁹⁴ Citizenism pushes this literature further by defining the concept of citizenism as an analytical framework that more fully explains the evolution of structural racism.⁹⁵

B. *Citizenism as an Analytical Framework*

Citizenism is a system of discrimination that sanitizes structural racism. The *Intersections of Illegality Table*, contained in this Section, outlines how citizenism apports the rights of noncitizens and citizens based on race. It also demonstrates how the *band of illegality* racializes people of color, including citizens of color. This Section also elaborates on how racialized exclusion originated by prohibiting Black people and Native Americans from accessing birthright and naturalized citizenship. Building on this exclusion, this Section discusses how the construct of illegality is designed to exclude and racially regulate access to citizenship.⁹⁶ Lastly, this Section summarizes how immigration law and policy is premised on permissible racial discrimination.

The root of citizenism is the system of advantages and privileges that limit civil and political rights of noncitizens.⁹⁷ Noncitizens are almost entirely precluded from serving on juries and running for elected office.⁹⁸ Noncitizens

⁹² *Id.* at 128.

⁹³ See *supra* notes 51-52, 54-63, 85 and accompanying text.

⁹⁴ See generally Ramji-Nogales, *This Border Called My Skin*, *supra* note 37.

⁹⁵ See GÓMEZ, *INVENTING LATINOS*, *supra* note 15, at 6 (“Racial logics, or, different racisms, operate in different and connected ways, but always in ways that protect [w]hites as the unquestionably dominant racial group.”).

⁹⁶ See *Trends in Migration to the U.S.*, POPULATION REFERENCE BUREAU (May 19, 2014), <https://www.prb.org/resources/trends-in-migration-to-the-u-s/> [<https://perma.cc/UG8R-KCQE>].

⁹⁷ See García Hernández, *supra* note 56, at 44-76 (explaining theoretical bases for making citizenship a central nexus in conferring certain benefits and protections onto individuals).

⁹⁸ See *id.* at 63, n.131 (noting the Supreme Court held states have no affirmative obligation to extend political rights to noncitizens); see also Andrew Guthrie Ferguson, *Why Restrict Jury Duty to Citizens?*, ATLANTIC (May 9, 2013), <https://www.theatlantic.com/national/archive/2013/05/why-restrict-jury-duty-to-citizens/275685/> (arguing one reason jury duty

generally pay taxes but are not allowed to vote in federal and state elections and almost all local elections.⁹⁹ Noncitizens without a formal immigration status cannot travel outside the United States and have a legal pathway of return. Noncitizens do not have the same rights and protections under civil rights law to assert a discrimination claim based on their status, even if this is informed or driven by race.¹⁰⁰ Noncitizens detained in immigration proceedings are almost entirely prohibited from accessing criminal procedural due process rights under the Fourth, Fifth, and Sixth Amendments.¹⁰¹ Under citizenism, it is normative for people without citizenship status to have diminished civil and political rights, even for those with a formal immigration status. This differentiation, although premised on status, is racialized by function, history, and composition and serves as an anchor to suppress the rights of citizens of color.¹⁰²

The following table depicts how documented, undocumented, and citizens of color are grouped in a *band of illegality* that permits racial profiling, suppression of voting rights, and presumptions of “illegality,” criminality, and belonging.

Table 1. Intersections of Illegality.

Racially Profiled Presumed “Illegal” and/or Foreign Voting Rights Suppressed Deemed Inherently Criminal		
Undocumented Person of Color	Documented Person of Color	Citizen of Color
Very Limited Civil Rights	Limited Civil Rights	Precarious Civil Rights
NO Political Rights	NO Political Rights	Precarious Political Rights

Starting from left to right, the table depicts undocumented people of color who are denied political rights and possess minimal civil rights. People of color

should be restricted to citizenship is citizens’ “legal and social relationship with the government”).

⁹⁹ See Francine J. Lipman, *The “ILLEGAL” Tax*, 11 CONN. PUB. INT. L.J. 93, 96-97 (2011).

¹⁰⁰ See *infra* Subsection I.B.3.

¹⁰¹ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 5 (2d ed. 2021).

¹⁰² See *infra* Subsection I.B.2.

comprise almost the entire totality of the undocumented population of the United States.¹⁰³ Indigenous people from Latin America comprise a significant portion of this population.¹⁰⁴ Specifically, approximately ten-and-a-half million people are living with an undocumented status, or instead said, without a formal immigration status.¹⁰⁵ Almost ten million are people of color, with over seven and a half million migrating from Latin America.¹⁰⁶

Next, the table describes documented people of color who are largely excluded from accessing political rights but have access to some limited civil rights. The table portrays U.S. citizens of color next with precarious political and civil rights that are further suppressed through the construct of illegality.¹⁰⁷ It also represents how the presumption of racialized illegality exists within the *band of illegality* that promulgates the criminalization and racial profiling of citizens of color.¹⁰⁸

¹⁰³ Charles Kamasaki, Commentary, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS INST. (Mar. 26, 2021), <https://www.brookings.edu/articles/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/> [<https://perma.cc/62J6-DLG3>] (contrasting experiences of predominantly white undocumented immigrants in the early 1900s through 1960s with contemporary undocumented immigrants who are “mostly Latin[x] and overwhelmingly people of color”); see Howard F. Chang, *Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation*, 2007 U. CHI. LEGAL F. 93, 120-130 (drawing an analogy between immigration restrictions and racial segregation).

¹⁰⁴ See Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR. (Nov. 16, 2023), <https://www.pewresearch.org/short-reads/2023/11/16/what-we-know-about-unauthorized-immigrants-living-in-the-us/> [<https://perma.cc/4GND-33QQ>].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (click hyperlinked text next to “detailed table” that reads “Unauthorized immigrant population by region and selected country of birth (and margins of error), 1990-2021” to download Excel sheet with supporting data).

¹⁰⁷ See 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, 537 [hereinafter Johnson, *Race Matters*] (describing how targeting undocumented persons inevitably translates into attacks on Mexican American citizens); see also Raquel E. Aldana, *Silent Victims No More?: Moral Indignation and the Potential for Latino Political Mobilization in Defense of Immigrants*, 45 HOUS. L. REV. 73, 80-81 (2008) (explaining “the executive branch seized the opportunity to employ and expand its immigration powers to conduct law enforcement, while local police became immigration law enforcers. Finally, local governments passed hundreds of anti-immigrant measures restricting immigrants’ access to basic necessities such as housing and drivers’ licenses.” (footnotes omitted)); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL’Y 45, 59 (2008) (“[C]entering on citizenship as the vehicle for the delivery of rights can have the effect of presumptively excluding noncitizens not only from political, but also economic and social rights and liberties.”).

¹⁰⁸ See, e.g., Menjivar, *supra* note 35, at 95 (describing Maricopa County’s use of checkpoints in predominantly Latinx neighborhoods and workplace raids of businesses employing Latinx workers as means of immigration enforcement).

The table omits undocumented and documented white people. They fall outside *band of illegality* because even though, through their status, they possess lesser civil and political rights than citizens, they are not subjected to the same form of racialization as people of color. Their assumed citizenship and belonging through whiteness protects undocumented and documented white people from racialized illegality. They are also presumed to have status based on their race and represent a relatively small percentage of the undocumented population. Lastly, the table also omits white citizens as possessing absolute access to and protections of citizenship.¹⁰⁹

Citizenism is highly adaptable, particularly in this era of “colorblindness,” which relies on presumptively nonracial categories to promulgate and fortify structural racism.¹¹⁰ Race is the engine that drives immigration regulation and enforcement that enables citizenist discrimination.¹¹¹ It is a facially neutral apparatus that is rooted in a prologued history of racialized exclusion to citizenship.

1. Explicit Precedent of Racialized Exclusion

The United States has always organized access to citizenship status around race.¹¹² The pre-Reconstruction Constitution did not formally define nor delineate birthright or naturalized citizenship.¹¹³ But this Subsection elaborates on how citizenship has been a tool that regulates and defines whiteness through law. Whiteness is a shifting concept that privileges people who are classified as white or are in close proximity to whiteness and subordinates those who are not considered white or are legally and socially at a distance from whiteness.¹¹⁴

¹⁰⁹ The author recognizes intersectionality is at play here and the term “absolute” does not capture how every person who is white experiences their citizenship rights.

¹¹⁰ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing racism as social structure is highly adaptable).

¹¹¹ See *id.* at 229-35.

¹¹² David Scott FitzGerald, *The History of Racialized Citizenship*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* 129, 130-31 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017).

¹¹³ The legal process and rules to attain citizenship via birthright and naturalization are different. See Gerald L. Neuman, *Citizenship*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 587, 588-89 (Mark Tushnet, Mark Graber & Sanford Levinson eds., 2015) (tracing evolution of U.S. citizenship); see also JACK MASKELL, CONG. RSCH. SERV., R42097, *QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT 1* (2011) (“The Constitution does not define the term ‘natural born Citizen,’ nor are the notes from the debates at the Constitutional Convention of 1787 instructive as to any specific collective intent of the framers concerning the meaning of the term.”).

¹¹⁴ See GÓMEZ, *INVENTING LATINOS*, *supra* note 15, at 6 (“Race is about power, including the power to decide when and how to classify people into this or that racial category and what those very categories are. We think of race categories as essential and immutable, as reflecting notions of blood, stock, ancestry, and DNA. But they are actually political categories, reflecting the power of one group ([w]hites) to define other groups as inferior to them, as less

People of color were almost entirely denied access to birthright and naturalized citizenship.¹¹⁵ For people of color, specifically Black people, access to birthright citizenship status was a gradual and painful process entailing a Civil War and enduring civil, political, and legal battles.¹¹⁶ Until the adoption of the Fourteenth Amendment in 1868, only white people had access to U.S. birthright citizenship, with a few notable treaty exceptions that extended citizenship to some Native American nations.¹¹⁷

Before the Civil War and Reconstruction Era, a limited set of Native American Nations negotiated by force or necessity with the federal government to attain U.S. citizenship via treaties under the misrepresentation that such agreements would guarantee them rights to land and autonomous governance.¹¹⁸ There are still ongoing debates within Native American nations that reject U.S. citizenship as a form of resistance to conquest premised on the notion that even when Native Americans have U.S. citizenship rights, they are nonetheless relegated to a subordinated political and economic status, plagued by poverty, over-incarceration, health disparities, and lack of political representation within all levels of federal government.¹¹⁹ Native Americans were almost entirely

than fully human.”); see also Stefano Luconi, *Italian Immigrants, Whiteness, and Race: A Regional Perspective*, 11 ITALIAN AM. REV. 4, 4 (2021) (arguing Italian immigrants gained recognition as white by distancing themselves from Black Americans); Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890-1945*, 118 AM. J. SOCIO. 327, 342 (2012) (discussing racial boundaries between northern and western Europeans and southern and eastern Europeans).

¹¹⁵ Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 1 (2021) (“Although modern immigration laws no longer expressly mention race, their enforcement unmistakably impacts people of color from the developing world.”).

¹¹⁶ See generally MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018) (discussing Black activists overcoming opposition and racially discriminatory laws to ensure Fourteenth Amendment’s birthright principles were realized); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM REVOLUTION TO RECONSTRUCTION (2021).

¹¹⁷ See *infra* note 118-20 and accompanying text; Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 935 (2012) [hereinafter McKanders, *Immigration Enforcement*] (“The 1857 *Dred Scott* decision denied the possibility of citizenship to all slaves, ex-slaves, and descendants of slaves . . .”); Boswell, *supra* note 57, at 317-18 (noting “the Supreme Court had ruled that a person could be born in the United States and still not be considered a citizen.”).

¹¹⁸ See Alexandra Witkin, *To Silence a Drum: The Imposition of United States Citizenship on Native Peoples*, 21 HIST. REFLECTIONS/RÉFLEXIONS HISTORIQUES 353, 366 (1995) (“Treaty citizenship included the understanding, sometimes explicitly stated, that those who chose citizenship and an allotment lost all special rights attached to their status as members of an Indigenous nation.”); Lark Lewis, *Civil Rights and American Indians: History and Law*, FINDLAW (Dec. 12, 2023), <https://www.findlaw.com/civilrights/civil-rights-overview/civil-rights-and-american-indians-history-and-law.html> [<https://perma.cc/WB58-LGN7>].

¹¹⁹ See Joseph Heath, *The Citizenship Act of 1924*, ONONDAGA NATION (June 7, 2018), <https://www.onondaganation.org/news/2018/the-citizenship-act-of-1924/> [<https://perma.cc/UV66-UUVL>] (noting Haudenosaunee continue to reject United States

excluded from accessing formal birthright citizenship until the Indian Citizenship Act of 1924.¹²⁰

On the other hand, the Naturalization Act of 1790 established only a “free white person” could naturalize as a U.S. citizen.¹²¹ Based on the Supreme Court’s interpretation of naturalization statutes, the legal classification of whiteness was almost entirely limited to people of Western European descent.¹²² A person would have to be classified as white to be eligible for naturalized citizenship as a matter of law.¹²³

Furthermore, many U.S. Senators objected to incorporating large swaths of Mexico into the United States after the 1846-1848 Mexican-American War. Their racial objection was based on restricting access to U.S. citizenship for

citizenship to this day); Cristina Stanciu, *Native Acts, Immigrant Acts: Citizenship, Naturalization, and the Performance of Civic Identity During the Progressive Era*, 20 J. GILDED AGE & PROGRESSIVE ERA 252, 263 (2021) (sharing sentiments from Yavapi, Dakota, and Wyandotte citizens against unilateral imposition of American citizenship).

¹²⁰ Snyder Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (“[A]ll non-citizen Indians born within the territorial limits of the United States [are] declared to be citizens of the United States.”). The Dawes Act of 1887, which created federally recognized reservations, permitted some Native Americans to become citizens in exchange for accepting a certain land allotment and “adopt[ing] the habits of civilized life” but did not apply to a number of nations. Ch. 119, sec. 6, 24 Stat. 388, 390 (1887). Despite all Native Americans being granted citizenship by Congress in 1924, they could not “vote in city, county, state, or federal elections; testify in courts; serve on juries; attend public schools; or even purchase a beer, for it was illegal to sell alcohol to [them].” Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L.J. 126, 127 (2004); see, e.g., *In re Burton*, 1 Alaska 111, 112-14 (D. Alaska Nov. 3, 1900) (“[Petitioner] is an Indian, and, if born within the territorial limits of the United States, and having severed his tribal relations, adopted the habits of civilized life, and otherwise complied with the law above referred to, then he is a citizen of the United States . . .”).

¹²¹ Naturalization Act of 1790, ch. 3, sec. 1, 1 Stat. 103 (repealed 1795). Not until the mid-twentieth century was the boundary of whiteness expanded to include southern and eastern European immigrants. See DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE* 82 (2d ed. 2018).

¹²² See *Ozawa v. United States*, 260 U.S. 178, 194-95 (1922) (“The language of the naturalization laws from 1790 to 1870 had been uniformly such as to deny the privilege of naturalization to an [immigrant] unless he came within the description ‘free white person.’”); see also *United States v. Thind*, 261 U.S. 204, 213-15 (1923) (“The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to ‘any alien, being a free white person,’ it was these immigrants . . . and their kind whom they must have had affirmatively in mind.”).

¹²³ See Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163, 235 (listing classes of individuals eligible for naturalized citizenship); *supra* note 39 and accompanying text; see also Boswell, *supra* note 57, at 319 (“As a legal matter, in order for an immigrant to naturalize [she or] he would have to be white.”). While the Naturalization Act of 1870 extended naturalization access to African immigrants, it also restricted Chinese and Asian immigrants, as well as other people of color. Pub. L. No. 41-254, 16 Stat. 254 (1870).

mixed-race people.¹²⁴ Consequently, the Treaty of Guadalupe Hidalgo effectively denied citizenship rights to almost all new Mexican residents.¹²⁵ The treaty's official language provided residents in the area covered by the treaty "the choice" to become U.S. citizens or retain Mexican citizenship.¹²⁶ However, courts and local, state, and federal entities refused to recognize the citizenship of mixed-raced Mexicans.¹²⁷

For example, under the California Constitution, only Mexicans classified as white (i.e., not racially mixed with Indigenous or Black people) were granted U.S. citizenship. In *People ex rel. Kimberly v. De La Guerra*,¹²⁸ the California Supreme Court granted U.S. citizenship to Don Pablo de la Guerra because he was considered a "white male citizen of Mexico."¹²⁹ Additionally, a Mexican

¹²⁴ John C. Calhoun, *Speech of Mr. Calhoun, in the Senate of the United States, January 4, 1848, upon His Resolutions, in THE WAR WITH MEXICO* 3, 9 (John T. Towers ed., 1848) ("Nor have we ever incorporated into the Union any but the Caucasian race. To incorporate Mexico, would be the first departure of the kind; for more than half of its population are pure Indians, and by far the larger portion of the residue mixed blood. I protest against the incorporation of such a people. Ours is the Government of the white man."); see also Timothy Evans Buttram, "Swallowing Mexico Without Any Grease": The Absence of Controversy over the Feasibility of Annexing All Mexico, 1847-1848, at 33 (2008) (M.A. thesis, University of New Hampshire) (on file with University of New Hampshire Scholars Repository) (highlighting Senate resistance to annexing entirety of Mexico).

¹²⁵ Treaty of Peace, Friendship, Limits & Settlement with the Republic of Mexico, Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo] ("Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States . . . shall be free to continue where they now reside . . . [and] may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States."). Articles VIII and IX of the treaty gave former Mexican citizens the right to choose U.S. citizenship or retain their Mexican citizenship and move within the new borders of Mexico. *Id.* at arts. VIII, IX. But see RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* 51 (1990) ("American local, state, and national courts later ruled that the provisions of the treaty could be superseded by local laws.").

¹²⁶ See Treaty of Guadalupe Hidalgo, *supra* note 125, at art. VIII.

¹²⁷ For example, in *McKinney v. Saviego*, the Supreme Court held Articles VIII and IX did not apply to Texas, because the territories referenced previously belonged to Mexico and Texas had long "exist[ed] separately and independently of Mexico." 59 U.S. 235, 240 (1855).

¹²⁸ 40 Cal. 311 (1870).

¹²⁹ *Id.* at 330 ("The Constitution . . . declares that every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace . . . 'shall be entitled to vote at all elections which are now, or may hereafter be authorized by law . . .'"). Importantly, this case was not decided under naturalization laws but rather under state constitutional classifications, as well as an international treaty. Of note here is the ease with which those of European ancestry more easily fit into the category of white under the law for citizenship purposes. See *id.* The court held, "Don Pablo de la Guerra, being a Mexican, then established in California, having refrained from declaring his intention to retain the character of a Mexican citizen, during the time specified in the treaty, elected to become, and by his election did become, a citizen of the United States." *Id.* at 326.

citizen could naturalize for U.S. citizenship by application in Texas. *In re Rodriguez*¹³⁰ dealt with a naturalization application by a Mexican citizen that was opposed because of his skin color. He was neither deemed white nor of African descent.¹³¹ However, the Fourteenth Amendment had purportedly made citizenship race-neutral almost thirty years prior.¹³²

In briefs requested from members of the bar, Rodriguez was determined either to be “Indian” and thus ineligible or simply Mexican and still ineligible because no specific treaty covered him.¹³³ After reading the briefs and discussing the applicability of various treaties with Mexico, the court determined that “citizens of Mexico are eligible [for] American citizenship” and could individually naturalize.¹³⁴ Notably, the court held that “[w]hile [the Fourteenth Amendment] . . . was intended primarily for the benefit of [Black people], it also confer[red] the right of citizenship upon persons of all other races, white, yellow, or red, born or naturalized in the United States.”¹³⁵ Although *In re Rodriguez* affirmed the race neutrality of the Fourteenth Amendment, Mexicans who did not qualify as white were almost entirely precluded from accessing citizenship.

Furthermore, there were two seminal cases in the early 1920s in which the Supreme Court interpreted the term “free white person” in the Naturalization Act of 1790. In *Ozawa v. United States*, Mr. Ozawa was born in Japan and continuously resided in the United States for twenty years, meeting all of the requirements for naturalization, except that the Court racialized him as belonging to the “Japanese race.”¹³⁶ The Court refused to use “the color test” to determine whether Mr. Ozawa was considered white under the law because he argued that his skin was “fair enough” to classify him as white.¹³⁷ The Court reasoned, “[t]he intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.”¹³⁸ The Court denied Mr. Ozawa’s naturalized citizenship

¹³⁰ 81 F. 337 (W.D. Tex. 1897).

¹³¹ *Id.* at 348.

¹³² *See id.* at 341.

¹³³ *See id.* at 338-47.

¹³⁴ *Id.* at 348-54.

¹³⁵ *Id.* at 353.

¹³⁶ 260 U.S. 178, 189 (1922). Writing for the majority, Justice George Sutherland recognized Mr. Ozawa:

was a graduate of the Berkeley, Cal., high school, had been nearly three years a student in the University of California . . . educated his children in American schools . . . attended American churches and . . . maintained the use of the English language in his home. . . . [H]e was well qualified by character and education for citizenship

Id.

¹³⁷ *See id.* at 198; Takao Ozawa, *Naturalization of a Japanese Subject in the United States of America: A Brief in re Ozawa Case Now Pending the Decision in the Supreme Court of the U.S.A.*, at 15 (1922) (on file with author).

¹³⁸ 260 U.S. 178, 195 (1922).

because he was “clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.”¹³⁹ In *United States v. Thind*, the Court denied naturalized citizenship to a high-caste Hindu man who was scientifically classified as Aryan or Caucasian.¹⁴⁰ The Court held that this scientific classification did not equate to being classified as white for purposes of naturalization because he was not of European descent.¹⁴¹ In *Thind* and *Ozawa*, the Supreme Court interpreted and set the legal construction of whiteness that continues to shape the modern notion of U.S. citizenship.¹⁴² This racially explicit restriction remained in operation in naturalization laws until 1952.¹⁴³

Birthright and naturalized citizenship function as a metric that has constructed and demarcated the boundaries of whiteness.¹⁴⁴ Today, birthright citizenship excludes racialized people within U.S. territories.¹⁴⁵ It is used to deny

¹³⁹ *Id.* at 198.

¹⁴⁰ 261 U.S. 204, 214-15 (1923) (understanding the original intent of American citizenship was to confer citizenship only on “type of man whom [the original framers] knew as white”).

¹⁴¹ *Id.* (holding “free white persons” to be words of “common speech” that must be “interpreted in accordance with the understanding of the common man,” rather than scientifically).

¹⁴² BILL ONG HING, *DEFINING AMERICA: THROUGH IMMIGRATION POLICY* 265 (2004) (“In other words, the Court was saying to Thind, ‘We know an American when we see one, and you’re not one.’”). This construction impacts the interconnecting legal systems that disproportionately impact people of color living in the United States, regardless of their immigration status. Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1192 (1997) (“Among those who employ ‘ethnicity’- and other concepts such as ‘nationality,’ ‘immigrant,’ ‘non-citizen,’ and ‘illegal alien’-some do so not solely in order to highlight certain salient aspects of identity implicated in such terms, for example cultural differences or political status, but in order to hide or deny the extent to which the groups referred to have often been racialized as non-[w]hite.”).

¹⁴³ Naturalization Act of 1870, Pub. L. No. 41-254, 16 Stat. 254 (1870); Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1181-1189. However, while “[t]he McCarran-Walter Act reformed some of the obvious discriminatory provisions in immigration law,” such as racial restrictions on citizenship and disallowing immigration quotas to some countries, it still retained the quota system, and 85% of quotas were allocated to western and northern European countries. *Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, IMMIGR. HIST., <https://immigrationhistory.org/item/immigration-and-nationality-act-the-mccarran-walter-act> [https://perma.cc/CJY6-432W] (last visited Apr. 3, 2024).

¹⁴⁴ Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 18 (2009) (“From 1790 through 1952, only ‘white’ immigrants were generally eligible for naturalization and thus enjoyed a legal path to U.S. citizenship.”); see also HANEY LÓPEZ, *supra* note 39, at 2.

¹⁴⁵ There’s a rich body of literature discussing the different impartment of rights to U.S. citizens living in different territories. See, e.g., Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 74-81 (2013); Ileana I. Diaz, *Malignant Citizenship: Race, Imperialism, and Puerto Rico-United States Entanglements*, 25 CITIZENSHIP STUD. 333, 339-343 (2021). Notably, though Puerto Rico is an official U.S. territory, its citizens who reside on the island do not have the right to vote in federal elections.

citizenship rights to even those born within uncontested U.S. borders based on the alienage of their parents.¹⁴⁶ While the formal requirement of “whiteness” is no longer available, citizenism builds on that legacy of racial exclusion so that race continues to be intricately interwoven with the access to and substance of U.S. citizenship rights and privileges.¹⁴⁷ Thereby, today’s immigration system essentially operates as a racialized caste system under the construct of illegality.

2. Illegalization Is a Racial Anchor

Almost every western democratic nation-state, including the United States, operates on the normative presumption that you must possess citizenship status to exercise basic civil and political rights.¹⁴⁸ The normative presumption in U.S. immigration policy and enforcement law is that people who enter the country without status or whose visa expires remain in a legal limbo based on their “illegal” status.¹⁴⁹ This Subsection explores illegality as an anchor of racial subordination because the system of undocumented immigration is almost—and has always been—entirely composed of people of color. Occupying the lowest status in this caste system is the undocumented person of color.¹⁵⁰ This modern iteration of the racial regulation of immigration began with API immigrants in the post-Civil War Era, after the legal abolition of the institution of enslavement.¹⁵¹

See PEDRO A. MALAVET, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* 158 (2004) (“The United States imposes on Puerto Ricans every obligation or duty of ‘American’ citizenship, such as taxation, military service, and the criminal laws of the United States. But at the same time, the United States gives to the ‘American’ citizens who live in Puerto Rico few of the benefits of their legal citizenship.” (internal citations omitted)).

¹⁴⁶ See *supra* notes 16-27 and accompanying text.

¹⁴⁷ See generally HANEY LÓPEZ, *supra* note 39 (examining state and federal court cases seeking to define who was white enough to become naturalized citizens); Ming Hsu Chen, Notice & Comment, *Colorblind Nationalism*, YALE J. ON REGUL. (July 13, 2020), <https://www.yalejreg.com/nc/colorblind-nationalism-by-ming-hsu-chen/> [<https://perma.cc/39RR-W86Q>] (“Exclusionary immigration policies are cloaked in the neutral language of national protection, public health, and economic justice rather than being seen for what they really are: racism toward immigrants.”); Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 16 (2014) (discussing how racialized barriers to citizenship and political participation have been formally abolished, yet ongoing inequalities persist).

¹⁴⁸ See William Safran, *Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community*, 18 INT’L POL. SCI. REV. 313, 314 (1997).

¹⁴⁹ Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. IMMIGR. L.J. 567, 575-77 (2021).

¹⁵⁰ *Id.* at 571.

¹⁵¹ *Immigration to the United States, 1851-1900*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/immigration-to-united-states-1851-1900/> [<https://perma.cc/JS2E-Q2KF>] (last visited Apr. 3, 2024).

Historians and Critical Race Scholars have documented that three-hundred-year system gave birth to the foundations of structural racism.¹⁵² Crucially, people of color, particularly Black people, continue to feel much of its effects today.¹⁵³ One of the realities of building an economy based on an enslaved population of close to eleven million people is that key industries, like agriculture and infrastructure, were built with unpaid labor.¹⁵⁴ Thus, at the end of the Civil War, numerous laws were implemented to facilitate the movement of racialized and exploitable populations to maintain and grow the industries that formerly relied on enslaved labor.¹⁵⁵ Such laws were enacted to regulate—and limit—the incorporation of Mexican and API immigrants into the U.S. economy, which relied on the lack of access to citizenship as a mechanism of population control.¹⁵⁶

In the later 1800s, Congress began regulating the influx of contractual migrant laborers. Several laws and bilateral agreements were enacted to regulate and limit the migration of eastern and southern European immigrants, who were not considered white when they were enacted.¹⁵⁷ Congress then targeted API immigrants, as well as immigrants from Mexico.¹⁵⁸ For example, Congress passed the harboring statute in 1952 “during the new political climate where the once-needed and relied-upon Mexican immigrant was now the invader that needed to be expelled.”¹⁵⁹ Then, the legislation was amended again to limit the entry of Mexican male immigrants under the Wetback Bill in 1952.¹⁶⁰ These enactments exemplify how racial animus permeates throughout immigration law and enforcement.

¹⁵² See generally BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

¹⁵³ ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENT* (2020) (arguing hidden caste system is operating in the United States).

¹⁵⁴ Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and Economic Opportunity*, CTR. AM. PROGRESS: CAP 20 (Aug. 7, 2019), <https://www.americanprogress.org/article/systematic-inequality-economic-opportunity/> [<https://perma.cc/W3YW-KEBX>].

¹⁵⁵ *Id.*

¹⁵⁶ Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625, 626 (2001) (showing how racial discrimination against Asians following the Civil War was perpetuated by federal laws).

¹⁵⁷ See ROEDIGER, *supra* note 121, at 342.

¹⁵⁸ See Boswell, *supra* note 57, at 322.

¹⁵⁹ See Hannah M. Hamley, *The Weaponization of the “Alien Harboring” Statute in a New-Era of Racial Animus Towards Immigrants*, 44 SEATTLE U. L. REV. 171, 189 (2020).

¹⁶⁰ Immigration and Nationality Act, *supra* note 39. See *To Assist in Preventing Aliens from Entering or Remaining in the United States Illegally: Hearings on S. 1851 Before the S. Comm. on the Judiciary*, 82nd Cong. 807 (1952) (statement of Sen. Harley M. Kilgore) [hereinafter *Hearings*] (“I believe the enactment of the bill with the amendment would invite an invasion by wetbacks.”).

3. Permissible Racial Discrimination Underwritten in Immigration Law

Race has ordered how the immigration and citizenship system is constructed. The deference currently granted to Congress and the Executive Branch under the plenary power doctrine¹⁶¹ for immigration law and enforcement since the Chinese Exclusion Case of 1889 has been a major structural obstacle to disturbing the built-in racial order within this area of law.¹⁶² This Subsection explores the built-in structural levers that permit racial discrimination through immigration regulation and border enforcement with little to no judicial oversight. A concrete example is the different constitutional scrutiny used for national origin, immigration status, and race when they are intricately intertwined.

The Supreme Court has held the equal protection analysis under the due process clause of the Fifth and Fourteenth Amendments applies to federal and state governments, respectively.¹⁶³ However, there are two recognized exceptions to this rule: (a) deference to federal authority for immigration law and enforcement; and (b) the governmental function exception, where governmental action discriminating against noncitizens to preserve a political community warrants rational basis review rather than strict scrutiny.¹⁶⁴ These exceptions enable the differential treatment of people based on status and citizenship, resulting in racialized outcomes for people of color.¹⁶⁵

a. *Deference to Federal Authority for Immigration Law and*

¹⁶¹ See *supra* note 52 and accompanying text.

¹⁶² See *Ping v. United States*, 130 U.S. 581, 603 (1889) (holding legislative branch has plenary power over immigration law and can authorize government to overturn terms of international treaties on this basis); see also Saito, *supra* note 52, at 16 (“[S]ince the 1880s, the Supreme Court has consistently invoked the plenary power doctrine, which rests on explicitly xenophobic depictions of the Other, to allow Congress and the Executive unfettered authority over immigration matters, the administration of external colonies, and American Indian nations.”); Johnson, *Systemic Racism*, *supra* note 52, at 1472 (contending plenary power deference has “allowed Congress and the executive branch to act on the nation’s worst instincts”); Lindsay, *supra* note 49, at 2 (noting jurisprudential origins of “immigration exceptionalism” and plenary power doctrine are based on urgent senses of national peril regarding irregular immigration).

¹⁶³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (internal citations omitted).

¹⁶⁴ *Foley v. Connelie*, 435 U.S. 291, 291-92 (1978) (upholding statute excluding immigrants from the state’s police force and determining “[p]olice officers fall within the category of ‘important non-elective . . . officers who participate directly in the . . . execution . . . of broad public policy,’” and thus rational basis review was appropriate standard to apply under strict scrutiny’s political community exception) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)); *Ambach v. Norwick*, 441 U.S. 68, 68 (1979) (applying rational basis review under governmental function exception because of “role of public education and the degree of responsibility and discretion teachers possess in fulfilling that role” to uphold statute excluding immigrants from public school teacher certification unless they manifest intent to apply for citizenship).

¹⁶⁵ See *infra* Part II.

Enforcement

Under the first exception, the Supreme Court has granted Congress and the Executive Branch almost exclusive power with little to no judicial review over immigration laws and enforcement.¹⁶⁶ This deference generally allows for racially discriminatory treatment under the pretense of immigration control and national security in this area of law.¹⁶⁷ Notably, the Supreme Court articulated the strict scrutiny test in *Korematsu v. United States* to determine when the state can discriminate based on race.¹⁶⁸ This has been the only case in which the state met the constitutional muster of strict scrutiny to racially discriminate.¹⁶⁹

b. *The Governmental Function Exception*

Under the second exception, the key lever that sustains citizenism is the differential treatment of judicial review claims based on immigration status with racial implications. Despite the exceptions in treating immigrants under constitutional interpretation, in the 1970s, the Supreme Court recognized the violation of noncitizens' equal protection rights.¹⁷⁰ However, the general trend over the past fifty years has been to give less recognition to the equal protection rights of noncitizens.¹⁷¹ Although there are some exceptions,¹⁷² the Supreme Court has not ruled in favor of an immigrant in an equal protection case in the

¹⁶⁶ Chang, *supra* note 52, at 1190-1209 (delineating subordination of noncitizens and people of color in immigration and national security matters); Gebin v. Mineta, 231 F. Supp. 2d 971, 973 (C.D. Cal. 2002) (noting one exception to heightened review is "the special deference to the political branches of the federal government in the area of immigration and naturalization"); Saito, *supra* note 52, at 16 ("The plenary power doctrine is often traced to the Chinese exclusion cases of the 1880s.").

¹⁶⁷ See generally AZIZ, *supra* note 30 (stating much of discrimination against immigrant Muslims in U.S. was justified by national security); Ramji-Nogales, *This Border Called My Skin*, *supra* note 37.

¹⁶⁸ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁶⁹ Alexander M. Heideman, *Hispanic-Serving Institutions and Emerging Constitutional Issues*, 24 FEDERALIST SOC'Y REV. 147, 162 (2023).

¹⁷⁰ For example, in *Mathews v. Diaz*, the Court created the second exception when a noncitizen challenged a federal statute that required noncitizens to maintain a permanent residence and reside in the United States for a minimum of five years to qualify for Medicare. 426 U.S. 67, 69-71, 84, 86-87 (1976). The Court held it did not violate equal protection because a federal act treating "aliens differently from citizens does not . . . imply that such disparate treatment is 'invidious,'" and it is the role of the federal government to regulate immigration and conditions applying to noncitizens. *Id.* at 80.

¹⁷¹ Heeren, *supra* note 54, at 370-71 (noting since 1970s "the once sharp contours of the Court's equal protection analysis for noncitizens have begun to blur and even fade").

¹⁷² See, e.g., Gebin v. Mineta, 231 F. Supp. 2d 971, 973, 975-76 (C.D. Cal. 2002) (holding federal government deference exception for immigration did not apply because petitioners were legal permanent residents, and thus applied strict scrutiny).

last half-century, the lower courts increasingly reject such claims, and litigators tend to avoid making them.¹⁷³

In 1982, the Supreme Court held that undocumented immigrant children enjoy the protections of the Equal Protection Clause.¹⁷⁴ The Supreme Court arguably applied intermediate scrutiny and struck down a law that required undocumented children to pay a fee to attend public schools. In contrast, children with legal status were permitted to attend for free.¹⁷⁵ However, the Court acknowledged that “undocumented status is not . . . an ‘absolutely immutable characteristic’” and thus undocumented people “cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”¹⁷⁶

In response, lower courts “have interpreted *Plyler* to stand for the proposition that classifications based on undocumented status only warrant rational basis review.”¹⁷⁷ While it is true that the legal status of an individual can change during their lifetime, a person’s race or how they are racialized does not change because their status changes.¹⁷⁸ A person’s race will largely instead determine if and when they can access citizenship rights and how they will experience such rights.

The Supreme Court has only upheld laws discriminating against noncitizens in two situations: excluding noncitizens from political and government functions and denying benefits to noncitizens who are in the United States without status.¹⁷⁹ Since 1982, and without specific guidance from the Supreme Court,

¹⁷³ Heeren, *supra* note 54, at 370-71. For example, in *Foley v. Connelie*, a state statute limited state police officer employment to citizens. 435 U.S. 291 (1978). The Court held the statute did not violate the Equal Protection Clause because “[i]n the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position.” *Id.* at 300.

¹⁷⁴ *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982) (“The children [of undocumented immigrants] are special members of this underclass . . . [T]hose who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including . . . deportation. But the children of those illegal entrants are not comparably situated . . . It is thus difficult to conceive of a rational justification for penalizing these children . . .”).

¹⁷⁵ See Cathy Liu, *An Assault on the Fundamental Right to Parenthood and Birthright Citizenship: An Equal Protection Analysis of the Recent Ban of the Matrícula Consular in Texas’s Birth Certificate Application Policy*, 50 COLUM. J.L. & SOC. PROBS. 619, 632-33 (2017).

¹⁷⁶ *Plyler*, 457 U.S. at 220, 223.

¹⁷⁷ Liu, *supra* note 175, at 633.

¹⁷⁸ See *supra* Table 1. Racial discrimination permeates immigration law, and a person’s immigration status can change, but the discrimination they experience continues. For examples of racially discriminatory immigration measures implemented by the Trump Administration, see generally McKanders, *Immigration and Blackness*, *supra* note 35.

¹⁷⁹ See *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) (recognizing state’s power to exclude noncitizens from participation in democratic political institutions); cf. *Plyler*, 457 U.S. at 219 (striking down law denying benefits to noncitizen children but otherwise declining to state protections for noncitizen status generally).

lower courts have struggled to develop consistent precedent, diverging on the appropriate level of review to apply when the case involves children or legal permanent residents, but always treating claims brought forward by undocumented immigrants under rational basis review. For example, the Second Circuit, Third Circuit, and Ninth Circuit Courts of Appeal have all used rational basis in answering the question of which review standard to use in the contexts of citizenship and adoption.¹⁸⁰ The courts applied rational basis review because the Supreme Court has not determined adopted children to be a suspect class. Still, they noted the correct standard of review remains an open question.¹⁸¹

Notably, “The Supreme Court [has] never differentiated equal protection review based on [immigration] status That nonimmigrant[s] . . . work under a different tax structure, cannot serve in the military, and face mandatory departure from the United States . . . does not justify offering them less constitutional protection”¹⁸² However, the Court has made subtle distinctions. The Court applied “close judicial scrutiny” to a law that allowed some (but not all) legal residents to receive state financial aid in *Nyquist v. Mauclet*.¹⁸³ The Court found heightened scrutiny inappropriate for a statute that only discriminated against a subclass of immigrants.¹⁸⁴

In November 2020, in *La Clinica de la Raza v. Trump*,¹⁸⁵ the plaintiffs challenged the constitutionality of a Department of Homeland Security’s (“DHS”) rule requiring “all noncitizens seeking to be lawfully admitted into the United States or to become lawful permanent residents prove they are not inadmissible” that is, “likely at any time to become a public charge.”¹⁸⁶ The government argued the rule was facially neutral and that plaintiffs could not

¹⁸⁰ See *Cabrera v. Att’y Gen. U.S.*, 921 F.3d 401, 404 (3d Cir. 2019) (applying rational basis review to statute classifying on basis of child’s adopted status); *Dent v. Sessions*, 900 F.3d 1075, 1080-82 (9th Cir. 2018) (applying rational basis review to statute imposing disparate treatment to parents based on whether they had adopted children); *Smart v. Ashcroft*, 401 F.3d 119, 122-23 (2d Cir. 2005) (upholding law under rational basis review and finding government had legitimate interest in treating biological and adopted children differently).

¹⁸¹ In the most recent iteration of this saga, the Ninth Circuit decided *United States v. Mayea-Pulido* in 2020. 946 F.3d 1055 (9th Cir. 2020). Mayea-Pulido argued when his father naturalized, Mayea-Pulido should have received automatic derivative citizenship—but because his mother did not naturalize, he did not. *Id.* at 1057. The court classified Mayea-Pulido as the child of legally separated parents, found such children are not a suspect class, and—applying rational basis review—upheld the statute. *Id.* at 1063-65.

¹⁸² *Constitutional Law – Equal Protection. Fifth Circuit Holds That Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar* – LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005), 119 HARV. L. REV. 669, 673-74 (2005).

¹⁸³ 432 U.S. 1, 7-8 (1977) (applying close judicial scrutiny, requiring (1) the asserted governmental interests must be legitimate, and (2) the means adopted must be necessary and precisely drawn to meet the stated goals).

¹⁸⁴ *Id.* at 8-9.

¹⁸⁵ No. 19-cv-04980, 2020 WL 6940934 (N.D. Cal. Nov. 25, 2020).

¹⁸⁶ *Id.* at *1-2.

establish discriminatory intent.¹⁸⁷ The plaintiffs challenged this contention, arguing the rule would “bear more heavily on non-white immigrants, which DHS acknowledged in the Rule.”¹⁸⁸ Although the District Court noted the plaintiffs plausibly alleged the rule would have a greater impact on certain racial groups than others, they said this was not dispositive.¹⁸⁹

The Court rejected the plaintiffs’ claim that the DHS rule violated their equal protection rights under the Fifth Amendment, but the outcome might have been different if the claim had been assessed under strict scrutiny.¹⁹⁰ In doing so, the Court relied on its prior holding that “the disparate impact of the DACA rescission on Latinos was not sufficient to state a claim” because it would permit virtually any immigration policy to be challenged on the grounds of equal protection.¹⁹¹ Even though the Court recognized in *La Clinica de la Raza* that immigration policy could be challenged under equal protection grounds because of racially disparate outcomes, courts continue to treat such matters under a rational basis review rather than strict scrutiny. The Ninth Circuit, however, might have overturned this decision, after a district court held in *United States v. Carrillo-Lopez*¹⁹² that criminal immigration laws challenged under equal protection grounds due to disparate impact are subject to strict scrutiny.¹⁹³ In finding the government’s arguments for rational basis review unconvincing, the court stated, “[t]he federal government’s plenary power over immigration does not give it license to enact racially discriminatory statutes in violation of equal protection.”¹⁹⁴ But indeed, it does.

Without clear direction from the Supreme Court, Circuit Court precedent distinguishing among subclasses has continued to evolve.¹⁹⁵ But these cases and their outlines portray how a hierarchical system of advantages and privileges functions based on citizenship. Citizenism impacts citizens of color by failing to protect a racialized immigrant population. It is informed by existing frameworks of racism, xenophobia, and nativism.

¹⁸⁷ *Id.* at *16.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at *19.

¹⁹⁰ *Id.* at *20.

¹⁹¹ *Id.* at *19.

¹⁹² 555 F. Supp. 3d 996 (D. Nev. 2021).

¹⁹³ *Id.* at 1001 (finding strict scrutiny “applies to criminal immigration laws such as Section 1326” which disparately impact Latinxs and are at least partly motivated by discriminatory intent); *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1137-42 (reversing district court but declining to address standard of scrutiny).

¹⁹⁴ *Id.* at 1002.

¹⁹⁵ See *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 530 (6th Cir. 2007) (identifying lawful permanent residents as the only subclass of noncitizens that should be treated as suspect class and refusing to extend this classification to lawful temporary resident aliens).

C. *The Frameworks That Inform Citizenism*

This Section briefly explores the relationship citizenism has with racism, xenophobia, and nativism and how these dynamics work alongside one another to shape citizenism. Overall, citizenism embodies how the concept of whiteness—informed by racialized exclusion (racism)—is juxtaposed against people of color (nativism) to weaponize their race, ethnicity, culture, and language (xenophobia) to the end of delegitimizing their constitutional rights, protections, and question their belonging in the United States. Citizenism facilitates the subordination of people of color by using nativism as a fear tactic, xenophobia as fuel, and racism as the underlying excuse.

In the United States, racism is a structural system of power and privilege bestowed on those categorized as white and overwhelmingly withheld from people of color.¹⁹⁶ Relying on racism as a foundation while obscuring its use, particularly in the immigration and criminal legal systems, allows citizenism to pass as a “neutral” way of ordering the hierarchy of legal rights. In the United States, xenophobia works alongside racism to give “preferential treatment”¹⁹⁷ to those who are labeled as natives.¹⁹⁸ Professor Achiume documents “two forms of xenophobic discrimination: (1) *explicit prejudice-based xenophobic discrimination* and (2) *structural xenophobic discrimination*.”¹⁹⁹

Citizenism goes one step further than the conception of xenophobia in that it identifies how racial subordination is operationalized primarily through immigration and increasingly through the criminal legal system to impact

¹⁹⁶ See GÓMEZ, *INVENTING LATINOS*, *supra* note 15, at 5 (“[T]he system of racial classification, rooted in American history, exists to maintain white supremacy.”).

¹⁹⁷ Sampson I. Ekwonna, *International Migration and Policy: Xenophobia in Structure of Immigration Policy of US, UK and South Africa*, 4 S.E. POL. REV. 60, 67 (2019) (describing differences and similarities between xenophobia and racism); Erika Lee, *America First, Immigrants Last: American Xenophobia Then and Now*, 19 J. GILDED AGE & PROGRESSIVE ERA 3, 5 (2020).

¹⁹⁸ Lee, *supra* note 197, at 5-6 (“[X]enophobia is a system of power that is used to divide, control, and dominate. One of the ways it does so in the United States is by promoting an exclusive form of American nationalism and a narrow definition of who is ‘American’ and, equally important, who is not.”); *see also* Joseph O. Baker, David Cañarte & L. Edward Day, *Race, Xenophobia, and Punitiveness Among the American Public*, 59 SOCIO. Q. 363, 365 (2018) (noting that xenophobia is mobilized as a form of racial animus); RAYMOND TARAS, *XENOPHOBIA AND ISLAMOPHOBIA IN EUROPE* 10 (2012).

¹⁹⁹ E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT’L L. 323, 326 (2014) (“[E]xplicit prejudice-based xenophobic discrimination refers to harm that refugees and other categories of foreigners experience on account of explicit anti-foreigner prejudice.”).

citizens.²⁰⁰ Nativism relies on xenophobia to create fear of the other,²⁰¹ and in the U.S., it often relies on racism to decide who is part of the “out-groups.”²⁰² Citizenism differs from nativism in that it is more than a sentiment of superiority or fear.²⁰³ The interplay of these existing frameworks facilitates the subordination of people of color through the *band of illegality*.²⁰⁴

II. INEXTRICABLY LINKED RACIAL FATE THROUGH THE CRIMINALIZATION OF ILLEGALITY

Illegalization facilitates the erosion of the civil and political rights of citizens of color.²⁰⁵ This Part documents three case studies that demonstrate how illegalization has effectively eroded the citizenship rights of such citizens through mass-scale deportations, internment without due process, and the ongoing curtailment of civil rights and protections.²⁰⁶ Specifically, this Part profiles the scaled deportations of millions of U.S. citizens of Mexican descent throughout the 1930s and 1950s to illustrate how the citizenship rights of people of color are suspect, fragile, and removable.²⁰⁷ It also profiles how the state deprived U.S. citizens of Japanese descent of liberty without due process, terminated their property rights, and imprisoned them for several years in the

²⁰⁰ See Carrie Rosenbaum, *UnEqual Protection in Immigration Law*, YALE J. ON REGUL., July 22, 2020, <https://www.yalejreg.com/nc/unequal-protection-in-immigration-law-by-carrie-rosenbaum/> [<https://perma.cc/R28X-3UGQ>]; Saito, *supra* note 52, at 22 (“[T]he government has invoked xenophobic depictions of these young people [non-naturalized immigrants] as criminal ‘aliens’ who pose a danger to the United States.”).

²⁰¹ BRIAN N. FRY, NATIVISM AND IMMIGRATION: REGULATING THE AMERICAN DREAM 6 (2007) (“[N]ativism requires a sense of group position, a perception of threat, and sufficient power to police and enforce proprietary claims.”).

²⁰² *Id.* at 35–69 (surveying history of U.S. nativism).

²⁰³ See William Arrocha, *Combating Xenophobia and Hate Through Compassionate Migration: The Present Struggle of Irregular Migrants Escaping Fear and Extreme Poverty*, 71 CRIME, L. & SOC. CHANGE 245, 249 (2019); see also *Nativism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/nativism> [<https://perma.cc/S4HE-XR4R>] (Apr. 3, 2024) (“[A] policy of favoring native inhabitants as opposed to immigrants.”).

²⁰⁴ See *supra* Table 1.

²⁰⁵ *Id.*

²⁰⁶ See The Chinese Exclusion Act, Pub. L. No. 71 (1882) (repealed 1943); Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing mandatory internment of Japanese Americans); see also Brent Funderburk, *Operation Wetback: United States Law-Enforcement Campaign*, BRITANNICA, <https://www.britannica.com/topic/Operation-Wetback> [<https://perma.cc/GM33-PBCY>] (last visited Apr. 3, 2024) (detailing how, in the summer of 1954, 1.1 million Mexican nationals were mass deported in an event known as “Operation Wetback”); see also David Zucchino, *The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans*, TIME (July 1, 2020, 12:30 PM), <https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/>; Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>.

²⁰⁷ See *infra* discussion Section II.A.

1940s.²⁰⁸ Lastly, this Part discusses the ongoing racialization of U.S. citizens of Muslim and Arab descent and explains the suppression of their civil rights.²⁰⁹ Cumulatively, revealing how citizenism permits and rationalizes the wide-scale racial discrimination by the state upon U.S. citizens of color through illegality.

A. *Mass Deportations of U.S. Citizens of Mexican Descent*

Citizenism specifically targets Latinxs with mixed immigration and citizenship status.²¹⁰ This contemporary reality is grounded in a history of racial discrimination that includes separate and unequal public education tracks, segregated housing through racial covenants, employment discrimination, restricted access to U.S. citizenship, hypercriminalization, overincarceration, and narrow pathways of economic mobility.²¹¹ Notably, though Puerto Rico is an official U.S. territory, its citizens who reside on the island still do not have the right to vote in federal elections.²¹² More importantly for this Article, one of

²⁰⁸ See *supra* discussion Section II.B.

²⁰⁹ See *infra* discussion Section II.C.

²¹⁰ See *supra* notes 53-67; KATE BRICK, A.E. CHALLINOR & MARC R. ROSENBLUM, *MEXICAN AND CENTRAL AMERICAN IMMIGRANTS IN THE UNITED STATES* 1 (2011).

²¹¹ In *Westminster School District of Orange County v. Mendez*, the Ninth Circuit Court of Appeals held,

By enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, [the school district] violated the federal law as provided in the Fourteenth Amendment to the Federal Constitution by depriving them of liberty and property without due process of law and by denying to them the equal protection of the laws.

Westminster School Dist. of Orange Cnty. v. Mendez, 161 F.2d 774, 781 (9th Cir. 1947). See also, e.g., *Mexican Americans*, PBS: HIST. DETECTIVES SPECIAL INVESTIGATIONS, <https://www.pbs.org/opb/historydetectives/feature/mexican-americans>

[<https://perma.cc/8FJE-CRPL>] (last visited Apr. 3, 2024) (“Mexican Americans have continued to struggle against their treatment as second class citizens. Today, Mexican Americans still lag behind other Americans in income, education, and home ownership.”); Suzanne Gamboa, *Racism, Not a Lack of Assimilation, Is the Real Problem Facing Latinos in America*, NBC NEWS (Feb. 26, 2019, 8:41 AM), <https://www.nbcnews.com/news/latino/racism-not-lack-assimilation-real-problem-facing-latinos-america-n974021>

[<https://perma.cc/MQ8X-VKMY>] (“[A] recent report found that in Iowa City, Iowa, Latinos were denied home loans four times more often than whites, the biggest disparity in the country. This adds to the wealth gap between whites and Latinos because most families’ net worth comes from their homes and their equity.”); Vicki L. Ruiz, *South by Southwest: Mexican Americans and Segregated Schooling, 1900-1950*, 15 OAH MAG. HIST., Winter 2001, at 23, 24 (“Throughout the Southwest, Spanish-speaking children had to sink or swim in an English-only environment. Even on the playground, students were punished for conversing in Spanish. Admonishments, such as ‘Don’t speak that ugly language, you are an American now . . . ,’ not only reflected a strong belief in Anglo conformity but denigrated the self-esteem of Mexican American children.” (omission in original)).

²¹² Dánica Coto & Adriana Gomez Licon, *Puerto Rico, Unable To Vote, Becomes Crucial to US Election*, ASSOC. PRESS (Oct. 18, 2020, 6:14 PM), <https://apnews.com/article/election-2020-race-and-ethnicity-joe-biden-donald-trump-puerto-rico->

the harshest and most distinct forms of discrimination experienced by U.S. citizens of Mexican descent occurred in the first half of the 1900s.²¹³

The U.S. government conducted mass deportations of Mexican immigrants and U.S. citizens of Mexican descent under two distinct federal mandates in the 1930s and 1950s.²¹⁴ Historians document that over 1 million people were deported in the 1930s, and 60% of them were U.S. citizens.²¹⁵ In the 1950s, the U.S. government launched “Operation Wetback,” an integrated government strategy to deport people of Mexican descent, including U.S. citizens.²¹⁶ This federal, state, and local government intervention targeted people regardless of their immigration and citizenship status.²¹⁷ Most of those deported were U.S.

3018eade64921c72b0ebb1df3f22061e [https://perma.cc/HP8A-XC6K]; MALAVET, *supra* note 145, at 158 (“Puerto Ricans cannot vote for the president, vice-president, or a congressional delegation.”).

²¹³ See generally JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980); FRANCISCO E. BALDERRAMA, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995) (showing over one million people of Mexican descent, with approximately 60% being United States citizens, were removed and driven out of United States in the 1930s because of raids, deportation, and public pressure); Funderburk, *supra* note 206.

²¹⁴ See ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION, REPATRIATION PRESSURES 67 (1974) (explaining antialien campaign in 1930s has been described as “terror reign” involving “closed door investigations,” “handcuffs instead of warrants,” amounting to “deportation mania”); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 MODERN AM. 42, 46 (2011) (“Due to the economic downturn, the repatriation was intended to ensure that only ‘true Americans’ held jobs in the United States.”).

²¹⁵ See Fresh Air, *America’s Forgotten History of Mexican-American ‘Repatriation,’* NPR, at 1:28 (Sept. 10, 2015, 1:11 PM) <https://www.npr.org/2015/09/10/439114563/americas-forgotten-history-of-mexican-american-repatriation> (discussing deportation of “over one million Mexican nationals and American citizens of Mexican descent from throughout the United States . . . This occurred on a number of different levels through a formal deportation campaign at the federal government, then also efforts by major industries as well as efforts on the local and state level”).

²¹⁶ See, e.g., GARCÍA, *supra* note 213, at 98-100; Erin Blakemore, *The Largest Mass Deportation in American History: As Many as 1.3 Million People May Have Been Swept Up in the Eisenhower-era Campaign*, HISTORY (Oct. 4, 2023), <https://www.history.com/news/operation-wetback-eisenhower-1954-deportation> [https://perma.cc/2MSQ-BCM2] (“The short-lived operation used military-style tactics to remove Mexican immigrants—some of them American citizens—from the United States. Though millions of Mexicans . . . legally entered the country through joint immigration programs in the first half of the 20th century, Operation Wetback was designed to send them back to Mexico.”); Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. MIAMI INTER-AM. L. REV. 171, 178 (2005); *Repatriation: Afuera*, LOS REPATRIADOS: A DECADE OF MEXICAN REPATRIATION, http://umich.edu/~ac213/student_projects07/repatriados/history/chap5.html [https://perma.cc/TAH6-8JB8] (last visited Apr. 3, 2024).

²¹⁷ See, e.g., GARCÍA, *supra* note 213, at 97-98; Blakemore, *supra* note 216; Sandoval, *supra* note 214, at 46 (“To assist in the round-up, all over the nation police raided public

citizens of Mexican descent.²¹⁸ Citizenship status did not protect them from being forcibly removed from the United States.

The racialized mass deportations of U.S. citizens of Mexican descent illustrate how the construction of illegality, criminality, invasion, national security, and border security function under citizenism. Hundreds of thousands of U.S. citizens suffered from forcible removal, property loss, and family separation, even though they were formally and legally entitled to all of the rights and privileges of U.S. citizenship.²¹⁹ These deportations demonstrate how citizenism permits the suppression of the rights of citizens of color when discriminatory action by the state is premised on the racialized fear of immigrants of color—in this case, Mexican immigrants. This form of state action constitutes a fundamental violation of U.S. citizenship rights without little to no legal recourse.²²⁰ U.S. citizens of Japanese descent have experienced similar treatment, particularly during the 1940s.

B. *Mass Internment of U.S. Citizens of Japanese Descent*

The U.S. government removed from their homes and communities and interned over one hundred thousand Japanese immigrants and U.S. citizens of Japanese descent in the 1940s without due process.²²¹ Leading up to World War

spaces, including churches, and forced people of Mexican ancestry onto trains and buses headed for the U.S.-Mexico border.”). Furthermore, many children of Mexican immigrants who were born in the United States were forced to leave the country when their parents were forcibly removed. Ray, *supra* note 216, at 178, 180. Families with older children sometimes returned to Mexico without them, and some mothers who stayed with children in the United States ultimately brought their children to Mexico after keeping their family apart became too difficult. *Repatriation: Afuera*, *supra* note 216.

²¹⁸ Blakemore, *supra* note 216.

²¹⁹ Ray, *supra* note 216, at 171.

²²⁰ Claims by Mexican-Americans who were deported under these policies against the state remain barred. The federal government has enacted no formal apology, remedy, or reparation. *See id.* at 175. Those detained could either seek a deportation proceeding (which few knew was an available option) or voluntarily return to Mexico. *Id.* “[L]ocating concrete evidence of the United States’ involvement in deporting Mexican-Americans is a very challenging task given how long ago the actions took place.” *Id.* at 180.

²²¹ President Franklin Roosevelt issued Proclamation 2525, requiring “[a]ll natives, citizens, denizens, or subjects of Japan” over age fourteen who were in the country and not naturalized had become “enemy aliens,” and were subject to regulations including immediate apprehension of those determined dangerous. Proclamation No. 2525, 6 Fed. Reg. 6321, 55 Stat. 1700 (Dec. 7, 1941). The next day, Roosevelt issued Proclamations 2526 and 2527, applying to German and Italian noncitizens. U.S. DEP’T OF JUST., REPORT TO THE CONGRESS OF THE UNITED STATES: A REVIEW OF THE RESTRICTIONS ON PERSONS OF ITALIAN ANCESTRY DURING WORLD WAR II 4 (Nov. 2001) [hereinafter DOJ REPORT], <https://www.schino.com/pdf/italian.pdf>; Proclamation No. 2526, 6 Fed. Reg. 6323, 55 Stat. 1705 (Dec. 8, 1941); Proclamation No. 2527, 6 Fed. Reg. 6324, 55 Stat. 1707 (Dec. 8, 1941). For example, Gordon Hirabayashi, a U.S. citizen, challenged his conviction for violating a curfew order imposed on Japanese-Americans in Portland, Oregon. The Supreme Court

II (“WWII”), the United States had a history of anti-Asian racism and racialized APIs as belonging to “an alien race.”²²² For instance, the Alien Land Laws of the early 1900s prevented Japanese immigrants from owning agricultural land in some states.²²³ The Japanese population was “victim[] of the anti-Asian ‘yellow peril’ imagery that had been cultivated to attack Chinese immigrants in the 1840s,” painting them as untrustworthy, suspicious, and unassimilable.²²⁴ This sentiment fostered a belief that Japanese-Americans were “spies and saboteurs” long before WWII.²²⁵

In February 1942, President Roosevelt issued Executive Order 9066, directing the Secretary of War to create a “military area” for the internment of Japanese people, including U.S. citizens.²²⁶ Between 110,000 and 120,000 people of Japanese descent, two-thirds of them U.S. citizens, were forcibly evacuated from their homes and interned in barbed-wire-encircled camps.²²⁷ In addition to

denied relief on the grounds that the curfew order was valid: “inferences which could be rationally drawn from [the military commander’s appraisal of facts], support the judgment of the military commander, that the danger of espionage and sabotage to our military resources was imminent, and that the curfew order was an appropriate measure to meet it.” *Hirabayashi v. United States*, 320 U.S. 81, 103-04 (1943); *see also Yasui v. United States*, 320 U.S. 115, 116-17 (1943).

²²² Kevin Allen Leonard, “*Is That What We Fought For?*” *Japanese Americans and Racism in California, The Impact of World War II*, 21 W. HIST. Q. 463, 464 (1990).

²²³ *See* 1913 Cal. Stat. 206. Although the law denied all “aliens ineligible for citizenship the right to own, lease, or otherwise enjoy land, except to the extent provided by treaty,” it was applied in a discriminatory manner against Japanese people. Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61, 61 (1947). Though its exclusion provisions were repealed in the 1920s, the original language of the Oregon Constitution stated:

White foreigners who are, or may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens. And the Legislative Assembly shall have power to restrain, and regulate the immigration to this State of persons not qualified to become Citizens of the United States.

OR. CONST., art. I, § 31 (1857) (repealed 1970).

²²⁴ Hiroshi Fukurai & Alice Yang, *The History of Japanese Racism, Japanese American Redress, and the Dangers Associated with Government Regulation of Hate Speech*, 45 HASTINGS CONST. L.Q. 533, 548 (2018).

²²⁵ *Id.*

²²⁶ *See* Exec. Order No. 9066, *supra* note 206. While Executive Order 9066 did not specify Japanese residents or Japanese Americans, nationals of other enemy countries and their descendants were not really subject to mass evacuation and internment. YASUKO I. TAKEZAWA, *BREAKING THE SILENCE: REDRESS AND JAPANESE AMERICAN ETHNICITY* 30 (1995).

²²⁷ DOJ REPORT, *supra* note 221, at 5 (documenting almost immediately several hundred Japanese people were arrested in mass raids without warrants). Notably, “10,000 [Italian-Americans] were evacuated, mostly from coastal areas and sites near power plants, dams and military installations . . . [a]nd 257 [Italians] were put in internment camps for up to two years.” Patricia Yollin, *A SECRET HISTORY / The Harassment of Italians During World War II Has Particular Relevance Today and Serves as a Warning of What Could Happen*, SF GATE

internment, many of them suffered from ongoing discrimination and lost property and generational wealth.²²⁸

In 1944, a Japanese U.S. citizen contested Executive Order 9066 in *Korematsu v. United States*.²²⁹ Mr. Korematsu refused the internment order.²³⁰ He was arrested and charged with a criminal offense.²³¹ He was born a U.S. citizen and the government presented no evidence of his involvement with the Japanese government.²³² He contested his criminal charges, but the Court upheld his conviction.²³³ As Justice Frank Murphy notes in his dissent, there was immense public pressure, based on racist sentiments, to have all Japanese people removed and imprisoned.²³⁴ They were racialized as “enemy aliens” in official

(Oct. 21, 2001), <https://www.sfgate.com/magazine/article/A-SECRET-HISTORY-The-harassment-of-Italians-2866287.php>; David A. Taylor, *During World War II, the U.S. Saw Italian-Americans as a Threat to Homeland Security*, SMITHSONIAN MAG. (Feb. 2, 2017), <https://www.smithsonianmag.com/history/italian-americans-were-considered-enemy-aliens-world-war-ii-180962021> [<https://perma.cc/L6U3-KQF7>].

²²⁸ TAKEZAWA, *supra* note 226, at 76-77 (“Assets in Japanese banks were frozen,” and with evacuation pending, Japanese-Americans were ordered to dispose of their belongings but were not informed of location or duration of detention).

²²⁹ 323 U.S. 214, 215-16 (1944).

²³⁰ *Id.* at 216.

²³¹ *Id.* at 215.

²³² *Id.* at 226 (Roberts, J., dissenting) (“The petitioner . . . according to the uncontradicted evidence, is a loyal citizen of the [United States].”).

²³³ *Id.* at 219-20 (upholding exclusion order because “[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”). Notably, there were tens of thousands of German-Americans in the United States. The United States was at war with Germany too, and even though German-Americans engaged in large-scale demonstrations of support for Nazi Germany “they were not give[n] quite the same degree of suspicion as the Japanese . . .” *More Perfect - American Pendulum I*, RADIOLAB, at 40:15-18 (Oct. 1, 2017), <https://www.wnycstudios.org/podcasts/radiolab/articles/radiolab-presents-more-perfect-american-pendulum-i>. Nearly 11,000 German-Americans and German Nationals were interned in camps. Monica Forsthoefel, *The German-American Community During World War II*, 10 ARMSTRONG UNDERGRADUATE J. HIST. 51, 59 (2020).

²³⁴ *Korematsu*, 323 U.S. 214 at 239, n.12 (Murphy, J., dissenting) (“Special interest groups were extremely active in applying pressure for mass evacuation.”) (internal citations omitted); see NAT’L ARCHIVES, RECORDS OF THE SELECT COMMITTEE OF THE HOUSE OF REPRESENTATIVES INVESTIGATING NATIONAL DEFENSE MIGRATION, 1940-43 (1954). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, admitted:

We’re charged with wanting to get rid of [Japanese Americans] for selfish reasons We do. It’s a question of whether the white man lives on the Pacific Coast or the brown men. . . . [W]e’d never miss them in two weeks, because the white farmers can take over and produce everything the [Japanese American] grows.

government proceedings.²³⁵ For instance, General DeWitt, the head of the Western Defense Command, stated in 1943: “It makes no difference whether he is an American; theoretically he is still a Japanese and you can’t change him.”²³⁶ Ultimately, the Court gave great deference to the military’s judgment despite clear racial animus from high officials behind the internment order.

The Court declined to protect the citizenship rights of Mr. Korematsu and, by extension, those of other U.S. citizens of Japanese descent affected by these citizenist policies.²³⁷ The doctrine of *Korematsu* remains legal precedent today, as the Court recently embraced its reasoning in *Trump v. Hawaii*.²³⁸ This logic permits blanket forms of state discrimination, and racializes the suppression of the rights of citizens of color, including U.S. citizens of Muslim and Arab descent.²³⁹

C. Mass Targeting of U.S. Citizens of Arab and Muslim Descent

The events of September 11, 2001, “facilitated the consolidation of a new identity category that groups . . . persons who appear Middle Eastern, Arab, or Muslim.”²⁴⁰ Members of this group tend to be racialized as “terrorists” and

Frank J. Taylor, *The People Nobody Wants: The Plight of Japanese-Americans in 1942*, SATURDAY EVENING POST (May 31, 2017), <https://www.saturdayeveningpost.com/2017/05/people-nobody-wants> [https://perma.cc/D7KL-523G] (originally published May 9, 1942).

²³⁵ Proclamation No. 2525, *supra* note 221.

²³⁶ TAKEZAWA, *supra* note 226, at 78.

²³⁷ In 1988, the U.S. government finally acknowledged that Japanese internment was motivated by racism, not national security. A formal apology was issued, \$20,000 in reparations was paid to each living survivor of the internment camps, and an educational foundation was created. Fukurai & Yang, *supra* note 224, at 535.

²³⁸ Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, YALE L. J.F., Jan. 30, 2019, at 646-49 (concluding while Hawaii overturned *Korematsu*, it essentially recreated the doctrine under another name).

²³⁹ *Id.* at 654 (noting though DHS explicitly reported that citizenship was an “unreliable indicator” of terrorist threat to the United States, the administration chose to enact a citizenship-based travel ban under the guise of national security). See generally Carrie L. Rosenbaum, *(Un)Equal Immigration Protection*, 50 SW. L. REV. 231 (2021); Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231.

²⁴⁰ Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 n.2 (2002) [hereinafter Volpp, *The Citizens and the Terrorist*]; David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E.L. 85, 86 (2012) (“Former FBI informant Craig Monteilh . . . declared in a 2009 interview that ‘Islam itself is a national security threat.’” (internal citations omitted)); see also *September 11 Hijackers Fast Facts*, CNN (Sept. 6, 2023, 2:39 PM), <https://www.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/index.html> [https://perma.cc/RL77-KHFH]; LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11, at 117 (2011) (explaining how, just days after 9/11, commentators suggested United States “had been infiltrated by a cult of Muslim fanatics” and promoted “racial and

disidentified as citizens.²⁴¹ Since then, federal, state, and local actions have limited the civil rights and liberties of Arab and Muslim Americans without regard to their citizenship status.²⁴²

For instance, the USA PATRIOT Act, enacted in 2001, provided expansive surveillance powers to law enforcement in four areas: record searches, secret searches, intelligence searches, and “trap and trace” searches.²⁴³ As a result, security agencies have increased access to resources to fight terrorism domestically and abroad. Such resources and added agency powers have had racialized impacts on U.S. citizens of Arab and Muslim descent.²⁴⁴ Additionally, no minimal proof—probable cause or reasonable suspicion—is required to explain how an individual is connected to a counter-terrorism investigation under this Act.²⁴⁵

Since 9/11, “[t]here is now public consensus that racial profiling is a good thing, and in fact necessary for survival.”²⁴⁶ Furthermore, in 2001, the New York Police Department (NYPD) established a secret surveillance program that ran until 2011 and “mapped, monitored and analyzed American Muslim daily life

religious profiling, . . . the assassination of international leaders . . . the invasion of foreign countries[,] and the indiscriminate bombing of civilians”).

²⁴¹ See Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 BYU L. REV. 779, 782. Innocent lives have been lost simply for appearing to be Muslim. An Indian father of two, Vasudev Patel, was shot while working at a convenience store in Texas on October 4, 2001. Mark Stroman said he shot Patel because he appeared to be Muslim: “I did what I had to do. I did it to retaliate.” MICHAEL WELCH, *SCAPEGOATS OF SEPTEMBER 11TH: HATE CRIMES & STATE CRIMES IN THE WAR ON TERROR* 63 (2006). Stroman also admitted to killing Waquar Hassan, a Pakistani father of four who was murdered on September 15, 2001, while working at a grocery store in Dallas. *Id.* Similarly, Balbir Singh Sodhi was shot outside of a gas station in Mesa, Arizona, by white gunman Frank Roque, who said he thought he was shooting a Muslim because of Sodhi’s beard and turban. Olivia Munson, *9/11 Slaying of Mesa Sikh Not Forgotten*, E. VALLEY TRIB. (Sept. 24, 2020), https://www.eastvalleytribune.com/news/9-11-slaying-of-mesa-sikh-not-forgotten/article_293055fa-fc3b-11ea-9512-873aaf88e888.html [<https://perma.cc/6UJE-VJSE>].

²⁴² See United and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 18 U.S.C.); see also Homeland Security Act of 2002 Amendments, Pub. L. No. 108-7, 117 Stat. 67-68 (2003).

²⁴³ *Surveillance Under the USA/PATRIOT Act*, ACLU (Oct. 23, 2001), <https://www.aclu.org/other/surveillance-under-usapatriot-act> [<https://perma.cc/45E2-CE5F>].

²⁴⁴ *Id.* (“Under the Patriot Act, the FBI can secretly conduct a physical search or wiretap on American citizens to obtain evidence of crime without proving probable cause, as the Fourth Amendment explicitly requires.”); PEEK, *supra* note 240, at 114 (“Government policies and law enforcement tactics that singled out members of the Muslim community prompted additional fears of public humiliation, police brutality, unlawful arrest, and myriad other civil-rights concerns.”).

²⁴⁵ *Surveillance Under the USA/PATRIOT Act*, *supra* note 243 (“Section 215 of the Patriot Act . . . [v]iolates the Fourth Amendment, which says the government cannot conduct a search without obtaining a warrant and showing probable cause to believe that the person has committed or will commit a crime.”).

²⁴⁶ Volpp, *The Citizen and the Terrorist*, *supra* note 240, at 1576-77.

[including U.S. citizens] throughout New York City, and even its surrounding states.”²⁴⁷ The program targeted “Muslim entities and individuals in New Jersey for investigation solely because they [we]re Muslim or believed to be Muslim.”²⁴⁸ Spying included the use of surveillance cameras and undercover officers called “mosque crawlers.”²⁴⁹ The surveillance, revealed in late 2011, lasted for nearly a decade and affected thousands of Muslims, including U.S. citizens of Muslim descent.²⁵⁰ However, the Chief of the NYPD testified under oath that the unit did not yield a single criminal lead in the six years of his tenure.²⁵¹

Countless lawsuits have been filed by Arab and Muslim Americans since 9/11, asserting racial discrimination and harassment by the state. Almost all claims filed (and not settled) have unfavorable outcomes for the plaintiffs.²⁵² One lawsuit involved the surveillance of a U.S. citizen student of Muslim descent who discovered a Global Positioning System (“GPS”) tracking device attached underneath his car during an oil change.²⁵³ He later learned that the Federal Bureau of Investigation (“FBI”) had placed the tracker and sued, claiming violations of his First and Fourth Amendment rights.²⁵⁴ The District Court dismissed the lawsuit in 2015 even though in 2012, the Supreme Court held that under the Constitution, GPS tracker placement on a person’s car requires a warrant.²⁵⁵ The District Court reasoned:

[T]he Circuits were split regarding the constitutionality of the warrantless use of a GPS device at the time of the conduct at issue. [Additionally,] the warrantless use of a GPS device was lawful under Ninth Circuit precedent at the time of its use in this present case.²⁵⁶

²⁴⁷ See MUSLIM AMERICAN CIVIL LIBERTIES COALITION, CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY & ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 4 (Ramzi Kassem et al. eds., 2013) [hereinafter MAPPING MUSLIMS]; see also Aziz, *supra* note 241, at 788. Aside from the traditional forms of surveillance, the advent of social media has made surveillance of Black and Brown activists “more accessible, and, in turn, it exposes marginalized groups to modern forms of monitoring that are more intrusive and potentially more injurious.” Sahar F. Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 B.U. L. REV. 1151, 1153 (2020).

²⁴⁸ Hassan v. City of New York, 804 F.3d 277, 285 (3d Cir. 2015).

²⁴⁹ *Id.*

²⁵⁰ Romtin Parvaresh, *Prayer for Relief: Anti-Muslim Discrimination as Racial Discrimination*, 87 S. CAL. L. REV. 1287, 1287-88 (2014).

²⁵¹ MAPPING MUSLIMS, *supra* note 247, at 49.

²⁵² See Parvaresh, *supra* note 250, at 1228.

²⁵³ Affi v. Lynch, 101 F. Supp. 3d 90, 95 (D.D.C. 2015).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 106; United States v. Jones, 565 U.S. 400, 404 (2012) (“We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”).

²⁵⁶ Affi, 101 F. Supp. 3d at 102.

The District Court held that the plaintiff could not recover under the 2012 precedent.²⁵⁷ The cases filed point to a discernible pattern in which state action results in discriminatory treatment. These three case studies demonstrate how the state, through citizenist discrimination, suppresses the rights of citizens of color beyond national security and immigration enforcement. They also point to how citizenism functions to perpetuate structural racism. This sanitized racism operates through presumed illegality, criminality, and foreignness of communities of color.²⁵⁸

III. LEGALIZED RACIAL PROFILING THROUGH PRESUMED ILLEGALITY

Fourth Amendment procedures, as interpreted by Supreme Court precedent, instantiate citizenist discrimination by constructing Latinxs as presumptively “illegal.” This Part explains how illegalization constructs Latinxs as inherently dangerous, perpetually foreign, presumptively “illegal,” and unworthy of legal protection.²⁵⁹ The construct of the “illegal other” serves as an anchor to suppress the rights of Latinxs regardless of their citizenship status. This is operationalized through the erosion of Fourth Amendment protections by enabling legally permissible racial profiling.²⁶⁰

This Part then shows the specific ways in which law enforcement and lower court cases have racially profiled Latinxs along several dimensions, including speech and phenotype. I distill the legally salient concepts of “speaking like an illegal” or “looking like an illegal” to grasp how citizenism operationalizes the illegalization of Latinxs. Relying on the opening case of *Francisco Erwin Galicia*,²⁶¹ this Part specifically profiles instances in which U.S. citizens of Latinx descent have been questioned, detained, and arrested because they were presumed to be “illegal” by law and immigration enforcement.²⁶²

A. “Illegal”-izing the Fourth Amendment

The following Section examines Fourth Amendment violations and rulings premised on the construction of racialized illegality.²⁶³ Arguing that citizenism

²⁵⁷ *Id.* at 110.

²⁵⁸ See discussion *supra* Introduction.

²⁵⁹ See *Romero*, *supra* note 37 (analyzing racial profiling in United States and its effect on Latinx citizens’ rights).

²⁶⁰ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”).

²⁶¹ See *supra* notes 16-27 and accompanying text.

²⁶² See discussion *infra* Subsections III.B.1-2 (describing detainment of Ms. Davila and Ana Suda).

²⁶³ See *Carbado & Harris*, *supra* note 85, at 1547-48; see also Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 *FORDHAM URB. L.J.* 129, 136 (2010) (examining permissibility of “warrantless, suspicionless” searches of citizens in close proximity to international borders).

constructs a system of legalized racial profiling that disproportionately impacts Latinxs regardless of their citizenship status.²⁶⁴ Thus, status functions as a proxy for race for Latinxs and permits racial profiling for immigration and law enforcement.²⁶⁵ This Section then discusses how cases dealing with undocumented immigrants have eroded Fourth Amendment protections generally and identifies how this practice adds precarity to the limited rights of citizens of color.²⁶⁶

Racial profiling of Latinxs for “speaking and looking illegal” is legally permissible under citizenism.²⁶⁷ This legal precedent was first established in *Brignoni-Ponce*.²⁶⁸ While the Court held that “Mexican appearance” is a “relevant factor” in determining suspicion of undocumented status, it failed to provide any directive to immigration and law enforcement agencies to regulate or limit this practice, which is particularly concerning given the racial profiling implications.²⁶⁹ Rather, the court relied on the government’s claim that trained officers rely on factors such “as the mode of dress and haircut” to ascertain Mexican appearance and determine which cars to stop with mere reasonable suspicion.²⁷⁰ This holding fortified the presumption of illegality for Latinxs who are racialized as “illegal” in society and through law enforcement practices.²⁷¹ Since *Brignoni-Ponce*, “Fourth Amendment jurisprudence . . . [has] facilitate[d] both the idea that Latin[x]s are presumptively undocumented (the racial profile) and the practice of detaining Latin[x]s because of that presumption (racial profiling).”²⁷² Jurisdictions across the country—with some

²⁶⁴ See Chacón & Coutin, *supra* note 85, at 162 (“The cases that validate racial profiling in immigration enforcement are old, but they remain good law and are still cited in government briefs in support of the legitimacy of immigration enforcement practices that rely on racial profiling.”).

²⁶⁵ See *id.* at 160 (“[I]mmigration law is operating as a central node for the production of Latino racial identity and the perpetuation of racial hierarchy in the United States.”).

²⁶⁶ Chacón, *supra* note 51, at 68. See generally Carbado, *supra* note 85 (discussing interaction between Fourth Amendment rights and race).

²⁶⁷ Chacón, *supra* note 51, at 67 (interviewing individuals about their attitudes toward police mistreatment of Latinx citizens for appearing Latinx or lacking English proficiency). See generally McKanders, *Immigration Enforcement*, *supra* note 117 (analyzing social and political motives driving anti-immigration legislation that segregates, excludes, and discriminates against Latinx citizens).

²⁶⁸ 422 U.S. 873, 885 (1975); see *supra* notes 64–67.

²⁶⁹ See *Brignoni-Ponce*, 422 U.S. at 886–87.

²⁷⁰ *Id.* at 885–86.

²⁷¹ See Johnson, *Racial Profiling*, *supra* note 67, at 1009 (reasoning legacy of *Brignoni-Ponce* is “allowing law enforcement reliance on ‘Mexican appearance’ in making immigration stops, [which] remains central to modern enforcement of the U.S. immigration laws at the border and in the interior of the United States”).

²⁷² Carbado & Harris, *supra* note 85, at 1547–48 (footnote omitted).

exceptions in the Ninth Circuit—have followed suit over the last four-and-a-half decades.²⁷³

Furthermore, in *Egbert v. Boule* the Supreme Court allowed for immigration enforcement to enter a home without a warrant that is suspected of having undocumented people within one hundred miles of the border.²⁷⁴ Additionally, the Court allowed CBP officials to continue conducting warrantless stops, searches, and arrests within one hundred miles of the U.S. borders with mere reasonable suspicion.²⁷⁵ CBP agents can also set up checkpoints, patrol highways, board buses, and use a person's race (i.e., "Mexican appearance") in determining who is undocumented and who to stop within this zone.²⁷⁶ Communities of color enjoy lesser Fourth Amendment protections because they live in larger concentrations within the one-hundred-mile border zone.²⁷⁷ These holdings have implications for everyone in the United States, but the impact is more severely felt in communities of color.

Thus, Fourth Amendment protections from unreasonable searches and seizures have been eroding due to the intricate connection between race and illegality over at least the last five decades.²⁷⁸ Professors Devon Carbado and Cheryl Harris examined *INS v. Delgado*,²⁷⁹ *United States v. Brignoni-Ponce*, and *United States v. Martinez-Fuerte*.²⁸⁰ These cases involve undocumented immigrants and have each weakened Fourth Amendment protections.²⁸¹

The undocumented cases import a pernicious aspect of immigration exceptionalism into Fourth Amendment doctrine—namely that the government can legitimately employ race when it is enforcing immigration

²⁷³ See Johnson, *Racial Profiling*, *supra* note 67, at 1015, 1028-30, 1032 (surveying circuit splits interpreting and applying *Almeida-Sanchez v. United States*, *United States v. Brignoni-Ponce*, and *United States v. Martinez-Fuerte*).

²⁷⁴ 596 U.S. 482, 522 (2022) (Sotomayor, J., concurring in part); see also ACLU, *Border*, *supra* note 69.

²⁷⁵ *Egbert*, 596 U.S. at 522 (critiquing majority's decision).

²⁷⁶ Misra, *supra* note 70.

²⁷⁷ See *id.* (quoting Patrick Eddington, "It really is kind of a constitution-free zone . . . I guess the best way to phrase it is that in this area, [border patrol agents] are being allowed to nullify people's rights"); *supra* notes 70-71 and accompanying text.

²⁷⁸ See DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER AND THE FOURTH AMENDMENT 75-76 (2022).

²⁷⁹ 466 U.S. 210, 210 (1984) (holding workplace raid in Southern California of Latinx workers "did not result in the seizure of the entire work force, and the individual questioning of the respondent employees by Immigration and Naturalization Service agents concerning their citizenship did not amount to a detention or seizure under the Fourth Amendment").

²⁸⁰ 428 U.S. 543, 545 (1976) (holding vehicle stops "at a fixed checkpoint for brief questioning of [the vehicle's] occupants even though there is no reason to believe the particular vehicle contains illegal aliens" are "consistent with the Fourth Amendment"). See generally Carbado & Harris, *supra* note 85.

²⁸¹ See Carbado & Harris, *supra* note 85, at 1549-50 (describing how these cases facilitate use of "Mexican appearance" to determine whether someone is undocumented, and how Fourth Amendment doctrine enables and legitimizes this practice of racial profiling).

laws. In so doing, the cases constitutionalize racial profiling against Latin[x]s and unduly expand governmental power and discretion beyond the borders of immigration enforcement. This weakens the Fourth Amendment and enables racial profiling in the context of ordinary police investigations.²⁸²

This logic of racial profiling espoused through citizenism leads to the erosion of the rights of citizens of Latinx descent, a practice rooted in a long-standing tradition of illegalizing people of color.²⁸³ Further, citizens of color are more likely than white citizens to live within the one-hundred-mile border zone, within which the Supreme Court recently gave more latitude to immigration and law enforcement to infringe on previously protected privacy interests under the Fourth Amendment. They are more likely to be stopped and searched without a warrant or reasonable suspicion.²⁸⁴ More broadly, while racial profiling has been deemed illegal per se, citizens of color are discriminated against based on their phenotype, language, religion, class, and ancestry through citizenist discrimination.²⁸⁵ This trend is discussed directly in the cases profiled in the next Section.

B. *Race-Making Through Presumptive Illegality*

Citizenist discrimination extends the practice of racial profiling beyond the border to citizens of color based on their presumed illegality.²⁸⁶ This presumption particularly applies to Latinxs, but it also impacts other citizens of

²⁸² *Id.* at 1543.

²⁸³ See discussion *supra* Section I.B (outlining how racialized exclusions and presumptions of illegality strip people of color of their rights); see also Chacón & Coutin, *supra* note 85, at 159 (expounding racially discriminatory practices in immigration enforcement impacting people of color, regardless of citizenship).

²⁸⁴ See U.S. CONST. amend. IV; see also Johnson, *Race Matters*, *supra* note 107, at 537 n.57 (describing Arizona police and border patrol stopping people who “looked Mexican” to request citizenship and immigration status verification); Chacón & Coutin, *supra* note 85, at 170 (explaining how laws incentivize stopping unauthorized immigrants and promote police practices resulting in targeting of Latinxs). See generally Maria Cristina Morales & Denise Delgado, *What Is Your Citizenship Status? Racial and Citizenship Profiling by Law Enforcement Along the U.S.-México Border* 2-3 (Univ. of Tex. at El Paso, Working Paper, 2017), https://www.utep.edu/liberalarts/cibs/_Files/docs/working-papers/morales-and-delgado-border-studies-working-paper_heyman-corrections.pdf [<https://perma.cc/NH6Q-SN67>] (discussing connection between racial profiling of Latinxs, criminalization, and increased immigration enforcement).

²⁸⁵ See discussion *infra* Subsection III.B.1 (describing how documentation status becomes proxy for racial identity where Latinx individuals and other individuals of color are racialized as illegal).

²⁸⁶ See Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597 (2005) (discussing conflation of racial identity with notions of illegality, illegitimacy, and criminality in Asian and Latinx communities).

color.²⁸⁷ White people, including undocumented ones, are largely unscathed by this form of racial profiling.²⁸⁸ This Section explores the presumption of illegality as a pathway for criminalization that gives ample latitude to law enforcement to detain, arrest, and assume a lack of belonging for Latinxs within and outside the U.S.-Mexican Border.²⁸⁹

“‘[I]llegality’ is not a race-neutral term”²⁹⁰ Various forces within law and politics produce the racialization of illegality.²⁹¹ Illegality “is a political identity that underscores immigrants’ relationship to the state.”²⁹² Furthermore, it is socially constructed, based on “elaborate narratives of threat and transgression.”²⁹³ Ultimately, the racial profile of illegality becomes a stand-in for race and permits the criminalization of people of color. This is the work that racialized citizenship is doing under citizenism.

Illegality is based on race, Indigeneity, phenotype, language, religion, class, and ancestry. Those presumed to speak an “illegal” language, which often refers to Spanish (although this depends on geography), are suspected not to possess

²⁸⁷ See Menjivar, *supra* note 35, at 92 (noting “strong association between being Latina/o and undocumented, broadcast in the media and cemented through enforcement practices Thus, the immigration regime targets Latinas/os today with particular force: both the legislative and the enforcement side of the regime illegalize and racialize them”); see also Yuning Wu et al., *supra* note 61, at 74 (detailing anti-immigrant sentiment Asian immigrants face, including perpetual foreigner stereotypes regardless of citizenship status, and subsequent nativist arguments).

²⁸⁸ See *supra* Table 1 (showing how citizens and noncitizens of color remain suspect and politically limited while white U.S. citizens do not).

²⁸⁹ See *supra* Subsections II.B.1-2.

²⁹⁰ Menjivar, *supra* note 35, at 92 (explaining term “has become synonymous with ‘Mexicanness’ and with being Latina/o”); see Pia Møller, *Restoring Law and (Racial) Order to the Old Dominion*, 28 CULTURAL STUD. 869, 877 (2014) (noting concept of illegality is always racialized even under pretext of race neutrality); see also NAZLI KIBRIA, CARA BOWMAN & MEGAN O’LEARY, RACE AND IMMIGRATION 56 (2014); CONSTRUCTING IMMIGRANT ILLEGALITY: CRITIQUES, EXPERIENCES, AND RESPONSES 21 (Cecilia Menjivar & Daniel Kanstroom eds., 2014); Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82, 91 (2016); Christina M. Getrich, “Too Bad I’m Not an Obvious Citizen”: The Effects of Racialized US Immigration Enforcement Practices on Second-Generation Mexican Youth, 11 LATINO STUD. 462, 467 (2013) (linking illegality, applied often to Latinxs, with racialized law enforcement practices); EDWARD J. ESCOBAR, RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945, at 3 (1999); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 261 (2004).

²⁹¹ Menjivar, *supra* note 35, at 93 (identifying law, politics, social constructions based on stereotypes, popular discourse, and institutionalized policies in enforcement agencies).

²⁹² *Id.*

²⁹³ *Id.* (quoting Miranda C. Hallett, “Better Than White Trash”: Work Ethic, Latinidad and Whiteness in Rural Arkansas, 10 LATINO STUD. 81, 86 (2012)); see also Saito, *supra* note 52, at 4 (“In the United States, racism is frequently condemned, in theory, if not in practice However, discriminatory measures targeting people on the basis of their ‘outsider’ status rather than their racial identity or ethnicity are met with more ambivalence.”).

U.S. citizenship.²⁹⁴ There is a similar assumption of religion that affects non-Christians, primarily Muslims, who are racialized as outsiders.²⁹⁵ Phenotype also plays an essential role in the racial profile of illegality both within and outside the immigration enforcement context. This profile of illegality connects to the construction of whiteness the Supreme Court adopted in excluding nonwhite people from naturalization in *Dred Scott*, *Ozawa*, and *Thind*, and it extends through a long history of racialized exclusion.²⁹⁶

Citizenism stretches the *bands of illegality* by enabling the racial profile through illegality. A discernable pattern arises in cases targeting citizens of Latinx descent because they are presumed to be undocumented.²⁹⁷ Hence, “looking or speaking like an illegal” often functions as a euphemism for race for citizens of Latinx descent.²⁹⁸ The cases below depict U.S. citizens being stopped, detained, or arrested for their presumed illegality.²⁹⁹ Furthermore, they highlight the heightened surveillance in regions of the United States proximate to the border.³⁰⁰ No similar case law is found in which white U.S. citizens or white

²⁹⁴ See, e.g., *United States v. Manzo-Jurado*, 457 F.3d 928, 937-39 (9th Cir. 2006) (holding groups’ speaking exclusively in Spanish and not understanding English is relevant to support reasonable suspicion that individuals stopped lack authorization); *Suda v. U.S. Customs & Border Prot.*, No. CV-19-10, 2020 WL 919574, at *2 (D. Mont. Feb. 26, 2020) (addressing targeting of two citizens because police officer overheard them speaking Spanish in predominantly English-speaking state).

²⁹⁵ See Beydoun, *supra* note 247, at 1737 (explaining Islamophobia characterizes Muslims, including Muslim citizens, as foreign, violent, and unassimilable); AZIZ, *supra* note 30, at 169 (“Racialization criminalizes Muslim identity.”).

²⁹⁶ See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV; *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Thind*, 261 U.S. 204 (1923).

²⁹⁷ Cf. Carbado & Harris, *supra* note 85, at 1590 (“At the border, the reliance on race, and at times race alone, as a basis for stopping and investigating travelers [is] a common practice, and . . . law enforcement [has] operated with relatively few constraints as searches [are] permitted without warrants or probable cause. . . . This [is] the context [for] *Brignoni-Ponce* . . .”).

²⁹⁸ See, e.g., *Manzo-Jurado*, 457 F.3d at 932; *Davila v. N. Reg’l Joint Police Bd.*, 370 F. Supp. 3d 498, 509 (W.D. Pa. 2019) (referring to police officer who required legal permanent resident to submit her name for immigration status check despite doing nothing to cause him to believe she was not lawfully present in United States); see also Yuning Wu et al., *supra* note 61, at 83 (describing study where Chinese respondents overwhelmingly reported belief police treated English-speaking people better than non-English-speaking people).

²⁹⁹ See McKanders, *Immigration Enforcement*, *supra* note 117, at 941-46 (providing overview of enacted state legislation to enforce federal immigration law that civil rights groups have challenged based on prevalence of racial profiling, such as Arizona’s S.B. 1070, Georgia’s Illegal Immigration Reform and Enforcement Act of 2011, and Utah’s H.B. 497); see also Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 995 (2016) (emphasizing racial profiling of minority groups resulting in traffic stops and law enforcement abuse).

³⁰⁰ See, e.g., Bryce Clayton Newell, Ricardo Gomez & Verónica E. Guajardo, *Sensors, Cameras, and the New ‘Normal’ in Clandestine Migration: How Undocumented Migrants*

noncitizens are targeted and racially profiled by law or immigration enforcement.³⁰¹

1. Looking Like an “Illegal”

Undocumented status is transmuted to a racially subordinated identity imposed upon Latinxs because they are generally presumed not to belong and to lack citizenship status. Undocumented status serves as an anchor to further suppress the citizenship rights of citizens of color. This subsection discusses how the presumption that Latinx people are undocumented extends far beyond the U.S.-Mexican border and ultimately makes documentation status function as a proxy for racial identity.³⁰²

Racialization through illegalization is evident in *Davila v. Northern Regional Joint Police Board*.³⁰³ Ms. Davila, a U.S. citizen, was unlawfully arrested during a traffic stop.³⁰⁴ She was leaving a grocery store when the detaining officer observed that the headlights on her car were off and pulled her over.³⁰⁵ The officer lengthened the traffic stop without reasonable suspicion or probable cause to investigate any unlawful act.³⁰⁶ The officer asked Ms. Davila about her immigration status, and she mistakenly stated she was a legal permanent resident when she was, in fact, a U.S. citizen.³⁰⁷ The officer submitted her name to Immigration Customs and Enforcement (“ICE”) to check her status.³⁰⁸ ICE erroneously responded that Ms. Davila did not have an immigration status and

Experience Surveillance at the U.S.-Mexico Border, 15 SURVEILLANCE & SOC’Y 21, 25 (2017) (highlighting increased use of surveillance technologies, such as sensors and cameras, driving migrants into harsher, more remote regions).

³⁰¹ The author’s research included a general internet search and a Westlaw search for cases brought by white U.S. citizens and white people lacking immigration status who were targeted or racially profiled by law enforcement because of their presumed illegality. The author found none as of March 2024.

³⁰² Carbado & Harris, *supra* note 85, at 1545-46 (“In the context of contemporary immigration enforcement, and with respect to Latin[x]s, this proxy function of race blurs the boundary between citizen and noncitizen and further conflates noncitizenship and undocumented status. . . . [T]he simple ‘fact’ of apparent Latin[x] ancestry renders a person presumptively an undocumented noncitizen . . .”).

³⁰³ *Davila*, 370 F. Supp. 3d at 509 (showing officer believed U.S. citizen was lying about her immigration status because of her Latinx ethnicity).

³⁰⁴ *Id.* at 522.

³⁰⁵ *Id.* at 508 (noting no other reason for initial traffic stop aside from headlights violation).

³⁰⁶ *Id.* at 509-10 (showing even though Ms. Davila had done nothing to cause officer to believe she was not lawfully present, officer called for backup and did not allow her to leave for approximately two hours before being taken to the police station).

³⁰⁷ *Id.* at 508 n.2.

³⁰⁸ *Id.* at 509.

was subject to removal.³⁰⁹ Hours later, ICE confirmed Ms. Davila was indeed a U.S. citizen.³¹⁰

The court determined the officer's actions following the initial questioning of Ms. Davila were unconstitutional but not the initial stop.³¹¹ The officer admitted Ms. Davila did nothing to cause him to believe she lacked formal immigration status. Still, he submitted her name to ICE anyway because he thought she might be lying.³¹² Significantly, the court noted, in two other stops made around the same time, the officer submitted the information about Latinx people to ICE following minor traffic violations, prolonging the detentions as he had done here.³¹³ The court held that Ms. Davila advanced sufficient facts such that a reasonable jury could conclude the officer's actions had a discriminatory effect based on her race.³¹⁴ While Ms. Davila had a favorable outcome, her life was disrupted because she was racialized as undocumented. Furthermore, while the questioning of Ms. Davila was deemed unconstitutional, the initial stop would pass constitutional muster due to her "Mexican appearance."

The illegalized presumption of Latinxs far extends beyond the U.S.-Mexican border and it makes documentation status a proxy for racial identity. After 9/11, "the executive branch seized the opportunity to employ and expand its immigration powers to conduct law enforcement, while local police became immigration law enforcers."³¹⁵ Concretely, the *Davila* court found that, in twelve different cited incidents between 2007 and 2012, the defendant police organization had submitted information about Latinxs to ICE.³¹⁶ This expansion of powers over immigration enforcement to local law enforcement has

³⁰⁹ *Id.*

³¹⁰ *Id.* at 510 (showing, despite notification of ICE's error and confirmation Ms. Davila was legally present, officer did not release Ms. Davila from custody).

³¹¹ If this were "a 'typical' stop for driving without headlights on, [the officer] would have simply checked Ms. Davila's documents, warned or cited [her] for the violation, and then allowed her to leave." *Id.* at 516. The seizure was extended because the officer submitted her name to ICE. *Id.* at 511.

³¹² "[T]here is no evidence in the record [the officer] has ever submitted the names of someone in an unprotected class to ICE during a similar stop." *Id.* at 526.

³¹³ *Id.*

³¹⁴ *Id.* at 526-27.

³¹⁵ Aldana, *supra* note 107, at 80-81; *see also* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 601 (2012) ("[I]n the post-9/11 era, the executive branch used the immigration enforcement and detention system as a primary site of domestic anti-terrorism policy, notwithstanding the lack of nexus between much of the immigration enforcement and any actual terrorist threat.").

³¹⁶ *Davila*, 370 F. Supp. 3d at 524. The defendant claimed this was because the Latinx individuals lacked identification, spoke little English, or presented false identification. *Id.* at 542-43. However, in five incidents individuals presented valid identification, but they still had their names submitted to ICE and their detentions elongated. *Id.* at 540.

heightened racial profiling for Latinxs and other communities of color outside border areas.³¹⁷

Low-income communities of color in border areas—and increasingly outside border areas—are particularly susceptible to permissible racial profiling by immigration and law enforcement.³¹⁸ The practice of presuming illegality based on racial identity is inconsistent with the Equal Protection Clause.³¹⁹ This practice of racial profiling through illegality is largely based on phenotype, but it also extends to religion, class, ancestry, and language.

2. Speaking Like an “Illegal”

All Latinxs, particularly those who speak Spanish, “live under a condition of presumed illegality.”³²⁰ This subsection discusses relevant case law dealing with law enforcement stops, detentions, and arrests for speaking a language that is presumed to be spoken by an illegalized population. While this impacts other communities, it particularly impacts Latinxs, including U.S. citizens.³²¹

*Suda v. United States Customs and Border Protection*³²² exemplifies this presumption of illegality based on language. Ana Suda and Martha “Mimi” Hernandez, two U.S. citizens of Mexican descent, were standing in line at a grocery store in Havre, Montana, when they were questioned and detained for

³¹⁷ See Aldana, *supra* note 107, at 75-76 (describing how Border Patrol agents enforced immigration laws against Latinx victims of California fires, apprehending and deporting Latinx individuals seeking aid).

³¹⁸ See Chacón & Coutin, *supra* note 85, at 172 (explaining complexity of Latinx racial identity, where factors like class make marginalized Latinx communities more vulnerable); see also Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 699-700 (2000) (referring to Border Patrol’s race-based and class-based undocumented immigrant profile to limit access to “every region of the United States,” not just borders).

³¹⁹ See Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOYOLA L. REV. 67, 67 (2004) (“Before September 11, 2001 . . . the highest levels of government had condemned racial profiling by law enforcement. The nation had increasingly embraced the idea that impermissible reliance on race by police in traffic stops and other law enforcement activities was a serious problem, in addition to being unlawful and a poor law enforcement practice.” (footnote omitted)); see also McKanders, *Immigration Enforcement*, *supra* note 117, at 949 (“Racial profiling reinforces the unequal application of the laws against certain populations. . . . Racial profiling in enforcement may lead to denied access to counsel, unlawful, prolonged detention without the bringing of charges, and denial of substantive and procedural due process rights.”).

³²⁰ Carbado & Harris, *supra* note 85, at 1546 (emphasizing Latinx identity, not actual status or illegal conduct, is the driving force behind this presumption).

³²¹ See, e.g., N.Y. UNIV. SCH. OF L. IMMIGRANTS RTS. CLINIC, N.Y.C.L. UNION & FAMS. FOR FREEDOM, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK’S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL’S INTERIOR ENFORCEMENT PRACTICES 16 (2011) (noting vast majority of passengers arrested at Rochester Station are Latinx and “confirm[s] anecdotal reports that arresting officers focus on Latin Americans and persons of color in their enforcement operations”).

³²² No. CV-19-10, 2020 WL 919574, at *1 (D. Mont. Feb. 26, 2020).

almost an hour by a CBP officer only for speaking Spanish.³²³ Underlying their detention was the racialized construction of illegality that they did not belong or that they lacked citizenship status. When Ana and Mimi asked the CBP officer why he had detained them, he stated:

Ma'am the reason I asked you for your ID is because I came in here and saw that you guys are speaking Spanish which is very unheard of up here . . . it has to do with you guys speaking Spanish in the store . . . in a state where it's predominantly English speaking.³²⁴

Ana inquired "whether they would have been detained if [they] had been speaking French. The supervisors [of the CBP officer who detained them] said '[n]o, we don't do that.'"³²⁵ Interestingly, no cases have been filed by white noncitizens or white U.S. citizens who have been detained for speaking French, even though the town of Havre is within 30 miles of the U.S.-Canadian border.³²⁶ Importantly, this case demonstrates how the regulation and enforcement of racialized citizens differ based on racialized markers. The contrast is stark: while potentially undocumented white Canadians can speak French and not be detained, U.S. citizens are detained for "speaking like an illegal," meaning for speaking Spanish.³²⁷

In this case, racialized undocumented status was used as a proxy for race for the unlawful detention of two U.S. citizens merely because they were speaking Spanish while in line to buy groceries.³²⁸ CBP settled the case out of court. It demonstrates how citizenism facilitates racial profiling by law enforcement for merely "speaking like an illegal," although that infringes on the civil rights of U.S. citizens.³²⁹

³²³ *Id.* at *2.

³²⁴ ACLU, *CBP Detains US Citizens for Speaking Spanish*, YOUTUBE (Feb. 14, 2019), <https://www.youtube.com/watch?v=Ry8BqMjVbkk> [<https://perma.cc/QRN8-MGJU>].

³²⁵ *Suda*, 2020 WL 919574, at *2.

³²⁶ The author's research included a general internet search and a Westlaw search for cases brought by a Canadian or U.S. citizen detained for speaking French. The author found none. There was, however, a case of a French national, a nineteen-year-old Black woman, who was detained by ICE for two weeks after she mistakenly crossed the border from Canada into Washington while jogging. *French Jogger Detained After Crossing US-Canada Border*, BBC NEWS (June 23, 2018, 6:16 AM), <https://www.bbc.co.uk/news/world-us-canada-44588643> [<https://perma.cc/7ADU-DA53>].

³²⁷ *See, e.g.*, ACLU, *supra* note 324.

³²⁸ *Suda*, 2020 WL 919574, at *2-5. The case settled out of court. *See Customs and Border Protection Settles Federal Lawsuit with American Citizens Racially Profiled and Unlawfully Detained for Speaking Spanish*, ACLU (Nov. 24, 2020, 9:00 AM) [hereinafter ACLU, *Customs and Border Protection*], <https://www.aclu.org/press-releases/customs-and-border-protection-settles-federal-lawsuit-american-citizens-racially> [<https://perma.cc/ENH2-BPEW>].

³²⁹ *See* Carbado & Harris, *supra* note 85, at 1543 (arguing Supreme Court has essentially constitutionalized racial profiling against citizens of Latinx descent by allowing border patrol agents to consider race while enforcing immigration laws).

In the cases outlined above, U.S. citizens of Latinx descent were illegalized and treated as presumptively suspect.³³⁰ While these markers may not be legally defined characteristics, they function as a euphemism for race by using Indigeneity, phenotype, language, religion, class, and ancestry to illegalize Latinxs and other communities of color.³³¹ Thus, centering citizenship status provides a lens for understanding racial subordination for Latinxs in the United States through racial profiling.

CONCLUSION

This Article's central intervention is laying out the concept of citizenism as a theory of discrimination that sustains structural racism. Citizenism delimits the civil and political citizenship rights of noncitizens and citizens of color who are racialized as presumptively "illegal." This structure is rooted in the normative practice of nation-states allocating differential rights based on citizenship status. In the United States, it is specifically engrained in a prolonged history of race-based exclusion from citizenship. From the Naturalization Act of 1790 to the ruling of *Dred Scott* in 1857, to the Chinese Exclusion Acts of 1882, to the mass deportations of millions of people of Mexican descent in the early 1990s, to the forced internment of people of Japanese ancestry in the 1940s, to the holding in *Brignoni-Ponce* in 1975, to the racialization of Arabs and Muslims since 2001 race continues to be a central organizing principle of U.S. citizenship.³³² Citizenism, this Article posits, is an underlying layer of white supremacy that uses citizenship status as a proxy for race to perpetuate racialized outcomes for communities of color.

Addressing citizenism is beyond this Article's reach. Yet, structural and legal solutions may be needed to remedy citizenism. Confronting the root causes of citizenism may require a potential restructuring of how nation-states apportion civil and political rights based on citizenship status. This necessitates a reckoning of how the construct of "illegality" maintains a racially subordinated population of millions of people while diminishing the rights of citizens of color. Furthermore, administrative and legislative policies and long-established legal

³³⁰ See *id.* at 1548-49 ("[L]aw enforcement personnel routinely employ Latino racial identity as a basis for determining whether a person is undocumented or 'illegal.'"); see also ACLU, *Customs and Border Protection*, *supra* note 328 ("One such incident led to a published Ninth Circuit opinion holding that CBP agents illegally detained a group of men in Havre in 2006."). The holding in *Suda* "revealed that local CBP agents have engaged in a longstanding pattern of abusive seizures and investigations. Agents from the local administrative CBP unit—known as the 'Havre Sector'—have repeatedly targeted Latinx individuals without justification, often based on their race." *Id.*

³³¹ TARAS, *supra* note 198, at 10 (noting "prejudices and chimeras" are used to create in-groups and out-groups, in part, by identifying markers of membership); see also HANEY LÓPEZ, *supra* note 39, at 90 ("Law frees racial categories from their local settings in another, quite distinct sense, as well: it occasionally provides a new language with which to construct racial differences.").

³³² See *supra* Parts I-II.

precedents must be reexamined and plausibly overturned. This includes contending with the immense deference underwritten by law with scant judicial review under the plenary power doctrine of immigration control and enforcement.

A readily available legal remedy may be overturning *United States v. Brignoni-Ponce*. Immigration and law enforcement should not be allowed to use “Mexican appearance” as a reasonable factor to stop or detain people. This ruling has led to the targeting, race-making, criminalization, detention, and deportation of Latinxs within and outside border areas.³³³ To address this, *Brignoni-Ponce* can be renounced as unconstitutional.

Furthermore, weakening Fourth Amendment protections within the 100-mile border zone has broader implications for all people living in the United States.³³⁴ The constitutional protections previously granted by the Fourth Amendment require a more stringent process. Law enforcement must be held to a standard that necessitates more than an arbitrary hunch that a person may lack citizenship based on race. Therefore, increasing Fourth Amendment protections in cases connected to undocumented immigrants can remedy citizenship, provide a higher level of protection from potential governmental intrusion, and limit the growing practice of racial profiling based on the construction of illegality.

Another potential tangible remedy is establishing a cognizable claim for this distinct form of racial discrimination. Like sexual harassment became available to litigants who experienced discrimination in employment, citizenship can become a legally viable claim for racial discrimination under civil rights.³³⁵ Employees, primarily women and LGBTQIA+ people, who experienced workplace sexual harassment lacked avenues for legal remedies before they could sue under Title VII of the Civil Rights Act.³³⁶ Courts turned away potential plaintiffs because sexual harassment was viewed as “a personal, not a civil rights, violation.”³³⁷ Sexual harassment did not fit the definition of discrimination based on sex, and Title VII was viewed as a remedy primarily

³³³ See FitzGerald et al., *supra* note 67.

³³⁴ See Egbert v. Boule, 596 U.S. 482 (2022).

³³⁵ See, e.g., Kyle Swenson, *Who Came up with the Term ‘Sexual Harassment’?*, WASH. POST (Nov. 22, 2017, 5:52 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/11/22/who-came-up-with-the-term-sexual-harassment/> (“Naming sexual harassment, and calling it what it is in law — a practice of sex discrimination — has given survivors then and now . . . the dignity of a civil rights violation, and a forum for accountability and relief.”).

³³⁶ See Erin Blakemore, *Until 1975, ‘Sexual Harassment’ Was the Menace with No Name*, HIST. (June 2, 2023), <https://www.history.com/news/until-1975-sexual-harassment-was-the-menace-with-no-name> [<https://perma.cc/LD4P-MMZV>] (discussing instances where women sought justice for sexual harassment but lacked legal definition or other terms to describe their experience).

³³⁷ See ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 30 (2021).

used to address racial discrimination.³³⁸ Plaintiffs like Diane Williams and Paulette Barnes,³³⁹ advocates like Eleanor Holmes Norton and Lin Farley,³⁴⁰ and professors like Anita Hill and Catherine MacKinnon effectively persuaded the American judiciary to provide relief for sexual harassment as a practice of sex discrimination in employment.³⁴¹ Recognizing citizenism as a form of racial discrimination can serve a similar purpose by naming it as a specific practice and civil rights violation, providing a sense of its systemic pervasiveness, and opening the courts and the law as a forum for legal remedies.³⁴²

³³⁸ See Swenson, *supra* note 335 (“[C]ourts said, harassment was a personal matter, not an employment issue. [Additionally], they reasoned that it wasn’t a gender-based offense because it could happen to either a man or a woman. Finally, [Title VII], while it mentioned sex almost as an afterthought, was primarily about racial discrimination.”).

³³⁹ See Carrie Baker, *Race, Class, and Sexual Harassment in the 1970s*, 30 FEMINIST STUD. 7, 8-10 (2004) (highlighting Black women, including Williams and Barnes, “filed the first precedent-setting cases under Title VII, long before white middle-class feminists began to work on the issue, thereby setting the prevailing framework within which sexual harassment law developed”).

³⁴⁰ See *id.* at 14 (describing Norton as one “of the most important government officials to shape sexual harassment law,” as she helped promulgate “extremely influential” sexual harassment guidelines and testified at key congressional hearings on sexual harassment); Blakemore, *supra* note 337 (noting how Farley helped create a name for sexual harassment and was first to use the term in public while speaking before the Commission on Human Rights of New York City).

³⁴¹ See Swenson, *supra* note 335 (noting MacKinnon “was responsible for much of the legal theory linking harassment and discrimination”); Baker, *supra* note 339, at 22-23 (describing how Hill’s testimony brought sexual harassment to the forefront of public discussion and contributed to “explosion of sexual harassment complaints”).

³⁴² Professor MacKinnon’s work outlining the legal context for sexual harassment claims in the 1970s provides a useful roadmap for legal success and potential judicial doctrines for courts to use in establishing citizenism as a legally cognizable claim. See CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 143-208 (1979). Early court decisions analyzed sexual harassment claims through two approaches: (1) the “differences” approach, where arbitrary distinctions based on sex were prohibited; and (2) the “inequality” approach, which considered “women’s imposed inferiority, social disabilities, and the stigma and reality of second-class status.” *Id.* at 102-03. The inequality approach viewed the purpose of the “prohibition on sex discrimination [as] aim[ing] to eliminate the social inferiority of one sex to the other, [and] to dismantle the social structure that maintains a series of practices that cumulatively . . . ‘disadvantage’ women.” *Id.* at 103. It further determined “[r]ational no more than irrational sex differences are legitimate reasons for perpetuating the social inequality of the sexes.” *Id.* While the Supreme Court, in the end, did not adopt the inequality approach—although Justice Brennan was an early proponent—Professor MacKinnon noted the legal doctrines of “disparate impact” and “suspect classification” could have supported its adoption for sexual harassment claims. *Id.* at 102-03; see also *Frontiero v. Richardson*, 411 U.S. 677, 689 n.22 (1973) (noting laws differentiating between men and women were “not in any sense designed to rectify the effects of past discrimination”); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 147 (1976) (Brennan, J., dissenting) (noting this case is “unusual in that it presents a question the resolution of which at first glance turns largely upon the conceptual framework chosen to identify and describe the operational features of the challenged disability program”).

Considering the structural inequalities citizenism imposes on citizens of color, courts could adopt the inequality approach, utilizing the legal doctrines of “disparate impact” and “suspect classification”³⁴³ to allow for the adjudication of claims. In adopting such an approach, however, courts must remain cognizant of intersectionality³⁴⁴ and “multidimensional discrimination,”³⁴⁵ being careful not to make citizenist discrimination a “monolithic experience”³⁴⁶ or mutually exclusive legal claim.³⁴⁷ In her work, Professor Kimberlé Crenshaw notes the limited scope of antidiscrimination law has forced Black women like Professor Hill to “mold [their] experience [of discrimination] into that of either white women [in sex-based claims] or black men [in race-based claims] in order to be legally recognized.”³⁴⁸ Analyzing, in particular, the attacks on Professor Hill after her Congressional testimony, Professor Crenshaw notes some scholars viewed “Black women’s historical lack of protection [from sexual harassment as] a basis for saying no protection [was] necessary.”³⁴⁹ Professor Athena Mutua’s work on multidimensionality is of further importance, which warns “against imposing a limited and essentialized identity on a multidimensional identity of groups because to do so prevents us from identifying how race, gender, class[,] and nation interact differently to create subordination.”³⁵⁰ Most importantly, any potential legal remedies to address citizenist discrimination

³⁴³ See discussion *supra* Subsection I.B.3; Crenshaw, *supra* note 89, at 167.

³⁴⁴ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152 (1989) (noting “adoption of a single issue framework for discrimination” can marginalize subgroups, making antidiscrimination goals “even more difficult to attain”).

³⁴⁵ See Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 S.M.U. L. REV. 257, 278-84 (2014) (discussing harms of multidimensional discrimination, particularly as encountered by Latinx immigrant workers).

³⁴⁶ See *id.* at 259 (citing Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 588-89 (1990)) (noting to assume “a monolithic experience based on race or gender” is to reduce peoples’ lives to math problems that can be solved by adding together aspects of their identities).

³⁴⁷ Kimberlé Crenshaw, *Whose Story Is It Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 404-05 (Toni Morrison ed., 1992).

³⁴⁸ *Id.* at 404.

³⁴⁹ *Id.* at 430.

³⁵⁰ Saucedo, *supra* note 345, at 259 (citing Athena D. Mutua, *The Multidimensional Turn: Revisiting Progressive Black Masculinities*, in MASCULINITIES AND THE LAW 78, 80-82 (Frank Rudy Cooper & Ann C. McGinley eds., 2012)).

should take into account “intersectional nuances”³⁵¹ of power, migration, history, racial construction, and subordination.³⁵²

Establishing cognizable claims for the legally constructed concepts of “speaking like an illegal” and “looking like an illegal” can extend the rights of citizens of Latinx descent like Francisco Erwin Galicia, Ana Suda, and Martha “Mimi” Hernandez. This remedy would make citizenist discrimination illegal by prohibiting the legally permissible suppression of precarious constitutional and civil rights of citizens of color through state-sanctioned racial discrimination. Making this remedy accessible would address the root causes of citizenism and begin eroding some of the entrenched legacies of racial discrimination embedded in U.S. citizenship.

Citizenism, this Article argues, permits the continued differential and unequal treatment of people of color regardless of citizenship status under the law.³⁵³ Thus, people of color have not only been prohibited from accessing birthright and naturalized citizenship for much of this country’s history,³⁵⁴ but the diminished legal protections of racialized immigrants continue to erode the constitutional rights of citizens of color.³⁵⁵ Loss of liberty through unjustified detention and indefinite criminal imprisonment with minimal due process, unlawful deportation, presumptive and constructed criminality, large-scale deportation, property takings, racialized surveillance, loss of generational wealth, and racial profiling are realities that people of color, including U.S. citizens, experience under citizenism.³⁵⁶ By centering citizenship status, the concept of citizenism explains how citizenship is weaponized to sustain structural subordination.

³⁵¹ Blackwell et al., *Critical Latinx Indigeneities*, *supra* note 3, at 131 (explaining “Critical Latinx Indigeneities [as a] perspective [that] is situated at a crossroads that further exposes complex intersectional nuances, intergroup oppression, and enduring multiple colonialities of power”).

³⁵² *Id.* at 132 (noting this perspective “unpacks the particularities of these Indigenous Latinx multilayered experiences that invite a more nuanced and profound knowledge and reflection on history and racial construction and subordination across various national and international contexts, including those of sovereign tribal nations”).

³⁵³ See discussion *supra* Section I.B.

³⁵⁴ See discussion *supra* Subsection I.B.1.

³⁵⁵ See discussion *supra* Parts II-III.

³⁵⁶ See *id.*