THE ROAD NOT TAKEN: A CRITICAL JUNCTURE IN RACIAL PREFERENCES FOR NATURALIZED CITIZENSHIP

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ABSTRACT

In The "Free White Person" Clause of the Naturalization Act of 1790 as Super-Statute*, Gabriel Jack Chin and Paul Finkelman argue that racist results in naturalization have arisen despite, or maybe because of, the race neutral interpretation. This happened in a manner that could have been predicted by the federal government's attitudes toward non-White persons in the Naturalization Act of 1790 and the nearly unbroken chain of legal developments. This leads them to think of the law as a "super-statute." While I agree that this is the path actually taken in history, I view the mid-1960s civil rights era as a "critical juncture" when the U.S. government could have taken a counterfactual path that was less racist. The counterfactual path would have required legal interpretations of Constitutional equality and statutory nondiscrimination that remained cognizant of racial implications of purportedly race neutral laws, which was briefly captured in language rights and voting rights statutes in the late 1960s to 1970s. But the egalitarian interpretations unraveled due to contradictions within the liberal national ideology that permitted a post-racial pragmatism about colorblindness that stalled the political incorporation of some non-White immigrants—Asian, Latino/a, Arab—due to their racialization as perpetual foreigners (racialized foreigners).*

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TABLE OF CONTENTS

INTRODUCTION

Professors Gabriel Jack Chin and Paul Finkelman describe the legacy of the "free white person" clause of the Naturalization Act of 1790 in terms of its enduring racial impacts, especially for racial minorities considered to be perpetual foreigners—Asians, Latino/as, and Arab[1] Americans—who were previously considered ineligible to naturalize.[2] In their account, even after Reconstruction and statutory amendments that made the naturalization statute race neutral on the books, it continued to advance racial disparities in reality.[3] Chin and Finkelman's account uses archival data to demonstrate that even after the racial restriction was modified, the introduction of the "declaration of intention to naturalize" (added five years after the original Naturalization Act of 1790) made it possible for state and federal law to grant political and economic rights to White immigrants immediately upon arrival, while ensuring that non-White immigrants could never enjoy them.[4] The ephemeral elimination of the racial exclusion illustrates that the original Naturalization Act of 1790 constitutes a "super-statute."[5]

There are two implications that I explore in this essay. First, Chin and Finkelman's account resolves the racial preference of the Framers for a White country and places it in a "place of dishonor" alongside segregation laws, prohibitions on interracial marriage, and other laws establishing White supremacy.[6] Their tongue-in-cheek characterization of the Naturalization Act as a "super-statute" renders it a part of the anti-canon of Constitutional law. But simply because the original intent for a pro-White, racially exclusionary

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1. Throughout this Article, the term "Arab" is used as a racial category to comport with the style conventions of the *William & Mary Law Review*. I would also like to acknowledge scholars that use the term "Muslim" as a religious marker for a racialized identity. *See generally* SAHAR AZIZ, THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM (2022); Moustafa Bayoumi, *Racing Religion*, 6 NEW CENTENNIAL REV. 267 (2006); Ming H. Chen, *Colorblind Nationalism and the Limits of Citizenship*, 44 CARDOZO L. REV. 971 (2023).

2. *See generally* Gabriel Jack Chin & Paul Finkelman, *The "Free White Person" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047 (2024).

3. *See id.* at 1103.

4. *See id.* at 1055.

5. *See id.*

6. *Id.* at 1048.

naturalization was effective, was it inevitable? Second, Chin and Finkelman suggest that citizenship is not always essential to equal status, bringing together their current research on the "free white person" clause with prior research from "A Nation of White Immigrants" that showed White noncitizens were able to naturalize and become legally equal to White citizens.[7] Even if formal citizenship was not essential to unequal status, could it have been skipped over entirely?

I. RACIALIZED CITIZENSHIP

Regarding the first question, was racial naturalization inevitable? That is, could naturalization have incorporated the egalitarian spirit of the 1960s civil rights era or was citizenship inextricably bound up in the racialized history of the U.S.?

Chin and Finkelman describe the "free white person" clause of the Naturalization Act of 1790 law as a "super-statute" because it "successfully penetrate[s] public normative and institutional culture in a deep way" and more specifically in a "quasi-Constitutional" way.[8] I would use a different word for this kind of stickiness. I would instead use what Paul Pierson in *Politics in Time* speaks of as a "critical juncture" in American political development; institutional arrangements within a political system can lead to "path dependence" or dynamics of self-reinforcing processes with enduring consequences—namely, inequalities of power can be reinforced over time and come to be deeply embedded in organizations, political action, and shared understandings.[9]

What is different between these conceptions is understanding the institutional mechanism that maintained racialized naturalization. Whereas a super-statute is a statement of public values or norms,

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7. *See id.* at Part II.

8. William N. Eskridge, Jr. & John A. Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215-17 (2001).

9. PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 10-11, 51 (2004) ("[These dynamics] can be highly influenced by relatively modest perturbations at early stages. Thus, such processes can produce more than one outcome. Once a particular path gets established, however, self-reinforcing processes make reversals very difficult ... Political alternatives that were once quite plausible may become irretrievably lost."). Pierson cites Margaret Levi's metaphor of a tree that has sprouted roots to illustrate that once a country has started down a track, the costs of reversal are very high. *Id.* at 20.

path dependence describes institutional development.[10] The way that change happens in legal institutions can be captured in statutes, but the government institutions that implement them have a motive force of their own.[11] Legal institutions can articulate norms that become entrenched in court cases, statutory interpretations, and agency issuances.[12] Stare decisis governs courts that rely on prior court cases as precedent. Congress is not bound by prior enactments, but the statutory meanings they enact give rise to implementing guidance and shape beliefs (e.g., in agency guidance) and behaviors (e.g., of regulated entities) going forward.[13] Over time, the accumulated norm articulations become part of the institution and infrastructure of legal institutions.

While path dependence can be found in many types of institutional development, my argument highlights the distinctive institution of citizenship. Naturalized citizenship redefines outsiders as members of a political society.[14] This political society can vote, write policy, and hold office. The civil rights era was a critical juncture in the definition of the political society. The statute itself certainly presented Congress an opportunity to revise ideas about racial equality, such as with the elimination of racially exclusionary clauses and national origin quotas in immigration law and passage of the 1964 Civil Rights Act. Close on the heels of the 1964 Civil Rights Act was passage of the 1965 Hart-Celler Act that brought new immigrants to the U.S. Beyond amending statutory language to be less discriminatory, these new immigrants could become naturalized citizens.[15] The passage of civil rights and immigration statutes enlarged the electorate and made possible an egalitarian road-not-taken for naturalized citizenship. The enlarged electorate is subsequently able to directly participate in politics, for example, by voting and articulating new egalitarian norms. It also influences who elected officials consider their constituents, such that representative democracy can indirectly impact communities with

10. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 612-13 (2001).

11. *See id.* at 655.

12. *See id.*

13. *See id.* at 657 n.209.

14. *See* Chin & Finkelman, *supra* note 2, at 1080.

15. *See id.* at 1110.

immigrants. Thus, the newly refreshed citizenry redraws the national identity and the governing laws around equality—the sources of legal authority, the range of statutory interpretations, and the context for policy implementation.

This mechanism of institutional development bears traces of Daria Roithmayr's racial "lock-ins"; using economic concepts, Roithmayr says White advantage functions as a powerful self-reinforcing monopoly or cartel that reproduces itself from generation to generation even in the absence of intentional discrimination.[16] Racial covenants that restrict homebuying and influence neighborhood school assignments might be one example.[17] In the context of citizenship, the removal of racial prerequisites and national origin quotas could have led to a multiracial democracy that would vote in the interest of its co-ethnics and elevate racial minority groups into racial majority groups.

This egalitarian pathway toward a multiracial electorate would have been counterfactual to the one that immigrants encountered after the "free white person" clause was eliminated from the letter of the law, as they found themselves ineligible for many rights within the U.S.—owning property, working certain jobs, and mobilizing as voters.[18] Chin and Finkelman convincingly show that the path *actually* taken—the purportedly race-neutral interpretations of the 1790 Naturalization statute—did not disrupt the boundaries of "American" as White persons, with Asians, Latino/as, and Arabs as "non-Americans" and perpetual foreigners rather than new Americans.[19] By arguing that the civil rights statute in combination with the Hart-Celler Act brought the possibility of a multiracial majority even though the White majority prevented that possibility from taking hold. Multiracial naturalization could have broken through the status of the founding era, when White meant

16. DARIA ROITHMAYR, REPRODUCING RACISM 4-7 (2014). Her definition is based on principles of economics and antitrust. *Id.* at 31. For definitions based on legal institutions, see also Juliet Stumpf & Stephen Manning, *Liminal Immigration Law*, 108 IOWA L. REV. 1531, 1582 (2023) ("Liminal rules, once firmly rooted, achieve path dependence."); Hathaway, *supra* note 10, at 622-27 (path dependence means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it).

17. *See* ROITHMAYR, *supra* note 16, at 154.

18. *See* Chin & Finkelman, *supra* note 2, at 1081.

19. *See id.* at 1057-58.

White (time period one: 1790-1868), and the Reconstruction era, when race neutral was pretext for White (time period two: 1868-1952).[20] It could have avoided a colorblind interpretation of civil rights statutes that converged with the post-racial interpretation and that collectively prevail in the contemporary moment.

A. Time One (1790-1868): American Means White Persons

During time period one (1790-1868), the statutory language of "White" meant White persons. The 1792 Naturalization Act contained an explicit racial exclusion from naturalization.[21] It limited naturalization to "free white person[s]" with a two-year residence limitation and supported the construction of federal citizenship law as being only available to White persons.[22]

The 1795 repeal of "free white person" from the federal statute could have been revolutionary, but instead it was an empty gesture. This is because the "declaration of intention" to naturalize (first papers) injected an additional step into the naturalization process that narrowed the possibilities for non-White persons by conditioning political and economic benefits—land owning, employment, and voting (most critically)—for those racially ineligible to naturalize.[23] Restricting those who could file first papers to those "racially eligible to naturalize," such as European immigrants, pointedly meant that Asian immigrants could not become rights-bearing citizens and voters.[24] Rather than opening the gates to citizenship, it maintained pass codes for entry that were selectively given out after a probationary period.[25]

The "declaration of intention" functioned as a lock-in during the 1849 Passenger cases[26] and the 1857 Supreme Court decision *Dred Scott v. Sandford*, which relied on the interpretation of the 1790 Act as being for White naturalization to reach its conclusion that black

20. *See id.* at 1053, 1105-06.
21. *Id.* at 1161-62.
22. *Id.*
23. *See id.* at 1055.
24. *Id.*
25. *See id.*
26. *Id.* at 1093-1101.

persons could not be rights-bearing citizens and voters.[27] In other words, the declaration of intent created a Black/White dichotomy justified by a racial hierarchy in the law.[28]

B. Time Two (1868-1952): American Means Black and White Persons

The 1868 Reconstruction laws were ostensibly based on personhood, but they rendered naturalization a possibility for Black and White persons. These laws maintained an anti-Asian interpretation of citizenship.[29] Everything and nothing changed during the Civil War and adoption of the Reconstruction Amendments. The incorporation of the Fourteenth Amendment in 1868, with an "equal protection" clause, radically reworked the letter of the law by using race-neutral language that shifted the eligibility criteria from the social reality of race to operation of a law based on personhood.[30] A similar logic motivated the birthright citizenship clause and the requirement for a uniform naturalization law. The Civil Rights Act of 1868 and 1870 extended their provisions to "all persons."[31] While the language of the 1870 Naturalization Act similarly no longer spoke of "White persons" or "Black persons," it permitted only "formerly enslaved persons" and those "illegally smuggled" by a set date (1808) to naturalize.[32] In other words, the Naturalization Act elevated the status of Black persons by allowing both Black and White persons to become citizens.[33] (Imperfect as the realization of Black enfranchisement would prove to be.)

However, the Naturalization Act simultaneously barred other races that were neither Black nor White—such as Asians—from

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27. *Id.* at 1057.

28. *See History of the Certificate of Naturalization (1906-1956)*, USCIS (Jan. 6, 2020), https://www.uscis.gov/about-us/our-history/stories-from-the-archives/history-of-the-certificate-of-naturalization-1906-1956 [https://perma.cc/S8UX-HB7E]; Gabriel Jack Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1271 (2020); Hiroshi Motomura, Comment, *Choosing Immigrants, Making Citizens*, 59 STAN L. REV. 857, 865 (2007).

29. *See* Chin & Finkelman, *supra* note 2, at 1103.

30. *See id.* at 1102.

31. *See id.* at 1104.

32. *Id.* at 1056 n.44.

33. *See id.* at 1056.

citizenship. This understanding is consistent with a reading of the 1882 Chinese Exclusion Act and efforts to restrict birthright citizenship, notwithstanding the *Wong Kim Ark* decision that broadened the meaning of persons beyond what the law and lawyers envisioned in 1898.[34] It is also consistent with *Plessy v. Ferguson*, in which Justice Harlan's dissent from the maintenance of Black/White segregation made exception for Chinese persons.[35] As Ian Haney Lopez and others have shown, it is also consistent with the racial pre-requisites case law that revived and extended the 1792 "free white person" clause's intentions without activating the naturalization process for non-Black and non-White persons such as Asians.[36] It reinforces the Black/White racial dichotomy that persisted throughout the civil rights era.[37]

Were the laws in time period two intended to leave out Asians on the basis of their race or simply leave out immigrants from specified countries, who were by definition political outsiders and not protected from the same egalitarian commitments? The language of exclusion left out those who were "not persons," but it made no mention of those who were instead considered "aliens."[38] Since Asian immigrants were considered aliens, it would have been paradoxical for them to be able to naturalize.[39] Chin and Finkelman point out that European immigrants could naturalize, suggesting that the distinction was about race and not only about country of origin.[40] The 1924 Johnson-Reed Act relied on eugenics to enforce national origin quotas that disfavored migration from Asian countries.[41] A

34. *See generally* Timeline: Citizenship in the United States, 1781-Present, GRANTMAKERS CONCERNED WITH IMMIGRANTS AND REFUGEES (Dec. 2023) (slides 40-48), https://www.gcir.org/resources/timeline-citizenship-united-states-1781-present [https://perma.cc/AU6M-4L5M]. *See also* Sam Erman & Nathan Perl-Rosenthal, *International Lawyers for White Supremacy and the Road to Wong Kim Ark*, (March 23, 2023) (unpublished working paper) (presented at UC Law S.F. RICE Colloquium).

35. 163 U.S. 537, 561 (1896) (Harlan, J. dissenting).

36. U.S. v. Thind, 261 U.S. 204, 207 (1923); Ozawa v. U.S., 260 U.S. 178, 192-95 (1922); *see also* IAN HANEY LOPEZ, WHITE BY LAW 35-37 (1996); Devon Carbado, *Yellow By Law*, 97 CALIF. L. REV. 633, 664-67 (2009).

37. *See* LOPEZ, *supra* note 36, at 31-32.

38. *Id.* at 90.

39. *See id.*

40. *See* Chin & Finkelman, *supra* note 2, at 1053.

41. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKINGS OF MODERN AMERICA 23-25 (2004).

1925 veteran exception to a White rule for naturalization reinforced this interpretation.[42] By comparison, the 1940 Nationality Act added naturalization for descendants of races indigenous to the western hemisphere and native-born Filipino service members,[43] who were categorized as Malay rather than Asian at the time.[44]

Even after the 1943 repeal of the Chinese Exclusion Act and the provision for naturalization of Indians and Filipinos post-World War II, there remained an Alien Land Act that restricted Asians from property ownership during a time when land claims were core to citizenship claims.[45] There were Chinese Confession Programs and Japanese American citizenship renunciations.[46] These suggest that Asian aliens were not considered part of the egalitarian progress of America.

C. Time Three (1952-1965) Critical Juncture: Person Means Non-Alien American

The thirteen years between 1952 and 1965 represented a crucial moment when American institutions could have moved toward a multiracial democracy, rather than limiting itself to pro-Whiteness and anti-Blackness. In the policy domain of immigration and naturalization, the 1952 McCarran Walter and 1965 Hart-Celler Acts eliminated the racial exclusions and national origin quotas within immigration law.[47]

The liberalized immigration policies converged with the strengthened civil rights laws of the same time period, marked by the

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42. Toyota v. United States, 268 U.S. 402 (1925); *see also* Deenesh Sohoni & Amin Vafa, *The Fight to be American: Military Naturalization and Asian Citizenship*, 17 ASIAN AM. L. J. 119, 135-37 (2010); SOFYA APTEKAR, GREEN CARD SOLIDER: BETWEEN MODEL IMMIGRANT AND SECURITY THREAT 73 (2023).

43. 8 U.S.C. § 703 (1940) (repealed 1952).

44. MALCOLM HARRIS, PALO ALTO: A HISTORY OF CALIFORNIA, CAPITALISM, AND THE WORLD 121 (2023).

45. In 2023, Florida enacted a disturbingly similar Alien Land Law Act that restricts foreign ownership and specifically is motivated by a mistrust of China. *See* Fla. Stat. § 287.138 (2023). *See generally* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2009).

46. *See* NGAI, *supra* note 41, at 187-88, 204.

47. Immigration and Nationality Act of 1952 (McCarran Walter Act), Pub. L. 82-414, 66 Stat. 163 (1952); Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub. L. No. 89-236, 79 Stat. 911.

Supreme Court issuing landmark court opinions such as *Brown v. Board of Education* (1954) and *Lau v. Nichols* (1974) and Congress passing the Civil Rights Act of 1964.[48] As Chin has written previously, the civil rights ethos seeped into Congress's enactment of the 1965 immigration law.[49] Chin says Congress passed the Hart-Celler Act with a "racial egalitarian motivation," thus taking a revolutionary step toward non-discriminatory immigration laws.[50] His evidence is contemporary recollections of participants and legislative history on knowledge that Asian immigration would increase due to prevalence of Asian professionals and Asian families that would seek reunification in the U.S.[51]

This interpretation of the civil rights moment suggests that the Civil Rights Act was the super-statute and that it rewrote the "free white person" clause of the Naturalization Act, rather than the other way around. The interpretation of civil rights as the super-statute is implied in the "assimilation assumption" section of Chin's article that hypothesizes "Congress may have felt comfortable admitting a greater proportion of non-whites because they assumed immigrants would assimilate."[52] Simply letting Asians in would not undermine the American way of life.[53] They could be viewed as individuals and "evaluated as future Americans, not as former Italians, or Greeks, or Congolese, or Ethiopians, or anything else."[54] Senator Kennedy at the time said, "[f]avoritism based on nationality will disappear. Favoritism based on individual worth and qualifications will take its place."[55] What kinds of qualifications? Chin goes further and says it was a "cosmopolitan" form of assimilation and was "fluid" insofar as it did not require immigrants to wipe clean

48. 347 U.S. 483, 493 (1954); 414 U.S. 563, 566-67 (1974); Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 (2006)); 34 C.F.R. § 100.3 (2013).

49. Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub. L. 89-236; 79 Stat. 911 (1965); *see also* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 300-02 (1996); MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 166-67 (2000).

50. *See* Chin, *supra* note 49, at 300-02.

51. *Id.* at 306-21.

52. *Id.* at 339.

53. *Id.*

54. *Id.* at 341.

55. *Id.* at 342 (alteration in original).

their history as they arrived, nor did it seek for the U.S. to be devoid of cultural change.[56] In other words, the counterfactual course in history was that America could become a multiracial democracy with increased global migration.

Some scholars dispute the interpretation that immigration quotas were passed with knowledge or desire to increase Asian migration, instead arguing that the law was passed to help Southern and Eastern Europeans immigrate and that boosting Asian immigration was an unintended consequence.[57] A subset of these accounts go farther to say legislators found Asian population increases due to chain migration to be not only unexpected but undesirable.[58] These skeptical accounts resonate with subsequent resistance to Asian migration. However, these skeptical accounts gloss over the window of opportunity when egalitarian norms took hold in the law and created institutional conditions for a changed course.[59] The language of egalitarianism did not have to retreat into race neutrality or colorblindness, nor did it have to lead to a reassertion of White supremacy, as it did with the rights retrenchment and cultural backlash of the 1980s.[60] It could have instead let naturalization forge a multiracial American citizenship. There were glimpses of this multiracial vision in language rights and national origin nondiscrimination provisions that protected minority cultural and religious distinctions in anti-discrimination law.[61] However, they were undermined by opposition in lower courts and state legislatures that sought cultural dominance by a singular group: White, English-speaking, and Protestant Christian Americans.

Either way, these new immigrants were incorporated into a changing landscape for race and civil rights. As Hugh Davis Graham describes, the institutional commitment to racial equality evolved during the Nixon presidency and Congress from nondiscrimination under a race-blind Constitution to more race conscious

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56. *Id.*

57. *See, e.g.*, DAVID M. REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 92-94 (2d ed. 1992) (questioning what Congress would have done if this issue were clear in 1965).

58. *See, e.g.*, PETER BRIMELOW, ALIEN NATION 76-77, 90-91 (1996).

59. *See* Chin, *supra* note 49, at 301-06.

60. *See* LOPEZ, *supra* note 36, at 158-59.

61. *See* Chin, *supra* note 49, at 340-41 n.323.

preferences for minorities in federal agencies such as the newly-developed Equal Employment Opportunity Commission.[62] Immigrants from Asian and Latin American countries were folded into this multiracial institutional landscape, which has been elsewhere termed an ethno-racial pentagon of White, Black, Asian, Hispanic, and Native American.[63] But the convergence of expanded non-White immigration and affirmative action collided in 1990s California.[64] Economic recession and job insecurity about American workers led to complaints that employers were hiring immigrants in order to keep wages low and satisfy affirmative action directives for increased racial diversity.[65] This fueled a backlash of racial resentment and anti-immigrant sentiment that led to the contraction of some civil rights laws.[66] But before that moment arrived, there was a twenty-year period of growing racial egalitarianism that included immigrants in the story of civil rights.[67]

II. THE ROAD-NOT-TAKEN OF MULTIRACIAL DEMOCRACY

If citizenship is not essential to equal status, what is the role of citizenship for non-White, non-Black persons in a multiracial democracy? That is, if racial progress could have gone either way, why did race neutrality and colorblindness continue to mean pro-White and anti-Black? This essay claims that the post-racialism ushered in by the election of Barack Obama demonstrates the racially egalitarian possibility for a multiracial democracy: another road not taken in America's institutional development.

Kimberlé Crenshaw's twenty-year retrospective on critical race theory (CRT) explains how colorblindness and post-racialism converged into a post-racial pragmatism.[68] Crenshaw interprets

62. *See* HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 66 (2002) [hereinafter COLLISION COURSE]; Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POLI. & SOC. SCI. 50, 60 (1992).

63. DAVID A. HOLLINGER, POST-ETHNIC AMERICA: BEYOND MULTICULTURALISM 23 (1995).

64. *See* GRAHAM, COLLISION COURSE, *supra* note 62, at 1.

65. *See id.*

66. *See id.* at 124.

67. *See id.* at 66.

68. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1314 (2011).

colorblindness as a type of legal formalism that meant to advance equality.[69] But the commitment to equality for non-White persons was lost in the 1980s and 1990s retrenchment, as evidenced by the backlash against race and immigration in California under Governor Pete Wilson and the installment of right-wing judges under President Reagan.[70] These political forces came together with neutral conceptions of merit as an explanation for the lack of racial representation at elite law schools and other corridors of power, prestige, and wealth in America.[71] This movement for colorblindness emerged as the reaction to a robust civil rights era and an emerging multi-racial America. It thwarted the momentum of the civil rights era and the institutional infrastructure of a veritable minority rights revolution that encompassed race, immigration, the environment, and other liberal causes.[72]

Crenshaw says that colorblindness merged with a distinct post-racialism following the election of Barack Obama as the first Black U.S. President in 2008.[73] She distinguishes her brand of post-racialism from those who view the current moment as "the opposite of what preceded it."[74] Giving the example of Barack Obama's election as the first Black President, she says post-racialism is misguided when it is "no longer measured by sober assessments of how far we have come, but by congratulatory declarations that we have arrived."[75] In her opinion, post-racialism should instead serve as the recognition of alternative ways of being racially egalitarian that "jettisons the liberal ambivalence about race consciousness to embrace a colorblind stance even as it foregrounds and celebrates the achievement of particular racial outcomes."[76] In the new post-racial

69. *Id.* at 1313.

70. *See* GRAHAM, COLLISION COURSE, *supra* note 62, at 124.

71. *See* Crenshaw, *supra* note 68, at 1300-10.

72. Cass Sunstein includes this minority rights expansion as part of a broader liberal movement in AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 61-64 (1993). *See generally* JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2004).

73. *See* Crenshaw, *supra* note 68, at 1314-15.

74. *Id.* at 1314.

75. Crenshaw, *supra* note 68, at 1312-14 (analogizing President Obama's shattering of the political glass ceiling to the taking down of White only signs in the 1960-70s). It turned out formal equality's triumph over White supremacy was unwarranted; it did little to disrupt ongoing patterns of institutional power and reproduction of differential privileges and burdens across race.

76. *Id.*

moment, Crenshaw describes a racial pragmatism that brings together the strange bedfellows of conservatives seeking erasure of race as a contemporary phenomenon and liberals who believe significant progress can be made without race consciousness.[77] She explains that this realignment "brings liberals and some civil rights advocates on board so that a variety of individuals and groups who may have been staunch opponents of colorblindness can be loosely allied in post-racialism."[78]

In the eight years since Obama's presidency and ten years since Crenshaw's retrospective, we can now see Donald Trump's election as President and the overt racism and White nationalism that ensued. The reassertion of White supremacy and the institutional arrangements that maintained had roots in earlier eras. We still see it unfolding today in the face of a more racially diverse America, with the U.S. Supreme Court overturning affirmative action in higher education on the theory that the need for racial remedy would sunset a mere twenty-five years after the *Grutter* decision declared the legitimacy of racial diversity in higher education institutions in *SFFA v. Harvard*.[79]

Beyond Black and White, anti-immigrant and pro-nationalist presidential agendas run alongside one another in the post-racial pragmatism of the modern moment. While the post-racial pragmatism affects many racial groups, I particularly emphasize "racialized foreigners" such as Asian, Latino/a, and Arab Americans who are viewed as foreign even after they have naturalized.[80] My claim is that the history of racialized barriers to citizenship functioned for "racialized foreigners" in a way that yields insights about how citizenship and race operate.[81]

The reason that racial inequality persists for Asian Americans is a combination of colorblindness and nationalism.[82] Nationalism provides a race-neutral justification for preferring Americans in

77. *Id.*

78. *Id.*

79. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary."); Students for Fair Admissions, Inc. v. Harvard, 143 S. Ct. 2141, 2165-66 (2023).

80. Chen, *supra* note 1, at 971.

81. *Id.*

82. *See id.* at 957-62.

immigration law. Other formulations include national security, public health, and economic protectionism.[83] Colorblindness provides a seemingly neutral justification for protecting the racial majority in civil rights law. Case studies of colorblind nationalism include countering allegations of espionage and political disloyalty for Chinese and Japanese during World War II and in the strained U.S.-China economic relationship emerging as a World War III or Cold War II.[84] For Latino/a persons, colorblind nationalism shows itself in the repatriation of Mexican Americans and continuing challenges to Mexican Americans in borderlands and in military/criminal justice.[85] For Arab Americans, it shows itself in racial profiling of Muslims as terrorists post-9/11 and in the Muslim travel ban.[86]

My prior article, *Colorblind Nationalism and the Limits of Citizenship*, is not focused on White populist nationalism or xenophobia per se. The historical account I adopt here would similarly not take the "free white person" clause to be part of an anti-canon of racial exclusion in immigration law. My claim is that the dynamics of citizenship and race for racialized foreigners expose contradictions *inherent* to liberal nationalism and its institutions. In terms of path dependence, multiple pathways for contending with expanded racial diversity after 1965 were possible.[87] The ones that took hold entrenched the early preferences for a White American identity and the halting acceptance of foreigners who were neither White nor Black with a distrust of the regulatory state that had proliferated during the minority rights revolution and extended the scope of civil rights laws and racial equality beyond the comfort of liberal ideology.[88]

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83. *See id.* at 962-66.

84. *See id.* at 966-67, 977.

85. *Id.* at 972; Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1139 (1998).

86. AZIZ, *supra* note 1 , at 2-3, 166-67.

87. Chen, *supra* note 1, at 949 (apart from overtly race-based preferences for White persons, there were also race-neutral "good faith justifications that are nevertheless vulnerable to misuse").

88. *Id.*

III. WHERE TO GO FROM HERE? A POST-RACIAL CITIZENSHIP AGENDA

The history of racialized naturalization suggests that statutory enactments are followed by policy implementation, statutory interpretation, and agency discretion that create openings between the law's aspiration (the law on the books) and the social reality (the law in action). While these openings can expand the original legal intent behind a statute, the story of immigration and naturalization law is mostly one of legal institutions constraining the racially egalitarian spirit of civil rights by restricting the definition of who can become a citizen and stunting change in the demographic composition of U.S. citizenship.

Such a historical reading means that the persistent effects of racialized naturalization can also be seen in subsequent political incorporation and legal mobilization of the non-White persons who were historically ineligible to naturalize. Evidence abounds that these Asian, Latino/a, or Arab naturalized citizens are underrepresented in public life at nearly every stage of political incorporation—naturalizing, voting, party participation, and holding public office—even though some indicators of political interest are rising with high stakes elections and intensive community organizing in 2020 and 2022.[89] There is insufficient theorizing to understand the linkages between the history of race-based naturalization and the contemporary political participation of non-White, recently-naturalized Americans. Scholarship advancing understanding of racialized naturalization is critical during a time when the vestiges of a racist past are being actively erased from institutional memory.

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89. *See, e.g.*, *Asian American Voting Survey 2022: Voting Enthusiasm-Q6*, AAPI DATA (Aug. 4, 2022), https://aapidata.com/aavs-2022-voting-enthusiasm-q6/ [https://perma.cc/8P73-FCEB]; *Latino Voters Are Ready to Deliver a Decisive Victory to Biden and the Democrats*, LATINO DECISIONS (Nov. 2, 2020), https://latinodecisions.com/blog/latino-voters-are-ready-to-deliver-a-decisive-victory-to-biden-and-the-democrats/ [https://perma.cc/8XYU-V8TS]; *State of New American Representation: State Legislatures in 2022*, NEW AM. LEADERS, https://newamericanleaders.org/wp-content/uploads/2022/08/State-of-Representation-2022-New-American-Leaders.pdf [https://perma.cc/APV9-8UT6]; *Represent 2020: Toward a Better Vision for Democracy, A Scorecard for Immigrant Leadership in America*, NEW AM. LEADERS 7-10, https://newamericanleaders.org/wp-content/uploads/2017/05/nalp-represent2020.pdf [https://perma.cc/PD4H-4SR4].

It is noteworthy that the racial progress described by Chin and Finkelman is captured in statutory law but the regression occurs in more informal forms of law: agency guidance, internal memoranda, and forms.[90] Compared to the more conventional forms of statutes and case law relied on during the apex of civil rights, liminal forms of law are less protective of rights and do not lead to citizenship.[91] The amendments to the Naturalization Act of 1790 contain that possibility of progress, even if they can be resisted during implementation.[92] Chin and Finkelman show this historically; Stumpf and others show it presently.[93]

Naturalization represents merely one facet of political incorporation, but it is a facet of outsized importance because it builds the institution of politics and impacts prospects for political incorporation of new Americans into American democracy. How can legal scholars understand the laggard political incorporation of Asian, Latino/a, and Arab minority groups in the institutions of American public life, as measured by naturalization, voting, and holding public office? For example, if political socialization begins with naturalization, how does locking out certain segments of a community influence their subsequent voting? How does it shape public debate and the formation of public policy? Do legal exclusions from political participation—such as the statutory and constitutional barriers to hiring legal permanent residents as civil servants or the constitutional requirement that presidents be birthright citizens of the U.S.—dampen immigrants' interest in public service? Does public awareness and consciousness of America's racist naturalization history influence present efforts to claim public benefits, activate grievance processes, or redress legal wrongs?

This Comment has been an initial attempt to understand how the racialized history of naturalization impacted who could become an American for years to come. Researchers should seek to further understand how this history impacts naturalized citizens' decisions to deepen their subsequent engagement in politics and public life, which in turn stalls a multiracial democracy.

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90. *See* Stumpf & Manning, *supra* note 16, at 1589.
91. *See id.* at 1595.
92. *See supra* Part I.A.
93. *See generally* Chin & Finkelman, *supra* note 2; Stumpf & Manning, *supra* note 16.

My hypothesis is that the naturalization process impacts non-White groups' ideas about their relationship to the state and sense of belonging in the nation, but this is an empirical question that requires more data gathering and analysis. Such data could capture and explain the ways that non-White naturalized citizens decide to deepen their political participation and mobilize their newly-acquired rights. For example, such research could ask about political participation: (1) Why do Asian Americans vote less often and with less effect than Black and White Americans?[94] How did Latino/as change their political trajectory in the face of intense opposition in places like California, which adopted restrictionist and racially exclusionary state policies in the 1990s and has since become a progressive pocket and multiracial mecca?[95] What possibilities exist for Arab Americans to change their racial positioning and transform the electorate in a shifting landscape of religious and racial rights? (2) How does political incorporation compare across these racial groups? (3) How does it differ for naturalized and U.S.-born citizens? Researchers could also examine *naturalized citizens'* willingness and ability to mobilize newly-acquired rights, such as claiming public benefits that federal laws restrict to citizens seeking protection under federal civil rights laws such as the Civil Rights Act of 1964 and the Voting Rights Act, if unlawful discrimination under statute is discovered.

Answers to these empirical questions would deepen and extend the scope of knowledge about naturalization and political incorporation. It would contribute a nuanced understanding of racialized naturalization as it plays out for hard-to-reach immigrant populations—Asian elders, Latino men, non-English speakers, and poor people—that never reach the threshold of naturalization.[96] It would

94. *See Voter Turnout, 2018-2022*, PEW RSCH. CTR. (July 12, 2023), https://www.pewresearch.org/politics/2023/07/12/voter-turnout-2018-2022/ [https://perma.cc/24EY-LVZN].

95. *See The Latinx Voting Bloc Transformed 2020*, VOTOLATINO, https://votolatino.org/understand-the-vote/ [https://perma.cc/8LE3-C6W2]; *1994: California's Proposition 187*, LIBR. OF CONG., https://guides.loc.gov/latinx-civil-rights/california-proposition-187 [https://perma.cc/5JRE-D3TB].

96. *See* Emily Ryo & Reed Humphrey, *The Importance of Race, Gender, and Religion in Naturalization Adjudication in the United States*, 119 PNAS 1, 1 (2021) (finding non-White applicants less likely to be approved and applicants from Muslim-majority countries especially); *see generally Naturalization Statistics*, USCIS, https://www.uscis.gov/citizenship-resource-center/naturalization-statistics [https://perma.cc/VK9L-9DR6].

extend the lens of analysis beyond the threshold of naturalization to reveal the political socialization that flows from naturalization. Researchers could measure the effects of naturalization as a catalyst for voting or holding public office—political activities that beget a multiracial citizenry and build the institutions to support a multiracial democracy.[97]

The history of race and citizenship in the U.S., as told by Chin and Finkelman, cautions against overreliance on formal citizenship laws as an antidote to racial inequality, but citizenship remains vital.[98] Their study suggests that amending statutes and extending judicial doctrines will not by themselves cure racial inequality in citizenship.[99] Scholars must also consider the institutional opportunities and limitations of citizenship given the path dependence of U.S. history on race.[100]

97. *See State of New American Representation*, *supra* note 89, at 2.
98. *See generally* Chin & Finkelman, *supra* note 2.
99. *See id.*
100. *See id.*