SECOND CLASS CITIZENSHIP? THE PLIGHT OF NATURALIZED SPECIAL IMMIGRANT JUVENILES

Irene Scharf†

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I. WHAT IS UNITED STATES CITIZENSHIP?

T.H. Marshall, in the mid-twentieth century, "offer[ed] an enduring summary of the three elements that make up citizenship. . . . [A] civil element, made up of individual freedoms; the political element, entailing participation in government; and a social

† Professor of Law, University of Massachusetts School of Law. I'd like to thank Assistant Dean of the U. Mass. Law Library, Misty Peltz-Steele, and U. Mass. Law School Assistant Librarian, Emma Wood, for their dedicated and skillful assistance, as well as U. Mass. School of Law for a research grant to support this work.

element, requiring an equitable distribution of goods."[1] Daniel Webster defined a citizen of the United States as being "a person, native or naturalized, who has the privilege of exercising the elective franchise, and of purchasing and holding real estate."[2]

A web page geared toward secondary school students answered the citizenship question this way: "A *citizen* is a person who is a member of our *country*. As a citizen, you give your loyalty to the U.S. government. In return, the government protects you and all your rights granted in the Bill of Rights and the Constitution."[3]

The Constitution's Citizenship Clause states, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[4] The Citizenship Clause, defining who is entitled to the rights specified by the Fourteenth Amendment's Privileges and Immunities Clause,[5] did not identify a "precise definition" of those rights until after the Civil War.[6]

A measure of at least the original meaning of citizenship could be made by examining immigration history, especially in light of the fact that those immigrating to the United States become naturalized citizens

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1 EMILY RUSSELL, READING EMBODIED CITIZENSHIP: DISABILITY, NARRATIVE, AND THE BODY POLITIC 16 (2011).

2 Crandall v. State, 10 Conn. 339, 345 (1834).

3 Phyllis Naegeli, *United States Citizenship*, EDHELPER.COM, https://www.edhelper.com/ReadingComprehension_34_3.html [https://perma.cc/9UQD-25GL] (last visited Aug. 22, 2018).

4 U.S. CONST. amend. XIV, § 1. Note this sentence, while identifying who citizens are, does not define citizenship rights. For more on the Citizenship Clause, see Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493 (2013).

5 Early on, the Privileges and Immunities Clause was stripped of much of its potential power. In 1873, the *Slaughter-House Cases* interpreted the Privileges and Immunities Clause narrowly to protect only a small subset of rights protected by the national government; there were few at that time. 83 U.S. 36 (1873). The following year, *Minor v. Happersett* similarly held that voting was not a privilege or immunity of citizenship, asserting, "[t]he Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere." 88 U.S. 162, 170–71 (1874).

6 DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 34 (1981). Even Edward Bates, Abraham Lincoln's Attorney General, could not ascertain a meaning for "citizen of the United States." He found "no such definition, no authoritative establishment of the meaning of the phrase . . . ." Nick Sacco, *Edward Bates and the Question of U.S. Citizenship in 1862*, EXPLORING PAST (May 19, 2015), https://pastexplore.wordpress.com/2015/05/19/edward-bates-and-the-question-of-citizenship-in-1862 [https://perma.cc/Z6BJ-HSWX].

in great numbers.[7] Generally, the early years of the Republic offered a relatively open reception to new settlers when, especially in advance of the Civil War, prosperity demanded population expansion.[8] By the 1870s, though, economic pressures and growing racial animus promoted resentment against immigrants, particularly the Chinese, based on perceptions that they were depriving employment to those already settled.[9] Thus began both a nativist reaction among the early settlers, primarily Europeans, fearful of an invasion from other parts of the world,[10] and efforts to restrict new immigrants, beginning with the Chinese Exclusion Acts of the 1880s.[11]

Entwined in this history was, of course, the complex reality of slavery, the Civil War, Reconstruction, the legacy of xenophobia, and decades-long attempts by former slaves to attain full citizenship rights.[12] I ask about the meaning of U.S. citizenship because the answers affect my analysis of the following conundrum: I came upon this study when scrutinizing a provision in the Immigration Act of 1990, wherein Congress created a mechanism to grant permanent resident status to undocumented unaccompanied minors arriving in this country seeking refuge from parents who were unavailable to care for and protect them. Before the Act, "undocumented children in state care routinely found themselves in an immigration predicament. They remained in state care

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7 For example, more than 653,000 U.S. immigrants naturalized in fiscal year 2014, bringing the total number of naturalized citizens to 20 million, nearly half the overall immigrant population of 42.4 million. Jie Zong & Jeanne Batalova, *Naturalization Trends in the United States*, MIGRATION POL'Y INST. (Aug. 10, 2016), https://www.migrationpolicy.org/article/naturalization-trends-united-states [https://perma.cc/5H6C-CLTB].

8 *See* Meredith K. Olafson, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 434 (1999). Even in 1868, "Congress declared that 'the right of expatriation is a natural and inherent right of all people' and affirmed the country's open door policy to those seeking a new home." *Id.* (internal citation and alteration omitted).

9 *Id.* at 435. *See also* AM. FED'N LABOR, SOME REASONS FOR CHINESE EXCLUSION: MEAT VS. RICE. AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM—WHICH SHALL SURVIVE?, S. DOC. NO. 137 (1st Sess. 1902).

10 *See* Irene Scharf, *Tired of your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation*, 21 U. HAW. L. REV. 131, 134–39 (1999). For a more recent history of nativism, see IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997).

11 *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); Chinese Exclusion Act of 1888, § 13, 25 Stat. 476, 479 (repealed 1943); Ng Fung Ho v. White, 259 U.S. 276, 278 n.1 (1922).

12 For discussion of this period in U.S. history, see *infra* Section III.A.

until their majority, and then found themselves turned out to face the world without legal immigration status [essentially stateless] and all its associated benefits."[13]

Finally, in 1990, Congress provided immigration relief for undocumented children who are dependent on juvenile courts for their protection.[14] The Immigration Act of 1990 created a status known as Special Immigrant Juvenile Status (SIJS), protecting children by according them legal permanent residency (LPR)[15] through a process that begins after they receive a declaration from a juvenile court ruling that they were subject to abuse, abandonment, or neglect by their parents, causing reunification with them not to be viable; that it would not be in the child's best interests to be returned to her home country.[16] A 1997 amendment addressed perceptions that some parents might be relinquishing their parental rights so that their children could apply for SIJS.[17]

In 2008, the Act was amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), allowing SIJS even when "reunification with [one] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law."[18] These amendments also offered additional protection for the thousands of unaccompanied minors

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13 David B. Thronson & Veronica T. Thronson, *Immigration Issues–Representing Children who are not United States Citizens*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 559 (Donald N. Duquette et al. eds., 3d ed. 2016) (citing 8 U.S.C.A. § 1101(a)(27)(J).

14 *Id.* at 559–63.

15 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1101(a)(27)(J) (2018) (legislation proposed to amend language from "[one] or both of the immigrant's parents" to "either of the immigrant's parents"), *see* H.R. 7068, 115th Cong. § 103 (2018)). From this status people are permitted, after a time and if meeting other qualifications, to naturalize. 8 U.S.C. § 1421–59.

16 8 U.S.C. § 1101(a)(27)(J) (2018). SIJS "was a small provision included in a major overhaul of immigration law with little fanfare." RUTH ELLEN WASEM, CONG. RESEARCH SERV., R43703, SPECIAL IMMIGRANT JUVENILES: IN BRIEF 2 (2014) [hereinafter WASEM CRS REPORT]. Nor did the committee reports or legislative conference documents establishing Pub. L. No 101-649 (S. 358 and H.R. 4300) discuss the provision. *Id.* at n.15.

17 "Congress added language amending the INA to ensure that the SIJ benefit was not 'sought primarily for the purpose of obtaining . . . relief from abuse or neglect or abandonment.'" WASEM CRS REPORT, *supra* note 16, at 3 n.16.

18 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 1101, 122 Stat. 5044 (2008); *see also* 8 U.S.C. § 1232(d) (amending 8 U.S.C. § 1101(a)(27)(J)). For legislative history, see 154 CONG. REC. H10898 (2008).

entering the United States by expanding legal protections and access to services.[19]

Like most other LPRs, after maintaining this status for five years, the law permits SIJS-holders to naturalize and become United States citizens (USCs).[20] It is at this time that the law presents a conundrum for those with SIJS: Once they become citizens and reach twenty-one years of age, one would have assumed that, as with others who naturalize, they could apply to reunite with their parents (or at least the parent who did not abuse them, if that were the case) by filing an application to have them immigrate.[21] However, since the Act's enactment in 1990, subsection (J)(iii)(II) has provided that these children's parents cannot use their status to "be accorded any right, privilege, or status under this Act."[22] Notwithstanding a 2008 amendment easing the proof requirement causing abuse of only one parent to suffice, the initial 1990 provision preventing Special Immigrant Juveniles (SIJ or SIJs) from ever using their status to bestow immigration benefits on their parents was neither addressed nor altered; it remains the case even if, as is commonplace, the parental rights were never formally terminated.[23] This provision remains the law today, even if one parent was completely innocent of abuse, or even if an innocent parent was also a victim of the other parent's abuse.[24]

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19 *See* Thronson & Thronson, *supra* note 13, at 563–64; *see also* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1–4 (2017).

20 8 U.S.C. § 1427 (2018); *see also* 8 U.S.C. § 1429 (2018).

21 8 U.S.C. § 1101(b)(1) (2018); *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (2018).

22 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2018).

23 For an analysis of the destructive effects caused by federal legislation's devaluation of children's rights in the context of immigrant families, see David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006).

24 It is likely that the non-abusing parent was also victimized by the abuser. Domestic violence and child abuse are related; among child abuse victims, 40% report domestic violence at home. *Behind Closed Doors: The Impact of Domestic Violence on Children*, UNICEF 7 (2006), http://www.unicef.org/protection/files/BehindClosedDoors.pdf [https://perma.cc/M6CN-CPN8]. In this Article, I often shorten the phrase "abuse, abandonment, or neglect" to "abusing parent" or "abuser" when referring to the parent who harmed the child. Also, because I agree that, regarding abusers, Congress can restrict immigration benefits, I do not challenge that aspect of the law. However, I seek answers from the perspective of the naturalized SIJ, not her parent outside the U.S. While I do not quarrel with the national government's right to ensure that those entering pose no security threat, and that even parents of United States Citizens

It is unknown why Congress failed to make a corresponding change in the SIJS law when it enacted the provision requiring only one parent's abuse.[25] Why did the 2008 TVPRA not amend subsection (a)(27)(J)(iii)(II) to reflect the change in parental proof requirements? Was there a political compromise, made in the final hours of the legislative session?[26] An oversight?[27] A desire to make SIJS so unattractive that only the most desperate would apply?[28] It could not have derived from an effort to deter parental abuse, as the prohibition applies to *both* parents of those granted SIJS, regardless of whether the abuse stemmed from only one of them.

A review of the legislative history of the SIJS provision of the Immigration and Naturalization Act (the Act or INA)[29] leads to the

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(USCs) must be appropriately vetted, I challenge the prohibition upon naturalized SIJs to *apply* for their parents to join them in their new homeland.

25 It is hard, perhaps impossible, to discern congressional motivation behind the failure of the 2008 amendments to address the changes made to the "two-parent" rule. The 1990 INA committee reports and legislative conference documents that led to Pub. L. 101-649 (S. 358 and H.R. 4300) did not discuss the SIJ provision. WASEM CRS REPORT, *supra* note 16. In addition to reviewing the legislation, I also searched the Immigration Act of 1990: A Legislative History of Pub. L. No. 101-649, 104 Stat. 4978 (1990), as well as the 1994 Technical Corrections Act (Pub. L. No. 103-416, 108 Stat. 4305 (1994)) and the 2008 amendments (*see supra* note 18 and accompanying text), to search for explanations as to why the 2008 elimination of the requirement for both parents to have abused the child did not prompt a corresponding amendment of subsection (iii)(II) of 1101(a)(27)(J). This produced no additional insight. Research by U. Mass. Law School librarian Misty Peltz-Steele, verified on March 2, 2017, confirmed that there was no media coverage in 2008 regarding the withdrawal of the two-parent requirement, or in 1990 regarding the motives of those in Congress voting in favor of the original SIJ legislation. The "paucity of legislative history" from which to discern the legislators' intents as they removed the requirement for two-parent abuse but did not concomitantly amend subsection 27(J)(iii)(II) "strengthens the argument" in favor of a generous interpretation of it. *See* Irene Scharf, *Un-torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 32 (2013) (arguing for the application of immigration lenity when there is scant legislative history).

26 For a study of federal legislation enacted in haste, see Irene Scharf, *The Problem of Appropriations Riders: The Bipartisan Budget Bill of 2013 as a Case Study*, 42 MITCHELL HAMLINE L. REV. 791, 795 (2016). In the SIJ case, there is no evidence that it was a last-minute legislative change; in fact, the exact wording was suggested during 2007 proposed amendments that were finally included in legislation in 2008, with precisely the same words.

27 If true, this could be corrected by a Technical Corrections Amendment, as occurred in 1994. *See supra* note 25.

28 On the difficulty of discerning intent from legislation, see Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 487–91 (1998).

29 8 U.S.C. § 1101(a)(27)(J) (2008) reads:

necessary inference that the goal of section (J)(iii)(II) was *simply* to ban the abusing parent from receiving immigration benefits through the child's SIJS classification;[30] when the subsection was enacted in 1990, it included *both* parents. While it has not encompassed both since 2008, the law was not amended to reflect the change.

> (a) As used in this chapter–
>
> (27) The term "special immigrant" means—
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> (J) an immigrant who is present in the United States—(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
>
> (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—
>
> (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and
>
> (II) *no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;*

(emphasis added).

30 Full reviews and searches were conducted of both the legislative history and the media through Westlaw and HeinOnline Federal Legislative History Library: A Legislative History of Pub. L. No. 101-649 [https://heinonline-org.libproxy.umassd.edu/HOL/Index?index=leghis/lhimact&collection=leghis], Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994) (addressing the 1990 legislation and expanding eligibility for protected juveniles); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440 (1998) (limiting eligibility to those declared dependent on the court because of abuse, neglect, or abandonment); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (removing requirement for judicial determination of long-term foster care eligibility and substituting requirement of juvenile court finding that reunification with one or both parents not viable due to abuse, neglect, abandonment, or similar basis under state law; expanding eligibility for protected juveniles; adding USCIS adjudication timeframe of 180 days of filing).

A. *The Problem*

For those neither born in the United States, expressed in the Latin phrase *jus soli*, or "law of the soil,"[31] nor who acquired or derived U.S. citizenship through operation of law,[32] the way to become a citizen, as specified in the Constitution, is through naturalization: "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[33] Nowhere does the Constitution say that naturalized citizens' rights can be abridged vis-à-vis native born citizens; nowhere does the Constitution say that naturalized citizens possess fewer rights than those born in the United States. To be sure, any USC, regardless of how citizenship was attained, can suffer deprivations of certain citizenship rights, such as losing the right to vote or to serve on juries following conviction of certain crimes.[34] All other restrictions, beyond those identified in the Constitution—requiring both the President and Vice President to be "natural-born citizens"[35]—are baseless and violate the Constitution.

Curiously, the SIJS law establishes a two-tiered system of citizenship when it provides, in section 1101(a)(27)(J)(iii)(II), that "no natural parent . . . of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this [Act]."[36] Thus, naturalized SIJs are the only naturalized citizens who may not sponsor their parents' immigration. In the end, what the Act offers these children with one hand (protection in the United States), it takes away with the other, when it prohibits them from reuniting with their innocent parent. For a myriad of reasons, this consequence is both unwarranted and irrational.

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31 "*jus soli* (jəs soh-li) n. [Latin "right of the soil"] (1884) The rule that a child's citizenship is determined by place of birth. • This is the U.S. rule, as affirmed by the 14th Amendment to the Constitution. Cf. Jus Sanguinis." *Jus Soli*, BLACK'S LAW DICTIONARY (10th ed. 2014).

32 8 U.S.C. § 1431 (2018).

33 U.S. CONST. amend. XIV, § 1. Note that this section, while asserting that these people are citizens, does not specify those rights.

34 For example, through conviction of a crime of "infamy." *See infra* Section III.B.

35 U.S. CONST. art. II, § 1, cl. 4 (referring to the President); U.S. CONST. amend. XII (referring to the Vice President via the requirements set forth for the President).

36 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2018).

It is troubling that there is no rationale for the continuation of the prohibition against a naturalized SIJ sponsoring a non-abusing parent. There is no evidence that the bill was rushed and thus drafted in error: the text of the SIJS section when it was introduced in the House compared with that which became law in December 2008 remained unchanged. Moreover, an amendment to the TVPRA was introduced in 2007 and, while it soon failed, its SIJS-related text was identical to that in the eventual 2008 enactment. Clearly, the SIJS amendments were drafted long before the 2008 bill passed.[37]

In any event, the 2008 SIJ amendment, which eased the proof requirements regarding parental abuse, will cause that child, once naturalized, to live in a perpetual state of second class citizenship, with her rights to petition for the immigration of her non-abusing parent forever foreclosed. This is not only illogical,[38] but also constitutionally unacceptable. Either a Technical Corrections Amendment should address this deficiency or the provision should be challenged judicially.

In attempting to seek answers to the questions concerning these SIJ restrictions by examining the history and theories of naturalization and citizenship, I realized my naïveté of the plethora of historic gradations of United States citizenship. True, at least "on paper," naturalized and "natural-born" citizens have possessed the same rights, except in the limited situations in which the Constitution makes distinctions.[39] Nonetheless, vast is the extent of both historical and contemporary distinctions among citizens who are deprived of "full" citizenship rights;

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37 Research by Associate Library Director Misty Peltz-Steele, citing Congress.gov. Email of 1/16/18, on file with author. The bills also had vast bipartisan support: The 2007 version was sponsored by Rep. Tom Lantos (D-CA), with forty-two cosponsors. *See, e.g.*, H.R. 3887-William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/3887?q=%7B%22search%22%3A%5B%22H.R.3887%22%5D%7D&r=18 [https://perma.cc/9A82-5HNS]. The amendment to the TVPRA was introduced in 2007, with the SIJ text at Section 236. H.R. REP. NO. 110-430(I), pt. 8, at 22 (2007). The 2008 version was sponsored by Rep. Howard Berman (D-CA), with six cosponsors. H.R. 7311-William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/7311? q=%7B%22search%22%3A%5B%22H.R.3887%22%5D%7D&r=6 [https://perma.cc/N2K5-8JLA]. Section 235 was introduced in the House on December 9, 2008 and signed into law on December 23, 2008. *Id.*

38 No logical proposition can support a federal law intended to assist youthful abused, abandoned, and/or neglected immigrant children and then deprive them of lifetime reunification with their innocent parent.

39 *See* sources cited *supra* note 35.

"millions of Americans lose some of their citizenship rights every day."[40] Deprivations have affected, and to some extent continue to affect, convicted felons,[41] children, women,[42] nonwhites,[43] and the disabled—particularly those with intellectual disabilities. In addition, others suffer the curtailment of social rights, such as violations of laws regulating minimum wage or the right to unionize.[44]

Digesting these disparities caused me to consider further the historical and current understanding of naturalization in the United States. What are its roots? How did it develop? What, truly, *are* the rights of current United States citizens? How have these changed throughout history? If the consequences of naturalization have evolved since colonial times, how has that evolution been drawn? Have consequences diminished? Expanded? Finally, notwithstanding the answers to these questions, is it fair, or constitutional, to treat citizens and naturalized citizens differently, or some naturalized citizens differently than others? Part II reviews the historical record, from the British roots through the post-World War II era, to gain an understanding of the meaning of citizenship, naturalization, and opposition thereto, and to ascertain whether there is a basis for creating multiple tiers of citizenship. Part III examines the impact of discrimination against various sub-groups of society on citizenship, with a lens into the constitutional basis, or lack thereof, of subsection (a)(27)(J)(iii)(II). Part IV concludes that Congress's naturalization power over America's singular class of citizenship does not reach to prevent a naturalized citizen from reuniting with her parent. It is an unlawful class-based distinction within the singular class to which belong all United States citizens.

In U.S. law today, there is but a single class of U.S. citizen. As there is no legal distinction between native-born and naturalized citizens,[45] those naturalized are entitled to the same citizenship rights as those

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40 BEN HERZOG, REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR 3 (2015) (internal citations omitted).

41 *See infra* Section III.B.

42 *See infra* Section III.C. Women would lose their citizenship if they married noncitizen, on the theory that they took on the legal status of their husbands. *See id.*

43 *See infra* Section III.A.

44 HERZOG, *supra* note 40, at 3 (internal citation omitted).

45 This is other than the natural-born requirement for holding the offices of President and Vice President. *See* sources cited *supra* note 35.

born in this country—*except*, that is, naturalized SIJs.[46] This Article will appraise historical occasions in which citizens were not treated equally, treatment that was ultimately acknowledged to be anathema to U.S. citizenship.[47] This same correction, made vis-à-vis the rights of women, racial minorities, and rights of the intellectually disabled, is warranted for naturalized SIJs.

II. NATURALIZED U.S. CITIZENSHIP IN HISTORICAL PERSPECTIVE

A historical review of the notions of naturalized U.S. citizenship reveals that the concept of a single class of citizenship derived from Britain and persisted through late nineteenth century America. Without a doubt, the new Americans in what would become the United States "drew heavily upon the *accumulated* traditions of English law in articulating new ideas of citizenship . . . ."[48] Dating to 1368, English law held that those born within the boundaries of royal lands were subjects of the king.[49] English jurists, though, did not hew solely to the theory of *jus soli*, that place of birth determined one's status; those born outside royal territory were not necessarily considered outside royal control. In addition to place of birth, descent or ancestry "could also determine who was a 'natural-born subject' with an inherent claim to the rights of an Englishman."[50]

The doctrine of nationality also has its roots in the fourteenth century, with an emphasis on the personal nature of the relationship between subjects and the king. Within those relationships there was a gradation of rank, with each rank carrying varying rights and privileges

46 There are rare exceptions, the most notable being natives of U.S. territories such as Puerto Rico. Although they are U.S. citizens, residents of territories can neither vote for President nor members of Congress. *See, e.g.*, Igartúa-de la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (en banc). On the long-standing Puerto Rican independence movement, see AJ Vicens, *The Lost History of Puerto Rico's Independence Movement*, MOTHER JONES (Apr. 21, 2015, 10:00 AM), https://www.motherjones.com/media/2015/04/puerto-rico-independence-albizu-campos [https://perma.cc/PQG8-W6FZ].

47 *See* discussion *infra* Section III.A (concerning Black Americans and other racial minorities, women, and the intellectually disabled).

48 JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870 ix (1978). *See also id.* at 13–44. My description of this history is, admittedly, abbreviated.

49 *Id.* at 13.

50 *Id.* at 13–15.

or lack thereof.[51] Naturalization followed a piecemeal practice of removing disabilities and granting increasing privileges.[52] By the seventeenth century, England had established procedures to incorporate newcomers into its community, ranging from parliamentary acts of naturalization to royal patents of denization.[53] A series of English cases as far back as the mid-1600s established the principle of "fundamental equality of status and rights among naturalized and native-born subjects."[54] The very term naturalization "led to the conclusion that the alien must be considered reborn as a natural subject."[55] Likewise, from close to the outset of the new settlement, "the American colonists . . . adopted aliens as fellow subjects . . . ."[56]

To be sure, distinctions existed between the established customs in England and those in the colonies. While at times English law was employed to "delay or destroy the political careers of ambitious naturalized subjects," for example, by interfering in the 1690s with the acceptance of someone elected to the House of Burgess,[57] these restrictions were generally rejected.[58] When those controversies ensued, as they did in the 1770s, they generally ended in victory for the naturalized citizen.[59]

Most importantly, while English law stressed the "personal nature of the subject-king relationship,"[60] with English judges "conclud[ing] that the essential purpose of naturalization was to make the alien legally

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51 *See id.* at 4.

52 *See id.* at 4–5.

53 *See id.* at 29. Denization created a part-way member, a ranking "above . . . alien yet somewhat below the native-born or naturalized subject." *Id.* The early seventeenth century, though, saw naturalized subjects apparently enjoying full, unconditional political rights. *Id.* at 34. On the English theory of "acquired allegiance," see *id.* at 36–43.

54 *Id.* at 39 (concerning inheritances).

55 *Id.* at 42.

56 *Id.* at 78. Because I find the word "alien" inapt when referring to humans, as opposed to extraterrestrials, I use it only when quoting another's words, such as statute, case, or other text. Otherwise, I use "noncitizen" to refer to noncitizens.

57 *Id.* at 122.

58 *Id.* at 123.

59 *See id.* at 124–25.

60 *Id.* at 4. For more on the theory of allegiance and subjectship, and its articulation by Sir Edward Coke, see *id.* at 7–9, 17–28, 158–68; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 3d ed. 1988); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 268–73 (1969); Note, *Membership Has Its Privileges and Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship*, 102 HARV. L. REV. 1925, 1931–32 (1989).

the 'same' as a native Englishman,"[61] the American system gradually came to normalize a different type of relationship between citizens and their government, one of consensual membership in a voluntary community.[62] Adding to the practical necessity of attracting newcomers to the country,[63] "[g]enerous inducements designed to entice foreign settlers expanded the benefits conferred by naturalization and made it difficult to consider natives and adopted aliens distinct types of members."[64] These liberal naturalization policies "contributed to a growing assumption that membership status was and ought to be undifferentiated."[65] In the colonies, political debates "revealed an increasing sense that aliens who chose to commit their efforts and resources to the common good justly deserved an equal share of the rights of membership."[66]

During the Constitutional Convention, the founders had to decide whether to "reproduce" in the United States the British tradition of graded civil status.[67] "Some delegates, including Madison, suggested a

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61 KETTNER, *supra* note 48, at 9.

62 *Id.* at 9. For a historical framing of the theories of citizenship in America, see *id.* at 1–9. Note that when English judges first paid attention to the process of naturalization, the goal was seen as making "the alien legally the 'same' as a native Englishman." *Id.* at 9. Chief Justice Waite, in *United States v. Cruikshank*, aptly described this theory:

> Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

92 U.S. 542, 549 (1875). *See also* Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989) (discussing the implied consent theory of political obligation by presence).

63 KETTNER, *supra* note 48, at 9. "Survival, population growth, and economic expansion—not doctrinal consistency—dictated the course of colonial policy." *Id.* at 78. The notion that the colonists possessed "parliamentary" powers to naturalize its subjects were inferred from various provisions in the colonial charters. *See id.* at 78–81.

64 *Id.* at 126.

65 *Id.* at 126–27. The unquestioned contribution of immigrants to their community's well-being would have made "senseless" a limitation on their rights, "on grounds both of self-interest and of abstract justice." *Id.* at 127. "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen . . . ." Boyd v. Nebraska *ex. rel.* Thayer, 143 U.S. 135, 162 (1892).

66 KETTNER, *supra* note 48, at 126–27. There was an uncontested premise that Americans were British subjects; this was supported by the Naturalization Act of 1740, which assumed they were entitled to the rights of natural-born Englishmen. *Id.* at 134.

67 RICHARD A. EASTERLIN, DAVID WARD, WILLIAM S. BERNARD & REED UEDA, IMMIGRATION 115 (1980) [hereinafter IMMIGRATION].

plan by which applicants would receive incremental rights as, step by step, they fulfilled the basic requirements of citizenship."[68] This suggestion was eventually rejected, with the founders concluding "that the only disadvantage to be placed upon naturalized citizens would be ineligibility for the presidency of the United States."[69] Thus, in its final iteration, "the Constitution repudiated graded citizenship as well as any notion that native-born and naturalized citizens should possess different sets of rights, and confirmed the principle that U.S. citizenship, once conferred, would be uniform and complete."[70]

Following the Revolutionary War and the establishment of the various states, laws were sometimes enacted delimiting citizenship requirements; the first made was based on race when, in 1779, Virginia declared that its citizens would constitute "all white persons born within the territory and all who had resided there for the two years preceding . . . ."[71] Subsequently, immigrants were made to prove their intent to reside in the state and prove their fidelity.[72] A Virginia law withheld the right of new state citizens to hold office until residing there for two years, evincing "a permanent attachment to the state, by having

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68 *Id.*

69 *Id.*

70 *Id.* During the first half of the nineteenth century, "[s]ectional conflict between slave states and free states was mirrored in an ambiguous constitutional idea of citizenship . . . ." *Id.* at 152. Reconstruction amendments passed following the Civil War extended "constitutional protection and national citizenship to Blacks . . . the status of U.S. citizenship became decisively national in scope and federal in origin." *Id.* Soon, naturalization, previously "a casual and informal process," was replaced by "crude racist criteria" so that only those found "'suitable'" were permitted to naturalize. *Id.* at 153. Nonetheless, by the second to third decade of the 20th century, this restrictive trend was replaced by one favoring assimilation, so "the vast majority of aliens" were welcomed for citizenship. *Id.* By mid-twentieth century, racial restrictions on naturalization were lifted as experience demonstrated "that all ethnic groups . . . had the capacity to assimilate in the national civic culture . . . ." *Id.* Even the ruling in *United States v. Cruikshank*, "appears to indicate that in a republican form of government second class status among citizens is not permitted." Leslie Friedman Goldstein, *The Second Amendment, the* Slaughter-House Cases *(1873), and* United States v. Cruikshank *(1876)*, 1 ALB. GOV'T L. REV. 365, 400–01 (2008) (internal citation omitted). Regarding women, under the Cable Act of 1922, female citizens who married those ineligible to become citizens lost their own citizenship until the Act's repeal in 1931. IMMIGRATION, *supra* note 67, at 135. Also harmed by these restrictionist views were American Indians. While during the nineteenth century tribal members were considered to be members of separate nations, with Congress naturalizing some Indians through treaties and other laws, not until 1924 did Congress grant citizenship to all Native Americans born in the United States. *Id.* at 137.

71 KETTNER, *supra* note 48, at 215. Note that race was a prerequisite for citizenship.

72 *Id.*

intermarried with a citizen of the commonwealth, or a citizen of any other of the United States, or purchased lands to the value of one hundred pounds therein."[73] Generally, though, requirements included merely sworn allegiance, a certain period of residence, and proof of good character.[74]

A. *The Constitution and Naturalization*

The "competing views of citizenship" arising during the constitutional ratification debates resulted in the document of 1787, which failed to define the meaning of "being naturalized."[75] In fact, it referred to citizenship on only three occasions: Article I, Section 8, which authorizes Congress to establish a uniform Rule of Naturalization; Article I, Section 2, which restricts eligibility for the House of Representatives to those who have been citizens for seven years, and eligibility for the Senate to those who have been citizens for nine years; and Article II, Section 1, which restricts the presidency to "natural born Citizens, or a citizen of the United States," at the time the Constitution was adopted. The absence of a constitutional definition of citizenship "reflected the unresolved dispute" between national and state loyalty.[76] Birthright citizenship was seen as "an incentive for immigrants who expected to have children, and thus served to help populate the new nation."[77] For those born elsewhere, citizenship through naturalization emphasized the notion of consent, reflecting the

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73 *Id.* (citation omitted). Other states, such as South Carolina, Georgia, New Jersey, etc. enacted similar citizenship laws, with Georgia evidencing skepticism about Scots, who would be deported unless they fought on "behalf of the freedom and Independence of the United States." *Id.* at 215–18 (citation omitted).

74 *Id.* at 218.

75 NOAH PICKUS, TRUE FAITH AND ALLEGIANCE: IMMIGRATION AND AMERICAN CIVIC NATIONALISM 22–23 (2005).

76 *Id.* at 23. A plethora of scholarship has examined this most basic struggle faced by the founders, federalism, or the relative rights of the states vis-à-vis a federal government. THOMAS PAINE, COMMON SENSE, *reprinted in* THOMAS PAINE, COLLECTED WRITINGS 5 (Eric Foner ed., 1995) (1776); THE FEDERALIST NOS. 1, 6–9, 11–13, 15–17, 21–36, 59–61, 65–85 (Alexander Hamilton); DANIEL J. ELAZAR, EXPLORING FEDERALISM (1987); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010). This struggle continues to this day. *See* JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER (2d ed. 2008).

77 PICKUS, *supra* note 75, at 23 (citing KETTNER, *supra* note 48, at 248–86).

developing understanding that, unlike in England, obedience was not owed to a superior king.[78] This notion echoed the tenets in the Declaration of Independence, declaring that governments derive their powers from the "consent of the governed."[79] Thus, the American naturalization process reflected a voluntary, contractual arrangement between one who chose an allegiance and the community to which she joined, a community that accepted her.[80]

"For most of this country's [early] history, immigration laws and policies permitted relatively easy access to lawful immigration status"[81] and, following immigration, ease at gaining citizenship. Not until the mid to late 1820s do we find any adverse references to immigrants: "mostly not such as we would generally prefer," they being poor.[82] As tolerance of the poor waned, a law was proposed "to allow no alien to land till the master of the vessel on which he came had paid the city five dollars."[83] Fear was afoot that the British were trying to rid themselves of their poor by sending them off to America.[84]

It is true that citizenship rights of the native born derive from Section 1 of the Fourteenth Amendment, while those of naturalized citizens derive from satisfying statutory requirements. Nonetheless, the Supreme Court confirmed the lasting and equal status of naturalized citizens as early as 1824, in the case of *Osborn v. Bank of United States.*[85]

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78 *Id.* at 23 (quoting KETTNER, *supra* note 48).

79 "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

80 *See* PICKUS, *supra* note 75, at 23 (quoting KETTNER, supra note 48, at 8–9).

81 Thronson, *supra* note 23, at 66 n.36, only 1% of the "25 million immigrants who landed at Ellis Island before World War I" were excluded, mostly based on health concerns (citation omitted).

82 FRANK GEORGE FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES: FROM THE REVOLUTIONARY WAR TO 1861 187 (1906). These immigrants were arriving from Canada and Sussex, England. *Id. But see* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (identifying early involvement by individual states in regulating immigration into and among them, including race-based controls).

83 FRANKLIN, *supra* note 82, at 188.

84 *Id.* at 187.

85 22 U.S. 738, 827 (1824). Chief Justice Marshall, writing for the Court, stated that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and the treaties made, . . ." *Id.* at 819. The Court answered the case's question in the affirmative. *Id.* The ruling, however, was superseded by statute. Nicodemus v. Union Pacific Corp., 318 F.3d 1231 (10th Cir. 2003).

Brought by a recently naturalized citizen, the case determined whether a charter provision of the Bank of the United States, which authorized cases to be brought by and against it in the federal courts, was authorized by Article III of the Constitution. In upholding the provision, the Court distinguished incorporation from naturalization, explaining

> [a] naturalized citizen is indeed made a citizen under an act of Congress . . . . He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. *He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction.* The law makes none.[86]

By defining naturalized citizenship in this way, *Osborn* certified, at this early date in the national history, the concept of "no distinctions" between native-born and naturalized citizens.[87]

Earlier decisions, though not all emanating from the Supreme Court, supported the inference that the Constitution created only one class of citizen, whether born of birth in the United States or of

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86 *Osborn*, 22 U.S. at 827–28 (emphasis added). This reasoning was endorsed in *Afroyim v. Rusk*, 387 U.S. 253, 275–76 (1967). Supporting my assertion in this study that naturalized citizens can possess neither more nor fewer rights than native-born citizens, Justice Marshall, in *Afroyim*, described "Congress' inability to offer a naturalized citizen rights or capacities which differ in any particular from those given to a native-born citizen by birth." *Id.* at 276.

87 *Osborn*, 22 U.S. at 827; *see also* Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949) ("The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.") (citing United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898)). While in 1991, a First Circuit Court of Appeals decision held that *Osborn*'s suggestion "that all suits involving a federally-chartered corporation presented a federal question" was overruled by 28 U.S.C. § 1349, the aspects of *Osborn* relevant to the citizenship issue nonetheless remain intact. S.G. v. Am. Nat'l Red Cross, 938 F.2d 1494, 1497 (1st Cir. 1991). Subsequently, the Supreme Court overruled the First Circuit opinion and reaffirmed *Osborn*, quoting *Osborn* on the federal charter issue. Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 249–56 (1992).

naturalization. In the 1800 case *Jackson v. Beach*,[88] hailing from the Supreme Court of New York County, naturalization retroactively confirmed the sale of land to a noncitizen, thereby establishing his good title upon naturalization. "[T]he lessor of the plaintiff having been naturalized, that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture . . . "[89] as well as "a good conveyance."[90] The principles of *Jackson v. Beach* were affirmed in an 1826 Supreme Court case involving a similar objection, with like result. In *Doe, ex rel. Governeur's Heirs v. Robertson*,[91] the plaintiff proved that he had good title to land acquired from the son of a noncitizen who naturalized after receiving a "patent" for the land, but before the defendant's competing claim was made. The point: a naturalized USC had full rights to hold land, including a right that applied retroactively. This openness to welcoming new members of the American community was reflected in *Minor v. Happersett* as Chief Justice Waite declared "[w]hoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. . . . Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were."[92] And in a Supreme Court case from 1892, *Boyd v. Nebraska ex rel. Thayer*, asking whether the newly elected Nebraskan governor James E. Boyd could lawfully hold that office, as he was alleged to not yet have become a United States citizen on election day, the Court supported the officeholder when it said: "[n]aturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen . . . ."[93]

B. *Mounting Opposition to Immigration*

This study of citizenship, particularly the question of equal citizenship, is attempting to ascertain whether the SIJS provision in

88 1 Johns. Cas. 399 (N.Y. Sup. Ct. 1800).

89 *Jackson*, 1 Johns. Cas. at 401.

90 *Jackson*, 1 Johns. Cas. at 402.

91 24 U.S. 332 (1826).

92 88 U.S. 162, 167 (1874).

93 143 U.S. 135, 162 (1892). Governor Boyd's naturalization was based on derivation from that of his father. *See id.* at 177–82.

question violates the United States' principles of citizenship. A window into the history of the efforts to restrict admission of immigrants should be instructive for that project.

While "[m]any commonly believe that the United States was open to outsiders until the early twentieth century," it is more precise to aver that,

> except as to African slaves, prior to the late nineteenth century, entry restrictions commonly focused on [] economic conditions (i.e., poverty) or [] physical or mental conditions (i.e., lunacy) . . . . [While] the first effort to restrict immigration by creating obstacles to naturalization arose in 1798, when the Naturalization Act extended the required residence period from five to fourteen years; [the] law went largely unenforced and was repealed shortly thereafter.[94]

On the other hand, race-based immigration restrictions were firmly established in the 1790 Naturalization Law, signed by President Washington, allowing for citizenship eligibility after just two years of U.S. residence, but only for "free white persons."[95] This limitation to "white persons" lasted until 1870 when, still denying citizenship to Native Americans and those of Chinese descent, it was extended to "Africans and . . . persons of African descent."[96] Racial preferences were not thoroughly eliminated from the law until 1952.[97]

As the 1800s progressed, with many fleeing despotism and hunger, entreaties opposing immigration hastened. Questions were raised about the extent to which the nation should welcome immigrants. In 1837, the "Native American Association organized . . . a meeting held in Washington," with a goal of repealing the naturalization law "to save their institutions from the corruption of foreign countries and themselves from the loss of their birthright."[98] The participants feared that "[a]lready many of the most important elections had been swayed

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94 *See* Scharf, *supra* note 10, at 133–34 (internal citations omitted).

95 *Id.* at 142; *see also* An Act to Establish a Uniform Rule of Naturalization, March 26, 1790, ch. 3, 1 Stat. 103. This is the first federally enacted color-conscious law. Siegel, *supra* note 28, at 520. Prior thereto, several states maintained color-conscious laws. *Id.* at 494–514. States enacted anti-Black laws as early as 1714 (New Jersey) and some as late as 1788 (Massachusetts). *Id.* at 496–513.

96 Siegel, *supra* note 28, at 521 (internal citation and quotation marks omitted).

97 *Id.* (citation omitted).

98 FRANKLIN, *supra* note 82, at 191.

and decided by the votes of foreigners, notoriously ignorant, used by artful demagogues."[99]

From the late nineteenth century through the early twentieth, "the first nationally-organized movement developed against immigrants. 'Nativism' . . . is distinctively American . . . . Although the word was coined around 1840, the 'spirit' of American nativism surfaced long before that."[100] "[T]his powerful anti-foreigner tradition . . . can be traced as far back as the Protestant Reformation." It was, at least partly, an "anti-Catholic tradition" that shaped the identity of the nation.[101]

This "Protestant nativism" reflected the apparent conflict between Catholic traditions and the "American concept of individual freedom"; "Americans were tempted to view American liberty and European popery as irreconcilable."[102] The flood of Catholic immigrants in the nineteenth century exacerbated this perceived threat. "Fear of foreign radicals" increased following the 1790s and the French Revolution,[103] especially when there was truth behind the sentiment, as with "the influx of the German Forty-Eighters, some of whom [brought] the Marxist movement" to the United States.[104] This influx "kindled xenophobia" over the threat to American institutions from radical immigrants.[105] It was during this period that "the Know Nothing Party, anti-Catholic and anti-immigrant in nature, had some legislative successes."[106]

Ongoing anti-foreign sentiment buttressed attitudes opposing racial minorities; "[t]he racist tendencies of the Americanization movement" buoyed the Ku Klux Klan[107] in the 1860s. Racial nativism

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99 *Id.* at 193. Readers will note that this xenophobia is strikingly similar to that experienced during the 2016 U.S. Presidential Election. *See* Editors of Rethinking Schools, *Racism, Xenophobia, and the Election*, HUFFPOST, https://www.huffingtonpost.com/the-zinn-education-project/racism-xenophobia-and-the_b_12674144.html [https://perma.cc/JZ29-8WTQ] (last updated Dec. 6, 2017); Michael Schaub, *Xenophobia is the 'Word of the Year for 2016,' says Dictionary.com*, LA TIMES (Nov. 28, 2016, 9:25 AM), http://www.latimes.com/books/la-et-jc-xenophobia-word-of-the-year-20161128-story.html [https://perma.cc/A2XS-3FYN]. For historical context, see Scharf, *supra* note 10.

100 Scharf, *supra* note 10, at 134 (internal citations omitted).

101 *Id.* at 134–35 (internal citations omitted).

102 *Id.* at 135 (internal citations and alterations omitted).

103 *Id.*

104 *Id.*

105 *Id.* at 135–36 (internal citation omitted).

106 *Id.* at 136.

107 *Id.* at 142.

endorsed the claim "that the United States belongs in some special sense to the Anglo-Saxon 'race.'"[108] The first apparent effects of this sentiment were the efforts to exclude Chinese immigrants, who had been used for decades for cheap labor to build the nation's railroads. "While anti-Asian sentiment culminated in enactment of the Chinese Exclusion Act in 1882, the notion of race as a factor in immigration became a strong sub-text of nativism around the turn of the [twentieth] century,"[109] culminating "in the movement described by the expression 'One Hundred Percent Americanism.'"[110]

Anti-immigrant sentiment swelled as the nation turned the page into the twentieth century. After 1910, for example, most citizenship applications from natives of East Asia were rejected,[111] along with those from the Near and Middle East.[112] In 1913, during the World War I era, the Bureau of Naturalization was established,[113] bolstering Americanization drives and similar widespread programs heralding the importance of educating immigrants regarding the responsibilities and duties of citizenship.[114] "President Wilson did little to stem the growing tide of xenophobia. . . . Soon, to stifle [anti-war efforts], the Espionage and Sedition Acts were enacted,"[115] which were "responsible for more than two thousand arrests, over a thousand imprisoned, and 2537 loyalty investigations of federal workers in 1918 . . . ."[116]

As the logical response to these aggressive anti-immigrant actions was naturalization, by the 1920s, citizenship became the touchstone for most immigrants, who possessed the

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108 *Id.* at 136 (internal citation omitted).

109 *Id.* For sources of racial attitudes, see *id.* at 136–37; for a discussion of attacking groups, union opposition, and generalized hostility towards them, see *id.* at 137–38.

110 *Id.* at 138. Rampant, almost competitive patriotism arose, seen in discriminatory taxing programs, involvement from the Progressive Movement, and President Wilson's active role in it. *Id.* at 138–39.

111 IMMIGRATION, *supra* note 67, at 131.

112 *Id.*

113 *Id.* at 139.

114 *Id.* at 153. These programs commonly included both immigrants and their children. *See also* Scharf, *supra* note 10, at 140–41 (noting that additional actions were taken to "Americanize" immigrants, such as enacting laws mandating that English be the only language spoken in meetings, prohibiting private school education, and banning foreign-language classes).

115 Scharf, *supra* note 10, at 139.

116 *Id.* at 140.

> growing conviction . . . that U.S. citizenship would give them the rights, privileges, and protections guaranteed by the federal government; they would live, vote, and secure work on the same basis as native U.S. citizens and would escape the restrictions and encumbrances of alien status. Citizenship also meant acceptance as an American: it was an unimpeachable sign that the newcomer had assimilated and had become equal as a result of possessing a set of rights that he or she had not known as an alien.[117]

> The ultimate threat to immigrants, [] swift deportation, proved the most potent weapon in the arsenal of the nativists. This was fueled by the confluence of several events: the Bolshevik Revolution of 1917, the end of World War I in 1918, the establishment of revolutionary governments in Germany and Hungary during 1918 and 1919, the labor strikes of 1919, and the resulting Red Scare.[118]

"In 1919, foreign-born radicals and so-called anarchists such as Emma Goldman and her lover Alexander Berkman were being deported by the hundreds in . . . the Palmer raids."[119] From 1920 to 1921, this anti-foreign fervor led to a new wave of legislation that excluded foreigners from many occupations.[120] The climax occurred in the early 1920s, resulting in

> the most significant . . . legislation enacted in this arena either before or since. . . . With the 1921 Immigration Act Congress established a quota system limiting immigration to 3% of the number of foreign-born of each nationality recorded in the 1910 census, with an annual maximum of 355,000. This meant that 55% of new immigrants would be from northern Europe and only 45% would be from southern and eastern Europe.[121]

Shortly thereafter, new anti-immigration laws passed overwhelmingly, implementing "racial nationalism through a quota system based on national origin."[122] Consequently, "[b]y 1923, nearly

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117 IMMIGRATION, *supra* note 67, at 143; *see also* Nancy Foner, *Engagements Across National Borders, Then and Now*, 75 FORDHAM L. REV. 2483, 2487 (2007).

118 Scharf, *supra* note 10, at 143–44.

119 *Id.* at 144.

120 *Id.* at 142.

121 *Id.* at 144.

122 *Id.* at 145.

225,000 United States residents" became "racially ineligible" to naturalize.[123] A mere two years later, only a nominal number of immigrants passed through Ellis Island.[124]

In 1952, the Immigration and Nationality Act was first codified in a single piece of legislation, which organized the immigration and naturalization statutes from the past half-century into one Act, strengthening the government's "deportation powers and widen[ing] its surveillance" of noncitizens.[125] The 1952 Act also enhanced citizenship qualifications, requiring speaking and understanding English along with reading and writing proficiency.[126] By the mid-twentieth century, racial restrictions on naturalization seemed impolitic and impractical: "[e]xperience had shown that all ethnic groups, given time and encouragement, had the capacity to assimilate into the national civil culture, and so U.S. citizenship was opened to all."[127] Thus, the most significant change of the 1952 Act was the "abolition of all racial tests or marital qualifications for citizenship[,]"[128] resulting in an enormous effect on subsequent immigration.[129]

Amendments enacted in 1965, the Hart-Celler Act,[130] replaced the discriminatory national origins quota system with per-country ceilings. Hart-Celler led to a rise in naturalizations in subsequent years; for example, in 1975 there were 142,000—8% more than the year before.[131] "The 1965 amendments were a sea change in U.S. immigration law, marking the first time that it adopted a basic nondiscrimination principle" and "was apparently race-neutral[,] . . . part of a basic movement toward civil rights in American public law that included the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[132]

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123 *Id.* at 142 (citations omitted).

124 *Id.* at 145.

125 IMMIGRATION, *supra* note 67, at 146. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

126 IMMIGRATION, *supra* note 67, at 146–47.

127 *Id.* at 153.

128 *Id.* at 147.

129 *See* U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 5 (1957) (table showing immigration rates from 1948–57); *id.* at 1 (noting that immigration reached a thirty-year high in fiscal year 1957).

130 Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

131 IMMIGRATION, *supra* note 67, at 151–52.

132 HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 132 (2006) (internal citations omitted). The Act created an

Between 1965 and the present day, several important immigration-related amendments were adopted, including the Refugee Act of 1980,[133] the Immigration Reform and Control Act of 1986 (IRCA),[134] the Immigration Marriage Fraud Amendments of 1986 (IMFA),[135] the Immigration Act of 1990,[136] the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),[137] and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[138] Also enacted in 1996 was the Personal Responsibility and Work

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annual ceiling of 170,000 on immigrants from the eastern hemisphere and a 20,000-person limit on immigration from any one country, with visas allocated in accordance with a

> preference system that sought to facilitate family reunification, attract skilled immigrants, and offer a safe haven to certain kinds of refugees. The 1965 amendments also established the first numerical limits on immigration from the Western Hemisphere. . . . [I]mmigration . . . was capped at 120,000 per year . . . until 1976 [when] the INA was further amended to apply the country quotas and preference system to nations in the Western Hemisphere. In 1978 the separate hemispheric quotas were abolished to create a single worldwide ceiling of 290,000 . . . .

Fernando Riosmena, *Policy Shocks: On the Legal Auspices of Latin American Migration to the United States*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 270, 274 (2010).

133 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (adopting internationally-recognized definition of "refugee" from 1951 UN Convention and Protocol on the Status of Refugees and procedures for accommodating new refugees, raising the limit on the annual number admitted into the U.S., and establishing the Office of U.S. Coordinator for Refugee Affairs and the Office of Refugee Resettlement).

134 Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (also known as Reagan Amnesty, Section 201 of the Act gave legal status those who entered the U.S. before January 1, 1982 and instituted employer verification requirements for workers).

135 The Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.) provided for temporary period of conditional LPR status for those marrying a USC within two years of admission to the United States.

136 Immigration Act of 1990 § 203, Pub. L. No. 101-649, 104 Stat. 4978, 5015 (codified as amended in scattered sections of 8 U.S.C.). This Act reformed the 1965 INA and its annual immigration numbers, as well as provide for family and employment-based immigration visas and established a diversity visa program—a lottery admitting immigrants from "low admittance" countries or those whose citizenry was underrepresented in the United States. *See* Riosmena, *supra* note 132, at 275.

137 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

138 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.).

Opportunity Reconciliation Act (PRWORA).[139] The 1990 Act increased total immigration to 675,000 a year, with family-based immigration increasing annually from 290,000 to 480,000, continuing historic support for family immigration.[140] These post-1952 changes "strengthened the focus on family-based immigration."[141] In fact, as late as 2001, studies of the U.S. immigration system confirmed that "[l]egal immigration through the family-based [visa] classification is Congress' highest preference, providing for eighty percent of all legal immigration."[142]

Following the attacks of September 11, 2001, the U.S. immigration system was overhauled again and moved to the new Department of Homeland Security (DHS) under three branches: Customs and Border Protection; Immigration and Customs Enforcement; and Citizenship and Information Service. Finally, the REAL ID Act of 2005[143] instituted federal standards for state-issued driver's licenses and non-driver identification cards.

More recently, particularly during the Obama presidency, some states such as Texas and Arizona began to resist the federal government's control over immigration, frustrated that it was not doing enough to rid the nation of unauthorized immigrants. Arizona, for example, enacted anti-immigrant legislation, commonly referred to as S.B. 1070, that (1) made failure to comply with federal alien-registration requirements a state misdemeanor, (2) made it a misdemeanor for an unauthorized noncitizen to seek or engage in work in Arizona, (3) authorized officers to arrest someone without a warrant if the officer

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139 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C).

140 WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY 2 (2016); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.). For a good summary, see JOYCE C. VIALET, CONG. RESEARCH SERV., 91-141 EPW, A BRIEF HISTORY OF IMMIGRATION POLICY (1991).

141 Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 854 (2007).

142 Marie Weisenberger, *Broken Families: A Call for Consideration of the Family of Illegal Immigrants in U.S. Immigration Enforcement Efforts*, 39 CAP. U. L. REV. 495, 504 (2011); *see also* Michael Fix et al., *The Integration of Immigrant Families in the United States*, URBAN INST., 7–8 (2001), https://www.urban.org/sites/default/files/publication/61601/410227-The-Integration-of-Immigrant-Families-in-the-United-States.PDF [https://perma.cc/DA2F-CEKZ].

143 REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8 U.S.C.).

had probable cause to believe that person had committed "any public offense that makes the person removable from the United States," and (4) provided for officers conducting a stop, detention, or arrest to sometimes try to verify the person's immigration status.[144] Following the federal government's challenge, all but the fourth provision was stricken as violating the federal government's preemptive powers over immigration law.[145]

Shortly thereafter, the presidential campaign of 2016 and the years hence have aggravated anti-immigrant hysteria.[146] Actions taken and/or threatened since the January 2017 inauguration include calls for a 1000-mile border wall, criminal prosecutions for undocumented parents who bring in undocumented children, reduction of family reunification (pejoratively called "chain migration"),[147] executive orders to limit immigration from several majority-Muslim nations, and attempts to cancel the popular Deferred Action for Childhood Arrivals program, benefitting innocent youngsters and created in 2012. Indeed, there is a mounting outcry from immigrants and their advocates seeking to counterbalance the attacks on civil and human rights that immigrants are experiencing now and are fearing for the future.[148]

144 Arizona v. United States, 567 U.S. 387, 393–94 (2012).

145 *Id.* at 439–40.

146 Donald J. Trump campaigned on several immigration issues, all subject to considerable media reporting: building a wall across the U.S.–Mexican border, limiting various visitor—especially worker—visas, restricting grants of permanent residence, abandoning birthright citizenship, and mass deportation of undocumented people.

147 Family immigration/reunification is "what immigration to this country has always looked like," currently accounting for "about a quarter of all legal immigration to the United States." *See* Jonathan T. Weinberg, Opinion, *Don't Attack Legal Immigration*, DETROIT NEWS (Feb. 1, 2018, 12:04 AM), http://www.detroitnews.com/story/opinion/2018/02/01/attack-legal-immigration/109987496 [https://perma.cc/YV82-ZLPZ].

148 The citations to both the press and academic scholarship debating the pro- and anti-immigrant issues on the table since President Trump took office are numerous. *See generally* Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611 (2017). *See also* Arunajeet Kaur, *Trumpism, Immigration and Globalisation*, S. RAJARATNAM SCH. INT'L STUD. (Feb. 5, 2018), https://dr.ntu.edu.sg/bitstream/handle/10220/44408/CO18018.pdf?sequence=1&isAllowed=y [https://perma.cc/8PRR-3N8P].

III. THE IMPACT OF DISCRIMINATION ON CITIZENSHIP

A. *Discrimination Against Blacks and Other Racial Minorities*

In suggesting, as I do here, that there is constitutionally but one class of U.S. citizen, attention must be paid to the nation's blighted history founded on forcible slavery and complete disregard for citizenship or other basic human rights.[149] A full grasp of U.S. citizenship is impossible without command of the historical support for these conditions. Undoubtedly, slavery was accounted for, envisioned, and even sanctioned by the Constitution.[150] Obviously, in identifying those who possessed commonly understood citizenship rights such as voting[151] and jury service[152]—only white men[153]—early legislation

149 I apologize for this simplistic sketch of the sordid history of the United States versus African-Americans. For comprehensive studies, see EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2014); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 (1935); MICHAEL TADMAN, SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH (1989); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008);.

150 Generally, when historians note the ways of slavery, they point to the 3/5 clause, U.S. CONST. art. I, § 2, the power granted the federal government to suppress domestic insurrections, *id.* art. I, § 8 and art. IV, § 4, the fugitive slave clause, *id.* art IV, § 2, cl. 3, and the prohibition against outlawing slave importation until 1808, *id.* art. IV, § 9, cl. 1. *See Abolition of the Slave Trade: The Slave Trade and the Constitution*, N.Y. PUB. LIBR., http://abolition.nypl.org/essays/us_constitution/3 [https://perma.cc/JT6M-TCDA] (last visited Oct. 4, 2018) (positing that the final text of this prohibition was "designed to disguise" the essence of the Convention's action). The Constitution was clearly riddled with contradictions, some of which were addressed by Frederick Douglass in *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS (Philip S. Foner, ed. 1950) (noting the hypocrisy of slavery in statements such as "the existence of slavery in this country brands your republicanism as a sham, your humanity a base pretense, and your Christianity as a lie"); *see also* HOANG GIA PHAN, BONDS OF CITIZENSHIP LAW AND THE LABORS OF EMANCIPATION 143 (2013) (citing FREDERICK DOUGLASS, *What to the Slave Is the Fourth of July?: An Address Delivered in Rochester, New York on 5 July 1852*, *in* 2 THE FREDERICK DOUGLASS PAPERS 359 (John Blassingame ed., 1982)). Phan identifies many of the Constitution's contradictions regarding slavery. *See id.* "[T]he rights of black citizens were violated by the laws designed for slaves: 'Any such citizen of a free State, visiting a slave State, is liable to be seized on suspicion of being a fugitive from slavery . . . and unless able . . . to make satisfactory proof of his freedom, sold into perpetual slavery.'" *Id.* at 131 (citing WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 76 (1845)) (omissions in original).

151 Many incorrectly assume that voting was always considered an essential constitutional right, but denial of voting rights was so profound that, prior to women and the poor being

excluded more than half the population. Eventually, rights were denied to a wide swath of people, from women[154] to Native Americans[155] to Asians,[156] and even ultimately to those with intellectual disabilities.[157]

From the early days of the Republic, citizens were limited to free white persons.[158] That Blacks were *intended* for exclusion[159] from the outset underscores the significance of race to an understanding of U.S. citizenship. To be sure, racial exclusion did not form the basis of *all* thought as to what it meant to be a citizen. For example, Jacob Howard's introduction to Section 1 of the Fourteenth Amendment, speaking for the Joint Committee on Reconstruction, described an Amendment that abolished

> all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to

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eligible to vote, well over half the nation's population, and a substantial percentage of its citizens, were denied the vote, including women, *see infra* Section III.C, non-landowners, felons, *see infra* Section III.B, and women who married noncitizens, *see infra* Section III.C. *See also* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1339 (2011). Because of this vast ineligibility, it is likely that, early on, voting was not assumed to be a basic citizenship right. Early court decisions noted that "[w]omen and minors . . . cannot vote . . . when a property qualification is required to vote or hold a particular office, those who have not the necessary qualifications cannot vote or hold the office; yet they are citizens." New Hartford v. Canaan, 5 A. 360, 366 (1886) (citing Dred Scott v. Sandford, 60 U.S. 393, 422 (1857)). It is now, though. While "[m]odern political theorists disagree about the full meaning of equal citizenship, . . . there is an overlapping consensus that voting is at its very core—that the right to vote is a 'minimal condition of political equality[,]'" Fishkin, *supra*, at 1335 (internal citation omitted), "'at the heart of the idea of equal citizenship' [as] 'the preeminent symbol of participation in the society as a respected member,'" *id.* (first quoting Kenneth L. Karst, *The Supreme Court 1976 Term: Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 28 (1977); then quoting KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 94 (1989)), and "constitutive" with being a full citizen. *Id.* at 1333 (internal citation omitted). *See also* discussion of the *Dred Scott* case, *infra* notes 165–79, and accompanying text.

152 In *Norris v. Alabama*, 294 U.S. 587, 589 (1935), the Supreme Court declared it a violation of Equal Protection to deny Blacks the right to serve on juries.

153 *See id.* (jury service); *Fishkin*, *supra* note 151, at 1339 (voting).

154 On discrimination against women, see *infra* Section III.C.

155 On discrimination against Native Americans, see *supra* notes 70, 132 and see *infra* 205, 245, and corresponding text.

156 On discrimination against Asians, see *supra* note 9 and *infra* notes 183, 205, 247, and accompanying text.

157 *See infra* Section III.D.

158 *See supra* note 95 and accompanying text.

159 *See supra* note 149.

> another. . . . Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws . . . ?[160]

Howard's statement, while opposing the racialization of the United States, evidences the intent that this aspect of the Fourteenth Amendment confirmed a single class of U.S. citizenship.

This singular class of United States citizen reflected the rights affirmed in *Osborn v. Bank of United States*, *Jackson v. Beach*, *Minor v. Happersett*, and *Boyd v. Nebraska*, all of which established that naturalized citizens are full members of society, possessing the same rights as native-born citizens, and, according to the Constitution, standing on the same footing. This is a fact that cannot be altered by Congress, as its power is solely to prescribe the naturalization rules.[161]

Confirmation of a singular class of citizenship demonstrates the affront INA § 1101(a)(27)(J) poses to naturalized SIJs' citizenship rights. This singular class of United States citizen is supported by further evidence derived from an unexpected source, the case of *Dred Scott v. Sandford*, notorious in American jurisprudence. Justice Taney, writing for the majority, addressed the constitutional dimensions of citizenship. While the infamous result in this 1857 case was that Black people born in the United States were not citizens,[162] Taney reaffirmed the single status of United States citizenship, a concept contained in the Constitution if not well defined therein.[163]

Scott, who had been enslaved while living in Missouri, sued for his freedom after being transported to both Illinois, a free state, and Minnesota, a free territory. He claimed that residence in these free areas

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160 Siegel, *supra* note 28, at 581 (internal citation omitted).

161 *See supra* notes 85–93 and accompanying text.

162 The fact that slaves were not citizens, despite that many of them were natural-born, demonstrates how "out of alignment" citizenship and voting were at this time. *See* Fishkin, *supra* note 151, at 1339.

163 Dred Scott v. Sandford, 60 U.S. 393 (1857). Throughout the opinion are comments such as "in the sense in which that word is used in the Constitution" and indications that the word "citizen" has a set meaning when used in the Constitution: "The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when . . . emancipated, or who are born of parents . . . free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States." *Id.* at 400–03.

had nullified his slave status.[164] A key issue in the case was whether Scott had a right to sue, a right reserved for citizens.[165] In making "some of the Supreme Court's first rulings on citizenship,"[166] Justice Taney, in declaring that "[t]he words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing,"[167] described "the political body who . . . form the sovereignty, and who hold the power and conduct the Government through their representatives."[168] "They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."[169] Justice Taney's opinion is infamous for holding that even a free Black man did not own the rights and privileges of citizenship—in this case, the right to sue—because the framers never intended that they be "admitted to the political community of citizens."[170]

Justice Taney reasoned that there was only one class of "people of the United States," citizens, and as the only members of that class, citizens had the right to sue; therefore, it was proper to deny the lower court's jurisdiction over the lawsuit Scott filed to establish his citizenship. To Taney,[171] Blacks, whether enslaved or not, were not meant to be citizens; thus, Blacks were unable to file suit.[172] In his ruling,

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164 IMMIGRATION, *supra* note 67, at 121–22.

165 *Dred Scott*, 60 U.S. at 403.

166 Brook Thomas, *China Men,* United States v. Wong Kim Ark*, and the Question of Citizenship*, 50 AM. Q. 689, 695 (1998).

167 *Dred Scott*, 60 U.S. at 404.

168 *Id.*

169 *Id.*

170 IMMIGRATION, *supra* note 67, at 122. As to "whether the class of persons described in the plea in abatement[, Blacks,] compose a portion of this people, and are constituent members of this sovereignty," the answer was no. *Dred Scott*, 60 U.S. at 404. Taney explained that Blacks "are not included, and were not intended to be included, under the word 'citizens' in the Constitution . . . ." *Id.* at 404. Citing the 1790 naturalization law, Taney opined that citizenship was intended to be reserved for whites. *See id.* at 419–20.

171 Much controversy, and of course scholarship, ensued concerning the precise holding of the case, as nine separate opinions were penned, although Taney did manage a majority for the narrow ruling on Black citizenship. *See* FEHRENBACHER, *supra* note 6, at 4, 175, 235, 237, 298. Conjecture is that virtually all other aspects of the opinion were dicta. *See id.* at 183.

172 Justice Taney added:

> The question before us is, whether the class of persons described in the plea . . . are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary,

Justice Taney uttered one of the most unfortunate pronouncements ever to derive from the Supreme Court: that, in the term "people of the United States," which he described as synonymous with citizens, Blacks, both free and enslaved, were excluded.[173]

> they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Dred Scott, 60 U.S. at 404–05. The case also declared the 1820 Second Missouri Compromise to be unconstitutional, permitting slavery throughout the country. *See* FEHRENBACHER, *supra* note 6, at 4; *see also* Paul Finkelman, Scott v. Sandford*: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 4 (2007); Thomas, *supra* note 166, at 695–96.

[173] *Dred Scott*, 60 U.S. at 404; *see also* Thomas, *supra* note 166, at 696. According to Taney, the degraded way in which Blacks were treated made clear the founders' intent—to exclude them from that "class" intended to be part of the polity. *Dred Scott*, 60 U.S. at 409–10. He used exclusion from enrollment in states' military as a ready example: "the African race, . . . forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it." *Id.* at 415. As one of the most infamous and disparaged opinions of the Court, it has been subject to a plethora of books and scholarly critiques. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1449 (2001) ("Infamous and unjust cases like *Dred Scott v. Sandford*—which held that blacks could not be citizens . . . tend to be remembered as examples of how courts should not behave."); "Today it is virtually impossible to find anyone who supports Taney's decision or the outcome of the case." Finkelman, *supra* note 172, at 4. Notwithstanding the near universal contempt in which *Dred Scott* is held, there are occasionally courts citing it for purposes unrelated to its infamous comments. For example, it was recently cited by a federal court in the Western District of Texas. *See* Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 WL 388589 (W.D. Tex. Feb. 2, 2005), *aff'd and remanded*, 459 F.3d 618 (5th Cir. 2006). The case involved defendant Border Patrol Agent's unsuccessful immunity defense to a Federal Tort Claims Act suit filed following his altercation with a Mexican citizen. The court noted that, while "*Dred Scott* is commonly labeled by scholars as one of the more infamous decisions in Supreme Court history . . . aspects of its textual analysis are worthy of some discussion as it elucidates the present textual analysis." *Id.* at 6 (construing whether the Fourth Amendment's phrase "the people" could include noncitizens).

Actually, Justice Taney implied his personal umbrage with the policy leading to his ruling:

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

Dred Scott, 60 U.S. at 405.

Judges continue to disdain opinions they feel forced to endorse; for example, Judge Reinhardt of the 9th Circuit, recently stated:

While the opinion was decried by many, including the dissenting Justices McLean and Curtis,[174] in the ensuing years its injustice has generated even greater disdain and is widely and commonly considered one of the worst, most notorious Supreme Court opinions.[175] Notwithstanding the sorrowful and unjust nature of much of the opinion, it should be acknowledged that in the opinion, Justice Taney also pronounced the singular status of U.S. citizenship; it is in that awareness that this case could, to a degree, redeem itself.[176] Through the Justice's statements on citizenship, he can, oddly, assist those under consideration here. For, if there is but one class of U.S. citizenship, the benefits of that citizenship cannot be denied to naturalized SIJs. Recognizing this aspect of the *Dred Scott* decision can promote good, as opposed to the evil it has represented for so long. In the present day, a particularly maligned group in the United States, immigrants, and the weakest members of that group—abused, abandoned, and neglected

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> We are compelled to deny Mr. Magana Ortiz's request for a stay of removal because we do not have the authority to grant it. We are not, however, compelled to find the government's action in this case fair or just. . . . The government's decision . . . shows that even the "good hombres" are not safe.

Ortiz v. Sessions, 857 F.3d 966, 967 (9th Cir. 2017) (denying injunction when government suddenly withdrew stay of removal in case involving case individual with decades of U.S. presence, three USC children, and USC wife who filed a permanent resident petition). And another classic example: "We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake." Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952) (rejecting due process challenges to deportation of those who had belonged to "subversive organization").

174 *See* FEHRENBACHER, *supra* note 6, at 221–26, 239–40. There were nine separate opinions, including two dissents. The case is even mentioned as one of the causes of the economic Panic of 1857 and a key impetus for the Civil War. *See* Finkelman, *supra* note 172, at 3.

175 It "stands first in any list of the worst Supreme Court decisions." BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW 70 (1997). From historian Michael A. Wolff, it is "unquestionably our court's worst decision ever." Michael A. Wolff, *Missouri Law, Politics, and the* Dred Scott *Case*, *in* DAVID KONIG ET AL., THE *DRED SCOTT* CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW 213 (2010); "It compresses volumes into a half-sentence to say that the *Dred Scott* decision triggered events that led to the Civil War." MOTOMURA, *supra* note 132, at 72 (citations omitted).

176 *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 44–45 (1989) (acknowledging the opinion "for the light it can throw on the meaning of citizenship . . . particularly the equal citizenship that later came to be guaranteed in the Fourteenth Amendment"); Karst illuminates "the American dilemma—the existence, side by side, of the ideal of equality and the subordination of a racial group." *Id.* at 45.

children—can benefit by an informed understanding of the vital declaration made in this case.

The Civil War followed closely on the heels of *Dred Scott* and, some suggest, was a reason therefor.[177] After the War's end and the 1865 abolition of slavery through the Thirteenth Amendment, efforts arose in the South to disenfranchise, terrorize, and otherwise repudiate citizenship rights for African Americans.[178] Southern lawmakers in Mississippi and South Carolina first drafted Black Codes in 1865 and 1866,[179] imposing restrictions such as limiting former slaves' mobility, work options, and free use of public accommodations, as well as imposing unequally cruel punishments for crimes.[180] In 1865, the Ku Klux Klan formed in Tennessee and included many leading white southerners as members; the organization acted as the "chief instrument" of violence used by whites to destroy the developing southern base of Black power.[181] "In response to the harshness of the Black Codes and the belief that only the federal government could guarantee African Americans' civil rights in southern states,"[182] the Civil Rights Act of 1866 was passed, followed two months later by the Fourteenth Amendment,[183] a direct response to *Dred Scott*, intending "to nullify Taney's ruling," condemn the decision to the annals of

177 *See* Finkelman, *supra* note 172, at 3. The decision became a rallying cry of northern abolitionists and contributed to the 1860 election of Abraham Lincoln. *Dred Scott*, HISTORYNET, http://www.historynet.com/dred-scott [https://perma.cc/BU8V-7X3K] (last visited Oct. 4, 2018).

178 *See e.g.*, LEON F. LITWACK, HOW FREE IS FREE? THE LONG DEATH OF JIM CROW (2009).

179 *See* U.S. CONST. art. IV, § 2, cl. 3; ELIZABETH REGOSIN, FREEDOM'S PROMISE: EX-SLAVE FAMILIES AND CITIZENSHIP IN THE AGE OF EMANCIPATION 4 (2002).

180 *See* REGOSIN, *supra* note 179, at 5; SIG SYNNESTVEDT, WHITE RESPONSE TO BLACK EMANCIPATION 32 (1972).

181 *Id.* at 27 (citing John Hope Franklin, Reconstruction Era historian, detailing 1870s Klan-led violence, which "involved the murder of respectable Negroes by roving gangs of terrorists, the murder of Negro renters of land, the looting of stores whose owners were sometimes killed, and the murder of peaceable white citizens."); *id.* at 28; *see also id.* at 55–76 (for details of post-Reconstruction inhumane treatment of Blacks, including lynchings).

182 REGOSIN, *supra* note 179, at 5.

183 *See* REGOSIN, *supra* note 179, at 5; Thomas, *supra* note 166, at 700. These actions "confirm[ed] the citizenship of African Americans . . . ." MOTOMURA, *supra* note 132, at 72 (internal citations omitted). For a description of the failure of the Fourteenth Amendment to address the question of the citizenship of Native Americans and children born in the United States to Asian parents, see *id.*

history, and guarantee the constitutionality of the Civil Rights Act.[184] The Amendment's Citizenship Clause, holding that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," was expected to bring Blacks "'within the pale of the Constitution'" and henceforth entitled to equal treatment with other citizens unless there was a reasonable basis for distinctive treatment.[185]

> The . . . Clause, by clarifying that native born blacks were citizens, altered the application of the norm of citizen equality . . . [and] is essential to the logic of the Fourteenth Amendment, which is that any laws distinguishing between blacks and whites *would distinguish between members of the same class*, implicating the norm against class legislation. The way that the Fourteenth Amendment proscribed some forms of racial discrimination, then, was . . . by clarifying that blacks were citizens.[186]

By 1869, on paper at least—the Constitution—Blacks born in the United States were "officially" considered a part of the singular class that constituted United States citizens.[187] At that moment, it appeared that their rights were intended to be equal to those of whites. Unfortunately, both the Act and the Amendment failed for too long to accomplish this mission of equality.

Without doubt, naturalized SIJs in the United States are not suffering the profound deprivations imposed on Blacks forced into slavery; nonetheless, apt comparisons can be made. First, the

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184 Thomas, *supra* note 166, at 696, 700. The Civil Rights Act acknowledged that equal citizenship needed more than "a bare declaration," it "needed substantive underpinnings." KARST, *supra* note 176, at 51; *see also* Jennifer M. Chacón, *Citizenship and Family: Revisiting* Dred Scott, 27 WASH. U. J.L. & POL'Y 45 (2008); Harry V. Jaffa, Dred Scott *Revisited*, 31 HARV. J.L. & PUB. POL'Y 197 (2008).

185 U.S. CONST. amend XIV, § 1. Siegel, *supra* note 28, at 583 (internal citation omitted).

186 Siegel, *supra* note 28, at 583–84 (internal citations omitted) (emphasis added). Following enactment of the Thirteenth and Fourteenth Amendments, eligibility for citizenship "was extended to 'aliens of African nativity and to persons of African descent.'" MOTOMURA, *supra* note 132, at 73. For discussion of the meaning of "free white persons," see *id.* at 74. The Amendment prohibited abridgement of the privileges and immunities of citizenship, identified the principles of due process and equal protection of the laws, and provided the "constitutional backing for the Civil Rights Act . . . ." REGOSIN, *supra* note 179, at 5. In the *Slaughter-House Cases*, the Court held that "[t]he first clause of the fourteenth amendment was primarily intended to confer citizenship on . . . [Blacks]." Slaughter-House Cases, 83 U.S. 36, 37 (1872).

187 *See* U.S. CONST. amend. XIV, § 1.

underground nature of Black families during slavery caused a variety of acknowledged horrors, not the least of which was families broken apart and loved ones shipped far from one another; Black couples were also forced into informal unions that made it difficult to collect post-Civil War pensions. Likewise, a naturalized SIJ who cannot reunite with her parent is permanently separated from this most important family member; her family relationship with her parent is essentially eliminated, invisible from U.S. law. Next, prior to the post-Civil War Amendments, free Blacks traveling to slave states could be seized back into slavery, unable to rely on the protection of their citizenship. Similarly, naturalized SIJs cannot rely on their naturalization for the protection they need from reuniting with their parent in their new homeland. The norm of citizen equality, which arrived with the founding of the United States and was clarified by the Fourteenth Amendment, is the light that shines on the United States; it should shine on all citizens equally, including newly naturalized SIJs.

The Fifteenth Amendment, ratified in 1870, sought to allow African Americans to vote by declaring, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Notably, while this Amendment was met with Blacks' conciliatory attitudes towards whites and uncommon success at involvement in political life in the South,[188] it also inspired considerable measures to denigrate and dehumanize Blacks so as to negate the Amendment's impact. These efforts were embodied in what became known as "Jim Crow laws"—poll taxes, literacy tests, and other state-imposed obstacles to voting.[189] The scope of discrimination was gradual but vast, reaching housing and segregation in all types of public accommodations, from motels and railroads to waiting rooms and water fountains. In Birmingham, Alabama, the "ultimate idiocy" was manifest

188 SYNNESTVEDT, *supra* note 180, at 24–25. For example, in South Carolina in 1873, eighty-seven Blacks outnumbered forty whites. In Mississippi, Black voters outnumbered whites, though the legislature was never more than one-third Black. *Id.*

189 *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009); JOHN A. HANNAH, FREEDOM TO THE FREE: CENTURY OF EMANCIPATION, 1863–1963, A REPORT TO THE PRESIDENT BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS 51–61 (1963); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955); *see also* SYNNESTVEDT, *supra* note 180, at 24–29, 50.

in an ordinance making it "unlawful for a Negro and a white person to play together or in company with each other . . . at dominoes or checkers."[190] Aspects of these laws persisted through the early 1940s, but Jim Crow-ness persevered into the 1960s, when dramatic breaches of the citizenship rights of Blacks marred claims that they were making achievements towards equal protection.[191]

Reconstruction Era failures in the South were answered by a series of civil rights bills, most notably the Civil Rights Act of 1875, requiring "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement . . . ."[192] The Act too was thwarted, even by the judiciary. One notable Supreme Court example during this period, *United States v. Cruikshank*, held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment only protected citizens from state actions and not from actions of private persons.[193] By accommodating whites who refused Blacks services and other public accommodations, *Cruikshank* blunted the

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190 BIRMINGHAM, ALA., RACIAL SEGREGATION ORDINANCES 798-F § 597 (1951); James Bryce, an English writer, observed:

> Except on the Pacific Coast . . . a negro man never sits down to dinner with a white man in a railway refreshment room. You never encounter him at a private party. He is not received in a hotel of the better sort, no matter how rich he may be. He will probably be refused a glass of soda water at a drug store . . . . Kindly condescension is the best he can look for . . . . Social equality is utterly out of reach.

SYNNESTVEDT, *supra* note 180, at 54 (citing JAMES BRYCE, THE AMERICAN COMMONWEALTH (1906)).

191 On lynchings, see RALPH GINZBURG, 100 YEARS OF LYNCHINGS (1966); *see also* ROBERT W. THURSTON, LYNCHING: AMERICAN MOB MURDER IN GLOBAL PERSPECTIVE (2016). On attacks on Civil Rights volunteers, see JOEL NORST, MISSISSIPPI BURNING (1988); *see also* SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID (1989); HARVEY FIRESIDE, THE "MISSISSIPPI BURNING" CIVIL RIGHTS MURDER CONSPIRACY TRIAL: A HEADLINE COURT CASE (2002); WILLIAM BRADFORD HUIE, THREE LIVES FOR MISSISSIPPI (1965). On attacks on Black churches, see *Violent History: Attacks on Black Churches*, N.Y. TIMES (June 18, 2015), https://www.nytimes.com/interactive/2015/06/18/us/19blackchurch.html [https://perma.cc/F3TN-JSJY]. On more recent events, see Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past*, 10 HARV. BLACKLETTER J. 67 (1993); *see also* Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53 (2016).

192 Civil Rights Act of 1875, ch. 114, 18 Stat 335 (found in the "Whereas" clause at the beginning of the Act).

193 *See* United States v. Cruikshank, 92 U.S. 542 (1875).

thrust of the equal rights legislation, as most violations originated privately.[194] As a result, during the 1880s federal courts rejected constitutional challenges to race-based separate facilities.[195] In 1883, the Supreme Court, ruling in *The Civil Rights Cases*, excused innkeepers' and theater owners' refusals to grant equal access, concluding that the actions had "nothing to do with slavery or involuntary servitude . . . ."[196] Twenty years later, Supreme Court jurisprudence continued its tin ear on equal protection when, in *Plessy v. Ferguson*, it sanctioned a Louisiana law forbidding those of different races from sitting in the same railroad car,[197] reaching, with this decision, perhaps the nadir of post-Civil War Black rights.[198]

The denial of rights for Black citizens persisted. Even the benefits of the Civil War pension system were often denied to Black families.[199] While "[t]he extension to former slaves of the right to . . . inherit a pension" through family members was "an offering of citizenship,"[200] white society, including officials working in the pension system, was forced to adjust its expectations and assumptions about family

194 *See* SYNNESTVEDT, *supra* note 180, at 32.

195 *Id.* at 46.

196 The Civil Rights Cases, 109 U.S. 3, 24 (1883).

197 *See* Plessy v. Ferguson, 163 U.S. 537 (1896). It was fifty-eight years before the Court in *Brown v. Board of Education of Topeka* reversed the ruling. 347 U.S. 483 (1954). For an alternative view of the significance of these actions, see T. Alexander Aleinikoff on Justice Harlan's dissent in *Plessy*:

> [It] has become an important cultural text in late twentieth century America. The opinion is seen as righteous and prophetic, announcing the proper understanding of the Equal Protection Clause of the Fourteenth Amendment years ahead of its time. The famous phrase—"Our Constitution is color-blind"—is understood to have been redeemed by *Brown v. Board of Education* and the civil rights legislation of the 1960s. Martin Luther King Jr.'s hope that his children would be evaluated on the content of their character, not the color of their skin, is seen as but a gloss on Harlan's theme.

T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in* Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961 (1992) (citations omitted).

198 On Reconstruction, see JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (1961). For the perspective of a Black intellectual, see W. E. B. DU BOIS, *supra* note 149. On Jim Crow, see C. VANN WOODWARD, *supra* note 189.

199 *See* REGOSIN, *supra* note 179, at 3.

200 *Id.* at 11. According to Regosin, it was more than that (but citizenship is what is relevant here): it was white society's effort to mold former slaves into "citizens," as they envisioned them. *See id.*

relationships in order to honor legitimate claims of relatives of Black Civil War soldiers.[201]

Specifically, during slavery, Blacks, alienated from white society, were prevented from forming the same type of formal family relationships as had whites. As a result, following the Civil War, Blacks often had difficulty obtaining their pension benefits due to inability to prove the formal family relationships that were required, which whites generally possessed.[202] This peculiar difficulty, experienced by pensioners simply trying to reap a benefit from their Civil War service along with other citizens, reflected "the challenges former slaves faced in claiming the status of citizen."[203]

The pension system illustrated just one roadblock experienced by Blacks in the post-Civil War era as they attempted to enjoy full citizenship rights. To a large degree, these impediments were soon experienced by other non-white minorities. Even from the judiciary, race-based restrictions and other efforts to exclude non-white minorities from the club of "true" Americans persisted over the decades. Notwithstanding the anticipation of a unitary class of citizen following the Civil War, laws were enacted even after the Civil War Amendments were adopted,[204] affirmed by the Supreme Court, denying citizenship to members of various "racial" groups beyond African Americans. The first group targeted was Chinese immigrants through the Chinese Exclusion Act of 1882, suspending the admission of Chinese laborers and declaring them to be "ineligible for citizenship." Soon, Mexican and Japanese persons suffered similar discrimination and exclusion.[205] In

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201 *See id.* at 12.

202 *See id.* at 13.

203 *Id.* at 183.

204 This is how the Thirteenth, Fourteenth, and Fifteenth Amendments came to be known.

205 *See* Chae Chang Ping v. United States, 130 U.S. 581 (1889); *see also* IMMIGRATION, *supra* note 67, at 125. The Enforcement Act of 1870, also known as the Civil Rights Act of 1870 or the First Ku Klux Klan Act, was enacted to enforce Section 1 of the Fifteenth Amendment, countering attacks on the voting rights of African Americans from state officials or violent groups. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 454 (1997). The question of whether the color of one's skin could be used to deny naturalization arose later regarding Mexicans, who were eventually declared to be, regardless of skin color, naturalizable given that the Constitution of Texas, and the U.S. laws and treaties, had granted acts of naturalization to Mexicans when Texas joined the Union. *See* IMMIGRATION, *supra* note 67, at 130. On the same issue of color-based ineligibility, the Supreme Court in 1922 decided, vis-à-vis Japanese, in *Ozawa v. United States*, that Japanese were ineligible, and likewise after 1910 to those from East Asia, the Near East, and Middle East.

1922, the Supreme Court in *Ozawa v. United States* affirmed that Japanese noncitizen were nonwhite and therefore ineligible to naturalize.[206] The Court's reasoning was internally contradictory in the way it defined citizenship eligibility, sometimes requiring scientific tests to determine physical characteristics and other times using "the definition of the common man" to determine "whiteness"[207] and thus naturalizeability.[208] It was not until 1924 that Congress granted citizenship to "all [Native Americans] born within the jurisdiction of the U.S. government."[209]

Despite affirmations of equal rights in laws and constitutional amendments, the denial of civil rights to both the formerly enslaved and even those never subject to such indignities is shameful. At a minimum, following the Civil War and Reconstruction, Blacks suffered decades-long denials of their citizenship rights, sometimes even culminating in murder.[210] To be sure, today numerous liberties remain out of the reach of Black citizens,[211] evidenced by, among other conditions, poverty,[212]

See id. at 131. From 1790 to 1870, naturalization was open only to whites; from 1870 to the 1940s, only to whites and Blacks; thereafter "races indigenous to the Western hemisphere," including Native Americans, persons of Mexican ancestry, and some Asians. MOTOMURA, *supra* note 132, at 123. "Only in 1952 were all racial barriers finally repealed." *Id.* at 123. For a thorough discussion of the history and use of "declarations of intent" as prerequisites for naturalization applications, see *id.* at 96–101.

206 260 U.S. 178 (1922).

207 On "whiteness" as social construction, see NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 59, 76, 96 (1995). On white working class racism in the United States and the transformation of European colonists from multiple statuses to that of "white," with African laborers transformed into slaves, see THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: VOLUME I: RACIAL OPPRESSION AND SOCIAL CONTROL (1994); THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: VOLUME II: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA (1997); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991); DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY (1994).

208 IMMIGRATION, *supra* note 71, at 132. States often did the same during these years. *Id.* at 132–34.

209 *Id.* at 137.

210 *See, e.g.*, AMY KATE BAILEY & STEWART E. TOLNAY, LYNCHED: THE VICTIMS OF SOUTHERN MOB VIOLENCE (2015); ROBERT W. THURSTON, LYNCHING: AMERICAN MOB MURDER IN GLOBAL PERSPECTIVE (2016).

211 *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2018). *See, e.g.*, Michael C. Bender & Peter Nicholas, *Trump Says 'Both Sides' to Blame in Charlottesville Violence*, WALL STREET J. (Aug. 15, 2017, 9:28 PM), https://www.wsj.com/articles/trump-says-both-sides-to-blame-in-charlottesville-violence-reversing-mondays-stance-1502830785 [https://perma.cc/

educational deprivation,[213] unemployment,[214] disproportionate police involvement in Black lives,[215] and high incarceration rates.[216] Examining the African American struggle for full citizenship rights[217] is a good way to view the evolution, maturation, and realization of United States citizenship.

The denial of full citizenship for Black citizens both before and after the Civil War, along with the denial of rights to immigrants hailing from Mexico, China, Japan, and numerous other nations, are akin to the painful effects that section 1101(a)(27)(J)(iii)(II) will have on naturalized SIJs who will, even as U.S. citizens, permanently be denied the ability to live with their non-abusive parent in the United States.

B. *Discrimination Against Felons*

The denial of citizenship rights of those convicted of felonies is intricately linked with race, slavery, and slavery's aftermath. "While laws disfranchising certain classes of convicted criminals have long been part of the Anglo-European law, in the decades after the Civil War, white

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7EJF-AKXN]; Graham Moomaw, *At NAACP Forum, Northam and Gillespie Talk Race, History and Charlottesville*, RICH. TIMES-DISPATCH (Sept. 7, 2017), https://www.richmond.com/news/virginia/government-politics/at-naacp-forum-northam-and-gillespie-talk-race-history-and/article_dc8c9668-6d17-5bc8-b57f-84b6f54cb719.html [https://perma.cc/5HK4-3JGY].

212 As of September 2017, 22% of Black Americans still remained in poverty, compared with 11.6% of the total population 18–64-year-olds and 9.3% of the total population 65 years and older. *See U.S. Poverty Statistics*, FEDERAL SAFETY NET, http://federalsafetynet.com/us-poverty-statistics.html [https://perma.cc/FV5G-E4YU] (last visited Oct. 23, 2018).

213 The National Center for Education Statistics found that, "in 2014 the rate of college enrollment directly out of high school was 68% for white students, 63% for Black students and 62% for Hispanic students." Mitchell Wellman, *Report: The Race Gap in Higher Education is Very Real*, USA TODAY (Mar. 7, 2017, 4:15 PM), http://college.usatoday.com/2017/03/07/report-the-race-gap-in-higher-education-is-very-real [https://perma.cc/YST5-35NX].

214 For 2016, the averages of unemployed for the overall population was 4.9%, while for Black Americans it was 8.4%. *See Unemployment Rate and Employment-Population Ratio Vary by Race and Ethnicity*, BUREAU LAB. STAT. (Jan. 13, 2017), https://www.bls.gov/opub/ted/2017/unemployment-rate-and-employment-population-ratio-vary-by-race-and-ethnicity.htm [https://perma.cc/FAW7-QM8H].

215 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

216 *See* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246 [https://perma.cc/8ZT9-WSS5].

217 *See* REGOSIN, *supra* note 179, at 5.

southern Democrats found ways to use them to disproportionately affect African Americans."[218] This system, while not limited in application to African Americans, continues to threaten American democracy.[219]

Infamy[220] offered both "a justification for the denial of citizenship rights to African Americans"[221] and a strategy to advance the effort "to infame and thus disfranchise the race—by associating African Americans with criminality, degrading them through legal and extra legal violence, and denying the newly freed slaves the dignity traditionally associated with those deserving of suffrage."[222]

The concept of "infamy," which was firmly integrated into western legal tradition, dating both to Greek and Roman as well as English tradition, "served as a judgment on the civil and political status of convicted individuals. Infamous individuals experienced civil 'degradation'—meaning the loss of the rights of citizenship,"[223] such as the right to vote, for those who actually *possessed* that right at the time.[224] In the United States, "the connection between denying the vote

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218 PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 1 (2014).

219 *Id.* Holloway demonstrates that, not just disenfranchisement, but also the use of literacy tests, poll taxes, and residence requirements were used to deny suffrage to African Americans in the century following Reconstruction. *Id.*

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> That state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness, or juror. The loss of character or position which results from conviction of certain crimes, and which formerly involved disqualification as a witness and juror. When . . . convicted of an offence inconsistent with the common principles of honesty and humanity, the law considered his oath of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court . . . .

JOHN BOUVIER, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA, Vol. I 1027 (Francis Rawle ed., 1897). While, generally, the categorization of infamy was limited to felonies, some minor larcenies were also held to disfranchise, rejecting the federal standards in the Reconstruction and Readmission Acts limiting this practice to felonies. *See* HOLLOWAY, *supra* note 218, at 157.

221 HOLLOWAY, *supra* note 218, at 2.

222 *Id.* at 3.

223 *Id.* at 3–4. In addition to voting rights, one might also lose the right to testify in court, bring civil cases, "serve on juries, hold public office, or even enlist in the army." *Id.* at 4. For more detailed history of infamy and changes over time, see *id.* at 4–5.

224 *See id.* at 4.

to convicts and denying the vote to African Americans predates the Civil War by at least half a century;"[225] the two are intricately connected.

> Both slaves and convicts had limitations put on their civil rights due to their bondage and captivity . . . . The rights of degraded individuals stood in contrast to freemen, those "not infamous nor subject to another man's will," who enjoyed suffrage and the full privileges of citizenship. It is not a coincidence that slaves and convicts appear together in the Thirteenth Amendment, with its allowance of slavery as a punishment for crime, and in the Fourteenth Amendment's simultaneous affirmation of the civil rights of African Americans and refusal to protect the suffrage rights of convicts.[226] These amendments sought to remove African Americans from their degraded social and civil status by distinguishing their civil rights from those of convicts.[227]

Clear parallels can be drawn between felon disfranchisement and Black subjugation.

> Convicting African American men of infamous crimes fostered the belief that the entire race was undeserving of suffrage. . . . Referring to African Americans as "degraded," . . . was not just a figure of speech. It was a reference to a legal and civil status, and its use helped maintain African Americans in an inferior social status.[228]

Given that "many white southerners believed that African Americans were undeserving of suffrage because . . . the race was infamed by slavery," "[i]nfamy also helps explain why laws disfranchising for crime" represented early ways to "disfranchise African Americans in the South after 1865."[229] Further, "[t]he open language of the Fourteenth Amendment, allowing for disfranchisement

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225 *Id.* at 151.

226 *Id.* at 151–52. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted . . . ." U.S. CONST. amend. XIII, § 1.

227 HOLLOWAY, *supra* note 218, at 152.

228 *Id.* at 152.

229 *Id.* at 153. Justice Taney, writing in *Dred Scott v. Sandford*, seemed to justify his finding that Blacks could not have been intended to become citizens given the degradation of their status. It was circular reasoning, surely—the degraded status of Blacks in society supported their exclusion *from* society, yet their exclusion *from* society then degraded them. Dred Scott v. Sandford, 60 U.S. 393, 409–12 (1857).

for any crime, offered an opportunity" seized by white southerners.[230] "Associating African Americans with criminality . . . perpetuated the infamy of the entire African American race."[231] The South's significance in shaping the law and practice of infamy[232] guided its concomitant influence on shaping American criminal justice, specifically its "influence in creating a system of mass incarceration, a nationwide acceptance of racial disparities in incarceration, and a criminal justice system that prioritizes retribution over rehabilitation."[233]

"By the end of the nineteenth century nearly all southern states imposed lifelong disfranchisement" against felons,[234] as did some outside the South.[235] Today, felon disfranchisement continues to be used by local and state election administrators for "racial and partisan ends . . . ."[236] Most states "maintain laws disfranchising for crime;" some recently began revising their laws and procedures for restoring

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230 HOLLOWAY, *supra* note 218, at 153.

231 *Id.* at 153. For descriptions of efforts to quell this race-based disfranchisement, see *id.* The class-related aspects of infamy are discussed in *id.* at 154.

232 Note that the practice of infamy was not limited to the South: Hawaii (prior to statehood), Kentucky, and Idaho also adopted laws disfranchising for crime. These practices were often part of a political agenda to disfavor one political class over another. *See id.* at 155–57.

233 *Id.* at 154.

234 *Id.* at 3 (internal citation omitted).

235 *See id.* at 3. The debate over whether Congress, in enacting the Fourteenth Amendment, intended to allow states to disfranchise for a lifetime continues to this day. *See id.* at 158. Florida, until recently, restricted reinstitution of voting rights to those who have completed their prison terms. *Cf.* Frances Robles, *1.4 Million Floridians With Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/KD2N-7J7P]. In February 2018, a federal judge ruled Florida's system "unconstitutional and potentially tainted by racial, political or religious bias." Derek Hawkins, *Florida's Ban on Ex-Felons Voting is Unconstitutional and Biased, Federal Judge Rules*, WASH. POST (Feb. 2, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/02/02/floridas-ban-on-ex-felons-voting-is-unconstitutional-and-biased-federal-judge-rules/?noredirect=on&utm_term=.1ae844569aaf [https://perma.cc/FW7G-YFUN]. Christopher M. and Richard M. Re, who suggest that "disfranchising for crime was central to the philosophy behind the notion of political rights developed in the Reconstruction era," as "'retributive disenfranchisement' was the necessary counterpart to 'egalitarian enfranchisement'; disfranchising for immoral actions helped legitimate the elimination of 'morally insignificant' barriers to voting such as race." HOLLOWAY, *supra* note 218, at 158–59 (citing Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1670 (2012)).

236 HOLLOWAY, *supra* note 218, at 157.

citizenship rights.[237] It is perhaps unsurprising that there remains today "a national consensus on permanent disfranchisement for certain convicted criminals . . . ."[238]

The significance of felon disfranchisement is felt by all who have these types of convictions, but its history as integral to the degradation of African Americans is noteworthy: the point *was* the degradation, which was considered in these cases to have been accomplished.[239] "Race is certainly not absent in this history," as those with criminal convictions, especially those who have suffered incarceration, "are marked with a disgrace and contamination that is incompatible with citizenship."[240] Today, then, we are left with "[l]aws, political agendas, and ideologies [that] have intersected . . . to produce . . . a class . . . who are excluded from suffrage."[241]

Notwithstanding the racially repugnant aspect of felon disfranchisement, while it deprives those with these convictions of a significant aspect of citizenship, the practice is usually temporary; additionally, it follows conviction for a crime that is considered more serious than most, a felony. SIJ "disfranchisement," on the contrary, in denying the right and therefore ability to unite with a parent, is permanent, a harsh punishment prosecuted against those who all acknowledge were *victims* of abuse, abandonment, and/or neglect, not perpetrators thereof. Absent is the logic behind this punishment.

C. *Discrimination Against Women*

While exclusion from equal citizenship for conviction of criminal acts can at least be justified because of *actions* taken by the convicted person, citizenship discrimination against women, as is that founded on race, is based on immutable characteristics.[242] Perhaps not surprisingly,

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237 *Id.* at 157. Some restore voting rights automatically upon sentence completion for certain classes of felonies. *See id.* at 157–58. Others, like Florida, do not. *See id.* at n.234.

238 *Id.* at 3.

239 *See id.* at 160.

240 *Id.*

241 *Id.*

242 Immutable characteristics are defined in immigration law in the asylum context, wherein a person claims to be part of a "particular social group" subject to persecution. *See* 8 C.F.R. § 208.13(b)(1) (2018); group members share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that either cannot change or is so fundamental to the

issues of race also have played a role in women's citizenship inequality. Coverture,[243] the principle linking married couples into a single legal entity—the husband—began affecting citizenship in 1855, when noncitizen white women who married citizens could derive citizenship through their husbands.[244] Noncitizen women who were nonwhite, Black, or Native Americans living on reservations, however, were denied this benefit.[245] In 1870, during Reconstruction, a federal law extended naturalization to African American women, so-called "aliens of African nativity and to persons of African descent."[246] Again, Native Americans and Asians were excluded until 1952.[247] The benefits of derivative citizenship had their downside: a 1907 law terminated the citizenship of women who married noncitizens ineligible to naturalize based on the theory that, having assumed her husband's nationality, these women could not regain it until their husbands naturalized.[248] Following the 1920 passage of the Nineteenth Amendment granting women the vote, a drive to end coverture resulted in the Cable Act of 1922, conferring "independent citizenship on [some] married women."[249] There was a

identity or conscience of the member that she should not be required to change it. *In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).

243 WILLIAM BLACKSTONE, COMMENTARIES *430; *see also* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991).

244 IMMIGRATION, *supra* note 67, at 135; Act of Feb. 10, 1855, ch. 71, 10 Stat. 604; Act of Mar. 2, 1907, ch. 2534, 34 Stat. 1228; *see also* MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965 14 (2005). A similar principle applied to noncitizen children born to USC fathers. *Id.* Early naturalization statutes limited naturalization to "free white person[s]." *See supra* note 95 and accompanying text.

245 GARDNER, *supra* note 244, at 14. In the case of Native Americans, neither men nor women could achieve citizenship without forsaking their claims to Reservation lands and relations with their tribal communities and governments. *Id.* at 16.

246 Act of July 14, 1870, ch. 254, 16 Stat. 256; *see* Broadis v. Broadis, 86 F. 951, 955 (C.C.N.D. Cal. 1898).

247 *See supra* note 183; *see also* United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (Asian Indian); Ozawa v. United States, 260 U.S. 178 (1922) (Japanese); *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878) (Chinese); GARDNER, *supra* note 244, at 16.

248 IMMIGRATION, *supra* note 67, at 135. *See* Mackenzie v. Hare, 239 U.S. 299 (1915). Other strings attached to derivative citizenship included rigid interpretations of *bona fide* marriage, and moral objections to so-called polygamous marriages, prostitution, suspicion of entering for other immoral purposes, and even to the Japanese custom of "picture brides." *See* GARDNER, *supra* note 244, at 31–33.

249 IMMIGRATION, *supra* note 67, at 135; *see also* Cable Act, ch. 411, § 7, 42 Stat. 1021 (1922). The Cable Act applied only to women who had lost citizenship because of their marriage to a noncitizen eligible to naturalize—women married to men racially eligible for citizenship. GARDNER, *supra* note 244, at 123–24. This provision was not repealed until a 1931 amendment

catch, though: to the extent that the Cable Act provided an independent means for women to naturalize, it departed from the historic principle of family unity that had been such a powerful tool for immigrants.[250]

Women have been denied a plethora of rights throughout U.S. history. While some of this discrimination continues, it is uncertain whether these denied rights would each be considered badges of citizenship. The discriminations include unequal employment opportunities, sexual abuse, and salary inequities in the workplace; injustice in court when victims of physical abuse, particularly in the domestic arena; and unequal access to higher education and training. Abuses such as these inspired the movement during the 1980s to enact an Equal Rights Amendment, whose mission was to guarantee equal rights to all citizens regardless of gender. It was unsuccessful.[251] But are these truly "rights of citizenship?" Certainly, equal treatment is written into the Constitution, but one need not be a citizen to challenge the other types of unequal treatment.[252] Equal pay, as well, is now mandated by statute,[253] again regardless of citizenship.

In the same way that women were long denied core citizenship rights to vote and to marry freely (without losing their citizenship), naturalized SIJs are denied core citizenship rights when they are excluded from full citizenship by a law preventing them from reuniting with their non-abusing parent. This denial is based on their immutable characteristic, a fundamental part of their identity they cannot erase—that they were victims of abuse, abandonment, and/or neglect by their other parent. Placing naturalized SIJs in a separate category of citizen, and in an inferior category as naturalized citizens, denies them core

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to the Cable Act, guaranteeing that women "citizens who married aliens ineligible for citizenship" could not be deprived of citizenship. Cable Act, ch. 422, § 4, 46 Stat. 1511 (1931).

250 GARDNER, *supra* note 244, at 124–25.

251 The Equal Rights Amendment (ERA) was first proposed in 1921, finally passing both houses of Congress in 1972, but never gaining support of the thirty-eight states necessary by the 1982 ratification deadline. For more on the ERA, including efforts to enact it in individual states, see Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (2005); Sabrina Ariel Miesowitz, Note, *ERA is Still the Way*, 3 N.Y.U. J.L. & LIBERTY 124 (2008).

252 The Fifth and Fourteenth Amendments' due process and equal protection guarantees extend to all "persons." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

253 *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56; Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

citizenship rights and breaches the commitment to a singular class of citizen in this country.

D. *Discrimination Against the Intellectually Disabled*

To the list of groups denied full citizenship rights for a considerable extent of U.S. history, again based on immutable characteristics, those with disabilities must be added, particularly disabilities of an intellectual nature. Often considered incompetent, even sometimes "deviant and dangerous,"[254] their diminished legal status was long excused by references to the "inevitable consequence" of their disabilities.[255]

From the nation's founding, most states enacted legal "restrictions abrogating from 'idiots,' 'incompetents,' or 'imbeciles' the rights to vote, to make contracts . . . and to serve on juries"; these restrictions "made individuals vulnerable to segregation, marginalization, and abuse."[256] In the early twentieth century, eugenicists portrayed those with intellectual disabilities as "profoundly unfit for citizenship,"[257] resulting in institutionalization, sterilization,[258] exclusion from public education,

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254 ALLISON C. CAREY, ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH-CENTURY AMERICA 10 (2009). The book rethinks "the definition of intellectual disability and its relationship to rights" and questions "fundamental assumptions about citizenship . . . ." *Id.* at 2.

255 *Id.* Voting and other discrimination against the elderly, while not a significant issue when mortality came much sooner, has become more profound recently as the elderly population has surged. Real and perceived cognitive lapses are often used to justify denying the elderly voting and other rights. *See* Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 439 (2000); Elias S. Cohen, *The Elderly Mystique: Constraints on the Autonomy of the Elderly with Disabilities*, 28 GERONTOLOGIST 24 (Supp. 1988) (discussing misconceptions about elderly capabilities to make decisions). Challenges to these laws abound. *See* Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001); Joel E. Smith, Annotation, *Voting Rights of Persons Mentally Incapacitated*, 80 A.L.R.3d 1116 (1977).

256 CAREY, *supra* note 254, at 2.

257 *Id.* at 215–16.

258 *See* Buck v. Bell, 274 U.S. 200 (1927). Penned by Oliver Wendell Holmes, and never overturned, *Buck v. Bell* affirmed a state's right to forcibly sterilize the "unfit," including the intellectually disabled, by denying a violation of the Due Process Clause. The case of President Kennedy's sister, Rosemary, who suffered from intellectual and emotional disabilities and was lobotomized in her twenties, spending the rest of her life institutionalized, is an example of the often typical reaction, just a few decades ago, to the difficulties of those suffering intellectual disabilities.

deprivation of treatment, and other dehumanizing discriminations,[259] continuing through much of the twentieth century.

The 1927 decision *Buck v. Bell* endorsed states' rights to forcibly sterilize people suffering from intellectual disabilities.[260] But the ruling lost influence as both "scientific 'evidence' no longer supported [stereotyping them] . . . as deviant and dangerous," and changes brought about by the movements of the 1960s and 1970s caused community-based housing to win widespread support.[261] Finally, those with disabilities began to be accepted as "full citizens,"[262] leading to the passage of the 1975 Education for All Handicapped Children Act.[263]

Thereafter, it was foreseeable for state courts, such as one in New Jersey, to hold that "residence at a state school for the mentally retarded [sic] did not" automatically render someone ineligible from voting,[264] reaffirming that treatment in mental institutions does not raise a presumption of incompetence.[265] This view was reflected in a 1985 Supreme Court case that transformed the jurisprudence on this issue. In *City of Cleburne v. Cleburne Living Center*, an organization assisting those with intellectual disabilities was denied a special permit for a group home lease, city officials deciding it was really a hospital for the

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259 CAREY, *supra* note 254, at 4–5 (discussing *Buck*, with Justice Oliver Wendell Holmes offering "unwavering support for the state's authority to deny basic civil rights, including the rights to privacy, parenthood, and bodily integrity, to people with intellectual disabilities"). His now infamous line "[t]hree generations of imbeciles are enough" speaks volumes about attitudes at the time. *Buck*, 274 U.S. at 207. Issues of rights owed to those with intellectual disabilities raise questions of state control and institutionalization that are beyond the scope of this study.

260 *See Buck*, 274 U.S. at 207 (affirming sterilization of pregnant seventeen-year-old who was unmarried, born in the same institution as her mother, and suffering the same infirmity).

261 CAREY, *supra* note 254, at 10. The rights movement pushed for inclusion in all aspects of society, positing that "people with intellectual disabilities . . . *could be*—sufficiently independent, competent, productive, and moral to exercise rights." Societal denial of education, job training and other opportunities prevented this. *See id.* at 7.

262 *Id.* at 6.

263 Before passage, a class action case, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, charged denial of public education. 343 F. Supp. 279 (E.D. Pa. 1972). In the court's consent decree, it cited experts indicating that people with mental challenges "are capable of benefitting from a program of education and training[,] . . . capable of achieving self-sufficiency . . . the earlier such education and training begins, the more thoroughly" will be the benefit, even "at any point in [their] life and development . . . ." *Id.* at 296 (citations omitted).

264 *In re* Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital, 750 A.2d 790, 793 (N.J. Super. Ct. App. Div. 2000) (reaffirming Carroll v. Cobb, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976)).

265 *Id.* at 793 (citing *Carroll*, 354 A.2d at 359–60.)

feeble-minded.[266] The Supreme Court ruled that the zoning ordinance was being enforced in a manner that violated equal protection, as the city breached the plaintiffs' due process rights by discriminating against potential group home residents based on fears related to mental retardation.[267]

In 1990, the Americans with Disabilities Act (ADA) was passed, "affirm[ing] the rights of disabled Americans in the last of that century's civil rights laws."[268] Crucial to the ADA

> was the insistence that disabled Americans were not seeking so-called special treatment, but demanding foundational civil rights. The need for this legislation two centuries after the Bill of Rights was enacted . . . captures an equally fundamental truth about American citizenship: the concepts that are central to U.S. national identity are not timeless, but uneven, compromised, and contested.[269]

While these citizens continue to suffer indignities,[270] today conditions for them are greatly improved over those experienced in the 1930s.

1. The Elderly

The elderly, who often suffer from varying cognitive difficulties akin to those experienced by those with life-long intellectual disabilities, have also been victimized by restrictions of their voting and other meaningful rights. While tending to vote in greater numbers than do their younger counterparts,[271] elders face barriers sometimes justified by the notion that voting should be predicated on a defined level of competence.[272] Because states regulate voter qualifications and access to the vote,[273] notwithstanding the Supreme Court's holding that "voting is of the most fundamental significance under our constitutional

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266 473 U.S. 432, 436 (1985).

267 *Id.* at 449–50. Laws encumbering citizenship rights of the intellectually challenged impact equal protection, due process, and also may breach the ADA.

268 RUSSELL, *supra* note 1, at 1 (internal citation omitted).

269 *Id.* at 1.

270 CAREY, *supra* note 254, at 3. Ongoing indignities include dependencies caused by inadequate public transportation and segregation in public education. *Id.*

271 *See* Jane Maslow Cohen, *Competitive and Cooperative Dependencies: The Case for Children*, 81 VA. L. REV. 2217, 2244 (1995).

272 Schriner, *supra* note 255, at 439.

273 *Id.* at 438.

structure,"[274] statutes that disenfranchise the mentally incompetent disproportionately affect elderly voters; this is particularly the case for elderly who have guardians, as mental incompetence is a prerequisite for these guardianships.[275] While rationalizations for these laws are based on safeguarding the democratic process, the hypocrisy inherent here is evident in the clearly stated purposes of these laws: "[t]hey have no consent to give. A fool has no consent; the lunatic has none" and "[i]diots and insane . . . are manifestly not a part of the acting society . . . ."[276]

More recently, courts have begun to accommodate those with intellectual disabilities, one ruling that "a mentally retarded person need not be an 'idiot,' and a mentally ill person need not be 'insane.'"[277] Further, regardless of the plethora of state rules that hinder elder voting, few are refused the right based on incompetency, perhaps because they do not vote in high numbers so are unlikely to affect election results.[278]

Shining this light onto the loss of basic citizenship rights for those with intellectual and cognitive disabilities can help to illuminate the related losses suffered by naturalized SIJs. Deprivations enforced against the disabled reveal something about "the deepest quandaries of American citizenship: Who should be able to claim and exercise rights and who should not? . . . Should we strive to include all people as valued members of society, and if so, how might we achieve this lofty goal?"[279] SIJs forbidden to reunify with the one parent who cared for them will receive a strong message of worthlessness, as they will be unable to claim

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274 Burdick v. Takushi, 504 U.S. 428, 433 (1992).

275 Several states impose mental competency tests for voting; others disenfranchise those placed under guardianship. Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 484 (2001). Forty-four have either statutes or constitutional provisions permitting disenfranchisement of the mentally incompetent. *Id.* at 483.

276 Kay Schriner, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 DISABILITY STUD. Q. 61 (2002) (referring to legislative delegates in Nebraska in 1871 and Massachusetts in 1853, respectively). Such claims clearly ignore the multitudes of both mis and uninformed voters.

277 *In re* Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 750 A.2d 90, 93 (N.J. Super. Ct. App. Div. 2000) (citing Carroll v. Cobb, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976)).

278 RICHARD C. ALLEN, ELYCE ZENOFF FERSTER & HENRY WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 364 (1968).

279 CAREY, *supra* note 254, at 213.

and exercise their rights. This will forever constitute, for them, a badge of dishonor.

CONCLUSION: A SINGULAR CLASS OF CITIZENSHIP

What is citizenship? This is a simple question with a complex answer. Citizenship means voting and serving on juries, except when it did not and except when it does not; it did not for quite some time. Today, citizenship does mean voting, except for felons and except in states that exclude those with intellectual and other cognitive disabilities. But citizenship must mean something more than voting. It must envision some "penumbra" of rights, surely including equal treatment with other citizens unless there is a compelling excuse. In the end, is citizenship simply one of those "I will know it when I see it" ideas?

Whatever citizenship does mean, what good is it if it does not embrace new members, allowing them to reunite with their most important first-degree relative, their parent? Citizenship must encompass life in community along with one's parents. All citizens, whether naturalized or not, must be so entitled. A nation such as ours, with one class of citizenship, is violated by 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

This Article scrutinized the creation of an unconstitutional two-tier system among U.S. citizens, those who attain SIJS and are later naturalized, and everyone else. While Congress is empowered to regulate naturalization, that regulation must satisfy universal concepts of fairness. Congress's power should not extend to preventing a naturalized citizen from reuniting with her parent. It is an unlawful class-based distinction within the singular class to which belong all United States citizens.