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The Continuing Legacy of the National Origin Quotas

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THE CONTINUING LEGACY OF THE NATIONAL ORIGIN QUOTAS

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INTRODUCTION

The 1965 Immigration Act is heralded as important civil rights legislation.[1] This Act eliminated the national origin quota system, which was adopted in 1924 and explicitly enshrined white supremacy within the United States' immigration law.[2] The elimination of national origin quotas based on racial and ethnic desirability was a necessary step in creating an immigration and citizenship regime based on fairness and equality. Yet one feature of the national origin quota system remains with us today—the lawful permanent resident (LPR) naturalization requirement. After sweeping immigration

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1. Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV 575, 579 (2019); *see* Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 119, 132 (2013).

2. Villazor & Johnson, *supra* note 1, at 579; ELIZABETH F. COHEN, ILLEGAL: HOW AMERICA'S LAWLESS IMMIGRATION REGIME THREATENS US ALL 84–86 (2020); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 23, 26 (2014); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 49 (2009). While the immigrants who were targeted as undesirable in the national origin quotas would be understood as white within today's understandings of race and ethnicity, that was not the case in the early twentieth century. COHEN, *supra* note 2, at 85–86. For example, influential theories about race and America's "native stock" stated that "Irish, Italians, Poles, Russians, and Jews all made up distinct and distinctly inferior races that were infecting the superior gene pool that predated their arrival." *Id.*

restrictions were enacted in 1924, it quickly became apparent that the restrictions could be evaded.[3] Once individuals who evaded the national origin quotas were in the United States, nothing in the naturalization laws prevented them from becoming United States citizens.[4] Concerns about unauthorized migrants becoming citizens lead to a new naturalization requirement in 1929.[5] Applicants for naturalization had to demonstrate that they had been lawfully admitted for permanent residence.[6] This naturalization requirement remains with us today.[7] It is the primary barrier to citizenship for the almost 11 million unauthorized migrants in the United States.[8] The continued use of the LPR naturalization requirement is one of the mechanisms by which U.S. citizenship law is underinclusive.[9]

American citizenship law inconsistently recognizes the diversity of ways in which people belong to American society.[10] The legal status of "citizen" is only available to individuals who are born within the territory of the United States and to other individuals deemed desirable.[11] Desirability within United States citizenship law has been, and continues to be, a fraught concept.[12] Race and ethnicity have been used as explicit measures of desirability as evidenced by the racial restrictions in the naturalization laws between 1790 and 1952.[13] In addition, low-wage foreign workers have also been, and continue to be, viewed as undesirable.[14] These individuals have been denied access to citizenship less explicitly, but equally as effectively.[15] This reflects a paradox: low-wage foreign workers are critical for the economic growth and development of American society, yet they are viewed as a threat to American society and denied consistent access

3. *See* COHEN, *supra* note 2, at 95.
4. *See id.*
5. *See id.* at 101, 106.
6. *See id.* at 102, 105.
7. 8 U.S.C. § 1427(a); 8 C.F.R. § 316.2(a)(2) (2020).
8. *See* Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (June 17, 2019), https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants [http://perma.cc/YJM3-6JZ7].
9. *See* Keyes, *supra* note 1, at 103.
10. *See* Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 4 (2017).
11. *See* Keyes, *supra* note 1, at 136.
12. *See id.* at 116, 136, 138.
13. *See* Banks, *supra* note 10, at 11, 30.
14. *See, e.g.*, Leticia M. Saucedo, *The Impact of 1965 Immigration and Nationality Act on the Evolution of Temporary Guest Worker Programs, or How the 1965 Act Punted on Creating a Rightful Place for Mexican Worker Migration*, *in* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA 292, 304 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015) (discussing that the Immigration and Naturalization Act of 1965 "limited the number of immigrant visas available for unskilled manual work").
15. *See id.*

to American citizenship.[16] It is this immigrant-labor paradox that prevents the 11 million unauthorized migrants in the United States from accessing the legal status of citizen.[17]

One approach to membership and belonging that expands our understanding of who belongs in a society is the *jus nexi* principle.[18] This principle focuses on the social fact of membership or the actual ties that an individual has to a society.[19] Within this approach to belonging, the focus is on an individual's presence within a community, which gives rise to personal relationships and participation that connect an individual to the society.[20] The *jus nexi* principle has a long, albeit inconsistent, history in U.S. citizenship law.[21] Perceptions regarding desirability have shaped who is eligible for citizenship based on the *jus nexi* principle.[22] The *jus nexi* principle was the basis for providing a pathway to citizenship for nearly 3 million unauthorized migrants in the Immigration Reform and Control Act of 1986.[23] However, the pathway created did not alter the general naturalization rules and is unavailable to the current 11 million individuals living in the United States as unauthorized migrants.[24]

This Article begins with an overview of U.S. citizenship law to illustrate that the legal status of "citizen" is underinclusive because it fails to recognize the membership of individuals who belong to U.S. society based on the *jus nexi* principle. In Part II of the Article, the ways that race, class, and gender have operated as citizenship boundaries are analyzed. The use of race, class, and gender to determine who is and is not a *de jure* member of American society highlights the long history of U.S. citizenship law failing to recognize the social fact of membership and extend citizenship status based on presence and actual connections. Part III of the Article illustrates how one of the most significant citizenship boundaries today is rooted in the national origin quotas of the 1920s. The LPR requirement, which was adopted to reinforce the national origin quotas, continues to operate as the most significant barrier to unauthorized migrants' *de facto* membership in American society gaining legal recognition. The analysis in Part IV of the Article reveals how limiting access to

16. Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 IND. J. GLOB. LEGAL STUD. 143, 145–46 (1994).

17. *See* Radford, *supra* note 8.

18. Keyes, *supra* note 1, at 124.

19. *Id.*

20. *Id.* at 127.

21. *See id.* at 124.

22. *See id.* at 127.

23. NANCY RYTINA, IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001 3 (2002).

24. *See id.*; Radford, *supra* note 8.

citizenship, through the LPR requirement, is an explicit strategy to resolve the immigrant labor paradox. Resolving this paradox requires ensuring employers have access to the low-wage foreign workers they desire while also limiting these workers' incorporation in American society because they are viewed by many as an economic, social, and political threat.

This country's long-standing response to the immigrant labor paradox is untenable. As Max Frisch stated in describing the guest worker programs in Europe after World War II, "we wanted workers, but people came."[25] Sixty-two percent of unauthorized migrants in the United States have lived in the country for at least ten years.[26] Twenty-one percent have lived in the country for at least twenty years.[27] As a result of this long-term residence, unauthorized migrants have developed strong familial, community, and economic ties to the United States.[28] To deny these individuals access to citizenship status while depending upon their labor for the country's economic growth and development undermines our democracy.

I. THE LEGAL REGULATION OF CITIZENSHIP

Citizenship is a legal status that denotes membership in American society.[29] Within citizenship discourse, membership and citizenship are often synonymous, yet there is little exploration of the possibility of being a member of society without citizenship status.[30] To distinguish between these two different conceptions of membership, the concepts of *de jure* members and *de facto* members are useful. *De jure* members are those individuals who have the formal legal status that identifies them as members.[31] *De facto* members are individuals who, based on the facts of their lives—their social, political, and economic connections to society—are members.[32] *De jure* membership is extended to certain individuals at birth and others through the naturalization process.[33]

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25. MAX FRISCH, Schweiz als Heimat?: Versuche über 50 Jahre 219 (Walter Obschlager ed., 1990) ("[M]an hat Arbeitskräfte gerufen, und es kommen Menschen.").

26. *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US [http://perma.cc/UU9F-NEZN].

27. *Id.*

28. *See, e.g.*, Keyes, *supra* note 1, at 109 (discussing DREAMers' ties to the United States).

29. *See* Banks, *supra* note 10, at 3–4 (exploring that "unauthorized migrants" must prove their "worth[iness] of full membership in American society").

30. *See id.*

31. *See De Jure*, BLACK'S LAW DICTIONARY (9th ed. 2009).

32. *See De Facto*, BLACK'S LAW DICTIONARY (9th ed. 2009).

33. 8 U.S.C. §§ 1401, 1427.

A. Birthright Citizenship

Approximately ninety percent of individuals residing in the United States are natural-born citizens.[34] This means that they have been U.S. citizens since birth, and they became U.S. citizens based on either the *jus soli* principle or the *jus sanguinis* principle.[35] The *jus soli* principle extends citizenship to all individuals who are born within the territory of the United States.[36] The Fourteenth Amendment of the United States Constitution is based on this principle. This constitutional provision states that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[37] The *jus sanguinis* principle grants citizenship based on descent.[38] Individuals have access to birthright citizenship if their parents—or grandparents in some cases—are citizens.[39] In the United States, federal statutory law allows individuals born outside of the United States to be citizens at birth if at least one of their parents is a U.S. citizen.[40] Birthright citizenship ensures that individuals who are either born within the State's territory or have parents who are citizens of the State will be citizens of that State.[41]

B. Naturalization

The second pathway to citizenship is naturalization.[42] Within the United States there are 20.7 million naturalized citizens.[43] These individuals were born in a non-U.S. territory and did not have access to *jus sanguinis* citizenship.[44] Federal naturalization law articulates the requirements for these individuals to become U.S. citizens.[45] United States naturalization law has six basic requirements: one must be a lawful permanent resident (LPR) for five years; reside in the United States continuously for five years; have basic English language skills, good moral character, knowledge of U.S.

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34. *See* Radford, *supra* note 8 (stating that immigrants account for 13.6% of the U.S. population).
35. Keyes, *supra* note 1, at 136.
36. *Id.*
37. U.S. CONST. amend. XIV, § 1.
38. Keyes, *supra* note 1, at 137.
39. *Id.*
40. 8 U.S.C. § 1401(g).
41. *See id.*
42. 8 U.S.C. § 1427.
43. Radford, *supra* note 8.
44. Keyes, *supra* note 1, at 136
45. 8 U.S.C. §§ 1427, 1423.

history and civics; and demonstrate attachment to the principles and ideals of the U.S. Constitution.[46]

The most significant obstacle to unauthorized migrants being recognized as *de jure* members of American society is the LPR requirement. Unauthorized migrants are ineligible to naturalize because they lack lawful permanent residence status.[47] Unlike many of the other naturalization requirements that date back to 1790, the LPR requirement was added in 1929 to reinforce the national origin quotas that were enacted in the 1920s.[48] LPRs are commonly referred to as green card holders, and they are noncitizens who are granted permission to enter and reside in the United States indefinitely.[49] There are two major pathways to LPR status: family and employment.[50] Spouses, parents, children and siblings of United States citizens are eligible for LPR status as are the spouses and children of LPRs.[51] On the employment side, noncitizens are eligible for LPR status if they are professional, executive, skilled workers, or unskilled workers.[52] For both pathways there are often long waits.[53] Family-based applicants have been waiting anywhere from a few months to twenty-five years.[54] For example, in April 2020 the government was still processing German citizens with a U.S. citizen sibling who applied for LPR status in July 2006.[55] Mexican citizens who have a U.S. citizen sibling have been waiting since March 1998.[56] Employment-based applicants typically have shorter wait times; however, current applicants have been waiting from between a few months to twelve years.[57]

For unskilled workers, the waits can be quite long as there are few green cards available for that employment-based category.[58] Between 2010 and 2018, an average of 3,000 noncitizens were admitted annually as unskilled workers.[59] For each of these years, the number

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46. Immigration and Nationality Act, Pub. L. No. 82-414, §§ 312, 316, 66 Stat. 163, 239, 242 (1952).

47. *See id.*

48. *See* Registry Act of 1929, Pub. L. No. 70-962, §§ 1, 3, 45 Stat. 1512, 1512–13 (repealed 1940).

49. *See* Liliana Zaragoza, *Delimiting Limitations: Does the Immigration and Nationality Act Impose a Statute of Limitations on Noncitizen Removal Proceedings?*, 112 COLUM. L. REV. 1326, 1327 n.1 (2012).

50. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., VISA BULLETIN 2–3 (2020).

51. *Id.* at 2.

52. *Id.* at 3.

53. *See id.* at 2, 4.

54. *Id.* at 2–3.

55. *See id.* at 2.

56. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *supra* note 50, at 2.

57. *Id.* at 4.

58. *Id.* at 3.

59. DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2010 YEARBOOK OF IMMIGRATION

of unskilled workers admitted as LPRs was less than half of one percent.[60] In April 2020, unskilled workers from China who were admitted to the United States had been waiting since July 2008, those from India had been waiting since January 2009, and most others had been waiting since January 2017.[61] Thus unskilled workers were waiting anywhere from three to twelve years to immigrate to the United States as LPRs.[62] Additionally, LPR status for unskilled workers is only available to noncitizens who are entering the United States for a permanent—not temporary or seasonal—job and the employer can demonstrate that there are no available workers in the United States.[63]

Noncitizens seeking LPR status not only have to fit within one of the family-based or employment-based categories, they also have to be admissible.[64] Within the Immigration and Nationality Act there is a list of factors that can make an individual inadmissible, which means they will be denied LPR status.[65] The inadmissibility grounds generally address criminal behavior or prior violations of immigration law.[66] However, another important inadmissibility ground is that the person is likely to become a public charge.[67] This inadmissibility ground dates back to 1882 and it means the person is unable to support one's self.[68] There are specific factors that the government reviews to determine if a noncitizen is likely to become a public charge, and individuals with low incomes are more often found likely to become a public charge.[69] This presents an additional challenge for low-wage, unskilled workers to gain access to United States citizenship.

STATISTICS 22 (2011); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2011 YEARBOOK OF IMMIGRATION STATISTICS 21 (2012); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2012 YEARBOOK OF IMMIGRATION STATISTICS 22 (2013); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2013 YEARBOOK OF IMMIGRATION STATISTICS 22 (2014); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2014 YEARBOOK OF IMMIGRATION STATISTICS 22 (2016); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2015 YEARBOOK OF IMMIGRATION STATISTICS 22 (2016); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2016 YEARBOOK OF IMMIGRATION STATISTICS 22 (2017); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2017 YEARBOOK OF IMMIGRATION STATISTICS 22 (2019); DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., 2018 YEARBOOK OF IMMIGRATION STATISTICS 21–22 (2019) [hereinafter 2019 DEP'T OF HOMELAND SEC.].

60. *See* 2019 DEP'T OF HOMELAND SEC., *supra* note 59, at 5.

61. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *supra* note 50, at 4.

62. *See id.* at 4–5.

63. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 212, 66 Stat. 163, 183 (codified as amended at 8 U.S.C. § 1182(a)(5)(A)).

64. *See* 8 U.S.C. § 1182.

65. *Id.* § 1182(a).

66. *Id.* § 1182(a)(2).

67. *Id.* § 1182(a)(4).

68. Immigration Act of 1882, Pub. L. No. 47-376, § 2, 22 Stat. 214, 214.

69. *See* 8 U.S.C. § 1182(a)(4)(B)(IV).

Therefore, socio-economic class is one of the boundaries of *de jure* membership in the United States.

II. RACE, CLASS & GENDER AS CITIZENSHIP BOUNDARIES

Race, class, and gender have all been boundaries to United States citizenship. Historically, racial boundaries were explicit in naturalization law and based on the idea that certain racial and ethnic groups were uninterested and/or unable to adopt mainstream American values, norms, and practices.[70] Within the birthright citizenship context, the Supreme Court dictated the racial boundaries of citizenship through a number of cases in which African Americans, American Indians, and Asian Americans contested their exclusion from *de jure* membership.[71]

Before the Fourteenth Amendment was adopted, the *jus soli* principle generally governed birthright citizenship in the United States.[72] In 1857, the United States Supreme Court held that the *jus soli* common law principle did not apply to African Americans.[73] Dred Scott, an enslaved person, sued for his freedom in federal court.[74] The federal court only had jurisdiction over cases involving citizens of different states.[75] John Sandford, the person who owned Mr. Scott, argued that Mr. Scott could not sue in federal court because he was not a citizen of the United States or of any state within the United States.[76] The Court stated that the question it had to decide was as follows:

> Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[77]

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70. *See* Naturalization Act of 1790, Pub. L. No. 1-3, § 1, 1 Stat. 103, 103–04 (establishing naturalization for "free white person[s]") (repealed 1795); *see, e.g.*, Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847, 848 (2004) ("Such determinations often rested on the presumption that Asians . . . would not, and could not, assimilate.").

71. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870 296–97 n.32 (1978); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898); Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

72. KETTNER, *supra* note 71, at 342–43.

73. *Dred Scott*, 60 U.S. at 404–05.

74. *Id.* at 396.

75. *Id.* at 400–02.

76. *Id.* at 400.

77. *Id.* at 403. The Court specified that it was only considering the citizenship status of people. *Id.* ("[T]he plea applies to that class of persons only whose ancestors were

The Court concluded that African Americans could not become *de jure* members of American society.[78] Focusing on the founding of the United States, the Court concluded that African Americans "were not intended" to be citizens of the United States because

> they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[79]

The Civil War brought an end to slavery in the United States and the adoption of the Fourteenth Amendment codified in the U.S. Constitution that African Americans would be *de jure* members of American society.[80]

While the Fourteenth Amendment of the United States Constitution clarified African Americans' access to *de jure* membership, its application to American Indians and the children of Asian immigrants was not straightforward. The Supreme Court had to intervene to determine whether the Fourteenth Amendment applied to each of these groups.[81] The assumptions about birth within the territory and socialization to dominant national values, norms, and practices were questioned for those who were not African American or of European descent.[82] In 1884, the Supreme Court held that the Fourteenth Amendment did not grant birthright citizenship to American Indians.[83] The Court explained that American Indians were not "subject to the jurisdiction" of the United States because of their affiliation with tribal nations, which have been described as "separate, self-governing political communities whose sovereignty predated the Constitution."[84] The Court explained that American Indians

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negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.").

78. *Dred Scott*, 60 U.S. at 451–52.

79. *Id.* at 404–05.

80. *See* KETTNER, *supra* note 71, at 342–43, 345 n.31.

81. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898); Elk v. Wilkins, 112 U.S. 94, 101(1884).

82. *Elk*, 112 U.S. at 101 ("The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes . . . and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside.") (citation omitted).

83. *Id.* at 109.

84. *Societal and Legal Issues Surrounding Children Born in the United States to*

> are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[85]

This ruling was made despite the fact that the petitioner in the case, John Elk, had "severed his tribal relation to the Indian tribes."[86] Relying on a theoretical conception of Indian sovereignty, the Court failed to recognize American Indians as individuals entitled to Constitutional birthright citizenship.[87] It was not until 1925, when Congress passed the Indian Citizenship Act, that all American Indians would be recognized as United States citizens at birth.[88]

In 1898, the U.S. Supreme Court decided that the children of Chinese immigrants born in the United States were birthright citizens pursuant to the Fourteenth Amendment.[89] Wong Kim Ark was born in San Francisco and his parents were Chinese citizens.[90] He traveled to China and upon his return to the United States in 1895 he was denied admission.[91] The government argued that Wong Kim Ark "has been at all times, by reason of his race, language, color and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation" so he was not admissible pursuant to the Chinese Exclusion Act.[92] The Chinese Exclusion Act barred the entry of Chinese nationals who were laborers.[93] The Court rejected the government's argument explaining that the Fourteenth Amendment used the phrase "all persons," which is universal.[94] The only restriction is jurisdictional, rather than on the basis of race or color.[95] The Court was concerned that the government's position in this case could lead to the denial of citizenship for the children of the "thousands of English, Scotch, Irish, German, or other European"

Illegal Alien Parents: Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Const. of the H. Comm. on the Judiciary, 104th Cong. 105–09 (1995) (statement of Prof. Gerald Neuman, Columbia University Law School).

85. *Elk*, 112 U.S. at 102.

86. *Id.* at 98.

87. *See id.* at 109.

88. Citizenship to Indians Act of 1924, Pub. L. No. 68-175, 43 Stat. 253, 253 (codified as amended at 8 U.S.C. § 1401(b)) (declaring "all non-citizen Indians born within the territorial limits of the United States" to be citizens).

89. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

90. *Id.* at 649.

91. *Id.*

92. *Id.* at 650.

93. *Id.* at 653.

94. *Id.* at 654.

95. *Wong Kim Ark*, 169 U.S. at 654.

immigrants.[96] These children "have always been considered and treated as citizens of the United States."[97] The Court decided not to distinguish between the children of European immigrants and those of Asian immigrants, and held that Wong Kim Ark was a U.S. citizen based on the Fourteenth Amendment.[98] This was not a unanimous decision—Chief Justice Fuller and Justice Harlan issued a dissenting opinion.[99] Historian Lucy Salyer explains that "Harlan saw the Chinese as fundamentally different, in terms of their racial and cultural identities and their ability to be part of America's unique republican experience."[100] She concludes that neither Chief Justice Fuller nor Justice Harlan "believed that the American law of citizenship should be read to make citizens of individuals who, in their opinion, would never be able to develop a true allegiance to the country."[101]

Concerns about cultural assimilation also shaped the naturalization rules enacted by Congress.[102] Between 1790 and 1952, there were racial requirements for naturalization.[103] The first naturalization law only allowed "free white person[s]" to naturalize.[104] This racial requirement was expanded to include individuals of "African nativity" or "persons of African descent" after the Civil War and African Americans gained birthright citizenship pursuant to the Fourteenth Amendment.[105] The legislative history of the 1870 Naturalization Act is rather instructive regarding the role of race as a proxy for values and norms that were desirable in future citizens.[106] Senator Sumner of Massachusetts offered an amendment to the proposed naturalization reforms that would have eliminated the racial requirements.[107] While there was little objection to making immigrants of African descent eligible for naturalization, there were strong objections to making Chinese immigrants eligible for naturalization.[108] Members of Congress expressed grave concerns about the

96. *Id.* at 694.
97. *Id.*
98. *Id.* at 694, 705.
99. *See id.* at 705–32 (Fuller, J., dissenting).
100. Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, *in* IMMIGRATION STORIES 51, 76 (David A. Martin & Peter H. Schuck eds., 2005).
101. *Id.* at 76.
102. *See id.* at 57 ("Not only would [Chinese immigrants] remain strangers to American ideas and culture, but nativists argued, they also posed a distinct threat to the country's republican principles and institutions. Americans, the inheritors of the 'Anglo-Saxon civilization,' loved freedom . . . .").
103. *See id.* at 53.
104. Naturalization Act of 1790, Pub. L. No. 1-3, § 1, 1 Stat. 103, 103–04 (repealed 1795).
105. Naturalization Act of 1870, Pub. L. No 41-254, § 7, 16 Stat. 254, 256.
106. For a comprehensive review of the legislative history of the Naturalization Act of 1870, see Banks, *supra* note 10, at 11–18.
107. *Id.* at 11.
108. *Id.* at 14.

values, norms, and practices of Chinese immigrants.[109] While there were counter-narratives offered portraying Chinese immigrants as Christian, law-abiding, and hardworking people, the narrative that presented Chinese immigrants as a threat to mainstream American values, norms, and practices dominated.[110] Chinese immigrants remained ineligible for citizenship until 1943 when Congress repealed the Chinese Exclusion Act and made Chinese immigrants eligible for naturalization.[111] The exclusion of Asian immigrants from naturalization was based on the idea that no matter how much time Asian immigrants spent in the United States, they were unassimilable because they would neither adopt nor commit to mainstream American values, norms, and practices.[112]

Congressional concerns about married women's commitment to American values, norms, and practice also shaped the federal laws governing citizenship.[113] Between 1907 and 1931, American women were stripped of their U.S. citizenship if they married a noncitizen.[114] Coverture, a governing theory in the early twentieth century, dictated that married women did not have an independent legal existence.[115] Married women were subsumed under their husbands' legal identities and were treated as their husbands' dependents.[116] The 1907 Expatriation Act stated that a U.S. citizen woman who married a noncitizen man would take the husband's citizenship.[117] If the husband's country of citizenship did not provide a basis for the wife to obtain citizenship, she became stateless.[118] The former American citizen wife could naturalize to regain her U.S. citizenship, but only if her husband naturalized first.[119] This law was modified in 1922

109. *Id.* at 12–14.

110. *Id.* at 12.

111. Act of Dec. 17, 1943, Pub. L. No. 78-199, 57 Stat. 600 (repealing the Chinese Exclusion Act).

112. NGAI, *supra* note 2, at 8 ("The legal racialization of these ethnic groups' national origin cast them as permanently foreign and unassimilable to the nation."); Banks, *supra* note 10, at 39–44 ("Concerns about social unrest were most often expressed as concerns about the inability of Chinese immigrants to assimilate."); Salyer, *supra* note 70, at 848 ("Such determinations often rested on the presumption that Asians would remain always 'yellow at heart,' that they would not, and could not, assimilate.").

113. *See* Banks, *supra* note 10, at 18–19.

114. Expatriation Act of 1907, Pub. L. No. 59-193, § 3, 34 Stat. 1228, 1228–29 (repealed 1922).

115. *See* Felice Batlan, *"She Was Surprised and Furious": Expatriation, Suffrage, Immigration, and the Fragility of Women's Citizenship, 1907–1940*, 15 STAN. J. C.R. & C.L. 315, 317–18 (2020).

116. *Id.*

117. *Id.* at 319–20.

118. *Id.* at 321.

119. *See* Citizenship of Married Women (Cable) Act of 1922, Pub. L. No. 67-346, §§ 2, 4, 42 Stat. 1021, 1021–22 (amended 1930).

with the enactment of the Cable Act of 1922.[120] This Act allowed a U.S. citizen woman to retain her citizenship if she married an alien who was "eligible for citizenship."[121] In 1922, only white immigrants and immigrants of African nativity or African descent were eligible to naturalize.[122] Therefore, U.S. citizen women married to non-white and non-black immigrants continued to lose their citizenship upon marriage.[123] It was not until 1931 when the Naturalization Act of 1906 was amended that U.S. citizen women could marry any noncitizen without losing their American citizenship.[124] The legal rules depriving U.S. citizen women of their citizenship upon marriage to a noncitizen were rooted in the idea that, due to coverture, a married woman could not have a legal identity, and therefore a citizenship, that differed from that of her husband.[125] Regardless of whether a woman was born in the United States or if she resided there long-term, her citizenship status was based on her husband's status.[126]

The boundaries of U.S. citizenship have been shaped by race, class, and gender, each of which has been used as a proxy for desirability. Legal rules have been instrumental in creating or reinforcing the boundaries of belonging. Courts have interpreted legal rules in ways that denied individuals access to citizenship based on race, and legislatures have enacted laws that explicitly prohibited certain groups from being eligible for citizenship.[127] By the 1920s, hostility toward Southern and Eastern European immigrants could not be ignored by Congress.[128] Yet these immigrants were white and could not be denied access to *de jure* membership based on existing law.[129] This led Congress to utilize the same strategy it had used to limit

120. *See* Batlan, *supra* note 115, at 324–26.

121. Cable Act of 1922, § 4.

122. *See* Banks, *supra* note 10, at 14.

123. *See* Naturalization Act of 1870, Pub. L. No. 41-254, § 7, 16 Stat. 254, 256 ("And be it further enacted, [t]hat the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."); *see also* Citizenship of Married Women (Cable) Act of 1922, Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (amended 1930) ("Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States."); Batlan, *supra* note 115, at 325–26.

124. *See* Act of July 3, 1930, Pub. L. No. 71-508, §§ 1, 4, 46 Stat. 854, 854 (amending the Cable Act of 1922).

125. *See* Batlan, *supra* note 115, at 317–18.

126. *See id.* at 319–20.

127. *See, e.g.*, Banks, *supra* note 10, at 21 (illustrating the Court's upholding of Congress's constitutional authority to prohibit immigration based on race in the case of the Chinese Exclusion laws).

128. *See* Julia Young, *Making America 1920 Again? Nativism and U.S. Immigration, Past and Present*, 5 J. MIGRATION AND HUM. SEC. 217, 221–23 (2017).

129. *Id.* at 223 ("Prior to World War I, legislation did not explicitly restrict the selection or composition of immigrants based on race or nationality, with the exception of Asian immigrants.").

Chinese migration in the late 1800s—immigration restriction.[130] In an effort to reinforce the national origin quotas that were adopted in the 1920s, Congress also revised the naturalization rules to require lawful admission for permanent residence.[131] This new LPR requirement would limit the ability of migrants deemed undesirable to become *de jure* members of American society.[132]

III. A CONTINUING LEGACY OF THE NATIONAL ORIGIN QUOTAS

The LPR naturalization requirement continues to operate as a significant barrier to *de jure* membership in the United States.[133] Though the requirement began as a response to undesirable Southern and Eastern European migration, it continues to limit low-wage foreign workers' ability to obtain the legal status of citizen.[134] The effect of those limitations is reminiscent of the national origin quotas.[135] National origin quotas were first adopted in 1921 in order to limit the number of immigrants from Southern and Eastern European.[136] This was a temporary quota regime that was made permanent three years later with the enactment of the Johnson-Reed Immigration Act of 1924.[137] This act was the first comprehensive immigration restriction law that was based on "a *global* racial and national hierarchy that favored some immigrants over others."[138] The 1924 law limited migration from the Eastern Hemisphere to 155,000 individuals per year and established per country quotas whereby the number of individuals allowed to migrate from each country was "2 percent of the foreign-born population" in the United States in 1890 from that country.[139]

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130. *See* Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2, 42 Stat. 5, 5–6 (limiting immigration based on census percentages); Immigration Act of 1924, Pub. L. No. 68-139, § 11, 43 Stat. 153, 159.

131. *See* Registry Act of 1929, Pub. L. No. 70-962, §§ 1, 3, 45 Stat. 1512, 1512–13 (repealed 1940).

132. *See* Keyes, *supra* note 1, at 138–39.

133. *See, e.g.*, *id.* at 140.

134. NGAI, *supra* note 2, at 238.

135. *See id.*

136. *Id.* at 21 ("The law set the quotas according to the 1910 census because data from the 1920 census was not fully compiled at the time. Using 1910 as the base, the southern and eastern European countries received 45 percent of the quotas and the northern and western European countries received 55 percent. Although the quotas reduced southern and eastern European immigration by 20 percent from prewar levels, nativists believed it was still unacceptably high. They argued for a 2 percent quota based on the 1890 census. That was when, they argued, the sources of European immigration shifted, altering the racial homogeneity of the nation. The 1890 formula reduced the level of immigration to 155,000 per year and reduced the proportion of southern and eastern European immigration to a mere 15 percent of the total.").

137. *See* NGAI, *supra* note 2, at 3.

138. *Id.* at 3.

139. *Id.* at 22–23.

This quota regime was the culmination of agitation from two broad camps. First, American labor interest groups were concerned that immigrant laborers were lowering wages and working conditions.[140] Second, supporters of the eugenics movement believed that Southern and Eastern European immigrants were racially inferior.[141] The quotas that were enacted "served contemporary prejudices among white Protestant Americans from northern European backgrounds and their desire to maintain social and political dominance."[142]

With the enactment of such drastic immigration restrictions, individuals who were inadmissible due to the quotas began to find ways to evade the quotas and become United States citizens.[143] For example, European migrants would enlist in Canadian agricultural labor programs and—shortly after arriving in Canada—seek entry into the United States.[144] Additionally, European immigrants entered the United States through Mexico.[145] In 1924, Walter Elcarr, the Commissioner General of Immigration, explained that "[l]ong established routes from southern Europe to Mexican ports and overland to the Texas border, formerly patronized almost exclusively by diseased and criminal aliens, are now resorted to by large numbers of Europeans who cannot gain legal admission because of passport difficulties, illiteracy, or the quota law."[146] Once these individuals had entered the United States, they were able to naturalize and become citizens.[147] At that time, a noncitizen had to satisfy residence and character requirements, be "attached to the principles of the Constitution of the United States, and well disposed to the good order and

140. KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR, 1820–1924 139–41 (1984).

141. *See* COHEN, *supra* note 2, at 91–92 ("Irish, Italians, Russians, Polish, and many other Europeans were referred to as 'contagions' that could infect the good stock of Americans tracing their lineage to countries like England.").

142. NGAI, *supra* note 2, at 23.

143. *See id.* at 66.

144. *Id.* ("An investigation by the Federal Bureau of Investigation in 1925 reported that 'thousands' of immigrants, 'mostly late arrivals from Europe,' were 'coming [into Canada] as fast as they can get the money to pay the smugglers.'").

145. *Id.*

146. *Id.* By the late 1920s it was no longer necessary for European migrants who were inadmissible due to the national origin quotas to enter without authorization through Canada or Mexico. *Id.* Alternative legal routes existed for them to enter the United States. NGAI, *supra* note 2, at 66. For example, Europeans who resided in Canada for five years could be lawfully admitted for permanent residence in the United States. *Id.* Additionally, as Southern and Eastern European migrants became naturalized citizens they were able to sponsor relatives who would not be subject to the national origin quotas. *Id.* Historian Mae Ngai notes that in 1927 over half of the nonquota immigrants were from Italy with Polish, Czechoslovakian, and Greek immigrants being the next largest groups of nonquota immigrants. *Id.* at 66–67.

147. *See id.* ("Europeans could go to Canada and be admitted to United States legally after they had resided in Canada for five years.").

happiness of the United States," file a declaration of intention two years prior to naturalizing, speak English, and provide a certificate from the Department of Commerce or the Department of Labor stating the date, place, and manner of their arrival in the United States.[148] The last requirement was adopted in 1906 as a way to support applicants' claims that they satisfied the residence requirement.[149] Whether a noncitizen was admitted for a vacation or with the intent to reside permanently was of little importance in 1906, but it became critically important with the introduction of the national origin quotas.[150]

Despite the creation of the certificate of arrival requirement in 1906, it was not a significant barrier to naturalization until 1921.[151] While Congress wanted the government to provide certificates that would evidence noncitizens' arrival in the United States, such certificates were not routinely issued until 1911.[152] Between 1921 and 1925 it was the practice of the Bureau of Naturalization to authorize the issuance of a certificate of arrival to individuals who were seeking naturalization but did not have a record of their arrival.[153] If the noncitizen made a statement under oath regarding their entry into the United States, a certificate of arrival was issued.[154] After the adoption of the temporary national origin quota system in 1921, the Bureau of Naturalization became concerned that it could end up granting certificates of arrival to individuals who had evaded the national origin quotas.[155] The practice of issuing certificates of arrival based on a statement under oath ended, but to help shape their future practices, the Bureau sought legislative reform to address the variety of reasons that noncitizens lacked a certificate of arrival.[156]

In 1928, Congress held hearings exploring amendments to the national origin quota system.[157] There was a lot of discussion about

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148. Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, § 4, 34 Stat. 596, 598 (codified as amended in 8 U.S.C. § 1427).

149. *See* Immigration and Naturalization Act of 1906 § 4.

150. *See* NGAI, *supra* note 2, at 22–23 (the quota "restricted immigration to 155,000 a year, established temporary quotas based on 2 percent of the foreign-born population in 1890, and mandated the secretaries of labor, state, and commerce to determine quotas on the basis of national origins by 1927. The law also excluded from immigration all persons ineligible to citizenship, a euphemism for Japanese exclusion.").

151. BUREAU OF NATURALIZATION, ANNUAL REPORT OF THE COMMISSIONER OF NATURALIZATION TO THE SECRETARY OF LABOR 9–10 (1927).

152. *Amendments to Immigration Act of 1924: Nonquota and Preference Provisions—Certificates of Arrival—Nurses and Teachers in Porto Rico*: *Hearings Before the H. Comm. on Immigr. & Naturalization*, 70th Cong. 88 (1928) [hereinafter *Amendments to the 1924 Immigration Act Hearings*].

153. *See* BUREAU OF NATURALIZATION, *supra* note 151, at 10.

154. *Amendments to the 1924 Immigration Act Hearings*, *supra* note 152, at 89–90.

155. *See id.* at 88–89.

156. *See id.* at 88–90.

157. *See id.* at 1.

the need for some sort of process to grant certificates of arrival for noncitizens who did not obtain them at the time of their entry.[158] The discussion often turned to the reason why noncitizens were not issued a certificate of arrival.[159] Representative Hays B. White from Kansas explained that the officers at ports of entry did not routinely issue certificates of arrival until 1911.[160] Nevertheless, members of Congress expressed concern that the reason individuals lacked the certificate was that they had entered in a manner that evaded the national origin quotas and therefore should not obtain the certificate.[161]

Congress heeded the suggestion from the Bureau of Naturalization by adopting a registry program in 1929, and went a step further in introducing a new naturalization requirement.[162] The registry program empowered the Commissioner General of Immigration to issue a certificate of arrival to individuals who could demonstrate that they (1) had entered the United States before June 3, 1921; (2) had resided in the United States continuously since their entry; (3) had good moral character; and (4) were not subject to deportation.[163] Additionally, applicants had to pay a twenty-dollar fee.[164] A certificate issued under this process would satisfy the naturalization requirements.[165] However, this Act also created a new naturalization requirement.[166] In addition to having to produce "a certificate showing the date, place, and manner of his arrival," applicants for naturalization also had to establish their "lawful entry for permanent residence."[167] The LPR naturalization requirement was adopted to ensure that individuals who evaded the national origin quotas would not be able to naturalize.[168] In 1926 the main obstacle for individuals interested in long-term residence in the United States was the national origin quota system.[169]

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158. *See id.* at 86–90, 99.

159. *See id.* at 88–90.

160. *Amendments to the 1924 Immigration Act Hearings*, *supra* note 152, at 88.

161. *See id.* at 89.

162. *See* Registry Act of 1929, Pub. L. No. 70-962, §§ 1–3, 45 Stat. 1512, 1512–13 (repealed 1940).

163. *Id.* § 1.

164. *Id.*

165. *Id.* § 3.

166. *See id.* § 4.

167. *Id.*

168. *See* Registry Act of 1929 § 4.

169. *See* NGAI, *supra* note 2, at 22–23. Connecting immigration admission restrictions and limiting access to naturalization was not new in 1929. *See, e.g.*, Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882). That relationship was made when the first large-scale federal immigration restrictions were adopted in 1882. *See id.* The Chinese Exclusion Act prohibited the entry of Chinese laborers, and it made Chinese immigrants ineligible for naturalization. *Id.* § 1. The prohibition on Chinese immigrant naturalization was a bit superfluous since the federal naturalization law only allowed white persons

National origin quotas were repealed in 1965, yet the LPR naturalization requirement remains.[170] It remains because restrictions continue to be a part of U.S. immigration law.[171] While the current immigration restriction regime was enacted to disavow the use of immigration law to shape the racial and ethnic demographics of the United States, restrictions continue to exist.[172] Today numerical restrictions are applied equally to all countries in the world and substantive restrictions limit access to LPR status based on family relationships and employment skills and opportunities.[173] The LPR requirement—a tool that was introduced into American citizenship law to reinforce white supremacy—continues to operate as a barrier to *de jure* membership. In particular, today that barrier limits low-wage foreign workers access to citizenship.[174] As long as admission restrictions exist, the LPR naturalization requirement will continue to ensure that individuals who circumvent the restrictions are unable to become *de jure* members of American society.

IV. RESOLVING THE IMMIGRANT LABOR PARADOX

Since the founding of the United States of America, a paradox has existed regarding noncitizen labor. Immigrant workers have been critical to the economic growth and development of American society, yet they have been perceived as economic, social, and political threats to American society.[175] Audre Lorde captured this broad perspective when she wrote, "[i]n a society where the good is defined in terms of profit rather than in terms of human need, there must always be some group of people who, through systematized oppression, can be made to feel surplus, to occupy the place of the dehumanized inferior."[176] Immigration and citizenship law has responded

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and persons of African nativity and African descent to naturalize. Naturalization Act of 1870, Pub. L. No 41-254, §§ 1–4, 16 Stat. 254, 254–55. Prohibiting Chinese immigrant naturalization served two goals. First, it ensured that any Chinese laborers who evaded the Chinese Exclusion Act would be unable to become *de jure* members of American society. *See* NGAI, *supra* note 2, at 37–50. Second, it ensured that Chinese immigrants, who were viewed as culturally undesirable, would be unable to become *de jure* members of American society. *Id.*

170. *See* Immigration Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911–12 (codified as amended in 8 U.S.C. § 1152); 8 U.S.C. § 1429.

171. 8 U.S.C. § 1429.

172. *See* 8 U.S.C. § 1153.

173. *Id.*

174. *See id.* § 1153(b).

175. CALAVITA, *supra* note 140, at 138–41; LEO CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 23–47 (2013).

176. AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 114–15 (1984).

to this paradox by granting employers access to their desired workers, but doing so in a way that requires the workers to remain on the periphery of society without a pathway to *de jure* membership. The primary strategies for achieving this equilibrium are temporary worker programs and limited immigration enforcement.[177]

A. Access to Workers

The growth and development of the United States has depended on the work of foreign workers who earn low wages and work in challenging environments. This can be seen from enslaved people of African descent doing agricultural, domestic, and skilled labor in the American South,[178] to Chinese laborers building the transcontinental railroad,[179] to Mexican laborers staffing the agricultural expansion in the American Southwest.[180] The desirability of foreign workers was, and remains, based on their willingness to work for wages and in conditions that enable employers to maximize profits.[181] During the nineteenth century there were significant, and often violent, clashes over the immigrant labor paradox.[182] Uprisings by, and on behalf of, American citizen workers led to the enactment of the Chinese Exclusion Act in 1882 and the Alien Contract Labor Law in 1885, also known as the Foran Act.[183] These laws prohibited certain immigrants from being able to enter the United States—Chinese laborers and unskilled contract laborers, respectively.[184] The list of prohibited

177. *See infra* notes 187–277 and accompanying text.

178. *See* Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 239 (2003).

179. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 6 (1998).

180. DAVID GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 39–42 (1995).

181. Legal scholars Jennifer Gordon and R.A. Lenhardt explain that one reason for this is that recent immigrant workers use different yardsticks to measure the value of their work than long-term resident foreign workers and citizen workers. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1220 (2008). For example, for newer immigrants "the yardstick is global and, at least initially, short-term." *Id.* Low wages and challenging work conditions allow new immigrants to "provide meaningful financial support and some tangible advancement" to family in their home country. *Id.* Long-term resident immigrants and citizen workers use a yardstick that is comparatively local and long term. *Id.* at 1221. For these workers the money earned must support life in the United States and low wages do not provide an opportunity for upward mobility. *Id.* at 1221–22.

182. CALAVITA, *supra* note 140, at 27.

183. *See id.* at 39–59 (exploring American laborers unrest, and the state's response, in the late nineteenth century).

184. *See* Chinese Exclusion Act, Pub. L. No. 47-126, § 1, 22 Stat. 58, 59 (1882); Alien Contract Labor Law, Pub. L. No. 48-164, §§ 1–2, 23 Stat. 332, 332–33 (1885) (prohibiting employers from paying the transportation costs of foreign workers or otherwise

immigrants expanded in 1917, and additional requirements were implemented to deter immigrants deemed undesirable.[185] For example, the 1917 Immigration Act created a head tax for all immigrants and literacy requirements for admission.[186] Additionally, the prohibition on contract laborers was broadened compared to its 1885 Foran Act predecessor.[187] The adoption of more stringent admissions requirements made it increasingly difficult for low-wage foreign workers to gain admission to the United States, which satisfied the goals of American labor and other restrictionists. However, it left employers in agriculture, mining, construction, and manufacturing without the workers they desired.[188] The response to employers' concerns has been temporary worker programs and limited immigration enforcement.[189]

1. Temporary Worker Programs

With the United States in the midst of World War I, employers in industries reliant upon low-wage foreign labor successfully lobbied Congress for a temporary worker program.[190] In addition to the restrictions included in the 1917 Immigration Act, there was a provision that gave the Commissioner General of Immigration the authority to issue rules that would allow for the admission of noncitizens who were otherwise inadmissible if the individuals were seeking temporary admission.[191] Based on this authority, regulations were enacted that allowed Mexican migrants to enter the United States as temporary workers.[192] Approximately 80,000 Mexican migrants were admitted to work in agriculture and for the railroad companies.[193] The use of

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encourage migration as part of a contract to work in the United States that was executed before migrating to the United States).

185. *See* Immigration Act of 1917, Pub. L. No. 64-301, §§ 2–3, 39 Stat. 874, 875–78.

186. *See id.* §§ 2, 3.

187. The Immigration Act of 1917 excluded all foreign workers who had "been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled." *Id.* § 3. Compare with the broader limitations of the Alien Contract Labor Law of 1885. *See supra* note 184 and accompanying text.

188. GUTIÉRREZ, *supra* note 180, at 52; MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900–1940 58–59 (1976).

189. *See, e.g.*, Saucedo, *supra* note 14, at 294–96.

190. DAVID E. LOREY, THE U.S.-MEXICAN BORDER IN THE TWENTIETH CENTURY: A HISTORY OF ECONOMIC AND SOCIAL TRANSFORMATION 69–71 (1999).

191. Immigration Act of 1917, § 39 Stat. at 878 (the Commissioner General of Immigration was authorized "to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission").

192. Saucedo, *supra* note 14, at 294.

193. *Id.*

these exceptions ended in 1921 in response to pressure from the American Federation of Labor.[194]

Employers viewed the World War I Mexican temporary worker program as a success, and it became one strategy for responding to the immigrant worker paradox.[195] It would be another twenty-one years before a formal temporary worker program was adopted in the United States, but the value of temporary foreign workers shaped the Immigration Act of 1924 that created the permanent national origin quota system.[196] As this legislation was being discussed in Congress during the early 1920s, employers testified that the immigrant labor shortage that would be caused by the new restrictions could be mitigated.[197] The mitigation was discussed in terms of new labor sources—African Americans and Mexican migrants.[198] Mexican workers were viewed as a desirable replacement because they were considered temporary workers.[199] There were two reasons for the presumption of temporariness.[200] First, due to the proximity of the United States and Mexico, Mexican workers could engage in circular migration—migrate to the United States for seasonal work and then return to Mexico until the next opportunity for seasonal work.[201] The possibility of seasonal temporary migration was hailed as an improvement over the use of Asian and European immigrant laborers.[202] Second, Mexican migrants could be viewed as temporary because it was easier for the government to remove them when it was politically or economically desirable.[203] This desire for access to temporary foreign workers lead Congress to exempt the Western Hemisphere from the national origin quotas.[204] Individuals from this region were classified as "non-quota immigrants" and were only subject to qualitative immigration restrictions.[205] Consequently, Mexican workers

194. *Id.*

195. *Id.* at 294–95.

196. *See* NGAI, *supra* note 2, at 22–23.

197. *Prohibition of Immigration: Hearing on H.R. 13325, 13669, 13904, and 14577 Before the H. Comm. On Immigr. & Naturalization*, 65th Cong. 24–25 (1919) [hereinafter *1919 House Hearings*]. Eastern and Southern European migrants had been a major source of low-wage foreign workers. *See, e.g.*, GUTIÉRREZ, *supra* note 180, at 52. With the enactment of the national origin quotas employers were concerned that they would be unable to meet their labor demands. *Id.*

198. *1919 House Hearings*, *supra* note 197; CALAVITA, *supra* note 140, at 160.

199. *1919 House Hearings*, *supra* note 197.

200. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965,* 21 LAW & HIST. REV. 69, 88–89 (2003).

201. *Id.*

202. NGAI, *supra* note 2, at 70–71.

203. *1919 House Hearings*, *supra* note 197.

204. *See* Immigration Act of 1924, Pub. L. No. 68-139, § 4, 43 Stat. 153, 155.

205. *Id.* Qualitative restrictions included rules regarding being a public charge or the

were able to enter the United States as immigrants, but the qualitative restrictions could be used to reduce admission during times of economic downturns or when politically expedient.[206]

In practice the qualitative restrictions and required fees imposed a significant burden on Mexican migration after the Immigration Act of 1924.[207] Mexican citizens interested in migrating to the United States had to pass the literacy test, obtain a visa from an American consulate in Mexico, which cost ten dollars, and pay an eight-dollar head tax.[208] The literacy test was due to the prohibition on the entry of noncitizens "over sixteen years of age, physically capable of reading, who cannot read the English language, or some other language or dialect, including Hebrew or Yiddish."[209] Literacy was evaluated by requiring individuals to read thirty to forty words in the language or dialect of their choice.[210] Not only were these fees prohibitive for many migrants seeking jobs in the United States that paid low wages, but there were expenses involved in obtaining the required visa.[211] Individuals had to travel to a consulate to apply for a visa and spend a few days in a hotel waiting to obtain the visa.[212] Consequently, thousands of Mexican citizens entered the United States without authorization "[r]ather than abandon their hopes of

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requirement of a head tax. *See, e.g.*, CALAVITA, *supra* note 140, at 160 (discussing that after the enactment of the Immigration Act of 1924 "[c]onsuls abroad were told to utilize the old 'likely to become a public charge' clause during depressions in order to reject applications for visas").

206. CALAVITA, *supra* note 140, at 160. This theoretical possibility became a reality when the Great Depression reduced employers' need for workers. *See* GUTIÉRREZ, *supra* note 180, at 72–73. Between 1929 and 1937 Mexican immigrants and Mexican Americans were forcibly removed en masse in a program known as Mexican Repatriation. *Id.* at 72. The name is a bit of a misnomer given that many of the individuals that moved to Mexico were United States citizens and thus not being repatriated. *Id.* On average 80,000 individuals of Mexican descent were removed to Mexico; however, a lot of data from that time period regarding the ethnic Mexican population in the United States are unreliable. *Id.* Consequently, scholars estimate that anywhere from 350,000 to 600,000 Mexican migrants and Mexican Americans left the United States and went to Mexico. *Id.* The individuals who were removed to Mexico during this time period were "not formally deported." *Id.* Deportation is a "cumbersome and time-consuming administrative procedure." GUTIÉRREZ, *supra* note 180, at 72. Rather, officials from "the U.S. Department of Labor and the Border Patrol, local welfare agencies, and other government bodies encouraged Mexican aliens to depart voluntarily" and the Mexican government encouraged its nationals to return by offering subsidized transportation costs "and, in some cases, to resettle repatriates on government-sponsored agricultural tracts." *Id.* at 72–73. Despite the "voluntariness" of the movement to Mexico, for most people who left, it "was a traumatic, disorienting, and sorrowful course undertaken under extreme duress." *Id.* at 73.

207. NGAI, *supra* note 2, at 67.

208. REISLER, *supra* note 188, at 59.

209. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 877.

210. *Id.*

211. *See* REISLER, *supra* note 188, at 59.

212. MANUEL GAMIO, MEXICAN IMMIGRATION TO THE UNITED STATES: A STUDY OF HUMAN MIGRATION AND ADJUSTMENT 204–05 (1930).

finding jobs in the United States."[213] As will be addressed below, limited enforcement of immigration law became another response to the immigrant labor paradox.[214]

With World War II came new labor shortages that gave rise to a new temporary worker program—the Bracero Program.[215] This program operated between 1942 and 1964.[216] The program's structure changed several times over the course of the program, but the basic premise of ensuring agricultural employers had continued access to Mexican farm workers remained.[217] During the program's operation an average of 200,000 workers came annually to work on farms throughout the Southwest and a total of 4.5 million Mexican workers came over the course of the program.[218] At various times there was pressure to end the program, but it persisted based on claims from growers that there were insufficient U.S. workers available to do the work.[219] In 1961 the program received its last extension and began a four-year wind down.[220]

The turn to temporary immigrant labor provided a solution to the immigrant labor paradox. Employers would continue to have access to immigrant workers that allowed profit maximization, but the migrants would be temporary. The workers' admission as nonimmigrants made them ineligible for naturalization and their nonimmigrant admission was contingent on the needs of employers and the economy more broadly.[221] Thus, if employers determined their need for workers diminished, the temporary immigrant workers could be required to leave the country.[222]

The immigration restrictions that Congress enacted in the late 1800s and early 1920s significantly limited the ability of individuals to migrate to the United States as laborers and become *de jure* members of American society.[223] Large numbers of potential immigrants were prohibited from entering the United States.[224] The small number of immigrants allowed each year was thought to be insufficient

213. REISLER, *supra* note 188, at 59.
214. Saucedo, *supra* note 14, at 295–96.
215. *Id.* at 296.
216. *Id.* at 295, 299.
217. *Id.* at 294–96.
218. *Id.* at 296; *see also* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 55 (1992).
219. Saucedo, *supra* note 14, at 296–97.
220. *Id.* at 301–02.
221. *Id.* at 293
222. *See id.*
223. *See* Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION DEV. REV. 1, 1 (2012).
224. *See* NGAI, *supra* note 2, at 22–23.

to meet the labor demands of the agricultural, mining, construction, and manufacturing industries.[225] The introduction of the LPR naturalization requirement in 1929 meant that the turn to temporary foreign workers who were admitted as non-immigrants would result in a pool of laborers who would be ineligible for citizenship.[226]

2. Limited Immigration Enforcement

The end of the Bracero Program marked the return of another strategy for managing the immigrant labor paradox—limited immigration enforcement.[227] When the program ended there was an increase in the number of unauthorized migrants in the United States.[228] As sociologists Douglas S. Massey and Karen A. Pren have detailed, this increase is due in large part to the 1965 Immigration Act.[229] This significant piece of immigration reform eliminated the national origin quotas that were first adopted in 1921.[230] Therefore, this Act is often viewed as critical for creating a more just and equitable immigration system.[231] However, that narrative privileges the impact the act had on European immigrants rather than those from Mexico and other parts of the Western Hemisphere.[232] For individuals from Mexico and other parts of the Western Hemisphere the 1965 Immigration Act introduced numerical restrictions and eliminated an important pathway for foreign workers to immigrate to the United States.[233]

Three aspects of the 1965 Immigration Act changed Mexican laborers lawful access to the United States: first, the introduction of numerical restrictions; second, the failure to provide meaningful access to green cards for low-wage workers; and third, the failure to implement a robust temporary worker program.[234] While the 1965 Immigration Act eliminated the national origin quotas, it created new quotas for the Western Hemisphere.[235] The Western Hemisphere had always eluded numerical restrictions "in deference to the need for labor in southwestern agriculture and American diplomatic

225. GUTIÉRREZ, *supra* note 180, at 52; CALAVITA, *supra* note 140, at 147–49.
226. Registry Act of 1929, Pub. L. No 70-962, §§ 1–4, 45 Stat. 1512, 1513.
227. *See* Saucedo, *supra* note 14, at 306.
228. *Id.*
229. Massey & Pren, *supra* note 223.
230. *Id.* at 2–3.
231. *See id.* at 1.
232. NGAI, *supra* note 2, at 263.
233. *Id.* at 260–61.
234. *See* Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).
235. *See* Massey & Pren, *supra* note 223, at 2–3.

and trade interests with Canada and Mexico."[236] With the elimination of the national origin quotas, many liberal reformers argued that it would be inequitable to have per-country quotas for the Eastern Hemisphere but not the Western Hemisphere.[237] These advocates were successful and the 1965 Immigration Act created 20,000 per country quotas for the Eastern Hemisphere and a 120,000 quota for the entire Western Hemisphere.[238] This quota limited the number of lawful permanent residents that could be admitted each year.[239] This Western Hemisphere quota was not sufficient to provide access to the 177,000 Mexican laborers who were admitted to the United States in the last year of the Bracero Program.[240] Additionally, qualitative restrictions—like not being likely to become a public charge—would remain a challenge for laborers engaging in low-wage work.[241] Finally, the 1965 Immigration Act did not include a robust temporary worker program.[242] Growers and other agricultural employers lobbied Congress to incorporate a temporary worker program into the 1965 Immigration Act.[243] The 1952 Immigration Act included a small guest worker program—the H-2 program—and there were efforts to get the Bracero Program folded into that program.[244] However, the same interests that were against low-wage workers having access to lawful permanent residence status objected to an expansion of the H-2 temporary worker program.[245] In 1964, the Department of Labor issued regulations that "effectively exclude[ed] Braceros from the H-2 program."[246] The regulation was intended to ensure that "foreign workers will not be admitted where unemployed domestic workers are available, and in no event, will be admitted under circumstances adversely affecting domestic wage levels."[247] Employers would not be certified if they were "found to have had in his employ after the effective date of these regulations, any foreign worker when such employer knows or has reasonable grounds to believe or suspect or by reasonable inquiry could have ascertained that such foreign worker is not lawfully in the United States."[248] Then–Secretary of

236. NGAI, *supra* note 2, at 22.
237. *See* Saucedo, *supra* note 14, at 303–04.
238. Massey & Pren, *supra* note 223, at 1–2.
239. Saucedo, *supra* note 14, at 303–04.
240. Massey & Pren, *supra* note 223, at 26.
241. *See* 8 U.S.C. § 1182(a)(4)(A).
242. Saucedo, *supra* note 14, at 304.
243. *Id.* at 301–02.
244. *Id.*
245. *Id.* at 301.
246. *Id.* at 300.
247. *Id.* (quoting Certification and Use of Foreign Labor for Agricultural Employment, 29 Fed. Reg. 19,101 (Dec. 30, 1964)).
248. Saucedo, *supra* note 14, at 300.

Labor Willard Wirtz testified that the Department of Labor "did not envision using the H2 [sic] program to replace the Bracero Program," and the ultimate interpretation of the H-2 regulations were narrow and "the temporary Mexican labor pool was never fully absorbed into the H-2 program."[249]

As a result of the 1965 legislative reforms Mexican laborers who continued to work in the United States overnight went from lawfully present Braceros to unauthorized migrants without a pathway to citizenship.[250] These migrants were able to continue entering the United States and employers were able to continue to hire these migrants due to a long-standing history of limited immigration enforcement, particularly in border areas.[251] Sociologist Kitty Calavita explains that even during the Bracero Program the "Border Patrol was notoriously reluctant to apprehend and deport illegal farm workers during the harvest season or at other times of peak labor demand."[252] For example, the Chief of the Border Patrol in Tucson, Arizona explained that the El Paso District Director "issued orders each harvest season to stop apprehending illegal Mexican farm workers."[253] Calavita notes that "[t]his reluctance to detain illegal farm workers was not confined to the idiosyncrasies of regional enforcement. Instead, it seems to have been the official policy through much of the 1940s and early 1950s."[254]

This approach to enforcement was not new during the Bracero era. In the early 1920s after the World War I era temporary worker program ended, unauthorized migration from Mexico increased.[255] The creation of the Border Patrol in 1924 made unauthorized migration more difficult, which gave rise to increasing hostility by growers.[256] From the growers' perspective, the increased immigration enforcement was "needless and unjustified harassment of their workers."[257] Concerned that enthusiastic enforcement would jeopardize their labor supply, growers complained to administrative officials in

249. *Id.* at 301–02.
250. *Id.* at 306.
251. CALAVITA, *supra* note 218, at 32–33.
252. *Id.*
253. *Id.* at 33.
254. *Id.* Additionally, during the Bracero Program there were times when there were more bracero candidates than official slots. *Id.* at 32. At these times an increasing number of Mexican laborers "took matters into their own hands, crossing the border illegally." *Id.* These laborers found that they were often able to become lawful participants in the Bracero Program due to the policy of legalizing unauthorized migrants. CALAVITA, *supra* note 218, at 28. This process was referred to as "drying out the wetbacks." *Id.* For example, between 1947 and 1949, 142,200 unauthorized migrants were "legalized and contracted directly to growers," and in 1950, the number was over 96,000. *Id.* at 28–29.
255. Saucedo, *supra* note 14, at 295–96.
256. Massey & Pren, *supra* note 223, at 4.
257. REISLER, *supra* note 188, at 60.

Washington, D.C.[258] The Immigration and Naturalization Service district director for El Paso once testified that from the time he assumed the position in March 1926,

> nearly every year at cotton-chopping or cotton-picking time, the farmers would send a complaint to the Secretary of Labor . . . or to the Commissioner of Immigration, I am certain for no other purpose than to cause an investigation that would result in one of two things: Either I get word from some higher official to go easy until cotton-chopping time was over, or cotton-picking time was over; or the men who were doing the work would be so upset by the investigation that they would go easy on their own.[259]

Administrative officials used limited enforcement as a tool for managing the immigrant labor paradox. As long as these officials believed that agricultural employers needed Mexican laborers, they would "bow to grower influence and quietly relax its enforcement of immigration laws."[260] This approach was desired because even these administrative officials "opposed the permanent addition of Mexican workers to the American population" because these workers were abandoning the fields in search of better economic opportunities in factories and "it was imperative [to the Labor Department and the American Federation of Labor] that industry [factory jobs] remain the exclusive province of white Americans."[261]

Throughout the late 1960s and 1970s, the unauthorized migrant population in the United States grew.[262] In 1965, approximately 37,000 unauthorized migrants entered the United States from Mexico.[263] When the 1965 Immigration Act became effective in 1968, unauthorized migrant entries from Mexico had increased to approximately 100,000 individuals, while the number of temporary-worker entries from Mexico dropped to zero.[264] Temporary migrant admissions would remain at zero through 1976 and unauthorized migrant entries would rise to approximately 400,000 in 1974 and remain there until 1976.[265] By 2007, the unauthorized migrant population in the

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258. *Id.*

259. *Id.* It should also be noted that at time growers viewed immigration officers as an ally. *Id.* at 60 n.50. Historian Mark Reisler recounts that there were times when growers would ask "immigration officers to arrest and quickly deport their illegal Mexican workers. This occurred at the end of the season to avoid paying workers their due wages." *Id.*

260. *Id.* at 70.

261. REISLER, *supra* note 188, at 70.

262. Massey & Pren, *supra* note 223, at 4.

263. *Id.* at 27.

264. *Id.*

265. *Id.*

United States reached a high of 12.2 million individuals.[266] That figure dropped to 10.5 million in 2017.[267] In 2017, for the first time, Mexicans were less than half of the unauthorized migrant population.[268] Mexican unauthorized migration has fallen while unauthorized migration from Central America and Asia has increased.[269] The growth of the unauthorized migrant population in the United States reflects the continued desire for foreign workers and limited paths for the lawful admission of such workers combined with strategic enforcement.[270] While immigration enforcement has become much more robust and intrusive to the lives of unauthorized migrants, late twentieth-century enforcement strategies reflect an intentional response to the immigrant worker paradox.[271]

With the enactment of the immigration reforms of the 1920s, the United States became a country in which it was nearly impossible for foreign-born workers who have been—and continue to be—essential to the economic development and prosperity of the United States to become formal members of society. Until that point, low-wage foreign workers were eligible to naturalize.[272] Naturalization did not require LPR status because there was no meaningful difference between those who migrated with the intention of permanent residence and those who planned a temporary visit.[273] With the adoption of the national origin quotas came a set of admissions restrictions that not only sought to limit the permanent residence of Southern and Eastern European immigrants, but also that of low-wage foreign workers more broadly.[274] The immigration system ushered in with the 1920s reforms reflected a new strategy for prioritizing profitability in the face of growing opposition to immigrant-based precarious labor.[275] These reforms ensured that American workers

266. Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 facts about illegal immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s [http://perma.cc/QFP2-9HQ9].

267. *Id.*

268. *Id.*

269. *Id.*

270. Massey & Pren, *supra* note 223, at 5; Miriam Jordan, *8 Million People Are Working Illegally in the U.S. Here's Why That's Unlikely to Change.*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html [https://perma.cc/7JJN-BHMX].

271. *See* Massey & Pren, *supra* note 223, at 9.

272. *See* Registry Act of 1929, Pub. L. No. 70-962, § 1, 45 Stat. 1512, 1513 (repealed 1940).

273. *See id.* § 4.

274. *See* Massey & Pren, *supra* note 223, at 2–3.

275. *See, e.g.*, Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2, 42 Stat. 5, 5–6 (limiting immigration based on census percentages); Immigration Act of 1924, Pub. L.

would see a decline in low-wage foreign workers from Southern and Eastern Europe.[276] However, employers in the agricultural, mining, construction, and manufacturing industries would continue to have access to sufficient labor due to immigration law and policy that facilitated the migration of low-wage workers from Mexico.[277]

B. Ineligible for Citizenship

Noncitizens deemed undesirable have long been denied entry into the United States and simultaneously denied access to citizenship.[278] The creation of immigration restrictions is reinforced with related naturalization restrictions.[279] The adoption of national origin quotas in the 1920s created the most sweeping immigration restrictions since the Chinese Exclusion Act was adopted in 1882.[280] In both instances, the individuals who were denied entry into the United States were deemed ineligible for naturalization.[281] The Chinese Exclusion Act accomplished this goal directly through a provision stating, "no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."[282] In 1929, the Registry Act prevented noncitizens from naturalizing by refusing to accept declarations of intention "until the lawful entry for permanent residence of such alien shall have been established, and a certificate showing the date, place, and manner of his arrival shall have been issued."[283] The national origin quotas determined who would be able to enter the United States for permanent residence and this type of entry became a requirement for

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No. 68-139, § 11, 43 Stat. 153, 159–60 (establishing quotas for immigrants that may lawfully enter from both hemispheres).

276. *See* Massey & Pren, *supra* note 223, at 2.

277. *See id.* at 1.

278. Elizabeth Keyes, *Race and Immigration, Then and Now: How to Shift to Worthiness Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOWARD L.J. 899, 905–07 (2014).

279. *See* Massey & Pren, *supra* note 223, at 20.

280. *See* Immigration Act of 1924, Pub. L. No. 68-139, § 11, 43 Stat. 153, 159; Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

281. Chinese Exclusion Act, 22 Stat. at 61; Massey & Pren, *supra* note 223, at 1.

282. Chinese Exclusion Act, 22 Stat. at 61.

283. Registry Act of 1929, Pub. L. No. 70-962, § 4, 45 Stat. 1512, 1513 (repealed 1940). Beginning in 1795, applicants for naturalization had to file a declaration of intention three years prior to being naturalized. Naturalization Act of 1795, Pub. L. No. 3-20, § 1, 1 Stat. 414, 414. The declaration of intention was an oath or affirmation filed with a court stating that it was the individual's bona fide "intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject." *Id.*

naturalization.[284] Prior to the 1929 Registry Act, it did not matter whether an individual entered the United States for permanent residence or a temporary stay.[285] As long as the individual satisfied the residence, knowledge, and loyalty requirements, that person could become a citizen.[286] Beginning in 1906, naturalization applicants had to present a certificate stating the date, place, and manner of their arrival to the United States.[287] This requirement grew out of concern that applicants would perjure themselves regarding their length of residence in the United States.[288] The new requirement that applicants provide evidence of their lawful admission for permanent residence was a response to concerns that noncitizens were evading the national origin quotas, entering the United States, and becoming citizens.[289]

Since 1929, the LPR naturalization requirement has been an important tool in reinforcing immigration restrictions.[290] While the rationale for immigration restrictions has shifted since the 1920s, the United States' immigration system continues to be organized around the idea that immigration must be limited.[291] The limits today are based on family connections and employment opportunities or skills.[292] Despite the country's continued reliance upon low-wage foreign workers, these workers face significant obstacles to lawfully migrating to the United States. First, most low-wage workers are ineligible for LPR status. The Immigration and Nationality Act states that no more than 10,000 visas are available annually for unskilled workers.[293] However, those numbers are reduced by up to 5,000 per year to accommodate the provisions of the Nicaraguan and Central American Relief Act.[294] Between 2010 and 2018, an average

284. *See* Massey & Pren, *supra* note 223, at 2.

285. *See, e.g.*, Immigration Act of 1906, Pub. L. No. 59-338, § 4, 34 Stat. 596, 596–98.

286. *Id.*

287. *Id.* The 1906 Naturalization Act required commissioners of immigration to create records for each non-citizen's entry into the United States. *Id.* § 1 (recording "the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes"). Commissioners of immigration were also instructed to provide each non-citizen "a certificate of such registry." *Id.*

288. *A Bill to Establish a Bureau of Naturalization, and to Provide for a Uniform Rule for Naturalization of Aliens throughout the United States: Hearing on H.R. 9964 Before the H. Comm. on Immigr. & Naturalization*, 59th Cong. 16–17, 25 (1906).

289. *See Amendments to the 1924 Immigration Act Hearings*, *supra* note 152, at 89–90.

290. *See* Massey & Pren, *supra* note 223, at 5.

291. *See id.* at 1, 22.

292. *Id.* at 1.

293. 8 U.S.C. § 1153(b)(3)(B).

294. CARLA N. ARGUETA, CONG. RSCH. SERV., R42048, NUMERICAL LIMITS ON PERMANENT

of 3,000 foreign workers were admitted annually as lawful permanent residents in the unskilled worker category.[295] In March 2020, workers in this category have been waiting anywhere from three to twelve years to immigrate to the United States as an LPR.[296] Second, many low-skilled workers run the risk of being deemed inadmissible for likelihood of becoming a public charge.[297] Third, the more robust pathways for entry into the United States as a low-skilled worker only provide for non-immigrant status.[298] These challenges reflect the paradox around low-wage foreign workers.

The United States has a system that denies most low-wage foreign workers access to *de jure* membership as part of a great compromise between American industry and American workers. This compromise allows industry to have access to the desired low-wage foreign workers, but the manner in which it does so prohibits the workers from becoming *de jure* members of American society. In addition to the legal rules and policies governing immigration and citizenship, low-wage foreign workers are framed within public discourse as economic, public safety, and cultural threats.[299] This framing justifies low-wage foreign workers' exclusion from *de jure* membership. In James Baldwin's 1963 essay "A Talk to Teachers," he explains that

> [B]lack men were brought here as a source of cheap labor. They were indispensable to the economy. In order to justify the fact that men were treated as though they were animals, the white republic had to brainwash itself into believing that they were, indeed, animals, and deserved to be treated like animals.[300]

Baldwin's words adeptly describe not only the United States' approach to enslaved labor, but also the country's approach to low-wage foreign workers from the Western Hemisphere, particularly Mexico.

EMPLOYMENT-BASED IMMIGRATION: ANALYSIS OF THE PER-COUNTRY CEILINGS 3 (2016); DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *supra* note 50, at 4.

295. *See supra* notes 59–60 and accompanying text.

296. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *supra* note 50, at 4.

297. *See* 8 U.S.C. § 1182(4)(a)(i)(IV).

298. *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 7, 2011), https://www.uscis.gov/working-in-the-united-states/temporary-nonimmigrant-workers [http://perma.cc/D3JN-2B5V].

299. Massey & Pren, *supra* note 223, at 7–8.

300. JAMES BALDWIN, *A Talk to Teachers*, *in* COLLECTED ESSAYS 678, 681 (1998); *see also* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 9 (2017) ("[P]owerful and brilliant men and women have produced racist ideas in order to justify the racist policies of their era, in order to redirect the blame for their era's racial disparities away from those policies and onto Black people."); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1112 (1998).

CONCLUSION

Citizenship law provides important information about the boundaries of membership in democratic societies.[301] The continued use of the LPR naturalization requirement combined with few opportunities for unauthorized migrants to regularize their status reveals a paradox.[302] Low-wage foreign workers are critical for the economic growth and development of American society, yet they are viewed as a threat to American society and denied opportunities to be recognized as formal members of American society.[303] The United States' long-standing response to the immigrant labor paradox is unjust and untenable. The LPR naturalization requirement is an attempt to reinforce immigration restrictions.[304] Current immigration law has few opportunities for low-wage foreign workers to enter the United States as lawful permanent residents, yet numerous industries rely on these workers.[305] Consequently, the workers overwhelmingly enter the United States without authorization or overstay temporary non-immigrant visas.[306] The failure to acknowledge the value that these workers provide to American society—economically, socially, and politically—is a threat to democratic governance. It is no longer possible to view unauthorized migrants as a temporary population in the United States. The majority of unauthorized migrants have lived in the United States for at least ten years and many have children and spouses who are U.S. citizens.[307] Their connections to American society are significant. A state that claims to be a democracy derives its power "from the consent of the governed."[308] The United States' current approach to citizenship denies many of the governed the opportunity to provide their consent. A *jus nexi* approach to citizenship allows our country to more closely realize this hallmark aspect of democracy.

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301. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 28–29 (2008) ("[T]he question of citizenship's subjects is consequently the question of who it is that will be counted as (usually national) political or social members.").

302. *See* Massey & Pren, *supra* note 223, at 5.

303. *See id.* at 7–8; CALAVITA, *supra* note 140, at 138–41; CHAVEZ, *supra* note 175, at 23–47; RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 80–81 (2006).

304. *See* Massey & Pren, *supra* note 223, at 5.

305. *See* Jeffrey S. Passel & D'Vera Cohn, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Falls Since 2007*, PEW RSCH. CTR. (Mar. 26, 2015), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2015/03/2015-03-26_unauthorized-immigrants-passel-testimony_REPORT.pdf [https://perma.cc/73U7-GXSE].

306. Massey & Pren, *supra* note 223, at 2–5.

307. Jeffrey S. Passel & D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017 [https://perma.cc/9NA5-HAZM].

308. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).