

## REPARATIVE CITIZENSHIP

AMANDA FROST\*

### ABSTRACT

*The United States has granted reparations for a variety of historical injustices, from imprisonment of Japanese Americans during the Second World War to the Tuskegee syphilis experiments. Yet the nation has never considered reparations for 150 years of discriminatory immigration and citizenship policies that excluded millions based on race, gender, and political opinion—including some who are alive today. This Article argues that the United States can atone for these transgressions by granting “reparative citizenship” to those individuals and their descendants, following the lead of several European countries who have recently provided such relief for those wrongly expelled or excluded in the past.*

*Reparative citizenship could take many different forms. The executive branch could unilaterally implement a narrow version of reparative citizenship by instructing immigration officials to loosen evidentiary standards and grant discretionary remedies to victims of discriminatory policies. A more expansive version would require amending the Immigration and Nationality Act to re-allocate to historically excluded groups the 50,000 green cards currently given out through a lottery system. Austria, France, Germany, Greece, Poland, Portugal, and Spain have adopted similar approaches in*

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\* Professor of Law, University of Virginia School of Law. I am grateful to Ming Hsu Chen, Kristin Collins, Sam Erman, Martha Jones, Jayesh Rathod, Jenny Roberts, Rachel Rosenbloom, Shana Tabak, Rose Cuison-Villazor, and Lindsay Wiley for helpful feedback on earlier drafts. Thanks go as well to the participants in the Fall 2021 symposium *Contested Boundaries: The Past, Present, and Future of U.S. Citizenship*, the University of Virginia Spring 2022 faculty workshop, and the participants in the Spring 2022 *Immigration Law Scholars and Teachers Conference* for thoughtful comments and suggestions. Special thanks to Maria Segura Bentancourt and Kylie Mignat for their excellent research assistance.

*granting citizenship to the descendants of Jewish citizens expelled in the past, as well as to individuals denied citizenship based on gender or political opinion. The United States should do the same.*

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## INTRODUCTION

Throughout its history, the U.S. government has granted reparations for historical injustices. The United States paid \$9 million to subjects of the Tuskegee syphilis experiments in which black men's illnesses were left untreated, and \$117 million to survivors of radiation exposure from nuclear testing.<sup>1</sup> The Native American Graves Protection and Repatriation Act mandated the return of looted property to Native American tribes, and the Indian Claims Commission paid out approximately \$800 million to Native Americans for stolen land.<sup>2</sup> Perhaps best known, in 1988 Congress enacted legislation to award \$20,000 each to Japanese immigrants and Japanese Americans imprisoned during World War II, accompanied by an apology on behalf of the nation by Congress.<sup>3</sup> Aside from one narrow exception, however, the United States has never considered reparations for 150 years of overtly discriminatory immigration and citizenship policies. This Article argues it is time for that to change.

The historical record is clear. The Naturalization Act of 1790 permitted only "free white persons" to naturalize, and racial barriers to naturalization remained in place until 1952.<sup>4</sup> Throughout the nineteenth and twentieth centuries, the government excluded millions from immigration and citizenship based explicitly on race,

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1. Radiation Exposure Compensation Act, 42 U.S.C. § 2210 (2018); *Families of Tuskegee Syphilis Study Victims Seek Leftover Settlement Fund*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/07/15/us/tuskegee-syphilis-study-settlement.html> [<https://perma.cc/GY9U-S2KR>]; Remarks in Apology to African-Americans on the Tuskegee Experiment, 1 PUB. PAPERS 607 (May 16, 1997); Alfred Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 816, 835 (2006) (describing reparations as "cases where there is repair for past crimes against groups," including legislative reparations and payments made through settlements of lawsuits).

2. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001; H.R. Doc. No. 96-383 (1980).

3. Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988).

4. Naturalization Act of 1790, ch. 3 § 1, 1 Stat. 103, 103; see also Eric Foner, *An American Birthright*, THE NATION (Sept. 14, 2015), [http://www.ericfoner.com/articles/082715\\_nation.html](http://www.ericfoner.com/articles/082715_nation.html) [<https://perma.cc/CPV9-Y9RN>] (citing the 1790 law and declaring that, "at the outset, ideas of American citizenship were closely linked to race"); Marian L. Smith, *Race, Nationality, and Reality, Part 3: INS Administration of Racial Provisions in U.S. Immigration and Nationality Law Since 1898*, 34 PROLOGUE MAG., 2 (2002), <https://www.archives.gov/publications/prologue/2002/summer/immigration-law-3.html> [<https://perma.cc/N7GQ-6BSZ>].

gender, nationality, and political opinion. Included in that group were American women stripped of their citizenship for marrying foreigners, Asians and Arabs barred from immigrating to the United States, Mexican Americans deported in both the 1930s and 1950s, and foreign-born labor leaders denaturalized during the Red Scare.<sup>5</sup> As political scientist Rogers Smith explained, “for over 80 percent of U.S. history, American laws declared most people in the world legally ineligible to become full U.S. citizens solely because of their race, original nationality, or gender.”<sup>6</sup>

The ramifications of these policies extend into the twenty-first century. Individuals alive today were denied immigration status and citizenship on immoral and (for some) constitutionally prohibited grounds.<sup>7</sup> The current racial and ethnic composition of the U.S. citizenry also reflects these unconstitutional and immoral policy choices, as do the demographics of the eleven million undocumented immigrants living in the United States.<sup>8</sup>

This Article asks whether the United States should atone for these past transgressions by enacting “reparative citizenship” laws granting excluded individuals and their descendants immigration status and a pathway to citizenship. The Article examines the proposal from a number of angles, ranging from nuts-and-bolts details of institutional design to conceptual questions regarding its fit within the existing immigration system and U.S. constitutional commitments.

A reparative citizenship initiative could be narrowly crafted to repair harm to individuals wrongly denied immigration and citizenship status. Immigration officials could adopt a “reparative” mindset, loosening evidentiary standards, taking notice of relevant historical events, and granting discretionary forms of relief to those discriminated against in the past. Such changes could be made by the executive branch unilaterally and relatively quickly, through changes to guidance documents, the U.S. Citizenship and

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5. See *infra* Parts I.A & I.B.

6. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 15 (1997); see also AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS (2021).

7. See *infra* Part I.C (describing three individuals alive today who were denied citizenship based on race and gender).

8. See *infra* Part I.C.

Immigration Services (USCIS) policy manual, and regulations—all without amending existing laws.<sup>9</sup> Alternatively, the initiative could be broader in scope, including descendants of excluded individuals or even whole groups excluded by discriminatory policies of the past, which would require new legislation.<sup>10</sup>

Reparations in the form of access to U.S. citizenship is intriguing in part due to the unique nature of citizenship—an economically, politically, and symbolically valuable status that would provide a fitting remedy with which to atone for immigration law’s historical injustices. Reparative citizenship is a powerful form of corrective justice that could at least partially repair the past harm. Returning “stolen” citizenship could also serve an educative function, informing current citizens that the status they enjoy was denied to others on grounds now acknowledged to be both immoral and (at times) unconstitutional. Such an initiative would reaffirm constitutional commitments to equality generally, and equal access to citizenship in particular.<sup>11</sup>

Although reparative citizenship is almost unheard of in the United States, the idea has taken hold in Europe. In recent years, a growing number of European countries have granted a “right of return” to individuals expelled in the past, as well as to their descendants.<sup>12</sup> Germany, Austria, Poland, and most recently Greece created programs to return citizenship to Jews stripped of that status before and during the Second World War, as well as to their descendants.<sup>13</sup> Announcing the initiative on a visit to Israel in November 2010, Greek Deputy Foreign Minister Dimitrios Dollis declared: “They’re our people ... It’s their natural right,” adding that the loss of citizenship is a “moral injustice that had to be corrected.”<sup>14</sup> Similarly, Spain’s 2007 “Historical Memory Law” grants citizenship to individuals and their descendants expelled

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9. See *infra* Parts IV.A & B.

10. See *infra* Part IV.C.

11. See *infra* Part II (discussing reparations theory).

12. See *infra* Part II.B.

13. See *infra* Part III.

14. Jonathan Beck, *Greek Holocaust Survivors to Have Citizenship Restored*, JERUSALEM POST (Nov. 25, 2010, 1:17 AM), <https://www.jpost.com/jewish-world/jewish-news/greek-holocaust-survivors-to-have-citizenship-restored> [<https://perma.cc/4J3K-HVCC>] (describing Greek law granting approximately 100 Holocaust survivors Greek citizenship, and explaining that their descendants would also be permitted to file requests for citizenship).

from the country during the fascist regime of Francisco Franco.<sup>15</sup> Both France and Germany permit children of citizen mothers and foreign fathers to apply for the citizenship denied to them at birth due to gender-based discrimination in citizenship transmission laws.<sup>16</sup> Most remarkably, in 2015, Spain and Portugal significantly expanded the concept by offering citizenship to descendants of Sephardic Jews expelled from the Iberian Peninsula five hundred years before.<sup>17</sup> These European laws serve as a potential model for similar initiatives in the United States.<sup>18</sup>

Part I of this Article provides a brief history of explicitly discriminatory immigration and citizenship laws and policies that remained in place from the nation's founding until 1952.<sup>19</sup> Part II gives an overview of reparations theory. Part III describes the lone example of reparative citizenship in the United States, as well as the recent, broad reparative citizenship initiatives in Europe. Part IV addresses questions of institutional design, describing how reparative citizenship could be implemented in the United States within the framework of the current immigration system.

With this groundwork established, Part V turns to broader normative and constitutional questions raised by reparative citizenship. Access to citizenship fulfills many of the reparation movement's goals for such initiatives, and avoids the pitfalls that come with forced wealth transfers long after a wrongdoing occurs. Yet the broadest version of the concept would be hard to implement

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15. *New Democratic Memory Law for Spanish Citizenship*, IMMIGR. SPAIN, <https://www.immigrationspain.es/en/democratic-memory-law/> [<https://perma.cc/N7AV-KCLL>]; Natalia Junquera, *The Enduring Myths Around Spain's Historical Memory Law*, EL PAÍS (July 1, 2019, 2:41 AM), [https://english.elpais.com/elpais/2019/06/28/inenglish/1561732798\\_239871.html](https://english.elpais.com/elpais/2019/06/28/inenglish/1561732798_239871.html) [<https://perma.cc/38A9-Z7J9>].

16. Jacky Deromedi, *Conséquences sur la nationalité de la décision du Conseil constitutionnel du 9 janvier 2014*, LE SÉNAT, <https://www.senat.fr/questions/base/2014/qSEQ141013424.html> [<https://perma.cc/JYX2-T43X>]; *Declaration or Application for German Citizenship If You Have a German Mother or Father But Never Were Considered German*, GER. MISSIONS IN THE U.S. (Feb. 2, 2023), <https://www.germany.info/us-en/service/03-Citizenship/-/2479488> [<https://perma.cc/L9KB-GXKN>].

17. See *infra* Part III.

18. See generally Amanda Frost, *The Rise of Reparative Citizenship*, 26 CITIZENSHIP STUD. 454 (2022).

19. Although many immigration advocates and scholars argue that race, gender, and political opinion continue to factor into immigration determinations, immigration law today does not explicitly permit such discrimination. See Smith, *Race, Nationality, and Reality*, *supra* note 4, at 4.



for many reasons. Allocating immigration status and citizenship to a new category of noncitizens would be difficult to integrate into an already overburdened U.S. immigration system, in which wait times for visas are often decades long. In addition, granting a pathway to citizenship based on discrimination in the past is an uneasy fit with a forward-looking American conception of citizenship, which emphasizes current geographical connections over ancestry and “bloodline.”<sup>20</sup> Similarly, such an initiative risks replacing citizenship based on an emotional and cultural connection to the nation (“affective citizenship”) with citizenship valued primarily for its economic and mobility benefits (“instrumental citizenship”), potentially undermining the value of citizenship for all.<sup>21</sup> Finally, as a practical matter, a broad version of reparative citizenship will be a hard sell politically in a nation deeply divided over immigration policy and the future of the approximately eleven million undocumented immigrants currently living in the United States.<sup>22</sup>

Nonetheless, the Article concludes that a discussion of reparative citizenship is worth having, if only to bring a fresh perspective to stalled debates on the topics of immigration and citizenship. Immigration enforcement policies under Republican and Democratic administrations alike view asylum seekers arriving at the southern border as presumptive criminals and lawbreakers. Both the Obama and Biden administrations supported legislation offering the nation’s undocumented immigrants earned citizenship, requiring these immigrants “get right with the law” by proving themselves worthy during a decade-long probationary status.<sup>23</sup> Reparative citizenship flips the narrative, asking instead whether the nation

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20. See Foner, *supra* note 4 (describing the United States’ unusual citizenship acquisition laws, which grant citizenship based primarily on birth on U.S. soil rather than ancestry, and characterizing them as the good kind of “American exceptionalism”).

21. See *infra* Part V.

22. Robert Lynch & Patrick Oakford, *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants*, CTR. FOR AM. PROGRESS (Mar. 20, 2013), <https://www.americanprogress.org/article/the-economic-effects-of-granting-legal-status-and-citizenship-to-undocumented-immigrants/> [https://perma.cc/9FZN-QFYA].

23. Remarks at American University, 2 PUB. PAPERS 1001, 1005 (July 1, 2010) (stating that undocumented immigrants must “get right with the law” and then “get in line and earn their citizenship”); see also Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 260 (2017) (critiquing the rhetoric of earned citizenship).

owes citizenship to individuals or groups unjustly denied or stripped of that status in the past.

## I. CITIZENSHIP ACQUISITION AND LOSS IN THE UNITED STATES

Citizenship laws are existential; they craft a nation's identity and set it on its course for the future.<sup>24</sup> Referring to citizenship, political theorist Michael Walzer declared that the “primary good that we distribute to one another is membership in some human community.”<sup>25</sup> As Walzer and others have also recognized, the methods of allocating and revoking citizenship in the United States have always been complex and controversial, and remain so today.<sup>26</sup>

### A. Acquisition of U.S. Citizenship

Today, over 90 percent of U.S. citizens acquired that status automatically through birth on U.S. soil, a legal principle known as *jus soli* (“right of the soil”), and often referred to as birthright citizenship.<sup>27</sup> About 1 percent were born abroad and obtained citizen

24. SMITH, *supra* note 6, at 31 (“Citizenship laws ... literally constitute—they create with legal words—a collective civic identity.”); OXFORD HANDBOOK OF CITIZENSHIP 8 (Ayelet Shachar, et al., eds., 2020) (Citizen laws “tell us about the construction of a national ‘us’ (and, implicitly, ‘them’)”).

25. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-34 (1983).

26. *Id.* See also KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); SMITH, *supra* note 6, at 14 (“American citizenship, in short, has always been an intellectually puzzling, legally confused, and politically charged and contested status.”); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991); Michael Walzer, *Citizenship*, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 212 (Terrence Ball et al. eds., 1989); Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 242-243 (2010).

In this Article, I use the term “U.S. citizenship” to mean primarily the formal legal status of full and equal membership in the political community of the United States, with the attendant legal rights and obligations that come with citizenship. As citizenship scholars have long recognized, however, the formal legal status of citizenship also comes with social, cultural, and emotional connections among citizens and between citizens and nation. See generally Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447 (2000). I will occasionally refer to that broader, psychological conception of citizenship when discussing the benefits (and perils) of reparative citizenship initiatives.

27. See SMITH, *supra* note 6, at 4; *Nativity and Citizenship Status in the United States, American Community Survey*, U.S. CENSUS BUREAU (2020), <https://data.census.gov/table?q=>

ship at birth through a U.S. citizen parent who lived for the requisite period in the United States, known as *jus sanguinis* (“right of the blood”), or citizenship by descent.<sup>28</sup> Another 7 percent of U.S. citizens acquired that status later in life, through naturalization.<sup>29</sup>

All three methods of acquiring citizenship have existed since the nation’s founding.<sup>30</sup> For much of U.S. history, however, some or all of these pathways were barred to certain individuals or groups on grounds that today are acknowledged to be immoral, at times unconstitutional, and at odds with the nation’s egalitarian values.<sup>31</sup>

### 1. *Birthright Citizenship (Jus Soli)*

The U.S. Constitution of 1787 did not define the rights or privileges of U.S. citizenship, or even who was entitled to claim that status. The Framers assumed that citizenship could be acquired at birth, mandating that the President of the United States be a “natural born” citizen.<sup>32</sup> Citizenship through birth on a country’s soil was well-established in English common law at the time of the founding, further suggesting that the Constitution incorporated the same principle.<sup>33</sup> But who was entitled to that status? That question was fraught in a nation divided by racialized slavery and the contested status of 500,000 free Blacks.<sup>34</sup>

In 1857, Chief Justice Roger Taney attempted to resolve the issue once and for all in *Dred Scott v. Sandford*, writing that all Blacks, whether slave or free, “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

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ACSDT1Y2018.B05001&tid=ACSDT1Y2019.B05001&hidePreview=true [https://perma.cc/AE3T-832Z]; Amanda Frost, “By Accident of Birth”: *The Battle Over Birthright Citizenship After United States v. Wong Kim Ark*, 32 *YALE L.J. & HUMAN.* 38, 40 n.7 (2021). Many of those who automatically acquire citizenship through birth on U.S. soil would also qualify for citizenship-by-descent through their U.S. citizen parents.

28. U.S. CENSUS BUREAU, *supra* note 27; Frost, *supra* note 27, at 48.

29. U.S. CENSUS BUREAU, *supra* note 27.

30. *See infra* Part I.A.

31. SMITH, *supra* note 6, at 15.

32. U.S. CONST. art. II, § 1.

33. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case* (1608), 9 *YALE J.L. & HUMAN.* 73, 74 (1997).

34. MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 9-12 (2018); SMITH, *supra* note 6, at 126.

instrument provides for and secures to citizens of the United States.”<sup>35</sup> Eleven years later, in 1868, the nation overturned *Dred Scott* in the first sentence of the newly-ratified Fourteenth Amendment, which provides: “All persons born ... in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>36</sup>

The Citizenship Clause should have put an end to debate over whether those born on U.S. soil were U.S. citizens. Yet it did not. For thirty more years, the citizenship of native-born U.S. citizens of Chinese descent was questioned by federal and state government officials.<sup>37</sup> These Americans were regularly denied re-entry to the United States after traveling abroad, and state and local government barred them from voting, holding public office, inheriting land, and serving in professions reserved for U.S. citizens.<sup>38</sup>

The issue came to a head in the 1898 case *United States v. Wong Kim Ark*.<sup>39</sup> The Solicitor General of the United States argued before the Supreme Court that the native-born children of noncitizens were excepted from automatic birthright citizenship because they shared their parents’ allegiance to another country, and therefore were not “subject to the jurisdiction” of the United States.<sup>40</sup> The government lost.<sup>41</sup> Still, the federal government did not fully concede the issue. Immigration officials established proof of citizenship standards for certain races—in particular, the Chinese—that were higher than for whites.<sup>42</sup> For decades following Wong’s

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35. 60 U.S. 393, 404 (1857).

36. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment’s Citizenship Clause followed from the Civil Rights Act of 1866, which declared: “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” ch. 31, 14 Stat. 27 (1866); see also Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 AM. U. L. REV. 331 (2010).

37. See generally BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2018); LUCY SALYER, *LAWS AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 99 (1995).

38. See generally LEW-WILLIAMS, *supra* note 37; SALYER, *supra* note 37.

39. 169 U.S. 649 (1898).

40. Brief for Petitioner at 2, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904).

41. 169 U.S. at 705.

42. Frost, *supra* note 27, at 63-64.

victory, Chinese-Americans were denied reentry into the United States, and sometimes deported, despite their birth on U.S. soil.<sup>43</sup>

## 2. *Citizenship by Descent (Jus Sanguinis)*

Throughout U.S. history, American fathers automatically transmitted their citizenship to their foreign-born, marital children as long as those men had lived in the United States before their children's births.<sup>44</sup> Nonetheless, the children of U.S. citizen fathers and non-white mothers were sometimes barred from claiming citizenship under ostensibly race-neutral family-status rules.<sup>45</sup> For example, children born in Samoa to U.S. citizen men and their Samoan wives were denied citizenship on the ground that such marriages were not legitimate unions under U.S. laws.<sup>46</sup> A 1915 legal treatise on the subject declared: "illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens."<sup>47</sup>

Furthermore, despite the Fourteenth Amendment's express repudiation of *Dred Scott*, that decision lived on in citizenship transmission laws and policies. Following the Civil War, some

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43. See *id.* Wong Kim Ark himself was arrested by immigration authorities and nearly deported in 1901, three years after his Supreme Court victory, because immigration officials presumed that all persons of Chinese ethnicity were not U.S. citizens. *Id.* at 66.

44. Naturalization Act of 1790, ch. 3 § 1, 1 Stat. 103, 104. The residency requirement was "intended to ensure that parents who transmitted their [United States] citizenship were sufficiently imbued with American values to convey [those] ideals to their children." *Friend v. Reno*, 172 F.3d 638, 644 (9th Cir. 1999).

45. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2158 (2014) ("[R]estriction of father-child citizenship transmission outside the marital family regularly operated to exclude nonwhite children from citizenship."); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (discussing intersection of race and gender in immigration law).

46. Collins, *supra* note 45, at 2162-64.

47. *Id.* at 2136 (quoting Edwin Borchard, *The Diplomatic Protections of Citizens Abroad* (New York, 1915)).

Until the Supreme Court's 2017 decision in *Sessions v. Morales-Santana*, 582 U.S. 47 (2017), U.S. citizen fathers faced greater hurdles in transmitting their citizenship to non-marital children than did U.S. citizen mothers. Although the Supreme Court invalidated that statutory distinction as a violation of equal protection, it did not make the change retroactive. See *USCIS Policy Manual*, vol. 3, pt. H, ch. 3, U.S. Citizens at Birth, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3> [<https://perma.cc/N77C-BAGE>] (describing effects of *Sessions v. Morales-Santana*).

officials within the U.S. Department of State declared that foreign-born children of African American men were not citizens if the father had departed the United States before the Fourteenth Amendment's ratification in 1868.<sup>48</sup> The Supreme Court of Michigan reached that same conclusion in 1872, holding that a child born in Canada was not a U.S. citizen because his father, a fugitive slave, had fled the United States in the 1840s.<sup>49</sup>

For nearly 150 years, the law expressly denied citizenship to children born abroad to U.S. citizen women and foreign men, regardless of whether the parents were married.<sup>50</sup> Not until 1934 were women given the same right as men to transmit their U.S. citizenship to their children born outside the United States,<sup>51</sup> and that law was not made retroactive.<sup>52</sup> Sixty years later, in 1994, Congress finally amended the Immigration and Nationality Act to grant citizenship to the children of U.S. citizen women born before the law was amended—though for many that change came too late.<sup>53</sup>

### 3. Naturalization

In 1790, Congress enacted the first Naturalization Act, which permitted “free white person[s]” to become citizens.<sup>54</sup> Naturalization was limited to white immigrants for the first eighty years of the nation's history. In 1870, Congress amended the Naturalization Act to permit Blacks as well as whites to naturalize, but rejected Senator Charles Sumner's proposal to remove all racial bars to naturalization.<sup>55</sup> Over the next eighty-two years, Congress slowly

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48. See Collins, *supra* note 45, at 2147.

49. Michigan *ex rel.* Hedgman v. Bd. of Registration of the First Ward of Detroit, 26 Mich. 51 (1872) (holding that a child of fugitive slaves who was born in Canada was not a U.S. citizen entitled to vote).

50. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 104.

51. See Act of May 24, 1934, ch. 344, § 1933, 48 Stat. 797, 797.

52. *Id.*; Elias v. U.S. Dep't of State, 721 F. Supp. 243, 244 (N.D. Cal. 1989); see also Collins, *supra* note 45, at 2157 n.82.

53. See *infra* Part III.A. U.S. immigration law also has long standing barriers to citizenship for children born out of wedlock to a U.S. citizen parent. See Leticia M. Saucedo & Rose Cuisson Villazor, *Illegitimate Citizenship Rules*, 97 WASH. U. L. REV. 1179 (2020).

54. Naturalization Act of 1790, ch. 3, § 1, 1 stat. 103, 103. 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. (forthcoming 2024).

55. Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870) (permitting naturalization

eliminated the remaining racial restrictions to naturalization, lifting the barriers to naturalization of the Chinese in 1943,<sup>56</sup> Indians and Filipinos in 1946,<sup>57</sup> and Guamanians in 1952.<sup>58</sup> As Ian Haney López describes in his book *White By Law*, during this period courts struggled to determine whether various racial or ethnic groups were white or of African descent and thus permitted to naturalize, or non-white and also non-African and therefore prohibited from doing so.<sup>59</sup>

The U.S. government also prohibited certain racial and ethnic groups from legally immigrating to the United States, a prerequisite to naturalization.<sup>60</sup> These same laws had the collateral (and intended) effect of barring many of these immigrants from having children on U.S. soil, who would then have been automatically entitled to birthright citizenship under the Citizenship Clause of the Fourteenth Amendment.<sup>61</sup>

The literature describing race-based immigration restrictions is voluminous, and only the briefest sketch is provided here.<sup>62</sup> The first exclusion grounds focused on Asians. The Page Act of 1875 barred prostitutes from “China, Japan, or any Oriental country” from immigrating to the United States, a thinly-veiled pretext for excluding nearly all Asian women.<sup>63</sup> The Chinese Exclusion Act of 1882

by white persons and “[persons] of African nativity and persons of African descent”).

56. President Franklin Delano Roosevelt referred to Chinese exclusion as a “historic mistake.” *The President Urges the Congress to Repeal the Chinese Exclusion Laws*, 111 PUB. PAPERS 427, 428 (Oct. 11, 1943).

57. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 45 (1996).

58. 8 U.S.C. § 1407.

59. LÓPEZ, *supra* note 57, at 43-44.

60. Abrams, *supra* note 45, at 643.

61. *Id.*

62. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 168-88 (2006) (describing the “long history of racial and ethnic discrimination in U.S. immigration”); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1119 (1998) (“Racism ... has unquestionably influenced the evolution of immigration law and policy in the United States.”); SMITH, *supra* note 6; Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000).

63. Page Act, ch. 141, 18 stat. 477; see Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLAL. REV. 405, 410-11 (2005) (explaining that the Page Act barred almost all Chinese women from immigrating to the United States); Abrams, *supra* note 45, at 643; Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, 95-109, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1883-1943* (Sucheng Chan, ed., 1991).

expanded that bar to apply to Chinese laborers.<sup>64</sup> In 1917, Congress created the Asiatic barred zone, which excluded almost all persons from Asia.<sup>65</sup>

In response to rising rates of immigration at the start of the twentieth century, Congress put in place annual quotas on immigration for the first time in the nation's history. The goal was to restrict immigration by race and national origin.<sup>66</sup> The Quota Act of 1921 limited the number of immigrants who could be admitted to the United States based on national origin.<sup>67</sup> The Johnson-Reed Act of 1924 made the quotas permanent, permitting immigration without numerical restrictions from the western hemisphere, but otherwise limiting immigration from each country to 2 percent of the total number of individuals of that nationality who were residing in the United States in 1890.<sup>68</sup> Congress chose that year to turn back the clock, seeking to replicate the racial composition of the nation more than a generation in the past. The law also barred immigration by groups deemed ineligible to naturalize (primarily Asians) and provided only a few hundred slots for immigrants from Africa.<sup>69</sup> The result was to permit large numbers of western and northern Europeans to enter the United States, while limiting immigration from southern and eastern Europe, restricting it severely from Africa, and barring it altogether from Asia and the Middle East.<sup>70</sup>

In the words of President Calvin Coolidge, "America must be kept American"—by which he meant white.<sup>71</sup> Senator David Reed of

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64. Chinese Exclusion Act, ch. 126, § 14, 22 Stat. 58-59 (1882); *see also* Volpp, *supra* note 63, at 410.

65. Immigration Act of 1917, Pub. L. 64-301 (1917).

66. Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST., 67, 67 (June 1999).

67. Emergency Quota Act of 1921, ch. 8, 42 Stat. 5 (1921).

68. Johnson-Reed Act of 1924, ch. 190, 43 Stat. 153 (1924).

69. Ngai, *supra* note 66, at 67 (estimating that the formula gave 85 percent of the quota to northern and western European nations).

70. *Id.* As Ngai explains, however, as a practical matter it was extremely difficult to determine the national origin of the U.S. population on which to base the percentages. *Id.* at 79-80; BUREAU OF NATIONAL LITERATURE, SUPPLEMENT TO THE MESSAGES AND PAPERS OF THE PRESIDENTS 9351 (1925).

71. SMITH, *supra* note 6, at 3 (describing the restrictions on immigration and naturalization as expressing "passionate beliefs that America was by rights a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors").



Pennsylvania, who was co-sponsor and architect of the 1924 national origins quota, stated in a New York Times article that the “chief aim” of that law was to limit immigration by race, declaring: “It [is] best for America that our incoming immigrants should be of the same races as those of us who are already here.”<sup>72</sup> As immigration and citizenship scholar Patrick Weil explained, the 1924 act “represented a victory for the racialist approach in U.S. immigration policy.”<sup>73</sup>

Blanket racial exclusions from immigration and citizenship were eliminated in 1952.<sup>74</sup> In 1965, Congress enacted the Immigration and Nationality Act (INA) as part of the broader civil rights movement of that era.<sup>75</sup> The INA significantly restructured the U.S. immigration system, diversifying immigration flows and eventually transforming the racial and ethnic composition of the United States.<sup>76</sup>

### *B. The Revocation of U.S. Citizenship*

In addition to denying access to immigration and citizenship based on race and gender, federal law also stripped citizenship on these same grounds.<sup>77</sup> Under the Expatriation Act of 1907, U.S. citizen women automatically lost their citizenship upon marrying a

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72. David A. Reed, *America of the Melting Pot Comes to End*, N.Y. TIMES (Apr. 27, 1924), at 3, <https://www.nytimes.com/1924/04/27/archives/america-of-the-melting-pot-comes-to-end-effects-of-new-immigration.html> [<https://perma.cc/ZL8T-337R>].

73. Patrick Weil, *Races at the Gate, Racial Distinctions in Immigration Policy: A Comparison Between France and the United States*, in *MIGRATION CONTROL IN THE NORTH ATLANTIC WORLD* 271, 276 (Andreas Fahrmeir et al. eds., 2003); see also PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA* 108, 120, 124-25 (2010); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 27 (2014).

74. Alicia J. Campi, *The McCarran-Walter Act: A Contradictory Legacy on Race, Quotas, and Ideology*, IMMIG. POL'Y CTR., <https://www.americanimmigrationcouncil.org/sites/default/files/research/Brief21%20-%20McCarran-Walter.pdf> [<https://perma.cc/V7NT-KQNG>].

75. Gabriel J. Chin, *Were the Immigration and Nationality Act Amendments of 1965 Antiracist?* in *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 11, 11 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

76. *Id.* at 11-12; see also *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change through 2065*, PEW RSCH. CTR. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/> [<https://perma.cc/79BE-373C>].

77. See Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228.

noncitizen.<sup>78</sup> Although the law was amended in 1922 to allow U.S. citizen women who married foreign men “eligible to naturalize” to remain citizens, it continued to strip citizenship from women who married foreign men barred from naturalizing—that is, men from Asia and the Middle East.<sup>79</sup> In 1931, the law was amended to limit the last vestiges of marital expatriation, but only after thousands of U.S. citizen women had lost their citizenship over the previous twenty-four years.<sup>80</sup>

Marital expatriation laws were the first of many federal laws stripping citizenship throughout U.S. history. Thousands of Japanese Americans imprisoned during the Second World War were coerced into renouncing their citizenship in 1945, leading to a decade-long legal battle to reclaim that citizenship.<sup>81</sup> Hundreds of thousands of Mexican Americans were deported from the United States during mass deportations in the 1930s and again in the 1950s, often with the goal of barring them from accessing the paperwork that would prove their citizenship and enable their return.<sup>82</sup> Political speech and association were also bases for citizenship stripping in the Red Scares of the 1930s and the 1950s.<sup>83</sup> Patrick Weil estimated that twenty-two thousand U.S. citizens were denaturalized based on speech, affiliation, and political activity

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78. *Id.* Ch. 2534, § 3, 34 Stat. 1228; *Mackenzie v. Hare*, 239 U.S. 299 (1915) (unanimously upholding marital expatriation against constitutional challenge). See generally CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

79. BREDBENNER, *supra* note 78 (“[A]ny woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen.”). López observed that marital expatriation laws viewed “marriage to a non-White alien by an American woman as akin to treason.” LÓPEZ, *supra* note 57, at 34.

80. BREDBENNER, *supra* note 78.

81. PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 101 (2012).

82. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (1995) (describing mass “repatriations” of legal Mexican immigrants and Mexican Americans in the 1930s). L.A. Chamber of Commerce member George Clements wrote that the “repatriation” included many “born in America,” yet who were “without very much hope of even coming back into the United States” because the “burden of proof of citizenship” was placed entirely on the individual. See also *Examination of Unconstitutional Deportation and Coerced Emigration of Legal Residents and U.S. Citizens of Mexican Descent During 1930s Before S., S. Select Comm. on Citizenship Participation*, 2002-2003 Leg. Sess. (Cal. 2003) (testimony of Emilia Castañeda).

83. See, e.g., FROST, *supra* note 6, at 143-44.

before 1967 when the Supreme Court declared such widescale use of denaturalization to be unconstitutional in *Afroyim v. Rusk*.<sup>84</sup>

### C. *The Consequences of Denying Citizenship*

Citizenship status is required to exercise significant rights and privileges of membership in the United States.<sup>85</sup> Today, noncitizens cannot vote, hold political office, sit on juries, or enter certain professions tied to state functions.<sup>86</sup> Depending on state laws, noncitizens may be barred from receiving public benefits, certain types of property ownership, educational loans, and government grants.<sup>87</sup> Most important, noncitizens have no right to enter or remain in the United States.<sup>88</sup> Many of those denied citizenship over the nation's history were either deported from the country or barred from entering it—often losing their families, jobs, and homes as a result.<sup>89</sup> In fact, one of the government's primary goals in denying and stripping citizenship was to enable removal of the unwanted.<sup>90</sup>

The denial or loss of citizenship also served a symbolic purpose, depriving targets of their identity and sense of belonging.<sup>91</sup> Those deprived of citizenship are told by their government that they are *not* American; all those allowed to remain are informed that the

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84. 387 U.S. 253 (1967); *see also* WEIL, *supra* note 81, at 170-71; FROST, *supra* note 6, at 137-56; JULIA ROSE KRAUT, *THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES* (2020).

85. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 27 (1990) (noting that the Supreme Court justified excluding noncitizens from state political positions to avoid “obliterat[ing] all the distinctions between citizens and aliens, and thus deprecate the historic value of citizenship”).

86. STEPHEN H. LEGOMSKY & DAVID. B. THRONSON, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1621-27 (7th ed. 2019).

87. *Id.*

88. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see also* Aleinikoff, *supra* note 85, at 17. Noncitizens do retain important rights, however, such as the right to due process in immigration proceedings, to all constitutional protections in criminal proceedings, and to First Amendment rights of expression and association. *Id.* at 18. For noncitizens present in the United States without legal immigration status, however, these rights can be hard to enforce. *See id.*

89. *See* WEIL, *supra* note 81, at 52; BREDBENNER, *supra* note 78, at 163.

90. FROST, *supra* note 6, at 1-17 (describing government motivation for citizenship stripping).

91. *See* THE OXFORD HANDBOOK OF CITIZENSHIP (Ayelet Schachar et al. eds., 2017).

excluded are not “one of us.”<sup>92</sup> Accordingly, even when loss of citizenship does not come with exclusion or deportation from the United States, it is accompanied by social and political exile from the community.<sup>93</sup>

The ramifications of these discriminatory policies continue to be felt long after the laws were removed from the U.S. Code. People alive today were barred from citizenship, or stripped of that status, under these laws. To give just a few examples:

- Marianne Wilson was born in Japan on April 17, 1949, to a white U.S. citizen father and half-Japanese mother. Marianne’s parents were barred from marrying legally under U.S. anti-miscegenation laws, and so Marianne could not inherit her father’s citizenship. Marianne’s father returned to the United States, hoping to arrange for his family to join him, but before he could succeed Marianne’s mother died of tuberculosis. Marianne was raised by her nanny in Japan, not learning of her U.S. citizen father until 1975. Eventually, Marianne fought to have her citizenship as the daughter of a U.S. citizen recognized by the U.S. government—a process that took twelve years, and which only succeeded after law professor Rose Cuison-Villazor advocated on her behalf with U.S. immigration officials.<sup>94</sup>

- N.Q.’s father was born in a barn in Howard County, Texas, in 1926, to legal migrant laborers from Mexico. He was deported along with his parents in the 1930s as part of the mass repatriation of Mexican immigrants and Mexican Americans during that era. As an adult, N.Q.’s father returned and worked in the United States for more than thirty years. N.Q. was born in 1971 in Mexico and, under U.S. law, automatically inherited U.S. citizenship from her father at the time of her birth. Nonetheless, immigration officials questioned both whether N.Q.’s father was

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92. *Id.* at 8 (Citizenship laws and policies “tell us about the construction of a national ‘us’ (and, implicitly, ‘them’)”).

93. Alejandra Hurtado-de-Mendoza, Felisa A. Gonzales, Adriana Serrano & Stacey Kaltman, *Social Isolation and Perceived Barriers to Establishing Social Networks Among Latina Immigrants*, 53 AM. J. CMTY. PSYCH. 72 (2014), <https://link.springer.com/article/10.1007/s10464-013-9619-x> [<https://perma.cc/TGQ3-CQHJ>].

94. Ken Moritsugu, *An Identity Lost in Post-War Japan Took 67 Years to Reclaim*, ASSOC. PRESS (Nov. 24, 2016, 11:50 PM), <https://apnews.com/article/416a65ef8a524347b45c350cd6ad9cf4> [<https://perma.cc/L99S-2YWT>]. Professor Cuison-Villazor is currently at work on a book describing Marianne Wilson’s story in more detail.

born in the United States and whether he had lived in the United States for a sufficient length of time to transmit his citizenship to N.Q. Both father and daughter were denied U.S. citizenship and the right to enter the United States.<sup>95</sup>

• A.D., currently a citizen of Canada, is the grandson of a native-born U.S. citizen woman barred by gender-discriminatory citizenship laws from transmitting her citizenship to her foreign-born son, A.D.'s father. As a result, A.D. was also prevented from acquiring citizenship at birth from his father, and so was also barred from transmitting citizenship to his children. His daughter feels the injustice keenly, stating: "As a direct descendant of these two individuals ... it is with a sad heart that I think of the inequities they experienced." A.D. and his children retain a strong connection to the United States, visiting frequently, and A.D.'s daughter expressed "great hope" that someday she and her father can "acquir[e] U.S. citizenship" that was wrongly denied to them based on "discriminatory and sexist" laws.<sup>96</sup>

These laws have also had a lasting effect on the demographics of the United States, just as their supporters intended.<sup>97</sup> For nearly two centuries, Asians, Arabs, and Africans were all deprived of the opportunity to immigrate to the United States, naturalize, and become Americans.<sup>98</sup> In 1960, just before the United States amended immigration laws to end national origin quotas, 99.1 percent of the U.S. population was recorded as "White" or "Negro," with all other racial groups (including Indians, Chinese, Japanese, and Filipinos) listed at less than one percent combined.<sup>99</sup> (At the time, however, the United States did not include a separate census category for Hispanics). The 2020 census reports that 60 percent of the nation is

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95. See Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 THE SCHOLAR ST. MARY'S L. REV. MINORITY ISSUES 583, 636 n.315 (2012).

96. Telephone interviews with Debbie D., A.D.'s daughter, on (Oct. 24, 2021; Oct. 8, 2023; 12, 2023; Nov. 2, 2023) (information shared with family's permission) (notes on file with author).

97. See *infra* notes 99-101 and accompanying text.

98. See *infra* notes 99-101 and accompanying text.

99. U.S. CENSUS BUREAU, RACE OF THE POPULATION OF THE UNITED STATES BY STATES: 1960 3, tbl. 56.

white (not Hispanic), another 19 percent are Hispanic, 13.4 percent are Black, and 6 percent are Asian.<sup>100</sup> How might those percentages have differed had immigration and citizenship laws not intentionally been crafted to create a white nation?<sup>101</sup>

## II. REPARATIONS FOR HISTORICAL INJUSTICES

Many of the citizenship and immigration laws described in Part I violate contemporaneous understandings of the Constitution's Citizenship Clause and guarantees of equal protection of the law.<sup>102</sup> Today, any law that stripped women of their U.S. citizenship for marrying noncitizens, or that restricted naturalization of lawful permanent residents based on race, would not survive judicial review.<sup>103</sup> Although noncitizens outside of the United States have no constitutional right to enter, laws that bar noncitizens from admission into the United States based on race or gender or political opinion are viewed by many as antithetical to constitutional values and can be struck down as violating the constitutional rights of U.S. citizens adversely affected.<sup>104</sup>

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100. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/DZ35-X7PV>].

101. The undocumented population today consists of many of the same groups who have long been denied immigration and citizenship based on their race and national origin. Three quarters of the eleven million undocumented immigrants living in the United States are from Mexico, Central, and South America. Another 15 percent are from Asia. Only 4 percent of undocumented immigrants hail from Europe, Canada, and Oceania. *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> [<https://perma.cc/7LL6-E23Z>] (analyzing data from the 2015-2019 American Community Survey).

102. See Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 387 (2010).

103. See U.S. CONST. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

104. Noncitizens have no constitutional right to enter the United States, but constitutional challenges to restrictions on entry can be brought by U.S. citizens living in the United States who are harmed by such restrictions, albeit under a minimal standard of review. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) ("[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."); see *Kerry v. Din*, 576 U.S. 86, 135 S. Ct. 2128 (2015) (plurality opinion) (reviewing merits of claims brought by U.S. citizens regarding violations of their rights caused by government exclusion of foreign nationals); see also *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

Yet, aside from one narrow exception discussed in Part III, the U.S. government has never sought to address or repair the harm done by those laws even for individuals alive today who still suffer the consequences. This Part examines reparations theory to lay the groundwork for the subsequent discussion of the feasibility, legality, and desirability of establishing reparative citizenship in the United States.

### A. *Defining Reparations*

Broadly defined, reparations grant benefits to individuals or groups to atone for past wrongdoing.<sup>105</sup> Typically, reparations are characterized as a response to a historical injustice that the government enabled or allowed at the time it occurred.<sup>106</sup> Some reparations programs involve direct cash payments to individuals both as compensation and apology for past misconduct.<sup>107</sup> Others provide in-kind remedies, such as transfers of land, public apologies, truth commissions, scholarships, and civil rights legislation, as well as monetary payments to groups who represent or work on behalf of the victims and their descendants.<sup>108</sup>

There are hundreds of examples of reparations programs throughout U.S. history, ranging from payments to the families of those executed during the 1692 Salem witch trials to the \$117 million allotted to victims of radiation exposure from nuclear tests and mining.<sup>109</sup> The Indian Claims Commission and Alaska Native Claims Settlement Act provided billions of dollars to compensate to Native Americans for stolen land.<sup>110</sup> The Native American Graves

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105. See Roy L. Brooks, *Reflections on Reparations*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 103 (John Torpey ed., 2003); Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 *HASTINGS INT'L & COMP. L. REV.* 157, 159 (2004) (“Reparations are the embodiment of a society’s recognition, remorse and atonement for harms inflicted.”); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 *CAL. L. REV.* 683, 694 (2004) (describing how reparations can serve the goals of corrective justice).

106. See Brooks, *supra* note 105, at 107.

107. ALFRED L. BROPHY, *REPARATIONS: PRO AND CON* 7-10 (2006).

108. *Id.*

109. Alfred L. Brophy, *Reconsidering Reparations*, 81 *IND. L.J.* 811, 820-23 (“[R]eparations are common in American history and predate the United States government.”).

110. 43 U.S.C. §§ 1601-29 (2000); Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went*, *N.Y. TIMES* (June 19, 2019), <https://www.nytimes.com>.

Protection and Repatriation Act mandated the return to Native American tribes of looted property.<sup>111</sup> Perhaps the best known example of reparations at the federal level is the 1988 Civil Liberties Act providing payments of \$20,000 to Japanese immigrants and Japanese-Americans incarcerated by government order during World War II, accompanied by an apology by President George H.W. Bush and a fund to sponsor research and public education about these events.<sup>112</sup>

### *B. Rationales for Reparations*

Reparations are justified with an assortment of theories drawn from tort, criminal, and constitutional law. The “litigation model” of reparations compensates injured victims and serves as a form of corrective justice—a backward-looking justification based on repairing the harm done to injured individuals and groups.<sup>113</sup> In contrast, the “legislative model” of reparations has broader societal-wide goals and is justified by forward-looking rationales, such as deterring future wrongdoing and promoting distributive justice.<sup>114</sup> Reparations have the potential to serve even more ambitious goals, such as restructuring existing institutions and promoting a more democratic society.<sup>115</sup>

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com/2019/06/19/us/reparations-slavery.html [https://perma.cc/6SQS-XGFF]. The Indian Claims Commission paid compensation to federally recognized tribes for land seized by the United States, but in the end paid out only about \$1.3 billion, which was less than \$1,000 for each Native American in the United States. *Id.*

111. 25 U.S.C. § 3005 (2000); *see also* Nell Jessup Newton, *Compensation, Reparations & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 469 (1994) (describing critiques of the Indian Claims Commission).

112. Civil Liberties Act, 50 U.S.C. §§ 4220-4221 (1988); MITCHELL T. MAKI, HARRY H.L. KITANO & S. MEGAN BERTHOLD, *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS 2* (1999).

113. *See, e.g.*, Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002).

114. Brophy, *supra* note 109, at 824 (describing the legislative and litigation models for reparations); A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1273-74, 1276 (2020) (describing different models for slavery reparations).

115. Lawrie Balfour, *Unreconstructed Democracy: W.E.B. Du Bois and the Case for Reparations*, 97 AM. POL. SCI. REV. 33, 40-41 (2003) (describing reparations as promoting more democratic practices and institutions); BROPHY, *supra* note 107, at 17-18 (discussing reparations intended to transform society in a manner akin to President Lyndon B. Johnson's



Whatever form they take, reparations programs rarely hold the perpetrators liable because the remedy typically comes at least a generation after the wrong occurred. Nonetheless, they can deter future misconduct by publicly condemning the past injustice, thereby instilling new national norms. In the wake of the 9/11 attacks, for example, policymakers and commentators warned against blanket vilification of Muslims, citing the nation's shameful history of incarcerating innocent Japanese immigrants and Japanese Americans during the Second World War.<sup>116</sup> The analogy was stronger, the lesson learned clearer and more powerful, because the government had previously acknowledged its wrongdoing through public apology and cash reparations.<sup>117</sup>

Reparations programs can also educate the public about historical wrongdoing, bringing "hard history" out of the shadows. The process of debating and discussing reparations forces a societal-wide re-examination of the historical record.<sup>118</sup> Although advocates for reparations for slavery have yet to succeed, the debate has already served this educative function. When the U.S. House of Representatives held a hearing on the issue in June of 2019, the media prominently covered the debate between Senate Majority Leader Mitch McConnell, who is opposed to the idea, and reparations advocate Ta-Nehisi Coates.<sup>119</sup>

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Great Society Initiatives or a domestic Marshall Plan). In 1866, Congressman Thaddeus Stevens argued in favor of providing former slaves with forty acres and a mule in part to ensure that they would be sufficiently economically secure to cast their votes independent of whites' influence. *Id.* at 27 (quoting Stevens, who declared: "The whole fabric of southern society *must* be changed, and never can it be done if this opportunity is lost.").

116. See, e.g., *The Due Process Guarantee Act: Banning Indefinite Detention of Americans: Hearing Before the Comm. on the Judiciary*, 112th Cong. 86 (2012) (statement of Karen Korematsu); Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 413 (2017) (drawing analogies between imprisonment of Japanese immigrants and Japanese Americans during the Second World War and the treatment of Muslims in the wake of 9/11).

117. The U.S. government was sued for discriminating against Muslims in response to the 9/11 attacks, particularly in its round-up of noncitizens from Muslim countries. See Sinnar, *supra* note 116, at 406. Nonetheless, its actions fell far short of the mass incarceration of Japanese Americans in the wake of the attack on Pearl Harbor.

118. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383 (1987).

119. See, e.g., Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> [<https://perma.cc/EH5W-FHLP>]. In 2009, Congress enacted resolutions apologizing to Black Americans "on behalf of the people of the United States" for "wrongs

Reparations can also reinvigorate constitutional values after significant lapses jeopardize their status. As political scientist Lawrie Balfour has explained, “states’ claims to democratic legitimacy in the present [are] connected to a willingness to confront the crimes of the past.”<sup>120</sup> Reparations demonstrate remorse and seek to repair the damage to constitutional principles, reasserting the nation’s commitments to those values. President Bush made that goal explicit in his letter of apology accompanying reparation payments for imprisonment of Japanese Americans: “In enacting a law calling for restitution and offering a sincere apology,” he declared, “your fellow Americans have ... renewed their traditional commitment to the ideals of freedom, equality and justice.”<sup>121</sup>

### C. Critiques of Reparations

Reparations are nonetheless controversial. Although federal and state governments, as well as private institutions, have implemented thousands of reparation programs, the nation has never come close to granting reparations for one of its greatest sins: the institution of slavery.<sup>122</sup> Critics have a catalog of reasons for rejecting reparations, especially for wrongdoing that occurred many generations before.

Reparations programs must define the relationship between the original wrongdoers and contemporary payers, as well as the original victims and contemporary beneficiaries.<sup>123</sup> When reparations

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committed against them and their ancestors who suffered under slavery and Jim Crow laws.” S. Cong. Res. 26, 111th Cong. (2009).

120. Lawrie Balfour, *Reparations After Identity Politics*, 33 POL. THEORY 786, 787 (2005).

121. MAKI ET AL., *supra* note 112, at 2.

122. See, e.g., Donna M. Owens, *Veteran Congressman Still Pushing for Reparations in a Divided America*, NBC NEWS (Feb. 20, 2017, 2:23 AM), <https://www.nbcnews.com/news/nbcblk/rep-john-conyers-still-pushing-reparations-divided-america-n723151> [<https://perma.cc/Q3U8-R2YF>] (describing Representative John Conyers’s re-introduction of a bill in Congress to consider reparations for slavery); KATHERINE FRANKE, REPAIR: REDEMING THE PROMISE OF ABOLITION 127-28 (2019) (describing the Movement for Black Lives’s calls for reparations for slavery); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 15, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/B94F-SVXM>].

123. FRANKE, *supra* note 122, at 129-30 (noting the difficulty of determining who should receive reparations, as well as who should pay, generations after the wrong to be remedied has been perpetrated); *id.* at 129 (“Who should receive reparations for slavery today? Are all

involve payments long after the transgression, they are criticized as a forced wealth transfer based on group identity or membership—be it race, ethnicity, gender, religion, or some similar characteristic. Some critics contend that these exchanges are unconstitutional, and would in any case stoke resentments and perpetuate the very harm that reparation payments were intended to address.<sup>124</sup>

Even some victims and their advocates hesitate to support reparations. Reparations initiatives run the risk of commodifying the victims' injury, trivializing the harm by reducing horrific and irremediable injustices such as slavery, torture, imprisonment, and genocide to dollars and cents.<sup>125</sup> In a related critique, legal scholar Mari Matsuda supports the concept of reparations generally, but nonetheless worries that today's payees might sacrifice the interests of future generations for their own benefit, allowing "[o]ne generation [to] sell away their claim at bargain-basement prices, to the detriment of future generations."<sup>126</sup> Reparation programs might also give perpetrators and their descendants a false sense of having fully repaid their debt to the victims.<sup>127</sup> If the U.S. government paid money as reparations for slavery, for example, would some Americans conclude that the slate had now been wiped clean?

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Black people entitled? Only those who can demonstrate through DNA or some other method that they are descendants of slaves?"); Matsuda, *supra* note 118, at 375; Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 740 (2003) ("The problem is that as the identity of the beneficiaries diverges more and more from the identity of the victims, the moral basis of the program becomes attenuated, political support will wane, and new resentments will be stoked.").

124. See Forde-Mazrui, *supra* note 105, at 710-23 (reviewing common critiques of reparations); Posner & Vermeule, *supra* note 123, at 706-11; BROPHY, *supra* note 107, at 28.

125. Cf. Jonathan Blitzer, *Why Biden Refused to Pay Restitution to Families Separated at the Border*, NEW YORKER (Dec. 22, 2021), <https://www.newyorker.com/news/news-desk/why-biden-refused-to-pay-restitution-to-families-separated-at-the-border> [<https://perma.cc/H8KQ-DMDR>] (describing the difficulties of compensating victims of the Trump administration's family separation policy at the southern U.S. border).

126. Matsuda, *supra* note 118, at 396; see also Balfour, *supra* note 115, at 43 (observing that "reparations [that seek] to close the book on American racial history rather than opening it to scrutiny ... might be worse than none at all").

127. Matsuda, *supra* note 118, at 397.

### III. EXPERIMENTS WITH REPARATIVE CITIZENSHIP

Although the United States has paid cash or granted in-kind remedies for a variety of past wrongdoings, reparations for the unjust and unconstitutional immigration and citizenship policies described in Part I have rarely been raised by policymakers or discussed in the academic literature.<sup>128</sup> Yet the concept is not entirely unprecedented. In 1994, Congress granted retroactive citizenship to foreign-born children of U.S. citizen women, who were denied citizenship at birth under gender-based citizenship transmissions laws.<sup>129</sup> Also relevant are European initiatives offering citizenship as reparations for past policies expelling unwanted individuals and groups. These examples serve as models for potential future reparative citizenship initiatives in the United States.

#### *A. Reparative Citizenship in the United States*

In 1934, Congress amended laws governing citizenship by descent to permit U.S. citizen women to automatically transmit their citizenship to children born abroad, just as U.S. citizen men had always been allowed to do.<sup>130</sup> The law was not retroactive, however, and so it did not confer citizenship on children born before its enactment to U.S. citizen mothers and foreign fathers.<sup>131</sup> Congress

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128. A few scholars have addressed the interesting and related concept of enacting more lenient immigration policies for residents of countries adversely affected by U.S. foreign policy as a form of reparations for U.S. misconduct abroad. *See, e.g.*, Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 *DENV. L. REV.* 585, 588, 590 (2018) (arguing for changes to immigration to aid asylum seekers wronged by U.S. foreign policy that had created “peril and hardship” for Central Americans); Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States’ Haitian Immigration Policy*, 45 *STAN. L. REV.* 687, 688 (1993) (arguing for immigration remedies for Haitian asylum seekers who have been harmed by U.S. policies in Haiti); *cf.* E. Tendayi Achiume, *Migration as Decolonization*, 71 *STAN. L. REV.* 1509, 1510 (2019) (arguing that former colonial powers who benefitted economically from exploiting colonies today have an obligation to permit migration from those colonies); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 *MELB. J. INT’L L.* 392, 439 (2013) (connecting contemporary international migration systems with prior European colonial migration).

129. Pub. L. No. 103-416, 108 Stat. 4305.

130. Ch. 344, 48 Stat. 797 (1934) (1994); LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998).

131. KERBER, *supra* note 130, at 43.

finally addressed that issue in 1994, amending Section 301 of the Immigration and Nationality Act to grant retroactive citizenship to any person born outside the United States to “an alien father and a mother who is a citizen of the United States.”<sup>132</sup> As the House Report accompanying the amendment explained, the law was intended “to remove disparate treatment between men and women in their ability to transfer U.S. citizenship to their children.”<sup>133</sup> In his signing statement, President William Clinton declared that the law “corrects a decades-old injustice.”<sup>134</sup> The 1994 legislation is unique in its expression of regret for the discriminatory denial of citizenship, combined with its retroactive remedy seeking to right the past wrong.<sup>135</sup>

The measure could be described as too little, too late. The people eligible to benefit would be at least sixty years old. Their lack of citizenship may have barred them from entering the United States for most of their lives. Even if they did succeed in entering the country, they were prohibited from exercising the political and civil rights of full membership. They may have lost educational and employment opportunities and some may have been born stateless.<sup>136</sup> Many would have been forced to live through the Great

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132. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 101, 108 Stat. 4306 (1994); INA § 301(h). The law applies only to the children of U.S. citizen women who resided in the United States before their children had been born. § 101, 108 Stat. at 4306.

133. H.R. REP. NO. 103-287, at 3 (1994).

134. THE AMERICAN PRESIDENCY PROJECT, *William J. Clinton: Statement on Signing the Immigration and Nationality Technical Corrections Act of 1994* (Oct. 25, 1994), <https://www.presidency.ucsb.edu/documents/statement-signing-the-immigration-and-nationality-technical-corrections-act-1994#axzz1pQDdX86N> [<https://perma.cc/X5YU-LBSY>].

Before that amendment became law, courts were divided over whether the differential treatment of women’s ability to transmit citizenship to their children violated equal protection. See *Wauchope v. U.S. Dep’t of State*, 985 F.2d 1407, 1409-10 (9th Cir. 1993) (finding an equal protection violation); *Villanueva-Jurado v. Immigr. & Naturalization Servs.*, 482 F.2d 886, 887 (5th Cir. 1973) (rejecting the equal protection claim on the ground that “an alien has no constitutional right to citizenship”); see also *Breyer v. Meissner*, 214 F.3d 416, 418 (3d Cir. 2000).

135. Until the Supreme Court’s 2017 decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), U.S. citizen fathers faced greater hurdles in transmitting their citizenship to nonmarital children than did U.S. citizen mothers. *Id.* at 1686. Although the Supreme Court invalidated that statutory distinction as a violation of equal protection, it did not make the change retroactive. See *id.*

136. Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. IMMIGR. L.J. 567, 576 (2021).

Depression and then the Second World War in dangerous regions of the world, with no access to the safe haven of the United States.<sup>137</sup> The denial of citizenship would likely have had ramifications for their children and their children's children, who would be born outside the United States without citizenship.<sup>138</sup> Nonetheless, the 1994 amendment is significant because it stands alone in U.S. immigration law as an explicit attempt to repair a historically unjust denial of citizenship.<sup>139</sup>

Although the United States has not otherwise sought to remedy its past wrongdoing in the realm of immigration and citizenship policy, Congress has occasionally relaxed U.S. immigration policy to assist victims of U.S. foreign policy blunders. In 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), which permitted undocumented immigrants from certain Central American countries to adjust to lawful permanent resident status and eventually naturalize, even as most undocumented immigrants were barred by a 1996 law from doing so.<sup>140</sup> Congress granted a special pathway to citizenship for this group, at least in part, because it recognized that U.S. foreign policy choices had contributed to civil war, violence, and poverty in those countries.<sup>141</sup>

Similarly, the Amerasian Act of 1982 provided a special immigration pathway to non-marital children born in Korea, Vietnam, Laos, Cambodia, or Thailand between 1951 and 1982 to U.S. military fathers and native mothers.<sup>142</sup> Congress acknowledged that these children faced persecution due to their mixed race and declared

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137. Volpp, *supra* note 63, at 431 (describing plight of numerous American women and their children who lost their citizenship before and during World War I).

138. The law states that the retroactive conferral of citizenship does not eliminate the residency requirements for transmitting citizenship to offspring. See Pub. L. No. 103-416, § 101(d), 108 Stat. 4305, 4306 (1994).

139. It is difficult to prove a negative, but I have not found another law granting citizenship to individuals or groups excluded in the past under laws now recognized as unconstitutional or unjust.

140. Pub. L. No. 105-100, 111 Stat. 2160, 2194 (1997).

141. Congress's motivations for enacting NACARA are complex, arising from a combination of Cold War ideology, Central American advocacy, campaign contributions, public relations campaigns, and class action litigation. See generally Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569 (2011).

142. Pub. L. No. 97-359, 96 Stat. 1716 (1982); see also *ch. 9, Amerasian Immigrants, in* Citizenship & Immigr. Servs., Policy Manual, <https://www.uscis.gov/policy-manual/volume-7-part-p-chapter-9#footnotelink-1> [<https://perma.cc/JE3P-2A3R>].

that the United States needed to “take ... responsibility.”<sup>143</sup> The law provided \$15 million to fund processing and transit costs, and directed the State Department to assist Amerasians in documenting their parentage—a difficult task for some applicants.<sup>144</sup> Significantly, the law also loosened evidentiary standards, permitting immigration officials to conclude that the father was a U.S. citizen based on nothing more than the child’s mixed race appearance.<sup>145</sup>

In recent years, the United States has passed legislation to assist Afghani refugees who face persecution based on their assistance to the U.S. government during the twenty-year war. Recognizing its special obligation to these refugees, Congress enacted legislation enabling some Afghans who can prove that they worked for the United States to obtain visas for themselves and their families.<sup>146</sup>

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143. *Immigration Reform: Hearings Before the Subcomm. on Immigr., Refugees, and Int’l Law of the H. Comm. on the Judiciary*, 97th Cong. 903-07 (1981) (statement of Rep. Stewart B. McKinney); *id.* at 925-28 (testimony of Amerasian immigrants regarding discriminatory treatment in their home countries due to their biracial appearance).

144. 8 U.S.C. § 1154.

145. 8 U.S.C. § 1154(f)(2). The amendment replaced INA § 309’s “clear and convincing” evidence standard of proof with the more lenient “reason to believe” standard for those applicants who can show they were born in one of five Asian countries between 1950 and 1982 and were fathered by a United States citizen. The statute allows officials to “consider the physical appearance” of the child when making paternity determinations. *Id.*; INA § 309(a). Explaining that Amerasians would not be required to provide documentary proof that their fathers were U.S. citizens, Congressman Thomas Ridge, a Republican of Pennsylvania, declared: “Basically the [child’s] face is the road map” for making such determinations. *Congressmen Claim an Accord with Hanoi to Resettle Amerasians*, N.Y. TIMES (Jan. 21, 1988), at A8, <https://www.nytimes.com/1988/01/21/world/congressmen-claim-an-accord-with-hanoi-to-resettle-amerasians.html> [<https://perma.cc/A675-LQBH>]; *see also* Mary Kim DeMonaco, *Disorderly Departure: An Analysis of the United States Policy Toward Amerasian Immigration*, 15 BROOK. J. INT’LL. 641, 683 (1989); Ranjana Natarajan, Note, *Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123, 124 (1999).

146. *See* Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, 123 Stat. 807, 808-11 (2009) (granting Special Immigrant Visas to Afghani interpreters); *Special Immigrant Visas (SIVs) for Iraqi and Afghani Translators/Interpreters*, U.S. DEPT OF STATE—BUREAU CONSULAR AFF., <https://travel.state.gov/content/travel/en/us-visas/immigrate/siv-iraqi-afghan-translators-interpreters.html> [<https://perma.cc/2NQN-Q7XU>]. The laws enacted to assist Afghani refugees have been criticized as insufficient in scope and poorly administered. *See* Lara Jakes, *At Every Step, Afghans Coming to America Encounter Stumbling Blocks*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/19/us/politics/afghan-war-refugees.html> [<https://perma.cc/6MGZ-XCGN>].

These laws demonstrate that incorporating reparative goals into the U.S. immigration system is neither unprecedented nor unworkable. But each of these laws is narrow, and—aside from the 1994 amendments retroactively granting citizenship to the children of U.S. citizen women born abroad—each addresses a historical wrong extrinsic to U.S. immigration law, not embedded within it. Thus far, neither Congress nor the executive has shown much interest in repairing the harm from unjust immigration and citizenship laws of the past.

### *B. Reparative Citizenship in Europe*

Although the United States has yet to embrace reparations in the form of citizenship for the unjustly excluded, a number of European countries have recently done so.

Germany, Austria, Poland, and Greece grant citizenship to Jews and their descendants who were stripped of their citizenship and expelled from those countries before and during the Second World War.<sup>147</sup> In 1949, West Germany was the first to adopt the policy of restitutionary citizenship (*Wiedergutmachung*), allowing its former Jewish citizens and their direct descendants to reclaim German citizenship.<sup>148</sup> In recent years, Austria, Poland, and Greece followed

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147. Grundgesetz [GG] [Basic Law], May 23, 1949, BGB1 I, art. 116(2) (Ger.), translation at [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/) [<https://perma.cc/U7RQ-UNC2>]. Poland's laws provide a right of return to Jews expelled as recently as 1968. Sever Plocker, *Jews Who Fled Poland to Regain Citizenship*, YNET (Mar. 4, 2008, 11:43 AM), [www.ynetnews.com/articles/0,7340,L-3514697,00.html](http://www.ynetnews.com/articles/0,7340,L-3514697,00.html) [<https://perma.cc/HV75-TFTH>]; Jonathan Beck, *Greek Holocaust Survivors to Have Citizenship Restored in Expedited Process*, JERUSALEM POST (Nov. 25, 2010, 1:17 AM), <https://www.jpost.com/jewish-world/jewish-news/greek-holocaust-survivors-to-have-citizenship-restored> [<https://perma.cc/BGX8-M3GJ>] (describing Greek law granting approximately 100 Holocaust survivors Greek citizenship, and explaining that their descendants would also be permitted to file requests for citizenship).

148. See Press Release, German Fed. Ministry of the Interior and Cmty., Easier Path to German Citizenship for Descendants of Victims of Nazi Persecution (Aug. 30, 2019), <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/EN/2019/08/wiedergutmachung-ns-verbrechen-en.html> [<https://perma.cc/FE5R-Q776>]. Interior Minister Horst Seehofer declared that “Germany must live up to its historical responsibility towards descendants of German victims of National Socialist persecution who have been deprived of citizenship rights.” *Id.* The law allows descendants from the second, third, fourth, and in some cases fifth generation to apply for citizenship. *Germany Eases Citizenship Rules for WWII Refugees Descendants*, BBC (Aug. 30, 2019), <https://www.bbc.com/news/world-europe-49523933> [<https://perma.cc/R8BC-UFGJ>].



suit.<sup>149</sup> Acting out of similar motives, Spain enacted the Democratic Memory Law in 2007 to provide citizenship to individuals exiled from Spain under Francisco Franco's fascist regime as well as to their descendants.<sup>150</sup>

Some European countries have also sought to remedy gender-based discrimination in citizenship transmission. Both Germany and France now grant citizenship to the children of citizen-mothers and noncitizen-fathers who were denied citizenship at birth based on such discriminatory laws, even if those children have never lived in those countries.<sup>151</sup> Germany permits the grandchildren of these women to obtain citizenship as well, recognizing that denials of citizenship affects the status of future generations.<sup>152</sup> Both countries require applicants to clear significant bureaucratic hurdles to qualify for citizenship, however. Applicants must prove a close cultural connection to the country similar to that of a noncitizen seeking to naturalize, including successfully passing language and civics tests.<sup>153</sup> The process typically takes several years, and even those who fulfill all the legal requirements might be denied citizenship at the administrator's discretion.<sup>154</sup>

Remarkably, Spain and Portugal launched a reparative citizenship initiative to remedy a historical injustice that occurred half a

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Upon the liberation of France, the French Committee for National Liberation automatically revoked all denaturalizations under Vichy. See CLAIRE ZALC, DENATURALIZED: HOW THOUSANDS LOST THEIR CITIZENSHIP AND LIVES IN VICHY FRANCE 287 (2020).

149. Toby Axelrod, *Thousands of Jews from Around the World Expected to Seek Austrian Citizenship*, TIMES ISRAEL (Sept. 2, 2010, 10:06 AM), <https://www.timesofisrael.com/thousands-of-jews-from-around-the-world-expected-to-seek-austrian-citizenship/> [<https://perma.cc/8JPB-PEEY>]; *Greece Law Allows Descendants of Holocaust Survivors to Apply for Citizenship*, JEWISH TELEGRAPHIC SERV. (Mar. 19, 2017, 11:59 AM), <https://www.jta.org/2017/03/19/global/greece-law-allows-descendants-of-holocaust-survivors-to-apply-for-citizenship> [<https://perma.cc/EEG5-DPA3>]; Sever Plocker, *Jews Who Fled Poland to Regain Citizenship*, YNET NEWS (Mar. 4, 2008, 11:43 PM), <https://www.ynetnews.com/articles/0,7340,L-3514697,00.html> [<https://perma.cc/Q3UG-QVG9>].

150. *New Democratic Memory Law for Spanish Citizenship*, IMMIGRATION SPAIN, <https://www.immigrationspain.es/en/democratic-memory-law/> [<https://perma.cc/N7AV-KCLL>].

151. *Conséquences sur la nationalité de la décision du Conseil constitutionnel du 9 janvier 2014*, *supra* note 16; Paul Lagarde, *Nationalité* [Nationality], REVUE CRITIQUE DE DROIT INTERNATIONALE PRIVÉ, 2014/2 No. 2, 329-338 (2014); *Declaration or Application for German Citizenship*, *supra* note 16.

152. *Declaration or Application for German Citizenship*, *supra* note 16.

153. *See id.*; Lagarde, *supra* note 151.

154. Lagarde, *supra* note 151.

millennium ago. In 2015, both countries offered citizenship to Sephardic Jews to atone for the 1492 expulsion of the Jewish population then residing in the Iberian Peninsula.<sup>155</sup> Portugal described the new law as creating a “right of return.” Spain framed its initiative in expressly reparative terms as an “historical ... reconciliation” with the Sephardic community.<sup>156</sup>

Applicants for these initiatives need not demonstrate that a direct ancestor was among those expelled<sup>157</sup>—likely an impossible task for most. Nor do applicants need to show that they continue to practice Judaism.<sup>158</sup> But the laws *do* demand proof of Iberian Sephardi lineage.<sup>159</sup> Both nations require that authorized Rabbis or recognized leaders of Jewish communities certify the applicant’s Sephardic origins after reviewing a variety of different types of evidence, such as genealogical testing and current cultural connections to Sephardic communities.<sup>160</sup> Jewish marriage certificates, burial records, and knowledge or use of Ladino or Haketia (two languages used by the Sephardi diaspora) are all helpful, but not dispositive.<sup>161</sup> Above all else, these laws make clear that it is “bloodline” that matters.<sup>162</sup>

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155. Kiku Adatto, *Spain’s Attempt to Atone for a 500-Year-Old Sin*, ATLANTIC (Sept. 21, 2019), <https://www.theatlantic.com/international/archive/2019/09/spain-offers-citizenship-sephardic-jews/598258/> [<https://perma.cc/2E9Q-YGY8>]. Sepharad is the Hebrew word for the Iberian Peninsula. *Id.*

156. B.O.E. n. 151, June 25, 2015 (Spain). Decreto-Lei n. 30-A/2015 de 25 de febreiro [Decree-Law no. 30-A/2015], <https://diariodarepublica.pt/dr/detalhe/decreto-lei/30-a-2015-66619927> [<https://perma.cc/HZZ4-KMFR>] (Port.). These laws have historical antecedents in the eighteenth and nineteenth centuries, when Spanish and Portuguese consulates in the Ottoman Empire bestowed Spanish passports and special “protected status”—but not full citizenship rights—to a select number of Sephardic Jews. See SARAH ABREYAYA STEIN, EXTRATERRITORIAL DREAMS: EUROPEAN CITIZENSHIP, SEPHARDI JEWS, AND THE OTTOMAN TWENTIETH CENTURY 14 (2016).

157. Rina Benmayor & Dalia Kandiyoti, *Ancestry, Genealogy, and Restorative Citizenship: Oral Histories of Sephardi Descendants Reclaiming Spanish and Portuguese Nationality*, 18 QUEST. ISSUES IN CONTEMP. JEWISH HIST. 219, 231-33 (2021).

158. *See id.*

159. *Id.* at 221.

160. *Id.* at 230-31.

161. *Id.* at 232 (“Cultural evidence helps establish the continuity of lineage ... [but] it is ancestry that determines eligibility. Citizenship cannot be awarded to those without the ‘right’ ancestors; for example, those acculturated into Sephardi communities but who are not of exilic Iberian Jewish descent are technically not eligible.”).

162. *Id.* at 222.

Proving a five-hundred-year-old lineage can be difficult, particularly for a diasporic community that has been forced to flee persecution in multiple countries in the intervening centuries. Portugal requires submission of an extensive family tree, even though many who are eligible do not have documentary proof of ancestry for more than a few generations.<sup>163</sup> Applicants often turn to services such as ancestry.com to assist in tracing relatives.<sup>164</sup> DNA tests such as those provided by 23andme and AncestryDNA are also frequently used forms of proof.<sup>165</sup>

This emphasis on bloodline is troubling to some applicants, who note that their “Jewish blood” was the source of their persecution throughout history.<sup>166</sup> As one academic described it: “Herein lies the tension. The very states that historically sought to cleanse themselves of their Sephardi populations and their archives and memories now ask for documentary proof of ancestry.”<sup>167</sup> In interviews, American applicants in particular reported finding the emphasis on lineage jarring, perhaps because U.S. constitutional and cultural traditions claim to eschew a connection between blood and citizenship.<sup>168</sup> An American Sephardic Jew who recently received Portuguese citizenship under the initiative commented: “It’s a little disturbing how much, how important the bloodline is .... The whole reason that Jews were ... hounded was because of their impure blood and that hasn’t changed. I mean now I’ve got the right blood, but it’s still all about the blood line.”<sup>169</sup>

Spain’s law has also been criticized for creating a convoluted application process requiring applicants to jump over a number of bureaucratic hurdles at significant expense. Many applicants spent

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163. *Id.* at 230 n.228.

164. Meryl Schumacker, *Can I Get Spanish Citizenship if I Have Sephardic Ancestry?*, WE GO WAY BACK (Sept. 21, 2019), <https://www.waybackgen.com/what-new/spanish-citizenship-sephardic> [<https://perma.cc/V37H-B8JP>].

165. *Id.*

166. Benmayor & Kandiyoti, *supra* note 157, at 234.

167. *Id.* at 233.

168. The history of citizenship discussed in Part I demonstrates that the United States has also often tied citizenship to race. But the Citizenship Clause of the Fourteenth Amendment, coupled with the strict limits on citizenship by descent, nonetheless express commitments to a civic-nationalist rather than ethnic-nationalist citizenship.

169. Benmayor & Kandiyoti, *supra* note 157, at 234 (quoting interview with Judy Berck by Rina Benmayor, November 8, 2017, via Zoom).

time and money gathering documents and traveling to Spain to submit their applications in person, as the law requires.<sup>170</sup> Successful applicants declared that hiring a Spanish or Portuguese lawyer was “essential,” putting citizenship out of reach for all but those who could afford such expenses.<sup>171</sup> And even those who managed to compile detailed documentary evidence of their connections to the Sephardic community were sometimes rejected. Congresswoman Teresa Leger Fernández, a Democrat from New Mexico, complained to the U.S. State Department on behalf of her constituents about the difficult, frustrating process many endured.<sup>172</sup> She declared the Spanish law to be “an example of how you don’t do reparations.”<sup>173</sup>

Nonetheless, both countries’ initiatives have proven popular, and thousands of Sephardic Jews all over the world rushed to apply. By October 2019, Portugal had received 33,000 applications and Spain 132,226.<sup>174</sup> Tens of thousands of applicants have been granted citizenship, and thousands more are still awaiting a final decision.<sup>175</sup>

#### IV. IMPLEMENTING REPARATIVE CITIZENSHIP

The examples of reparative citizenship discussed in Part III demonstrate that the concept is tenable. Integrating reparative citizenship into existing U.S. immigration policy nonetheless raises a number of normative and constitutional questions at the intersection of reparations policy, U.S. immigration law, and citizenship theory. Before addressing those broader questions, however, it is helpful first to sketch out the various options for how a reparative citizenship program could be structured and implemented within the context of the U.S. immigration system.<sup>176</sup>

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170. See Schumacker, *supra* note 164.

171. Interview with A. Lahav, (Dec. 23, 2021) (on file with author).

172. Nicholas Casey, *Spain Pledged Citizenship to Sephardic Jews. Now They Feel Betrayed*, N.Y. TIMES (Jul. 8, 2021), <https://www.nytimes.com/2021/07/24/world/europe/spain-jews-citizenship-reparations.html> [<https://perma.cc/SF8P-YCHL>].

173. *Id.* One applicant concluded that Spain enacted its “right of return” law in the hope of attracting the wealthy Sephardic diaspora. See Email exchange with S. Tabak, (Dec. 30, 2021) (on file with author).

174. Benmayor & Kandiyoti, *supra* note 157, at 221.

175. *Id.*

176. Posner & Vermeule, *supra* note 123, at 689 (arguing that “a normative recommendation for or against any particular grant of reparations must be highly sensitive to the

A. *Reparative Citizenship for Victims (“Litigation Model”)*

In its narrowest form, reparative citizenship in the United States would grant relief only to those alive today who were direct victims of unjust or unconstitutional immigration and citizenship laws. Such a program would track the litigation model of reparations, providing the victims individual remedies for the harm in a manner akin to that of a court ordering relief in a tort case. This limited form of reparative citizenship would resemble the legislation described in Part III.A, in which the government provided citizenship to the foreign-born children of U.S. citizen women who had been denied citizenship at birth based on discriminatory citizenship transmission laws.

In accordance with this litigation model, applicants for legal immigration status and citizenship would have to prove that they were unjustly denied that status in the past—a difficult task for those born at a time when the paperwork needed to prove identity, parentage, and citizenship was minimal to nonexistent. The problem is particularly acute for the U.S. citizen children of legal Mexican immigrants targeted for mass “repatriations” in the 1930s and then again in the 1950s.<sup>177</sup> Today, those children often have difficulty proving their U.S. citizenship because they lack access to birth certificates proving their place of birth.<sup>178</sup> (In fact, government records reveal that one goal of the mass deportation initiatives in the 1930s and 1950s was to deport U.S. citizen children without such documentation to prevent their return).<sup>179</sup> Likewise, the Mexican-born children of these deported U.S. citizens often have difficulty proving that their U.S. citizen parent was born and lived in the United States for a sufficient period of time to transmit citizenship by descent.<sup>180</sup>

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question of how the reparations scheme is to be designed; the question of whether reparations should be paid turns crucially on choices about the form of payment, the identity of the beneficiaries, the identity of the parties who will bear the costs of payment, and so forth”).

177. See Terán, *supra* note 95, at 598-601.

178. *Id.* at 628-29.

179. See generally FROST, *supra* note 6, at 159-74 (describing the motivations of mass “repatriations” in the 1930s).

180. Terán, *supra* note 95, at 628-29 (explaining that the children of wrongfully deported Mexican Americans can find it hard to prove citizenship by descent because “there may be scant and sometimes no documentary evidence to support the parent’s birth in the United

A reparative citizenship program could address these problems by incorporating flexibility into the evidentiary requirements and burdens of proof needed to demonstrate citizenship. Administrators could also take into account evidence of past discriminatory exclusions when making determinations regarding discretionary relief, such as granting “parole in place,” cancellation of removal, or waivers of exclusion grounds.<sup>181</sup> For the most part, these reparative measures could be made by changing administrative regulations and practices rather than by enacting new legislation.

Most of the statutes governing acquisition of citizenship do not mandate a specific standard of proof or list required documentary evidence, leaving such details to regulations, guidance documents, and administrators’ discretion.<sup>182</sup> For example, the regulation governing applications for certificates of citizenship, 8 C.F.R. § 341.2(d), gives immigration officials broad authority to investigate the matter—including the authority to “present and receive evidence; to rule upon offers of proof; to take ... depositions or interrogatories; ... to examine and cross-examine all witnesses ... and to take such other action as may be appropriate to the conduct of the examination and the disposition of the application.”<sup>183</sup> A

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States and presence in the United States prior to the birth of the child”).

181. See INA § 212(d)(5)(A), 8 U.S.C. § 1182 & 8 C.F.R. § 212.5 (permitting officials to “parole” a noncitizen into the United States on a “case-by-case basis”). See generally STEPHEN H. LEGOMSKY & DAVID B. THRONSON, *supra* note 86, at 327 (describing immigration officials’ broad authority to grant parole and parole in place); USCIS Policy Memorandum PM-602-0091, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 15, 2013) (describing the legal authority under which immigration officials have the power to grant “parole in place” to unauthorized immigrants in the United States).

182. See 8 U.S.C. § 1401 (listing requirements for acquiring citizenship at birth without stating burden of proof or standard of proof); § 1452 (listing requirements for obtaining certificate of citizenship without stating burden of proof or standard of proof). *But see id.* § 1409 (requiring that out-of-wedlock children claiming citizenship through a U.S. citizen father show “a blood relationship between the person and the father” that is “established by clear and convincing evidence”). Under 8 C.F.R. § 341.2(c), individuals applying for a certificate of citizenship bear the burden of proof of demonstrating their citizenship by a preponderance of the evidence. In removal proceedings, by regulation the government bears the burden of proof to establish that an individual already in the United States is a noncitizen. See 8 C.F.R. § 1240.8(c). The government satisfies that burden, however, by proving that the individual in removal proceedings was born abroad. The individual then bears the burden of establishing citizenship by descent or naturalization. Terán, *supra* note 95, at 622.

183. 8 C.F.R. § 341.2(d).

second regulation, 8 C.F.R. § 204.1(g)(2), suggests types of evidence that can be used to support citizenship claims—including baptismal records, school transcripts, and affidavits by third parties—but then clarifies that the list is not exhaustive.<sup>184</sup> As this flexible language suggests, immigration officials have leeway to assist noncitizens claiming to be the victim of discriminatory citizenship practices in the past by searching government records for evidence of their citizenship, as well as by taking notice of relevant historical facts, such as mass deportations of legal immigrants and their U.S. citizen children during the 1930s and again in the 1950s.<sup>185</sup>

NACARA provides an example of an immigration law administered liberally by immigration officials willing to take historical events into account when granting immigration status. In his signing statement, President William Clinton urged the Attorney General “to consider the ameliorative purposes of this legislation and the unique history and circumstances of the people covered by it in giving effect to its provisions.”<sup>186</sup> The agency complied, adopting a rebuttable presumption that applicants for relief under NACARA would face “extreme hardship” if forced to leave the United States, which made it much easier for this group to qualify for legal status.<sup>187</sup> Government officials also took the unusual step of actively

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184. *Id.* § 204.1(g)(2) (explaining evidence “may include, but is not limited to,” a series of suggested documents). Government officials accepted secondary evidence of citizenship as well, such as a baptismal certificate, school records, and affidavits from witnesses with knowledge of the place of birth. *USCIS Form N-600, Instructions for Application for Certificate of Citizenship*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/sites/default/files/document/forms/n-600instr.pdf> [<https://perma.cc/AWR2-AW42>].

185. *Cf.* Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1 (2017) (arguing that immigration officials should assist undocumented immigrants to obtain legal status just as officials in other executive-branch agencies assist regulated entities with efforts to comply with federal law); Mary Giovagnoli, *Using All the Tools in the Toolbox: How Past Administrations Have Used Executive Branch Authority in Immigration*, IMMIGR. POL’Y CTR. (Sept. 2011), [https://www.americanimmigrationcouncil.org/sites/default/files/research/Using\\_All\\_the\\_Tools\\_-\\_NACARA\\_090111.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/Using_All_the_Tools_-_NACARA_090111.pdf) [<https://perma.cc/TGE6-7C5Q>] (describing how the executive branch has leeway in interpreting and implementing statutory immigration standards).

Although administrative doctrines such as *Chevron* and *Auer* deference have been questioned and narrowed in recent years, agency officials retain significant discretion to interpret ambiguous statutory commands and interpret their own regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2018) (retaining a narrow version of *Auer* deference).

186. Statement on Signing District of Columbia Appropriations Legislation, 2 PUB. PAPERS 1615 (Nov. 19, 1997).

187. Suspension of Deportation and Special Rule Cancellation of Removal for Certain

assisting applicants to qualify for relief under the law. As one lawyer explained, asylum officials gave applicants for NACARA the “benefit of the doubt” even when they lacked the requisite documentation.<sup>188</sup> Another observed an asylum officer assist an applicant in drafting an affidavit, “actually helping [the applicant] create the record that would allow him to approve her request.”<sup>189</sup>

Agency officials were similarly liberal in their implementation of the Amerasian Act of 1982, which gave certain Amerasian children “preferential treatment” in obtaining visas.<sup>190</sup> The law instructed immigration officials to conduct “an investigation of the facts of each case” and approve the petition as long as the official “has reason to believe” the child was “fathered by a United States citizen.”<sup>191</sup> Immigration officials were granted unusual flexibility in making such determinations, such as being allowed to “consider the physical appearance” of the child when deciding paternity.<sup>192</sup> These practices suggest that immigration officials have the flexibility under existing laws and policies to adopt a reparative mindset, implementing immigration and citizenship laws to assist those wrongly excluded in the past.

Such a narrowly crafted reparative citizenship initiative would benefit only direct victims of unjust, at times illegal, immigration and citizenship policies. This type of limited approach would provide no relief to the children and grandchildren of these victims, even though they may also have lost access to citizenship due to government wrongdoing.<sup>193</sup> As a result, the number of beneficiaries would surely be small. Most people directly affected by explicitly discriminatory laws and policies are no longer alive, and those who are may

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Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 63 Fed. Reg. 64895 (proposed Nov. 24, 1998) (to be codified as 8 C.F.R. pts. 103, 208, 240, 274a, and 299).

188. See Coutin, *supra* note 141.

189. *Id.* at 585.

190. Amerasian Act of 1982, Pub. L. No. 97-359, 96 Stat. 1716 (codified as amended at 8 U.S.C. § 1154(f)).

191. *Id.*

192. 8 U.S.C. § 1154(f).

193. Recipients of reparative citizenship would be able to petition for green cards for their children and spouses, just like all other citizens, but only if they live in the United States and only if the beneficiary does not have any exclusion grounds (such as being at risk of becoming a public charge). In addition, the process is expensive and time consuming for both petitioner and beneficiary.



see little benefit in changing their immigration and citizenship status at this point in their lives. Nonetheless, at least some would take advantage of the opportunity, and such a program could be symbolically valuable as an act of atonement for past wrongs even if it is of limited practical benefit.

*B. Reparative Citizenship for Victims and Their Descendants  
("Litigation Plus Model")*

A more expansive program would return citizenship not only to those denied that status but also to their descendants, tracking several of the European laws described in Part III.B. Included in that group would be all those who likely would have been U.S. citizens had their parents or grandparents not lost their citizenship. For example, a child born outside the United States to a U.S. citizen parent is only a citizen by descent under U.S. law if that parent lived for a sufficient number of years in the United States before that child's birth.<sup>194</sup> But if discriminatory U.S. immigration and citizenship laws prevented the parent from accruing the required residence, then that person's children should also be granted citizenship to repair fully the original wrongdoing. The multi-generational harm justifies a multigenerational remedy.<sup>195</sup>

The difficulty comes in deciding where to draw the line. Germany allows the children of German mothers and foreign fathers to apply for citizenship through a reparative citizenship program to remedy the harm caused by sexist citizenship transmission laws.<sup>196</sup> It extends that benefit to the grandchildren as well, reasoning that if not for original discrimination, the next generation would also have

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194. See *supra* Part I (describing the history of citizenship by descent). As described in Part I.C, A.D. does not have U.S. citizenship because his grandmother, a U.S. citizen, was barred by gender discriminatory laws from transmitting her citizenship to her son. Although A.D.'s father received retroactive citizenship under the 1994 amendments to INA § 301, he had been unable to live in the United States prior to the passage of the law due to his lack of U.S. citizenship, and thus could not legally transmit his newly acquired U.S. citizenship to his son at the time of his birth. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305; INA § 301(h), 8 U.S.C. § 1401.

195. See *supra* Part I.C. (describing denial of inherited citizenship to A.D. and his children based on laws barring his grandmother from transmitting her U.S. citizenship to her son, A.D.'s father).

196. *Declaration or Application for German Citizenship*, *supra* note 16.

inherited citizenship.<sup>197</sup> But it ends the reparative citizenship program there, even though the same rationale would justify giving citizenship to great-grandchildren and beyond.<sup>198</sup>

In addition, German law does not make the grant of reparative citizenship automatic. To obtain citizenship, applicants living outside Germany must show not only that their mother or grandmother was denied the right to transmit citizenship under discriminatory laws but also that they maintained significant cultural and linguistic connections to Germany.<sup>199</sup> Applicants must gather documents demonstrating that connection, such as plane tickets proving regular visits, courses of study, and ties to German family.<sup>200</sup> They also have to pass a language and civics test, as well as a screening interview.<sup>201</sup> Finally, German immigration officials have discretion to deny citizenship even to applicants who satisfy all the requirements.<sup>202</sup>

Granting citizenship to descendants of those wrongly excluded from the United States could not be accomplished by U.S. Citizenship and Immigration officials acting alone, but would instead require amendments to statutory requirements for citizenship acquisition. The changes need not be significant, however, and could be carefully structured to limit the number of applicants. If the United States were to adopt a reparative citizenship law that encompassed not just direct victims of discrimination but also their extended families, it could include restrictions similar to those in German law. Like Germany, the U.S. government could require applicants to show an ongoing connection to the United States, knowledge of both English and basic facts about U.S. history and

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197. *Id.*

198. *Id.* In contrast, Germany extends the right to obtain German citizenship as far as the fifth generation of descendants of those stripped of their citizenship by the Nazis, explaining that the law “also applies to the descendants of persons whose citizenship was revoked, as the injustices perpetrated against their forebears prevented them from becoming German citizens by descent.” *Easier Path to German Citizenship for Descendants of Victims of Nazi Persecution*, Press Release, GERMAN MINISTRY OF THE INTERIOR (Aug. 30, 2019), <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/EN/2019/08/wiedergutmachung-ns-verbrehen-en.html> [<https://perma.cc/FE5R-Q776>].

199. *Declaration or Application for German Citizenship*, *supra* note 16.

200. *Id.*

201. *Id.*

202. *See supra* notes 113-14 and accompanying text.

government, and could make grants of reparative citizenship discretionary. The benefit would be to limit the total number of applicants, and to ensure that the “reparative citizens” have a connection to the United States akin to those who gain it through naturalization (which typically requires five years of residence in the United States, knowledge of English, and knowledge of U.S. civics).<sup>203</sup>

*C. Reparative Citizenship for Historically Excluded Groups  
 (“Legislative Model”)*

The most expansive version of reparative citizenship would provide a pathway to citizenship to groups historically denied access to that status throughout most of U.S. history. Like the Spanish and Portuguese laws granting citizenship to Sephardic Jews, applicants would need only prove that they are members of a historically excluded group and not that a direct ancestor was denied immigration or citizenship status for discriminatory reasons.<sup>204</sup> In other words, there would be no need to demonstrate a direct connection between the original victims and the ultimate beneficiaries.<sup>205</sup> Unlike the other proposals, such a program would require a significant legislative change to the existing immigration system.

The numbers of eligible immigrants would be enormous, but the United States could set a quota and hold a lottery for eligible applicants. Such a program would resemble the current diversity visa program, which lotteries off 50,000 visas each year to applicants from countries that are underrepresented in current immigration flows.<sup>206</sup> Applicants who “win” the lottery then apply for admission by demonstrating that they do not fall within an exclusion ground, such as having committed a crime or being at risk

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203. See *10 Steps to Naturalization*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/citizenship/learn-about-citizenship/10-steps-to-naturalization> [<https://perma.cc/N3JR-PVWL>] (Aug. 31, 2023).

204. Brophy, *supra* note 109.

205. *Id.* at 813-14 (discussing the difference between the litigation model and legislative model of reparations).

206. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 498 (codified as amended at 8 U.S.C. §§ 1101-1537 (2014)).

of becoming a public charge.<sup>207</sup> The government could establish a similar lottery system to select among millions eligible for this legislative-model version of reparative citizenship.

A potential variation on this model could limit the lottery to members of historically excluded groups who are currently living in the United States without legal status or a pathway to citizenship. Today, the United States is home to approximately eleven million undocumented immigrants, 60 percent of whom have lived in the country for over ten years.<sup>208</sup> They are not authorized to work—though most do, under the table or with false papers—and all are at perpetual risk of deportation. A significant percentage of these undocumented immigrants are from countries and racial groups historically denied access to immigration and citizenship status.<sup>209</sup> Both President Barack Obama and President Joe Biden have suggested these immigrants be given a chance to “earn” a pathway to citizenship, requiring such immigrants to clear multiple educational and employment hurdles, pay fines, and persevere through a decades-long probationary process.<sup>210</sup> In contrast, reparative citizenship would give these undocumented immigrants status and citizenship not because they have earned it, but rather because the United States owes it to them as a remedy for wrongful exclusion.<sup>211</sup>

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207. *Id.* To be eligible, would-be applicants must have at least a high school education or its equivalent, or two years of work experience in the last five years in an occupation requiring at least two years of training or experience. 8 U.S.C. § 1153(c)(2). See LEGOMSKY & THRONSON, *supra* note 86, at 430-33. A reparative citizenship initiative could also impose such requirements.

208. Jessica Bolter, Muzaffar Chishti & Doris Meissner, *Back on the Table: U.S. Legalization and the Unauthorized Immigrant Groups that Could Factor in the Debate*, MIGRATION POL'Y INST. (Feb. 2021), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-rethinking-legalization-2021\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-rethinking-legalization-2021_final.pdf) [<https://perma.cc/X6LN-R3BV>].

209. Marc R. Rosenblum & Ariel G. Ruiz Soto, *An Analysis of Unauthorized Immigrants in the United States by Country and Region of Birth*, MIGRATION POL'Y INST. (Aug. 2015), <https://www.migrationpolicy.org/sites/default/files/publications/Unauth-COB-Report-FINALWEB.pdf> [<https://perma.cc/M79X-QEA3>] (finding that 51 percent of the undocumented population is Mexican, 17 percent are from Central America, and 14 percent are from Asia). Another 400,000 residents of the United States have Temporary Protected Status, most from Central America, South America, and Africa. See *Fact Sheet: Temporary Protected Status (TPS)*, NAT'L IMMIGR. F., <https://immigrationforum.org/article/fact-sheet-temporary-protected-status/> [<https://perma.cc/QU4Q-LC93>].

210. See Bolter et al., *supra* note 208.

211. Cf. Joseph Blocher & Mitu Gulati, *The U.S. Stole Billions from Haiti. It's Time to Give it Back*, SLATE (Sept. 14, 2021, 2:26 PM), <https://slate.com/news-and-politics/2021/09/the-united-states-owes-haiti-reparations.html> [<https://perma.cc/2ZAZ-EUZE>] (“Many think of

## V. REPARATIVE CITIZENSHIP, U.S. IMMIGRATION LAW, AND CITIZENSHIP THEORY

Part IV describes three different methods by which reparations could be integrated into the U.S. immigration system, and sketches the administrative and legislative changes needed to implement these proposals. The harder question, however, is whether any form of reparative citizenship is feasible, constitutional, and wise. This Part outlines the many benefits of reparative citizenship, as well as the costs that come with incorporating a backward-looking, lineage-based standard into America's civic-national view of citizenship.

### A. *The Benefits of Reparative Citizenship*

#### 1. *Corrective Justice*

Providing a pathway to citizenship for those who were wrongly excluded will at least partially remedy that injury, serving reparations' corrective justice goals. Citizenship is akin to a property right that comes with economic benefits, political rights, and symbolic value. A reparative citizenship program returns "stolen" property back to the original property holder, and thus is similar to existing in-kind reparations programs returning land and property wrongfully taken from Native American tribes.<sup>212</sup>

Reparations programs that involve a single, lump sum payment to descendants of a persecuted group are criticized for commodifying the injury, and also risk the selling out of future generations by the current beneficiaries.<sup>213</sup> Conferring citizenship avoids the problem of assigning a monetary value to past persecution, which can strike both payor and payee as insufficient and undignified. Reparative citizenship gives back what should never have been taken in the

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Haiti as a debtor nation, but the fact is that former colonial powers might be the ones legally in debt to Haiti.").

212. Cf. Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390 (2022) (discussing the public and private law approaches to reparations).

213. See Roht-Arriaza, *supra* note 105, at 177-78; Newton, *supra* note 111, at 475-76 (describing critiques of reparations programs).

first place, creating a symmetry between the wrong and the reparative remedy that is often lacking in other reparations programs.<sup>214</sup> Furthermore, the benefit of citizenship is not limited in time to the original beneficiaries. Under U.S. citizenship laws, current U.S. citizens have the power to transmit their citizenship to their children, passing down valuable benefits from one generation to the next.<sup>215</sup>

Admittedly, restoring lost citizenship many decades later will rarely make the victim whole. Those wrongfully denied citizenship were also denied its many advantages—such as political rights and economic benefits—that come with that status. They lost the right to enter and remain in the United States legally and permanently, without fear of removal; to participate in the political process by voting, serving on juries, and holding political office; to access government benefits such as health care, educational grants, and welfare; and to experience a sense of acceptance and belonging. Some of those deported or barred from entering the United States were forced to live in countries with inadequate health care, education, infrastructure, and employment opportunities. Giving these individuals legal status and a pathway to citizenship much later in life will not fully restore these lost benefits and opportunities.<sup>216</sup>

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214. See Forde-Mazrui, *supra* note 105, at 748 (describing how “corrective justice” requires “policies tailored to the nature of the harm suffered by the victims of past discrimination”).

215. See *supra* Part I (describing citizenship acquisition through *jus soli* and *jus sanguinis*).

216. In 2003, the California State Senate held hearings on the coerced deportation of an estimated 500,000 legal Mexican immigrants and Mexican Americans in the 1930s. See *Examination of Unconstitutional Deportation and Coerced Emigration of Legal Residents and U.S. Citizens of Mexican Descent During the 1930s*, Hearing Before the Cal. S. Select Comm. on Citizenship Participation (2003). Some of the deported U.S. citizens eventually made their way back to the United States, relying on family and friends to help them track down birth certificates to prove their U.S. citizenship. *Id.* Ignacio Piña, deported at gunpoint with his family in 1931, when he was about six years old, described a life of poverty in Mexico. “[O]ur clothes were rotting away,” and he and his older brother “stole bananas, oranges, guayabas ... whatever we could from the stands at the park so we could eat.” FROST, *supra* note 6, at 166-67. His family contracted typhoid, and his father died in 1935, leaving his mother “destitute, with six of us, in a country we knew nothing about.” *Id.* Emilia Castañeda, whose family was also coerced into leaving the United States when she was a child, described a life in Mexico spent ill, hungry, and “completely occupied by survival.” *Id.* Once they were adults, both Piña and Castañeda contacted family friends in the United States, who helped track down proof of their citizenship to enable them to reenter the United States. *Id.* at 168-70. But both lost over a decade of their life—along with the education, health care, and community they would have had as children in the United States.

Even if not a complete remedy, however, reparative citizenship is well tailored to address the initial wrongdoing.

## 2. *Distributive Justice*

Bestowing citizenship also promotes reparations' distributive justice goals by allocating the scarce resource of U.S. citizenship more fairly, as well as by granting political rights to long-term residents of the United States.

U.S. citizenship is among the most economically valuable in the world. The holder of a U.S. passport has access to a nation that, for all its flaws, has better education, higher wages, cleaner air and water, and better health care than most countries in the world.<sup>217</sup> Even for those already living in the United States, access to both legal status and citizenship are economically valuable. Noncitizens living in the United States with legal immigration status have a significantly higher quality of life—from wages to working conditions to educational opportunities—than noncitizens without legal status.<sup>218</sup> Citizenship has economic value even when disaggregated from legal immigration status. A study by the Migration Policy Institute found that naturalized citizens earn 5 percent more than

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217. *A New Ranking of Every Country's Citizenship*, THE ECONOMIST (June 2, 2016), <https://www.economist.com/graphic-detail/2016/06/02/a-new-ranking-of-every-countrys-citizenship> [<https://perma.cc/M6TZ-2UWF>]. The United States ranked thirty-second in a 2015 “quality of nationality index,” which measured the “internal value” of citizenship (the value to a person living in the country) and the “external value” of citizenship (the ability to live and work elsewhere). The United States ranked behind thirty-two European countries, but the primary reason for its lower ranking was a lower score on peacefulness due to its nuclear arsenal and involvement in armed conflict. *See also* AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009) (describing the vast inequalities in health, education, and lifespan experienced by citizens of developing countries as compared to citizens of the United States and Europe).

218. Raúl Hiojosa-Ojeda, Sherman Robinson, Marcelo Pleitez, Cassandra Hernández, Rodrigo Dominguez-Villegas & Abel Valenzuela Jr., *A Path to Prosperity: The Macroeconomic Benefits of Four Immigrant Regularization Scenarios*, UCLA LATINO POL'Y & POL. INITIATIVE (Mar. 23, 2021), [https://latino.ucla.edu/wp-content/uploads/2021/08/LPPI\\_Economic-Benefits-of-Legalization\\_03.23.21.pdf](https://latino.ucla.edu/wp-content/uploads/2021/08/LPPI_Economic-Benefits-of-Legalization_03.23.21.pdf) [<https://perma.cc/XF7B-ZKPE>]; Robert Lynch & Patrick Oakford, *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants*, CTR. FOR AM. PROGRESS (2013), <https://www.americanprogress.org/article/the-economic-effects-of-granting-legal-status-and-citizenship-to-undocumented-immigrants/> [<https://perma.cc/9FZN-QFYA>].

similarly situated lawful permanent residents.<sup>219</sup> Expanding access to legal status and U.S. citizenship more fairly distributes the valuable government benefit that is citizenship.

Bestowing citizenship would also strengthen democratic principles by enabling broader political participation. Approximately eleven million undocumented immigrants live in the United States today, making up 3.3 percent of the total U.S. population.<sup>220</sup> At least another million immigrants have a “liminal” status—such as temporary protected status (TPS) and deferred action for childhood arrivals (DACA)—that is precarious and provides no pathway to citizenship.<sup>221</sup>

These immigrants are here to stay. Sixty percent of undocumented immigrants have lived in the United States for a decade or more and will likely remain in the country for the rest of their lives.<sup>222</sup> They have a vested interest in the policies set by local, state, and federal government officials. And they are likely to be politically engaged if given the opportunity; studies show that naturalized citizens vote in higher numbers than the general population.<sup>223</sup>

Yet these noncitizens have little hope of finding a pathway to permanent status, citizenship, and the accompanying political rights of full membership. Not coincidentally, a large percent of these immigrants are from the same racial and ethnic groups that historically were excluded from immigration and citizenship status.<sup>224</sup> Providing a pathway to citizenship would enhance American

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219. Madeleine Sumption & Sarah Flamm, *The Economic Value of Citizenship for Immigrants in the United States*, MIGRATION POL'Y INST. (Sept. 2012), <https://www.migrationpolicy.org/pubs/citizenship-premium.pdf> [<https://perma.cc/7DMG-N4U8>]. Sumption and Flamm's study controlled for variables such as higher education level and U.S. work experience.

220. See *U.S. Unauthorized Immigrant Population Estimates by State*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/> [<https://perma.cc/654T-KW6J>].

221. *Fact Sheet: Temporary Protected Status (TPS)*, *supra* note 209 (estimating that approximately 400,000 immigrants have Temporary Protected Status); Rabin, *supra* note 136 (describing different types of liminal status).

222. Bolter et al., *supra* note 208.

223. Abby Budiman, Luis Noe-Bustamante & Mark Hugo Lopez, *Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020*, PEW RSCH. CTR. (Feb. 26, 2020), <https://www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/> [<https://perma.cc/5AZY-T2EA>].

224. Rosenblum & Ruiz Soto, *supra* note 209 (finding that over 50 percent of the undocumented population is Mexican, 15 percent are from Central America, and 14 percent



democracy by allowing millions of long-term residents to participate in government, giving political power to groups that were denied that opportunity at least in part due to exclusionary immigration and citizenship laws.

### 3. *Reaffirming Constitutional Values*

Reparative citizenship can also repair and reaffirm constitutional values violated by discriminatory immigration and citizenship policies of the past.

The Fourteenth Amendment has often been described as enshrining the equality principle of the Declaration of Independence into the U.S. Constitution.<sup>225</sup> That Amendment's Citizenship Clause overturned *Dred Scott* and, in the words of Senator Charles Sumner in 1869, sought to eliminate "caste" and "oligarchy of the skin" in America.<sup>226</sup> Legal scholar Cristina Rodríguez has described the Citizenship Clause as the Constitution's "reset button," placing "all people, regardless of ancestry, on equal terms at birth, with a legal status that cannot be denied them."<sup>227</sup> As explained in Part I.B, the United States violated both the text and purpose of that amendment by adopting and maintaining race-based citizenship and immigration laws well into the twentieth century.

American-born children of Chinese immigrants were refused entry back into the United States on a variety of grounds, all explicitly intended to undermine their claims to birthright citizenship.<sup>228</sup> In 1898, the Solicitor General of the United States argued that *no* child of noncitizens was a birthright citizen under the

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are from Asia). Another 400,000 residents of the United States have Temporary Protected Status, most from Central America, South America, and Africa. See *Fact Sheet: Temporary Protected Status (TPS)*, *supra* note 209.

225. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 363, 400 (1993); Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 396 (2016) (describing contemporary accounts of the Fourteenth Amendment as intending to incorporate the Declaration of Independence's values into the U.S. Constitution).

226. Charles Sumner, U.S. Senator, *Powers of Congress to Prohibit Inequality, Caste, and Oligarchy of the Skin*, CONG. GLOBE, 40th Cong., 3d. Sess., 895 (Feb. 5, 1869).

227. Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1365 (2009).

228. LEW-WILLIAMS, *supra* note 37, at 5.

Fourteenth Amendment, and further claimed that the Fourteenth Amendment was itself unconstitutional because the former Confederate states had been “coerced” into ratifying it.<sup>229</sup> For decades, U.S. citizen women lost their citizenship upon marrying noncitizens—today recognized as a clear violation of the Constitution’s birthright citizenship guarantee, as well as a denial of equal protection.<sup>230</sup> Just a few years after ratification, courts barred fugitive slaves and their children from claiming the rights of citizenship.<sup>231</sup> The United States could symbolically recommit itself to the values of equality generally, and equal citizenship specifically, by enacting laws allowing those who can prove that they are descended from excluded individuals a pathway to U.S. citizenship.<sup>232</sup>

#### 4. *Education and Deterrence*

Like other reparations programs, reparative citizenship initiatives would both educate the public about past injustices and help to deter future wrongdoing. Most Americans are unaware that for much of U.S. history, the nation had in place laws and policies excluding individuals and groups from accessing citizenship based on race, ethnicity, gender, and political opinion. The history of exclusionary immigration policy is not widely taught in schools or acknowledged publicly by politicians today. Quite the opposite, U.S. history textbooks typically describe the United States as a “nation of immigrants” that welcomed the “huddled masses” and liberally integrated them into the society.<sup>233</sup> Politicians and commentators often refer to undocumented immigrants as lawbreakers and moral

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229. Brief for Petitioner at 46-48 & n.1, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

230. Expatriation Act, ch. 2534, § 3, 34 Stat. 1228, 1228-30 (1907).

231. *See supra* Part I.

232. Today, descendants of fugitive slaves still living in Canada have established over twenty museums in an effort to keep this history alive. *See* Alexandra Kazia, *Descendants of Former Slaves Keep Black History Alive*, CBC NEWS (Feb. 28, 2014, 5:00 AM), <https://www.cbc.ca/news/canada/descendants-of-former-slaves-keep-black-history-alive-1.2554312> [<https://perma.cc/T94J-CWFG>].

233. SMITH, *supra* note 6, at 15; KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 2* (2004); ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 3* (2019).

transgressors, without acknowledging that the ancestors of current U.S. citizens benefitted from discriminatory laws of the past.<sup>234</sup> Even the Obama and Biden administrations, which adopt a more liberal approach to immigration than President Donald Trump and Republican leaders, demanded that undocumented immigrants “get right with the law” and “earn” a pathway to citizenship.<sup>235</sup> Absent from the discussion has been any suggestion that the nation arguably owes some would-be immigrants the legal status that it wrongfully denied to their parents and grandparents.<sup>236</sup>

The absence of historical memory also heightens the risk that this history could repeat itself. President Trump took office after a campaign in which he vowed to implement “a total and complete shutdown of Muslims entering the United States,” and then immediately issued a proclamation barring nationals from certain predominantly Muslim countries.<sup>237</sup> The proclamation survived constitutional challenge after the Supreme Court found that the government had provided a “facially legitimate and bona fide reason for its actions,” applying its traditionally deferential standard for reviewing immigration policies.<sup>238</sup> Despite the Fourteenth Amendment’s Citizenship Clause, President Trump repeatedly claimed

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234. See, e.g., Nicole Lewis, *Sessions’s Claim that “Dirty Immigration Lawyers” Encourage Clients to Cite “Credible Fear,”* WASH. POST (Oct. 26, 2017, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2017/10/26/sessionss-claim-that-dirty-immigration-lawyers-encourage-clients-to-cite-credible-fear/> [https://perma.cc/P236-X9B6].

235. President Barack Obama, Remarks at American University, 2 PUB. PAPERS 1001, 1005 (July 1, 2010).

236. Although today’s immigration laws do not draw explicit lines based on race, ethnicity, religion, or other protected grounds, they nonetheless can discriminate on those grounds. Consular officers in São Paulo, Brazil, denied visas based on explicit racial and economic grounds. *Olsen v. Albright*, 990 F.Supp. 31 (D.D.C. 1997). The Trump administration’s travel ban was challenged in court on the ground that it reflected President Trump’s anti-Muslim animus, and his explicit statements during his presidential campaign to ban Muslims. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018). For the past several decades, the U.S. Department of State has refused to accept birth certificates signed by midwives as evidence of citizenship for those born near the southern border—a policy many claim is racist. Debbie Weingarten, *My Children Were Denied Passports Because They Were Delivered by a Midwife*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/opinion/weingarten-homebirth-border-passports.html> [https://perma.cc/Z6NE-RD6B]; see also Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013).

237. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN POL. (Dec. 8, 2015, 4:18 AM), <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html> [https://perma.cc/VCE7-5M6S].

238. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

that he had the power to end birthright citizenship for the children of undocumented immigrants through an executive order.<sup>239</sup> In a policy that began under President Obama, the State Department denied passports to individuals born near the southern U.S. border whose birth certificates were signed by midwives.<sup>240</sup> Fearing fraud, the government adopted the presumption that these individuals were born outside the United States, and required additional evidence of place of birth before acknowledging their citizenship.<sup>241</sup> During the Trump administration, the government launched an aggressive denaturalization campaign to investigate 700,000 naturalized citizens, leading some to fear a return of political denaturalizations.<sup>242</sup> These are just a few recent examples of initiatives that run afoul of the text and spirit of American constitutional commitments to equal access to citizenship.

The process of enacting reparations into law often includes years of investigation and public debate, educating the public about the wrong to be repaired. For example, eight years before Congress passed the Civil Liberties Act granting reparations to imprisoned Japanese immigrants and Japanese Americans, a congressionally-appointed commission spent over a year investigating the matter.<sup>243</sup> The commission held public hearings in cities around the United States, interviewed over 750 people, and submitted a final report to Congress that was widely covered in the media.<sup>244</sup> Proponents of

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239. See Amanda Frost, *The Fragility of American Citizenship*, ATLANTIC (Oct. 9, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/fourteenthamendment-protects-citizenship-politics/599554/> [<https://perma.cc/H4PA-JAM3>].

240. Weingarten, *supra* note 236.

241. Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018, 6:18 PM), [https://www.washingtonpost.com/world/the\\_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd2a1991f075d5\\_story.html](https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd2a1991f075d5_story.html) [<https://perma.cc/296Z-X8W2>].

242. See Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence> [<https://perma.cc/TLS5-F9J5>]; Amanda Frost, *Alienating Citizens*, 114 NW. U. L. REV. 241, 241, 259 (2019).

243. Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988); COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, DENSHO ENCYCLOPEDIA, [https://encyclopedia.densho.org/Commission\\_on\\_Wartime\\_Relocation\\_and\\_Internment\\_of\\_Civilians/](https://encyclopedia.densho.org/Commission_on_Wartime_Relocation_and_Internment_of_Civilians/) [<https://perma.cc/2RG6-HQC7>].

244. JUSTICE DELAYED: THE RECORD OF THE JAPANESE INTERNMENT CASES 4 (Peter Irons

reparations for slavery urge Congress to establish a similar commission to examine the history of slavery and discrimination in the United States.<sup>245</sup> Such activities serve to educate the public about both the historical wrongdoing and its lingering effects on those alive today.<sup>246</sup> Accordingly, even if reparative citizenship proposals never became law, merely considering the matter might accomplish this goal.

### *B. The Costs of Reparative Citizenship*

Reparative citizenship comes with costs as well as benefits. Some arise from the difficulties of adding new grounds for immigration and citizenship into an overburdened system, and others from incorporating backwards-looking rationales at odds with American conceptions of civic-national citizenship. However, many of these potential problems can be ameliorated through tailored implementation.

#### *1. Penalizing the Innocent*

Critics of reparation programs often claim that they impose a penalty on the innocent.<sup>247</sup> Why should Americans who played no role in the institution of slavery, the seizure of Native American land, or the imprisonment of Japanese American have to pay the

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ed., 1989); Leslie T. Hatamiya, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* 4 (1993); COMMISSION ON WARTIME RELOCATION, *supra* note 243.

245. Every year for thirty years, Representative John Conyers introduced a bill proposing a commission to study slavery and racial discrimination for the purpose of considering reparations for those historical injustices. Melissa Nann Burke, *House Panel Advances Reparations Bill that Conyers Championed*, DET. NEWS (Apr. 14, 2021, 11:18 PM), <https://www.detroitnews.com/story/news/politics/2021/04/14/us-house-reparations-black-americans-bill-john-conyers/7219385002/> [<https://perma.cc/5FHM-R9TY>].

246. See Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 75 (exploring the lost history of the federal government's support of racial segregation, and noting that the "the obscurity of the constitutional principle, and the history underlying it, leaves ... remedial implications largely unexplored").

247. Arif Ali, David Attanasio & Camilo Sánchez, *US Has a Legal Obligation to Provide Reparations for Slavery*, LAW360 (July 26, 2020, 8:02 PM), <https://www.law360.com/articles/1291284> [<https://perma.cc/3TYG-TDJS>] (describing and refuting critiques of reparations for slavery).

price (through tax dollars or loss of property) of repairing a harm caused by others?<sup>248</sup> Worse, if reparations are perceived as imposing a penalty on one racial or ethnic group for the benefit of another, the program could perpetuate the divisions it seeks to heal.<sup>249</sup>

Reparative citizenship mostly avoids that problem by its very nature, however. Expanding U.S. citizenship—if done gradually, and within limits—would not deprive the current citizenry of rights and benefits they now enjoy. Citizenship is not pie. The rights to vote, hold office, work in government, and enter and remain in the United States are not lost or diminished by giving others access to those same rights.

Adding new immigrants to the U.S. population *could* impact the U.S. economy, however. If immigration were unlimited and uncontrolled, current American workers might suffer. But if reparative citizenship programs came with annual quotas, as is the case for most categories of immigrants today, this controlled influx of new workers would likely help, not hurt, the economy.<sup>250</sup>

Those benefits would be even greater if a reparative citizenship program granted legal status and citizenship to some percentage of the eleven million undocumented immigrants in the United States today. Approximately 5 percent of the U.S. workforce is undocumented, and most work for lower wages and in poorer conditions than if they had legal status, undermining labor conditions for all.<sup>251</sup>

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248. *Id.*

249. *Id.*; Forde-Mazrui, *supra* note 105, at 692 (describing how conservatives' arguments against affirmative action simultaneously support reparations for slavery and discrimination); Eric K. Yamamoto, *The Evolving Legacy of Japanese American Internment Redress: Next Steps We Can (and Should) Take*, 11 SEATTLE J. SOC. JUST., 77, 84 (2012) (describing critiques of reparations); Naomi Roht-Arriaza, *Reparations and Economic, Social, and Cultural Rights*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 109, 111 (Dustin N. Sharp ed., 2013) (same).

250. See Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages*, (Nat'l Bureau Econ. Rsch., Working Paper No. 12497, 2008) (finding positive increase on overall wages due to immigration from 1990-2004). The economic impact of immigrants on the wages of U.S. workers is the subject of debate among economists. Some economists have concluded that immigrants improve the overall economic conditions of U.S. workers, but undermine the wages of the least-educated U.S. born workers. See David Card, *Comment: The Elusive Search for Economic Impact of Immigrants*, 10 J. EUR. ECON. ASS'N. 211, 212 (2012); George J. Borjas, *The Wage Impact of the Marielitos: A Reappraisal*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 21588, 2015).

251. See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immi>

Granting these workers legal status would prevent such exploitation, benefitting not just them but also the lawful permanent residents and U.S. citizens who must compete with them for jobs.<sup>252</sup>

But the story is not all positive. Reparative citizenship could harm noncitizens hoping to enter the United States through one of the existing visa categories, and by extension hurt their U.S. citizen family members and U.S. employers petitioning on their behalf. If reparative citizenship is added as a category to the current U.S. immigration system without raising the caps on total annual immigration, then the costs will be borne by those noncitizens who already wait years in line for their chance to enter the United States. In 2024, unmarried adult children of U.S. citizens must wait nine years to obtain a visa to enter the United States.<sup>253</sup> For siblings of U.S. citizens, the queue is over fifteen years long.<sup>254</sup> The line for employment-based visas for some groups is also several years.<sup>255</sup> A reparative citizenship program limited to victims and their immediate relatives, such as described in Parts IV.A and B, could feasibly be integrated into the existing system without creating significant additional delays. But a broader approach—such as granting a pathway to citizenship to previously excluded groups—would burden a system already strained to the breaking point.

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grants/ [https://perma.cc/DZC6-WVAS] (unauthorized immigrants make up about 4.6 percent of the labor force); Daniel Costa, *Employers Exploit Unauthorized Immigrants to Keep Wages Low*, N.Y. TIMES (Sept. 3, 2015, 3:30 AM), <https://www.nytimes.com/roomfordebate/2015/09/03/is-immigration-really-a-problem-in-the-us/employers-exploit-unauthorized-immigrants-to-keep-wages-low> [https://perma.cc/9X9W-NZK6] (describing a study showing that over one-third of unauthorized immigrants are victims of minimum wage violations, and arguing that “[t]he bargaining power of U.S.-born workers competing in the low-wage labor market is undercut when millions of unauthorized workers cannot safely complain to the Labor Department or sue for unpaid wages”).

252. See Costa, *supra* note 251.

253. *Visa Bulletin for January 2024*, U.S. DEP’T OF STATE—BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-january-2024.html> [https://perma.cc/22L9-V4FB].

254. *Id.*

255. *Id.*

As suggested in Part IV, a potential solution would be to replace the existing Diversity Visa Program with visas for those qualifying for reparations. Established in 1990, the Diversity Visa Program reserves 50,000 visas for immigrants from countries with comparatively low rates of immigration to the United States.<sup>256</sup> The goal of the program is to diversify immigration flows into the United States.<sup>257</sup> In practice, the Diversity Visa Program primarily benefits residents of Europe and Africa because both regions are underrepresented in today's U.S. immigration flows, with the majority of slots going to Europeans.<sup>258</sup> Accordingly, the diversity program has often been criticized as "anti-diversity" because it creates special, streamlined pathways for a group that is already well represented in the U.S. population.<sup>259</sup> If the United States wanted to embrace reparative citizenship without adding to the annual immigration quotas or lengthening existing queues, it could replace the diversity visa with a "reparative" visa providing immigration status to individuals and groups historically denied such benefits in the past.

## 2. *Replacing Affective Citizenship with Instrumental Citizenship*

Reparative citizenship might undermine the affective ties that constitute the psychological dimensions of U.S. citizenship. The formal legal status of U.S. citizenship—with its attendant rights to political participation and to enter and remain in the United States—does not encompass all that it means to be an American. Also important is citizenship-as-identity or, as Linda Bosniak describes it, "the felt aspects of community membership."<sup>260</sup> Reparative

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256. *The Diversity Immigrant Visa Program: An Overview*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/diversity-immigrant-visa-program-overview> [<https://perma.cc/V6G6-L3TN>].

257. *Id.*

258. Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 329-30 (1993).

259. LEGOMSKY & THRONSON, *supra* note 86, at 437; Legomsky, *supra* note 258, at 330 (criticizing the diversity visa program as perpetuating racial inequalities in US immigration); Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of Modern U.S. / Mexico Border Enforcement*, IMMIGR. & NAT'Y REV. (forthcoming) (U.C. Davis Legal Stud. Rsch. Paper No. 360, 2013).

260. See Bosniak, *supra* note 26, at 479; Hiroshi Motomura, *Who Belongs? Immigration*



citizenship could undermine the solidarity that is a vital component of U.S. citizenship.

The reparative citizenship programs in Spain, Portugal, and Germany, described in Part III, do not require would-be citizens to reside in those countries. For that reason, these initiatives have been criticized for creating a new class of citizens lacking that national solidarity. Some applicants acquire new citizenship purely for its instrumental value.<sup>261</sup> Citizenship in a country within the European Union gives the holder additional mobility to live, study, and travel in the EU as well as in countries that waive visa requirements for EU citizens.<sup>262</sup> Some applicants from unstable countries describe European citizenship as a “reserve citizenship,” to be used as an exit strategy should life become dangerous or difficult in their home country.<sup>263</sup> For many in this group, European citizenship is now a useful accessory, not a primary identity.<sup>264</sup>

Once again, the structure of a U.S. reparative citizenship program matters. If the benefit provided is a *pathway* to citizenship—accompanied by the usual requirements for naturalization, such as five years as a lawful permanent resident, English language proficiency, and passing a civics test—then there is no need to think citizenship would be any less meaningful to those who acquired it through a reparations program as compared to through an employer, spouse, or grant of asylum.<sup>265</sup> If reparative citizenship comes without such requirements, however, then the connection to the United States would be shallower, replacing affective citizenship for one valued primarily for its instrumental benefits.<sup>266</sup>

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*Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 365 (2012) (describing the “civic solidarity” that can come from the “sense of bonds among members of a community ... of being involved in a joint enterprise for some common purpose”). Some scholars question the assumption that citizens share a sense of national identity.

261. See Benmayor & Kandiyoti, *supra* note 157.

262. *Freedom of Movement in the EU*, CITIZENS INFO., [https://www.citizensinformation.ie/en/government\\_in\\_ireland/european\\_government/european\\_union/freedom\\_of\\_movement\\_in\\_the\\_eu.html](https://www.citizensinformation.ie/en/government_in_ireland/european_government/european_union/freedom_of_movement_in_the_eu.html) [<https://perma.cc/8394-XSUZ>].

263. Benmayor & Kandiyoti, *supra* note 157, at 247.

264. See *id.* at 247-48.

265. See Edward Rothstein, *Refining the Tests That Confer Citizenship*, N.Y. TIMES (Jan. 23, 2006), <https://www.nytimes.com/2006/01/23/arts/refining-the-tests-that-confer-citizenship.html> [<https://perma.cc/53BK-84QG>] (describing the American citizenship test as “an instrument to promote civic learning and patriotism”).

266. See Jelena Dzankic, *The Pros and Cons of Ius Pecuniae: Investor Citizenship in*

### 3. *Imposing Unwanted Citizenship*

Reparative citizenship could be critiqued as an inappropriate, even arrogant, response to the United States' history of wrongdoing. Offering U.S. citizenship could inadvertently insult the citizens and governments of countries mistreated by the United States in the past.<sup>267</sup> As a matter of diplomacy, trumpeting a proposal to bestow U.S. citizenship as a gift or reward for the nation's past wrongs is ill advised.

The critique is valid, but could be addressed through tailored implementation. Reparative citizenship is not intended to repair the harm caused by the United States' foreign policy mistakes over the course of its history. It targets instead a significant but narrower act of wrongdoing—the immigration and citizenship policies that intentionally excluded groups based on race, gender, and political opinion.<sup>268</sup> Most important, citizenship would not be imposed automatically, but rather would be granted to only those who want it and affirmatively apply.<sup>269</sup> Finally, as more countries permit dual citizenship, accepting U.S. citizenship need not come at the expense of an alternative citizenship and identity, but rather can be conferred alongside that pre-existing attachment.

### 4. *Undermining the U.S. Commitment to Civic-National Citizenship*

Restoring citizenship to excluded individuals and their direct descendants is straightforward, but providing a pathway to citizenship to members of a particular ethnic or racial group, *solely* based on membership in that group, should give pause. The Citizenship Clause of the Fourteenth Amendment intended to de-couple

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*Comparative Perspective* (Eur. Univ. Inst. Working Paper, RSCAS 2012/14, 2012).

267. Cf. YOSSI HARPAZ, CITIZENSHIP 2.0: DUAL NATIONALITY AS A GLOBAL ASSET 103-04 (2019) (describing how Israelis once viewed acquiring dual citizenship with Germany or Poland as an “abomination,” but that now such citizenship has become “increasingly legitimate and socially acceptable to have”).

268. See REECE JONES, WHITE BORDERS (2021).

269. Cf. David Fraser & Frank Caestecker, *Jews or Germans? Nationality Legislation and the Restoration of Liberal Democracy*, 31 L. & HIST. REV. 391 (2013) (describing post-war laws that automatically restored German citizenship to denaturalized German Jews, many of whom did not want it).

race and citizenship. Reparative citizenship that grants citizenship based on race or ethnicity—as Spain and Portugal have done in granting citizenship to Sephardic Jews—risks reincorporating lineage and race back into U.S. citizenship law.

Unlike many European and Asian countries, U.S. citizenship emphasizes a shared commitment to a set of values rather than a common ethnic background. Political theorist Sarah Song has analogized the civic-nationalist view of U.S. citizenship to the motto of the Great Seal of the United States, *E pluribus unum* (“From many, one”), in which a sheaf of arrows represents a diverse population unified by a “willed affiliation” with a set of common ideals.<sup>270</sup> As Song explains

The basis of American solidarity is not any particular racial or ethnic identity or religious beliefs, but universal moral ideals embodied in American political culture and set forth in such seminal texts as the Declaration of Independence, the U.S. Constitution and Bill of Rights, Abraham Lincoln’s Gettysburg Address, and Martin Luther King, Jr.’s “I Have a Dream” speech.<sup>271</sup>

In line with these values, and in contrast to many European countries, U.S. law gives automatic citizenship to all born on U.S. soil, and does not permit citizenship to be transmitted by a parent who has never lived in the United States.<sup>272</sup>

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270. Sarah Song, *What Does It Mean to Be an American?*, DAEDALUS 31, 31 (2009).

271. *Id.* at 32 (citing Jürgen Habermas, *Citizenship and National Identity*, in BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, trans. William Rehg (1996). Habermas described Americans as sharing a political culture that does not depend on “all citizens’ sharing the same language or the same ethnic and cultural origins.” *Id.*

272. Today, no European country has retained the purest form of *jus soli*, and European countries grant citizenship by descent (*jus sanguinis*) under more permissive rules than does the United States. But these differences should not be overstated. Many European countries grant “conditional *jus soli*” citizenship to children whose parents have resided in the country for a set period of time before the child’s birth, and the United States also grants citizenship by descent. See Anita Calchi Novati, *The Battle for the Jus Soli*, PATH EUR. (May 11, 2021), <https://pathforeurope.eu/the-battle-for-the-jus-soli/> [<https://perma.cc/Y84C-27SD>]; see also Kerry Abrams, *No More Blood*, in DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP 121 (Rainer Bauböck ed., 2018) (critiquing focus on genetic rather than familial connections in determining citizenship by descent).

As Part I makes clear, U.S. citizenship and immigration laws in the past have often failed to live up to this ideal of citizenship as cultural connection, severed from race and ethnicity. Nonetheless, reincorporating race explicitly back into the immigration system, even in the spirit of reparations, is a troubling proposition. Spain's and Portugal's initiatives offering citizenship to Sephardic Jews required applicants to produce evidence of their ancestry through DNA tests and family trees—an emphasis on “bloodline” that disturbed many applicants, whose so-called “Jewish blood” had been the basis for centuries of persecution.<sup>273</sup> It is hard to imagine the United States adopting a similar lineage-based standard for citizenship.

Nonetheless, the conversation around reparative citizenship is worth having. Perhaps the United States will never be willing to go as far as European countries have done to right the immigration and citizenship wrongs of the past. And perhaps America's unusually strong version of birthright citizenship—which eschews ancestry for connection to U.S. soil—makes lineage-focused reparative citizenship especially unpalatable. But at the very least the public should learn about, and acknowledge, the transgressions of the past—if only to inspire new conversations around immigration and citizenship in the future.

#### CONCLUSION

The United States has a long history of denying or revoking citizenship on the basis of race, gender, and political opinion—all grounds now recognized as at odds with the nation's constitutional commitments and values. Individuals alive today were denied citizenship on these grounds, and the ethnic and racial composition of the United States has been altered as a result. This Article suggests that the United States consider granting reparative citizenship as a remedy for these past wrongs, and examines several different methods of doing so—some that could be implemented by the executive branch acting on its own and others requiring significant legislative changes.

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273. Benmayor & Kandiyoti, *supra* note 157, at 234.

Even if reparative citizenship initiatives are never incorporated into immigration law, however, debating the idea could shift the current narrative around the eleven million undocumented immigrants living in the United States and the thousands of other would-be Americans arriving at the southern border. Today, both political parties often describe these groups as legal and moral wrongdoers who must “earn” their citizenship (in the view of President Biden and other Democrats) or who should be forever barred from legal status and citizenship (in the view of former President Trump and many Republicans). This framing ignores the fact that the vast majority of the current citizens of the United States did nothing to earn that status. These Americans were born on U.S. soil as a result of laws that permitted immigration of their ancestors while excluding others for reasons now recognized as immoral, unjust, and (in some cases) unconstitutional. Rather than arguing about who has earned a pathway U.S. citizenship, the nation might ask itself whether it owes that status to those long excluded.