
**A NATION OF WHITE IMMIGRANTS:
STATE AND FEDERAL RACIAL PREFERENCES
FOR WHITE NONCITIZENS**

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ABSTRACT

U.S. law, of course, drew many lines based on race from the earliest days of slavery and colonialism. It is also well known that the government discriminated against noncitizens in favor of citizens in areas such as licensing and land ownership. This Article proposes that during the long Jim Crow era, there was an additional body of racially discriminatory state and federal law that discriminated against noncitizens of particular disfavored races. This body of law has not been fully recognized or described. Because the federal government and many state governments had policies encouraging white immigration, they sought methods to discriminate against nonwhite noncitizens, primarily Asians, without also burdening white noncitizens. The “declaration of intention” to naturalize, a required part of the naturalization process, was a key device used to effectuate this policy. Between 1790 and 1952, eligibility for naturalization was racially restricted, such that only members of preferred races could file a declaration of intent. Therefore, offering benefits to so-called “declarants” intentionally and effectively favored white immigrants. Hundreds of state and federal laws offered benefits to declarants with respect to a wide range of opportunities, including voting, land ownership, public benefits, military service, public employment, government contracting, and occupational licensing. This combination of state and federal law offered white immigrants in many parts of the United States an opportunity for substantial equality with white citizens from the moment they arrived in the United States, while it simultaneously restricted competition from—and maintained the subordinated status of—noncitizens of color. This body of law should be considered when evaluating the history of racial discrimination in this country and its present effects.

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INTRODUCTION

This Article describes a previously undeveloped aspect of discrimination against free people of color: the bodies of state and federal law providing a range of preferences for white noncitizens. That is, in addition to governmental discrimination based on race (such as school segregation or anti-miscegenation laws) and alienage (such as denying a benefit to all noncitizens), and in addition to federal racial discrimination with respect to immigration and naturalization (such as the Chinese Exclusion Act), there was a system of domestic discrimination apart from immigration that distinguished among foreign-born noncitizens based on race.¹ This system which primarily targeted Asian people was pervasive, particularly in the West, and afforded advantages and opportunities with regard to civil rights, land ownership, employment, and public benefits, among others. However, its contours have not been fully explored.²

A key mechanism of preferring white noncitizens was the now-obscure category of “declarant;” a declarant was a noncitizen who had filed a declaration of intent to naturalize. From 1795 until 1952, filing a declaration of intent was generally a prerequisite to naturalization.³ Sometimes called “first papers,” the declaration of intent changed its filer’s status to “declarant alien”⁴ or “intending

¹ Of course, the law regarded many native-born Americans as noncitizens. See *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that member of Indigenous tribe born in tribal territory within United States was not birthright citizen); *Dred Scott v. Sandford*, 60 U.S. 393, 404-05 (1857) (holding that descendants from slaves “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States”); see generally Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 *CARDOZO L. REV.* 1185 (2016).

² One reason for this has been the difficulty in the past of accessing law-related materials across the country below the level of state laws. Now, thanks to databases such as HeinOnline and Gale’s *The Making of Modern Law*, millions of pages of local ordinances, state session laws, proceedings of constitutional conventions, and other revealing legal materials are available on every laptop, albeit for a fee. HEINONLINE, <https://home.heinonline.org/> [<https://perma.cc/NL4A-2BSS>] (last visited Aug. 14, 2020); *The Making of Modern Law: Legal History Since the 17th Century*, GALE, <https://www.gale.com/primary-sources/making-of-modern-law> [<https://perma.cc/4FU6-QV4Z>] (last visited Aug. 14, 2020). Another resource changing the nature of legal-historical research is *Chronicling America*, LIBRARY OF CONGRESS, <https://chroniclingamerica.loc.gov/> [<https://perma.cc/QZ4K-PS7F>] (last visited Aug. 14, 2020), which is the historical newspaper database of the Library of Congress.

³ See generally *History of the Declaration of Intention (1785-1956)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/historians-mailbox/history-declaration-intention-1795-1956> [<https://perma.cc/9CKA-JUPL>] (last updated Jan. 6, 2020) (describing history of declaration of intention, which is “an American invention and unique aspect of our nation’s naturalization history”).

⁴ See Maximilian Koessler, *Rights and Duties of Declarant Aliens*, 91 *U. PA. L. REV.* 321,

citizen.”⁵ The Supreme Court explained declarants’ place in the hierarchy of status: “Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.”⁶

Declarant status operated as a racial classification because, from 1790 to 1952, the right to naturalize was restricted by race; initially, naturalization was limited to “free white persons.”⁷ Declarants, therefore, were necessarily members of a favored race. Declarant status was systematic; declarants enjoyed a range of advantages denied to nondeclarants, including voting, working, obtaining licenses, engaging in public employment, and receiving public benefits. The pervasiveness of the status is reflected by the fact that, although the naturalization process no longer requires a declaration of intent and the Supreme Court has held state discrimination against nondeclarants to be unconstitutional,⁸ scores of provisions advantaging declarants remain on the books.⁹

To be sure, the declaration of intent is hardly unknown; it has been the subject of a number of Supreme Court decisions.¹⁰ Among scholars, Professor Hiroshi Motomura in particular has argued that white immigrants were historically treated as “Americans in waiting” because of the benefits granted under the declaration of intent and that all noncitizens, without regard to race, should be treated this way again.¹¹ Scholars have also explored the history of declarant

322-23 (1942); Nathan Wolfman, *Status of a Foreigner Who Has Declared His Intention of Becoming a Citizen of the United States*, 41 AM. L. REV. 498, 499 (1907).

⁵ See Brian C. Riopelle, Note, *Revitalization of the “Intending Citizen” Status: Rights of Declarant Aliens After IRCA*, 28 VA. J. INT’L L. 987, 988 (1988).

⁶ *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

⁷ See *infra* notes 30-31 and accompanying text.

⁸ See *infra* notes 74-76 and accompanying text.

⁹ See *infra* notes 81, 109, 147-50, 165-69, 200, 203 and accompanying text.

¹⁰ See *infra* notes 63-67 and accompanying text.

¹¹ See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (describing how concept of Americans in Waiting arose, why this undermines the idea of a “nation of immigrants,” and why lawful immigrants should once again be treated as Americans in waiting); HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 100-01 (2014); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 115-16 (2014) (discussing rights of declarants); Hiroshi Motomura, *Brown v. Board of Education, Immigrants, and the Meaning of Equality*, 49 N.Y.L. SCH. L. REV. 1145, 1152 (2005) (“For over one hundred years ending in the 1920s, the line that really mattered in immigration and citizenship law was not the line between citizens and noncitizens. It was the line between citizens and intending citizens, who were given citizen-like rights, on the one hand, and everyone else on the other.”); Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 369 (2012) [hereinafter Motomura, *Who Belongs*].

voting.¹² But there has been no systematic assessment of the range and scope of the benefits granted to declarants or of their connection to other forms of racial discrimination among noncitizens.¹³

Race was used to classify noncitizens in two ways in addition to the declaration of intent. First, many laws explicitly discriminated against noncitizens of particular races by name.¹⁴ Second, laws sometimes offered benefits to those noncitizens who were racially eligible for citizenship under the naturalization laws, even if they had not filed a declaration of intention.¹⁵ Explicit racial classifications, restrictions to declarants, and limitations to eligible noncitizens were treated as substitutes or alternative legislative solutions to the same problem.

There were several reasons for this discrimination. One was simply the traditional policy of segregation that reserved the best opportunities for white people.¹⁶ The second was as an aspect of migration and development policy. As

¹² See, e.g., Gerald L. Neuman, "We Are the People": *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 307 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1393-94 (1993).

¹³ For example, Pauli Murray's magisterial 1951 compilation of Jim Crow laws states that it made no effort "to exhaust state laws which apply to aliens" but focused "upon those statutes which are directed primarily against aliens of certain racial origins, particularly the alien land laws of some western and southwestern states." *States' Laws on Race and Color* 18-19 (Pauli Murray ed., 1951). Additionally, Milton R. Konvitz's *The Alien and the Asiatic in American Law* has been cited five times by the Supreme Court, as befits its pathbreaking status. See *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 603 (1976); *Perez v. Brownell*, 356 U.S. 44, 64 n.5 (1958) (Warren, C.J., dissenting) (overruled in part by *Afroyim v. Rusk*, 387 U.S. 53 (1967)); *Oyama v. California*, 332 U.S. 633, 651 n.1 (1948) (Murphy, J., concurring); *In re Griffiths*, 413 U.S. 717, 719 n.5 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 644 (1973); see also MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946). Justice Powell wrote that the book captures "[t]he full scale of restrictions imposed on the work opportunities of aliens in 1946." *In re Griffiths*, 413 U.S. at 719 n.5. Neither book identified the race-based system described here.

¹⁴ See *infra* notes 97-102, 122-29, 178-95 and accompanying text.

¹⁵ As the Court explained:

Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammelled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not.

Terrace v. Thompson, 263 U.S. 197, 220 (1923) (footnote omitted).

¹⁶ A number of important studies explain how benefits were selectively offered to whites in later periods. See generally, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2005) (describing how key programs passed during New Deal and Fair Deal eras against Black people and other nonwhites actually widened racial wealth disparities);

Justice Grier wrote in 1849, “[i]t is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation.”¹⁷ Carrying out this policy, governments structured benefits to encourage some settlers and dissuade others.¹⁸

The existence of this structure of racial discrimination among noncitizens serves as a response to arguments that white ethnic immigrants were not responsible for and did not benefit from domestic racial discrimination.¹⁹ As Nathan Glazer wrote in *Affirmative Discrimination*,

[white immigrants] came to a country which provided them with less benefits than it now provides the protected groups. There is little reason for them to feel they should bear the burden of the redress of a past in which they had no or little part, or to assist those who presently receive more assistance than they did. We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others.²⁰

Similarly, Justice Powell’s opinion in *Regents of the University of California v. Bakke*²¹ contended that “the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups.”²² After the Court rendered its decision, Justice Scalia, then a professor, argued:

RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing government-imposed residential segregation through racial zoning, public housing, subsidies, tax exemptions, and support for residential segregation); see also, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 124-26 (2011).

¹⁷ The Passenger Cases, 48 U.S. (7 How.) 283, 461 (1849). See generally RANA, *supra* note 11 (tracing American history and political tradition from colonial period to modern times by focusing on notions of empire and citizenship).

¹⁸ PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 20 (1st paperback ed. 2019) (noting that throughout the period from 1783 to 1912, “prominent political leaders championed the argument that to be an American meant to be white”); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1401 (2009).

¹⁹ See, e.g., Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1418 (1993).

²⁰ NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 201 (1975).

²¹ 438 U.S. 265 (1978).

²² *Id.* at 292 (footnotes omitted). Notably, of the two examples Justice Powell used to describe the breadth of the Equal Protection Clause involving white people, one was a

Not only had [his father] never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history—Italians, Jews, Irish, Poles—who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority.²³

One fundamental problem with these arguments is that the network of traditional Jim Crow discrimination applicable to nonwhites—disenfranchisement, anti-miscegenation laws, residence restrictions, school segregation, and inability to naturalize—did not apply to any white groups. There is no question that some white immigrant groups, including Jews, Italians, Irish, and others, faced social and sometimes legal discrimination.²⁴ This racial bias turned into a bigoted policy discriminating against Southern and Eastern European immigrants.²⁵ However, there is also no question that these immigrants had the legal status of being white and the benefits that came along with it.²⁶

hypothetical—the exclusion from jury service of “naturalized Celtic Irishmen” in *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)—and the other a misstatement—the discrimination against an Austrian immigrant in *Truax v. Raich*, 239 U.S. 33 (1915), which was based on lack of U.S. citizenship, not race, ethnicity, or national origin. *See id.* at 43.

²³ Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race.”* 1979 WASH. U. L.Q. 147, 152.

²⁴ *See, e.g.*, Felix S. Cohen, 57 YALE L.J. 1141, 1144 (1948) (reviewing PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947)).

²⁵ *See* KATHERINE BENTON-COHEN, INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY 87-97 (2018). The consequences of this policy for European Jews was particularly horrifying. *See generally* DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945, at 61-103 (1984) (discussing how racist policies and Roosevelt's refusal to move quickly failed to rescue or assist European Jews).

²⁶ *See* Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890-1945*, 118 AM. J. SOC. 327, 364 (2012) (“[W]herever white was a meaningful category, [Southern and Eastern Europeans] were almost always included within it, even if they were simultaneously positioned below [Northern and Western Europeans].”). Put another way, the legitimate complaint of Southern and Eastern Europeans was that they were treated worse than the most-favored white people, albeit generally based on nongovernmental action which the Supreme Court held, correctly or not, is beyond the scope of the Constitution's prohibitions. *See id.* at 342-44. The legitimate complaint of people of color was that they were treated worse than the least-favored white people by laws now recognized to be unconstitutional. *See, e.g., id.* at 341 (racial zoning); *see also* MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 201-02, 213-22 (1st paperback ed. 1999) (describing how

A second compelling rebuttal comes from scholars, like Professor Adam Winkler, who point out that

whites, especially the immigrant groups cited by Professor Scalia, did in fact benefit from discrimination in employment opportunities by not having to compete with blacks, who were often excluded from labor pools in many industries both north and south of the Mason-Dixon Line. On another level, whites are advantaged by not having a stigmatized racial identity that they must confront daily in a hostile world.²⁷

This Article adds a third response: Examination of laws that classify noncitizens by declarant status, race, and eligibility for citizenship shows that the federal government and the states offered benefits to white people, citizen and noncitizen alike. From the very instant they stepped on U.S. soil until 1952, all white immigrants of whatever nationality or ethnicity, by positive law rather than social practice, enjoyed a range of special opportunities—solely because they were white.²⁸

Part I briefly outlines the history of racial discrimination in immigration and naturalization. It also discusses classifications involving declarants and aliens ineligible for citizenship. Part II addresses suffrage. It begins by explaining that Congress intentionally structured the Fifteenth Amendment to permit racial discrimination among noncitizens. It then describes provisions allowing white male noncitizens to vote. Part III addresses land ownership. It begins by explaining that the Reconstruction-era Congresses deliberately excluded land

Caucasian race was “manufacture[d]” to unify white people as singular race and assert superiority over all nonwhites).

²⁷ Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 952 n.143 (1995) (citations omitted); see also, e.g., Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1026 (2007); Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 84-86, 91-96 (1986) (recognizing that Supreme Court treats affirmative action “as penance for particular sins of discrimination,” thereby “reject[ing] the notion that all must be equally absolved. Only some – those who have themselves been guilty of race discrimination – may be permitted the *mea culpa* of voluntary affirmative action, or be prescribed such measures as penance by a court”); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1528-29 (1998) (noting that “rhetorical distancing” between individuals and past acts of racism, as articulated by Scalia, causes “race and racism [to] become distanced from the present circumstances of the descendant of the White ethnic immigrant”).

²⁸ This is not to say that all white immigrants either exploited or desired their race-based opportunities. It is also not necessarily the case that racial classifications of noncitizens ultimately benefitted white people as a whole; presumably, national economic productivity was reduced by racial classifications, as more productive people were excluded from opportunities in favor of less productive people. Yet, economically irrational classifications are not always objectionable to individuals who benefit from them.

ownership from the civil rights and anti-discrimination laws applicable to noncitizens. It then describes provisions allowing white noncitizens to own land, and the Homestead Act and other federal statutes allowing white noncitizens to obtain federal land. Part IV addresses discrimination in public works and contracting. Part V addresses discrimination in private employment, particularly through government licensing, government permitting, and in union membership. Lastly, Part VI describes racially restricted avenues for relief for nonwhite noncitizens facing deportation from the United States.

I. RACIAL DISCRIMINATION IN IMMIGRATION AND NATURALIZATION

Federal discrimination among noncitizens was the foundation for state discrimination among noncitizens. Beginning with the Naturalization Act of 1790²⁹ and ending in 1952, federal law racially restricted the right of foreign-born immigrants to become citizens through naturalization.³⁰ Starting in 1790, “free white persons” were granted the privilege to naturalize.³¹ Persons of African nativity and descent were allowed to naturalize in 1870,³² those of races

²⁹ Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

³⁰ See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 35 (10th anniversary ed. 2006); D.O. McGovney, *Race Discrimination in Naturalization: Part IV*, 8 IOWA L. BULL. 211, 213-16 (1922). See generally KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000* (2015).

³¹ 1 Stat. 103. As one committee member reasoned in consideration of a Mexican citizen’s application for U.S. citizenship:

The fear of Mongolian citizenship arose from considerations of the highest national policy. That race was not only alien in color, but was, in all things that render possible a sound citizenship, the very antipodes of the Anglo-Saxon or even native American races. His total inability to assimilate with our people in their laws, customs, institutions, or religion, or even to suffer his acquisitions to go into the general store of national prosperity; his idol worship; his mode of living; his very vices; and, lastly, the countless myriads who stood hovering on the shores of the Chinese waters, ready and anxious to swarm upon us, like the Goths and Huns upon ancient Rome,—were a menace that it would have been unpatriotic and unwise in the extreme to have disregarded; and yet, when the word “white” was first inserted, no such danger confronted us, nor was anticipated, and it was solely intended to meet the then solely existing danger or evil of African citizenship, possibly of the numerous tribes of Indians in their wild or tribal state.

Brief of T.M. Paschal at 340, *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897).

³² Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256. However, laws discouraged African migration in a number of ways. See generally Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965*, at 60 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

indigenous to the Western Hemisphere in 1940,³³ and Chinese in 1943.³⁴ Only in 1952 did U.S. naturalization law become race-neutral.³⁵ At the height of racial restriction, a unanimous Court described the policy as “a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions.”³⁶

Like naturalization law, immigration law also drew lines between races, beginning with the Chinese Exclusion Act of 1882.³⁷ Chinese exclusion quickly turned into Asian exclusion. As Japanese people began to immigrate, their entry was restricted by the Gentlemen’s Agreement of 1907.³⁸ In 1917, after Asian Indians began to immigrate, Congress drew a line around continental Asia, deemed the Asiatic Barred Zone, and excluded immigrants from anywhere in the world whose race traced to the Zone.³⁹

Only four years later, in 1921, numerical limitations were placed on non-Asian immigration in the form of a national origins quota system, which limited immigration to “3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.”⁴⁰ In effect until 1965, this quota system discriminated against even white immigrants who were Jewish, Catholic, Southern European, and Eastern European by awarding a disproportionate number of visas to natives of Germany, Great Britain, and Ireland, while natives of Greece, Italy, Poland,

³³ Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137, 1140, *repealed by* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified at as amended in scattered sections of 8 U.S.C. (2018)). Note that, standing alone, the naturalization statute does not reflect the complexity of the citizenship status of Indigenous tribal members, who often received citizenship by treaty or specific statute prior to the Snyder Act—also known as the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253—which granted citizenship to all U.S.-born Indigenous people who did not already enjoy it.

³⁴ Chinese Exclusion Repeal Act, ch. 344, § 3, 57 Stat. 600, 601 (1943).

³⁵ § 311, 66 Stat. 163, 239 (“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race . . .”).

³⁶ *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

³⁷ Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 59 (1882) (repealed 1943) (suspending immigration of Chinese laborers for ten years). *See generally* BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2018).

³⁸ *See* Paul Finkelman, *Coping with a New “Yellow Peril”: Japanese Immigration, the Gentlemen’s Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409, 1445-46 (2015). Although there is no complete, formal text of the Gentlemen’s Agreement, early articulations can be found in correspondence between government officials. *See id.* at 1410 n.3.

³⁹ Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-76 (repealed 1952).

⁴⁰ Emergency Quota Act of 1921, ch. 8, 42 Stat. 5.

Turkey, and other disfavored countries were awarded far fewer.⁴¹ In 1965, Congress retired the quota system and eliminated the remaining aspects of Asian exclusion.⁴²

In the Immigration Act of 1924, Congress linked immigration to the ability to naturalize by prohibiting “alien[s] ineligible to citizenship” from entering the United States as immigrants.⁴³ Ineligible status had nothing to do with whether a particular individual met the requirements for naturalization; if it had, almost no one would have been allowed to immigrate, as few prospective Americans seeking entry for the first time had, for example, already filed declarations of intent to naturalize in U.S. courts or lived in the United States for five years.⁴⁴ Instead, as the Supreme Court explained, “[g]enerally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not.”⁴⁵

The Supreme Court upheld state borrowing of federal racial immigration classifications to carry out state discrimination. For example, in *Porterfield v. Webb*⁴⁶ in 1923, the Court upheld a state prohibition on racially ineligible aliens owning land.⁴⁷ Some scholars, including Chester G. Vernier, have supported

⁴¹ See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279-80 (1996); see also, e.g., BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1939, at 103 tbl.104 (1940).

⁴² Chin, *supra* note 41, at 298 (“The law’s revolutionary feature was its race-neutrality: For the first time since the United States started regulating immigration, race was not a factor.”). All of this history, as well as other evidence of federal complicity with state Jim Crow laws, see, e.g., Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1367 (2011), calls into question Justice Scalia’s observation that the “struggle for racial justice has historically been a struggle by the national society against oppression in the individual States.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring in the judgment); see also *id.* at 523 (“What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level.”).

⁴³ Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (repealed 1952). See generally A. Warner Parker, *The Ineligible to Citizenship Provisions of the Immigration Act of 1924*, 19 AM. J. INT’L L. 23 (1925). Philip Jessup wrote, possibly ironically, that the law raised “the pleasing possibility of Nordic supremacy.” Philip C. Jessup, *Some Phases of the Administrative and Judicial Interpretation of the Immigration Act of 1924*, 35 YALE L.J. 705, 705 (1926).

⁴⁴ See Immigration—Admission of Pacifists, 39 Op. Att’y Gen. 509, 513 (1940); Immigration—Citizenship—Deportation—Alien Woman Married to an Am. Citizen, 27 Op. Att’y Gen. 507, 515 (1909).

⁴⁵ *Terrace v. Thompson*, 263 U.S. 197, 220 (1923); see also *Hidemitsu Toyota v. United States*, 268 U.S. 402, 412 (1925).

⁴⁶ 263 U.S. 225 (1923).

⁴⁷ *Id.* at 233 (“In the matter of classification, the States have wide discretion. Each has its own problems, depending on circumstances existing there. . . . We cannot say that the failure

these laws, reasoning: “The prospect of having a large part of the land in the particular jurisdiction acquired and held by persons who do not owe, who perhaps can never owe, any true allegiance to the United States or to the state is not an inviting one.”⁴⁸

However, in 1948, at the dawn of a new constitutional era, the Court in *Takahashi v. Fish & Game Commission*⁴⁹ struck down a California prohibition on fishing in public waters by ineligible aliens owning land, explaining:

It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.⁵⁰

After *Takahashi*, several state supreme courts struck down their prohibitions on ineligible noncitizens owning land.⁵¹ Congress then rendered the category obsolete in 1952 by making all races eligible to naturalize.⁵²

While ineligible aliens were disadvantaged compared to the average noncitizen, another class—declarants—were superior. Although a declarant was clearly not a full citizen of the United States,⁵³ federal laws sometimes treated them as U.S. citizens for particular purposes,⁵⁴ and, for a time, some state laws treated them as state citizens.⁵⁵

of the California Legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable.”).

⁴⁸ 5 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1937)*, at 338 (1938).

⁴⁹ 334 U.S. 410 (1948).

⁵⁰ *Id.* at 418-19.

⁵¹ See *Sei Fujii v. State*, 242 P.2d 617, 630 (Cal. 1952) (in bank); *State v. Oakland*, 287 P.2d 39, 42 (Mont. 1955); *Kenji Namba v. McCourt*, 204 P.2d 569, 583 (Or. 1949).

⁵² Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (2018)).

⁵³ See sources cited *supra* note 4. It was settled that “[t]he fact that the alien has declared his intention to become a citizen does not affect the power of Congress to order deportation.” *Guimond v. Howes*, 9 F.2d 412, 414 (D. Me. 1925) (citing *United States v. Uhl*, 211 F. 628 (2d Cir. 1914)); see also *United States ex rel. Claussen v. Day*, 279 U.S. 398, 401 (1929) (upholding deportation order because noncitizen’s “declared purpose to naturalize does not serve him here as he had not become a citizen”).

⁵⁴ *Citizenship—Seamen on Am. Vessels Engaged in the Ocean Mail Serv.*, 36 Op. Att’y Gen. 1, 3 (1929) (opining that federal maritime law treated declarants as citizens).

⁵⁵ See, e.g., *McLendon v. State*, 60 So. 392, 393 (Ala. 1912) (“Section 2 of the Bill of Rights in the Constitution of 1875 provided: ‘That all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become

The declaration was not a subjective statement or informal promise; it was a court filing.⁵⁶ Because declarations of intent were preliminary steps in a judicial action, courts developed a jurisprudence for determining when declarations would be void.⁵⁷ Accordingly, as one commentator explained, an “application may be denied because of the applicant’s illegal entry, race, or other circumstance relevant as a ground of exclusion.”⁵⁸ The Supreme Court⁵⁹ and other courts⁶⁰ explained that a declaration of intention was void if it somehow

citizens of the United States, are hereby declared citizens of the state of Alabama, possessing equal civil and political rights.” (quoting ALA. CONST. art. I, § 2 (1875)); *State ex rel. Leche v. Fowler*, 6 So. 602, 602-03 (La. 1889) (holding that declarant was state citizen eligible to hold office because he was allowed to vote); *Abrigo v. State*, 15 S.W. 408, 410 (Tex. App. 1890) (“[I]f the intention to become a citizen has been declared in due form, and the other conditions of age, residence within the state and voting district for the proper length of time, are found to exist, the individual thereby becomes, not only a qualified elector, but he is a citizen also who, in contemplation of law, is also qualified as a juror.”).

⁵⁶ Thus, criminal liability attached to filing a declaration without an actual intent to naturalize. *See, e.g., Soininen v. United States*, 279 F. 419, 419-20 (9th Cir. 1922). Note, however, that sometimes an informal intention, independent of legal eligibility or process, was held sufficient for a particular state law purpose. *See, e.g., In re Park*, 484 P.2d 690, 696 (Alaska 1971).

⁵⁷ *See, e.g., In re Pitto*, 293 F. 200, 200 (D. Or. 1923) (holding that declaration is void unless declarant has bona fide “intention to become a citizen of the United States”); *In re Silberschutz*, 269 F. 398, 399 (E.D. Mo. 1920) (holding that “declaration of intention . . . was not made in good faith . . . [because petitioner] asserted and claimed exemption from induction into the military forces of the United States of America”); *In re Cameron*, 165 F. 112, 112 (E.D. Wash. 1908) (concluding that, “though it was bona fide his intention to become a citizen at the time he made it,” voting in his home country “raises a conclusive presumption of the abandonment of that intention”); *State ex rel. Tanner v. Rychen*, 193 P. 220, 221 (Wash. 1920) (“[T]he trial court was fully warranted in concluding that appellant did not in good faith declare his intention to become a citizen of the United States.”); *State ex rel. Tanner v. Staeheli*, 192 P. 991, 993 (Wash. 1920) (finding respondent’s declaration was not made in good faith because “in the year 1917, . . . he immediately discovered that he was an alien and claimed his exemption from military service because of that fact. Then after the state brought this action he filed his declaration of intention to become a citizen”).

⁵⁸ Koessler, *supra* note 4, at 321; *see also* J. Allen Douglas, *The “Priceless Possession” of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930*, 43 DUQ. L. REV. 369, 389 n.45 (2005) (noting that “the form annexed for declaration of intent to be naturalized as a U.S. citizen required the applicant to state his color as well as his complexion”) (citing *United States v. Balsara*, 180 F. 694, 697 (2d Cir. 1910)).

⁵⁹ *See Porterfield v. Webb*, 263 U.S. 225, 233 (1923).

⁶⁰ At the 1873 Ohio Constitutional Convention, several delegates opposed declarant suffrage, arguing it would enfranchise Asians who could file a declaration of intent even if they could not ultimately naturalize. 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 1906 (1874) (remarks of Mr. Tuttle) (“[I]t was suggested that the fact that the declaration of intention must be in conformity to the law, and that prevents the Chinaman from becoming a voter. I say not.”); *id.* (remarks of Mr.

had been obtained by a person racially ineligible for naturalization.⁶¹ Similarly, Department of Labor regulations governing the naturalization process provided that “[c]lerks of courts shall not receive declarations of intention (Form 2202) or file petitions for naturalization (Form 2204) from other aliens than white persons or persons of African nativity or of African descent.”⁶²

The operation and effect of the declaration of intention was regularly the subject of Supreme Court decisions regarding naturalization⁶³ and other incidents of declarant status.⁶⁴ A declaration played a role in an 1892 Supreme

Campbell) (“[A]lthough, under the naturalization laws, the Chinese, Japanese, and others can never become citizens . . . [Under the declarant voting proposal] then the Chinaman, then the Japanese, then the Ashantee, and then everybody else who is a man on the face of the earth, who can get here to declare his intention, does become a sovereign with a right to vote . . .”). Courts, however, uniformly invalidated declarations by racially ineligible persons. *See, e.g.,* Terrace v. Thompson, 274 F. 841, 843 (W.D. Wash. 1921); *In re O’Sullivan*, 267 F. 230, 230 (D. Mont. 1920); *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890), *abrogated by* 344 P.3d 288 (Cal. 2015); *De Cano v. State*, 110 P.2d 627, 632 (Wash. 1941); Wash. Att’y Gen. Op. No. 364 (1908) (declaring declaration of intent issued to Japanese person void); *see also* State *ex rel.* Faris v. Hatch, 15 Nev. 304, 307 (1880) (detailing that if state statute at hand provided “that only citizens of the United States, or those who have declared their intention to become such, may purchase any lands, or receive patents therefor, from the state, it would not be claimed that an assignee, who is a Chinaman, could demand and receive a patent”); VERNIER, *supra* note 48, at 309.

⁶¹ *See* Motomura, *Who Belongs*, *supra* note 11, at 369; Riopelle, *supra* note 5, at 990. However, the racial quality of the declaration was not always understood. For example, Professor Dudley McGovney, a pioneering scholar of race, claimed that a law limiting land ownership to declarants “merely made a dispensation in favor of near-citizens, giving them the rights of citizens in landholding. It extended citizen rights to those aliens, regardless of race or national origin, who had ‘in good faith’ made declarations of intention to become citizens.” Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7, 42 (1947).

⁶² U.S. DEP’T OF LABOR, BUREAU OF NATURALIZATION, NATURALIZATION LAWS AND REGULATIONS § 21 (1914).

⁶³ *See, e.g.,* United States v. Menasche, 348 U.S. 528, 539 (1955) (holding that naturalization requirements created in Immigration and Nationality Act of 1952 were not applicable to person who previously filed declaration); United States v. Manzi, 276 U.S. 463, 467 (1928) (deciding that widow could not naturalize based on husband’s stale declaration); United States v. Morena, 245 U.S. 392, 397 (1918) (holding that 1906 statute requiring naturalization petition within seven years of declaration did not apply retroactively).

⁶⁴ *See, e.g.,* Lowe v. Dickson, 274 U.S. 23, 28 (1927) (“So, where an alien has made a public land entry, his subsequent naturalization or declaration of intention to become a citizen will, in the absence of adverse claims, relate back and confirm the entry.” (citing Bogan v. Edinburgh Am. Land Mortg. Co., 63 F. 192, 198 (8th Cir. 1894))). In *Manuel v. Wulff*, 152 U.S. 505, 511 (1894), the Court applied the same rule in the case of a purchase of a mining claim by an alien who became a citizen pending adverse proceedings. *But see, e.g.,* Yerke v. United States, 173 U.S. 439, 441-42 (1899) (rejecting this line of authority for claimant seeking compensation for “Indian depredations”). Also, the Pennsylvania Alien Registration

Court case holding that James E. Boyd, though foreign-born and unnaturalized himself, was a U.S. citizen and therefore eligible to serve as Governor of Nebraska.⁶⁵ The Court relied on the fact that Boyd's father had filed a declaration when Boyd was a minor, even though there was no record of the father's actual naturalization.⁶⁶ The Court found that as the *child* of a declarant, though not a declarant or naturalized citizen himself, Governor Boyd was a Nebraska citizen and thus became a U.S. citizen upon Nebraska's admission to the Union in 1867.⁶⁷

It is clear that the declarant category was consciously deployed to effectuate racial discrimination.⁶⁸ However, in the era when the Court was less skeptical about racial and citizenship classifications than it is now,⁶⁹ states were free to discriminate against nondeclarants. In the unanimous 1923 decision of *Terrace v. Thompson*,⁷⁰ the Court upheld the power of Washington State to deny land ownership to noncitizen nondeclarants⁷¹:

Act of 1939, invalidated by the Supreme Court due to preemption by the Federal Alien Registration Act of 1940, contained an exception for declarants. *Davidowitz v. Hines*, 30 F. Supp. 470, 472 n.2 (M.D. Pa. 1939), *aff'd*, 312 U.S. 52 (1941). In one famous historical incident, the United States engaged in an armed hostility to rescue a declarant crewmember on a U.S. ship:

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with.

In re Neagle, 135 U.S. 1, 64 (1890).

⁶⁵ *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 181-82 (1892).

⁶⁶ *Id.* at 177-79.

⁶⁷ *Id.* at 179.

⁶⁸ *See, e.g.*, 21 CONG. REC. 3159 (1890) (statement of Rep. Lodge) (discussing proposal restricting enlistment in the Navy to citizens and declarant, noting specifically that it would "prevent absolutely the employment of Chinamen on American men-of-war"); LUCILE EAVES, A HISTORY OF CALIFORNIA LABOR LEGISLATION 113 (1910).

⁶⁹ *Contra Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("[T]he Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939))); *Guinn v. United States*, 238 U.S. 347, 361 (1915) (invalidating Grandfather Clause as "an unmistakable, although it may be a somewhat disguised, refusal to give effect to the prohibitions of the Fifteenth Amendment").

⁷⁰ 263 U.S. 197 (1923).

⁷¹ *Id.* at 220.

“It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens.”⁷²

The Court’s modern alienage jurisprudence has invalidated such classifications. For example, in the 1977 decision of *Nyquist v. Mauclet*,⁷³ the Court struck down a New York law restricting educational financial aid to citizens, those who had applied for citizenship, and those who promised to do so as soon as they were qualified.⁷⁴ Based on cases like this, under current law, it appears that where the state can restrict an opportunity to citizens, such as appointment as a law enforcement officer or public school teacher,⁷⁵ it could instead take the less restrictive step of restricting them to citizens or declarants. On the other hand, where it is unconstitutional to deny a benefit to noncitizens as a class, such as financial aid in *Nyquist*, a state cannot deny the benefit to nondeclarants.⁷⁶

Although the declaration of intention is no longer a part of the naturalization process, it has not disappeared. It remains authorized by statute,⁷⁷ and U.S.

⁷² *Id.* at 220-21 (quoting *Terrace v. Thompson*, 274 F. 841, 849-50 (W.D. Wash. 1921), *aff’d*, 263 U.S. 197 (1923)). *But see* David Fellman, *The Alien’s Right to Work*, 22 MINN. L. REV. 137, 174 (1938).

⁷³ 432 U.S. 1 (1977).

⁷⁴ *Id.* at 9-12.

⁷⁵ Indeed, the Court described a New York statute that it upheld as one which “forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.” *Ambach v. Norwick*, 441 U.S. 68, 69-70 (1979) (citing N.Y. EDUC. LAW § 3001(3) (McKinney 2020)); *see also* *Cabell v. Chavez-Salido*, 454 U.S. 432, 448 (1982) (Blackmun J., dissenting).

⁷⁶ *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (striking down Pennsylvania welfare program, which limited benefits to citizens and declarants, for violating Equal Protection Clause).

⁷⁷ An alien over 18 years of age who is residing in the United States pursuant to a lawful admission for permanent residence may file with the Attorney General a declaration of intention to become a citizen of the United States. . . . Nothing in this subsection shall be construed as requiring any such alien to make and file a declaration of intention as a condition precedent to filing an application for naturalization nor shall any such declaration of intention be regarded as conferring or having conferred upon any such alien United States citizenship or nationality or the right to United States citizenship or nationality, nor shall such declaration be regarded as evidence of such alien’s lawful admission for permanent residence in any proceeding, action, or matter arising under this chapter or any other Act.
8 U.S.C. § 1445(f) (2018).

Citizenship and Immigration Services maintains form N-300, an application to file a declaration of intention.⁷⁸ The declaration of intention briefly became legally salient in the Immigration Reform and Control Act of 1986—which established that only declarants could object to employment discrimination against noncitizens⁷⁹—but Congress later eliminated that requirement.⁸⁰ Nevertheless, many provisions of current state and federal law continue to grant special privileges to declarants or deny benefits to noncitizens who have not declared their intent.⁸¹

An important milestone in the use of the declarant category to carry out racial discrimination was the convention leading to the California Constitution of 1879. The convention is the first known instance where a government used the eligible/ineligible distinction to discriminate.⁸² The debates over the California Constitution also demonstrate the connection between race, eligibility to citizenship, and declarant status. Article XIX of the Constitution addressed Chinese people, prohibiting their public⁸³ and private employment,⁸⁴ and encouraging their departure from the state.⁸⁵ The constitutional text and convention debates⁸⁶ make clear the close connection between domestic rights

⁷⁸ *N-300, Application to File Declaration of Intention*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/n-300> [<https://perma.cc/AQQ4-LGG5>] (last updated July 7, 2020).

⁷⁹ See Richard Magalski, *IRCA's Antidiscrimination Provisions: Protections Against Hiring Discrimination in Private Employment*, 25 SAN DIEGO L. REV. 405, 417-18 (1988).

⁸⁰ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; see also *Coverage of the Discrimination Provisions*, 2 IMMIGR. LAW & BUSINESS § 23:2 (2d ed.).

⁸¹ Undoubtedly, many of these statutes are invalid based on *Nyquist* and related cases. See, e.g., *Nielsen v. Wash. State Bar Ass'n*, 585 P.2d 1191, 1196 (Wash. 1978) (en banc); Ark. Att'y Gen. Op. No. 89-258 (1989); Mich. Att'y Gen. Op. No. 5221 (1977); Mich. Att'y Gen. Op. No. 4785 (1973). But see *State v. Rheume*, 116 A. 758, 761 (N.H. 1922) (upholding classification restricting firearm ownership to citizens and declarants); *State v. Hernandez-Mercado*, 879 P.2d 283, 290 (Wash. 1994) (en banc) (rejecting facial challenge to firearms statute exempting citizens and declarants). The continued existence of many suspect statutes and rules may be explained by the fact that it may be faster and cheaper for a noncitizen simply to pay for a declaration of intention, rather than litigating the constitutional question.

⁸² See McGovney, *supra* note 61, at 45 n.154 (dating this formulation to 1886 Washington statute, as he “found no prior appearance of this idea in American law”).

⁸³ CAL. CONST. of 1879, art. XIX, § 3 (“No Chinese shall be employed on any State, county, municipal, or other public work, except in punishment for crime.”).

⁸⁴ *Id.* § 2 (“No corporation . . . shall . . . employ directly or indirectly, in any capacity, any Chinese or Mongolian.”).

⁸⁵ See *id.* § 4 (“The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power.”).

⁸⁶ See, e.g., 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 698 (1881) [hereinafter 2 CAL. CONST. CONV.] (statement of Mr. Estee)

granted or withheld by state law and the desirability of the immigrants affected. Article I, § 17 of the Constitution provided: “Foreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens.”⁸⁷ The text itself makes clear that the limitation was racial. An earlier version of the proposal was substantially identical, but it identified the favored category as “Foreigners (except Mongolians).”⁸⁸

The delegates recognized that the categories of “Chinese,” “Mongolian,” and “ineligible for citizenship” overlapped.⁸⁹ When discussing a version of Article XIX, Section 3 which applied to “foreigners ineligible to become citizens,” Mr. Wyatt proposed to change the prohibition to apply to Chinese people only: “I do not think it is a good idea to whip the Chinese over the backs of other people. In other words, to place disabilities upon other people for the purpose of reaching

(“These people are a great injury to the State. We ought to adopt all means we can to keep them from coming here and sending them away within the law.”); *id.* at 699 (statement of Mr. Caples) (“The object, the desire, the aim of this Convention should be to do the very best that we can do to relieve the State of California and the Pacific Coast from this great curse that is upon us.”); *id.* at 701 (statement of Mr. Kleine) (“The time will come when these Chinese will drive out your wives and children, if you don’t drive out the Chinese.”); *id.* at 702 (statement of Mr. Wyatt) (“As I understand it, we do not intend to discourage the immigration of anybody at the present time except the Chinamen.”); *id.* at 703 (statement of Mr. Reynolds) (“If we can prohibit them from purchasing or holding land we can make it almost impossible for them to live here. . . . I propose to prevent [them] from leasing real property . . . [b]ecause we wish to discourage immigration and encourage deportation.”).

⁸⁷ CAL. CONST. of 1879, art. I, § 17.

⁸⁸ 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 82 (1881). This version, in turn, was substantially identical to Article I, Section 17 of the 1849 Constitution, with the addition of the restriction on Mongolians. *See* CAL. CONST. of 1849, art. I, § 17.

⁸⁹ *See, e.g.*, 2 CAL. CONST. CONV., *supra* note 86, at 698 (statement of Mr. Estee) (“Section four I should be very glad to support if it did not contain the word ‘Chinese,’ because as it is it will come in direct conflict with the treaty. I would support it upon the proposition that if the Government of the United States declare they are ineligible to become citizens of the United States, there is something about that people that renders them unworthy of the confidence of the people of the State, and we have the right to prohibit their coming.”). In addition, the committee proposal to restrict access to public works initially excluded ineligible noncitizens. *Id.* at 701. Speaking of the ineligible noncitizen clause—which became Article XIX, Section 3 of the 1879 Constitution—Mr. Van Voorhies said, “‘No alien’—that means a Chinaman; of course it don’t [sic] mean an Irishman [laughter]—‘shall catch fish.’ Well, what shall he catch? Do you mean that the Chinese shall not be permitted to live here?” In response, Mr. Grace stated, “That is what we mean.” 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1430 (1881).

the Chinese.”⁹⁰ Mr. Herrington assured Mr. Wyatt that there was no need for concern “for the reason that every person who comes here will be exempt from its provisions except the Chinese.”⁹¹

Delegates believed that Chinese people could not validly declare their intention to naturalize. Judge John S. Hager, for example, was eager to restrict Chinese immigration and economic activity but wanted to accomplish the goal within the limits of the Constitution and laws of the United States. He proposed an amendment that nondeclarants “shall neither hold nor inherit property, nor do business, nor engage in any employment in this State” unless they obtained a license costing five hundred dollars,⁹² an essentially prohibitive expense for the time. He explained:

Now, this section does not apply to the Chinese alone, it applies to all foreigners, until they declare their intention to become citizens of the United States. If a person, not born here, lives in this country, all he has to do is to declare his intention to become a citizen, and this provision ceases to apply to him. But the Chinaman does not have the right to declare his intention, and therefore it applies to him.⁹³

II. VOTING FOR WHITE NONCITIZENS

White male noncitizens, but not those of other races, historically enjoyed the right to vote in many parts of the United States.⁹⁴ At first blush, it seems puzzling that racial discrimination in voting could exist in a legal regime including the Fourteenth and Fifteenth Amendments. However, as Professor Earl Maltz has explained, the Fifteenth Amendment was intentionally drafted to apply only to “citizens of the United States” and specifically to allow states to discriminate on the basis of race with respect to noncitizens.⁹⁵ Senator Charles Sumner’s proposal for a race-neutral Fifteenth Amendment was resoundingly rejected.⁹⁶

⁹⁰ 2 CAL. CONST. CONV., *supra* note 86, at 702 (statement of Mr. Wyatt).

⁹¹ *Id.* As adopted, the restriction applied to “Chinese.” CAL. CONST. of 1879, art. XIX, § 3.

⁹² 2 CAL. CONST. CONV., *supra* note 86, at 702 (statement of Mr. Hager).

⁹³ *Id.*

⁹⁴ Neuman, *supra* note 12, at 295-97; Raskin, *supra* note 12, at 1395.

⁹⁵ Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL’Y 223, 233-34 (1994); *see also* Neuman, *supra* note 12, at 307 (“The Fifteenth Amendment addresses the question of racial discrimination in voting, and prohibits disenfranchisement only of citizens of the United States.”); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 82 (1996) (detailing that “Pacific coast opposition to the possibility of Chinese immigrant suffrage was explicit” when drafters limited language to “citizens” in Fifteenth Amendment).

⁹⁶ Maltz, *supra* note 95, at 233-35.

Thus, for example, the Oregon Constitution of 1857 granted suffrage, subject to age and residency requirements, to “every white male citizen” and “every white male of foreign birth . . . [who] shall have declared his intention to become a citizen of the United States.”⁹⁷ It also provided that “[n]o Negro, Chinaman, or Mullato shall have the right of suffrage.”⁹⁸ The distinction of white declarants from noncitizens of undesirable races shows the relationship between the categories. These racial restrictions could not be applied to birthright citizens after enactment of the Fifteenth Amendment.⁹⁹ However, because the Fifteenth Amendment prohibited racial discrimination only against citizens of the United States, such provisions could be applied to noncitizens.

Other states also drew lines based on race as such. The California Constitution of 1879 granted suffrage to “[e]very native male citizen of the United States” and “every male person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro” (the peace treaty ending the Mexican War) but added that “no native of China, no idiot, insane person, or person convicted of any infamous crime . . . shall ever exercise the privileges of an elector.”¹⁰⁰ Again illustrating the connection between race and eligibility to naturalize, California amended its constitution in 1930 to deny the right to vote to “alien[s] ineligible to citizenship.”¹⁰¹

From statehood until 1951, the Idaho Constitution provided: “nor shall Chinese nor persons of Mongolian descent not born in the United States, nor Indians not taxed who have not severed their tribal relations and adopted the habits of civilization, either vote, serve as jurors or hold any civil office.”¹⁰²

Professor Gerald Neuman identified jurisdictions having declarant noncitizen suffrage at one time or another, which included Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming.¹⁰³ Congress also authorized declarant

⁹⁷ OR. CONST. art. II, § 2 (amended 1914).

⁹⁸ *Id.* § 6 (repealed 1927).

⁹⁹ For example, in 1928, the Oregon Attorney General issued an opinion that a person of Japanese ancestry born in the United States was entitled to vote. Or. Att’y Gen. Op. No. 3 (1928).

¹⁰⁰ CAL. CONST. of 1879, art. II, § 1. The 1849 Constitution was similar except that it limited suffrage to white male citizens and former Mexicans. *See* CAL. CONST. of 1849, art. II, § 1; *People ex rel. Kimberly v. De La Guerra*, 40 Cal. 311, 343 (1870).

¹⁰¹ However, the prohibition on Chinese voting continued in the California Political Code at least until 1937. *See* CAL. POL. CODE § 1084 (Deering 1937).

¹⁰² IDAHO CONST. art. VI, § 3 (amended 1949).

¹⁰³ Neuman, *supra* note 12, at 304-06. Woman suffrage as an inducement to immigration is part of this story. As Professor Kerry Abrams noted, “[b]y 1914, the only state west of the Rockies that did not have woman suffrage was New Mexico; the only state east of the Rockies that *did* was Kansas.” Abrams, *supra* note 18, at 1407-08.

voting in the Alaska,¹⁰⁴ Montana,¹⁰⁵ and Wyoming¹⁰⁶ territories. Some states offered declarants other political rights, such as the ability to sit as jurors¹⁰⁷ and to hold office.¹⁰⁸ Colorado continues to permit declarants to vote in some irrigation district elections.¹⁰⁹

III. LAND OWNERSHIP

A. *Eligibility to Own*

Scholars have recognized that naturalization policy was a form of immigration policy, in part because of restrictions on the right of noncitizens to own land.¹¹⁰ As one article explained: “[T]wo factors—the practical reality of trans-Atlantic migration and the rules of property ownership—combined to make naturalization virtually synonymous with the immigration policy of the

¹⁰⁴ Act of June 6, 1900, 31 Stat. 321, 520.

¹⁰⁵ Act of May 26, 1864, ch. 95, § 5, 13 Stat. 85, 87-88.

¹⁰⁶ Act of July 25, 1868, ch. 235, § 5, 15 Stat. 178, 179-80.

¹⁰⁷ See *Ex parte Harding*, 120 U.S. 782, 783 (1887); Fellman, *supra* note 72, at 148 & n.74.

¹⁰⁸ See *Recent Cases, Public Officer—Election of an Alien—Naturalization After Election*, 7 HARV. L. REV. 119, 123 (1893) (discussing Iowa case in which noncitizen was elected sheriff). Compare *State ex rel. Taylor v. Sullivan*, 47 N.W. 802, 802 (Minn. 1891) (holding that non-declarant’s election was void), with *State v. Trumpff*, 5 N.W. 876, 878 (Wis. 1880) (“[I]f an alien who is not an elector receives a plurality of votes for an office, he may lawfully hold and exercise the same, if, by naturalization or declaration, his disability is removed before the commencement of the term of office to which he has been elected.”).

¹⁰⁹ See COLO. REV. STAT. § 37-26-103 (2020); COLO. REV. STAT. § 37-41-104(2) (2020).

¹¹⁰ See Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853-1889*, 12 U. PUGET SOUND L. REV. 197, 212 (1989) (“[L]iberal laws regarding aliens and foreign corporations may have stimulated Washington Territory’s immigration and economic growth”); Motomura, *Who Belongs*, *supra* note 11, at 375; Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77, 94 (2012) (“It is clear that [laws liberalizing alien property ownership] were seen, at least in part, as an inducement to settlement. They were one way of making a state more attractive to aliens, and thus to encourage them to live and work there.” (footnote omitted)).

early Republic.”¹¹¹ For this reason, government land policy also could promote or discourage immigration.¹¹²

The Reconstruction Congresses deliberately chose to permit racial discrimination among noncitizens with respect to land ownership. The Civil Rights Act of 1866 protects the right to own land: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”¹¹³ The bill that became the Civil Rights Act of 1866 originally protected the rights of “inhabitants,” but as enacted it granted rights only to “citizens.”¹¹⁴ The reason for this change was that some members of Congress objected to the idea that states and territories could not discriminate against nonwhite noncitizens regarding land ownership. Accordingly, for example, the U.S. District Court for the Southern District of Texas held that Vietnamese fishers could not sue the Ku Klux Klan under 42 U.S.C. § 1982 for trying to drive them off their land because the fishers were not citizens.¹¹⁵

Section Sixteen of the Enforcement Act of 1870 extended much of the Civil Rights Act of 1866 to noncitizens but intentionally excluded the right to own real property.¹¹⁶ In addition, the 1903 revision of the treaty between the United States and China pointedly gave Americans the right to own land in China but said nothing about the right of Chinese to own land in the United States.¹¹⁷

¹¹¹ James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 365 (2010); see also *id.* at 367 (“We can see the connection between property ownership, naturalization policy, and immigration in a variety of sources, including the population grievance in the Declaration of Independence.”); *id.* at 398 (writing of the 1790 Naturalization Act that “members of the House agreed that whatever rule of naturalization they adopted would operate in effect as a rule of immigration”).

¹¹² See *In re Tetsubumi Yano’s Estate*, 206 P. 995, 1001 (Cal. 1922); see also 2 CAL. CONST. CONV., *supra* note 86, at 703 (statement of Mr. Reynolds) (“If we can prohibit [Chinese] from purchasing or holding land we can make it almost impossible for them to live here. . . . I propose to prevent him from leasing real property . . . [b]ecause we wish to discourage immigration and encourage deportation.”).

¹¹³ 42 U.S.C. § 1982 (2018).

¹¹⁴ Torok, *supra* note 95, at 77.

¹¹⁵ *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1012 (S.D. Tex. 1981); see also *Mwangi v. Braegelmann*, 507 F. App’x 637, 640 (8th Cir. 2013).

¹¹⁶ 42 U.S.C. § 1981(a) now provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

¹¹⁷ Treaty for the Extension of Commercial Relations, China-U.S., art. III, Oct. 8, 1903,

Federal law effectively gave state legislatures a free hand. Some state legislatures elected not to discriminate at all.¹¹⁸ Others prohibited disfavored races from land ownership by name, favored declarants, excluded ineligible, or some mixture of two or all three techniques.¹¹⁹ In a series of cases, the Supreme Court upheld state classifications discriminating against nondeclarants¹²⁰ and ineligible noncitizens.¹²¹

1. Direct Racial Classifications

Arkansas. During World War II, Arkansas restricted Japanese land ownership.¹²² No doubt this was a message of unwelcome to Japanese Americans incarcerated in camps at Rohwer and Jerome.¹²³

Idaho. Idaho law used all three techniques: favoring declarants, restricting ineligible, and prohibiting Chinese and Mongolians *eo nomine*. State law provided that “[n]o person other than a citizen of the United States, or one who has declared his intention to become such” could acquire land except mining claims.¹²⁴ Lest there be any misunderstanding, the same act also provided that

33 Stat. 2208. *See generally* C. Kuangson Young, *Real Property Rights of Aliens in China and the United States*, 15 CHINESE SOC. & POL. SCI. REV. 184 (1931).

¹¹⁸ With respect to ownership of land in the territories, the United States itself was relatively lenient. One section of federal law governing the territories restricts land ownership to citizens and declarants. *See* 48 U.S.C. § 1501 (2018) (“No alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States . . . shall acquire title to or own any land in any of the Territories of the United States . . .”). However, the next section extended the right to *bona fide* residents as well. *See id.* § 1502 (“This chapter shall not apply to . . . any alien who shall become a bona fide resident of the United States, and any alien who shall become a bona fide resident of the United States, or shall have declared his intention to become a citizen of the United States . . .”).

¹¹⁹ McGovney, *supra* note 61, at 7-8; Comment, *Anti-Alien Land Legislation*, 31 YALE L.J. 299 (1922); Comment, *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017, 1019-20 (1947) [hereinafter *The Alien Land Laws*].

¹²⁰ *Terrace v. Thompson*, 263 U.S. 197, 221 (1923).

¹²¹ *Porterfield v. Webb*, 263 U.S. 225, 233 (1923); *see also* *Frick v. Webb*, 263 U.S. 326, 334 (1923) (holding California “may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens”); *Webb v. O’Brien*, 263 U.S. 313, 326 (1923) (upholding California prohibition on cropping contracts with ineligible noncitizens). While the Supreme Court has not formally overruled these cases, state courts have determined that they are no longer good law. *See* cases cited *supra* note 51.

¹²² ARK. CODE ANN. § 50-302 (1947).

¹²³ *See Japanese American Relocation Camps*, ENCYCLOPEDIA OF ARK., <https://encyclopediaofarkansas.net/entries/japanese-american-relocation-camps-2273/> [https://perma.cc/ZB9Q-VGN4] (last updated June 27, 2018) (“Arkansas was neither receptive to nor supportive of the Japanese Americans being incarcerated in the state.”).

¹²⁴ IDAHO CODE § 1-2609 (1908).

“no person not eligible to become a citizen of the United States shall acquire title to any land or real property.”¹²⁵ Finally, all noncitizens were allowed to “take, hold and dispose of mining claims and mining property . . . *Provided*, That Chinese, or persons of Mongolian descent not born in the United States, are not permitted to acquire title to land or any real property.”¹²⁶

Nevada. An 1879 Nevada statute provided:

Any non-resident alien, person, or corporation, except subjects of the Chinese empire, may take, hold, and enjoy any real property, or any interest in lands, tenements, or hereditaments within the State of Nevada, as fully, freely, and upon the same terms and conditions as any resident citizen, person, or domestic corporation.¹²⁷

Oregon. The Oregon Constitution of 1859 granted “[w]hite foreigners” the same right to own land as citizens,¹²⁸ but also added that “[n]o Chinaman, not a resident of the State at the adoption of this Constitution, shall ever hold any real estate, or mining claim.”¹²⁹

2. Restrictions on Racially Ineligible Noncitizens

Fifteen states prohibited noncitizens ineligible for naturalization from owning land: Arizona,¹³⁰ Arkansas,¹³¹ California,¹³² Delaware,¹³³ Florida,¹³⁴ Idaho,¹³⁵

¹²⁵ *Id.*

¹²⁶ *Id.* § 1-2610; *see also* Buckley v. Fox, 67 P. 659, 659 (Idaho 1902).

¹²⁷ 1879 Nev. Stat. 51. There may be less here than meets the eye. The quoted statute only applied to non-residents; rights of resident noncitizens to own land were not restricted. *See* State *ex rel.* Fook Ling v. Preble, 2 P. 754, 754 (Nev. 1884) (“The rights of foreigners are not confined to those who have declared their intention to become citizens of the United States, or to those who under our laws are entitled to become citizens by naturalization.”).

¹²⁸ OR. CONST. of 1857, art. I, § 31.

¹²⁹ *Id.* art. XV, § 8.

¹³⁰ 1917 Ariz. Sess. Laws 56 (repealed 1978).

¹³¹ *See* Applegate v. Lum Jung Luke, 291 S.W. 978, 979 (Ark. 1927) (invalidating “ineligible alien” land law under state constitutional provision allowing all noncitizens to own land).

¹³² CAL. GEN. CODE, Acts 260, 261 (Deering 1938), *invalidated by* Sei Fujii v. State, 242 P.2d 617, 630 (Cal. 1952) (in bank).

¹³³ 32 Del. Laws 616 (1921) (repealed 1933).

¹³⁴ FLA. CONST. art. I, § 2 (amended 2018).

¹³⁵ IDAHO CODE §§ 23.101-.112 (1932).

Kansas,¹³⁶ Louisiana,¹³⁷ Montana,¹³⁸ New Mexico,¹³⁹ Oregon,¹⁴⁰ Texas,¹⁴¹ Utah,¹⁴² Washington,¹⁴³ and Wyoming.¹⁴⁴

3. Restrictions on Nondeclarants

Another group of states, including Kentucky, Missouri, and Washington, granted rights to declarants.¹⁴⁵ Texas relaxed its laws for a hodgepodge of noncitizens, including declarants who were eligible for citizenship.¹⁴⁶ Like Washington, the Texas law used both techniques. Some states, including

¹³⁶ KAN. STAT. ANN. §§ 67.701-.711 (1935).

¹³⁷ LA. CONST. of 1921, art. XIX, § 21.

¹³⁸ MONT. REV. CODES §§ 6802.1-.8 (1935).

¹³⁹ See Jamie Bronstein, *Sowing Discontent: The 1921 Alien Land Act in New Mexico*, 82 PAC. HIST. REV. 362, 363 (2013).

¹⁴⁰ OR. COMP. LAWS ANN. §§ 61.101-.111 (1940).

¹⁴¹ 1921 Tex. Gen. Laws 261 (exempting “[a]liens eligible to citizenship in the United States who shall become bona fide inhabitants of this State, and who shall, in conformity with the naturalization laws of the United States, have declared their intention to become citizens of the United States”).

¹⁴² 1943 Utah Laws 127.

¹⁴³ In 1886, the Washington Territory legislature prohibited ineligible aliens from owning land. 1886 Wash. Sess. Laws 102 (repealed 1927). In its 1889 constitution, the state of Washington restricted land ownership to declarant aliens. WASH. CONST. art. II, § 33, *repealed* by WASH. CONST. amend. 42. The constitutional provision was enforced by a 1921 statute which the Supreme Court upheld in 1923. *Terrace v. Thompson*, 263 U.S. 197, 224 (1923); see also *The Alien Land Laws*, *supra* note 119, at 1022 n.42, 1036 (“The Washington land law is framed to prohibit only those who have not in good faith declared their intention of becoming a citizen. Since alien Japanese, ineligible to become citizens, may not file declarations of intention, the law has the same ultimate effect.”).

¹⁴⁴ 1943 Wyo. Sess. Laws 33.

¹⁴⁵ See Justin Miller, *Alien Land Laws*, 8 GEO. WASH. L. REV. 1, 14 (1939).

¹⁴⁶ 1921 Tex. Gen. Laws 261.

California,¹⁴⁷ Kentucky,¹⁴⁸ and Mississippi,¹⁴⁹ continue to favor declarants in their land laws.¹⁵⁰

B. *Land Grants*

In the nineteenth and twentieth centuries, Congress gave away or sold at submarket prices tens of millions of acres of federal land under a variety of programs.¹⁵¹ Beginning with the Preemption Act of 1841,¹⁵² all federal programs imposed racial restrictions on beneficiaries.

An early, important law was the Donation Land Act of 1850,¹⁵³ which contained an express racial limitation, offering free land “to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen.”¹⁵⁴ The Act applied to the Oregon Territory, which included what are now the states of Idaho, Oregon, and Washington, and parts of western Montana and Wyoming. The statute was extended to the territories of New Mexico (covering what are now the states of New Mexico and Arizona and parts of Colorado and Nevada)¹⁵⁵ and Washington.¹⁵⁶

¹⁴⁷ CAL. PUB. RES. CODE § 3900 (West 2020) (“Any person, who is a citizen of the United States or who has declared his or her intention to become a citizen, and who discovers a vein or lode of quartz, or other rock in place . . . may locate a claim upon the vein or lode . . .”); *id.* § 7601 (stating that application to purchase “lands uncovered by the recession or drainage of the waters of inland lakes . . . shall be accompanied by the applicant’s affidavit that he is a citizen of the United States, or has declared his intention to become such”).

¹⁴⁸ KY. REV. STAT. ANN. § 381.290 (West 2020) (“After declaring his intention to become a citizen of the United States, . . . any alien, not an enemy, may recover, inherit, hold, and pass by descent, devise or otherwise, any interest in real or personal property, in the same manner as if he were a citizen of this state.”).

¹⁴⁹ MISS. CODE ANN. § 89-1-23 (2019) (“[A] title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, . . . shall not be forfeited or escheated by reason of the alienage of any former owner or other person.”).

¹⁵⁰ *Cf.* 21 GUAM CODE ANN. § 1204(a) (2019) (“No alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States in the manner provided by law shall acquire title to or own any land in Guam except as hereinafter provided.”).

¹⁵¹ *See generally* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

¹⁵² Preemption Act of 1841, ch. 16, 5 Stat. 453.

¹⁵³ Donation Land Act of 1850, ch. 76, 9 Stat. 496.

¹⁵⁴ *Id.* § 4.

¹⁵⁵ Act of July 22, 1854, ch. 103, 10 Stat. 308.

¹⁵⁶ Act of Mar. 2, 1853, ch. 90, 10 Stat. 172 (making laws applicable to Oregon Territory also applicable to Washington Territory).

The Homestead Act of 1862 restricted its benefits to citizens and declarants.¹⁵⁷ Several episodes in the legislative history make clear that the resulting racial exclusion was intentional. Speaking of the 1860 homestead bill, Representative William M. Gwin of California made it clear he wanted land use restricted to citizens and declarants to exclude the Chinese:

There is a large population in those mines who are not citizens of the United States, and who cannot become citizens of the United States; who are like the grasshoppers or locusts—the Chinese—that I wish to deprive of the privilege of working those mines, as they heretofore have done, being slaves to Chinese masters, and going to these mines and destroying, in a great degree, their productiveness for the future. I want them to be occupied only by citizens and those who signify their intention to become citizens, and can become citizens of the United States. There are now fifty or sixty thousand of those Chinese in the mines, and I want the possession of the mines to be legalized to citizens of the United States and those who signify their intention to become such; and then these Chinese slaves—for they are no better than that—can be usefully employed in the State in agricultural purposes.¹⁵⁸

President James Buchanan vetoed the 1860 bill.¹⁵⁹ Among his reasons were that he, like Representative Gwin, objected to granting benefits to settlers “from China, and other eastern nations.”¹⁶⁰ Then-Senator Andrew Johnson responded:

[T]he allusion to Chinese entering lands under the provisions of this bill, is another proof that the President had not given the subject the consideration he should have done; for the courts of California have declared in unmistakable terms that the Chinese cannot become citizens of the United States under our naturalization laws, and cannot, therefore, entitle

¹⁵⁷ Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976). Asians were on the mind of Congress in 1862; in addition to the Homestead Act, they passed the Anti-Coolie Act restricting “involuntary” Asian immigration that year. Anti-Coolie Act of 1862, ch. 27, 12 Stat. 340.

¹⁵⁸ CONG. GLOBE, 36th Cong., 1st Sess. 1754 (1860) (statement of Sen. Gwin).

¹⁵⁹ *Id.* at 3264.

¹⁶⁰ *The Homestead Bill: Veto Message of President Buchanan*, N.Y. TIMES, June 30, 1860, at 11 (reprinting President Buchanan’s reasons for vetoing the Homestead Bill).

Our laws welcome foreigners to our shores, and their rights will ever be respected. Whilst these are the sentiments on which I have acted through life, it is not, in my opinion, expedient to proclaim to all the nations of the earth that whoever shall arrive in this country from a foreign shore and declare his intention to become a citizen, shall receive a farm of one hundred and sixty acres at a cost of twenty-five or twenty cents per acre, if he will only reside on it and cultivate it. The invitation extends to all; and if this bill becomes a law, we may have numerous actual settlers from China, and other eastern nations, enjoying its benefits on the great Pacific slope.

Id.

themselves to any of the benefits conferred by this bill upon the citizens of the United States.¹⁶¹

A delegate to the California constitutional convention noted that

the United States Congress has recognized a marked difference between those who are eligible to become citizens and those who are not. In all the laws of the United States with regard to public lands, Congress has so fixed the matter that no Chinaman can acquire from the United States any kind of right to land.¹⁶²

Other statutes restricting benefits to citizens and declarants include the Timber and Stone Act of 1878¹⁶³ and the Stock Raising Homestead Act of 1916,¹⁶⁴ those still in the U.S. Code include provisions of the General Mining Act of 1872,¹⁶⁵ the Desert Land Act of 1877,¹⁶⁶ the Taylor Grazing Act of 1932,¹⁶⁷ and provisions dealing with federal coal lands¹⁶⁸ and individual purchasers of railroad grants.¹⁶⁹ As one judge explained, discussing the General

¹⁶¹ CONG. GLOBE, 36th Cong., 1st Sess. 3268 (1860).

¹⁶² 2 CAL. CONST. CONV., *supra* note 86, at 704 (statement of Mr. Cross).

¹⁶³ Timber and Stone Act of 1878, ch. 151, § 1, 20 Stat. 89, 89 (repealed 1955).

¹⁶⁴ Stock-Raising Homestead Act of 1916, ch. 9, § 1, 39 Stat. 862, 862 (repealed 1976).

¹⁶⁵ The statute provides:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (2018).

¹⁶⁶ Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377, 377 (codified at 43 U.S.C. § 321) (allowing those eligible to be U.S. citizens to purchase desert lands from government).

¹⁶⁷ The statute provides:

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law. Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws

43 U.S.C. § 315b.

¹⁶⁸ For example, 30 U.S.C. § 71 provides:

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority

¹⁶⁹ 43 U.S.C. § 898 (2018) provides:

Mining Act but with implications for all similarly structured laws, “[n]ominally, these acts discriminate against the alien generally, but in fact against the dreaded Chinaman only; because all aliens, including the Congo negro, except the Mongolian, are permitted to become naturalized.”¹⁷⁰ A number of state statutes still on the books, apparently state implementations of the Homestead Act, also restrict their benefits to citizens and declarants.¹⁷¹

IV. RESTRICTIONS ON PUBLIC WORKS, EMPLOYMENT, AND CONTRACTING

With little apparent difficulty or disagreement, courts invalidated Arizona,¹⁷² California,¹⁷³ and Idaho¹⁷⁴ laws barring noncitizens from all or practically all forms of private employment. The Supreme Court recognized that “to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.”¹⁷⁵ A more difficult and recurring question was governmental power to prohibit noncitizens from employment on public works.¹⁷⁶

Where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns

¹⁷⁰ *Chapman v. Toy Long*, 5 F. Cas. 497, 500 (C.C.D. Or. 1876); *see also* EAVES, *supra* note 68, at 120 (arguing that under the law, federal “sanction was given to the exclusion of the Chinese, as only citizens or those who have declared their intention to become citizens can obtain a patent for mining land”).

¹⁷¹ *See, e.g.*, ARIZ. REV. STAT. ANN. § 37-706(A) (2020); COLO. REV. STAT. § 36-3-118 (2019); Hawaii Organic Act, HAW. REV. STAT. ANN. § 73(f) (LexisNexis 2019); IDAHO CODE § 42-2014 (2019); IDAHO CODE § 43-1704 (2019); OR. REV. STAT. § 273.255 (2019); WYO. STAT. ANN. § 36-7-403 (2019); *see also* IDAHO CODE § 58-901 (2019).

¹⁷² *Truax v. Raich*, 239 U.S. 33, 35 (1915).

¹⁷³ *In re Tiburcio Parrott*, 1 F. 481, 493 (C.C.D. Cal. 1880) (invalidating Article XIX, Section 2 of California Constitution of 1879, which provided that no corporation could “employ directly or indirectly, in any capacity, any Chinese or Mongolian”).

¹⁷⁴ *Ex parte* Case, 116 P. 1037, 1037-38 (Idaho 1911) (invalidating Section 1458 of the Idaho Code, which prohibited “any county government, or municipal or private corporation . . . to give employment in any way to any alien who has failed, neglected or refused, prior to the time such employment is given, to become naturalized or to declare his intention to become a citizen of the United States”).

¹⁷⁵ *Truax*, 239 U.S. at 42.

¹⁷⁶ *See generally* Robert W. Gascoyne, *Constitutionality of Enactment or Regulation Forbidding or Restricting Employment of Aliens in Public Employment or on Public Works*,

Many jurisdictions prohibited noncitizen public employment.¹⁷⁷ A provision of the Newlands Bill creating the U.S. Bureau of Reclamation in 1902 provided that “no Mongolian labor shall be employed”¹⁷⁸ on reclamation projects. The Bureau built the Hoover Dam and many other major projects;¹⁷⁹ the Newlands Bill has been said “to rank with the Homestead Act of 1862 . . . as one of the most significant measures in shaping the development of the West.”¹⁸⁰ California,¹⁸¹ Montana,¹⁸² Nevada,¹⁸³ and Oregon,¹⁸⁴ like the Bureau of Reclamation, prohibited public employment of Mongolians or Chinese.¹⁸⁵ Nevada also prohibited employment of Chinese in the construction or operation of state-chartered railroads.¹⁸⁶ In the same act denying Chinese and Mongolians the right to own land or make mining claims, Idaho excluded nondeclarants and those ineligible to citizenship from public works employment, directly or for contractors.¹⁸⁷

38 AM. L. REP. 3d 1213 (1971). The modern Court has held that states may not deny noncitizens state civil service positions, *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973), or public benefits, *Graham v. Richardson*, 403 U.S. 365, 374-76 (1971).

¹⁷⁷ See Lindley D. Clark, *State Regulation of Employment on Public Work*, 4 MONTHLY REV. BUREAU LAB. STAT. 455, 466 (1917); see also David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 111 (1993) (“By the 1890s, construction unions began to lobby successfully for state laws regulating labor on public works projects.”).

¹⁷⁸ Act of June 17, 1902, ch. 1093, § 4, 32 Stat. 388, 389 (repealed 1956).

¹⁷⁹ See generally 1 WILLIAM D. ROWLEY, *THE BUREAU OF RECLAMATION: ORIGINS AND GROWTH TO 1945* (2006).

¹⁸⁰ GATES, *supra* note 151, at 654.

¹⁸¹ CAL. CONST. of 1879, art. XIX, § 3.

¹⁸² MONT. REV. CODES, tit. VIII, § 2250 (1903).

¹⁸³ Act of Mar. 6, 1879, § 1, 1879 Nev. Stat. 1097. In 1935, the Nevada Attorney General held that the section had been repealed by implication. Nev. Att’y Gen. Op. No. 167, at 84 (May 27, 1935).

¹⁸⁴ 1878 Or. Laws 9 (prohibiting employment of Chinese on public works, and voiding contracts in violation thereof).

¹⁸⁵ Clark, *supra* note 177, at 466.

¹⁸⁶ § 2, 1879 Nev. Stat. 1097 (“Hereafter no right of way or charter, or other privileges for the construction of any public works by any railroad or other corporation or association shall be granted to such corporation or association, except upon the express condition that no Mongolian or Chinese shall be employed on or about the construction of such work in any capacity.”).

¹⁸⁷ H.B. 34, § 3, 1899 Leg., 5th Sess. (Idaho 1899).

In addition, many cities had charter provisions restricting employment by race, including Eureka,¹⁸⁸ Los Angeles,¹⁸⁹ and Sacramento,¹⁹⁰ California; Portland, Oregon;¹⁹¹ and Olympia¹⁹² and Tacoma,¹⁹³ Washington. In an ordinance authorizing a contract for a waterworks, Newark, Ohio stipulated that the builder “shall not in any event ship to Newark or employ Chinese or Italian labor.”¹⁹⁴ Nashville, Tennessee prohibited Chinese people from working on a railroad it allowed to be built on city land.¹⁹⁵

¹⁸⁸ *Charter of the City of Eureka*, in CHARTER AND REVISED ORDINANCES OF THE CITY OF EUREKA 50, § 190 (1905) (“No Chinese shall ever be employed, either directly or indirectly, on any work of the city, or in the performance of any contract or subcontract of the city, except in punishment for crime. Nor shall any provisions, supplies, materials, or articles of Chinese manufacture or production ever be used or purchased by or furnished to the city.”).

¹⁸⁹ *Charter of the City of Los Angeles*, in REVISED CHARTER & COMPILED ORDINANCES & RESOLUTIONS OF THE CITY OF LOS ANGELES 18, § 10 (1878) (“The Mayor and Council are prohibited from entering into any contract for public works or improvements, unless a proviso be inserted in the said contract to the effect that Chinese labor shall not be employed on such works or improvements.”).

¹⁹⁰ CHARTER FOR THE CITY OF SACRAMENTO § 221 (1893) (“No Chinese shall ever be employed, either directly or indirectly, on any work of the city or in the performance of any contract or sub-contract of the city, except in punishment for crime. Nor shall any provisions, supplies, materials, or articles of Chinese manufacture or production ever be used or purchased by or furnished to the city.”).

¹⁹¹ CHARTER OF THE CITY OF PORTLAND, AS AMENDED, TOGETHER WITH THE GENERAL ORDINANCES 12-13, § 38(6) (1881) (granting council the power “[t]o prohibit the employment of Chinese on any of the public streets of the city or any property belonging to the city”).

¹⁹² Olympia, Wash., Ordinance 187, § 1 (May 31, 1884) (“[N]o Chinese laborer shall be employed by the city officers, or by any person or persons who may hereafter enter into contract with the city for . . . any public works whatever within the limits of the City of Olympia.”).

¹⁹³ Tacoma, Wash., Ordinance 7, § 1 (Feb. 7, 1884) (“[A]ll contracts hereafter made or entered into by the City of Tacoma, or by authority of the same, for work, labor or services to the City, shall be upon the express agreement and condition that in performing such work, labor or services, no Chinamen or Coolie shall in any way, or for any purpose be employed . . .”).

¹⁹⁴ NEWARK, OHIO, REV. ORDINANCES 272 (Frank A. Bolton ed., 1907).

¹⁹⁵ Act of Jan. 12, 1884, § 4, THE CODE OF NASHVILLE 260 (1885) (“Be it further enacted, That neither Chinese nor convict labor shall be used in constructing the lines of said railway in the city.”).

Hawaii required government employees to be citizens or eligible to citizenship,¹⁹⁶ whereas Idaho required both eligibility and declaration.¹⁹⁷ The National Industrial Recovery Act of 1933 contained employment preferences which put declarants on the same footing as citizens but by implication disfavored other noncitizens.¹⁹⁸ Similarly, at least Arizona,¹⁹⁹ Idaho,²⁰⁰ Pennsylvania,²⁰¹ Utah,²⁰² and Wyoming²⁰³ limited public employment to citizens or declarants. The Arizona, Idaho, and Wyoming laws remain in force.

Minnesota law prohibited discrimination in public contracting because of race, creed or color with respect to “citizens of the United States.”²⁰⁴ Accordingly, just as did the Fifteenth Amendment and the Civil Rights Act of 1866, Minnesota law allowed racial discrimination with respect to noncitizens.

The question of the validity of these laws is complex, but ultimately courts found them valid. *Baker v. Portland*²⁰⁵ is an early, widely cited, and seemingly widely misunderstood authority. Judge Matthew Deady and Justice Stephen Field heard the case in the Circuit Court of Oregon.²⁰⁶ Plaintiffs, a group of contractors, challenged Oregon’s prohibition on employment of “any Chinese laborers . . . on any public works or public improvement of any character.”²⁰⁷ In an initial opinion for himself alone, Judge Deady noted that the Chinese had a

¹⁹⁶ See 1903 Haw. Sess. Laws 213 (restricting employment as mechanic or laborer on public works to person who is or is “eligible to become a citizen”); 1909 Haw. Sess. Laws 38 (extending prohibition to all employees); see also *Asiatics on Public Works*, HAWAIIAN STAR, Mar. 31, 1903, at 4 (“A German, a Portuguese, a Frenchman, or a Britisher may not be a citizen at the moment, he may not be eligible for a citizenship on account of his term of residence, but he can give notice of his intention to become a citizen, and would become a citizen in due course. Such a man should be eligible for any employment, but the case of the Asiatic is totally different, and he is certainly ineligible for territorial employment.”). Note that 1925 Haw. Sess. Laws 206 and 1925 Haw. Sess. Laws 388 ameliorated the prohibitions by eliminating the bar for a female employee or teacher who, “having been a citizen, has lost her citizenship through marriage to an alien.”

¹⁹⁷ IDAHO CODE § 44-1005 (2019).

¹⁹⁸ National Industry Recovery Act of 1933, ch. 90, § 206, 48 Stat. 195, 204-05.

¹⁹⁹ ARIZ. REV. STAT. §§ 3105-3106 (1913) (prohibiting employment of noncitizens for municipal works).

²⁰⁰ IDAHO CODE § 44-1005 (2019).

²⁰¹ 1897 Pa. Laws 418 (dictating punishment for employing noncitizens for public projects), *invalidated by* Commonwealth v. Casey, 80 A. 78, 81 (Pa. 1911).

²⁰² UTAH COMP. LAWS § 4865 (1917), *invalidated in part on other grounds by* Bohn v. Salt Lake City, 8 P.2d 591, 595 (Utah 1932).

²⁰³ WYO. CONST. art. 19, § 3.

²⁰⁴ MINN. STAT. § 181.59(1) (1941).

²⁰⁵ 2 F. Cas. 472, 474 (C.C.D. Or. 1879) (No. 777).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 473.

treaty right to equal treatment with other aliens.²⁰⁸ Judge Deady regarded the law's application to public works (as opposed to private employment) as immaterial:

True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.²⁰⁹

The source of the misunderstanding is that this language in Judge Deady's opinion was dicta;²¹⁰ the actual ruling was that "[t]he demurrer is sustained, and the restraining order vacated."²¹¹ Judge Deady held that the plaintiffs were not a proper class²¹² and could neither show damages nor a sufficient amount in controversy.²¹³ When the case was reheard before both Judge Deady and Justice Field, the Justice agreed with the initial ruling against those who challenged the law and in favor of the city, adding "that the plaintiffs have an adequate remedy at law."²¹⁴ The Justice pointedly declined to express his views on the validity of the statute, rendering his opinion "[a]ssuming that the act in question is invalid"²¹⁵ but making no suggestion one way or another.

While Judge Deady's *Baker* dicta is widely cited as a holding,²¹⁶ it did not prevail until the modern era. Litigation continued in Oregon courts; the Oregon

²⁰⁸ *Id.* at 473-74.

²⁰⁹ *Id.* at 474.

²¹⁰ See *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1017 (1957).

²¹¹ *Baker*, 2 F. Cas. at 475.

²¹² See *Scott v. Donald*, 165 U.S. 107, 117 (1897) (discussing *Baker* "where it was held by District Judge Deady, Mr. Justice Field concurring, that any number of persons who may from time to time be engaged in making street improvements under several and distinct contracts with a city are not therefore a class of persons having a common interest in the subject of street improvements, concerning which any one or more may sue for the whole").

²¹³ *Baker*, 2 F. Cas. at 473.

²¹⁴ *Id.* at 475.

²¹⁵ *Id.*

²¹⁶ See, e.g., *Bond v. United States*, 572 U.S. 844, 892 (2014) (Thomas, J., concurring) ("And treaties with China and Japan, which afforded subjects of those countries the same rights and privileges as citizens of other nations, were understood to preempt state laws that discriminated against Chinese and Japanese subjects." (citing *Baker*, 2 F. Cas. at 474)). In *Bond*, law professors filed an amicus brief describing *Baker* as having "str[uck] down an Oregon law prohibiting the employment of Chinese persons on public works projects as contrary to a treaty." Brief for *Amici Curiae* Professors of International Law and Legal History in Support of Respondent at 21, *Bond*, 572 U.S. 844 (No. 12-158). Likewise, many scholars describe *Baker* as invalidating Oregon's statute. See David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 222 n.65 (1999); David M. Golove,

Supreme Court also denied injunctive relief and declined to rule on the merits, and the opinion indicates that the Oregon Court of Appeals deemed Judge Deady's dicta in *Baker* erroneously reasoned.²¹⁷

In fact, Judge Deady's dicta in *Baker* was fatally flawed from the perspective of the jurisprudence of the era. In concluding that there was no difference between public and private employment, Judge Deady failed to anticipate a line of decisions culminating in two U.S. Supreme Court cases in 1915, *Heim v. McCall*²¹⁸ and *Crane v. New York*,²¹⁹ each unanimously holding that the Fourteenth Amendment permitted discrimination against noncitizens in public works.²²⁰ Based on these precedents, the California Supreme Court unanimously found that the answer was clear: "The right of any legislative body in this state to prohibit the employment of alien Chinese on public work may not be questioned . . ." ²²¹ Similarly, the Oregon Attorney General issued an opinion

Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075, 1249 (2000); Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 886 n.129 (1943); Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 252 (2017); Susan P. Graber, *The Legal Landscape of the U.S. District Court for Oregon*, 24 ENVTL. L. 1699, 1702 n.11 (1994) (book review).

²¹⁷ *City of Portland v. Baker*, 8 Or. 356, 366 (1880).

²¹⁸ 239 U.S. 175 (1915).

²¹⁹ 239 U.S. 195 (1915).

²²⁰ *Crane*, 239 U.S. at 198; *Heim*, 239 U.S. at 192-93. McGovney has pointed out that, in both cases, counsel did not raise—and the Court did not consider—the argument that citizen and noncitizen taxpayers "should be equally eligible for employment, nonpolitical in its nature, where the work is paid for from a fund contributed to by both." McGovney, *supra* note 30, at 229. The Court later found this argument persuasive: "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *Nyquist v. Mauclet*, 432 U.S. 1, 4 (1977) (quoting *In re Griffiths*, 413 U.S. 717, 722 (1973)).

²²¹ *City of Pasadena v. Charleville*, 10 P.2d 745, 750 (Cal. 1932), *overruled by Purdy v. State*, 456 P.2d 645 (Cal. 1969). An earlier California Supreme Court case had invalidated a Los Angeles ordinance restricting the hours of work on city contracts to eight per day, and forbidding the employment of Chinese labor. *Ex parte Kubach*, 24 P. 737, 738 (Cal. 1890). However, it may be that it was the limitation on hours of work that troubled the court. *See id.* ("[W]e cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day."). Six years after *Kubach*, the court treated the constitutionality of restrictions on Chinese labor as an open issue. *See Hellman v. Shoulters*, 44 P. 915, 922 (Cal. 1896) ("That those provisions in our constitution which prohibit the employment of Chinese labor on public works are void, because in conflict with the fourteenth amendment to the federal constitution, is maintained on both sides. We do not find it necessary to affirm either position."), *aff'd in bank*, 45 P. 1057 (Cal. 1896).

in 1927 upholding the prohibition on employment of Chinese in public works.²²² In 1919, a private bill was required in Nevada to reimburse the director of a state school who briefly employed a Chinese cook when the “white cook” was ill.²²³

These opinions are significant. In upholding bans on people with specific national origins, they suggest that the use of euphemistic ineligible alien or declarant categories may have been unnecessary in laws targeting nonwhites. These opinions, at a minimum, suggest that laws discriminating against particular ineligible races directly were valid. If, as the Supreme Court held, benefits could be restricted to those who had or could have declared their intent to become citizens, it is hard to see what difference it made how the category was described if the coverage was identical. Put another way, Chinese, Japanese, Mongolians and Malays were, under the law, racially ineligible for citizenship; if states were intent on discriminating against them, invalidating laws targeting specific races would have been pointless if they could have been replaced by laws with different words but precisely identical scope. In any event, there appear to be no cases striking down discrimination against named races when, under the jurisprudence of the time, the laws would have been valid if they had instead denied rights to ineligible noncitizens.²²⁴

The Hawaii Attorney General opined in 1915, just before the *Heim* and *Crane* decisions, that a proposed restriction of employment of stevedores on public docks to eligible noncitizens would be invalid.²²⁵ But the opinion was as much ahead of its time as *Baker*; it noted that the proposal, “from a political standpoint, is as objectionable as the recent anti-alien land laws of California,”²²⁶ which, as it happened, the Court would also uphold.²²⁷

V. PRIVATE EMPLOYMENT

A. Licenses and Permits

Many statutes limited the privilege of licenses or permits to citizens or declarants.²²⁸ A 1932 *ABA Journal* article noted that “[v]ery frequently a

²²² Or. Att’y. Gen. Op. No. 3, at 95 (1927).

²²³ An Act for the Relief of Matthew Kyle, 1919 Nev. Stat. 52.

²²⁴ See *VERNIER*, *supra* note 48, at 381 (noting that discrimination against Chinese might be justified by Supreme Court cases but arguing that all aliens ineligible to citizenship should be treated alike).

²²⁵ Haw. Att’y. Gen. Op. No. 405, at 24 (1915).

²²⁶ *Id.* at 25.

²²⁷ See *Frick v. Webb*, 263 U.S. 326, 334 (1923).

²²⁸ Patenting is an example. See *Baird v. Byrne*, 2 F. Cas. 423, 426 (C.C.D. Pa. 1854) (No. 757) (“So, also, the patent act of July 4, 1836, § 12, provides, ‘that any citizen of the United States, or alien who shall have been a resident of the United States one year next preceding, and who shall have made oath of his intention to become a citizen thereof, and who shall have invented any new art, &c., and shall desire further time to mature the same, may, on payment

declarant, that is, a person who has declared his intention to become a citizen, may receive a license on the same terms as a citizen.”²²⁹ Around the same time, a note in the *University of Pennsylvania Law Review* observed the existence of “the large body of new legislation making citizenship a requisite for employment in public projects and in many professions and trades.”²³⁰ The note explained that “[a] large number of the statutes make it sufficient if the person seeking admission to the regulated occupation has filed a declaration of intention to become a citizen.”²³¹ In the early 1960s, John F. Thomas reported “that citizenship or a declaration of intent is a requirement for licensing” in a majority of states for dentists, lawyers, practical nurses, physicians, school teachers, and veterinarians, and in more than twenty states for architects and professional nurses.²³²

Thus, in an 1890 opinion holding that a Chinese person could not be a California lawyer, the California Supreme Court explained that only declarants could waive in:

Only those who are citizens of the United States, or who have *bona fide* declared their intention to become such in the manner provided by law, (and we hold that this requires that they shall be persons eligible to become such, as well as to have declared their intention,) are entitled to be admitted to practice as attorneys and counselors of this court²³³

Similarly, the Wisconsin Attorney General opined that a statute providing that “[n]o certificate as a certified public accountant shall be granted to any person other than a citizen of the United States, or person who has in good faith declared

of the sum of \$20, file in the patent office a caveat, setting forth the design, &c. Here there is a right given equally to aliens who have declared their intention, &c. and to citizens of the United States, from which right all other aliens are excluded.” (quoting Act of July 4, 1836, ch. 357, § 12, 5 Stat. 117, 121-22 (1836)).

²²⁹ J.P. Chamberlain, *Aliens and the Right to Work*, 18 A.B.A. J. 379, 380 (1932). Perhaps the most comprehensive listing is contained in VERNIER, *supra* note 48, at 375-88.

²³⁰ Note, *Constitutionality of Legislative Discrimination Against the Alien in His Right to Work*, 83 U. PA. L. REV. 74, 74 (1934) (footnote omitted) [hereinafter *Constitutionality of Legislative Discrimination*].

²³¹ *Id.* at 74 n.3; *see also* Fellman, *supra* note 72, at 156-74.

²³² John F. Thomas, *Cuban Refugee Program*, WELFARE REV., Sept. 1963, at 1, 11 (citing AM. IMMIGR. & CITIZENSHIP CONF., GUIDE TO OCCUPATIONAL PRACTICE REQUIREMENTS IN THE U.S.A. FOR FOREIGN-TRAINED ARCHITECTS, DENTISTS, ENGINEERS, LAWYERS, LIBRARIANS, MUSICIANS, NURSES, PHYSICIANS, TEACHERS, VETERINARIANS (July 1961)); *see also* KONVITZ, *supra* note 13, at 190-211.

²³³ *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890), *abrogated by* 344 P.3d 288 (Cal. 2015); *see also* Howden v. State Bar of Cal., 283 P. 820, 821 (Cal. 1929) (admitting declarant to bar); Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 SETON HALL CONST. L.J. 103, 123 (1996) (“[T]welve states had permitted aliens to practice law if they had filed a declaration of intent with the federal court.”).

his intention of becoming such citizen” prevented a foreign-born person of Japanese descent from obtaining such certificate.²³⁴

Certain federal statutes provided minimum quotas for U.S. citizens serving on “vessels documented under the laws of the United States.”²³⁵ Beginning in 1872, federal law provided that a declarant sailor, after three years of service, shall “be deemed a citizen of the United States for the purpose of manning and serving on board any merchant ship of the United States.”²³⁶ The U.S. Attorney General opined that “wherever American citizenship is a prerequisite for serving as seamen on ‘any’ vessel of the United States, this class of aliens may enter or remain in that service on the same footing as citizens of the United States. This enactment makes them pro tanto citizens of the United States.”²³⁷ Fishing was restricted to citizens and declarants in the Alaska Territory²³⁸ and several states.²³⁹

In the pre-*Brown v. Board of Education*²⁴⁰ era of the Equal Protection Clause, there seemed to be little question that states could limit licensure to declarants or citizens, at least in the absence of treaty rights or some specific federal law and at least as to regulated businesses or professions legitimately requiring licenses.²⁴¹ Rarely, courts invalidated restrictions; for example, state courts

²³⁴ Wis. Att’y Gen. Op. No. 556, at 587-88 (1913) (quoting WIS. STAT. § 1636.203 (1913)); *see also* Wright v. May, 149 N.W. 9, 11 (Minn. 1914).

²³⁵ *E.g.*, Merchant Marine Act of 1928, § 405(c), ch. 675, 45 Stat. 689, 693.

²³⁶ Shipping Commissioners Act of 1872, ch. 322, § 29, 17 Stat. 262, 268 (repealed 1935).

²³⁷ Citizenship—Seamen on Am. Vessels Engaged in the Ocean Mail Serv., 36 Op. Att’y Gen. 1, 3 (1929); *see also* Koessler, *supra* note 4, at 326-27.

²³⁸ Act of June 14, 1906, ch. 3299, § 1, 34 Stat. 263, 263 (with some exceptions, making it “unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States” to fish in Alaska waters).

²³⁹ *See, e.g.*, State v. Catholic, 147 P. 372, 376-77 (Or. 1915) (discussing citizenship requirements for obtaining fishing license); *Ex parte* Desjeiro, 152 F. 1004, 1005-06 (C.C.D. Or. 1907) (discussing Oregon law providing license application process for “[a]ny person who is a citizen of the United States, or who has declared his intention to become such” (quoting CODES AND STATUTES OF OREGON § 4093 (Bellinger & Cotton 1905))); Wash. Att’y Gen. Op. No. 364, at 483 (1908).

²⁴⁰ 347 U.S. 483 (1954).

²⁴¹ As the Massachusetts Supreme Judicial Court explained in the context of a statute requiring licenses of peddlers:

If . . . the Legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect.

Commonwealth v. Hana, 81 N.E. 149, 150-51 (Mass. 1907); *see also* *Hughes v. City of Detroit*, 187 N.W. 530, 531 (Mich. 1922) (upholding peddler’s license statute limiting eligibility to those “who are, or have declared their intention to become, citizens of the United States”). *But see* *Constitutionality of Legislative Discrimination*, *supra* note 230, at 80 (“Such statutes can be seen only as arbitrary discriminations against persons who are felt to be

struck down New York's grant of driver's licenses only to citizens and declarants.²⁴² But many state statutes still on the books today restrict business licenses to citizens and declarants.²⁴³

B. *Union Membership*

In addition to discrimination based on race²⁴⁴ and gender,²⁴⁵ many unions limited membership to citizens and declarants.²⁴⁶ A form union constitution,

undeserving of work which involves a degree of skill or prestige and as manifestations of nationalistic and economic forces which make themselves felt particularly in times of unemployment.”).

²⁴² *Magnani v. Harnett*, 14 N.Y.S.2d 107, 107 (App. Div. 1939) (invalidating statute), *aff'd per curiam*, 25 N.E.2d 395 (N.Y. 1940).

²⁴³ *See, e.g.*, COLO. REV. STAT. § 37-91-105(2)(b) (2019) (limiting registration as contractor for building of wells or installation of pumping equipment to citizens and declarants); KY. REV. STAT. ANN. § 334A.050 (West 2020) (limiting ability of speech language pathologists and audiologists to obtain licenses to citizens and declarants); MASS. GEN. LAWS ANN. ch. 101, § 22 (West 2020) (limiting sales licenses to citizens and declarants); MASS. GEN. LAWS ANN. ch. 112, § 87TT (West 2020) (limiting eligibility for brokers licenses to citizens and declarants); MISS. CODE ANN. § 75-27-305(1) (2020) (limiting ability to obtain bonded weighmaster license to citizens and declarants); N.J. STAT. ANN. § 45:12-7 (West 2020) (limiting eligibility for optometry license based on license from another state to citizens and declarants); OKLA. STAT. ANN. tit. 5, § 1 (West 2019) (allowing alien who made declaration to practice law); 63 PA. STAT. AND CONS. STAT. § 642 (West 2020) (limiting eligibility for poultry technician licenses to declarants and citizens); *see also* Jennessa Calvo-Friedman, Note, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597 app. 2 at 1638 (2014).

²⁴⁴ *See, e.g.*, Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1776 (2001) (“The AFL not only marginalized race and gender in its ideology, it exploited them for purposes of organizing. Exclusionary racial practices were central to the creation and maintenance of [white] working class solidarity.” (alteration in original)); Charlotte Garden & Nancy Leong, “*So Closely Intertwined*”: *Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1141-59 (2013).

²⁴⁵ Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1942 (1994) (“Initially, women were excluded from union membership in an effort to force them out of the labor market; union leaders feared that female competition for jobs would depress men's wages and undermine the structure of the nuclear family.”).

²⁴⁶ In addition, as one court noted, the Communist Party of the United States restricted membership to citizens and declarants but had an exception for “[p]ersons who, by some present unjust and undemocratic laws, are excluded from citizenship and disbarred from legally declaring their intentions of becoming citizens . . .” *Harisiades v. Shaughnessy*, 90 F. Supp. 397, 399 n.1 (S.D.N.Y. 1950) (quoting THE CONSTITUTION AND BY-LAWS OF THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA 29 (1938)), *rev'd sub nom.* *United States ex rel. Harisiades v. Shaughnessy*, 187 F.2d 137 (2d Cir. 1951), *aff'd sub nom.* *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

prepared by the noted labor law firm of Mathew O. Tobriner—who would later serve on the California Supreme Court—provided that “[c]andidates for admission into this union must be American citizens or have declared their intention of becoming such.”²⁴⁷ Many examples of union constitutions found in litigated cases contain the same restriction.²⁴⁸

VI. WHITE LAWBREAKERS AND NONWHITE VETERANS

A final category of benefit to white noncitizens in the United States was relief from deportation. One type of relief was available to any noncitizen: the judicial recommendation against deportation (“JRAD”), which, from 1917 to 1990, allowed state and federal sentencing judges to issue binding rulings that a person convicted of a crime should not be deported on the basis of that conviction.²⁴⁹ JRAD was not race-restricted,²⁵⁰ but it was of no benefit to someone who had not been convicted of a crime or who was also deportable on some ground other than criminal conviction, such as being an unauthorized migrant in the country in violation of the Chinese Exclusion Act or being an alien ineligible to citizenship.

Relief for those here in violation of the immigration laws was racially restricted. Registry was a potential benefit offered to deportable white noncitizens. Registry remains in the Immigration and Nationality Act as a method of creating lawful status for long-term residents who cannot prove lawful entry.²⁵¹ When the remedy of registry was created in 1929, it was available to “any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence.”²⁵² While registry was available

²⁴⁷ NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 114:147 (2019).

²⁴⁸ See, e.g., *Rule v. Int’l Ass’n of Bridge, Structural & Ornamental Ironworkers*, Local Union No. 396, 568 F.2d 558, 565 n.8 (8th Cir. 1977); *NLRB v. Int’l Longshoremen’s Ass’n*, Local No. 1581, AFL-CIO, 489 F.2d 635, 636 (5th Cir. 1974); *Local 89, Int’l Bldg. & Common Laborers Union of Am. v. Young*, No. 246591, 1961 WL 1390, at *1 (Cal. Super. Ct. Mar. 6, 1961); *Park v. Hotel & Rest. Emps. Int’l All.*, (Locals Nos. 106, 107, 108, 167), 30 Ohio Dec. 64, 70-71 (Ct. Com. Pl. 1919); *Musicians Protective Ass’n, Local 466 v. Semon*, 254 S.W.2d 211, 212 (Tex. Civ. App. 1952). *Sailor’s Union of the Pacific* President Andrew Furuseh explained to Congress that “we do not take [Chinese or Japanese] into the union,” although white noncitizens were welcome: “Any man who is eligible to become a citizen of the United States may join the union on six months’ probation.” *Deportation of Alien Seamen: Hearing on Proposed Amendments to H.R. 11796 Before the H. Comm. on Immigration and Naturalization*, 68th Cong. 147 (1925) (statement of Andrew Furuseh, President, Sailor’s Union of the Pacific).

²⁴⁹ See Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143-44 (2002).

²⁵⁰ See *Wong Yow v. Weedon*, 33 F.2d 377, 379 (9th Cir. 1929).

²⁵¹ See 8 U.S.C. § 1259 (2018); see also *In re Linklater*, 3 F.2d 691, 693 (N.D. Cal. 1925).

²⁵² Act of Mar. 2, 1929, ch. 536, § 1(a), 45 Stat. 1512, 1512-13.

to “an unlawful alien who smuggles himself across the frontier[.]”²⁵³ it could not be granted to “an alien racially ineligible to citizenship.”²⁵⁴

Suspension of deportation was another racially restricted remedy; it exists today in current law as cancellation of removal.²⁵⁵ The statute as amended in 1940 granted the attorney general discretion to “suspend deportation of [an] alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien.”²⁵⁶ Thus, in many grants of relief, the administrative agency’s first finding is “[t]hat the alien is a person of the white race and is eligible for naturalization in the United States.”²⁵⁷ In these and other ways,²⁵⁸ white noncitizens here in violation of the law have had avenues of avoiding deportation which were unavailable to those racially ineligible to citizenship.

The impact and importance of race in this period are illustrated by comparing the humane, case-by-case consideration granted by law to white noncitizens convicted of crimes or who were in the United States unlawfully to the rigid, categorical racial prohibition applicable to nonwhite noncitizens who had put their lives on the line for the country. Military service was another arena in

²⁵³ *Linklater v. Perkins*, 74 F.2d 473, 476 (D.C. Cir. 1934).

²⁵⁴ *In re B—*, 3 I. & N. Dec. 304, 309 (B.I.A. 1948) (denying registry but recognizing lawful status on another ground).

²⁵⁵ 8 U.S.C. § 1229b (providing Attorney General discretionary authority to grant cancellation of removal to noncitizen).

²⁵⁶ Alien Registration Act of 1940, ch. 439, § 20(c)(2), 54 Stat. 670, 672 (repealed 1952).

²⁵⁷ *In re P—*, 2 I. & N. Dec. 84, 86 (B.I.A. 1944). Many other cases use the same language. *See, e.g., In re T—*, 2 I. & N. Dec. 614, 616 (B.I.A. 1946); *In re K—*, 2 I. & N. Dec. 411, 413 (B.I.A. 1945); *In re C—*, 2 I. & N. Dec. 220, 224 (B.I.A. 1944); *In re I—*, 1 I. & N. Dec. 627, 629 (B.I.A. 1943); *In re S—*, 1 I. & N. Dec. 606, 609 (B.I.A. 1943); *see also In re B—*, 2 I. & N. Dec. 492, 497 (B.I.A. 1946) (“The record establishes that the alien is racially eligible for discretionary relief under section 19 (c) of the 1917 act . . .”). After World War II, although the opinions sometimes still revealed that a noncitizen was “of the white race,” the findings themselves seem to have ceased mentioning race. *In re K—*, 4 I. & N. Dec. 348, 349 (B.I.A. 1951) (“The respondent is a native and citizen of Finland, now approximately 43 years of age, male, married, of the white race, who has been found subject to deportation on the charge stated above.”).

²⁵⁸ *See Sumio Madokoro v. Del Guercio*, 160 F.2d 164, 166 (9th Cir. 1947) (concluding Japanese resident not eligible for exception to excludability for returning residents, noting that “[i]t is unnecessary for us to determine whether the Act of 1924 repealed as to all aliens Section 3 of the Act of February 5, 1917, above stated, since it is clear that the 1924 Act repealed Section 3 of the 1917 Act so far as it applied to aliens ineligible to citizenship”).

which whites were favored; the United States²⁵⁹ and many states²⁶⁰ include both declarants and citizens as members of the militia. Military service is an important mechanism of honor, inclusion, and status. It has also long been coupled with tangible immigration benefits.²⁶¹

However, Professor Darlene Goring's scholarship on naturalization of veterans illustrates that Congress rigorously applied its racial restriction on naturalization even for veterans with war service.²⁶² Between 1862, when Congress first granted naturalization benefits to veterans, and 1952, when racial limits on naturalization ended, Congress relaxed the racial restrictions on naturalization only with respect to Filipinos—who were U.S. nationals rather than U.S. citizens, and therefore not technically aliens²⁶³—and briefly between 1935 and 1940.²⁶⁴

As the Supreme Court explained in invalidating the naturalization certificate of a Japanese American Coast Guardsman who had served for ten years, including in World War I, “as it has long been the national policy to maintain the distinction of color and race, radical change is not lightly to be deemed to have been intended[,]” and so “limitations based on color and race remain.”²⁶⁵ In denying citizenship to a Chinese-American sailor who had fought in the Battle of Manila Bay, a judge explained that Congress must have known “that members of other races would serve in the army and navy of the United States,” and its

²⁵⁹ See 10 U.S.C. § 246(a). Declarants could also enlist in the armed forces. See Act of Aug. 10, 1956, ch. 333, § 3253(c), 70A Stat. 1, 178; Act of August 10, 1956, ch. 833, § 8253(c), 70A Stat. 503, 503 (1956); Federal Power Act of 1920, ch. 286, 41 Stat. 1077; Act of Aug. 1, 1894, ch. 180, § 2, 28 Stat. 216, 216; State *ex rel.* Gallagher v. Salen, 26 Ohio Cir. Dec. 541, 542 (Cir. Ct. 1908).

²⁶⁰ See, e.g., ARIZ. REV. STAT. ANN. § 26-121 (2019); CAL. MIL. & VET. CODE § 122 (West 2020); IDAHO CODE § 46-102 (2020); NEV. REV. STAT. § 412.026(3) (2020); N.M. STAT. ANN. § 20-2-2(B) (2020); OR. REV. STAT. § 396.105(3) (2020); UTAH CODE ANN. § 39-1-1(1) (West 2020); WASH. REV. CODE ANN. § 38.04.030 (West 2020). *But see, e.g.,* WYO. STAT. ANN. § 19-8-102(a) (2020).

²⁶¹ See 8 U.S.C. § 1439 (2018) (providing for naturalization through service in armed forces); *id.* § 1440 (providing for naturalization for certain war veterans); Yepes-Prado v. U.S. Immigration & Naturalization Serv., 10 F.3d 1363, 1366 (9th Cir. 1993) (noting that authorities consider noncitizens' “service in the United States armed forces” as factor in discretionary determinations about deportation).

²⁶² Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 408-30 (2000).

²⁶³ Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1681 (2017).

²⁶⁴ Goring, *supra* note 262, at 444-45.

²⁶⁵ *Hidemitsu Toyota v. United States*, 268 U.S. 402, 412 (1925); *see also* *Bessho v. United States*, 178 F. 245, 248 (4th Cir. 1910) (“The history of the country through all the time thus indicated—to which we think we may with propriety allude—clearly develops the necessity for the legislation mentioned, and points out the purpose of the Congress in enacting it.”).

retention of the racial limitation must have been regarded as intentional.²⁶⁶ Similarly, in refusing to naturalize a South-American Indian and a Japanese American who had served in the Navy in World War I, a judge explained that “[h]owever worthy may have been the military services of the petitioners, I can find no warrant in the statutes for their naturalization.”²⁶⁷ A Korean-American U.S. Army veteran was reminded that “[i]t should be borne in mind that the policy of our law, from 1802 down to the present time, has had in view the prevention of all aliens, not free white persons, from becoming citizens.”²⁶⁸

To be sure, some of the cases involved cancellation or declarations of invalidity of naturalization certificates, indicating that some judges found racially ineligible veterans worthy of citizenship earlier in the process.²⁶⁹ But no court, once the issue was litigated, seems to have held that veterans of races not listed in the naturalization law were entitled to become citizens. The weight awarded and the humane, case-by-case consideration applied in determining whether white noncitizens who were in America unlawfully or who had committed crimes should be deported, compared to the rigid application of racial restrictions to nonwhite noncitizens who had put their lives on the line for the country, gives some sense of the importance of race in this period.

CONCLUSION

Recognizing the system of discrimination against nonwhite noncitizens adds to the understanding of the racial history of the United States. Of course, discrimination against noncitizens based on their status operated alongside of a set of racial classifications that did not turn on citizenship. These included school segregation, anti-miscegenation laws, abuse of the criminal justice system, restrictions on the right to testify, discriminatory taxation, restrictive covenants, disenfranchisement, and many other techniques. Although much more research remains to be done, understanding that the law energetically discriminated based on race even with respect to noncitizens helps a more complete picture come in to focus. Into the second half of the twentieth century, the commonplace “free, white and 21” signified adulthood and independence.²⁷⁰ It captured the reality

²⁶⁶ *In re Knight*, 171 F. 299, 301 (E.D.N.Y. 1909).

²⁶⁷ *In re Geronimo Para*, 269 F. 643, 647 (S.D.N.Y. 1919); *see also In re Buntaro Kumagai*, 163 F. 922, 924 (W.D. Wash. 1908) (noting that Congress meant “to extend the privilege of naturalization only to those of that race which is predominant in this country”).

²⁶⁸ *In re Easurk Emsen Charr*, 273 F. 207, 212 (W.D. Mo. 1921).

²⁶⁹ *See Sato v. Hall*, 217 P. 520, 525 (Cal. 1923) (holding that Japanese-American veteran not entitled to vote, notwithstanding naturalization certificate).

²⁷⁰ *See, e.g., People v. Perkins*, 35 Cal. Rptr. 589, 591 (Dist. Ct. App. 1963); *Evans v. Henry*, 230 S.W.2d 620, 621 (Tex. Civ. App. 1950); Andrew Heisel, *The Rise and Fall of an All-American Catchphrase: ‘Free, White, and 21,’* JEZEBEL (Sept. 10, 2015, 2:10 PM) <https://pictorial.jezebel.com/the-rise-and-fall-of-an-all-american-catchphrase-free-1729621311> [http://perma.cc/4RFN-4J9T].

that citizenship was not always essential to equal status (or, in the case of Black people, sufficient for it), while the characteristic of white race often was.

This body of law also might be relevant to understanding the current political situation. Economist Paul Krugman, among others, has queried why white working-class people “vot[e] against [their] own interests” by preferring Republicans to Democrats.²⁷¹ If we indulge the assumption that many Americans know their family history—the stories of parents who were union members, grandparents who served in the military, great grandparents born on homesteads—members of the white working class were often advantaged by racial policy where the best opportunities were reserved for people like them. By promising to crack down on immigration, President Trump sent a signal that those days could be coming around again.

²⁷¹ Thomas Frank, Opinion, *Paul Krugman Got the Working Class Wrong*, THE GUARDIAN (Jan. 10, 2018, 3:00 PM), <https://www.theguardian.com/commentisfree/2018/jan/10/paul-krugman-mistake-white-working-class-voters-republicans> [<http://perma.cc/7KCG-7PMA>]; see also, e.g., Joshua Zeitz, *Does the White Working Class Really Vote Against Its Own Interests?*, POLITICO MAG. (Dec. 31, 2017), <https://www.politico.com/magazine/story/2017/12/31/trump-white-working-class-history-216200> [<http://perma.cc/UCA9-UB4H>].