ABSTRACT

This thesis navigates the concept of U.S. citizenship, and analyzes how access to U.S. citizenship has been denied to different sections of the population based on race, country of origin, and ethnicity. Citizenship is investigated as a point of exclusion, instability, and legal ambiguity, in contrast with the conception of citizenship as a permanent and stable concept. Using case studies from court cases on the state and federal level, executive orders, and legislation developed by Congress, the legal and policymaking history of the United States reveals its propensity to associate whiteness as a parameter for achieving citizenship. These three areas of legislation and policy reveal how whiteness is intrinsically linked to access to citizenship in the United States. Additionally, these case studies demonstrate how through changing immigration laws and policies ranging from border enforcement to denaturalization, citizenship renders itself flexible, and subject to the coercion of the U.S. federal government. As the racial component of citizenship related legislation and policy is fundamental to my research, the experiences of Europeans, Asians, African Americans, Mexicans, and Indigenous peoples are referenced throughout my work to portray their different relationships with access to U.S. citizenship and political membership. My argument positions birthright citizenship as a last defense against any government that seeks to take away one of the most essential attributes of the United States's Constitution– the application of the 14th Amendment for all native-born children, regardless of their parents' legal status or racial identity. The 14th Amendment has never been easily accepted, and since its conception in 1868, it has been the subject of countless proposals to restrict its scope of power.[1] Nonetheless, the legal tradition of the United States has upheld the 14th Amendment as applicable to all children born on U.S. soil, even the children of unlawful or undocumented immigrants. Given the severity of race's influence on immigration law in the past, the existing administration is not immune to the influence of racist ideology; in fact, they often are responsible for its entrance into the American imagination. As a result, birthright citizenship protects the current and future populations by ensuring that no government or individual can undermine the legacy and legitimacy of the U.S. Constitution, prioritizing the interests of the vulnerable over the dominant, but temporary, voices in power.

[1] Natalia Molina, "Birthright Citizenship beyond Black and White," In *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts*, 1st ed., 68–88. (University of California Press, 2014) http://www.jstor.org/stable/10.1525/j.ctt4cgfv5.8. ;Cassaundra Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," In *Contested Americans: Mixed-Status Families in Anti-Immigrant Times*, 9:95–124. (NYU Press, 2023) http://www.jstor.org/stable/jj.8784641.6. 103. ; "H.R.569 - Birthright Citizenship Act of 2025" congress.gov. January 21st, 2025. https://www.congress.gov/bill/119th-congress/house-bill/569#:~:text=%2F21%2F2025)-,Birthright%20Citizenship%20Act%20of%202025,jurisdiction%20is%20entitled%20to%20citizenship

The Apparitional Citizen

The Impermanency of Legal Status and Access to Citizenship

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A Thesis Submitted to the Faculty of Mount Holyoke College, in Partial Fulfillment of the Requirements for the Degree of Bachelor of Arts with Honors

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INTRODUCTION

In the fall of 2016, I was in my second year of middle school and was finally old enough to truly understand the tensions and complexities of U.S. presidential elections. I remember waking up on the morning of election day, finding out that Donald Trump would be the new president, and googling how to apply for Canadian citizenship. The website, overrun with visitors, immediately crashed.[2] Well, there went that plan. Instead, I decided I needed to do something else. Even though I was only 12, I was already thinking about my future career. What if I became an immigration lawyer? I firmly believed that people were not "illegal," that undocumented immigrants deserved a chance at working and living safely in the United States, and that the "us" versus "them" narrative in conservative politics was not at all aligned with my values. My interest in immigration law persisted throughout high school, and in my first year of college, I finally took courses that taught me about immigration law in the United States, and the various stories and experiences that encapsulate the life of an immigrant. Throughout my academic career, I found ways to incorporate immigration studies into my classwork, allowing me to find ways to connect different themes to the root ideas of citizenship and the migrant experience.

When I'm asked why I wanted to do this thesis, those who know me wonder whether I am the child of an immigrant and whether that experience influenced my interest in researching U.S. immigration. While it is true that my father came to the United States from India, my desire to research the United States' history with citizenship and its proximity to whiteness is less based on a personal connection to the content, and more from an acute awareness of race's influence in

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[2] "Canada's immigration website crashes during US vote," bbc.com, November 9, 2016, https://www.bbc.com/news/technology-37921376.

politics as a result of growing up in the 21st century. I would argue that we all should be concerned about immigration politics in the United States– even if we cannot draw any immediate connections to immigration on a personal basis. Especially in 2026, when the treatment of immigrants has reached unprecedented levels of surveillance, lawlessness, and insanity, it is crucial that our eyes are open to the world around us, and that we resist against the normalization of legal and physical violence as perpetuated by the U.S. federal government and immigration law enforcement. My thesis seeks to connect the past and present, revealing the harsh reality that the concerns over immigration and immigration policy that existed in the 1800s still pervade political discourse in the 21st century.

The title of my thesis, "The Apparitional Citizen: The Impermanency of Legal Status and Access to Citizenship," builds on the idea of citizenship as a temporary or unstable concept. While citizenship is typically perceived as definite and secure, my research examines how citizenship and the requisites for its acquisition are flexible and subject to change. Depending on how the U.S. federal government chooses to restrict access to political membership and the rights of U.S. citizens, access to citizenship becomes fluid and adjustable. The vision of an apparitional citizen implies a citizen who cannot depend on the permanency of their citizenship status. Apparitional citizens enjoy the rights and privileges of citizenship; however, they cannot with certainty expect to always maintain their citizenship status, and thus the rights that come with it. For example, when Bhagat Singh Thind, an Indian immigrant to the United States, went to the Supreme Court in 1923, he had briefly been naturalized by the state of Washington before being denaturalized because of his Indian ethnicity.[3] Thind's fleeting grasp of U.S. citizenship made

[3] Matthew Frye Jacobson, "Naturalization and the Courts," In *Whiteness of a Different Color: European Immigrants and the Alchemy of Race,* 223–45. (Harvard University Press, 1998) https://doi.org/10.2307/j.ctvjk2w15.15. 236.

him an apparitional citizen, once a citizen via naturalization, then denaturalized because of his racial difference.

My research analyzes U.S. citizenship, particularly through a lens that examines how citizenship has been denied to different segments of the population based on race, country of origin, and ethnicity. In contrast with the perception of citizenship as a permanent, unchanging form of identity, citizenship is recognized as impermanent and increasingly malleable depending on the interests of the U.S. federal government. To evidence these claims, I utilize case studies from the Supreme Court and state courts, presidential executive orders, and Congressional policy. These areas of legislation and policy demonstrate the role of whiteness in facilitating access to citizenship in the United States. Additionally, these case studies reveal how, through the development of immigration law and policy, including changing racial requisites for citizenship and the construction of "illegal" as a criminalized category of people, citizenship renders itself flexible and subject to the coercion of the U.S. federal government. Citizenship-related legislation and policy also bear consequences for building racial classifications within the United States. By examining the experiences of different racial and ethnic groups regarding access to naturalization and birthright citizenship, I analyze the transformation of racial categories in the United States from the early 1800s to the present.

My argument positions birthright citizenship as a last defense against any government that seeks to strip away the application of automatic birthright citizenship for native-born children, based on their parents' legal status or racial identity. I'm not sure about the use of "native-born." Despite the myriad of proposals to restrict birthright citizenship since the 14th Amendment's creation in 1868, the legal tradition remains that all children born on U.S. soil are

citizens.[4] Birthright citizenship protects all native-born children in the United States by determining that no government can overturn the U.S. Constitution in affirming such rights for all born in the United States. Without automatic birthright citizenship, a core tenet of belonging in the United States would be subject to the undeniable influence of, and shifting ideas about, race, ethnicity, and country of origin, which already impact areas of immigration policy such as detention, deportation, and asylum policy. In fact, lawmakers and judiciary bodies historically develop ideas about race that permeate the American consciousness in concert with emerging immigration policies.

In Chapter One, my focus is on the concept of citizenship itself. This section offers an overview of what U.S. citizenship is, and how it is acquired either through birthright citizenship or the process of naturalization. This section also analyzes the concept of denaturalization, framing it as an example of how U.S. citizenship is unstable, in that certain foreign-born individuals who transgress U.S. law risk losing their naturalized status. Finally, this chapter introduces the link between whiteness and citizenship in U.S. history. Race becomes the anchor for arguments against birthright citizenship.[5] This is not a failure of the system; it is how the system was designed to operate.

In Chapter Two, I analyze whiteness as an indicator of one's access to U.S. citizenship, either through naturalization or birthright citizenship. Using the cases of *In re Ricardo Rodríguez (1897)*, *Ozawa v. United States (1922)*, and *United States v. Thind (1923)*, I analyze the various

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[4] Natalia Molina, "Birthright Citizenship beyond Black and White," In *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts*, 1st ed., 68–88. (University of California Press, 2014) http://www.jstor.org/stable/10.1525/j.ctt4cgfv5.8.;Cassaundra Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," In *Contested Americans: Mixed-Status Families in Anti-Immigrant Times*, 9:95–124. (NYU Press, 2023) http://www.jstor.org/stable/jj.8784641.6. 103.; "H.R.569 - Birthright Citizenship Act of 2025," congress.gov. January 21st, 2025, https://www.congress.gov/bill/119th-congress/house-bill/569#:~:text=%2F21%2F2025)-,Birthright%20Citizenship%20Act%20of%202025,jurisdiction%20is%20entitled%20to%20citizenship.

[5] Robin Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists," Political Research Quarterly 59, no. 4 (2006): 645–54. http://www.jstor.org/stable/4148066. 646.

reasons and justifications the Supreme Court has offered to deny or grant naturalization to foreign nationals. Using a framework of physical whiteness, scientific whiteness, and common-knowledge whiteness, the Supreme Court of the United States and in once case, a Texas federal district court, determined each applicant's eligibility for naturalization based on whiteness. The myriad of reasons provide evidence about how racial determinations were integral for denying Ozawa and Thind naturalization, while both racial and legal ambiguity worked in favor of Rodríguez. Additionally, Chapter Two analyzes the concept of "legal whiteness." Author Ian Haney-López argues that the law constructs race, and with this framework in mind, it is apparent how different laws have developed understandings of race and racial categories that exist today.[6] Through comparing the experiences of Eastern and Southern Europeans with Asians and Mexicans, the difference in how they were received legally despite having similar social capital reveals how access to legal whiteness was important for restricting the ability of non-European immigrants from naturalizing.

In Chapter Three, I explore the concept of legality and how the morality associated with "legal" and "illegal" shapes public perceptions of undocumented immigrants. With a brief overview of legal philosophy, this section posits that the United States' history of citizenship law falls within the legal positivist camp. Legal positivism purports that law derives from social facts rather than from its own merit.[7] Positivists believe that even immoral or unjust laws remain legitimate. This chapter operates within the positivist framework because, while I argue that the United States has enacted immoral laws or reached unjust conclusions in Supreme Court cases, my argument is not that these practices are illegitimate or untrue, but that they constitute a form of legal violence institutionalized by the state. The term "legal violence" in scholarship stems

[6] Ian Haney-López, "White By Law: The Legal Construction of Race," (New York University Press, 2006) 36.
[7] Leslie Green and Thomas Adams, "Legal Positivism," *The Stanford Encyclopedia of Philosophy* (Winter 2025 Edition), edited by Edward N. Zalta & Uri Nodelman https://plato.stanford.edu/archives/win2025/entries/legal-positivism/. 1.

from the authors Cecilia Menjívar and Leisy Abrego, in which they use the concept of legal violence to refer to "the complex manner in which the law exerts its influence and control, [and] …the harmful effects of the law that can potentially obstruct and derail immigrants' paths of incorporation.[8] My use of the term is in line with the conception brought forth by Menjívar and Abrego, however I specify that racism is central to the "complex manner" in which the law functions. Legal violence in the context of immigration, which is the same context Menjívar and Abrego write from, will always be influenced by race given the connection between racism and U.S. immigration law.

By using legal philosophy as a vantage point for understanding the relationship between moral vs. immoral and legitimate vs. illegitimate legal concepts, I introduce an area of scholarship that supports my argument that the law is not automatically "good" by virtue of being law. This chapter also takes on a contemporary approach by highlighting the unprecedented degree to which law enforcement has wreaked havoc on lawfully present foreign nationals, the undocumented population, and even U.S. citizens.In this section, I explore the concept of "lawlessness" and discuss how the United States federal government both facilitates the production of laws while also breaking them through deploying ICE to essentially kidnap people off the street, without due process or typical legal protections.

Finally, my last section examines the process of "making illegals". This section investigates what it means to be an "illegal" person, reflecting on how undocumented immigrants have been constructed as "illegal" in ways that detract from their humanity and personhood. Not only does being perceived as illegal affect one's treatment with respect to policy making and acceptance, but illegality has come to reflect a specific physical makeup. In this sense, even

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[8] Cecilia Menjívar and Leisy Abrego, "Legal Violence: Immigration Law and the Lives of Central American Immigrants," In *American Journal of SociologyVolume 117, Issue 5,* (University of Chicago Press, 2012)

people with legal status in the United States, including U. S.-born citizens, are targeted by immigration law enforcement based on their appearance, regardless of their actual legal status. Becoming the face of illegality endangers all populations whose bodies are interpreted as a violation of the law. The fact of race becoming a legitimate way for immigration law enforcement to target individuals and communities reflects a deeper issue of racial profiling and an underlying belief in race as an indicator of criminality.

Finally, the end of Chapter Three addresses the process of “making illegals.” This section investigates the process of being an “illegal” person, reflecting on how undocumented immigrants have been established as “illegal” in a way that detracts from their humanity and personhood. Not only does being perceived to be "illegal" affect one's treatment with respect to policy making and acceptance, but illegality has come to reflect a specific physical makeup and racial profile. In this sense, even people with legal status in the United States, including U.S. born citizens, are targeted by immigration law enforcement based on their external appearance, and regardless of their actual legal status. Becoming the face of illegality endangers all populations whose bodies are interpreted as violations of the law. The fact of race becoming a legitimate way for immigration law enforcement to target individuals and communities reflects a deeper issue of racial profiling and an underlying belief of race as an indicator of criminality.

Finally, my last section further analyzes the practice of birthright citizenship within the United States. This section situates birthright citizenship as a last defense against a Congress and an executive whose interests in restricting access to birthright citizenship lay in also regulating the composition of the U.S. citizenry on the basis of race. This section explores how the United States began operating under the practice of common law birthright citizenship, and then formalized this process with the 14th Amendment in 1868. This chapter examines the arguments

for and against birthright citizenship, demonstrating how race is ingrained within arguments for restricting birthright citizenship. The main framework for categorizing arguments against birthright citizenship fall under the conception of citizenship as ascriptive—as in automatically designated—or consensual—based on the would-be citizens' relationship with government authority. Restrictionists mostly advocate for a consensual, more flexible model of citizenship. In this scenario, birthright citizenship is framed as going against the interests of the population because U.S. citizens did not consent to the presence of undocumented immigrants, nor did immigrants consent to their children automatically becoming birthright citizens. Given that the image of the undocumented immigrant broadly reflects Latina/o people, the racial implications of consensual citizenship cannot be ignored.

This section ends with an overview of the anchor baby stereotype, and dispels the various myths surrounding undocumented women who have children in the United States. I advocate for the maintenance of birthright citizenship as a standard practice for how the United States delivers citizenship. Not only is this a simple and straightforward tradition, but it also prevents Congress or the executive from making decisions based on shifting ideologies that would affect the future of how the United States administers citizenship. Many politicians have tried to introduce legislation that would alter birthright citizenship, but all have failed. The Supreme Court case *United States v. Wong Kim Ark (1898)*, cemented birthright citizenship for all people born on U.S. soil, regardless of their parents' legal status. To alter this in the 21st century undermines the precedents set by previous Supreme Courts who sided in favor of upholding that decision made in *Wong Kim Ark*, as well as the legacy of the United States as a country that does not discriminate against children who deserve to be treated equally by the federal government.

Writing this thesis in 2025 and 2026, in many ways, it feels like there is a new update in U.S. immigration policy every week. As I worked on finding current events to incorporate into my writing, there was always something new that I could add, whether it was a case of someone being abducted by ICE or new Congressional proposals to further restrict immigration. Everyone who I told my thesis topic to remarked on the relevance of writing about immigration in this current moment. And yet, despite the contemporary voice of this thesis, the underlying theme remains that none of the restrictions or attitudes that we see in the present are new, but instead are part of a legacy of xenophobia and resistance to change that permeates much of U.S. history.

LITERATURE REVIEW

1. Introduction

From the chambers of Congress to the halls of an elementary school or in the front of a courtroom, immigration has touched every crevice of American life, both politically and socially. Immigration is an issue that is staunchly defended and heavily criticized, and therefore remains intensely debated. Naturalization and birthright citizenship have long been part of political dialogue, and today immigration issues are even more heightened because of Donald Trump's win in the 2024 presidential election. With the rise of contemporary immigration restrictionists, birthright citizenship for the children of undocumented immigrants has resurfaced as a point of contention between anti-immigration activists and defenders of the rights of undocumented people.[9] The history of immigration legislation, related executive orders, and Supreme Court cases shows that the events of today are a continuation of an ongoing project to restrict immigrants from becoming part of the citizenry on the basis of race, class, and ethnicity.

My thesis is guided by these three essential questions:

1. How have Congress and the President used their legislative and executive powers in immigration policy to control access to citizenship and to shape the citizenry along racial and class lines?
2. How have the Supreme Court and the American legal system used the designations "citizen" and "non-citizen" to justify legal violence, even though only the right to vote and the right to hold public office are explicitly stated as powers reserved solely for citizens?

[9] Nancy Hiemstra and Deirdre Conlon, "Afterword: Chaos and Cruelty in the First Month of the Second Trump Administration," In *Immigration Detention Inc.: The Big Business of Locking up Migrants,* 1st ed., 151–62. (Pluto Press, 2025) https://doi.org/10.2307/jj.29381360.13.

3. How are contemporary debates about birthright citizenship, the 14th Amendment, and anti-immigrant interpretations of the Constitution rooted in the perpetual concern about a changing racial makeup within the United States?

Through the lens of these questions, the literature can be grouped into four categories: citizenship, whiteness, the social construction of legality, and birthright citizenship under the 14th Amendment.

2. Citizenship

The United States practices *jus soli* citizenship, under which everyone born on U.S. soil is a U.S. citizen (with very limited exceptions). It has formally used this method to confer citizenship since the ratification of the 14th Amendment in 1868.[10] Much of the literature on U.S. citizenship draws on history to show the evolving nature of citizenship in the United States and uses case studies, including laws and Supreme Court cases, to demonstrate how access to citizenship has changed.[11] Most of the literature on citizenship references *Elk v. Wilkins (1884), United States v. Wong Kim Ark (1898)*, *Ozawa v. United States (1922)*, and *United States v. Thind (1923).*[12] Citizenship-related literature also questions what the state can do to its own citizens and examines how the state uses denaturalization as a tactic to redefine the citizenry on its own terms.[13] The literature challenges the idea of citizen-specific rights through a human rights lens,

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[10] Laila Khan, "The Origins of Birthright Citizenship in the United States, Explained," americanimmigrationcouncil.org October 14th, 2024 https://www.americanimmigrationcouncil.org/blog/origins-birthright-citizenship-united-states-explained/; American Immigration Council, "Birthright Citizenship in the United States," americanimmigrationcouncil.org. March 14th, 2025. https://www.americanimmigrationcouncil.org/fact-sheet/birthright-citizenship-united-states/

[11] David Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?," in *Georgetown Law Faculty Publications and Other Works,* (2003) 367-388, https://scholarship.law.georgetown.edu/facpub/297.

[12] "Thind v. United States (1923)," immigrationhistory.org, https://immigrationhistory.org/item/thind-v-united-states%E2%80%8B/ ; "Owaza v. United States (1922)," immigrationhistory.org, https://immigrationhistory.org/item/takao-ozawa-v-united-states-1922/ ; Carol Nackenoff and Julie Novkov, "Wong Kim Ark v. United States," In *American by Birth: Wong Kim Ark and the Battle for Citizenship*, 100–130. (University Press of Kansas, 2022) https://doi.org/10.2307/j.ctv26fw7w2.11.; "Elk v. Wilkins (1884)," n.d. Immigration History, Accessed November 30, 2025. https://immigrationhistory.org/item/elk-v-wilkins/.

[13] Patrick Weil, "Chapter 1. Denaturalization, the Main Instrument of Federal Power," in *The Sovereign Citizen: Denaturalization and the Origins of the American Republic,* (University of Pennsylvania Press, 2012) ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/mtholyoke/detail.action?docID=3441927.Patrick Weil, "Introduction," in *The Sovereign Citizen: Denaturalization and the Origins of the American Republic,* (University of Pennsylvania Press, 2012) ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/mtholyoke/detail.action?docID=3441927.;Patrick Weil, "Chapter 5. Radicals and Asians," in *The Sovereign Citizen : Denaturalization and the Origins of the American Republic,* (University of Pennsylvania Press, 2012) ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/mtholyoke/detail.action?docID=3441927.;Patrick Weil, "Chapter 12. American Citizenship Is Secured: "May Perez Rest in Peace!"" in *The Sovereign Citizen : Denaturalization and the Origins of the*

arguing that people should expect to be treated with a certain level of decency regardless of their legal status.[14]

2.1 Rights of Citizens

The concept of citizenship can change depending on time, place, and the individuals defining the term, however a standard definition would describe being a citizen as being a person with a specific status in a given nation, and who is then entitled to certain privileges by their government or figures in positions of authority.[15] Citizens of the United States are typically familiar with a list of amendments that guarantee them certain rights: freedom of speech, freedom of religion, freedom of the press, and so on. Constitutional rights written with language *specifically* for citizens of the United States are the right to vote and to run for federal office.[16] Quinde, as with Cole and Bauböck, asserts that there are some rights all citizens can be expected to receive, such as the right to invoke habeas corpus, healthcare, and free speech.[17]

2.2 Rights of Foreign Nationals

The rights of foreign nationals in the United States, or in other words, how they are treated by law enforcement, their community, and the government, is determined by social imaginations of their own illegality, criminality, and exclusion.[18] Categories such as education, race, ethnicity, criminality, and housing all affect how one's legal status is interpreted, and

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American Republic, (University of Pennsylvania Press, 2012) ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/mtholyoke/detail.action?docID=3441927.

[14] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?"

[15] Rainer Bauböck, “Citizenship and Migration – Concepts and Controversies.” In *Migration and Citizenship: Legal Status, Rights and Political Participation*, edited by Rainer Bauböck, 15–32. (Amsterdam University Press, 2006) http://www.jstor.org/stable/j.ctt46mvkf.6.

[16] Cole"Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?"

[17] Bauböck, “Citizenship and Migration – Concepts and Controversies.” 23.; Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" 374; Liamarie Quinde, “Protecting the Substantive Due Process Rights of Immigrant Detainees: Using Covid-19 to Create a New Analogy,” In *The Journal of Criminal Law and Criminology (1973-)* 112, no. 2 (2022): 369–405. https://www.jstor.org/stable/48656975.

[18] René D. Flores and Ariela Schachter, “Who Are the ‘Illegals’? The Social Construction of Illegality in the United States.” in *American Sociological Review* 83, no. 5 (2018): 839–68. https://www.jstor.org/stable/48588674.

whether they are perceived as undocumented or lawfully present in the United States.[19] While most of the authors agree that there are some rights all humans should be entitled to, regardless of legal status, this is far from the reality for immigrants, and the rights of non-citizens are legally precarious.[20]

2.3 Denaturalization

If foreign-born individuals are prevented from practicing freedom of speech out of fear of deportation, denaturalization, or detainment, then it is as if they have no constitutional rights at all because their fear will always prevent them from being able to express their true voice.[21] Historically, denaturalization was also skewed on the basis of race and ethnicity. For example, Chinese immigrants who had managed to naturalize were denaturalized because of their Chinese ethnicity post the 1882 Chinese Exclusion Act.[22] Japanese and Indian immigrants were recognized as ineligible for citizenship, and were denaturalized if they had been able previously to attain naturalization following the outcome of the *Ozawa* and *Thind* cases.[23]

2.4 Consensual Citizenship

In their book *Citizenship Without Consent: Illegal Aliens in the American Polity,* the authors Peter H. Schuck and Rogers M. Smith propose a consensual model of citizenship, so that the children of undocumented people and immigrants on temporary visas would not be given U.S. citizenship automatically through their birth.[24] They argue that the legislators of the 14th Amendment did not intend to grant birthright citizenship to everyone; hence, they included the

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[19] Flores and Schachter, "Who Are the 'Illegals'?" 862, 864.

[20] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" ; Quinde, "Protecting the Substantive Due Process Rights of Immigrant Detainees: Using Covid-19 to Create a New Analogy,";Bauböck, "Citizenship and Migration – Concepts and Controversies," 19.

[21] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" 37.

[22] Weil, "Chapter 5. Radicals and Asians," 70.

[23] Weil, "Chapter 5. Radicals and Asians," 70.

[24] Peter H. Schuck and Rogers M. Smith, "Citizenship Without Consent: Illegal Aliens in the American Polity," (Yale University Press, 1985) https://archive.org/details/citizenshipwitho0000schu/page/140/mode/2up 7.

"subject to the jurisdiction of" clause in the Citizenship Clause of the 14th Amendment.[25] However, Epps argues that the legal opinion at the time of the 14th Amendment's development actually held that citizenship belonged to all persons born on U.S. soil.[26] Jacobson confers with this perception and acknowledges the racial consequences of consensual citizenship, in which ending automatic birthright citizenship would restrict the racial diversity of native-born citizens.[27] While Schuck and Smith emphasize the "subject to the jurisdiction" component of the amendment to argue that the legislators meant to include some form of limitation in who had access to citizenship, other authors like Epps and Jacobson argue that the legislators knew what they were doing by asserting birthright citizenship for everyone, regardless of their parents' legal status.[28]

3. Whiteness

Much of the literature describes the connection between physical appearance and race, but when phenotypical markers could not categorize people into neat identities, the scientific and legal worlds had to seek alternatives for determining race.[29] The argument for whiteness for Mexicans, for example, was that while some were Indigenous, the majority would fit into the Caucasian or white race.[30] This argument could not hold, as Mexicans were classified as "mixed stock" or of the "red race", inhibiting them from being able to naturalize or immigrate to the United States.[31] For ethnic groups who could be imagined more easily as white, being incorporated into a white category was plausible; Mexicans and Asians faced greater difficulty

[25]Schuck and Smith, "Citizenship Without Consent" 116.
[26] Garret Epps, "The Citizenship Clause: A "Legislative History" in *American University Law Review:* Vol. 60: Iss. 2, Article 2. 2010. "https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1607&context=aulr 378.
[27] Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists,"
[28] Epps, "The Citizenship Clause," 387.; Schuck and Smith, "Citizenship Without Consent" 116.
[29] Haney-López, "White By Law,"; Thomas A. Guglielmo, "The White Peril of Europe" in *White on Arrival: Italians, Race, Color, and Power in Chicago, 1890-1945,* (Oxford: Oxford University Press, Incorporated. 2004) Accessed September 13, 2025. ProQuest Ebook Central.; Thomas A. Guglielmo, "Race, Color, and Crime" in *White on Arrival: Italians, Race, Color, and Power in Chicago, 1890-1945.* (Oxford: Oxford University Press, Incorporated. 2004) Accessed September 13, 2025. ProQuest Ebook Central.
[30] Molina, Natalia, "'What Is a White Man?': The Quest to Make Mexicans Ineligible for U.S. Citizenship," In *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts*, 1st ed., 43–67. (University of California Press, 2014) http://www.jstor.org/stable/10.1525/j.ctt4cgfv5.7. 65.
[31] Molina, "'What Is a White Man?'" 47, 53, 55.

entering the category of whiteness, thus restricting further opportunities for their access to citizenship.[32]

Whiteness is also intertwined with legality and access to citizenship. The courts used numerous techniques to determine race, including phenotype, geography, language, science, and popular opinion, to determine whiteness.[33] Guglielmo and Jacobson argue that for Irish, Italian, Southern, and Eastern European populations, despite experiencing discrimination and despite having specific features that could mark them as racially different, they still maintained their status as white and were afforded the privilege of naturalization.[34] Ngai argues that the law conflated whiteness with being American, creating a uniquely American racial category that encompassed all people of European ancestry into one category.[35] High-profile cases documented immigrants who argued for legal whiteness so they could naturalize, but were ultimately rejected and deemed non-white, as in the Supreme Court cases *Ozawa v. United States (1922)* and *United States v. Thind (1923)*.

Mexicans also occupied an ambiguous position with respect to legal whiteness, as facilitated by the Treaty of Guadalupe Hidalgo (1848), which granted them citizenship rights at a time when only whites could be U.S. citizens.[36] European immigrants were still considered white despite being seen as racially different but the same along color lines; "Caucasian" was used to create a difference between Black, Indigenous, or Asian populations, referred to as the "Mongol" race.[37] "Relative whiteness" allowed certain immigrants to access a white status depending on

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[32] Molina, "'What Is a White Man?'" 66.

[33] Haney-López, "White By Law" 25.

[34] Guglielmo, "Race, Color, and Crime," 12.; Matthew Frye Jacobson, "Anglo-Saxons and Others, 1840–1924," In *Whiteness of a Different Color: European Immigrants and the Alchemy of Race,* 39–90. (Harvard University Press, 1998) https://doi.org/10.2307/j.ctvjk2w15.7. 57, 75.

[35] Ngai, Mae M. "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law." In *Impossible Subjects: Illegal Aliens and the Making of Modern America - Updated Edition*, REV-Revised., 21–55. (Princeton University Press, 2004) http://www.jstor.org/stable/j.ctt5hhr9r.10 25.

[36] Molina, "'What Is a White Man?'" 45.

[37] Guglielmo, "The White Peril of Europe" 78.

their European origins, and meanwhile, there was a simultaneous project to designate a category of "perpetual foreigners" to apply to non-European immigrants. Molina argues that Anglo-Saxons were able to define their whiteness through "what they were not," such as being Black, Indigenous, or eventually Mexican.[38] White people were considered the most civilized and fit to self-govern, while non-white peoples were constructed as savage and "perpetual aliens."[39] Populations with a "perpetually foreign" association are imagined as undeserving of the rights of citizens, regardless of their actual legal status.[40] This reaffirms the idea that non-whiteness and being un-American are interrelated, while reinvigorating the characterization of a true American citizen being white.

4. The Social Construction of Legality

The social construction of legality encompasses the question of who gets to decide what is legal, and more specifically, *who* is legal. Given the many examples of times the law and justice system hurt certain populations, for example, *Dred Scott v. Sandford*, Executive Order 9066, which resulted in the internment of Japanese Americans, or the Chinese Exclusion Act of 1882, it raises the question of how obligated people are to follow laws that are discriminatory and harmful. Legal obligation says that if the state provides the people with certain benefits, then the people must give something back to the state either because they consented to this arrangement or because they feel it is only fair to give back to the country that has given them so

[38] Natalia Molina, "Placing Mexican Immigration within the Larger Landscape of Race Relations in the United States," In *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts*, 1st ed., 19–42. (University of California Press, 2014) http://www.jstor.org/stable/10.1525/j.ctt4cgfv5.6. 26.
[39] Haney-López, "White By Law," 217.
[40] Molina, "Placing Mexican Immigration within the Larger Landscape of Race Relations in the United States," 38.

much.[41] Legal obligation stems from the relationship between the government and the citizen, in which, even if we do not choose it, we are members of a relationship with distinct roles.[42]

As a result of racial discrimination in housing and employment, as well as socioeconomic inequalities, when certain groups transgress the law and resort to criminal activity as a means to make a living, the issue goes beyond personal choice and is a facet of their own survival.[43] While moral criticism can be made of those who stray from social norms, they should not be held personally accountable for the conditions they have been forced to live in.[44] This case study can be applied to immigration law because it considers whether parties who commit an illegal act should be held accountable, or whether their actions result from social and political conditions that make it impossible for them to pursue a legal pathway to citizenship.

4.1 Making "Illegals."

The law is a state-supported entity that determines a specific way of existing and being in a society.[45] This specific way of being is threatened by illegal immigration because the process of unregulated immigration unsettles political authority, social life, and the law itself, transgressing upon the institutions the state would like to define as given.[46] Ngai argues that quota-based regulations of immigrants developed a new category of being within the United States, "illegal aliens," who were part of the nation on the basis of their residence, employment, family, etc., but

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[41]Massimo Renzo and Leslie Green, "Legal Obligation and Authority," in *The Stanford Encyclopedia of Philosophy* (Spring 2025 Edition), Edward N. Zalta & Uri Nodelman https://plato.stanford.edu/archives/spr2025/entries/legal-obligation/

[42] Renzo and Green, "Legal Obligation and Authority," 12.

[43] Tommie Shelby, "Justice, Deviance, and the Dark Ghetto," *Philosophy & Public Affairs* 35, no. 2 (2007): 126–60. http://www.jstor.org/stable/4623785.133.

[44] Shelby, "Justice, Deviance, and the Dark Ghetto," 154, 160.

[45] Douglas Litowitz, "The Social Construction of Law: Explanations and Implications," in *Studies in Law, Politics, and Society* 21 (2000). 222.

[46] Roxanne Lynn Doty, "The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration." *Alternatives: Global, Local, Political* 21, no. 2 (1996): 171–89. http://www.jstor.org/stable/40644967. 178.

were legally excluded.[47] The experience of Japanese Americans during the 1940s is an example of "alien making" that resembles the experiences of Mexicans and other Latin American populations today. Japanese Americans who had been born in the United States renounced their citizenship for a myriad of reasons, including avoiding resettlement or fear that going to Japan would be the only way to escape discrimination from white Americans, making themselves native-born aliens.[48] In this case, the U.S. government facilitated the creation of alien status by allowing native-born people to renounce their citizenship without a pathway to regain it, thereby designating them as foreigners in their place of birth. In becoming "native-born aliens ineligible for citizenship" Japanese Americans experienced a transformation of their personhood, from legal to illegal. With the U.S. government responsible for creating the parameters for eligibility towards citizenship, they are uniquely responsible for the active production of illegality, in which a person becomes "illegal" as a result of legislation.

5. Birthright Citizenship

The literature on birthright citizenship is organized into the following categories: (1) the implications of the creation of the 14th Amendment and (2) the anchor baby discourse. The 14th Amendment was enacted to ensure that African Americans had access to the same rights as white citizens, rectifying the decision made in *Dred Scott* that had denied citizenship to those of African descent.[49] Molina acknowledges that members of both the federal government and general society believed the 14th Amendment only applied to Black and white people, and that

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[47] Mae M. Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," In *Impossible Subjects: Illegal Aliens and the Making of Modern America - Updated Edition*, REV-Revised., 56–90. (Princeton University Press, 2004) http://www.jstor.org/stable/j.ctt5hhr9r.11. 57.

[48] Mae M Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," In *Impossible Subjects: Illegal Aliens and the Making of Modern America - Updated Edition*, REV-Revised. 175-201. (Princeton University Press, 2004) http://www.jstor.org/stable/j.ctt5hhr9r.16. 190.

[49] Khan, "The Origins of Birthright Citizenship in the United States, Explained,"

other races were not eligible for citizenship, including Indigenous people.[50] It was only in 1898, in *United States v. Wong Kim Ark,* that the Supreme Court formally established that anyone born on U.S. soil was a citizen by virtue of their birth, regardless of the legal status of their parents.[51] The debate about the eligibility of children of undocumented immigrants to be born as birthright citizens stems from the "subject to the jurisdiction of" clause within the 14th Amendment. Throughout the Supreme Court's decision-making history since the ratification of the 14th Amendment, SCOTUS has concurred that undocumented immigrants and their children are both subject to the U.S. government.[52] Wydra emphasizes how many of the arguments against giving birthright citizenship to the children of undocumented immigrants stem from debates on race and which populations will have political membership on the basis of citizenship.[53]

5.1 Creation of the 14th Amendment & Immediate Effects

In Wydra's analysis of the legislators' intentions when creating the 14th Amendment, she argues that the purpose of the amendment was to ensure that all people, regardless of their race or economic position had access to the same rights of citizens, by the mere nature of their birth.[54] Epps goes further to argue that the purpose of the 14th Amendment was to protect individuals from their government, and from politicians who sought to use their power to recreate conditions of slavery.[55] The original purpose of the 14th Amendment is still debated, and Epps argues that adopting a restrictive view of the 14th Amendment would create two classes of people in the

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[50] Molina, "Birthright Citizenship beyond Black and White," 72, 73.
[51] Khan, "The Origins of Birthright Citizenship in the United States, Explained."
[52] Khan, "The Origins of Birthright Citizenship in the United States, Explained."
[53] Elizabeth Wydra, "Born Under the Constitution: Why Recent Attacks on Birthright Citizenship are Unfounded" In *American Constitution Society for Law and Policy: Issue Brief*, 2011. https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Wydra_Birthright_Citizenship2.pdf, 4.; Epps, "The Citizenship Clause" 333, 361.
[54] Wydra, "Born Under the Constitution: Why Recent Attacks on Birthright Citizenship are Unfounded," 3.
[55] Epps, "The Citizenship Clause," 286.

United States: one of native-born non-citizens and one of native-born citizens.[56] Epps alludes to this status as being a derivative of the status of enslaved people in terms of citizenship before the 13th Amendment.[57]

5.2 Anchor Baby Discourse

The next theme within the birthright citizenship debate surrounds the myth of "anchor babies," a phenomenon that imagines immigrant women as purposely having children in the United States so that they can have access to welfare and a pathway to citizenship. Many of the readings cite the 1990s as the emergence of the specific "anchor baby" idea; earlier mentions regarding the fear of non-white birthright citizen children have existed for much longer.[58] Politicians have worked to portray undocumented parents, specifically mothers, as creating extreme financial burdens for the state because of their children's access to education, food stamps, health care, or other services.[59] Multiple authors concur with the idea that Latinas, generally Mexican women, are the racialized and gendered group to which the anchor baby stereotype is most predominantly applied; however, historically, this notion has also been applied to Asian women.[60] Jacobson, along with Natalia Molina, Martha Menchaca, and Cassaundra Rodriguez, seeks to disrupt the notion of "anchor babies" through examining whether there is any truth within the stereotype and offering more analysis on undocumented parenthood, and different datasets show that there is limited evidence to support the anchor baby discourse.[61]

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[56] Epps, "The Citizenship Clause," 387.
[57] Epps, "The Citizenship Clause," 387.
[58] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 102. ; Molina, "Birthright Citizenship beyond Black and White," 78.
[59] Menchaca, Martha. "The Social Climate of the Birthright Movement in the United States," *Chicana/Latina Studies* 12, no. 2 (2013): 28–55. http://www.jstor.org/stable/43943327.; Schuck and Smith, "Citizenship Without Consent," 111.; Molina, "Birthright Citizenship beyond Black and White," 82.
[60] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 95.; Molina, "Birthright Citizenship beyond Black and White," 78.
[61] Menchaca,. "The Social Climate of the Birthright Movement in the United States," 50.; Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 100.

6. Conclusion

My thesis is relevant to the field of immigration studies because it analyzes how past immigration laws and practices are re-imagined today. While new demographics of people are targeted in different eras of immigration policy, the idea remains to attempt to restrict citizenship and naturalization to populations who are understood as undesirable. As immigration politics develops and changes each day, it is important to understand that today's legislation is a continuation of an ongoing American project to design a citizenry that fits specific racial, ethnic, religious and class standards. My thesis concludes with imagining what the United States would look like without birthright citizenship, particularly with respect to unprecedented attacks on birthright citizenship and the *Barbara v. Trump (2026)* Supreme Court case that is expected to determine the fate of native-born children of undocumented immigrants. The literature has not explicitly developed an analysis on possible futures without birthright citizenship, but have alluded to the implications of this through discussions of racial prejudice affecting the immigration system.

CHAPTER ONE: CITIZENSHIP

Introduction

In March of 2025, Mahmoud Khalil, a U.S. legal permanent resident, was arrested at his apartment by plainclothes ICE agents who offered no explanation or warrant for their actions, aside from the fact that his permanent resident status had been revoked.[62] A recent graduate of Columbia University, Khalil is a Syrian-born Palestinian whose activism for Palestine on Columbia's campus designated him as a target in the eyes of the U.S. government.[63] Khalil's story garnered widespread attention for its harshness, in which a person who committed no crime and had permanent legal status in the United States could still be detained for ideological differences that stood in contrast to the Trump administration. Khalil's detainment forced him to leave behind his pregnant wife, who is a U.S. citizen, and ultimately miss the birth of his child, highlighting the cruelty of the current practice in immigration law enforcement to detain individuals with no regard for their humanity and life circumstances.

The implications of his case are far greater than a single individual's story. The federal government has the power to cancel its legal residents' Green Cards—in this case, through an obscure and vague power of the Secretary of State—without offering any explanation or opportunity to appeal. Targeted individuals are first sentenced to mandatory detention in one of the U.S. Immigration and Customs Enforcement (ICE) detention facilities or one of its surrogate prisons. However, the government is responsible for initiating removal proceedings in an immigration court and must present evidence to support the charges.[64] The use of the foreign policy provision, §237(a)(4)(C)(i), to target and detain individuals on the basis of national

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[62] "Khalil v. Trump" aclu.org. March 11th, 2025. https://www.aclu.org/cases/khalil-v-trump

[63] "Khalil v. Trump"

[64] Greg Chen, and Grenier Amy. 2025. "Policy Brief: Explaining the Foreign Policy Ground of Removability." aila.org. https://www.aila.org/library/policy-brief-explaining-the-foreign-policy-ground-of-removability.

security is concerning because this "provision could be used against almost anyone who [the Trump administration determines] is undermining their foreign policy."[65]

The use of ICE as a quasi-military force threatens the possibility of abduction and deportation for non-U.S. citizens, and now targets even those with some form of legal status. Just two weeks after Khalil's detainment, Tufts University graduate student Rümeysa Öztürk was abducted in broad daylight in Somerville, Massachusetts. Öztürk was a recipient of an F-1 student visa, but because of her participation in co-authoring an op-ed criticizing Tufts' response to student activism surrounding Palestine and the call to divest from Israel, her visa was revoked, using a similar authority to that used against Khalil.[66] The video of Öztürk's abduction revealed the callousness of ICE agents in participating in what are essentially state-sanctioned kidnappings, with no regard for Öztürk as a human being, but only as an ideological pawn.

While the Immigration and Nationality Act §237(a)(4)(C)(i) includes a provision to prevent removal of foreign nationals based on their beliefs or statements, the Secretary of State may determine that an individual's presence in the United States "would compromise a compelling United States foreign policy interest" and thus warrant removal proceedings.[67] While the Secretary of State technically can determine which non-citizen individuals pose a threat to national security, neither Khalil nor Öztürk was charged with a crime or recognized as supporting a terrorist organization. The foreign policy provision that allowed both Khalil and Öztürk to be placed in detention is rarely used, and targeting individuals based on activism or journalistic contributions reveals a hyper-fixation on any messaging that may not completely align with the ideology of the federal government. The similarities between their stories are evidence of a rising pattern of immigration enforcement being abused to regulate the political participation of people

[65] Chen and Grenier. "Policy Brief: Explaining the Foreign Policy Ground of Removability."
[66] Kathy McCormack, "Judge releases Tufts University student Rumeysa Ozturk who was detained by ICE" pbs.org. May 9th, 2025. https://www.pbs.org/newshour/politics/judge-releases-tufts-university-student-rumeysa-ozturk-who-was-detained-by-ice
[67] Chen and Grenier. "Policy Brief: Explaining the Foreign Policy Ground of Removability."

residing in the United States, including silencing the voices of those with legal status in the country through threatening them with the revocation of their Green Card or student visa.

What both Khalil and Öztürk's stories demonstrate is that even legal standing in the United States is not sufficient protection against an American government that seeks to repress oppositional voices and criticism. Access to U.S. citizenship has been denied to those whom the government decides are not deserving of political membership or the freedom to express their beliefs, in the same way that persons who fit normative standards of citizenship based on race, class, ideology, and other forms of difference are. Racism has served as one of the primary mechanisms for achieving citizenship, either through discriminatory laws that prevented non-white people from being able to naturalize or have birthright citizenship or, in more recent instances, by banning citizens of certain countries from applying for a visa.[68] This chapter examines Supreme Court case studies, ranging from *Elk v. Wilkins (1884), United States v. Wong Kim Ark (1898)*, *Ozawa v. United States (1922)*, and *United States v. Thind (1923)*, to demonstrate the effects of legalized racism on composing the citizenry of the United States. This chapter demonstrates how, even with legal standing in the United States, citizenship can be revoked or invalidated. The power of the U.S. government to control membership within the citizenry does not end with attaining a legal status. When the federal government holds all the power to change the existing system based on its ideological beliefs, the categories of "illegal" and "legal," citizen and non-citizen, are destabilized.

Defining Citizenship

Citizenship is defined as membership in a state or institution. Citizens maintain certain expectations of privileges or rights afforded to them because of their citizenship status, but they

[68] Aaron Reichlin, "President Trump Expands His Travel Ban: What You Need to Know." *American Immigration Council,* 2025, https://www.americanimmigrationcouncil.org/blog/president-trump-expands-his-travel-ban-what-you-need-to-know/.

may also have certain obligations to earn the privileges of citizenship. In the United States, citizenship may be obtained through a variety of pathways, the simplest being through birthright citizenship. The United States operates under *jus soli* citizenship, which guarantees automatic citizenship to all people born on U.S. soil. The only exceptions pertain to children of diplomats residing in the United States, and native-born children of invading military personnel if the United States were infiltrated by another nation.[69] The United States also uses some components of *jus sanguinis*, or citizenship by ancestry, in granting citizenship to non-native-born people. Foreign-born children of U.S. citizens may still be eligible for citizenship, even if they were not born in or do not live in the United States. The final way to become a U.S. citizen is through naturalization, which involves undergoing the process of gaining legal status in the United States, usually through migration, and eventually becoming eligible to apply for citizenship.

There are only two rights specifically highlighted in the Constitution to apply only to U.S. citizens: the right to vote and the right to hold public office.[70] Given the specificity of these two clauses, all additional Constitutional rights are not restricted to citizens and can be assumed to apply to all people within the United States, regardless of their citizenship status. These quintessentially American rights—the right to free speech, freedom of assembly, freedom of religion, and due process—are supposed to protect everyone living in the United States. Yet, foreign nationals are subject to heightened scrutiny and, as a result, self-regulate to avoid the consequences of losing their visa and/or being deported. Legal scholar David Cole explains the impact of infringing on constitutional rights for non-citizens, writing, "If a foreign national has no First Amendment rights in the deportation setting, he has no First Amendment rights anywhere; the fear of deportation will always and everywhere restrict what he says."[71] While in

[69] American Immigration Council. "Birthright Citizenship in the United States"
[70] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" 370.
[71] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" 377.

theory the judicial system upholds that foreign nationals have the same rights to due process, freedom of speech, and equal protection of the law, the courts have also countered their own decisions by permitting racial discrimination or approving deportations as a result of political activity that did not transgress any real laws, except for perhaps public perception at the time.[72]

Discrepancies between how citizens and foreign nationals are treated under the same constitution are no surprise when considering the inherent exclusivity of citizenship as a concept, even after it is obtained. To have citizens of a specific place, there must be regulations defining who is included in the membership group, requiring the formation of boundaries between nation-states, or imposing different requirements for being a legal citizen. The struggle with citizenship for migrants is that, even when legally obtained, it may still not be recognized socially, as it is contingent on an individual's ability to be accepted by a collective community.[73] The rights associated with a legal citizenship status are challenged depending on the identity of the person trying to uphold them. The historical record provides countless examples of non-normative (i.e. non-white, non-English speaking) U.S. citizens facing challenges to their rights as citizens, for example in the cases of Javier Ramirez and Andrea Velez. If even U.S. citizens are unable to unquestionably access the rights guaranteed by the U.S. Constitution, then it raises the question of whether migrants without legal status can truly exercise all their rights.

Immigration law enforcement is a context in which the lines between citizen and non-citizen are blurred. If citizenship requires acceptance by the broader community and the local or federal government, then the power of legal status is mitigated by a lack of recognition as a fellow citizen from one's peers and government. In 2025, when Javier Ramirez was arrested by ICE agents, his U.S. citizen status became irrelevant as he was handcuffed and put in the back

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[72] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" 368, 369.
[73] Bauböck, "Citizenship and Migration – Concepts and Controversies,"

of a van.[74] Andrea Velez, also a U.S. citizen, was taken to the same prison as Ramirez after being arrested by ICE while walking to her place of work.[75] These are merely two instances of the recurring practice of U.S. citizens being racially profiled by ICE based on their non-white physical appearance, place of employment, or language, and as a result being targeted as non-citizens despite being U.S. citizens.

ICE represents and executes the values of the current Department of Homeland Security, as well as the initiatives encouraged and enforced by the current president. However, ICE is also a reflection of the beliefs of a subset of the American people in support of mass deportation. Because enforcement policy influences popular sentiment and vice versa, the scale of the enforcement apparatus's capacity to surveil migrants is immense. Discrimination may be facilitated by the federal government, but its authority to do so is perpetuated by the community, which fails to question the legitimacy of the government's discriminatory practices.

ICE agents' personal biases and perceptions of how a U.S. citizen looks and acts facilitated the mistreatment of their fellow citizens via racial profiling. In September 2025, the Supreme Court decided in *Noem v. Vasquez-Perdomo (2025)* that ICE agents have the legal cover to utilize racial profiling on the basis of language, workplace, race, or ethnicity when targeting individuals for detainment.[76] Race, ethnicity, and language are all components in determining how much someone "appears" to be a citizen. While there may not currently be racial parameters that determine eligibility for citizenship– as there were between 1790 and 1952– the detainment of U.S. citizens as a result of racial profiling reveals how the idea of an American citizen generates a specific image or normative set of characteristics.

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[74]Adrian Florido, "U.S. citizens caught in Trump's immigration dragnet." *NPR*. 2025, https://www.npr.org/2025/11/18/nx-s1-5606356/u-s-citizens-caught-in-trumps-immigration-dragnet

[75] Florido. "U.S. citizens caught in Trump's immigration dragnet."

[76] "Racial Profiling Rampant After Supreme Court Ruling." aclu-wi.org. 2026, https://www.aclu-wi.org/news/racial-profiling-rampant-after-supreme-court-ruling/.

Expanding upon ICE's increasing power to serve as quasi-law enforcement, the growing similarities between incarceration and detainment, which is technically an administrative non-criminal form of custody, require further analysis of how prisons and detention centers share comparable conditions. Liamarie Quinde uses the case study of the COVID-19 pandemic to examine how immigrant detainees were subjected to unsafe living conditions during a global pandemic, and as a result, were more prone to infection with COVID-19 because of their living environment.[77] During the pandemic, COVID-19 prevention efforts were not properly implemented and regulated within detention facilities, resulting in disproportionate infection rates among detainees. The high COVID-19 infection rate in detention centers, as well as ICE's inability to take the appropriate preventative measures, amounted to punishment, a punishment that those in civil detention should not have to experience as a result of being in non-punitive, civil custody.

In 2026, six years after the beginning of the pandemic, the fiscal year 2026 saw a record high of migrant deaths in ICE custody.[78] Immigrant detainees are subjected to conditions that not only harm their physical and mental health, but also to violence, prejudice, and mistreatment. Immigrant detention is not criminal, and thus, detainees' experiences of forms of punishment, both in terms of access to medical care and cruelty administered by ICE agents, violate the 5th Amendment.[79] The experience of immigrant detainees is evidence of how, in practice, the rights of foreign nationals, especially those in detention centers where they have limited contact with the outside world and virtually no means to advocate for themselves, are obstructed and violated. The current experiences of detainees, including the possibility of their deaths as a result of

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[77]Quinde, "Protecting the Substantive Due Process Rights of Immigrant Detainees: Using Covid-19 to Create a New Analogy."
[78]Sergio Martínez-Beltrán, Ximena Bustillo, Jasmine Garsd, and Rahul Mukherjee, "Deaths of migrants in ICE custody hit record high under Trump," *NPR*, 2026, https://www.npr.org/2026/04/17/nx-s1-5789092/deaths-of-migrants-in-ice-custody-hit-record-high-under-trump.
[79] Quinde, "Protecting the Substantive Due Process Rights of Immigrant Detainees: Using Covid-19 to Create a New Analogy," 2, 34.

detention, portray the direness of the plight of non-citizens to be treated humanely in the United States.

Becoming a Citizen from Birth

The mythology of Ellis Island and "The Great American Melting Pot" that Schoolhouse Rock! sang about in 1976 produces a sentiment of amnesia in which anti-immigrant restrictionists believe that the issue with the current state of immigration is the influx of illegal immigration, while ignoring the policies that facilitated the immigration of their own ancestors. If their family members could "do it the right way," then the inability of undocumented people to acquire adequate legal standing is a personal failure, and not a result of institutional obstacles that make it increasingly difficult to achieve legal status in the United States. In light of the Supreme Court's historical rulings, attaining legal citizenship was not an option for many migrants on the basis of race and ethnicity throughout the 19th and into the 20th centuries. Through an analysis of the origins and implications of four critical Supreme Court cases on citizenship, the reality emerges that the U.S. government has used race and country of origin as a tactic to deny citizenship to non-white people, and this is something that has never been fully eradicated.

After the passing of the 14th Amendment in 1868, the right to citizenship was officially articulated for the formerly enslaved African American population and those of African descent. This broadening of access to citizenship to encompass non-white individuals prompted the law's clarification on citizenship for those who were not easily divided into the Black and white racial binary. Starting with *Elk v. Wilkins* in 1884, this case followed John Elk, an Indigenous man who had left his reservation and lived amongst white Americans.[80] He was denied the right to vote because, despite being born in the United States, he was not recognized as a citizen under the

[80] "Elk v. Wilkins (1884)."

14th Amendment. The lack of birthright citizenship for Indigenous people disenfranchised them from political membership, diminishing their opportunities to advocate for themselves within a legislative setting. Denying the country's Indigenous population birthright citizenship seems nonsensical in retrospect; however, such archaic logic has reemerged through the current plight of children of undocumented immigrants.

Since Indigenous people were not recognized as citizens of the United States, their children were unable to gain either ancestral citizenship from their parents or birthright citizenship. Finally, in 1924, the Indian Citizenship Act, or the Snyder Act, finally allowed Indigenous people to gain birthright citizenship through being born within the limits of the United States' territory.[81] While some Indigenous people had acquired citizenship through military service by fighting in World War I, 40% of the Indigenous population were not citizens before 1924.[82] Similarly, the children of undocumented immigrants depend on the practice of *jus soli* citizenship in order to lay any claim to the nation in which they were born and reside in. Should the United States move to deny children of undocumented immigrants birthright citizenship, contemporary native-born children would find themselves in the same position as Indigenous people before 1924.

In the original *Elk v. Wilkins* decision, the court acknowledged the plaintiffs' birth in the United States, their position as being subject to the jurisdiction of the United States, and their *bona fide* residency in their specific state; yet still they denied the plaintiffs' birthright citizenship.[83] This parallels the experience of native-born children of undocumented immigrants who remain subject to U.S. laws and also reside in the states where they are born; however, the

[81] "An Act to Authorize the Secretary of the Interior to issue certificates of citizenship to Indians, June 2, 1924." n.d. U.S. Capitol - Visitor Center. Accessed January 6, 2026. https://www.visitthecapitol.gov/artifact/act-authorize-secretary-interior-issue-certificates-citizenship-indians-june-2-1924.
[82] "An Act to Authorize the Secretary of the Interior to issue certificates of citizenship to Indians, June 2, 1924."
[83] "Elk v. Wilkins (1884)."

practice of automatic birthright citizenship has been met with constant resistance through proposed bills aiming to revoke the application of *jus soli* citizenship for the children of undocumented immigrants.[84] Comparing the similarities between Indigenous people and the native-born children of undocumented immigrants demonstrates how, even over one hundred years apart, the desire to regulate the population outweighs the many reasons behind why all children born in the United States should have access to birthright citizenship.

Following *Elk v. Wilkins (1884)*, *United States v. Wong Kim Ark (1898)* made history by formally giving birthright citizenship to the children of non-U.S. citizens. Wong Kim Ark, a Chinese-American, was forbidden from leaving his ship that arrived in the United States from China in 1895.[85] At the time, the Chinese Exclusion Act restricted immigration from China to the United States, leading to Kim Ark's denial of re-entry. The attorney defending Kim Ark, Thomas Riordan, immediately drew the connection between race and access to citizenship: "Think of all the people in this country who have been born of parents who owed allegiance to either Great Britain, Germany, Italy, or some other European power. Are all these people to be declared not citizens?".[86] While Riordan's focus was to expand the reach of the 14th Amendment to apply to all persons born in the United States, the District Court Justice, Judge Morrow, focused on the "subject to the jurisdiction" portion of the 14th Amendment to support Kim Ark's claim to citizenship.[87] He believed that for a person to be a citizen of the United States, they had to be born or naturalized in the United States, and that there were no further requisites based on their parents or ancestry.[88] Judge Morrow ruled in favor of Kim Ark, but the case went on to the

[84] Wydra, "Born Under the Constitution: Why Recent Attacks on Birthright Citizenship are Unfounded."
[85]Nackenoff and Novkov, "Wong Kim Ark v. United States."
[86] Nackenoff and Novkov, "Wong Kim Ark v. United States," 103
[87]Nackenoff and Novkov, "Wong Kim Ark v. United States," 103, 105.
[88] Nackenoff and Novkov, "Wong Kim Ark v. United States," 105.

Supreme Court, where the debate remained about the citizenship status of Kim Ark and other native-born Chinese-Americans.

The oppositional viewpoint to Riordan, Morrow, and those who supported Kim Ark's claim to birthright citizenship stated that the purpose of the United States was to maintain a citizenry of just its original population, ironically glossing over the presence of Indigenous people and enslaved Africans in this statement.[89] They also stood firmly on the notion that citizenship was inherited by the status of one's parents, and that native-born children were still subject to the orders of a foreign power because of their parents' citizenship status.[90] At the Supreme Court level, the dissenting argument aimed to create conditions where the children of Europeans could freely become citizens, but the Chinese and other non-white populations were denied the same right.[91] Justice Fuller, one of the dissenters, noted that the existing Chinese population was so racially distinct and unassimilable that it was absurd that the accident of birth could grant citizenship to their children.[92]

In response, the advocates for Kim Ark's case cited common law stating that birth was grounds for citizenship, and that the 14th Amendment codified a practice already in existence.[93] Maxwell Evarts, one of the lawyers representing Kim Ark in the Supreme Court, argued that even Kim Ark's father, who was technically an alien resident of the United States, was still subject to the jurisdiction of the U.S. government, regardless of his original place of birth.[94] Justice Gray, who authored the majority opinion, believed that the Constitution was lacking in a definitive answer as to who could be excluded from or included within the bounds of citizenship, and as a result, turned to common law as a guiding point for determining the fate of Kim Ark,

[89]Nackenoff and Novkov, "Wong Kim Ark v. United States," 107.
[90] Nackenoff and Novkov, "Wong Kim Ark v. United States," 107.
[91] Nackenoff and Novkov, "Wong Kim Ark v. United States," 123.
[92] Nackenoff and Novkov, "Wong Kim Ark v. United States," 124.
[93] Nackenoff and Novkov, "Wong Kim Ark v. United States," 109.
[94] Nackenoff and Novkov, "Wong Kim Ark v. United States," 110.

and a nation of native-born children to foreign-born parents.[95] The "American tradition" of birthright citizenship for those born under normal circumstances aligned with Justice Gray's interpretation of common law.[96] Finally, Justice Gray affirmed that Congress could control citizenship only by regulating naturalization. Birthright citizenship was beyond their power. The implications of Kim Ark's case clarified the ambiguity over the "subject to the jurisdiction" clause within the 14th Amendment. All native-born children were now entitled to birthright citizenship, something that complicated the existing ideas about the ideal racial composition of the American citizenry.

Restricting Naturalization

While *Wong Kim Ark* formalized the citizenship status of native-born children in the United States, the ability of non-white and non-Black people to become naturalized citizens was still developing during the early 1900s. Race was an essential factor in determining who was eligible to become a citizen and who was barred from naturalization. When federal courts were tasked with determining who could naturalize, they used the law to justify both common perceptions of race and growing scientific inquiry that sought to use science to make judgments on the merit of different races.[97] Two cases appealed to the highest court in the land, the Supreme Court: *Ozawa v. United States (1922)* and *United States v. Thind (1923)*, both of which sought to secure naturalization for Japanese and Indian individuals, respectively, and both of which failed.

In both cases, the plaintiffs argued for their whiteness and used their alleged whiteness to present themselves as eligible for naturalization. Takao Ozawa was born in Japan, but filed for citizenship in the United States. He argued that Japanese people should be classified as white; however, the court denied him the ability to naturalize, saying that although he fit the

[95] Nackenoff and Novkov, "Wong Kim Ark v. United States," 114.
[96] Nackenoff and Novkov, "Wong Kim Ark v. United States," 115.
[97] Jacobson, "Naturalization and the Courts."

naturalization requirements in all other manners, scientific reasoning would not categorize him as being within the Caucasian race.[98] In *United States v. Thind (1923)*, Bhagat Singh Thind was found ineligible for naturalization, even though he had been granted citizenship for a brief period due to his military service. The Supreme Court disagreed with his argument that he was scientifically white, instead furthering the opinion that Thind would not be perceived as white in an everyday setting, regardless of any scientific backing that stated the contrary.[99] The link between the classification of Caucasian and Singh's Indian ethnicity was deemed too antiquated to support Thind's claim to whiteness. The rules governing both race and citizenship were continuously rewritten to keep certain demographics of the population from approaching naturalization and, thus, citizenship. The systematic categorization of Japanese and Indian people as being ineligible for citizenship resulted in a merging of Japanese, Indian, and Chinese populations as encompassing an Asian identity.[100] Their perceived unassimilability and mutual experiences of being denied whiteness and access to naturalization merged them into a racial category that did not previously exist. The creation of Asian as a racial category solved the issue of determining how to classify the "other" racial populations in the United States.

In 1924, the U.S. federal government passed new legislation to limit immigration from some countries while expanding the number of immigrants allowed from others. The effects of the Immigration Act of 1924 (the Johnson-Reed Act) set in motion national-origin quotas to limit the number of immigrants allowed to enter the United States from specific countries. This legislation limited immigration to 155,000 per year and excluded all persons ineligible for U.S. citizenship.[101] The creation of the Immigration Act of 1924 came out of rising fears over the growth of Eastern and Southern European populations in the United States, however the

[98] "Owaza v. United States (1922)"
[99] "Thind v. United States (1923)"
[100] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 38.
[101] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 23.

consequences of this act would be devastating for Asian immigrants.[102] As the Immigration Act of 1924 facilitated increasing biases against Asian immigrants by reaffirming the Asiatic Barred Zones that had originated in the Immigration Act of 1917, the federal government was directly responsible for disenfranchising certain populations from membership in the polity based on their country of origin, and thus race.

While the Immigration Act of 1924 targeted Asians and Southern and Eastern Europeans, it did not restrict immigration from the Western Hemisphere. Part of this was the necessity, particularly in the American Southwest, for labor performed primarily by immigrants. As a result, Mexican immigrants navigated a contentious relationship to naturalization that exemplified the connection between whiteness and naturalization. While they were certainly not treated as equals by European Americans, Mexicans were originally classified as white for purposes of naturalization in the years following 1848.[103] The 1848 Treaty of Guadalupe Hidalgo granted U.S. citizenship to all Mexicans living in the former Mexican territory. Whiteness was a requisite for U.S. citizenship in 1848, as the 14th Amendment would not be passed until 1868. Through extending rights of citizenship to all Mexicans, it conferred whiteness upon them for a brief period because it was commonly understood that only white people could be citizens. However, as immigration increased and interaction between European American settlers and the Mexican inhabitants grew, the ability of Mexicans to argue for their whiteness and ability to naturalize changed. Originally, the majority of European-American settlers interacted only with upper-class, landowning Mexicans; however, the next generation witnessed the diminishment of power held by Mexican-Americans, and their lack of high-class status and landownership reduced their proximity to whiteness.[104] The development of restrictions on naturalization for

[102] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 22.
[103] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 50.
[104] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 51.

Mexicans was a result of changing ideas about where Mexicans fell within racial lines. By restricting who could naturalize, the U.S. federal government took control over determining the composition of the citizenry. The Immigration Act of 1924 made clear who the U.S. federal government prioritized incorporating into its citizenry: white Europeans, particularly those from Northern Europe.

Not Permanent, Not Guaranteed: Denaturalization in the United States

The 1906 Naturalization Act authorized denaturalization for fraud in the naturalization process. Although this act was eventually repealed in 1940, the concerns over naturalization fraud remain. The present-day inspection of foreign-born U.S. citizens is reminiscent of the conditions and attitudes toward immigrants that allowed the 1906 Act to develop. In 2026, the U.S. Citizenship and Immigration Services (USCIS) was tasked with fulfilling a quota set by the current administration of "100-200 denaturalization cases per month."[105] The parallels between the past and present show that citizenship cannot be taken for granted, especially for foreign-born citizens who face the risk of being governed by a political body that does not easily accept differing ideological opinions to that of the federal government. Denaturalization also has a racial component as it targets specific immigrant demographics. Asian immigrants in the early 1900s occupied a vague position regarding their ability to naturalize. Bhagat Singh Thind was one of the victims of the federal government's quest to denaturalize those who had slipped through the cracks and successfully naturalized despite being ineligible on the basis of their race. When Bhagat Singh Thind lost his case with the Supreme Court and was determined to not be eligible for citizenship, at least fifty Hindu people were denaturalized by the federal court by 1928.[106] Denaturalization exposed the weaknesses in the federal government's ability to control

[105] Sutherland, Callum, "Trump Threatens to Denaturalize U.S. Citizens If They 'Deserve' It | TIME," *Time Magazine,* 2026, https://time.com/7344931/trump-threatens-to-denaturalize-us-citizens/.
[106] Weil, "Chapter 5. Radicals and Asians."

naturalization. By retracting the naturalization it had previously approved, the U.S. government devalued its own authority and its belief in citizenship's permanency.

Even native-born U.S. citizens faced the risk of losing their citizenship through denaturalization. It was not until the Cable Act of 1922 that American women who had married foreign partners could retain their U.S. citizenship, because marrying a foreign citizen was grounds for denaturalization.[107] While they would acquire their husband's nationality, women lost their U.S. citizenship through marriage. In 1967, the Supreme Court formally ensured that no native-born American citizen could be denaturalized unless they voluntarily relinquished their citizenship.[108] The concept and practice of denaturalization are evidence of how the U.S. government is not innocent in using its legislative powers to strip U.S. citizens of their citizenship on the basis of race, ethnicity, or political beliefs. In a January 2026 interview with current President Donald Trump, he made it abundantly clear that foreign-born U.S. citizens were at risk of losing their U.S. citizenship if he felt they did not "deserve" their citizenship.[109] The comments were targeted at Somali immigrants, with Trump going as far as to say in his Oval Office interview: "I would do it in a heartbeat if they were dishonest."[110]

While Trump is responsible for the contemporary resurgence of denaturalization as a threat within immigration politics, the Naturalization Act of 1906 originally introduced denaturalization as a means of reducing fraud in the immigration system, targeting foreign-born citizens by facilitating the removal of those whose beliefs were imagined as "un-American."[111] In one instance, Paul Herberger, a resident of Washington State, lost his citizenship for criticizing U.S. censorship and militarism during World War II. The evidence against him was ambiguous,

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[107] Molina, "Birthright Citizenship beyond Black and White," 74.
[108] Maria R. Uribe, "Fact-checking Trump's threat to take away Rosie O'Donnell's U.S. citizenship." *PBS*. 2025. https://www.pbs.org/newshour/politics/fact-checking-trumps-threat-to-take-away-rosie-odonnells-u-s-citizenship.
[109] Zolan Kanno, "Denaturalization Is Part of Trump's Crackdown on Immigrants." *The New York Times,* January 8, 2026. https://www.nytimes.com/2026/01/08/us/politics/trump-somalis-denaturalization.html.
[110] Kanno, "Denaturalization Is Part of Trump's Crackdown on Immigrants."
[111] Weil, "Introduction."

and the court could not establish beyond a reasonable doubt that he had committed treason.[112] Nonetheless, the district court in Washington State concluded that through his "actions and speech that he is not loyal and has not been loyal to this country."[113] In other cases, such as *Woerndle (1923)*, the court held that showing sympathy for Germany in the form of letters was not sufficient to warrant denaturalization, yet there was no uniform way to characterize treason.[114] If defendants had to rely on the hope that the judge would rule in their favor, freedom of speech failed to work in the interests of those who dissented from the U.S. government.

The loyalty referenced in Herberger's case and the deservingness of citizenship referenced by Donald Trump are both examples of subjective reasoning used to determine one's citizenship status. Corruption thrives in environments where opposing opinions are suppressed and fear pervades political discourse. True freedom of speech must protect even unpopular opinions, including those that criticize government policies or political figures. The current experience of Somali-Americans demonstrates that racial discrimination persists even after immigrants have successfully become U.S. citizens. The clear influence of prejudice and bias within immigration policy raises the question of how much the United States has truly evolved in creating neutral, anti-racist policies, and it also creates doubt about the permanence of U.S. citizenship if the government can undermine the legal institutions that bestowed citizenship on naturalized individuals in the first place.

Conclusion: Re-Imagining "Whites Only" in Citizenship Politics

In the second Trump administration, the rampage of white supremacy within policymaking reaffirms the notion that true citizenship belongs only to white Christians.[115] The

[112] Weil, "Chapter 5. Radicals and Asians,"
[113] Weil, "Chapter 5. Radicals and Asians,"
[114] Weil, "Chapter 5. Radicals and Asians,"
[115] Hiemstra and Conlon, "Afterword: Chaos and Cruelty in the First Month of the Second Trump Administration."

racist ideologies that Trump champions construct the "sorting [of] real Americans" from those deemed by the MAGA faithful to be unassimilable "aliens."[116] As this thesis consistently argues, the Trump administration may be a blatant example of the influence of racism in immigration policy, but it is by no means the first. The very origins of citizenship in the United States are rooted in exclusionary policies; beginning with the Naturalization Act of 1790, citizenship was accessible only to free white men.[117] In 1868, the 14th Amendment was passed, guaranteeing the right to citizenship for the formerly enslaved African American population and those of African descent.[118] The landmark *United States v. Wong Kim Ark (1898)* case ensured birthright citizenship for all individuals born in the United States, regardless of the parents' race or national origin. Both of these changes in the American legal system paved the way for non-white immigrants and native-born individuals to have the same access to citizenship as their white counterparts; however, the transition to full equality was not linear, and it does not exist today. There might not be a "whites only" sign on the Statue of Liberty, but if American history demonstrates anything, it is that U.S. immigration policy has always been rooted in race, and that the people most affected by changes in immigration legislation are those whose racial, ethnic, class, or religious identity stands in opposition to the ideals of the imagined "desirable" U.S. citizen.

Anti-immigrant ideology and the racism inherent in this belief system are recycled in response to immigration trends, reconfiguring itself to apply to whichever ethnic group is momentarily highlighted as an emerging immigrant population. Although immigration restrictionists have masked their arguments against automatic birthright citizenship in a myriad of ways, one thing remains: "the same racial characterization of the immigrant" is the anchor of

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[116] Hiemstra and Conlon, "Afterword: Chaos and Cruelty in the First Month of the Second Trump Administration," 161.
[117] Jacobson, "Naturalization and the Courts," 235.
[118] American Immigration Council, "Birthright Citizenship in the United States."

the argument.[119] The desire to characterize immigrants by race affects the lives of all people whose appearances position them as targets of racial profiling based on their potential immigrant status. Regardless of one's actual legal status, the belief that immigrants have a specific look renders parts of the population vulnerable to racial profiling, even if it is unfounded.

In 2018, René D. Flores and Ariela Schachter conducted the first systemic study of perceived illegality, providing evidence of the relevance of physical appearance and common beliefs for understanding immigration. Their study presented respondents with a paragraph describing the task, followed by two profiles of imaginary immigrants with various characteristics, including education, criminal background, race, etc.[120] The participants were asked: "Do you think these immigrants are illegal/undocumented? In other words, do you think they lack proper documentation status to be in the U.S.?" (Response options: yes, no)."[121] Their research found that respondents were more likely to assume the illegality of Latin Americans, than of Asians and Europeans.[122] Syrians and Somalians were also met with high levels of suspicion due to their perceived illegality.[123] The data illustrate that Asian individuals are no longer subject to the same intense scrutiny of their citizenship status as they were in the late 1800s and early 1900s; interrogation of one's citizenship status did not disappear, but instead shifted to a new population.

National origin plays a major role in determining whether someone is perceived as illegal, but the quality of illegality is ultimately an "internal" characteristic that resides within the human body. In Lee Medovoi's concept of ensoulment, he describes the "political effort to know (and, through knowing, an effort to conduct) an inner life that is assumed to be not directly

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[119] Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists," 646.
[120] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 846.
[121] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 846.
[122] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 856.
[123] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 848.

perceivable on the body's surface even if it can only be deciphered and governed through the mediation of bodily symptoms".[124] The imagined sense of threat created by the belief in illegality leads to "uncertainty regarding the precise individuals who bear enemy intentions, or the specific nature of the enemy intent they harbor."[125] Perceived criminality and disloyalty to the United States persist as factors that create fear and animosity toward migrants. "Crimmigration," as in the move toward criminalizing unauthorized entry into the United States, facilitates the conflation of illegality and criminality, alongside the perception that undocumented immigrants are criminals.[126] Attempting to discern illegality and even criminality from the physical body is an impossible task, yet racial profiling feeds the inference that this is possible.

As David Cole profoundly says: "Citizenship is a legal construct, an abstraction, a theory…It is far more difficult to deny that a human being is a "person."[127] What citizenship has done is create a division between individuals in every realm of being, whether that be the social or political world. However, the true nature of citizenship is that its permanency is a myth, and that citizenship is far more fluid and evolving than it is commonly understood to be. Citizenship is more than just a legal status; it is access to a type of power denied to foreign nationals. However, the instability of citizenship reveals itself when, for example, U.S. citizens are targeted by ICE and subjected to treatment that completely violates their rights as members of the citizenry. While citizenship is a hard-earned status in the United States, one's race, language, ethnicity, or appearance can complicate one's ability to enjoy the rights owed to them by virtue of their citizenship.

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[124] Leerom Medovoi, "Introduction: Ensoulment: A Strategy of Racial Power." In *The Inner Life of Race: Souls, Bodies, and the History of Racial Power*, p. 4. Duke University Press, 2024. http://www.jstor.org/stable/jj.18531021.4.

[125] Medovoi, "Introduction: Ensoulment: A Strategy of Racial Power," 11.

[126] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 862.

[127] Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" 375.

CHAPTER TWO: WHITENESS

Introduction

In 2024, the United States admitted 125,000 refugees. By 2025, that number had dropped to 7,500 due to the Trump administration. What was more surprising than the drastic decrease in refugees being accepted into the United States was the preferred ethnic population highlighted by this policy change: white South Africans.[128] The Trump administration's decision to prioritize the refugee resettlement of white Afrikaners stems from the belief that they experience persecution and race-based discrimination in their homelands.[129] However, the statistics from South African law enforcement do not show that there is a heightened risk of violence or crime for being white, nor do they provide evidence that white South Africans are the victims of a genocide, something which has been claimed by Donald Trump.[130] Additionally, while it is true that South Africa has one of the greatest homicide rates in the world, it is not solely white farmers who are targeted by violent crime, but Black South Africans as well.[131]

Why push aside refugees from across the globe to privilege one particular racial group from a multiracial nation? The U.S. government's decision to focus on white South African farmers, despite evidence that Black farmers face the same threats of violence and fear, is telling of the United States' understanding of which populations it wants to incorporate into the country and which it seeks to exclude. The Trump administration's South African policy revives past traditions of privileging white populations within immigration policies that had seemingly waned in the 20th century. Throughout U.S. immigration history, whiteness has always been seen as the most desirable racial trait. However, the conception of whiteness in today's social and political

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[128]Rebecca Santana, "Trump limits annual U.S. refugees to 7500. It'll be mostly white South Africans," *PBS*, 2025, https://www.pbs.org/newshour/nation/trump-limits-annual-refugees-to-u-s-to-7500-itll-be-mostly-white-south-africans.
[129] Miriam Jordan, "Trump Invited White South Africans to America. One Ended Up in Detention,"*The New York Times,* 2025, https://www.nytimes.com/2025/12/26/us/trump-afrikaner-ice.html.
[130] Jordan, "Trump Invited White South Africans to America. One Ended Up in Detention."
[131]Claire Mawisa, "White South Africans divided on US refugee offer," *BBC*, 2025, https://www.bbc.com/news/articles/c2lvk2ggl97o.

world differs from how it was conceived in the early days of the United States. This chapter delves into the linkages between whiteness and citizenship, particularly how immigration law is both influenced by racism and facilitates the creation of racial categories.

Citizenship in the United States is deeply rooted in whiteness. Among the original requirements for attaining U.S. citizenship through naturalization, established in 1790, was to be white. However, the qualities of whiteness are defined by their instability, as categorizing a community or individual as white depended on their ethnicity, birthplace, physical appearance, religion, and class. In the quest for citizenship, all the categories used to determine whiteness—geography, ethnicity, science, etc. —could be transformed into categories of exclusion to ensure that only specific populations could access citizenship and political membership. The complexities of determining whiteness meant that even when someone was deemed white for purposes of naturalization, this did not guarantee that this status was permanent or would not be interrogated in the future. The gatekeepers of whiteness– the U.S. federal government who created immigration policies that determined who was white for purposes of naturalization– closely guarded whiteness, but also made whiteness more inclusive by formulating a broad "white" racial category that encompassed more than solely Anglo-Saxons. The fact of whiteness being paramount within citizenship discourse is not an accident, nor is it a facet of the past. Analyzing constructions of race in U.S. immigration history is essential to understanding the context that created the racial dynamics of immigration today.

Origins of Whiteness in Citizenship

The first piece of legislation to address nationality in the newly formed United States was the Naturalization Act of 1790. The right to citizenship by naturalization was only accessible to those who were defined as "free white persons."[132] Despite the law using "persons," women had

[132] "Nationality Act of 1790." n.d. Immigration History. https://immigrationhistory.org/item/1790-nationality-act/.

greater difficulty than men with naturalization and were often defined by their husbands' legal status.[133] After 1855, any woman who married a U.S. citizen could gain citizenship, but any U.S. citizen woman who married a non-citizen ineligible for citizenship would lose her U.S. citizenship and take on her husband's nationality.[134] Racial restrictions within naturalization created the legal category of "alien ineligible for citizenship," a status that would haunt the many non-white immigrants vying for U.S. citizenship.[135] With regard to birthright citizenship, although it was not until the 14th Amendment in 1868 that the Constitution was amended to formally acknowledge the tradition of birthright citizenship in the United States, the practice existed in a pre-14th Amendment context. The common law practice of birthright citizenship drew on an ascriptive model of citizenship, in which those born in the United States automatically became citizens.[136] However, this did not apply to the Indigenous and enslaved African populations who, while being native-born, were not entitled to the rights of being a U.S. citizen. What both the origins of naturalization and birthright citizenship demonstrate is the critical division between white and non-white identities, and the relationship between whiteness and its adjacency to legal citizenship. The U.S. government established large-scale inequality within the population based on racial restrictive citizenship laws, in order to sustain a white citizenry.

Physical Appearance, Common Knowledge & Science

This section focuses on three mechanisms for determining whiteness: physical appearance, common knowledge, and science. The Supreme Court used all three of these modes of argumentation to decide the racial classification of immigrants desiring to naturalize who did

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[133] Marian L. Smith, ""Any woman who is now or may hereafter be married . . ."" *National Archives*, 2023, https://www.archives.gov/publications/prologue/1998/summer/women-and-naturalization-1.html.

[134] Smith. ""Any woman who is now or may hereafter be married . . .""

[135] "Nationality Act of 1790."

[136] Schuck and Smith. "Citizenship Without Consent," 42, 44.

not fit within a white-black racial binary.[137] What remains ironic about the Supreme Court's reasoning is that, where scientific understandings of race were upheld in one context, they were similarly denied in another case. An examination of the various "racial prerequisite cases" reveals that the Supreme Court had inconsistent reasoning and parameters for whiteness.[138] Achieving whiteness was necessary for attaining not only citizenship, but also access to rights and privileges that were denied to African Americans. While eligible for citizenship under the 14th Amendment, African Americans still faced discrimination and were subject to restricted access to the rights given to white citizens, explaining why ethnic populations argued for their incorporation into whiteness, not Blackness. As whiteness was the gateway to the full rights of citizenship, the Supreme Court had to defend whiteness's sanctity from being encroached upon by immigrants whom it did not serve in the interest of the U.S. government to incorporate as citizens. Using tactics that deny whiteness based on physical appearance, common knowledge, or science, it was not necessary for all three factors to align in colluding against the claim of whiteness for the applicant. The court only needed to use at least one of them to reject the argument for whiteness for immigrants who sought to assert a white identity so that they could naturalize and become citizens.

Physical characteristics and ancestry are embedded with racial meanings shaped by social understandings of how specific populations appear or are portrayed.[139] These ideas about race and its connection to the physical are re-articulated until they become factual, not because they are true, but because they are believed.[140] One of the many ways in which whiteness was identified was through physical appearance. This included having light-colored features, leading

[137] Haney-López, "White By Law," 95-149.
[138] Haney-López, "White By Law," 25, 36,119, 122.
[139] Haney-López, "White By Law," 38.
[140] Haney-López, "White By Law," 38.

to a conflation of physical color and race within the literal identity category of "white."[141] However, not everyone was so quick to make such sweeping judgments. Judge Sawyer, who worked on *In re Yup (1878)*, the first racial prerequisite case, argued that whiteness was possible even if one did not fit the rigid physical characteristics of whiteness, as there was space for variation.[142] Even those who were categorized as white for the legal purpose of naturalization were scrutinized under physical sorting, feeding into a hierarchy of whiteness that divided different ethnic groups and privileged Anglo-Saxon whites. Common knowledge, on the other hand, could contradict physical appearance-based findings and achieve whiteness for one who did not fit into the standard physical description. Put simply: "a person is white if he is recognized by the 'man in the street' as white."[143]

Yet, even if someone was able to achieve whiteness on all three fronts- through physical appearance, science, or common knowledge, it did not equate to automatically achieving equality as citizens in a shared country. Whiteness had its own racial hierarchy, formed in part because of newly arriving European immigrants in the late 1800s and early 1900s, who threatened the existing Anglo-Saxon population's sense of security in their employment and access to resources. Racialists of the time believed that Europeans were classified into three racial categories: Nordic, Alpine, and Mediterranean.[144] The superior category, Nordic, is where Anglo-Saxons fell, while Italians were pushed into the Mediterranean category. Sentiment towards Southern and Eastern European immigrants was overwhelmingly negative, with the attitude towards these immigrants generating visions of "the scum of Europe," "foreign mush," "good-for-nothing mongrels," or "parasite races."[145] Physical appearance was used to exemplify difference, especially for the

[141] Jacobson, "Naturalization and the Courts," 226.
[142] Jacobson, "Naturalization and the Courts," 227.
[143] Molina, "'What Is a White Man?'" 43.
[144] Guglielmo, "The White Peril of Europe," 3.
[145] Guglielmo, "The White Peril of Europe," 6.

Italian population, who were heavily criminalized and blamed for the violence and poverty within their communities. Italians were described as "swarthy, black haired, black eyed, [looking] not unlike Arabs" and having "a twilight complexion, dark enough to suggest night, and cold, hard, black eyes that slanted like a Chinaman's."[146] By comparing the features of Italian immigrants with those of Arab and Chinese populations, Italians were positioned further from whiteness.

However, despite being relegated to the bottom of the racial hierarchy of whiteness, Italians still benefited from access to naturalization and political membership. Even in the scientific realm, although Italian, Irish, and Southern and Eastern European immigrants lacked social capital, they were not denied whiteness on scientific grounds. They were both "racially inferior" and a part of the white race at the same time.[147] Not only is this telling of whiteness's flexibility as a racial category, but also an indicator of how physical appearance was only used as a legitimate form of regulating whiteness in certain instances. In others, as in the case of Italians, it was ignored in the interest of giving them access to naturalization and increasing the political power of the "white" race. Using physical appearance to discriminate against Italians and other Europeans was a project to obtain power and reaffirm the status quo, not to change naturalization law. This physical-body-based discrimination only occurred in the hierarchy of "white races," and ultimately was irrelevant for the naturalization of Italians, the Irish, and other Europeans. Despite the discrimination they faced, their ability to naturalize was never taken away or denied.

While the Immigration Act of 1924 sought to limit migration from Eastern and Southern Europe, privileging Anglo-Saxons over other European migrants, Eastern and Southern European immigrants were not explicitly denied access to migration because of their race. In

[146] Guglielmo, "Race, Color, and Crime," 11.
[147] Guglielmo, "The White Peril of Europe" 5.

contrast, the 1924 Act barred all immigration from "any alien who by virtue of race or nationality was ineligible for citizenship…As a result, the 1924 Act meant that even Asians not previously prevented from immigrating – the Japanese in particular – would no longer be admitted to the United States."[148] So while the Immigration Act of 1924 was a white exclusion law, it did not re-categorize Southern and Eastern European immigrants as non-white, and nor did it exclude them in totality from immigration to the United States, as it did with immigrants from Asia.

Looking again at the three factors of physical appearance, science, and common knowledge, three different case studies are used to examine how these components were influential in either affirming or denying claims for whiteness to attain citizenship. I choose to primarily focus on *Ozawa* and *Thind* because their decisions went to the Supreme Court, and formalized the legal racial category of those who fell into one of the "Asian" races. I also chose *In re Rodríguez (1897)* because it focuses on a Mexican individual whose request for naturalization was successful; the court's reasoning did not rest on affirming physical, scientific, or common knowledge of whiteness. When comparing this case to that of *Ozawa* and *Thind*, it reveals how whiteness as a basis for naturalization was rife with inconsistencies, demonstrating that the very aspects that were detrimental to achieving whiteness in one instance were irrelevant in another. All that mattered was the outcome the courts wanted to ensure—that the populations they did not want to be given equal access to citizenship, voting rights, and political membership would be considered legally non-white.

The figure below displays the three case studies, *Ozawa (1922)*, *Thind (1923)*, and *Rodríguez (1897)*. The table shows that the courts denied the plaintiffs' whiteness on grounds of

[148] "Milestones in the History of U.S. Foreign Relations." n.d. Milestones in the History of U.S. Foreign Relations - Office of the Historian. Accessed April 22, 2026. https://history.state.gov/milestones/1921-1936/immigration-act.

physical appearance, science, or common knowledge, but were inconsistent in the weight they assigned to each factor and in their ultimately rulings.

Case:	Plaintiff argued for physical whiteness?	Plaintiff argued for scientific whiteness?	Courts denied… (a) physical whiteness (b) scientific whiteness (c) common knowledge whiteness?	Courts denied citizenship?
Ozawa (1922)	Y	N	B, C	Y
Thind (1923)	N	Y	A, C	Y
Rodríguez (1897)	N	N	A, B, C	N

Beginning in *Ozawa*, the plaintiff argued that he was white because of his skin color; however, the court disagreed that appearing physically white was an indicator of legitimate whiteness.[149] The Supreme Court argued that even amongst Anglo-Saxons, there could be variation of features such as hair and skin color, despite these persons being of the same racial group.[150] If physical appearance were the only indicator of race, siblings with different skin colors could be placed in different racial categories, despite obviously sharing the same lineage.

[149] Molina, "'What Is a White Man?' 50.
[150] Jacobson, "Naturalization and the Courts," 225.

The court concurred that a color test was an insufficient mechanism for determining whiteness and it would lead to an amalgamation of races with no clear divisions.[151] The Supreme Court used science in order to classify Japanese people as a racial category outside of whiteness, but also outside of Blackness, re-imagining the white-black binary to include new forms of non-whiteness. By virtue of being Japanese, Ozawa was included in the "Mongolian" racial category.[152] The Supreme Court decided that Ozawa was not white because only "Caucasians" were considered white in 1790 when the first law on naturalization was created, and Japanese immigrants were "clearly" not in the Caucasian group.[153]

If the common understanding of whiteness was to be Caucasian, then a Japanese person would not be incorporated into that definition by the standards of someone whose only conception of the white race was that it encompassed Caucasian peoples. Denying anyone citizenship on the basis of race is a ploy to ensure that they do not have access to the same rights and privileges as their neighbors, and a project that reasserts white dominance with catastrophic social and political effects. The decision in *Ozawa* laid the groundwork for imagining Japanese immigrants as non-citizens, foreigners, and an excluded entity within American politics. This sentiment proved dangerous in the years to come, and the section on perpetual foreignness will illuminate how devastating the consequences of being politically and socially excluded would be for the Japanese community.

The next case examines *United States v. Thind (1923)*, in which an Indian man who resided in the U.S. sought to naturalize on the basis that he was part of the Caucasian race. The court's reliance on conflating "Caucasian" with "white" as it did in *Ozawa* would prove to be challenged in *Thind*, demonstrating the inability of science to justify racial categories. This case

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[151] Jacobson, "Naturalization and the Courts," 225.
[152] Haney-López, "White By Law," 122.; Jacobson, "Naturalization and the Courts," 235.
[153] Jacobson, "Naturalization and the Courts," 235.

followed one year after *Ozawa*, and had mostly the same composition of judges save for William Rufus Day who retired in 1922 and was succeeded by Pierce Butler, and then Mahlon Pitney who retired in 1922 but was not yet replaced by the time of Thind's case. As a result, *Thind* was overseen by only eight supreme court justices. Originally, Thind was naturalized by the state of Washington, but this was immediately rescinded. As an Indian with dark skin, his racial classification as white was met with suspicion, leading to further inquiry into whether he had a legitimate claim to whiteness.[154] While Thind was Sikh and not Hindu, he was constantly referred to as a "Hindu" or "Hindoo" even though Hinduism is a religion, but at the time it carried a racial connotation that was applied to all South Asians. With respect to physical appearance Thind's appearance was described as "very dark brown, almost black."[155] The Supreme Court determined that while "'It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity…the average man knows perfectly well that there are unmistakable and profound differences between them to-day.'"[156] The court rejected scientific whiteness, and defended Thind's denaturalization by asserting the dominance of common knowledge and physical appearance in defining whiteness.

Although the cases of *Thind* and *Ozawa* took place only a year apart, the Supreme Court ignored the role of science that had been so integral in determining Ozawa's fate, and instead undermined the use of science for forming racial categories. The court acknowledged that Thind was Caucasian, but they contended that science was less relevant in determining race than the perception of the "well-informed white American."[157] The Court prioritized the perception of the common man over the scientific classifications that they had used in the past. By combining both

[154] Jacobson, "Naturalization and the Courts," 236.
[155] Jacobson, "Naturalization and the Courts," 225.
[156] Jacobson, "Naturalization and the Courts," 226.
[157] Jacobson, "Naturalization and the Courts," 236.

physical appearance and common knowledge, the Court was able to justify the classification of Thind as non-white because of his physical characteristics, making him clearly non-white in the eyes of the average spectator.[158] When science lacked the capacity to justify the racial categories the Court intended to create, the Court abandoned the scientific evidence that previously had been so important to them.[159] Despite the irony of the Court's switching attitude towards science, this discrepancy between how science was utilized in Ozawa's case versus Thind's did not catalyze a change in how race itself was understood. The Court could not begin to unravel the myth of race as a natural concept without rupturing the beliefs that had guided their judicial decisions as well as the government's own legislation, and as a result rebuked science before questioning the true meaning of race.[160]

Finally, the last case study is that of *In re Rodríguez,* in which Ricardo Rodríguez, a Mexican man, applied for naturalization in 1897. Part of the argument in favor of his ability to naturalize was the Treaty of Guadalupe Hidalgo which had in 1848, incorporated Mexicans who resided in the annexed territory that now belonged to the United States, to become naturalized citizens. The Treaty of Guadalupe Hidalgo was established 20 years before the 14th Amendment, meaning that citizenship at this time was deeply intertwined with whiteness. However, the Treaty of Guadalupe Hidalgo did not officially declare that Mexicans were white, but because only white people could naturalize, it led to the assumption that Mexicans were, at least for purposes of naturalization, white.[161] When Rodríguez's case landed in the Texas federal district court, the judge in his case, Judge Maxey, acknowledged his "copper" or "red" skin tone, and "dark eyes [and] straight black hair" that differentiated him physically from what were understood to be

[158] Haney-López, "White By Law," 128.
[159] Haney-López, "White By Law," 134.
[160] Haney-López, "White By Law," 30.
[161] Molina, "'What Is a White Man?'" 45.

features of whiteness.[162] In terms of a scientific perspective, Judge Maxey observed that Rodríguez likely would not have been considered white from an anthropological perspective.[163] Given the failure of both physical whiteness and scientific whiteness to justify Rodríguez's claims to citizenship, it would seem that his request to naturalize would have been rejected. Additionally, Rodríguez did not base his argument in a claim to whiteness or the Caucasian race, unlike in *Thind* and *Ozawa*.

In the end, Judge Maxey argued that because of the Treaty of Guadalupe Hidalgo (1848) and the Texas constitution, Mexicans were able to become naturalized citizens.[164] The fact of "nonracial considerations (in this case, the history of Mexico and Texas)" being able to "supersede both ethnological authority and popular conventions of describing skin color" further complicated the question of who could naturalize, and what qualifications needed to be met to achieve citizen status.[165] The *Rodríguez* case demonstrates how access to naturalization could be secured through a treaty, engineering a pathway to citizenship that did not hinge on whiteness, which stands in contrast with the other naturalization cases like *Thind* and *Ozawa*.

In comparing the success of *In re Rodríguez* to the failures of *Ozawa* and *Thind*, one can begin to understand how whiteness was an unstable racial category, justified by arbitrary conditions that were equally insecure. The court agreeing to honor Rodríguez's claims to citizenship based on the Treaty of Guadalupe Hidalgo, while simultaneously acknowledging his lack of whiteness, demonstrates the courts lack of neutrality when applying the law uniformly. Meanwhile, the evidence for whiteness that was lacking in *Ozawa* was utilized in *Thind*, and vice versa. The Supreme Court's reasoning to deny whiteness, and thus naturalization, lacked

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[162] Molina, "'What Is a White Man?'" 45, 46.
[163] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 54.
[164] Molina, "'What Is a White Man?'" 45.
[165] Jacobson, "Naturalization and the Courts," 230

consistency, yet as the guards of whiteness the fragility of their arguments did not affect their ability to maintain power.

Even as ideas about race shift, there remains an underlying sentiment that race is something that can be assumed from an external perspective. Medevoi articulates this when he explains that many Americans operate with the understanding that they "cannot always tell when someone is Mexican or African American, but still [they] behave as if their Blackness or brownness is something [their] can see. The very idea of color registers this presumption of visual perceptibility, while the idea that one "cannot always tell" necessitates a game of concealment/exposure as the color line's backstop."[166] Biases and preconceived notions about immigration produce the catastrophic result of increased surveillance and profiling of people who fit the stereotypical perception of an illegal immigrant. When immigration enforcement such as ICE sees Black and brown bodies existing in the world, they are not seeing human beings but "illegal immigrants," and that prompts them to respond as if there is a security threat when in reality none exists.[167] The enforcement confrontation itself, however, can spiral into violence. Physical appearance and common knowledge, two pseudo-indicators of race, are still permeating understandings of immigration in the U.S. population.

Legal Whiteness

Ian Haney-López argues that the law constructs racial discourse and categories, and that the judicial system and courts have constructed the boundaries of race as we know them today, while simultaneously assigning a racial hierarchy among the racial identities they themselves have defined.[168] The Supreme and district courts created a way of "knowing" race that depended

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[166] Medovoi, "Introduction: Ensoulment: A Strategy of Racial Power," 17.
[167] "ACLU Sues Federal Government to End ICE, CBP's Practice of Suspicionless Stops, Warrantless Arrests, and Racial Profiling of Minnesotans | American Civil Liberties Union." *ACLU*. 2026. https://www.aclu.org/press-releases/aclu-sues-federal-government-to-end-ice-cbps-practice-of-suspicionless-stops-warrantless-arrests-and-racial-profiling-of-minnesotans.
[168] Haney-López, "White By Law," 36.

on “scientific doctrine, from popular understanding, from historical reasoning… from "commonsense" notions of color, from geographic conceptions of the world's peoples, and from legal precedent itself.”[169] The very first case of a non-white person applying for naturalization was in the case of *In re Ah Yup (1878)* in which Ah Yup, a Chinese immigrant, argued for his ability to naturalize as a U.S. citizen. The California district court determined that he could not be categorized as Caucasian or of African nativity, the two racial classes permitted to naturalize based on the Naturalization Act of 1870. Ah Yup’s identity as part of the “Mongolian race” denied him the ability to naturalize.[170] This case established the use of the “Caucasian race” as a requisite for U.S. citizenship, separating “Mongolians” from “Caucasians.”[171] This was the first instance in which someone was made non-white in a naturalization setting. The court not only denied him the status of legally white, but they created a category of non-whiteness for people who could not be sorted into the white-black racial binary that had previously governed immigration law, further guarding access to whiteness.

In post *Ah Yup* proceedings, immigrants continued to argue that they should be classified as white for purposes of naturalization. However, in the court systems, the judges could not clearly articulate what whiteness was. As shown in the case studies of *Ozawa* and *Thind*, which followed *Ah Yup* by almost half a century, the Supreme Court produced conflicting arguments to come to the same conclusion that neither applicant could be eligible for naturalization. Furthermore, the abundance of elements that could inform the potential race of an applicant led to severe inconsistencies in the court's decisions. The courts ruled that applicants from Mexico and Armenia were able to naturalize, but exhibited their indecision over the eligibility of immigrants from Syria, India, and Arabia to naturalize, particularly because of these groups'

[169] Jacobson, “Naturalization and the Courts,” 226.
[170] Jacobson, “Naturalization and the Courts,” 228.
[171] Jacobson, “Naturalization and the Courts,” 227.

argument to be classified as white for purposes of naturalization.[172] The courts were in many ways making up their legal definitions of whiteness as individual cases arose, leading to inconsistencies in how they ruled or what evidence was seen as integral in one context, but irrelevant in the next. As the law was used to define whiteness, it grew to define non-whiteness and establish racial categories that previously did not exist in the United States.

One example of the way in which legal whiteness differentiated from actual racial relationships in the United States during the late 1800s and early 1900s can be understood through the lens of the European dilemma. The attitude towards Irish, Italian, and Southern and Eastern European immigration was overwhelmingly negative, however, when it came to determining who was eligible for naturalization, these same populations were suddenly accepted and integrated into the racial category of white for purposes of naturalization.[173] While in reality an Anglo-Saxon person would have a negative perception of an Italian immigrant, naturalization discourse positioned all members of the white race as having some shared characteristics, while implying that Syrian, Turkish, Indian and Japanese applicants were lacking in these shared qualities.[174]

The law participated in race-making by creating a white race that did not exist outside of the United States. In legal environments, individuals of European descent were imagined as part of a single white race, and the courts facilitated the formation of a white race by being more generous in how they portrayed the relationships among these different ethnic communities when reviewing applications for naturalization.[175] However, the image the courts and the government wanted to promote of a unified white race was far from reality. Italians faced discrimination in

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[172] Haney-López, "White By Law," 25.

[173] Jacobson, "Anglo-Saxons and Others, 1840–1924," 75.

[174] Jacobson, "Anglo-Saxons and Others, 1840–1924," 75.

[175] Ngai. "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 25.; Jacobson, "Naturalization and the Courts," 241.

terms of being associated with criminality, violence, and poverty, and were compared to non-white populations in a manner designed to create a negative perception of them.[176] The 'exclusionary inclusion' that allowed Italians, Irish, and Eastern and Southern Europeans to be included as white in legal contexts while still facing discrimination benefited the overarching racial project of the U.S. government. The U.S. government could maintain a hierarchical perception of whiteness in social settings that excluded lesser whites from employment opportunities and building social capital, without the cost of losing whiteness as a legal identity.[177]

The formation of a white race in immigration politics paved the way for increased regulation of whiteness. For Mexicans, their experience with legal whiteness is an ideal case study for understanding the fluctuation of a white racial identity. In the years after the Treaty of Guadalupe Hidalgo annexed former Mexican territory and incorporated both the land and its inhabitants into the United States, Mexicans experienced holding multiple racial statuses. Having an Indigenous heritage marked one as non-white, but ownership of land, resources, and wealth could change one's social status.[178] For the U.S. government, incorporating Mexicans as U.S. citizens was a part of their economic interests. The agricultural labor force in the American Southwest required the use of Mexican workers, and as a result, impeding immigration from Mexico would jeopardize the function of the agricultural industry.[179] And so, while the Johnson-Reed Act of 1924 limited migrations from Asia and parts of Europe, Western Hemisphere countries were spared because of U.S. trade interests with Canada and Mexico.[180] What the legally white status of Mexicans proves is that legal whiteness does not ensure being

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[176] Guglielmo, "Race, Color, and Crime," 12.
[177] Jacobson, "Anglo-Saxons and Others, 1840–1924," 57.
[178] Molina, "Placing Mexican Immigration within the Larger Landscape of Race Relations in the United States," 40.
[179] Ngai. "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 50.
[180] Ngai. "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 23.

treated the same as citizens of European descent. Even though, like Italians, Mexicans were both legally white and considered racially inferior to Anglo-Saxons, they could not maintain a status of fundamental whiteness, and sooner or later their grasp of a white identity would loosen.

The argument for legal whiteness proved to be difficult for Mexicans to maintain, especially as, for purposes of naturalization, the division between white and non-white grew stronger in the judicial system. In 1930, Mexicans were removed from the "white" category in the U.S. Census and transferred to a category of their own.[181] Yet, in 1937, Mexicans were again listed as white and once again permitted into the legally white category.[182] Mexicans also successfully managed to challenge Jim Crow segregation through asserting their ancestry and appearance as "Mexican" while still being encompassed into the legally white category. For example, in *Mendez v. Westminster (1947)*, the Ninth Circuit Court of Appeals ruled that schools could not discriminate against students of "Mexican descent."[183] This case did not argue that Mexicans were racially white, but instead highlighted their ethnicity, and argued that their ancestry could not warrant their discrimination. The racial ambiguity that characterizes much of the experience for Mexicans in the United States played into their favor in this case, especially considering that it would not be until 1954 that the Supreme Court desegregated all schools on the basis of race.

Ultimately, the 1940 Nationality Act made naturalization possible for Mexicans, but no longer under the white category. The act declared citizenship through naturalization could be achieved by: "white persons, persons of African nativity or descent, and descendants of races Indigenous to the Western Hemisphere."[184] As Mexicans were more easily conceptualized as

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[181] Molina, "'What Is a White Man?' 64.
[182] Molina, "'What Is a White Man?' 64.
[183] "Research Guides: A Latinx Resource Guide: Civil Rights Cases and Events in the United States: 1946: Mendez v. Westminster." 2020. Library of Congress Research Guides. https://guides.loc.gov/latinx-civil-rights/mendez-v-westminster.
[184] Molina, "'What Is a White Man?' 66.

Indigenous, they were no longer considered legally white and had no further claim to the privileges of whiteness. The evolution of Mexicans from legally white to legally non-white shows not only how legality is not a fixed concept, but also how whiteness has evolved throughout American history.

Next, we will re-visit both *Ozawa* and *Thind*, and understand how the Supreme Court created a legal category of non-white in order to classify racial identities into legal ones. Whatever the Supreme Court decided in these cases would either make someone white, or deny them that whiteness. This is how the legal system was directly influential in race making, and not the other way around. As a legal concept, being a "white person" had a definition in 1790 that evolved to encompass more populations in the 1900s. Now, not only were the English and French considered white persons, but those from Spain, Hungary, Portugal, Italy, Russia, Poland and other European countries that had begun to spur more immigration to the United States.[185] However, the Supreme Court argued that despite the evolution in which populations were enveloped by the legally white category, in the case of *Thind*, people who were part of the "Hindu" race were not to be included within this categorization. The argument held that a certain "geographical class" was implied by whiteness, and while those of European descent could argue for similarities within their cultures, languages, politics and social environments, "Hindus" were not recognized as being part of this class.[186] Thind's inability to naturalize proved paradoxical: the Supreme Court did not allow him to naturalize because he was not white, but he only became legally non-white after the Supreme Court established that he was ineligible for naturalization.[187] Similarly in *Ozawa*, the Supreme Court had to officially establish a racial category that fell outside of the white-black racial binary, introducing non-whiteness into the legal sphere. The

[185] Jacobson, "Naturalization and the Courts," 243.
[186] Jacobson, "Naturalization and the Courts," 243.
[187] Haney-López, "White By Law," 162.

Naturalization Act of 1790 had created a broad category of "aliens ineligible for citizenship" while indicating naturalization as only for "free white persons". Over time, "white" as a racial category grew to encompass more people from European nations, but with the intention of formalizing who was legally white and limiting naturalization for Asians, as exhibited by *in re Ah Yup (1878)*, *Ozawa (1922),* and *Thind (1923)*.

In fact, not only did *Ozawa* and *Thind* cement the legally non-white status of Japanese and Indian migrants, but the repercussions were felt for all people who were part of the Asian race. A new legal construction was formed to describe the racial status of not only Japanese and Indian immigrants, but also Korean, Thai, Vietnamese, Indonesian and other Asian countries, designating all of them as "Asiatic," a term originating from the Immigration Act of 1917 that developed an "Asiatic Barred Zone" and was reaffirmed in the 1924 Immigration Act. [188] Racism preceded race by creating the need to form a new racial category that could be considered ineligible for citizenship, as a solution to the possibility of non-European immigrants applying for naturalization. Additionally, even though Ozawa and Thind as individuals were open to assimilating into existing racial hierarchies in the United States in order to naturalize, the Supreme Court and legal system needed to set a precedent that these populations were not white, in order to reaffirm the color line. Ozawa and Thind failed in their appeal for whiteness, but the idea of arguing to be considered Black was never an option even if it meant access to naturalization as given by the 14th Amendment. The political disenfranchisement of Black Americans as well as the racism and discriminatory treatment that they faced was enough to convince any immigrant applying for naturalization that their goal should remain to be considered legally white.[189]

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[188] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 46.
[189] Ngai, "The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law," 41.

The legal construction of race shows how specific prejudices influence law making, and as a result the law legitimizes the idea of race connoting certain characteristics and qualities so that they can pursue discriminatory policies. In more recent examples than the 1920s, the 1990s saw Lockheed Missiles and Space Company succeed in getting a lawsuit against them dismissed on the grounds that the plaintiff was technically Caucasian and thus not possibly discriminated against on the basis of race.[190] The ethnicity of the plaintiff? Indian. While in the end the dismissal was reversed, the fact that the company initially succeeded demonstrates how race can be constructed in different ways in order to justify the actions of those in power. The willingness of the first court to accept Lockheed Missiles and Space Company's argument is evidence of how race evolves and is not a fixed identity, especially when changing racial definitions can benefit the interests of those with power and influence in the United States. The law shapes race by saying that certain people are inferior, certain people are unworthy of citizenship, and certain people are necessarily discriminated against. Then, institutions in the United States such as the federal government or eugenicists disguised as scientists, write all the rules of racial categories, treating their own work like fact despite knowing and ignoring the many inconsistencies of their reasoning.

Conclusion: Relative Whiteness & Perpetual Foreignness

Relative whiteness and perpetual foreignness are two interconnected ideas that aid in proving the flexibility and inconsistency of whiteness. Relative whiteness is the idea of becoming white based on someone else's non-whiteness. For example, Italians and Irish immigrants became "more white" in conversations about who should be allowed to naturalize when non-European immigrants were also fighting for their right to naturalization. On the other

[190] John Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," *The Yale Law Journal* 109, no. 4 (2000): 817–48. https://doi.org/10.2307/797505. 844.

side of the spectrum of whiteness, some immigrant populations were positioned as perpetually foreign, where regardless of their actual legal status or years residing in the United States, they were constantly imagined as being non-native people and unassimilable, loyal to a foreign nation, and/or lacking in the civility and culture of the United States. Through a combination of the law and social attitudes towards different races and ethnicities, partially influenced by the government, some populations were more easily assimilated into whiteness while others, who had been designated as non-white, were re-imagined as foreign.

Different European groups were able to "whiten" themselves in the early 1920s when immigrants from non-European countries were also trying to claim whiteness for naturalization purposes. For example, regardless of the discrimination first generation Italians faced, over time Italians grew into a strong "Italian-American" identity. They succeeded in maintaining a cultural tie to their ancestral homeland while still being absorbed into a category of general whiteness, avoiding the "perpetual foreigner" label assigned to Asians and Latinos. Soon, the Anglo-Saxon race was "defined by what they were not: black, Indian, and…Mexican".[191] As a result of not being Black, Indigenous or Mexican, European immigrants who were previously considered racially inferior were now being upheld as the model of the ideal immigrant. Through escalating the perceived differences between Europeans and non-European immigrants, the whiteness of even the problematic white races was ensured.[192]

When a non-European person applied for naturalization, the courts, both state and federal depending on the context, needed to find a way to differentiate the applicant from anyone considered part of the white race. In the *Thind* case, the Supreme Court argued that Southern Europeans also had access to whiteness in the same manner as Anglo-Saxons, however this was

[191] Molina, "Placing Mexican Immigration within the Larger Landscape of Race Relations in the United States," 26.
[192] Jacobson, "Naturalization and the Courts," 225.

a generous interpretation because many Southern Europeans faced social discrimination and were subject to speculation surrounding their racial status.[193] The Irish were even considered the "blacks of Europe," showing how they were incorporated into the existing racial hierarchy of the United States by imposing a Black-adjacent identity upon them.[194] Despite how they were perceived as an immigrant group, problematic white immigrants were "rendered indelibly white by the presence of populations even more problematic than themselves."[195] The racial dynamics in the United States that separated Black and white people aided non-Anglo-Saxon European immigrants from being discriminated against within the naturalization sphere. As they shared the geographical component of Europeanness, even white immigrants who were considered part of the bottom of the white racial hierarchy were placed on the white side of the color line.

One tactic that immigrant groups who wanted to be recognized as white used was the practice of distancing themselves from other immigrant populations that were categorized as non-white. For example, both Mexican and Japanese immigrants tried to separate themselves from being associated with Black identified or Asian identified people, respectively. Yet, Mexicans were generally aligned with Black or Indigenous people when their physical appearance, class and language were deemed non-white. As with whiteness where hierarchies divided Anglo-Saxons and Southern and Eastern Europeans, unstable racial hierarchies also placed Mexicans in different racial categories depending on how their class, language, or appearance complicated their proximity to whiteness. The Japanese also tried to prove their whiteness through differentiating themselves from populations whose racial status was already cemented as non-white or ineligible for naturalization. John Wigmore, a legal scholar of the time, argued that while the other Asiatic people were not white, the Japanese were closer to whiteness

[193] Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," 825.
[194] Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," 825.
[195] Jacobson, "Anglo-Saxons and Others, 1840–1924," 76.

based on their culture, development in their country of origin, and social behavior.[196] Yet, the reason that both Mexican and Japanese populations eventually were categorized as non-white is because the U.S. government had already decided who they would permit to be citizens and who was to be denied.

Race did not precede the law; it was formed to support the law. The courts were inconsistent in how they created evidence for whiteness, but they still believed that it existed. Additionally, because immigrant populations wanted to be white, it gave racial divisions even more power. When whiteness became the quality that people wanted to achieve, being deemed non-white meant losing power and assuming an inferior status. As there is a category of "relative whiteness" in which people accessed a white status depending on their European origins and their color, as opposed to race, there also was a simultaneous project to designate certain populations as foreign, invasive, and unassimilable into the U.S. polity. Haney-López connects the perpetual foreigner idea with conceptions of race, examining how white people are considered the most civilized and fit to self-govern, while non-white peoples are constructed as savage and "perpetual aliens."[197] By creating a narrative that conflates "white" with "American" the U.S. government and political figures can pursue a revisionist historical perspective that says citizens are white and non-citizens are non-white. This would ignore the reality that whiteness as a category has shifted throughout time, and that even within the group now considered "white" that all those populations blended well together and had positive relations.

One of the strongest examples of the victims of a perpetual foreigner narrative is that of Mexicans, who had lived in the American Southwest until that territory was annexed to the United States after the U.S. Mexican War (1846-48). Mexicans were not "new" to the United

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[196] Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," 831, 832.
[197] Haney-López, "White By Law," 217.

States, but that the nation had been built around their presence, and yet they were still encapsulated by the "perpetual foreigner" label.[198] In contrast, the transition towards whiteness for Italians, Jewish people, and the Polish was facilitated by the government through affording them access to resources that were designed for white people, such as home ownership loan programs.[199] During the Jim Crow era, white Americans benefited from holding a privileged status with respect to access to education, employment, and opportunities that they "earned" based on their whiteness. The New Deal afforded white recipients social security, unionization, and the chance for generational wealth because of home ownership.[200] By denying both African Americans and Mexicans participation in these programs and access to these resources, Mexicans were further associated with non-whiteness through being in the same legal and social position as Black Americans. Mexicans may have avoided being subject to the same type of racial discrimination as experienced by Black people in the U.S, but what Mexicans specifically experienced was a consistent effort from the U.S. government to portray Mexicans as non-citizens. This in turn evolved into Mexicans being forever associated with foreigners and migration.[201]

The other case study that shows blatantly how racial lines created a narrative of perpetual foreignness is with the case of Japanese Americans during the internment camps in the wake of WWII. Japanese immigrants could not naturalize until the 1952 Immigration and Nationality Act, but under *Wong Kim Ark*, the children of Japanese immigrants were U.S. citizens if they were born in the country. Executive Order 9066 forced anyone of Japanese descent who resided in the United States to be relocated to internment camps, affecting not only Japanese immigrants,

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[198] Natalia Molina, "Deportations in the Urban Landscape," In *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts*, 1st ed., 112–38. (University of California Press, 2014) http://www.jstor.org/stable/10.1525/j.ctt4cgfv5.10. 119.

[199] Molina, "Deportations in the Urban Landscape," 120.

[200] Molina, "Deportations in the Urban Landscape," 120, 121.

[201] Molina, "Placing Mexican Immigration within the Larger Landscape of Race Relations in the United States," 38.

but their U.S.-born children.[202] The Supreme Court determined in *Korematsu v. United States (1944)* that it was within the power of the Executive Branch to force all people of Japanese ancestry to relocate to detention centers, marking the first time the Court had reaffirmed such an imposition on American citizens because of their racial background.[203] By portraying Japanese Americans as un-American on the basis of their Japanese ancestry, the government instilled upon them an identity of perpetual foreignness. Populations with a "perpetually foreign" association are imagined as undeserving of the rights of citizens, regardless of their actual legal status.[204] This reaffirms the idea that non-whiteness and being un-American are interrelated, while reinvigorating the characterization of a true American citizen being white.

[202] Robert Aitken, and Marilyn Aitken, "Japanese American Internment," *Litigation* 37, no. 2 (2011): http://www.jstor.org/stable/23075502 59.
[203] Aitken and Aitken, "Japanese American Internment," 62.
[204] Molina, "Placing Mexican Immigration within the Larger Landscape of Race Relations in the United States," 38.

CHAPTER THREE: LEGALITY

Introduction

Current laws that determine what is considered legal and illegal influence society's perception of innocence and criminality because lawfulness is associated with order, peace, and goodness. However, American history is more than familiar with legal violence. Examples include *Dred Scott v. Sandford (1857)* which denied citizenship to "free" antebellum Black persons, and precipitated the Civil War, or *Elk v Wilkins (1884)*, which 19 years after the Civil War, denied citizenship to Native Americans. Actions of the executive branch too represent an administrative form of legal violence—for example, *Executive Order 9066 (1942)* which resulted in the internment of Japanese Americans. If it is understood how public policy, as developed by Congress, interpreted by the Supreme Court and commanded by the President, has been used to create conditions of inequality and discrimination, then the law that exists in a contemporary context should not be revered as fact, but investigated as a potential source of injustice. This chapter analyzes how the law is not innately moral, using the legal positivist position of legal philosophy to contextualize how legal scholars are thinking of and understanding the relationship between the law, the good, and the bad. It also focuses on how the law is used to construct identity, specifically in the form of forging an "illegal" population within the United States who are denied the same access to legal rights, economic opportunities, and social acceptance on the basis of their legality. Finally, this chapter examines how the U.S government and immigration law enforcement defy conceptions of law and order, contributing to a sense of lawlessness within the current environment of immigration politics.

Legal Philosophy

The law itself has a way of crafting the world order, what we believe in, and what we conceive of as "right." This is applied to immigration law because immigrants are so engrossed in the discourse of illegality and legality, that we as a population form opinions on the rights and humanity of immigrants based on how we perceive they adhere to the law. Individuals such as the president and legal bodies such as the Supreme Court are influenced by science, culture, religion, and any other personal belief systems that by nature of being human, all people are affected by, contrasting with the perspective of the law as neutral. Stated in other terms, the purported objectivity of the law undermines the subjectivity of its creators. Legal philosophy supports the conclusion that the law is not natural, particularly the legal positivist approach which this chapter features.

There are two camps with different understandings of the role of the natural world in law: legal positivism and natural law theory. Legal positivism is the idea that the law is made from social facts and not made from its own merit.[205] No legal positivist argues that the law should be obeyed by subjects or applied by judges because it is the best moral position.[206] Natural law, on the other hand, asserts that laws are reflections of morality. For example, the term "unjust laws are not laws" is a facet of natural law.[207] This belief in the connection between law and morality is not so far-fetched when we consider how the law in its practice and development takes account of morality, inspiring reformers to make amendments in laws that they view as not promoting human rights, respect, dignity, or justice.[208] The origins of morality and the law began in Europe in the 17th and 18th centuries, in which moral principles were understood to be reflected in the

[205] Green and Adams, "Legal Positivism," 1.
[206] Green and Adams, "Legal Positivism," 4.
[207] John Finnis, "Natural Law Theories," In *The Stanford Encyclopedia of Philosophy* (Summer 2025 Edition), edited by Edward N. Zalta & Uri Nodelman (eds.). March 28, 2025. https://plato.stanford.edu/archives/sum2025/entries/natural-law-theories
[208] Tony Honoré, "The Necessary Connection between Law and Morality," *Oxford Journal of Legal Studies* 22, no. 3 (2002): 489–95. http://www.jstor.org/stable/3600656. 494.

legal system.[209] The English position agreed with and expanded upon this association of law and morality, determining that laws against violence were grounded in morality, and that criminal law is derived from the people's conception of moral standards.[210] The United States, which took inspiration from English Common Law, also incorporated morality as one of the guiding influences in their law making.

Yet, despite the connection between law and morality, the law is not innately moral, nor is it naturally a champion of protecting humanity from evil. Natural law positions itself as the moral force against the evils of the world, including lawlessness and tyranny.[211] However, natural law theory fails to acknowledge that despite being imperfect because of their unjust qualities, immoral laws and corrupt legal systems are still real.[212] Immigration legislation undermines the arguments of natural law because it proves how the law itself can be the purveyor of deep inequality and selective exclusion and marginality, and still strong enough to shape public perception, access to civil rights, and in serious instances, the fate of human lives. The law is tasked with preventing unregulated violence by promoting tolerance, if not mutual respect, between nations or within one nation.[213] However, take South African apartheid, or the Third Reich as examples. Both were completely corrupt, unjust systems, but still composed of real laws and legal systems that shaped entire societies despite their immorality.[214] The positivist interpretation of these former systems of governance embraces the idea that even if a law is immoral or cruel, that does not deny the fact that it is still the law. However, positivists agree that

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[209] Raghunadha A. Reddy, "Role of Morality in Law-Making: A Critical Study," *Journal of the Indian Law Institute* 49, no. 2 (2007): 194–211. http://www.jstor.org/stable/43952105. 195.
[210] Reddy, "Role of Morality in Law-Making: A Critical Study," 199.
[211] Finnis, "Natural Law Theories"
[212] Honoré, "The Necessary Connection between Law and Morality," 490.
[213] Honoré, "The Necessary Connection between Law and Morality," 492.
[214] Honoré, "The Necessary Connection between Law and Morality," 490.

social facts do impact the formation of the law, and beliefs about morality are encompassed as a part of that belief system.

This chapter adheres with the legal positivist camp because the United States has a long history of laws and policies that are immoral with respect to how they discriminate on the basis of race, ethnicity, and country of origin. Any law that discriminates on the basis of race, gender or religion produces inequality and injustice, a far stretch from righteousness and goodness. The legal positivist manner of thinking acknowledges that despite the immorality of these past laws, they were still laws with real material effects. For a nation whose foundational principles rest in life, liberty and the pursuit of happiness, laws and their execution within the United States expose contradictions between American values and legal traditions. Using legal philosophy to better understand the immigration legal system allows us to draw connections between how the naturality of the law in general is debated, and which arguments within the philosophical world support the idea that the law is not natural, but a social construct.

When something is described as a social construction, it implies that said thing is not innate.[215] The argument that the law is socially constructed implies that the law is not natural, but created by a society in order to regulate behavior and actions of the population, and ensure the order and maintenance of the society itself. Litowitz argues that scholarship validating the socially constructed nature of the law typically uses categories with legal definitions, such as race, crime, or family and shows that these groupings are socially constructed and subject to bias and prejudice.[216] For example, in *Ozawa* and *Thind*, the outcomes of each case determined the "connotation of being non-White versus that of being White. To be the former meant one was unfit for naturalization, while to be the latter defined one as suited for citizenship."[217]

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[215]Hacking, Ian, "The Social Construction of What?," (Harvard University Press, 1999) https://doi.org/10.2307/j.ctv1bzfp1z. 6.
[216] Litowitz, "The Social Construction of Law: Explanations and Implications," 217.
[217] Haney-López, "White By Law," 41.

Naturalization law shaped whiteness through how it determined whether one was racially eligible for naturalization, leading to cases like *Ozawa* and *Thind* where the Supreme Courts articulated their non-whiteness through rejecting their claim for naturalization. The law controls the possibilities of the social order, and in an immigration context that proves especially difficult for migrants to earn acceptance, equality, and a fair chance at life in the United States.

The law determines who is allowed to immigrate to the United States, who can become a naturalized citizen, who can be detained and how the relationship between immigration and federal and state governments, as well as courts function. The law determines how humans are regulated, and to what extent the U.S. government can rule over non-citizen subjects. This type of power derives from plenary power, in which Congress and the President have complete control over certain areas like immigration policies. This is a result of "authority not from any particular provision of the Constitution, but as inherent in sovereignty" as determined by the Supreme Court in the case of *Chae Chan Ping v. United States (1889)*.[218] In addressing plenary power as inherent to the nation's sovereignty, matters of immigration fall within the scope of Congress, allowing Congress to hold all the power with respect to dictating the conditions for non-citizens in the United States. In the case of *Chae Chan Ping*, the Supreme Court ruled that it was constitutional for Congress to bar the entry of Chinese laborers into the United States. The Supreme Court reaffirmed Congressional powers to hold non-citizens subject to different standards than U.S. citizens.[219] This excess power held by Congress persists in immigration policies of today, in which plenary power allows Congress to subject non-citizens to different standards than would be acceptable towards citizens, drawing on a constructed form of power in order to justify their actions.

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[218] Gabriel J. Chin, "Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power," In *Immigration Law Stories*, 7-29. N.p.: (Foundation Press, 2005) 13-14.

[219] Chin, "Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power," 22.

Even if we can acknowledge the failures of the law in the past to sufficiently respect the autonomy and right to equality that all human beings deserve, many people are unable to imagine any alternative. This is because people obey authority and authorities when they cannot comprehend a possible world beyond what currently exists.[220] In the United States, people accept that the government can regulate and control the behavior of the population in the interest of national security. During times of emergency, the government is empowered to control all activity within the citizenry, regardless of its actual role in maintaining public safety.[221] Despite the strong history of activism and revolutionary spirit in the United States, the population struggles to imagine enacting a drastic change within the government and legal system. It is only when a rupture occurs that exposes the cruelty or failures of the law, that people can begin to imagine other options.[222] People taking to the streets to protest ICE, the realization of how inhumane "law enforcement" can truly be, and a reckoning with how little regard the government has for following the law are all present examples of this rupture occurring. While it is true that the government, whether that is state, local, or federal, has a responsibility to ensure the law is being followed, it is a "disservice to them when federal employees carry out public executions. It is a greater disservice to them when such actions are defined as "law enforcement."[223] Current immigration politics and events represent a case study for how the law as a socially constructed institution reveals itself because people are realizing how wrong the law and law enforcement can be.

So, if we have finally come to understand how the law has failed to protect equality, justice, and freedom for all people in the United States, then we can start to think about how

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[220] Litowitz, "The Social Construction of Law: Explanations and Implications," 223.
[221] Reddy, "Role of Morality in Law-Making: A Critical Study," 204.
[222] Litowitz, "The Social Construction of Law: Explanations and Implications," 225.
[223] Timothy Snyder, "Lies and Lawlessness - by Timothy Snyder," Timothy Snyder | Substack. 2026. https://snyder.substack.com/p/lies-and-lawlessness.

obligated we are to follow "bad laws." If everyone in the United States chose to blindly follow every law that ever existed, then slavery, segregation, and other discriminatory practices would still be the accepted convention. If it were not for people who spoke out against unjust laws, or even rejected and fought back against injustice, then the United States never would have moved forwards. Yet, how can we determine what obligations we have to the law, and what is truly correct- the law, or another institution or individual's belief?

Philosopher Tommie Shelby expands on this idea in his exploration of the "ghetto poor" and the role that unlawful activity plays in survival, asking whether or not this behavior is justified. In Shelby's work, he defines the "ghetto" as having three characteristics: "(1) predominately black, (2) urban neighborhoods, (3) with high concentrations of poverty".[224] He argues that for some individuals, they commit crimes as a result of "material deprivation and institutional racism" and he further explores how criminal activity may be necessary for one's survival, if it is their only way to support themselves financially.[225] His work can be applied to an immigration context because of the similarities between the experiences of those in impoverished communities and immigrants to the United States, who both have a complicated relationship with legality and the law.[226] In some instances, following the law is no longer an option for immigrants who came to the United States out of necessity for their survival, but then lost their legal status and ability to be in the United States legally. For example, from October 2025 to April 2026, the United States has only let in 4,499 refugees, with all except three being white South Africans.[227] For those with different countries of origin, resettling within the United States legally as a refugee is no longer an option. Even refugees who had previously benefited from

[224]Shelby, "Justice, Deviance, and the Dark Ghetto," 134.
[225] Shelby, "Justice, Deviance, and the Dark Ghetto," 136.
[226] Shelby, "Justice, Deviance, and the Dark Ghetto," 126.
[227] Livia Daggett, "99.9% of US refugees since Oct. 2025 came from South Africa." kcra.com. 2026, https://www.kcra.com/article/us-refugees-2026-afrikaner-south-africa/70974816.

Temporary Protected Status (TPS) lost their eligibility to legally work in the United States and are now subject to deportation as a result of changes implemented by the Trump Administration.[228] If former TPS recipients stay in the United States, their legal grounds for residing and working in the United States may be diminished but their reasoning for leaving their country of origin remains the same.

The U.S. legal system is more concerned in making examples of the citizenry when it comes to criminal law that does not account for how poverty influences one's abilities to adhere to the law, making up for lack of compassion in the legal system with a cold focus on technicalities.[229] Americans also are quick to criticize the poor, specifically when they are convicted of crimes, for their responsibility in producing the conditions of their life. The urban poor are cited as not having taken enough '"personal responsibility" for their choices and [to] stop blaming the government or racism for hardships that they have imposed on themselves through self-defeating attitudes and bad conduct."[230] The opposing perspective places the responsibility on the U.S. government. If the government provided sufficient resources, such as social services, employment opportunities, or affordable housing, then poverty would be lessened. What cannot be ignored here, is the influence of race. The composition of the "ghetto poor" includes minorities in low socioeconomic classes, particularly Black Americans. Racial divisions have long been indicators of class and social status in the United States, and while despite a commitment to fulfilling the promise of equal rights for the citizenry, the United States still has a white supremacy problem, exemplified by police brutality that targets Black and brown

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[228] "Temporary Protected Status (TPS): Fact Sheet." *National Immigration Forum,* 2026, https://forumtogether.org/article/temporary-protected-status-fact-sheet/.
[229] Thane Rosenbaum, "Symposium Introduction: The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right," 4 Cardozo Pub. L. Pol'y & Ethics J. 3. 2006, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1487&context=faculty_scholarship, 3.
[230] Shelby, "Justice, Deviance, and the Dark Ghetto," 126.

bodies, and attacks on curriculums that includes slavery and Indigenous displacement.[231] So while personal responsibility cannot be disregarded entirely, attempting to compare the experiences of people marked by centuries of racial segregation through their association with criminality is a logical fallacy.

For both undocumented immigrants and inhabitants of the "ghetto poor," their lives are molded by social structures they had no control over.[232] While this is not to say the people do not have agency over their choice or control over the development of their lives, it is true that where, how, and when one is born materially affects the type of life that an individual has. However, the mere luck of being born in a certain family or in a certain place can greatly alter the opportunities and resources one has access to. The popular response to criminal activity is that the person responsible for such behavior is completely at fault, with no capacity for a nuanced perspective that could understand why this criminal activity occurred in the first place. However, from Shelby's analysis, when people living in the "ghetto" commit crimes, it comes from "conditions of material deprivation and institutional racism" that have led them to criminal activity as a substitute for something lacking in their lives.[233]

The stigma behind criminal activity prevents popular perception from empathizing with the criminal, particularly for subjects whose race already carries a conflation with criminality. In the legal positivist perspective, the law is understood to not be derived from the natural world order, and instead is constructed by specific structures of governance. In adopting a positivist perspective, we can better understand how the logic of not adhering to the law derives from facing conditions of poverty, vulnerability, and lack of access to necessary services and resources

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[231] Shelby "Justice, Deviance, and the Dark Ghetto" 134; Terrance Sullivan,. "Human Rights Crisis in the U.S.: White Supremacy's Comeback Tour," *Amnesty International*, 2025, https://www.amnestyusa.org/blog/human-rights-crisis-in-the-u-s-white-supremacys-comeback-tour/.

[232] Shelby, "Justice, Deviance, and the Dark Ghetto," 130.

[233] Shelby, "Justice, Deviance, and the Dark Ghetto," 136.

that the existing structures of government could not account for. Criminal activity manifests from a desperation for survival. While the law exists for a reason, it is also constructed to serve a purpose that may in some cases neglect the darker realities faced by members of the population whose necessity for survival positions them with no alternative but to transgress the law.

Part of the social contract is that citizens will allow the government to dictate certain aspects of their way of life in exchange for security and protection of their rights. One component of this is the idea of reciprocity. Since states provide the population with certain benefits, the population is tasked with completing certain duties, either as a result of consent to them or because it would be unfair to the collective to not perform civic duties.[234] Part of the legal obligation argument is that, being part of a relationship like that of citizen and government creates responsibilities that both sides must fulfill.[235] Even if being part of this relationship is not a choice, being a member of this relationship imbues a sense of responsibility and obligation, even if membership is not chosen.[236] The requirements of these institutions must be just, otherwise reciprocity is not expected towards an unjust institution.[237] The role of non-citizens with regard to how much they owe the government of the nation they reside in is subject to debate, however, considering that non-citizens are held responsible for crimes committed in the United States, and are subject to U.S. immigration law, non-citizens are still responsible for following and upholding these laws in the United States. There are a variety of forms of status for non-citizens, but they share in being subject to and responsible for following U.S. laws.

In the context of crime and the "ghetto poor," it cannot be reasonably expected that a population who have been failed by the government would fulfill the obligations created for

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[234] Renzo and Green, "Legal Obligation and Authority," 1.
[235] Renzo and Green, "Legal Obligation and Authority," 12.
[236] Renzo and Green, "Legal Obligation and Authority," 12.
[237] Shelby, “Justice, Deviance, and the Dark Ghetto,” 145.

them by the ruling class.[238] To ask someone experiencing abject poverty to accept an exploitative job or to respect harsh laws is unrealistic, and asks reciprocity of a population who does not receive the full benefits of their citizenship. Shelby argues that while moral criticisms are important for holding oppressed groups accountable and encouraging them to form political alliances, not all criticism is constructive or even legitimate.[239] The lack of justice and opportunity in the environments inhabited by the urban poor interfere with their ability to both benefit from and reciprocate the responsibilities of citizenship. This creates a need to better understand their lived experiences before criticisms can be made about their ability to abide by the law. Just as one's lived experiences support understanding their relationship to criminality, social conditions also assist in understanding the extent to which a reciprocal relationship between an individual and the law can exist.

In an immigration context, the experience of the "ghetto poor" can be compared to that of undocumented immigrants. Shelby argues for the importance of understanding that in some instances, the law cannot be followed because certain populations resort to criminal activity for their survival, which is a result of their state and federal governments ignoring their needs. For undocumented immigrants, although their presence in the United States is unlawful, their reasoning for immigration could be as varied as the opportunity for better education and economic status, or that they fled persecution in their country of origin. To accept the conditions of being an illicit population in the United States, undocumented immigrants are operating under the understanding that regardless of the difficulties of life in the United States, the alternative would be harder. Like the urban poor, illegality in the form of unlawful status is the only option for immigrants who turned to the United States when home was not a possibility.

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[238] Shelby, "Justice, Deviance, and the Dark Ghetto," 151.
[239] Shelby, "Justice, Deviance, and the Dark Ghetto," 160.

One thing of note is that being unlawful is not equivalent to having broken the law. While entry without inspection is a crime, immigrants who overstay visas are subject to deportation, but did not technically commit a crime. While both instances constitute deportable offences, unlawful status does not always result from committing a crime, and may arise in response to a lack of pathways towards adjusting one's legal status. Even following the official path to immigration may pose financial hardships or time constraints that make doing it "the right way" a non-option for certain immigrant populations. Although as non-citizens the reciprocal relationship between the urban poor and the government cannot be compared exactly to that plight of undocumented immigrants, there are some expectations of reciprocity between all human beings and any state that abides by a doctrine of human rights. Foreign nationals, as covered in Chapter One, do have a claim to protections from the state. It is unreasonable to blame undocumented immigrants for their lack of legal status, when there is no clear pathway for those who entered without inspection to ever change their legal status. We can make a moral judgement on breaking the law, but we cannot ignore that Congress has the ability to pass immigration reforms that would aid in providing pathways to citizenship for undocumented immigrants.[240] New immigration legislation would ameliorate perceived criticisms of undocumented immigrants by conferring a legitimate legal identity on to them which allows the state to enforce regulations of their labor and taxes, the central criticism towards the undocumented presence in the United States.

Making "Illegals"

If we can understand that law is constructed, then we can begin to explore how the idea of people being "illegal" is also something created and assigned to them. When the literature refers to something as a social construction, it typically means that a practice or institution is not

[240] Congress has done this before, see the 1986 Immigration Reform and Control Act.

innate.[241] The perception of migrants as "illegal" is both a social and legal construction. As argued by Litowitz, personal identity is also intertwined with law, and people define themselves using legal language, even if they are unaware of it. Citizenship, marital status, employment, housing, and property are all connected to legality in some form.[242] The law brings a specific social arrangement into being, and as a result is also interconnected to other forms of belief and relationship-making, such as religion and ideology.[243] This section seeks to understand who is imagined as being an "illegal" person, how this is determined in the contemporary as well as in the past, and finally how the federal government (the President, Congress, and the court system) have been influential in the formation of illegality as a category of identification.

In the simplest of terms, "legal" is synonymous with allowed, valid, legitimate, or other words that signify order and correctness. "Illegal" has much darker associations, such as criminal, unauthorized, or forbidden. While people may follow the law for different reasons, by agreeing to participate in the social practice of lawfulness, they are responsible for it through their acceptance.[244] This causes people to feel a sense of responsibility for the law and the world order it has constructed, understanding themselves to be participants in the shaping of the world, instead of indifferent to it.[245] The opposing viewpoint to this would be the foundationalist perspective, which argues that humanity happened upon a world order designed by God, human nature, or other greater forces.[246] There are no "basic" beliefs that create states, as each nation is built by people who are individually influenced by culture, politics, religion, or other components.

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[241] Hacking, "The Social Construction of What?" 6.
[242] Litowitz, "The Social Construction of Law: Explanations and Implications," 219.
[243] Litowitz, "The Social Construction of Law: Explanations and Implications," 220.
[244] Litowitz, "The Social Construction of Law: Explanations and Implications," 223.
[245] Litowitz, "The Social Construction of Law: Explanations and Implications," 230.
[246] Litowitz, "The Social Construction of Law: Explanations and Implications," 230.

In an immigration context, people are divided into two categories: “illegal” and “legal.” More often than not, the term “illegal” is used as a negative descriptor of immigrants who are undocumented or do not have official status in the United States. Anti-immigrant sentiment stems from building a government or "statecraft" in which citizens who believe themselves to be the true inhabitants of the state embrace the practice of re-enforcing boundaries and positioning them as fixed borders between citizen and non-citizen, or us versus them.[247] However, legal constructs cannot be inferred the way hair color could be, through an external gaze. And yet, assumptions about illegality are made on the basis of physical appearance, to the point where some people believe it is possible to tell someone’s legal status because of markers on their body. Even the Supreme Court reaffirmed in September 2025, the use of racial profiling for ICE agents, allowing them to use “factors like “apparent race or ethnicity,” language, accent, or workplace” to target and apprehend potential immigrant subjects.[248]

“Liminal legality” is a concept created by Evelyn Nakano Glenn to describe the space many undocumented students inhabit of having access to some legal protections, while ultimately not having a secure legal status in the United States.[249] Everyday practices, struggles, and experiences produce the citizenship status that we think of as fixed, when in actuality it is fluid.[250] The situation experienced by undocumented students makes evident how citizenship is created and challenged on a variety of fronts, both federal and local.[251] K-12 public education for undocumented students is legally protected post *Plyer v. Doe (1982)*, treating all students equally regardless of their legal status. Some universities have also extended in-state tuition to undocumented students, which permits them to receive the same financial benefits as citizens,

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[247] Doty, “The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration,” 185
[248] “Racial Profiling Rampant After Supreme Court Ruling.”
[249] Evelyn Nakano Glenn, “Constructing Citizenship: Exclusion, Subordination, and Resistance,” *American Sociological Review* 76, no. 1 (2011): 1–24. http://www.jstor.org/stable/25782178, 12.
[250] Glenn, “Constructing Citizenship: Exclusion, Subordination, and Resistance,” 1.
[251] Glenn, “Constructing Citizenship: Exclusion, Subordination, and Resistance,” 3.

lawful immigrants, or permanent residents. However, post-graduation undocumented students, who are not a part of the DACA program which allows undocumented people to live and work in the United States if they meet certain requirements, face the issue of not being legally authorized to work in the United States. The "liminal legality" position constrains undocumented students who are allowed to benefit from some of the same resources given to U.S. citizens and those with legal status, but are denied from other components of the student experience. The "liminal legality" of DACA recipients is further complicated by the knowledge that in committing certain crimes or leaving the United States without adequate permissions, one can lose their DACA status.

Different populations have been categorized as "illegal" over time, and while the targets have changed, the United States federal government perpetuates an idea that immigrants bring crime, disease and disorder to the country, while also siphoning away resources that more "deserving" U.S. citizens are then deprived of. In the late 1880s, anti-immigrant sentiment from U.S. citizens sounded like "'these immigrants come here, work for substandard wages, and then proceed to take over everything"; "we should treat the immigrant just like the Indians and exterminate them"; "because they have bad moral habits, low grades of development, and are filthy, the immigrants should be completely removed"; "immigrants are hard to assimilate; why don't they speak English?'" [252] In all of these examples, the author substituted the word "Chinese" for "immigrant" in order to express how similar anti-immigrant rhetoric is in the present as it was in the 1880s. Although the targeted population is different, prejudice against immigrants is a consistent tradition within the United States. The United States relies on immigrant labor, however, when the United States is struck by economic issues, immigrants

[252] Kathryn K. Imahara, "We Are the 'Illegal Immigrants,'" *Asian Pacific American Law Journal* 2, no. 1 (1994): 107–10. http://www.jstor.org/stable/45456725, 107.

become the scapegoat, blamed by politicians and non-immigrant populations for the United States' financial difficulties.[253] By adding the layer of illegality, immigrants are a vulnerable population made easily targetable because of their lack of legal status. With unlawful status being heavily associated with criminality, it is far simpler for politicians to shift the blame towards immigrants for the U.S's economic failures, without having to acknowledge their own responsibility in creating poor policies or not taking sufficient action to address current issues.

Additionally, the experience of Japanese Americans during the 1940s is another example of "alien making" that resembles the experiences of Mexicans and other Latin American populations today. In 1942, 120,000 Japanese Americans were incarcerated in internment camps, with around 2/3rds of them being U.S. citizens.[254] Japanese Americans at Tule Lake, who had been born in the United States, renounced their citizenship for a myriad of reasons including, avoiding resettlement, avoiding the draft, or fear that going to Japan would be the only way to escape discrimination from white Americans.[255] As a result of renouncing their citizenship, former U.S. citizens were made into aliens.[256] Japanese people were also barred from applying for naturalization, meaning that once they requested to renounce their citizenship they had no means of ever gaining it back.[257] In this case, the U.S. government facilitated the creation of aliens by allowing U.S. born people to give up their citizenship without any pathway to regain it, designating them foreign in their own place of birth.

One manner of "making illegals" stems from the construction of the border between two nation states, as well as the legislation made to enforce that border. Immigration law assists in

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[253] Imahara, "We Are the 'Illegal Immigrants,'" 109

[254] Glenn, "Constructing Citizenship: Exclusion, Subordination, and Resistance," 6.

[255] Mae M. Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," In *Impossible Subjects: Illegal Aliens and the Making of Modern America - Updated Edition*, REV-Revised, (Princeton University Press, 2004) http://www.jstor.org/stable/j.ctt5hhr9r.16. 190.

[256] Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," 191.; Those of Japanese ancestry were racially barred from naturalization through the 1790 Naturalization Act.

[257] Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," 192; Ozawa v. United States (1922) reaffirmed that Japanese people could not naturalize.

reproducing ideas about what and who exists beyond the imagined safety of the United States border, by using legislation as a way to determine who can be incorporated into the population and who is a potential danger. Immigration that evades legal documentation or inspection challenges understanding of the domestic sphere, and what the federal government has the power to control or dictate. The fact of "illegal" bodies inhabiting the United States threatens the presumed legality of all the people who are within the United States, challenging the assumed sanctity of the U.S's geographical borders containing the citizenry, and keeping out the non-citizens.[258] The legitimacy of the sovereign state hinges on their ability to regulate their domestic population, and when this balance is challenged, it disrupts the validity of the border by questioning if it is a meaningful boundary.[259]

Ngai argues that the immigration legislation of the 1920s yielded the creation of illegal immigration by reaffirming the U.S-Mexico border in new and more restrictive ways.[260] The Border Patrol can be credited with producing the conditions of racism that led to the formation of Mexicans as illegal aliens, an idea that persists in the collective imagination of U.S. citizens when conceptualizing immigrants and immigration. The Border Patrol interrogated and deported Mexicans, regardless of the fact that in most cases their actual legal status allowed them to work in the United States on a temporary basis, and that they were considered part of the Western Hemisphere and not bound to the numerical immigration quotas that Europeans and Asians were held to.[261] In 1952, Congress permitted the Border Patrol to arrest immigrants without a warrant if they were considered here unlawfully. The justification for this practice operated under the belief that it was not always possible to apprehend immigrants at the physical border, and so it

[258] Doty, "The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration," 176.
[259] Doty, "The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration," 177.
[260] Ngai "Deportation Policy and the Making and Unmaking of Illegal Aliens," 67.
[261] Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," 70, 71.

was necessary to continue pursuing them within the United States: "'Entry is a continuing offense and is not completed until the alien . . . reaches his interior destination'"; "[The Border Patrol] had defined its jurisdiction not just at the border but far into the nation's interior—easily one or two hundred miles but, theoretically, the entire interior."[262] The heightened visibility of the national borders between the United States and Mexico disguised the reality that there would inevitably be some merging of the lines between interior and exterior, to the extent that the Border Patrol had jurisdiction in patrolling areas under the name of border security.

A contemporary example is the use of expedited removal to deport non-citizens without giving them an immigration hearing, something that previously was only used at the border but now is used internally to target long-time inhabitants of the United States.[263] Patrolling the border was designed to survey a specific part of the United States, however that interest now extends its reach well beyond one geographic area. The collateral harm caused by the Border Patrol and ICE reveal the growth of the border in how it is no longer solely a physical space, but also how someone's physical appearance can serve as a border between them and being perceived as a U.S. citizen. This leads to the question of whether or not it is even possible to tell if someone is an unlawful immigrant based on an external perspective. Yet, does it even matter for immigration law enforcement if it is possible to determine one's legal status by their outward appearance? Or, perhaps by targeting those they perceive to be as undesirable members of the population, immigration law enforcement pursues a project of "sanitizing" the composition of the American population. Deportation laws, and the practice of apprehending immigrants based on their perceived illegality developed a new vocabulary for describing immigration politics. Deportation proceedings could be "just and unjust" and new language emerged to describe the merit of

[262] Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," 56.
[263] Jeanne Batalova, Muzaffar Chishti, and Kathleen Bush,. "Article: Trump Administration's Expansion of Fas..," *Migration Policy Institute*, 2025, https://www.migrationpolicy.org/article/trump-expedited-removal.

unlawful immigration, and the extent to which these immigrants deserved access to inhabiting the United States.[264]

The internal border was regulated not only by the Border Patrol, but also by Congress and the U.S. President. In 1942, Executive Order 9066 forced all persons considered a threat to national security to be contained in internment camps, resulting in the incarceration of around 120,000 Japanese Americans, including U.S. citizens. Japanese people interned in camps were subjected to an "Application for Leave Clearance" which was essentially a loyalty questionnaire that determined whether Japanese Americans were assimilable to American life.[265] The questionnaire was excessive in its investigation into the inner lives of Japanese Americans, focusing on culture, religion, and beliefs in order to differentiate between the loyal and those perceived as disloyal.[266] The question that delved into loyalty to the United States in the most explicit way was question 28, proposed to all adult internees: "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization?"[267] The implications of this question specifically targeted Issei's, or first-generation Japanese-Americans who were originally from Japan, because they could not be disloyal to the United States or Japan. If they said "yes" they would have been rendered stateless because they would lose their Japanese citizenship, while being ineligible for U.S. citizenship.

Loyalty becomes synonymous with legality when considering the position the U.S. government put Japanese Americans in. Japanese Americans were treated in ways that

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[264] Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," 57.
[265] Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," 181, 182.
[266] Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," 183.
[267] Ngai, "The World War II Internment of Japanese Americans and the Citizenship Renunciation Cases," 183.

differentiated enormously from Italian and German Americans, countries the United States was also in conflict with, showing how citizenship status was not enough to protect those of Japanese ethnicity from being "made" alien, or even apparitional. The experience of Japanese Americans shows how illegality is something that can be constructed, at times without regard to the actual law or legal status. If U.S. citizens could be detained without due process or justification aside from the United States' relationship to Japan during World War II, then what protections did citizenship even entail for the citizenry, or perhaps just the non-white citizenry? The homogenization of all Japanese people as being a threat to national security also supports the claim that whiteness and citizenship are synonymous, and that the legacy of whiteness as a prerequisite for citizenship never fully left the political sphere. It also bridges the past with the present, forcing us to consider that if this is what the U.S. government will allow its citizenry to experience, then the current immigrant populations trapped in detention centers have much bleaker claims to due process and personal freedoms.

As exemplified by actions taken by the Border Patrol, ICE, and the President with regard to the power of Executive Order, each institution extends the scope of their power beyond what was originally imagined to be the extent of their ability. These institutions which represent "the law" are influenced by the ideologies that they represent, and the types of attitudes they have toward immigrant populations. As ideology cannot be separated from law making, one of the most momentous ideological impacts is that of racism within the law. Using the earlier example of the contemporary treatment of white South Africans classified as refugees in comparison with the experiences of Haitian or Venezuelan refugees, the second Trump administration makes their opinions on race and its correlation to access to refugee status apparent. People are made "illegal" when they are perceived as undesirable, and desirability is directly affected by race. The

U.S. government decides to “step in” to protect order and the composition of the citizenry when its leaders feel their authority is unsettled by the presence of new, "other" immigrants.

The U.S. government has an interest in the personal lives of its population when there is a possibility that the status quo is threatened. While the U.S. Border Patrol is currently tasked with securing the borders between the United States and their neighboring countries, ICE is responsible for enforcing immigration law within the U.S. borders. ICE infiltrates the personal lives of people residing in the United States through asking neighbors and community members to report people who are undocumented, even if they have no evidence the suspected individual lacks legal standing in the United States.[268] Yet, Medevoi argues against using the body as a marker of unlawfulness: “just as easily the body can be expected to elide or deflect that inner truth…Sometimes an apparent danger proves to be a false alarm.”[269] The possibility that one’s body could reveal their legal status feeds into the idea that there is a category of identity of “illegal” people. Anyone could overstay their visa and become “illegal,” and yet the image of illegality is never the international student from London, but instead the Mexican migrant worker. Canada and the United States share a border just as Mexico and the United States does, but the Canada-United States border doesn’t appear as a quasi-war zone. The face of illegality has changed- evolving from Chinese to Japanese to Mexican to Haitian. The idea that illegality is visible persists, and the consistent effort to assign illegality a physical definition aids in the construction of people as "illegals" not human beings.

Lawlessness

[268] Flores and Schachter, “Who Are the ‘Illegals’? The Social Construction of Illegality in the United States,” 857.
[269] Medovoi, “Introduction: Ensoulment: A Strategy of Racial Power,” 10.

Lawlessness plays an integral part in the story of the United States, however, its implications are often underestimated.[270] While it would be simple to blame the current events in immigration politics—ICE raids, senseless deaths because of law enforcement, and mass protests—as a result of current political leaders, policy, and popular ideological beliefs made popular by both the media and politicians, lawlessness grows through all sectors of the government. The law is presented as an overarching force that everyone in a nation is subject to, for example in 2014 then President Barack Obama stated that "Even as we are a nation of immigrants, we're also a nation of laws" linking the existing issues within immigration to the United States with unlawfulness.[271] Yet, the use of law enforcement practices that encroach upon the safety, privacy, and civility of a community or individual are evidence of how the U.S. federal government wields power with regard to immigration law enforcement without necessity to follow regulations because they are also in charge of designing the rules they abide by. The type of law enforcement that is used at the border is distinct from the typical interaction between the law and the citizenry, however, by blurring the lines between domestic and foreign, external and internal, the practice of border policing transforms from geographic surveillance at the border into the government's vested interest into the lives of the people residing in the United States.

While the United States is meant to uphold due process for everyone, non-citizens are subject to the possibility of "unlawful imprisonment (now euphemistically called "detention," regardless of duration) of domestic persons and aliens."[272] The judicial system is also implicated in the production of lawlessness through preventing lawsuits that challenge the government,

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[270] Ralph Nader, "Land of the Lawless: How power in America has turned the rule of law into a mere myth," https://hlrecord.org. 2021, https://hlrecord.org/land-of-the-lawless-how-power-in-america-has-turned-the-rule-of-law-into-a-mere-myth/.
[271] "Remarks by the President in Address to the Nation on Immigration," *Obama White House Archives*. 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-President-address-nation-immigration.
[272] Nader, "Land of the Lawless: How power in America has turned the rule of law into a mere myth,"

investigations into abuses faced in detention centers or in ICE raids, or prohibiting legal challenges that they deem too "political" to be decided in the court, as opposed to between the President and Congress.[273]

Lawlessness, or abuse of the law by its stewards, is also present in the incarceration system, and today incarceration draws too many comparisons towards the treatment experienced by detained migrants. A lack of justice and access to legal services has long been an issue for incarcerated individuals. 75% of the inmates in New York City jails are awaiting trial, and have not even been convicted of any crime.[274] Being a victim of bureaucratic failures should not amount to prison time. And yet, the justice system traps people in jail cells without being able to say clearly what crime was even committed. For example, immigrants awaiting trial for immigration hearings are not eligible to post bond if they were detained when entering the United States, if they have already been deported, or if they have a dual order for deportation.[275] For migrants held in detention centers, freedom drifts further and further away with each day spent in a detention center, away from family, community, and familiarity. Like those who wait for a trial date with no end in sight, detained immigrants are imprisoned in detention centers without knowing if their time in the United States will be abruptly terminated or not. Even immigrants who are in the process of adjusting their legal status are at risk of detainment, regardless of the fact that they, like many New York City inmates, are just waiting for the federal immigration system to progress on their case.

Recently, Liam Conejo Ramos and his father were detained in Minneapolis and sent to a detention center in Texas. Aside from being only five years old, Liam and his family were

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[273] Nader, "Land of the Lawless: How power in America has turned the rule of law into a mere myth,"

[274] Nader, "Land of the Lawless: How power in America has turned the rule of law into a mere myth,"

[275] "Understanding Immigration Bonds What is an immigration bond? How much is a bond? How do I ask for a bond? Do I need a lawyer (at." n.d. The Advocates for Human Rights. Accessed April 25, 2026. https://www.theadvocatesforhumanrights.org/Res/Understanding%20Immigration%20Bonds-English.pdf.

awaiting progress on their request for asylum in the United States when they were detained, according to the family's lawyer Marc Prokosch.[276] While the Department of Homeland Security contradicts the claim that the family were asylum seekers, the truth remains that a five year old child was detained by ICE, when a possibility exists that he was making progress towards adjusting his legal status and had an ongoing asylum case. Children should never be detained and separated from members of their family, like Ramos who was separated from his mother and older brother when he was apprehended with his father, regardless of their legal status, as there is no world where we can justify harming the most vulnerable members of society in the name of maintaining order. Still, even if the argument persists that children will pay the consequences of their parents' action, the fact of the Ramos family applying for asylum should have been indicative of their adherence to the United States' legal system and sufficient protection from the whims of ICE.

The experience of Liam Ramos and his family is evidence of how "doing it the right way" was never the true reasoning behind immigration regulation, as even people who attempt to follow the law are treated like criminals by the U.S. government. The U.S. government's willingness to weaponize ICE to target undocumented immigration or to use Executive Orders to bypass Congress and change immigration policies reveals more than incompetence. It evidences complacency and a deliberate manipulation of governmental power with the intent to target immigrants and limit immigration. Despite the use of current events as a way to reflect on immigration politics in the present moment, it is also the goal of this thesis to demonstrate how the legal past within the United States is not innocent or free of the same issues that persist today. In fact, what this research has so far revealed is how the United States has a fundamental issue

[276] Holly Yan, and Priscilla Alvarez. "A preschooler was taken away by ICE, but officials say they had no choice. Here's what we know." *CNN*, 2026, https://www.cnn.com/2026/01/23/us/liam-conejo-ramos-ice-wwk.

with discrimination in the immigration system, something that has never been truly ameliorated. The echoes of the American legacy of racism, discrimination, and legal violence are roaring louder than ever.

Conclusion

The Supreme Court has long turned a blind eye to the traditions set by decades of judges before them, ignoring precedent and permitting blatant lawlessness in their rulings.[277] Allowing ICE to racially profile those they perceive to be non-citizens undermines previous efforts to diffuse the racism in law enforcement, and yet Brett Kavanaugh and the five other judges who concurred with him quietly opened the doors for further racism in immigration regulation. The federal government manipulates the expansion of immigration law enforcement and the judicial system to serve in their own anti-immigrant interests, enforcing the law when it aligns with their interest and neglecting it when it does not. Agencies have been undermined, journalists and university publications have been threatened, and most strikingly, plainclothes officers kidnapping people from off the street is considered a part of daily American life.[278] In 2026, "[Trump] is using ICE, nominally a border authority, to enforce his own whims on an American state of his choosing."[279] Even in airports, ICE agents joined TSA agents on the job, generating criticisms over the purpose of ICE in supporting airport security: "Trump's secret police are now stationed at airport checkpoints," said NAACP national president Derrick Johnson, "They are inadequately trained, armed, and instructed to profile people based on race and accent. What could possibly go wrong?"[280] In prioritizing immigration law enforcement over paying TSA

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[277] "Second Trump Administration Marked by Relentless, Direct Attacks on Rule of Law, Constitutional Rights | ACS." *American Constitution Society,* 2026, https://www.acslaw.org/press_release/second-trump-administration-marked-by-relentless-direct-attacks-on-rule-of-law-constitutional-rights/.

[278] Snyder, "Lies and Lawlessness - by Timothy Snyder."

[279] Snyder, "Lies and Lawlessness - by Timothy Snyder."

[280] George Chidi, "TSA lines stretch for hours as Trump deploys ICE agents to US airports." *The Guardian,* 2026, https://www.theguardian.com/us-news/2026/mar/23/us-airports-latest-tsa-ice.

agents, different federal agencies suffer while being forced to participate in the surveillance and regulation of possible immigrants. The federal government's ability to initiate the militarization of immigration regulation should not be the norm, yet it is the current state of American politics. While it is true that the federal government, in collaboration with local and state authorities, has a responsibility to keep the population safe, it is justifying senseless killings as part of law enforcement misrepresents the role of the government, and fails to hold them accountable for harm caused in the name of national security.[281]

[281] Snyder, “Lies and Lawlessness - by Timothy Snyder.”

CHAPTER FOUR: BIRTHRIGHT CITIZENSHIP

Introduction

This chapter focuses on the pre-14th Amendment practice of birthright citizenship in the United States, including who citizenship by birth applied to in a pre-14th Amendment context, and also the role of the 14th Amendment in restructuring access to citizenship by opening up birthright citizenship to a new demographic of the population and their lineage. I show how the current argument for taking away birthright citizenship for the children of undocumented immigrants is not new, but has been paramount to the restrictionist argument against birthright citizenship. I argue that birthright citizenship is a necessary function of U.S. citizenship because without it, the children of non-citizens, particularly non-white populations, face an increase in vulnerability towards racial profiling and restrictive processes of becoming citizens. The U.S. federal government as well as state politicians with more anti-immigrant beliefs facilitate this vulnerability through using federal and state policies to target the children of non-citizens. Birthright citizenship is in many ways the last defense against immigration policies that restrict access to legal status and citizenship because of country of origin or ethnicity. The intent of birthright citizenship is to ensure that equality, one of the most integral tenets of American values, is applicable to all people born in the United States, irrespective of their parents' backgrounds.

Origins of Birthright Citizenship in the United States

Before the 14th Amendment, the United States' practice of birthright citizenship stemmed from English Common Law. The principle of territorial birthright citizenship derives from a 1608 case in England called *Calvin's Case*.[282] This case asserted that Robert Calvin, who was

[282] Michael Robert W Houston, "Birthright Citizenship in the United Kingdom and the United States," 33 Vanderbilt Law Review 693. 2021. https://scholarship.law.vanderbilt.edu/vjtl/vol33/iss3/5.

born in Scotland while it was part of the Crown of England's rule, was an English subject and not an alien.[283] Under English Common Law, the only times in which birth in English territory did not warrant birthright citizenship were if an enemy of the Crown had a child in English territory, or if a minister or consul had a child in the Crown's land.[284] In the United States, before the passage of the 14th Amendment territorial birthright citizenship was largely accepted, except for instances in which a "child's parents are foreign ambassadors or diplomats…and second, where a child is born of alien enemies in an area of the territory under hostile occupation".[285] Even the Supreme Court reaffirmed that all persons born in the United States were United States citizens, acknowledging the common law conception of *jus soli* citizenship even before the 14th Amendment.[286]

Birthright citizenship, however, did not always apply to everyone. In 1857 the *Dred Scott v. Sandford* decision denied citizenship to any person of African descent, whether they be enslaved or freed, stating that they were not entitled to any protections from the U.S. government. Some abolitionists argued that regardless of their African descent, Black Americans born in the United States were citizens by nature of their birth, even if their parents could not apply for naturalization or adjust their non-citizen status.[287] In 1862, Edward Bates, one of President Lincoln's Attorney Generals stated, "As far as I know, Mr. Secretary, you and I have no better title to the citizenship which we enjoy than ―the accident of birth—the fact that we happened to be born in the United States", speaking to the fact that if white Americans could count on birthright citizenship, then it was clearly discriminatory that specific groups could be denied this function that was a universal attribute of the formation of citizenship.[288] The

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[283] Houston, "Birthright Citizenship in the United Kingdom and the United States," 699.
[284] Houston, "Birthright Citizenship in the United Kingdom and the United States," 700.
[285] Houston, "Birthright Citizenship in the United Kingdom and the United States," 706.
[286] Houston, "Birthright Citizenship in the United Kingdom and the United States," 707.
[287] Epps, "The Citizenship Clause," 375.
[288] 'Epps, "The Citizenship Clause," 377, 378.

ratification of the 14th Amendment in 1868 that African Americans and those of African descent were eligible for citizenship. After the Civil War, the 14th Amendment was enacted to ensure that African Americans had access to the same rights as white citizens, rectifying the decision made in *Dred Scott* that had denied citizenship to those of African descent.[289] Indigenous Americans were only able to become citizens in the Snyder Act of 1924.

With respect to immigrants from other countries, there is limited information on the pre-14th Amendment experiences of non-European immigrants. Yet, it can be assumed that given how *United States v. Wong Kim Ark (1898)* went all the way to the Supreme Court to answer the question of who birthright citizenship applied to in terms of race and ethnicity, the children of non-white immigrants were likely not enjoying birthright citizenship before *Wong Kim Ark*, and especially not before the 14th Amendment. *United States v. Wong Kim Ark* formally established that anyone born on United States soil was a citizen by nature of their birth, regardless of the legal status of their parents.[290] Wong Kim Ark was born in the United States to parents originally from China, but argued that by nature of his birth in the United States, he was entitled to birthright citizenship. The U.S. government barred Kim Ark from re-entering the United States after he made a visit to China in 1890, due to the Chinese Exclusion Act and sparking his case's ascent to the Supreme Court. In the end, the Supreme Court sided with Kim Ark in a 6-2 decision that an act passed by Congress could not override the 14th Amendment written into the Constitution, and so as a natural born citizen of the United States, he could not be denied re-entrance.[291]

One of the arguments in favor of Kim Ark was the perspective that the perceived allegiance of his parents to the Chinese emperor was irrelevant to his personal claim to birthright

[289] Khan, Laila "The Origins of Birthright Citizenship in the United States, Explained" americanimmigrationcouncil.org. October 14th, 2024. https://www.americanimmigrationcouncil.org/blog/origins-birthright-citizenship-united-states-explained/
[290] Khan, "The Origins of Birthright Citizenship in the United States, Explained"
[291] Khan, "The Origins of Birthright Citizenship in the United States, Explained"

citizenship. Denying Kim Ark citizenship because of the possibility that his Chinese-born parents felt loyalty to their country of origin would present a clear double standard between the treatment of those of Chinese ethnicity and those with European ancestry. In contrast, the potential of allowing an ethnically Chinese person to have birthright citizenship complicated the possibility of birthright citizenship for all people of Asian descent.[292] A critique against permitting Wong Kim Ark and people of Asian descent to have U.S. citizenship through birth was the conception of the United States as a nation only belonging to some individuals, mainly white immigrants and their descendants. The United States was interpreted as being only for "the original inhabitants of the United States (ignoring Native Americans and slaves) and their descendants" in a briefing from the Solicitor General, Holmes Conrad, before the United States Supreme Court.[293]

The dissenting argument in the Wong Kim Ark case affirmed the role of Congress in determining eligibility for citizenship on the basis of race.[294] The 1790 Naturalization Act barred Chinese individuals from naturalization, while the Chinese Exclusion Act of 1882 prevented Chinese laborers from immigrating to the United States.[295] Since the Chinese could not naturalize, those against Kim Ark's claim to citizenship argued that being born in the United States did not make one an American, when one's parents could never demonstrate allegiance to the United States through naturalization. However, those in support of Kim Ark argued that Congress was only responsible for determining how citizenship could be acquired in terms of naturalization, and not who could obtain it through birth.[296] This is a crucial fact because the Supreme Court clearly outlined the powers of Congress with respect to citizenship law, and in a

[292] NACKENOFF and NOVKOV. "Wong Kim Ark v. United States." 103
[293] NACKENOFF and NOVKOV. "Wong Kim Ark v. United States." 107
[294] NACKENOFF and NOVKOV. "Wong Kim Ark v. United States." 124
[295] "Edward Bing Kan: The First Chinese-American Naturalized after Repeal of Chinese Exclusion."
[296] NACKENOFF and NOVKOV. "Wong Kim Ark v. United States." 112

contemporary context when birthright citizenship for the children of the undocumented is under attack, *Wong Kim Ark* shows that the precedent set by the Supreme Court was that Congress could not attempt to make changes to the comprehensive application of birthright citizenship.

Through comparing the percentage of immigrants in the United States in the 1860s and today, it appears that the percentage of the foreign-born population then was not so contrasting from our current immigration demographic. Immigration to the United States has not been consistently upwards or downwards, with an increase between 1850 and 1930, followed by dipping from 1930 to 1970, and then finally rising upwards from 1970 to 2024.[297] The Immigration Act of 1924, which instilled quotas to reduce immigration from Eastern and Southern Europe and exclude immigrants from Asian countries, caused the percentage of immigrants in the U.S. to drop from 13.2% of the population in 1920, to 11.6% in 1930. In comparison, in the United States in 2025, 15.4% of all U.S. residents are foreign-born, including both those with and without legal standing in the United States.[298] Immigration politics in the United States was similarly relevant in the mid 1800s to how it is today, contradicting the argument that the legislators of the Constitution who were responsible for the 14th Amendment were unfamiliar with conflicts of migration policy that permeate much of current domestic politics.[299] The similar percentages of immigrants in the United States in 1860 and 2025 demonstrate that during the time of the creation of the 14th Amendment, the legislators were familiar enough with immigration that they were aware of how automatic birthright citizenship would apply to the children of immigrants, as it was not an issue that could be erased at this time.

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[297] "U.S. Immigrant Population and Share over Time, 1850-Present." 2024. Migration Policy Institute. https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time.
[298] Kramer, Stephanie and Jeffrey S. Passe. "lWhat the data says about immigrants in the U.S." Pew Research Center. August 21, 2025. https://www.pewresearch.org/short-reads/2025/08/21/key-findings-about-us-immigrants/
[299] 'Epps "The Citizenship Clause: A "Legislative History" 383

While there are many different frameworks that argue against birthright citizenship, the intellectual method of criticizing the application of the 14th Amendment stems from Peter Schuck and Rogers M. Smith, the authors of *Citizenship Without Consent: Illegal Aliens in the American Polity*. Schuck and Smith argued that birthright citizenship was enacted "as one ingredient of an integrated national strategy to encourage immigration in order to populate a vast essentially empty continent with the need for more laborers, mechanics and farmers than American society itself could produce."[300] However, even before the 14th Amendment in 1868, immigration had already increased by 3.5% from 1850 to 1860, showing that the formalization of birthright citizenship was not necessary for incentivizing immigration to the United States.[301] Additionally, immigration as a strategy for building up the labor force would be insufficient because parents would first have to immigrate to the United States, have children, and then those citizen children would have to join the workforce. Justifying the 14th Amendment through the lens of how it could appeal to potential immigrants has multiple flaws, and with this in mind, uncovering the reasoning behind the passage of the 14th Amendment will aid in supporting the argument that the legislators of the 14th Amendment were aware of its implications, and intentionally designed it to affect all children born on U.S. soil.

While the 14th Amendment was not originally part of the Constitution, its later incorporation generates the possibility of an acknowledgement of a constitutional error, and a manner of reforming their original work.[302] Since the context of the 14th Amendment is heavily intertwined with the newfound ability of Black Americans to be recognized as citizens and members of the polity (although the degree to which they enjoyed this was right was limited if not non-existent), the origins of the 14th Amendment are scrutinized through the lens of

[300] Schuck and Smith, "Citizenship Without Consent: Illegal Aliens in the American Polity" 92

[301] "U.S. Immigrant Population and Share over Time, 1850-Present." 2024. Migration Policy Institute. https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time.

[302] Epps, "The Citizenship Clause" 340.

determining who they were originally intended to apply to. The belief that the 14th Amendment was solely created to ameliorate the denial of birthright citizenship for African Americans has detrimental consequences in the current issue of determining the rights to citizenship for the children of undocumented immigrants.

Creation of the 14th Amendment and Immediate Effects

Extending citizenship to African Americans through the 14th Amendment was a method to ensure that the tumultuous battle to end the practice of slavery would be over for good, and not reinvented by aggrieved former slave owners and beneficiaries.[303] Conceptions of birthright citizenship were unquestioned before the 14th Amendment granted Black Americans access, however as a result of enslavement and the position of native-born Black people within the citizenry, pro-slavery advocates started to express an interest in consensual citizenship.[304] Consensual citizenship is the idea that, instead of automatic birthright citizenship for all children born in the United States, the 14th Amendment would be re-interpreted to make Congress responsible for creating legislation to control the legal status of children born to undocumented immigrants or those on temporary visas, undermining the decades of precedent that allocated birthright citizenship based on one's birth in the physical land that is the United States.[305] The consensual component lies in the argument that the federal government has a right to consent to those who wish to become part of the United States as citizens, and also that individuals themselves have a right to reject or accept citizenship to a nation.[306]

The necessity to "consent" to the presence of one's neighbors or community historically only arises as an issue when there is an effort to bring non-white populations into zones of

[303] Epps "The Citizenship Clause," 386.
[304] Epps, "The Citizenship Clause," 372.
[305] Schuck and Smith, "Citizenship Without Consent," 5.
[306] Schuck and Smith, "Citizenship Without Consent," 4, 37, 73.

whiteness, i.e. citizenship for Black Americans in the 1800s and citizenship for undocumented children in the 2000s. Nonetheless, the legislators of the 14th Amendment specifically rejected the idea that some immigrants were more deserving than others when it came to access to naturalization and citizenship, aligning with the viewpoint that birthright citizenship is meant to encompass all people, regardless of other factors of their identity. The initial backlash surrounding the 14th Amendment targeted African Americans, and later on *Wong Kim Ark* highlighted the role of Asians in accessing citizenship based on the 14th Amendment. In a contemporary setting, the children of Latina/o immigrants, and migrants from some African and Asian countries are centered in debates over the citizenship status of the children of the undocumented. Concerns over citizenship and race that began in the wake of the 14th Amendment have only reinvented themselves slightly, with the underlying racial crux still apparent.

Arguments in Favor of and Against the 14th Amendment

A form of birthright citizenship that is comprehensive in its depth, as in applying to everyone born in the United States, is still contentious amongst U.S. politicians, who in many instances wanted to restrict access to citizenship for marginal peoples. Immigration regulations from the 1790 Naturalization Act, exclusion acts in 1882, 1892, and 1902, establishing the Border Patrol in 1924, and heightened authoritative legislation in 1921, 1924, and 1929 are all evidence of how the 14th Amendment has never been accepted easily and maintains a site of conflicting political opinion.[307] In 1993 the Nevada Senator Harry Reid introduced legislation that would end birthright citizenship for the children of undocumented immigrants.[308] The US Citizen Reform Act in 2005 and the Birthright Citizenship Act in 2007 both proposed making

[307] Molina, "Birthright Citizenship beyond Black and White."
[308] Jon Feere, "Flashback: Sen. Reid on Birthright Citizenship" January 4th, 2011. https://cis.org/Feere/Flashback-Sen-Reid-Birthright-Citizenship

children born to undocumented parents ineligible for birthright citizenship, and were reintroduced in 2009 and 2019.[309] In 2025, the House introduced the Birthright Citizenship Act of 2025, which sought to clarify who was considered "subject to the jurisdiction of" the United States government.[310] These pieces of legislation, while not necessarily successful at changing the 14th Amendment, are evidence of how since 1868 when the 14th Amendment was passed, there have been active movements within the federal government to change its scope and application.

The premise of revoking access to birthright citizenship for the children of undocumented immigrants lies in the belief that these children do not deserve citizenship because of the actions of their parents, and that the undocumented parents will only exploit the wealth and resources of the United States without contributing to the economy or society. However, one's parents are arbitrarily given to them, and individuals are not in control of the composition of their families.[311] The practice of *jus soli*, or birthright citizenship, is an equalizer in many ways. Instead of relying solely on the citizenship status of one's parents, birthright citizenship ensures that geography and birthplace serve as the second option for acquiring citizenship at birth. Changing the 14th Amendment would rupture the simplicity of birthright citizenship by creating new constraints that must be met in order to access what was meant to be a solution to inequality and unfairness.[312] Such a change would also increase the level of stigma, obstacle, and hardship by the children of undocumented immigrants, exasperating conditions of inequality for the

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[309] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 103.
[310] "H.R.569 - Birthright Citizenship Act of 2025," congress.gov. January 21st, 2025, https://www.congress.gov/bill/119th-congress/house-bill/569#:~:text=%2F21%2F2025)-,Birthright%20Citizenship%20Act%20of%202025,jurisdiction%20is%20entitled%20to%20citizenship
[311] Michael Blake, "Moral Equality and Birthright Citizenship," *Nomos* 44 (2003): 398–409, http://www.jstor.org/stable/24220082, 400.
[312] "The Birthright Citizenship Amendment: A Threat to Equality," *Harvard Law Review* 107, no. 5 (1994): 1026–43. https://doi.org/10.2307/1341884. 1028.

children of people who already live, in many ways, invisible and covert lives as a result of their lack of legal status.[313]

Due to racial stereotyping, populations associated with immigration in the 21st century such as Latina/os currently face increased speculation over their legal status, regardless of whether or not they are undocumented in actuality. The current children of undocumented immigrants who have U.S. citizenship are tangentially affected by attacks on birthright citizenship because of the fear of being profiled as an unlawful immigrant, and also fears surrounding their parents ability to stay in the United States. Additionally, legal initiatives to restrict birthright citizenship are directly in contrast with the Constitution. The Equal Protection clause within the 14th Amendment articulates that all people born or naturalized in the United States should be treated equally by the law. Amendments to citizenship complicate this clause through discriminating against native-born children based on the status of their parents, including through the "requirement that a child's mother be a citizen or legal resident [which] treats fathers inequitably, and the enforcement of its provisions may engender race and national origin discrimination."[314] By placing more merit on the mother's citizenship status versus the fathers, it unfairly discriminates against children not just based on their parents legal status, but positioning one parent as more valuable than the other, bringing gender bias into the issue.

Another reason for maintaining the current system of birthright citizenship regardless of one's parents' legal status is the condition of statelessness that would be prescribed to all native-born people who were born in the U.S. to non-citizens. Ascriptive citizenship, which implies that one's membership into a polity is determined by something beyond the individual's control, would allow for all children to have political membership in one state that would then be

[313] Schuck and Smith,"Citizenship Without Consent," 136
[314] "The Birthright Citizenship Amendment: A Threat to Equality," 1030,

responsible for that child's protection, as the state and federal governments are responsible for ensuring the safety of the nation's children.[315] The potential of a stateless population composed of the children of undocumented immigrants would recreate the citizenship, or lack of citizenship status, that was experienced by enslaved people and which the 14th Amendment was designed to amend.[316] As a result, depending on the legal status and country of origin of their parents they may not have citizenship to any country. Any person, community, or country that claims to care about the interests of children should be concerned about the prospect of an entire population of American children growing up in the margins of society, disenfranchised by the U.S. government to make any claim to the rights enjoyed by their classmates, colleagues, community, and perhaps even siblings.

The first argument proposed by Schuck and Smith in *Citizenship Without Consent* is that the United States is experiencing a vast increase in illegal immigration which creates new domestic issues because of the presence of a "discrete population" that is unable to access political membership while still being affected by the decisions of the U.S. government.[317] The second argument stems from the existence of the American welfare state, something perceived by Schuck and Smith as an attractive feature of the United States for undocumented immigrants, and something that has spurred resentment from the U.S. citizenry who are concerned by the thought of non-citizens having the same access to social services as citizens.[318] Schuck and Smith argue that the United States must reform the current practice of automatic birthright citizenship if they want to ameliorate both the negative consequences of being a covert population within the

[315]Schuck and Smith, "Citizenship Without Consent," 4.; Blake, "Moral Equality and Birthright Citizenship," 403.
[316] Epps, "The Citizenship Clause," 387.
[317] Schuck and Smith, "Citizenship Without Consent,""3.
[318] Schuck and Smith, "Citizenship Without Consent,"3.

United States, and the challenge of overwhelming the social services system with the requests of the undocumented.

Schuck and Smith trace the roots of consensualism to English common law which was then applied to the emerging United States as a nation. The authors reference the interpretations of subjectship and jurisdiction as argued by the judge, Sir Edward Coke in the early 1600s, as the basis of where English law began to formulate a theory of political membership.[319] Birthright citizenship was ascribed to the children of English ambassadors residing in foreign territories, for they were still subject to the monarchy. Additionally, if England was under enemy occupation, then the children of occupying armies were ineligible for birthright citizenship even if they were technically born on English land.[320] For non-enemy aliens, although they might have only resided in England temporarily, their children were still considered natural subjects regardless of the perceived quality of the parents' obedience to the English crown.[321] These interpretations of birthright citizenship stemming from English common law align significantly with the current practice of birthright citizenship in the United States.

Schuck and Smith also acknowledge the reality of what restrictive birthright citizenship may do to those born in the United States, but who are heavily discriminated against by the U.S. government. If consent is required by both the community and the federal government for one to obtain citizenship, it is a possibility that certain populations will be more vulnerable to increased restrictions than others. One potential harm of consensualist policies is that "a society could freely denationalize citizens against their will, reducing their security and status" leading to the possibility of their statelessness, especially if their circumstances prevent them from having any

[319] Schuck and Smith, "Citizenship Without Consent," 12.
[320] Schuck and Smith, "Citizenship Without Consent," 14, 15.
[321] Schuck and Smith, "Citizenship Without Consent," 14, 15.

alternative nations to belong to or reside in.[322] However, Schuck and Smith also portray ascriptive citizenship as potentially negative because of how it assumes allegiance from all children born on U.S. soil, even if they disagree with the actions of the United States and are opposed to participating in anything that would require them to fulfill an obligation solely based on their citizenship status, which they may be against morally. Their argument proposes that it would be a violation of their political freedom to ask someone to participate in a war they do not believe in because of a citizenship status they did not ask for.[323]

Aside from the arguments laid out by Schuck and Smith, one of the popular arguments against birthright citizenship in the current era of immigration politics is based in the "subject to the jurisdiction" clause within the 14th Amendment. When the 14th Amendment was penned, the term "subject to the jurisdiction of" only applied to legally white or Black Americans. It would not be until 1898 that Asian immigrants would be officially categorized as eligible for birthright citizenship, through *Wong Kim Ark*, and it would not be until 1924 that Native Americans would be considered citizens through birth. As a result, the argument lies in the fact that the legislators had not accounted for the children of undocumented immigrants, and the following legislation or Supreme Court cases that specified who the 14th Amendment applied to did not include the children of immigrants unlawfully in the United States. This argument rests on the belief that when the legislators developed birthright citizenship, they assumed that the federal government had already consented to the parents of native-born children. Shuck and Smith argue that ascriptive citizenship would force the state to care for and support the children of people who they were actively working to prevent from entering the United States.[324] In this argument, undocumented immigrants are individuals for which American law has denied membership to,

[322] Schuck and Smith, "Citizenship Without Consent," 37, 28.
[323] Schuck and Smith, "Citizenship Without Consent," 20, 21.
[324] Schuck and Smith, "Citizenship Without Consent" 20, 21.

and so who is to say that their children would be accepted in a manner that differentiates from their parents.[325]

While technically Wong Kim Ark's parents were not "illegal aliens" at the time of Kim Ark's birth, their Chinese ethnicity and citizenship status positioned them as ineligible for ever attaining U.S. citizenship through naturalization, as articulated through the Naturalization Acts of 1790 and 1870. Yet, the legislators still agreed that Kim Ark's birth in the United States gave him birthright citizenship, including with the understanding that his parents were considered "subject to the Chinese emperor." So while not being undocumented, the parents of Kim Ark shared the lack of political membership and pathway to citizenship status, as well as the possibility of deportation faced by undocumented immigrants in the United States. Considering their shared features, undocumented immigrants and Kim Ark's parents are not so dissimilar that it would be inaccurate to compare the two with respect to the legislators understanding of birthright citizenship for children of non-citizens.

In Donald Trump's Executive Action "Protecting the Meaning and Value of American Citizenship" penned on January 20th 2025, he proposed that the 14th Amendment was never meant to apply to the children of undocumented immigrants, using the "subject to the jurisdiction" portion of the 14th Amendment to justify his Executive Order. Trump undermined the U.S. Constitution and the precedents set by the Supreme Court in *Wong Kim Ark*, and ordered that birthright citizenship was not applicable in cases in which: "(1) … that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting

[325] Epps, "The Citizenship Clause: A "Legislative History," 346.

on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth."[326] This Executive Order went beyond affecting the populations typically targeted in anti-immigrant discourse and moved towards prohibiting anyone with a temporary form of legal status from having citizen children. So much of the current Trump administration's justification for their stance on immigration derives from criticisms of unlawful immigration, and the supposed criminality imposed upon undocumented immigrants. The breadth of the Executive Order demonstrates how in practice the Trump administration wants to go beyond the original target of unlawful non-citizens, and limit birthright citizenship only to the children of U.S. citizens or permanent residents.

Part of the argument that this Executive Order relies on is the belief that those on temporary visas are not under the jurisdiction of the United States, and that they are subject to a foreign power. However, this argument undermines the capacity of the U.S. government to subject temporary visa holders to U.S. law, and also calls into question how much power foreign governments have over their citizens when those citizens are residing in the United States. One of the primary cases that handled jurisdiction in U.S. history is that of *Elk v. Wilkins (1884)*. In this case, John Elk, a Native American man, tried to register to vote and was denied based on the understanding that through being born on a reservation, he was not born under U.S. jurisdiction and did not have birthright citizenship.[327] Within the 14th Amendment itself, the phrases "subject to the jurisdiction" and "excluding Indians not taxed" were both used to argue that Indigenous people were both not within the jurisdiction of the United States for purposes of citizenship, and also were explicitly excluded from being counted as part of the population for purposes of state

[326] The White House, "Protecting the Meaning and Value of American Citizenship," whitehouse.gov, January 20th, 2025. https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/
[327] Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists."

representation.[328] While the question of jurisdiction on Indigenous lands is complicated, the Major Crimes Act of 1885 confirms that for major crimes that occur within Indigenous tribal lands, the federal government of the United States still has the ability to prosecute individuals responsible for those crimes.[329] *Elk v. Wilkins* and the Major Crimes Act were delivered just one year apart, showing that during the same context where the Supreme Court argued Native Americans were ineligible for birthright citizenship because they were outside of the federal government's jurisdiction, in instances of major crimes the U.S. federal government had the jurisdiction to prosecute those involved. This reveals how jurisdiction is a flexible term, and one that the U.S. government has used to deny citizenship to Native Americans while also asserting their own power to hold Indigenous people to U.S. laws.

Within Trump's Executive Order, the children of undocumented immigrants and lawful but temporary immigrants, occupy a similar legal position as Indigenous people before 1924. These native-born children may experience life the same way that American citizen children do; for example, through attending public schools from K-12. However the native-born children of undocumented immigrants are imagined as being subject to a foreign power on the basis of their parents' citizenship status, although the native-born children have no connection with this foreign government. Native-born children without birthright citizenship would be subject to "the liabilities of citizenship" but also denied the benefits that derive from being a U.S. citizen.[330] Policymakers in 1924 could recognize why Indigenous people needed access to birthright citizenship, and it would be a step in the wrong direction to take away birthright citizenship for those who are assumed to be under a foreign jurisdiction, when in reality they grow up in the

[328] George Beck, "The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed."" eric.ed.gov. 2004, https://eric.ed.gov/?id=EJ751642.
[329] Dmitry Gorin, "Federal Crimes Committed on Tribal Lands." Eisner Gorin LLP. 2025. https://www.egattorneys.com/crimes-on-tribal-lands.
[330] Epps, "The Citizenship Clause," 370.

United States and adhere to the norms of American society. Taking away birthright citizenship from the children of non-citizens makes them double victims; they would be raised in a country that rejected them despite being socialized in the same sense as their peers, and accused of having allegiance to a country they had virtually no understanding of and that might not recognize their citizenship either.

The early qualms against birthright citizenship for all rely on racial stereotypes and racist beliefs. In the late 1800s when Chinese immigrants were specifically targeted in immigration policy, George Collins, a birthright citizenship restrictionist, argued that immigrants from China were culturally oppositional to Americans, and that their customs and beliefs would always render them subject to the Chinese empire. The businessman Andrew Furseth who was one of the founders of the 1905 Asiatic Exclusion League, testified that Chinese immigrants were undeserving of U.S. citizenship based on a lack of commitment to American culture, ideals, and the workforce: "A Chinese businessman comes here…He raises children here. Those children are sent back to China for education. . . . They are brought up in China and to every intent and purpose that can be conceived, they are Chinese. But one of those comes here. He is an American citizen, but cannot speak a word of English. He does not know more about America and its institutions than the man in the moon."[331] While Furseth's claims were not backed by any evidence, the targeting of Chinese immigrants aligned completely with the existing racial ideology that negatively portrayed the Chinese as unassimilable and undeserving of U.S. citizenship. In fact, this rhetoric was so reminiscent of the past depictions of eastern and southern European immigrants that the fear of non-white "invasion" in the American citizenry was easily accepted.[332]

[331] Molina, "Birthright Citizenship beyond Black and White," 80.
[332] Molina, "Birthright Citizenship beyond Black and White," 80.

Ideas about race and citizenship exemplify how the fight for birthright citizenship and racial equality are not separate, but aligned in the same fight to ensure that the U.S. government does not restrict or deny access to the institution of citizenship based on birth. Schuck and Smith's argument fails to take into account existing racial relations in the United States and its long history of racial exclusion and marginalization of non-white migrants and their descendants. Automatic birthright citizenship, in many ways, is a last defense against racism and governments whose ideologies have led them to believe that some people are undeserving of being U.S. citizens. Given that *United States v. Wong Kim Ark* was determined at a time when racism was far more accepted in legislation and common perception, the argument that the native-born children of non-citizens should not be given automatic birthright citizenship ignores that *jus soli* citizenship has been the long standing practice of the United States from a time when racial tensions were even worse than they are today. Without birthright citizenship, the federal government has the potential to discriminate against anyone whom they deem to be undesirable additions to the citizenry, or to people whom they are afraid to give political membership. Birthright citizenship is essential for ensuring that no administration positions itself to reinterpret the Constitution for political means, and that the people, citizens and non-citizens alike, can trust that their children will not be denied access to the essential feature of birthright citizenship based on prejudiced attitudes of the current moment.

Anchor Baby Discourse

In debates over birthright citizenship, one class in particular is specifically targeted: mothers. This stereotype is known as the "anchor baby" phenomenon, in which there is a widespread belief that immigrants, particularly women, come to the United States and purposely give birth to children on U.S. soil that would grow up as U.S. citizens, affording their parent

access to welfare benefits accessible only to citizens and eventually, citizenship status for the parent. Restrictionists argue that the U.S. practice of *jus soli* citizenship is appealing to immigrants, motivating them to defy national borders and have U.S citizen children. The hope, according to restrictive proponents, is that the undocumented immigrant parent will achieve U.S. citizenship through their child.[333] This sentiment fits into a larger project of anti-immigrant rationale in which the issue of birthright citizenship for the children of undocumented immigrants expands beyond solely punishing undocumented parents for their unlawfulness, but in some areas, also assigning responsibility to the child itself for how their life presents a burden to the state.

Race, gender, and class are positioned as influencing factors behind the desire to move away from an ascriptive form of citizenship.[334] The historical legacy of the "anchor baby" stereotype has its roots in immigration policies that targeted immigrant women in the late 19th century, however the expansion of the anchor baby phenomenon grew in the 1990s. The Immigration Act of 1903 made it possible to deport any immigrant who used public funding in their first two years residing in the United States.[335] In 1907, Anna Metan, a Galician immigrant, gave birth in a public hospital. Unknowingly, by using a public service, she had made herself deportable and was sent back to Poland because of her use of public funds to remediate a "health issue" (her pregnancy) that had existed before her arrival to the United States.[336] Immigrant women of color are more affected by discriminatory immigration laws because of the intersection of their racial and gender identities, however Metan's case shows that her whiteness

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[333] Wydra, "Born Under the Constitution: Why Recent Attacks on Birthright Citizenship are Unfounded," 8.
[334] Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists," 653.
[335]Randa Tawil, "Time Difference: Pregnancy and Deportability in Early Twentieth-Century United States," In *Hidden Histories of Unauthorized Migrations from Europe to the United States*, edited by Dabielle Battisti and S. Deborah Kang, 103–25. (University of Illinois Press, 2025) http://www.jstor.org/stable/10.5406/jj.26868657.8. 104.
[336] Tawil, "Time Difference: Pregnancy and Deportability in Early Twentieth-Century United States," 104.

was not sufficient protection against deportation, as her country of origin, status as an immigrant, and low-class background made her a target for deportation.

The anchor baby stereotype constructs images of migrant women as hyper-reproductive and hyper-sexual, rendering the issue of undocumented parents with citizen children as a responsibility of solely the mother. Even though in many instances undocumented parents are in a partnership or married, the stereotypical image of the anchor baby relies on another stereotype: the single, pregnant woman. In the 1990s, the stereotypical immigrant changed from that of the male laborer to the pregnant woman, specifically one with three characteristics: Mexican, hyper-reproductive, and a burden to the state.[337] In actuality different data sets show that there is limited evidence to legitimize the anchor baby discourse.[338] Undocumented mothers are only eligible to apply for legal status when their child is 21, requiring that they have not only evaded detection from immigration law enforcement for over two decades, but that they also have the financial means to adjust their status.[339] Additionally, data from the PEW Hispanic Center estimated that 350,000 to 400,000 children are born to undocumented parents or those who overstayed their visa each year, but that only 9% of the parents had entered the United States between 2008 and 2010.[340]

Considering that the anchor baby stereotype emerged in the 1990s, the actual data shows a downward trend in recent arrivals having children, with the census data revealing that most parents with U.S. born children had already been living in the U.S. for many years before eventually having children. Thus decisions to have children are not linked to motivations for immigration, as most undocumented parents only choose to have children after already residing

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[337] Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists," 646, 647, 649, 651; Menchaca, "The Social Climate of the Birthright Movement in the United States," 32, 37; Molina, "Birthright Citizenship beyond Black and White," 84.

[338] Menchaca, "The Social Climate of the Birthright Movement in the United States," 50.; Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 100.

[339] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 100.

[340] Menchaca, "The Social Climate of the Birthright Movement in the United States," 50.

in the United States for some time. Undocumented parents also take great personal risk to have their child in a country where they themselves do not have lawful status. This can be interpreted as a personal sacrifice by the parent, specifically the mother, to make sure that their child is born in the United States and away from whatever has caused them to flee their country of origin to begin with.[341] This is very much in contrast with the anchor baby stereotype that takes away the selflessness of parents who accept a life of invisibility, without the rights of citizens for the sake of their children.

While recent statistics show that the children of at least one foreign-born parent are more likely to be in a two-parent household than the children of native-born parents, the stereotype of the anchor baby utilizes the image of a single woman to develop its effectiveness.[342] Even if the children of foreign-born parents are not more likely to be raised in single-parent households than the children of native-born parents, when undocumented women are single, this fact is exaggerated because of its defiance of normative structures of marriage and relationship building. Politicians have worked to portray undocumented parents, specifically mothers, as creating extreme financial burdens for the state because of their child's access to education, food stamps, health care, or other services.[343] However, undocumented parents of citizen children do not receive additional benefits for themselves if they choose to accept benefits for their children.[344] Many undocumented immigrants also pay taxes which support the same public benefits and social services they are assumed to be taking advantage of.[345]

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[341] Rodriguez, “Talking Back to ‘Anchor Baby’ and Birthright Citizenship Discourse,” 112.

[342] Lydia Anderson, and Paul Hemez. “Over a Quarter of Children Lived With At Least One Foreign-Born Parent.” *Census Bureau* 2022, https://www.census.gov/library/stories/2022/02/over-quarter-of-children-lived-with-at-least-one-foreign-born-parent.html.

[343] Menchaca, “The Social Climate of the Birthright Movement in the United States,” 36-38; FAIR (Federation for American Immigration Reform Issue Brief), "Anchor Babies: Is U.S. Citizenship Owed to Illegal Recent mobilization over challenges to the Fourteenth Aliens' Children?" 2002, http://fairus.org/html/04139708.htm.; Schuck and Smith, “Citizenship Without Consent” 111.; Molina, “Birthright Citizenship beyond Black and White,” 82.

[344] “The Birthright Citizenship Amendment: A Threat to Equality,” 1038.

[345] Schuck and Smith, “Citizenship Without Consent,” 113.

As children have no control over their parents' economic status, employment, or legal status, all children in societies that emphasize equality and children's protection should have no qualms about ensuring that all children can access food, healthcare, housing, and education. The "anchor baby" themself is also not automatically wealthy; they are after all still the child of undocumented immigrants and grow up facing a myriad of challenges as a result of their mixed status family.[346] The perception that the 14th Amendment should not apply to the children of undocumented immigrants rests on the perception that it rewards individuals who have broken U.S. immigration law, allowing transgressors to access U.S. citizenship through their children.[347] In framing the broader citizen population as victims of the exploitation of greedy immigrants, anti-immigrant restrictionists are able to forge the argument that it is in the best interest of the U.S. citizenry to change the 14th Amendment.

The anchor baby stereotype has a deep racial consequence through the image of the anchor baby and the undocumented immigrant being associated with a specific ethnic group, in this instance Mexicans, targeting an entire group on the basis of appearing as potential non-citizens, or in other words, a threat. An example directly from Congress proving the racial element of amending birthright citizenship was The Citizenship Reform Act of 1993. This proposal called for revoking the *jus soli* practice of the 14th Amendment, and also incorporating new language reforming the parameters of birthright citizenship to no longer include the children of undocumented mothers.[348] The wording of his proposed legislation was designed to not take away birthright citizenship from permanent legal residents or those with temporary visas, but specifically targeted Mexican and Latina/o youth.[349] Two years later, California Representative Brian Bilbray introduced the "Citizenship Reform Act of 1995". This bill was intended to affect

[346] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 113.
[347] Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists," 648.
[348] Menchaca, "The Social Climate of the Birthright Movement in the United States," 38.
[349] Menchaca, "The Social Climate of the Birthright Movement in the United States," 38.

the ability of children born to mothers on temporary visas to have U.S. citizenship.[350] Not only would this affect, primarily Latinas/os, but it expanded to also affect immigrants who were on temporary visas. By the mid-1990s, many of the recipients of H1-B and H2-B visas were from Asia, specifically China, India, the Philippines, South Korea and Bangladesh, whereas previously recipients of this type of visa had been Europeans.[351] The racial component is evident here because while the 1993 legislation did not target immigrants on temporary visas, the 1995 legislation expanded to account for the changing demographic population of those on temporary visas. As patterns in immigration shift, new legislation is introduced in order to limit the capacity of these new populations to live in the United States and have children that grow up as U.S. citizens because of their birth on U.S. land.

Ultimately, it is not possible to know for sure how the legislators would have reacted to undocumented immigration. Nonetheless, through the wording of the 14th Amendment, it is clear that the Constitution, not Congress, lays out the way in which birthright citizenship should be applied to all people born on U.S. soil. If the legislators "wanted to leave the matter [of birthright citizenship] within the control and consent of the national legislature, as opponents of birthright citizenship contend, it would have been far more sensible to draft and ratify an amendment that expressly authorized Congress to establish citizenship requirements for those born on U.S. soil, rather than expressly conferring citizenship on all persons born in the United States and subject to the jurisdiction thereof."[352] By having the Constitution, not Congress, create the conditions for *jus soli* citizenship, it prevents Congress from acting based on the political, economic, or social climate of their time, and instead forces the United States federal government and court system to adhere to a system of law that has survived economic recessions, internal conflicts, or global

[350] Menchaca, "The Social Climate of the Birthright Movement in the United States," 41.
[351] Menchaca, "The Social Climate of the Birthright Movement in the United States," 41.
[352] Wydra, "Born Under the Constitution: Why Recent Attacks on Birthright Citizenship are Unfounded."

wars. Governments are responsible for understanding that if exceptions are made with the intent to discriminate against one group, then arbitrarily changing U.S. policies to exclude one specific group undermines the validity of the U.S. Constitution.[353] While certainly some politicians believe that the children of undocumented immigrants do not deserve citizenship, it would be reckless to assume that Congress making exceptions to the 14th Amendment would end in solely targeting the children of the undocumented.

If the White House succeeds in preventing the children of undocumented immigrants from accessing birthright citizenship, members of ethnicities associated with undocumented immigration will likely be profiled as non-citizens, regardless of the individual's actual legal status.[354] Additionally, initiatives to find pathways to restrict citizenship for native-born children to undocumented parents, punishes American citizens by emphasizing their parents' legal status, and encourages discrimination towards them on the basis of their parents' lack of U.S. citizenship.[355] The speculation and inquiry into the legal statuses of those who appear as part of the targeted ethnic group reproduces through each generation, making it impossible for the descendants of undocumented immigrants to break away from the stigma and racism that permeates their lives.

Conclusion

While there is an increase in spectacle surrounding the outrageous immigration policies facilitated by the current administration, it is necessary to understand that none of this is new. Attacks on birthright citizenship are a recycled issue used to exclude certain members from having access to political membership and access to social services. Through analyzing the myriad of policies and legislation that have sought to restrict access to birthright citizenship, the

[353] Menchaca, "The Social Climate of the Birthright Movement in the United States," 51, 52.
[354] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 117.
[355] Rodriguez, "Talking Back to 'Anchor Baby' and Birthright Citizenship Discourse," 123.

influence of race, gender, class, and ethnicity are key factors in the formation of restrictive birthright citizenship policies. Based on an overview of American politics and its relationship to immigration law, the composition of the citizenry without birthright citizenship would encompass only the people who fit certain characteristics, and who are considered "worthy" of being U.S. citizens. This restrictive attitude favors the children of "desirable" immigrants, particularly those of European origin, while targeting the children of Latin American and Asian immigrants. The changes to birthright citizenship championed by the current administration are remnants of the racist, restrictive forms of U.S. immigration policy that dominate American history. The practice of birthright citizenship for all native-born citizens in the United States has been the tradition of the United States even in times of utmost racial tension and animosity. The prospect of taking away citizenship for native-born children extends beyond immigration reform and into the territory of cruelty, for what has a child done to deserve being stripped of a legal identity, state protection, access to social services, and in some cases, to be rendered stateless? Revoking access to birthright citizenship scapegoats a vulnerable sector of the American population by re-imagining the children of undocumented immigrants as problematic for state interests, while ignoring the complexities in the lived experiences of undocumented immigrants and their children.

CONCLUSION

Throughout this thesis, I have shown how whiteness is intrinsically linked to citizenship, be it as an indicator of one's ability to naturalize, or one's ability to access birthright citizenship. Using a variety of case studies from the Supreme Court of the United States, Executive Orders, and Congressional legislation, I have demonstrated how the United States is not immune to the influence of racism or xenophobia, and the nation's policies and actions across the executive, legislative, and judicial branches reinforce the entrenchment of racial anxieties within citizenship policy. My argument remains that given the United States' tendency to prioritize maintaining whiteness in its citizenry, the U.S. population must be wary of accepting the U.S. federal government's decisions with respect to immigration. Are these decisions motivated by fact, or is racism disguised as national security, loyalty, or other political calculations? Across four different chapters, my argument has been supported by a vast literature on citizenship and its relationship to race, ethnicity, and country of origin.

In Chapter One, I defined citizenship, as well as the rights owed to citizens versus non-citizens. This chapter also analyzed the practice of naturalization, and with it, denaturalization. Ultimately this chapter revealed how Constitutional rights do not sufficiently protect foreign nationals from being punished for expressing ideas that differ from the ideology advanced by the current administration, and also that even U.S. citizenship cannot reliably be depended on to protect citizens from having their rights infringed upon by the U.S. government. In Chapter Two, I provided an overview of whiteness and its relationship to citizenship. Through looking at case studies from both the Supreme Court and the Texas federal district court, I examined cases that brought into question legal whiteness, scientific whiteness, physical whiteness, and relative whiteness. The argument of this chapter is that the definition of whiteness

changes throughout American history, but that attaining whiteness is invaluable for securing access to U.S. citizenship. The theme of Chapter Three focuses on legality, introducing a lens of legal philosophy to view immigration law. In Chapter Three, I argue that the process of becoming "illegal" is facilitated by the U.S. government, and that the U.S. government is both the benefactor and transgressor of lawfulness. Finally, in Chapter Four, I compare arguments for and against birthright citizenship, gaining particular relevance in how as of the time of this thesis's development, birthright citizenship is being re-considered by the Supreme Court. This chapter finishes by arguing for the importance of maintaining automatic birthright citizenship in the United States, as the cost of losing it would be detrimental for the children of non-citizens, particularly those who are non-white.

Legality and the law both carry associations with morality, however, the law is not automatically moral or created with the best interests of the population at heart. When the United States Supreme Court decided in *Dred Scott v. Sandford (1857)* that both enslaved and formerly enslaved African Americans could not be citizens, that was a completely legal decision. Denying citizenship to a subset of the population on the basis of their race is immoral, as it relies on a hierarchical conception of race in order to justify itself. This blatant example serves to demonstrate the failures of the United States government to distance itself from biases and racist ideology, and as a result its inability to be neutral in matters of racial discrimination. Although the *Dred Scott* case was almost 170 years ago, the concept of the U.S. government being influenced by race, ethnicity, or country of origin still persists as an issue within American politics, especially immigration and citizenship politics.

This thesis represents the myriad of ways in which racial politics in the United States is still aligned with the politics of citizenship. As existing tensions between the U.S government,

the Supreme Court, the President, and the U.S. population only heighten with respect to immigration politics, citizenship equality is very much still at stake. The importance of my thesis is to bring together literature that examines the role of race in birthright citizenship and naturalization discourse, and merge these issues with contemporary examples of public policy and legal decisions. When it pertains to determining who should and should not have access to U.S. citizenship, many of the conversations of today bear a striking resemblance to discussions of the past. The possibility of a United States that only accepts white refugees, or with a president that refers to immigrants as "poisoning the blood of our country" seems oddly reminiscent of another time, and yet the dark truth is that this policy and rhetoric is still acceptable in the United States.[356] While not everyone agrees with the current U.S. government, or with President Donald Trump, the reality is that he represents one of the most powerful positions in the United States, and in the world at large. The positions and actions taken by both the president and the federal government have the capacity to influence public perception, as well as what is considered acceptable in the United States.

Thinking back to the title of my thesis, the concept of the apparitional citizen proves itself relevant again when thinking about the existing plight of the children of undocumented immigrants. At the time of my writing, the Supreme Court had just heard oral arguments regarding birthright citizenship in the United States. While the executive order signed by President Trump to take away birthright citizenship from children of non-citizens has been blocked by judges in numerous cases, current children born in the United States between February 19th 2025 when Trump put forth his executive order and now exist in a space of legal

[356]Hayes Brown, "Trump's white supremacy refugee policy is in full effect." *MS NOW,* 2026, https://www.ms.now/opinion/trump-refugee-white-south-african.; Maggie Astor, "Trump Doubles Down on Migrants 'Poisoning' the Country (Published 2024)." *The New York Times*, 2024, https://www.nytimes.com/2024/03/17/us/politics/trump-fox-interview-migrants.html.

ambiguity.[357] If the Supreme Court upholds Trump's executive order, what becomes of all of the children born to non-citizen parents during this time frame? They have birthright citizenship today, and technically given that the executive order is frozen, they should be able to maintain their birthright citizenship. Yet, this is truly not secured given the fact that birthright citizenship was upheld for decades following the legacy of *United States v. Wong Kim Ark*, and now that institution is suddenly under question. The children born to non-citizens inhabit an apparitional legal status because while technically citizens, their citizenship has been contested for their entire lives, leading to their positionality as unstable, perhaps impermanent subjects. The lack of clarity surrounding what happens next for these children, as well as for the children that come after them lends itself to an apparitional characterization of those born to non-citizens during a time when their claim to citizenship is delicate.

While this thesis also looks at cases of naturalization, the ending focus on birthright citizenship is intentional because the simplicity and permanency of birthright citizenship for all people born on U.S. soil is under attack right now. Discrimination on the basis of country of origin—which is often used in lieu of race—is essentially normalized in the United States with respect to visa applications and refugee status. However, birthright citizenship is the institution that the hands of Congress or the President cannot touch. At least, it is supposed to be constitutionally sound. The general shock of birthright citizenship even being up for debate positions it as the fitting ending of my analysis. While there already exists so much scholarship and literature on citizenship and its connection to race, my research project has the unique characteristic of being developed during contentious, and legally momentous times. This research also weaves together contemporary and historical examples in ways that bring to light

[357] Carlos Cabrera-Lomelí, "Birthright Citizenship at the Supreme Court: Who Could Be Affected by Trump's Order?" https://www.kqed.org/news/12078161/trump-executive-order-ending-birthright-citizenship-supreme-court-ruling-who-is-affected-can-citizen-be-revoked.

the cyclical nature of American history, and how so much of the rhetoric and action that we see today is reminiscent of the United States' immigration policies from the late 1800s and early 1900s. Clearly, there are many unanswered questions with respect to birthright citizenship and the future for immigrants in the United States at large. Although I cannot begin to answer them, the case studies laid out throughout my research unveil the ways in which race, ethnicity, and country of origin are not separate from citizenship history, but are woven into the fabric of the United States' legal traditions.

While much of this thesis relies on current events, one potential area of inquiry is what the United States will look like in the next administration. Many of the examples of both current rhetoric and policy used in this thesis resulted from the election of Donald Trump in 2024. Given that the next election is in only two years, depending on the attitudes towards immigration of the next president, the restrictionist agenda furthered by President Trump may either persist or lessen. Additionally, while in many ways President Trump's domineering personality and willingness to be in the spotlight presents him as the face of anti-immigration policy, in actuality, the Supreme Court and Congress also play significant roles in determining how restrictive U.S. immigration policy becomes. Another area of investigation would be an analysis of how both Congress and the Supreme Court react to the next administration, particularly with how they either persist with favoring restrictionist proposals for handling U.S. immigration, or if that area either becomes less of a central focus, or possibly more progressive.

The purpose of my research is to serve as a reminder that the U.S. federal government, the Supreme Court, and even the president can all be wrong. They can make legitimate, legal decisions that harm others, create conditions of inequality, and perpetuate injustices towards minorities who have limited power to change their access to political membership. The United

States' political history proves itself to be far from the righteous and moral institution that it presents itself to be. As such, it takes strength to challenge the U.S. government when for so long its leaders have upheld themselves as the wielders of morality. The larger context of my argument is that, if race is intrinsically linked to citizenship, all of the current events that seem unprecedented are in actuality continuations of an ongoing project to maintain the whiteness of the U.S. citizenry. Contemporary attacks on birthright citizenship, refugee resettlement, or free speech for non-citizens are not outliers in the system, but the system working how it was designed to operate– with the interest of maintaining the predominance of whiteness within the citizenry, no matter the cost. However, even if this is our past and our present, it does not have to be our future.

In the introduction of my thesis, I remarked on why I started this process. My interest in learning more about U.S. immigration was not a result of personal experience or proximity to the issue, but instead a basic understanding of right versus wrong that allowed me to identify all the ways in which U.S. immigration policy was discriminatory and biased against certain subsets of the immigrant population. Despite the uncertain future and unjust attacks on birthright citizenship, this is not to say that people have sat idly by and done nothing. Millions showed up to the March 2026 No Kings Protest, which was partially in response to ICE's nationwide rampage on unsuspecting individuals. Similarly the ACLU fought to challenge Trump's executive order to end birthright citizenship, defying the restrictive posture of the federal government at a time when immigrants' rights are so precarious.[358] By bringing up these two recent examples, I hope to demonstrate that there remains a strong voice in the United States that

[358] "No Kings draw estimated 8 million in largest single-day U.S. nonviolent protest," *NBC16*, https://nbc16.com/news/local/no-kings-protests-draw-estimated-8-million-in-largest-single-day-us-demonstrations-03-29-2026. ; Hibah Ansari, "Supreme Court Arguments Wrap in Landmark Challenge to Trump Birthright Citizenship Executive Order," *American Civil Liberties Union*, 2026, https://www.aclu.org/press-releases/supreme-court-arguments-wrap-in-landmark-challenge-to-trump-birthright-citizenship-executive-order.

asks this country to redirect itself away from the path forged through centuries of racial discrimination and injustice. While so much of my thesis looks at failures—whether it was failure to naturalize or failure to be accepted as a U.S. citizen—people who could not have been U.S. citizens in the late 1700s can now be part of the citizenry in 2026. Even though there is still so much progress to be made, and current events make it appear as if the United States is reverting to a darker, more restrictive time, we must remember Dred Scott, Bhagat Singh Thind, Takao Ozawa, and the others who also tried and failed to achieve citizenship, but were successful in kindling the possibility of a different kind of future in the United States. This future, the one in which race, ethnicity and country of origin are not requisites for access to U.S. citizenship, is the one we must work towards.

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