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≡ The Oxford Handbook *of*  
**CITIZENSHIP**

CHAPTER 7

THE HISTORY OF  
RACIALIZED CITIZENSHIP

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MOMENTS OF RACIALIZED CITIZENSHIP:  
KEY CONCEPTS

How have governments over the last two and half millennia used race to decide who can be a citizen? Major cycles defy a teleological description of progress toward deracialization over the entire period. High points of racialized citizenship in ancient Athens, late medieval Iberia, the United States from the late eighteenth to mid-twentieth centuries, several countries around World War II, and apartheid

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South Africa were followed by lulls. Since the mid-twentieth century, a strong international norm has emerged against racialized citizenship, though it is not dead in practice.<sup>1</sup> The following pages define race, the different moments at which citizenship can be racialized, and the broad patterns of racialization and deracialization at each of those moments. While there are no iron laws of history that define the precise conditions under which policies are racialized, these outcomes have been shaped by the formation of polities based on a strong sense of common descent,<sup>2</sup> colonization and decolonization,<sup>3</sup> and interstate relations.<sup>4</sup> A historical record centuries older than standard accounts of racialized citizenship reveals patterns of policy and their causes.

Racism refers to the sorting of social groups by their supposedly inherited and unchangeable physical attributes and/or phenotype, attributing differential moral and mental capacities to those physical characteristics, and then using those putative differences to legitimate the unequal distribution of resources and treatment. Race is a subset of ethnicity—the social process of making ascriptive distinctions among groups using language, history, descent, traditions, or religion. What makes race distinctive from other forms of ethnicity is the perceived inalterability of belonging to the category and/or emphasis on phenotype.

Citizenship may be ethnicized, or more narrowly racialized, at four distinct moments. Three of these moments emphasize the external dimension of citizenship—the legal nationality of an individual vis-à-vis other states. Nationality is defined through rules of birthright acquisition, naturalization, and denationalization. The fourth moment of potential racialization is the internal dimension of citizenship—the status, rights, and obligations of a group or individual within a state. Across all of these moments, racialization may consist of negative discrimination against a particular group and/or a positive preference that favors a particular group.

<sup>1</sup> On the role of international norms in immigration and nationality law, see Kristin Surak, 'Convergence in Foreigners' Rights and Citizenship Policies? A Look at Japan,' *International Migration Review* 42, no. 3 (2008): pp. 550–575; David Scott FitzGerald and David Cook-Martín, *Culling the Masses: The Democratic Origins of Racist Immigration Policies in the Americas* (Cambridge: Harvard University Press, 2014). See, more generally, John W. Meyer et al., 'World Society and the Nation State,' *American Journal of Sociology* 103, no. 1 (1997): pp. 144–181.

<sup>2</sup> Aristide R. Zolberg, 'The Formation of New States as a Refugee-Generating Process,' *The Annals of the American Academy of Political and Social Science* 467, no. 1 (1983): pp. 24–38; Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992); Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2005).

<sup>3</sup> George M. Fredrickson, *Racism: A Short History* (Princeton: Princeton University Press, 2002); Christian Joppke, *Selecting by Origin: Ethnic Migration in the Liberal State* (Cambridge: Harvard University Press, 2005).

<sup>4</sup> Rogers Brubaker and Jaeeun Kim, 'Transborder Membership Politics in Germany and Korea,' *European Journal of Sociology* 52, no. 1 (2011): pp. 21–75; FitzGerald and Cook-Martín (n 1).

Rules about birthright define who owns the status of citizen from the moment a baby draws its first breath. ‘All states are “ethnic” in the loosest sense that birth is the usual way of becoming a member of a state.’<sup>5</sup> If all states are ethnic in this loose sense, far fewer are racial in the narrower sense that they only give citizenship to some racially defined group at birth while excluding others. The history of birthright citizenship in the *longue durée* includes cycles of racialization and deracialization. The principal theoretical dispute about what explains these configurations has revolved around the nature of *jus sanguinis*, the principle of descent, and *jus soli*, the principle of territory, in guiding birthright citizenship. According to the controversial legacies of nationhood perspective associated with Rogers Brubaker, states tend to adopt *jus sanguinis* where an understanding of nationhood is based on ethnicity or descent, while states tend to adopt *jus soli* where an understanding of nationhood is framed by the political and territorial boundaries of the state.<sup>6</sup>

A second potential moment for assigning nationality is through naturalization. The most obvious, but historically rare, form of racist naturalization is to restrict eligibility to foreigners who are part of a racially defined group and to deny it to all others. The United States from 1790 to 1952 and Nazi Germany practiced such policies. ~~Instances of racialized naturalization are more common historically.~~ Contemporary cases are easier to identify when naturalization is analyzed as a whole system of policy regulating admission and membership rather than by narrowly focusing on naturalization rules alone. In most cases, admission to the territory is a precursor to naturalization. Many naturalization rules are not themselves racialized, but when considered together with immigrant admissions rules and practices, a system of racialized naturalization is revealed. There has been a sharp reduction since the late 1930s in the use of race as a criterion of selection in immigration policy. That fact does not mean that hidden racial criteria have been eliminated altogether or that they are guaranteed to vanish in the future. Positive preferences for named ethnic groups are more prevalent than negative discrimination against named groups.<sup>7</sup>

The third moment of potential racialization is denationalization. ‘Corporate expulsions’ of whole groups, as compared to forcibly moving groups within a country, first began in Western Europe during the Middle Ages.<sup>8</sup> Even practices as abhorrent as ethnic cleansing are not necessarily racist when groups or individuals are given the coerced option to assimilate, because assimilation suggests that a social boundary can be crossed. Racialized denationalizations accompanied expulsions and population transfers on a massive scale following the remaking of nation-states around the two world wars. Of all the moments where nationality is defined, the use of racial criteria in denationalization has become the most illegitimate.

<sup>5</sup> Joppke (n 3), p. 240.      <sup>6</sup> Brubaker (n 2).      <sup>7</sup> FitzGerald and Cook-Martin (n 1).

<sup>8</sup> Benjamin Z. Kedar, ‘Expulsion as an Issue of World History,’ *Journal of World History* 7, no. 2 (2005): pp. 165–180, p. 168.

Denaturalization for racial reasons continues in thin disguise to the present day but is relatively rare and the object of international opprobrium.

The fourth moment of potential racialization is the internal dimension of citizenship, which can be separated into legal status and substantive practice. As with the acquisition of citizenship, cycles of racialization and deracialization have marked this history, though racism has become increasingly illegitimate since the post-colonial Cold War era. The practice of citizenship continues to be racialized much more than citizenship status. Even the most homogenous countries include ethnic, if not specifically racial divisions, and differential access to the social, political, and civil rights of citizenship reflects these divisions.

## BARBARIANS AND INFIDELS

In the prevailing scholarly view, racism was unknown to the ancients. For example, ancient Chinese thought barbarians could become Chinese through a process of cultural transformation, suggesting a civilizational but not strictly racial hierarchy.<sup>9</sup> The standard scholarly position is that racism did not emerge until the onset of long-distance European colonization of the rest of the world beginning in the late fifteenth century.<sup>10</sup>

However, there is extensive evidence of at least proto-racialized citizenship in antiquity. Racial citizenship arguably may have been associated with democracy. The classical Athenian notions of citizenship were proto-racial in that they were based on the notion that ecological environments created immutable physical and moral differences between groups. Greeks were superior to racialized barbarians in this scheme.<sup>11</sup> Eligibility for citizenship in ancient Athens required the perceived capacity to rule. Aristotle's *Politics* argued that 'natural slaves' are incapable of ruling and benefit from being governed by masters inherently endowed with a higher capacity. Most slaves in ancient Greece were barbarians, particularly in Athens, where the enslavement of Athenians was prohibited. Prominent philosophers claimed that metics, foreign denizens, also lacked the capacity for self-rule.<sup>12</sup> Legally,

<sup>9</sup> Frank Dikötter, 'Group Definition and the Idea of "Race" in Modern China (1793–1949),' *Ethnic and Racial Studies* 13, no. 3 (1990): pp. 420–432, p. 421.

<sup>10</sup> Lewis Hanke, *Aristotle and the American Indians* (London: Hollis and Carter, 1959); David Theo Goldberg, *Racist Culture* (Cambridge: Blackwell, 1993); Fredrickson (n 3).

<sup>11</sup> Benjamin H. Isaac, *The Invention of Racism in Classical Antiquity* (Princeton: Princeton University Press, 2004).

<sup>12</sup> J.G.A. Pocock, 'The Ideal of Citizenship Since Classical Times,' in Gershon Shafir, ed., *The Citizenship Debates* (Minneapolis: The University of Minnesota Press, 1998), pp. 31–42, p. 33.

Athenian citizenship required birth to an Athenian father, and after the passage of the Periclean law in 451 BCE, birth to both an Athenian mother and father. Marriage to foreigners was banned.<sup>13</sup> Thus, Athenian citizenship was based on a strong version of *jus sanguinis*—the principle of descent. Regardless of whether Athens was the first society to develop a proto-racialized understanding of citizenship, its model enjoyed extraordinary influence on the later traditions of the Enlightenment and modernity.<sup>14</sup>

By contrast, an expansionist Rome used a territorial version of citizenship to assimilate diverse peoples and consolidate its grip over a vast empire. Even though xenophobia against groups like the Gauls, Germans, and Persians appears to have been the norm among Roman elites, the Roman foundational myth was not based on the idea of common descent.<sup>15</sup> Rome lacked a proto-racial citizenship despite deep prejudice against foreigners because it was an empire based on diverse peoples unified by allegiance to Caesar rather than a democracy like Athens obsessed with self-rule by a single community.

The division of Eurasia and the Mediterranean into empires organized around the universalistic religions of Islam and Christianity also failed to create racialized citizenships.<sup>16</sup> Racial distinctions are based on the perceived inalterability of inherited group characteristics, which raises the critical question of whether it was possible to assimilate to a higher citizenship status via conversion. Early expulsions of Jews and Muslims from medieval Christian jurisdictions do not appear to have been racialized. Conversion was an option.<sup>17</sup> The ubiquity of sumptuary laws that required Muslims and Jews to wear distinctive clothing suggests that phenotypical and religious distinctions did not overlap neatly.<sup>18</sup> The mutability of the religious categories—indeed the encouragement of conversion—and the apparent inability to make phenotypical distinctions among Christians, Jews, and Muslims—suggests that early medieval hierarchies of membership and expulsions were based on religious bigotry rather than racism.

It was only in the wake of forced mass conversions from Judaism and Islam to Christianity that a specifically racial form of citizenship took hold in sixteenth century Iberia and in its conquests in the Americas. The *limpieza de sangre* (blood purity)

<sup>13</sup> Susan Lape, *Race and Citizen Identity in the Classical Athenian Democracy* (Cambridge, New York: Cambridge University Press, 2010), p. 33.

<sup>14</sup> Isaac (n 11), p. 130. <sup>15</sup> Isaac (n 11).

<sup>16</sup> Antoine Fattal, *Le statut légal des non musulmans en Terre d'Islam* (Beyrouth: L'imprimerie Catholique, 1958); Bernard Lewis and Benjamin Braude, eds., *Christians and Jews in the Ottoman Empire* (New York: Holmes & Meier, 1982).

<sup>17</sup> David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (Princeton: Princeton University Press, 1996).

<sup>18</sup> Marjorie Ratcliffe, 'Judíos y musulmanes en la jurisprudencia medieval española,' *Revista canadiense de estudios hispánicos* (1985): pp. 423–438; John Tolan, 'The Legal Status of the Jews and Muslims in the Christian States,' in Abdelwahab Meddeb and Benjamin Stora, eds., *A History of Jewish-Muslim Relations: From the Origins to the Present Day* (Princeton Princeton University Press, 2013).

laws defined anyone with at least one Jewish ancestor not just as a *converso* who had made the desirable decision to become a Christian, but as a despised ‘Crypto-Jew’ who secretly maintained Jewish practices and tried to Judaize Christianity. Some Spanish communities explicitly banned *conversos* and their progeny from local citizenship, and *conversos* were excluded from rights enjoyed by Catholic subjects of the Spanish kings. *Moriscos*, converts from Islam to Christianity and their descendants, were expelled from Spain in 1609.<sup>19</sup> The legal impossibility of full membership for people of Jewish or Moorish background reveals the racialization of religious prejudice by the sixteenth century.<sup>20</sup> In effect, the *limpieza de sangre* laws were a strong, multi-generational form of *jus sanguinis* corresponding to a common religious community of descent.

Although the racialized treatment of Jews and Muslims suggests that overseas European colonization did not invent racism, notwithstanding the claim of many scholars,<sup>21</sup> colonization *did* generate many features of modern racism as European settlers sought to justify their military and economic conquests. The first permanent overseas European colonization of large populations took place in Spanish America, which engendered fundamental questions about the political and religious status of the indigenous population. During the Valladolid debate of 1550 to 1551, Bishop Bartolomé de las Casas drew on doctrines of Christian universalism to argue that the indigenous were rational beings with the right not to be enslaved. His opponent, the philosopher Juan Ginés de Sepúlveda, cited Aristotelian notions that natural slaves cannot rule and should be governed by a group inherently endowed with a higher capacity. His conclusion was that Spaniards should rule the indigenous.<sup>22</sup> In the wake of the debate, the *encomienda* system of forced indigenous labor was weakened, but harsh exploitation and a caste system continued to define colonial relationships. At independence, Spanish American governments abolished black slavery and the caste system even as blacks’ and indigenous peoples’ substantive rights of citizenship remained sharply curtailed.<sup>23</sup>

European colonization of nearly the entire planet was based on the logic of racial, religious, and civilizational superiority of white Christian Europeans. Native peoples and slaves, usually imported from Africa, had secondary or no citizenship in these colonial arrangements. Early European colonization of Southern Africa

<sup>19</sup> Seymour B. Liebman, *The Inquisition and the Jews in the New World* (Coral Gables: University of Miami Press, 1975); Jerome Friedman, ‘Jewish Conversion, the Spanish Pure Blood Laws and Reformation: A Revisionist View of Racial and Religious Antisemitism,’ *The Sixteenth Century Journal* 18, no. 1 (1987): pp. 3–30.

<sup>20</sup> Yosef H. Yerushalmi, *Assimilation and Racial Anti-Semitism: The Iberian and the German Models* (New York: Leo Baeck Institute, 1982).

<sup>21</sup> Hanke (n 10); Fredrickson (n 3). <sup>22</sup> Hanke (n 10).

<sup>23</sup> Robert H. Jackson, *Race, Caste, and Status: Indians in Colonial Spanish America* (Albuquerque: University of New Mexico Press, 1999); Peter Wade, *Race and Ethnicity in Latin America*, 2nd edition (London: Pluto Press, 2010).

initially justified European dominance over the native populations in religious terms. Similarly, in North America, English settlements in Virginia justified slavery as the rightful condition of heathens. When native populations and slaves in Africa and the Americas converted to Christianity, however, this justification was quickly eliminated. Slaveholders turned to race to legitimate slavery and discrimination against non-whites more generally. European colonists built political communities based on racial descent rather than religion.<sup>24</sup>

In a parallel process in Europe, the notion of shared religious descent was shunted aside by scientific racism. The leading racial theorists in the eighteenth century turned toward a lineage-based understanding of race and typically ignored the classification of Jews or classified them as Caucasian.<sup>25</sup> Jews eventually gained access to the full rights of citizenship in European countries in an uneven process across the continent that unfolded from the eighteenth to early twentieth centuries during the formation of nation-states.<sup>26</sup>

## NATION-STATES

The codification of nationality became a constitutive act in the construction of nation-states. In Brubaker's classic discussion of *jus sanguinis* and *jus soli*, the correspondence between nationality law and particular conceptions of nationhood is based on institutionalized historical idioms that shape the way political actors think and talk about nationality. An ethnic understanding of German nationhood sustained a *jus sanguinis* regime for most of modern German history, while a state-framed and territorial conception of French nationhood sustained a primarily *jus soli* regime. Brubaker recognized that there is no *automatic* connection between an ethnic conception of nationhood and *jus sanguinis*. Some versions of *jus sanguinis* are based on the idea that the accidental fact of birthplace on a territory is insufficient to create durable and legitimate bonds of citizenship, and thus *jus sanguinis* is used to ensure a substantive tie. Other versions of *jus sanguinis* are based on the idea that the nation is a 'community of descent.'<sup>27</sup>

<sup>24</sup> Pierre L. van den Berghe, *Race and Racism: A Comparative Perspective* (New York: John Wiley & Sons, 1967); George M. Fredrickson, *White Supremacy* (New York: Oxford University Press, 1981); Michael P. Banton, *Racial Theories*, 2nd edition (New York: Cambridge University Press, 1998).

<sup>25</sup> George L. Mosse, *Toward the Final Solution: A History of European Racism* (New York: Howard Fertig, 1978).

<sup>26</sup> Ibid. <sup>27</sup> Brubaker (n 2), pp. 123–124.



Scholars sharply dispute the legacies of nationhood argument. Weil shows that France, renowned in the twentieth century for its *jus soli*, adopted *jus sanguinis* in 1803 to promote socialization as the basis of nationality rather than the feudalistic allegiance to a territorial sovereign expressed in *jus soli*. Prussia adopted *jus sanguinis* in 1842, not out of a sense of ethnic nationalism, but because Prussian jurists considered France to have developed the most modern legal model. This policy transfer is evidence for the importance of international norms in shaping citizenship. Prussian *jus sanguinis* also allowed for the transmission of nationality to ethnic Poles and Jews, thus providing further evidence that *jus sanguinis* was not based on ethnic descent.<sup>28</sup> Brubaker's crystal ball was clouded when he predicted of Germany in 1992 that 'there is no chance that the French system of *jus soli* will be adopted; the automatic transformation of immigrants into citizens remains unthinkable in Germany.'<sup>29</sup> French and German nationality laws converged toward a mixed *sanguinis/soli* system in the 1990s, and the intergenerational transmission of German nationality by *jus sanguinis* was limited. Tests of German linguistic competency administered to the *Aussiedler* (ethnic Germans in Eastern Europe seeking to enter Germany) also reveal a mutable conception of ethnic Germanness.<sup>30</sup> 'The comparative history of German and French nationality law thus does not show any equivalence, any directly causal link between *jus sanguinis*, an ethnic conception of the nation, and Germany on the one hand, or between *jus soli*, a civic or elective conception of the nation, and France on the other hand,' concludes Weil.<sup>31</sup> Subsequent work by Brubaker and Kim comparing German and Korean policies toward co-ethnics emphasized the contingency and geopolitical dimensions of nationality policies and downplayed the importance of distinctive 'idioms of nationhood.'<sup>32</sup>

The Mexican and Japanese cases show the importance of the diffusion of foreign models of nationality and that *jus sanguinis* may simply reflect ideas about family rather than race. An analysis of all references to *jus sanguinis* and related terms of descent in Mexican congressional debates from 1916 to 1997 reveals that politicians generally framed blood ties in terms of parental or familial descent rather than race. Claims of a common, primordial descent group would not make sense within a dominant national narrative that celebrates Mexico as the mixing of Spanish and native elements. Mexican policymakers often referred to European and U.S. models of *jus sanguinis* and *jus soli* as standard principles to follow.<sup>33</sup> In Japan, the very strong version of *jus sanguinis* and absence of *jus soli* has an apparent affinity with

<sup>28</sup> Patrick Weil, *How to be French: Nationality in the Making Since 1789* (Durham: Duke University Press, 2008).

<sup>29</sup> Brubaker (n 2), p. 185.

<sup>30</sup> Joppke (n 3), p. 241; Doris Schüpbach, 'Testing Language, Testing Ethnicity? Policies and Practices Surrounding the Ethnic German *Aussiedler*,' *Language Assessment Quarterly* 6, no. 1 (2009): pp. 78–82.

<sup>31</sup> Weil (n 28), p. 191.

<sup>32</sup> Brubaker and Kim (n 4), p. 67.

<sup>33</sup> David FitzGerald, 'Nationality and Migration in Modern Mexico,' *Journal of Ethnic and Migration Studies* 31, no. 1 (2005): pp. 171–191.

the notion of Japan as an ethnically homogenous community.<sup>34</sup> Yet Kashiwazaki shows that ‘ethnic nationalism in the Meiji era had little direct impact on the legislation of the 1899 nationality law.’<sup>35</sup> The origins of *jus sanguinis* in the 1899 law lie in the adoption of European models and the family registration system adopted from China around the sixth century. The Meiji government attributed the same legal status to minority groups subject to discrimination in practice, such as the Burakumin, Okinawans, and the Ainu, underscoring the importance of separating out racialized access to status from racialized access to substantive enjoyment of citizenship rights. Family ties and legal emulation once again shaped formal access to citizenship through *jus sanguinis*.

Decolonized states have used *jus sanguinis* to separate indigenous populations from colonizers, their descendants, and other foreigners. For example, in post-colonial Algeria, a strict *jus sanguinis* policy reserved the status of ‘national by origin’ to Muslims whose parents were born in Algeria.<sup>36</sup> The Gulf Cooperation Council states created strong versions of *jus sanguinis*. In the United Arab Emirates, full citizenship is restricted to those who can trace their lineage to an Arab settled in the territory by 1925. A secondary form of citizenship is available for those who cannot trace their lineage back to 1925 through the ‘family book’ that registers parentage. *Bidoon jinsiyya* (those without nationality) do not have citizenship because they are considered nomads. Practically all other foreigners are temporary migrants with very little chance of becoming citizens. The origin of these differentiated citizenship policies does not appear to be specifically racial, however. The year 1925 was chosen because it preceded the development of the oil economy that attracted so many foreigners to share in its wealth, and registration of nomads was considered too inconvenient by British administrators under the protectorate that ended in 1971.<sup>37</sup> It could be argued that the UAE *jus sanguinis* policies have a racial element to the extent that they privilege Arabs, but they are not plainly racist in their origins. Rather, they reflect efforts to define nationality through familial ties at the moment nation-states were created from European colonies.

Brubaker argues that unlike the multiplicity of meanings that are attached to *jus sanguinis*, *jus soli* has a more restricted affiliation with a statist, civic understanding of nationhood. From an ethnonational point of view, *jus soli* is ‘rejected because it

<sup>34</sup> Hideki Tarumoto, ‘Multiculturalism in Japan: Citizenship Policy for Immigrants,’ *International Journal on Multicultural Societies* 5, no. 1 (2003): pp. 88–103, p. 89.

<sup>35</sup> Chikako Kashiwazaki, ‘Jus Sanguinis in Japan,’ *International Journal of Comparative Sociology* 39, no. 3 (1998): pp. 278–300, pp. 290–291.

<sup>36</sup> Zouhir Boushaba, *Etre Algérien: Hier, Aujourd’hui et Demain* (Alger: Editions Mimouni, 1992). See also Sadiq in this volume.

<sup>37</sup> Manal A. Jamal, ‘The “Tiering” of Citizenship and Residency and the “Hierarchization” of Migrant Communities: The United Arab Emirates in Historical Context,’ *International Migration Review* 49, no. 3 (2015): pp. 601–639; Jane Kinninmont, ‘Citizenship in the Gulf,’ in Ana Echagüe, ed., *The Gulf States and the Arab Uprisings* (Madrid: FRIDE, 2013).

grounds citizenship in territory rather than descent.<sup>38</sup> While it is true that there is an inherent tension between the abstract principles of *jus soli* and ethnonational understanding of the nation, governments have found many ways to resolve this tension in ways that are blatantly racist. Of thirty-five countries in the Western Hemisphere, thirty have *jus soli*.<sup>39</sup> The Americas is thus a strategic site to understand the contingent relationship between race and *jus soli*.

The United States was the first country in the Americas to gain independence and define racial eligibility for citizenship. The 1789 constitution treated Native Americans as ‘outside, though not necessarily independent of, the American political community.’<sup>40</sup> Supreme Court Chief Justice John Marshall characterized their status as ‘domestic dependent nations.’<sup>41</sup> As early as 1861, some Native Americans were able to gain citizenship through federal treaties, but the Supreme Court ruled in 1884 that the Fourteenth Amendment did not confer citizenship on Native Americans born under tribal jurisdiction, thus weakening *jus soli*. All Native Americans born in the United States were not recognized as U.S. citizens until 1924.<sup>42</sup> Black slaves were not citizens by definition. Individual states varied in whether and to what extent they considered free blacks to be citizens. The federal government did not have a consistent position until the Supreme Court’s 1857 *Dred Scott v. Sandford* decision effectively stripped all blacks, including free blacks, of their federal citizenship. In practice, the ruling separated U.S. citizenship from U.S. nationality. Blacks could hold the latter but not the former.<sup>43</sup> Following the Union’s victory in the Civil War, the 1866 Civil Rights Act and 1868 Fourteenth Amendment established a strong version of *jus soli*—citizenship for all persons born in the United States regardless of their racial categorization, with the exception of Native Americans described above.

The 1790 Uniform Rule of Naturalization had restricted eligibility to naturalize to free whites. Following the Civil War, the Naturalization Act of 1870 extended eligibility to naturalize ‘to aliens of African nativity and to persons of African descent’ as well as whites.<sup>44</sup> A contradictory series of fifty-two court cases from 1878 to 1952 gradually defined who was *not* white, even though these cases never positively defined who *was* white. From 1878 to 1909, eleven of twelve cases deciding racial prerequisites to naturalize ruled against their plaintiffs, thus declaring

<sup>38</sup> Brubaker (n 2), pp. 123–124.

<sup>39</sup> Olivier Willem Vonk, *Nationality Law in the Western Hemisphere: A Study on Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean* (The Hague: Martinus Nijhoff Publishers, 2014).

<sup>40</sup> Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), pp. 131–132.

<sup>41</sup> *Cherokee Nation v. State of Georgia* 30 US 1 (1831).

<sup>42</sup> Thomas Alexander Aleinikoff, *Semblances of Sovereignty* (Cambridge: Harvard University Press, 2002), p. 20.

<sup>43</sup> Smith (n 40), pp. 26, 257–258.

<sup>44</sup> 16 Stat. 254, Sec. 7.

people from China, Japan, Burma, and Hawaii to be non-white.<sup>45</sup> The Supreme Court ruled in 1922 in *Ozawa v. United States* that Japanese were not eligible for naturalization.<sup>46</sup> The courts often ruled inconsistently on the whiteness of particular groups. Syrians were ruled non-white in 1913 and 1914 but white in 1909, 1910, and 1915. Between 1909 and 1923, Armenians were declared white despite their origins in Asia. Filipinos were not considered white, but they could naturalize if they immigrated to the United States and served in the U.S. military in World War I.<sup>47</sup> Asian Indians were ruled white in 1910, 1913, 1919, and 1920 but non-white in 1909 and 1917. The Supreme Court's 1923 ruling in *U.S. v. Bhagat Singh Thind* definitively categorized Indians as non-white.<sup>48</sup> These rulings demonstrate the unusually high level of judicial autonomy to define race in the U.S. case.

Geopolitical considerations shaped the racialization of U.S. law as well. The 1897 *In re Rodriguez* case upheld the right of a Mexican immigrant to naturalize based on U.S. obligations in the 1848 Guadalupe Hidalgo and 1853 Gadsden treaties with Mexico. The Nationality Act of 1940 ensured Mexican racial eligibility to naturalize, regardless of indigenous background, with a provision that extended eligibility to naturalize to 'descendants of races indigenous to the Western Hemisphere.'<sup>49</sup> The 1940 statute was aimed at shoring up the incipient U.S. alliance with Latin American countries as the European war threatened to reach the Americas.<sup>50</sup> Similarly, the U.S. alliance with China in World War II and the decolonization of Asian countries in the subsequent Cold War competition to curry favor with the Third World drove the end of U.S. racialized bans on naturalization. The 1943 Magnuson Act made 'Chinese persons or persons of Chinese descent' eligible for naturalization.<sup>51</sup> Racial restrictions further eased in a 1947 amendment that allowed all Asians to obtain U.S. citizenship by marriage. As soon as India and the Philippines entered the final stages of independence, their citizens became eligible for U.S. naturalization.<sup>52</sup> Racial restrictions on naturalization ended in 1952.<sup>53</sup>

The main racial trajectory in U.S. nationality law has been the decreasing salience of race with a few major exceptions.<sup>54</sup> The most important early exception was the wholesale stripping of blacks' ambiguous citizenship status in 1857. The second was the denationalization of several thousand Japanese Americans in the immediate aftermath of World War II. Just as Japanese were singled out for mass internment

<sup>45</sup> Ian Haney-López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996).

<sup>46</sup> *Ozawa v. United States* 260 US 178 (1922).

<sup>47</sup> Charles Gordon, 'The Racial Barrier to American Citizenship,' *University of Pennsylvania Law Review* 93, no. 3 (1945): pp. 237–258, p. 244.

<sup>48</sup> *U.S. v. Bhagat Singh Thind* 261 US 204 (1923); Haney-López (n 45), pp. 67, 90–91.

<sup>49</sup> 54 Stat. 1137. Ch. III, Sec. 303.

<sup>50</sup> P.D. Lukens, *A Quiet Victory for Latino Rights: FDR and the Controversy Over 'Whiteness'* (Tucson: University of Arizona Press, 2012).

<sup>51</sup> 57 Stat. 600.

<sup>52</sup> 60 Stat. 416.

<sup>53</sup> 66 Stat. 163.

<sup>54</sup> Smith (n 40).

during the war, Japanese were singled out for denationalization while German and Italian Americans remained untouched.<sup>55</sup> The less obvious way that U.S. nationality was racialized was via its interaction with immigration policy. Admission to the territory is the first step toward naturalization, and the racialization of U.S. admissions policy was sustained until 1965. Restrictions on blacks in 1803, Chinese exclusion in 1882, the establishment of the Asiatic Barred Zone in 1917, and the 1921–1965 quota system that restricted entry by southern and eastern Europeans while all but banning Asians and Africans, shaped who could naturalize by limiting who could enter the United States in the first place.<sup>56</sup>

The U.S. case also stands out for its thorough racialization of the internal dimension of citizenship until the Civil Rights movement of the 1950s and 60s. By way of illustration, voting rights,<sup>57</sup> access to education,<sup>58</sup> the administration of criminal justice,<sup>59</sup> and social policy<sup>60</sup> have all been deeply racialized. Legal tools of racialized citizenship have included anti-miscegenation statutes,<sup>61</sup> residential segregation,<sup>62</sup> and ‘alien land laws’ preventing ‘aliens ineligible to naturalization’ from owning land.<sup>63</sup> The Civil Rights movement ended de facto statuses of racial hierarchy, but equal access to the substance of citizenship continues to elude African Americans in particular.

Despite being a *jus soli* country, Canadian law experimented briefly with racialized nationality law in ways that show the importance of geopolitical considerations for shaping the law. Free of British treaty obligations with China and Japan under Canada’s new dominion status, a 1931 Canadian law created naturalization requirements that only applied to Chinese and Japanese applicants.<sup>64</sup> The discriminatory requirement for Chinese lasted until 1947. Even when Chinese were born Canadians, they could not vote in British Columbia or Saskatchewan until reforms following

<sup>55</sup> Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004).

<sup>56</sup> FitzGerald and Cook-Martín (n 1).

<sup>57</sup> E. Earl Parson and Monique McLaughlin, ‘Persistence of Racial Bias in Voting: Voter ID, the New Battleground for Pretextual Race Neutrality,’ *Journal of Law and Society* 8, no. 2 (2007): pp. 75–104.

<sup>58</sup> Adrienne D. Dixson and Celia K. Rousseau, ‘And We are Still Not Saved: Critical Race Theory in Education Ten Years Later,’ *Race Ethnicity and Education* 8, no. 1 (2005): pp. 7–27.

<sup>59</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, revised edition (New York: New Press, 2010).

<sup>60</sup> Ian Haney-López, *Dog Whistle Politics: How Coded Racial Appeals have Reinvented Racism and Wrecked the Middle Class* (New York: Oxford University Press, 2013).

<sup>61</sup> Peggy Pascoe, ‘Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America,’ *The Journal of American History* 83, no. 1 (1996): pp. 44–69.

<sup>62</sup> Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge: Harvard University Press, 1993).

<sup>63</sup> Keith Aoki, ‘No Right to Own?: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment,’ *Boston College Third World Law Journal* 40, no. 1 (1998): pp. 37–72.

<sup>64</sup> P.C. 1378 of June 17, 1931.

World War II.<sup>65</sup> As in the United States, several thousand Japanese Canadians were singled out for coerced denationalization after the war.<sup>66</sup>

*Jus soli* Panama and Costa Rica were the only Latin American countries with negative racial discrimination in their nationality laws. For example, the Panamanian government suspended the citizenship of Chinese, Syrian, and Turkish migrants in 1909, and the 1941 constitution only awarded citizenship to the children of prohibited migrant races if one of the parents was a Panamanian by birth. This small exception was not extended to non-Spanish-speaking blacks. Racial discrimination continued until 1945.<sup>67</sup> Racial selection of citizens in the Americas was much more pervasive if one considers how nationality law works together with immigrant admissions law. Between 1803 and 1930, every one of the independent countries in the Americas passed laws explicitly seeking to restrict or exclude at least one particular ethnic group. Many of those laws were written in racial rather than national-origin categories, particularly for definitions of Asians and blacks.<sup>68</sup>

In sum, there is an extensive history of countries whose nationality law is primarily based on *jus soli* adopting racialized nationality policies, either in nationality law itself or, more widely, in interaction with immigration policy. The theoretical lesson is that neither *jus soli* nor *jus sanguinis* are useful predictors of whether race is a basis for assigning nationality. Interstate relations, efforts to separate colonizers from the colonized in post-independence contexts, and family registration have shaped the balance of *jus sanguinis* and *jus soli*.

## RACIAL DENATURALIZATIONS

In *The Dark Side of Democracy*, Michael Mann warns that ‘murderous ethnic cleansing is a hazard in the age of democracy’ as the *demos* becomes entwined with the *ethnos*. People who do not fit in the *ethnos* are killed or expelled.<sup>69</sup> The construction of nation-states in a context of unstable borders favors the elimination of groups outside a racialized vision of the nation. The destruction of the multi-ethnic Austro-Hungarian, Russian, and Ottoman Empires in World War I ignited a massive ‘unmixing’ of people.<sup>70</sup> The creation of nation-states from the debris of empire

<sup>65</sup> S.B.C., 1920, c.27; S.S. 1908, c.2; *Dominion Election Act* S.C. 1948, c.46, s.6.

<sup>66</sup> Audrey Macklin, ‘Citizenship Revocation, The Privilege to Have Rights and the Production of the Alien,’ *Queen’s Law Journal* 40, no. 1 (2014): pp. 1–54.

<sup>67</sup> Virginia Arango Durling, *La inmigración prohibida en Panamá y sus prejuicios raciales* (Panama: PUBLIPAN, 1999).

<sup>68</sup> FitzGerald and Cook-Martín (n 1).

<sup>69</sup> Mann (n 2), pp. 3–4.

<sup>70</sup> Brubaker (n 2).

prompted mass deportations and population exchanges, such as the 1.5 million ethnic Greeks and ethnic Turks exchanged between Greece and Turkey. These de facto denationalizations and creations of secondary citizenship for the ethnic minorities left behind arguably carried a racial element as they emphasized organic notions of national communities of descent.<sup>71</sup>

Germany carried the racialization of citizenship the farthest of the European states. *Mein Kampf* praised the United States for its ‘modest start’ in creating a racialized national state, noting that it refused ‘to allow immigration from elements which are bad from the health point of view, and absolutely forbid naturalization in certain defined races.’<sup>72</sup> After the Nazis came to power, Hitler passed a denaturalization decree based on ‘ethnic national principles’ to denaturalize many immigrants who had arrived between 1918 and 1933. ‘Jews from the East’ were the first named target.<sup>73</sup> The Nuremberg Laws and supplementary decrees passed in 1935 then reserved the status of ‘Reich citizen’ (as opposed to merely ‘subject of the state’) to those of ‘German or related blood.’ Anyone with three Jewish grandparents, regardless of the individual’s religious confession, was stripped of German citizenship. All German Jews who had left Germany were stripped of their German nationality in 1941, having already lost their citizenship in 1935. Similar decrees denaturalized Jews in fascist Hungary, Romania, Vichy France, French Algeria, and Italy.<sup>74</sup>

The immediate aftermath of World War II continued the pattern at the end of World War I, which was a massive expulsion of populations along ethnic lines. At least eight million ethnic Germans were expelled from Eastern Europe.<sup>75</sup> The destruction of the Japanese empire also led to mass denationalizations. During the Japanese imperial period, Koreans and Taiwanese were Japanese nationals even as they were excluded from the full rights of citizenship. The 1947 Alien Registration Law during the U.S. occupation recategorized Korean and Chinese residents of Japan as aliens. Five years later, Koreans and Taiwanese, whether they were living in Korea, Taiwan, or Japan, were stripped of their Japanese nationality.<sup>76</sup>

Notwithstanding the spasms of ethnoracial cleansing immediately after World War II, in the long run, the reaction against Nazism contributed strongly to the delegitimization of racism.<sup>77</sup> Post-colonialism and the formation of nation-states in Africa and Asia consolidated a nation-state system organized by rules in which racial denaturalization is illegitimate. The template for a modern nation-state, along

<sup>71</sup> Mann (n 2), pp. 3–4.

<sup>72</sup> Adolf Hitler, *Mein Kampf* (New York: Houghton Mifflin, 1971) [1925], p. 182.

<sup>73</sup> Weil (n 28), pp. 188–189.

<sup>74</sup> Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, ‘Nationality and Human Rights: The Protection of the Individual in External Arenas,’ *Yale Law Journal* 83, no. 5 (1974): pp. 900–998, p. 948; Weil (n 28), pp. 87, 128.

<sup>75</sup> Dariusz Stola, ‘Forced Migrations in Central European History,’ *International Migration Review* 26, no. 2 (1992): pp. 324–341, p. 336.

<sup>76</sup> Surak (n 1). <sup>77</sup> Banton (n 24).

the lines described by John Meyer in his work on the international diffusion of organizational norms, excludes overtly racial citizenship.<sup>78</sup> None of this is to say that racial expulsions have ended, but rather, that they are typically hidden or framed in other terms because they are no longer considered politically acceptable.

South Africa stands out for creating a more racialized system and sustaining it long after World War II. Beginning in 1948, the National Party built on colonial-era discrimination to establish a system of apartheid in which every South African was legally assigned to the white, Bantu (black), Colored, or Asian categories. Sex, marriage, housing, work, internal mobility, and access to recreational spaces was strictly divided by race under the guiding principles of ‘separate development’ and white supremacy. Blacks held South African nationality but did not have the right to vote and in practice held extremely limited rights of citizenship. Only whites enjoyed full rights in this *Herrenvolk* democracy.<sup>79</sup> In the face of strong international pressure to dismantle apartheid, the South African government created a ‘Bantustan’ system to denationalize the majority black population while retaining access to its labor. South African officials openly described to local white audiences why the policy was needed to placate international political pressure, specifically from the UN and the International Court of Justice.<sup>80</sup> A 1970 law provided that every black in South Africa who was not already a ‘citizen’ of a Bantu homeland would become a ‘citizen’ of a homeland to which he or she was attached by birth, residence, or cultural affiliation.<sup>81</sup> In keeping with even the apartheid government’s sensitivity to international norms, the law did not say that affiliation would be created on a racial basis, but rather through ties of language and culture, even though racial segregation was the obvious intent. From 1976 to 1981, South Africa granted four homelands ‘independence’ in an ‘exercise in political fantasy’ that denationalized millions of blacks by assigning their nationality to the fictive new states and stripping them of their South African nationality.<sup>82</sup> The Bantustan system was disbanded with the fall of apartheid.<sup>83</sup>

Denationalizations on racial grounds violate strong international norms, but in the twenty-first century the Dominican government has pushed against those limits. The Dominican Republic, which shares an island territory with Haiti, has a long history of discrimination against immigrants and their descendents from Haiti. Dominican national identity is built on identification with *hispanidad* in contradistinction to Haitian blackness. Since the early twenty-first century, the Dominican government has sought to restrict Haitians from acquiring Dominican nationality and even retroactively strip people of Haitian descent of their nationality, without

<sup>78</sup> See Meyer et al. (n 1). <sup>79</sup> van den Berghe (n 24); Fredrickson (n 24).

<sup>80</sup> John Dugard, ‘South Africa’s Independent Homelands: An Exercise in Denationalization,’ *Denver Journal of International Law and Policy* 10, no. 1 (1980): pp. 11–36, p. 14.

<sup>81</sup> *Bantu Homelands Citizenship Act* (1970). <sup>82</sup> Dugard (n 80).

<sup>83</sup> Gay Seidman, ‘Is South Africa Different? Sociological Comparisons and Theoretical Contributions from the Land of Apartheid,’ *Annual Review of Sociology* 25, no. 1 (1999): pp. 419–440.



saying as much in the letter of the law. Migration Law 285-04 passed in 2004 stated for the first time that foreigners who did not enter legally were ‘in transit.’<sup>84</sup> The following year, the Secretary of Labor announced a plan to ‘dehaitianize’ the Dominican Republic. After the government refused to issue birth certificates to two girls of Haitian descent because their parents did not have legal residency and thus were ‘in transit,’ the Inter-American Court of Human Rights ruled that the girls’ rights to Dominican nationality had been violated.<sup>85</sup> A new constitution in 2010 restricted *jus soli* by specifying that it did not apply to children of those who illegally resided in Dominican territory. In 2013, the Dominican Constitutional Court ruled that children of ‘irregular migrants’ ~~and even~~ foreign workers on non-immigrant visas were not Dominican nationals. The court ordered authorities to review all birth registries dating back to 1929 to determine who no longer qualified for citizenship. The decision thus retroactively stripped thousands of people of Haitian descent of their Dominican nationality.<sup>86</sup> The Inter-American Commission on Human Rights investigated and denounced the mass denationalization. Its report estimated that around 200,000 people of Haitian origin would be arbitrarily deprived of Dominican nationality.<sup>87</sup> While Dominican law does not use racial categories, and it is cast as the retroactive enforcement of qualifications around *jus soli*, the policy has received tremendous censure internationally because it is clearly motivated by an effort to reduce the black Haitian-origin population of the Dominican Republic and restrict the rights of those who stay. Denationalizations on racial grounds are now hidden by pretexts.

## RACIAL OR CULTURAL PREFERENCES?

Negative racial discrimination in nationality policy has become deeply and widely illegitimate since the mid-twentieth century. Positive racial preferences are also illegitimate, but some kinds of positive preferences continue, though they are often contentious. Proponents of preferences for particular groups cast them as being legitimately about family and cultural ties while opponents decry them as racist.

<sup>84</sup> Nicia C. Mejia, ‘Dominican Apartheid: Inside the Flawed Migration System of the Dominican Republic,’ *Harvard Latino Law Review* 18 (2015): pp. 201–229, p. 208.

<sup>85</sup> Monique A. Hannam, ‘Soy Dominicano—The Status of Haitian Descendants Born in the Dominican Republic and Measures to Protect Their Right to a Nationality,’ *Vanderbilt Journal of Transnational Law* 47, no. 4 (2014): pp. 1123–1166, pp. 1123, 1143.

<sup>86</sup> Mejia (n 84), pp. 202–203.

<sup>87</sup> Inter-American Commission on Human Rights, *Situation of Human Rights in the Dominican Republic* (2015), online <http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf>.

Following decolonization in Africa and Asia, European metropolitan countries became major destinations for the formerly colonized as well as the ‘return migration’ of their former colonizers. European countries created special statuses for current or former colonial subjects amid highly dynamic and varied contexts of sovereignty.<sup>88</sup> For example, the 1948 British Nationality Act established a ‘UK and Colonies (UKC)’ status that expressed the apex of the imperial monarchist notion of subjecthood regardless of color.<sup>89</sup> In the face of a nativist white British reaction against non-white Commonwealth immigration, the 1968 Commonwealth Immigrants Act restricted entry to the UK to UKC citizens who were themselves or whose parents or grandparents had been born, adopted, registered, or naturalized in the UK.<sup>90</sup> The racialization of British nationality became even more transparent in the 1971 Immigration Act, which divided British subjects into ‘patrials’ and ‘nonpatrials.’ Patrials were those individuals with ties to Britain detailed above in the 1968 Act or UKCs who had lived in the UK for at least five years. In effect, almost all patrials were whites and non-patrials were people of color. Ten years later, the 1981 British Nationality Act included a provision to deny patrial status to Commonwealth citizens born after 1981, thus ensuring that patriality would end within a generation and bring the UK into line with the growing anti-racist international norm.<sup>91</sup>

In France, post-war efforts to establish a racialized policy of immigration and nationality failed or were short lived. The Ministry of Justice stopped the government’s 1945 strict racial immigration quota plan that would have given 50 percent of visas to Nordics, 30 percent to Mediterraneans, and 20 percent to Slavs. A 1945 ordinance allowed nationality of origin to be considered by officials when deciding whether to grant naturalization.<sup>92</sup> Between April 23, 1952 and November 23, 1953, naturalization guidelines were explicitly ‘to favor to the fullest extent possible the naturalization of foreigners originating in countries of Western Europe.’ New instructions in 1953 ended this policy, because its continuance would ‘demonstrate an unacceptable racism.’<sup>93</sup>

While negative racial discrimination has become illegitimate, there is greater legitimacy for positive preferences framed in cultural terms. Sixteen countries in Latin America retain naturalization preferences for Spaniards, ten for Latin Americans, and three for Portuguese. The number of countries with positive ethnic preferences in their nationality law actually increased in the twentieth century as a

<sup>88</sup> See Thomas Janoski, *The Ironies of Citizenship: Naturalization and Integration in Industrialized Countries* (Cambridge: Cambridge University Press, 2010).

<sup>89</sup> Randall Hansen, *Citizenship and Immigration in Postwar Britain* (New York: Oxford University Press, 2000), p. 251.

<sup>90</sup> *Ibid.*, p. 179.

<sup>91</sup> Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Ithaca: Cornell University Press, 1997), p. 181; Joppke (n 3), p. 103.

<sup>92</sup> Weil (n 28), p. 145. <sup>93</sup> Weil (n 28), p. 149.

result of bilateral treaties between Spain and various Latin American countries and the growth of multilateral institutions such as the Organization of Ibero-American States.<sup>94</sup> Spanish and Portuguese ties have revolved around preferential naturalization for nationals of former colonies even if those nationals are not of Spanish ancestry. Ties with Iberia are framed not as common familial or racial descent, but as membership in a cultural and historic community.<sup>95</sup>

In Israel, the foundational Law of Return of 1950 grants that ‘every Jew has the right to come to this country.’ The Israeli Supreme Court ruled in the *Rufeisen* case of 1962 that a Jew who had converted to Catholicism could not be considered a Jew with a right of return,<sup>96</sup> thereby suggesting that Jewishness is mutable and a religious rather than exclusively descent-based category. A 1970 reform further weakened the descent-based notion of Jewishness by making converts to Judaism eligible for the right of return.<sup>97</sup> The various conditions for moving into or out of Jewishness suggest a non-racial definition, though Israeli secularists decry making biological descent the normal path of entry and for granting Orthodox rabbis the exclusive competence to determine legitimate conversions.<sup>98</sup>

In practice, naturalization discrimination may continue outside the black letter of the law. Until 2003, many Swiss cantons used local referenda to decide which applicants to accept for naturalization. A study of naturalization petitions decided at the ballot box between 1970 and 2003 found that Yugoslavs and Turks were 40 percent more likely to be rejected than similar applicants from northern or Western Europe, and the applicants’ language skills or level of integration had almost no effect on the decisions.<sup>99</sup> It is impossible to tell whether ~~this differences arise from~~ religious or racialized bias. Cultural discrimination retains greater legitimacy than biological racial discrimination.

## INTERNATIONAL LEGAL CONSTRAINTS

Overt racism is in disfavor internationally, but the recurrence of populist demands to restrain the immigration of Muslims to Europe and North America and Latin Americans to the United States raises questions about what might prevent these demands from creating racialized forms of citizenship. There are slightly ambiguous international legal constraints on racial discrimination in the assignment of

<sup>94</sup> FitzGerald and Cook-Martín (n 1). <sup>95</sup> Joppke (n 3). <sup>96</sup> Joppke (n 3).

<sup>97</sup> *Law of Return* 5710-1950. <sup>98</sup> Joppke (n 3), p. 181.

<sup>99</sup> Jens Hainmueller and Dominik Hangartner, ‘Who Gets a Swiss Passport? A Natural Experiment in Immigrant Discrimination,’ *American Political Science Review* 107, no. 1 (2013): pp. 159–187.

nationality and much clearer prohibitions on denationalization and discriminatory statuses for citizens on racial grounds.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which entered into force in 1969 and which had 177 state parties as of 2016, condemns

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

However, Article 1(2) provides that the convention does not apply to distinctions between citizens and noncitizens. According to Article 1(3), ‘Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.’ The U.N. Committee on the Elimination of Racial Discrimination interprets this clause to mean that illegitimate discrimination occurs only if the criteria ‘are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’<sup>100</sup> The Inter-American Court of Human Rights ruled in a 1984 advisory opinion that Costa Rica’s less stringent naturalization residency requirements for Central Americans, Ibero-Americans, and Spaniards compared to other nationals were justified given their ‘much closer historical, cultural and spiritual bonds with the people of Costa Rica.’<sup>101</sup> Thus, the ICERD does not appear to be a legal deterrent against policies that maintain at least some kinds of ethnic distinction in naturalization policy. On the other hand, denationalization on racial grounds is highly illegitimate and illegal under international law. Article 9 of the 1961 Convention on the Reduction of Statelessness, which entered into force in 1975, specifies that ‘A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.’ By 2016, sixty-five states were parties to the convention.

International law does not itself prevent governments from doing as they please. The main deterrent is political. The postcolonial division of the world into sovereign states makes the external nationality dimension of citizenship policy subject to international as well as domestic scrutiny. Singling out particular groups for discrimination provokes the ire of the governments who claim to represent their targets. The organization of sovereign states into the United Nations and other fora also provides venues for shifting debates about racist laws from the national up to the international level and linking them to a wide range of issues. None of this is

<sup>100</sup> Liav Orgad, ‘Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe,’ *American Journal of Comparative Law* 58, no. 1 (2010): pp. 53–105, p. 92.

<sup>101</sup> Inter-American Court of Human Rights, Advisory Opinion OC- 4/84 of Jan. 19, 1984, 16.

to say that explicitly racist citizenship laws are now impossible. Rather, there are strong structural barriers that complement a global political culture in which racialized policies are stained by their association with Nazi Germany and South Africa under apartheid.<sup>102</sup>

## CONCLUSIONS

There is no clear trajectory in the racialization of citizenship from ancient Athens to the mid-twentieth century. The proto-racialization of citizenship in Athens was followed by a much more open model in ancient Rome. Differentiated citizenship in early medieval Europe and under classical Islamic rule and the Ottoman Empire was based on religious rather than racial discrimination. The racialization of religious bigotry did not become formalized until the anti-Jewish and anti-Moorish measures developed in sixteenth century Iberia. By 1917, Jews had become politically emancipated throughout Europe, but this deracialization was cut short by the extreme racialization of citizenship under fascist regimes.

Since the mid-twentieth century, citizenship has entered a deracialization phase. Ethnic preferences do remain in nationality law. These preferences are sometimes based on ideas about common culture rather than common racial descent, such as in Iberia and Latin America. Preferences in other settings, such as the British patrial system in its twilight, are consistent with notions of common racial descent. Racialized denaturalization has become the most illegitimate of the four forms of racialized citizenship practices discussed in the chapter. Substantive racialized denaturalization, such as Dominican denaturalization of Haitians in the early twenty-first century, is disguised as enforcement of new *jus soli* qualifiers because open racial denaturalization would be considered even more illegitimate.

Much scholarship on the acquisition of nationality has debated the extent to which *jus sanguinis* expresses ethnocentrism, or even racism, while *jus soli* expresses a civic and state-framed vision of the nation. Examining the historical record across diverse contexts suggests that *jus sanguinis* is not inherently racist. While in an abstract sense, *jus soli* might sustain a civic vision of nationality, in practice, the examples of Western Hemisphere states, particularly the United States, shows that *jus soli* is fully compatible with racialized citizenship. Racialization is found most obviously in rules around naturalization, including the admissions policies that usually are the first step toward possible naturalization.

<sup>102</sup> FitzGerald and Cook-Martín (n 1).

The construction of nation-states from empires is consonant with the racialization of policies. However, the consolidation of the nation-state system mitigates against legal racialization. Predictions are hazardous, but the institutionalization of an anti-racist norm in a world system of nation-states where both international and domestic actors patrol the boundaries of the law suggest that the current phase of legal deracialization is likely to be sustained, even as agents of religious bigotry and xenophobia test the strength of those institutions. Future research will continue to uncover techniques and patterns of selecting citizens that appear racially neutral, but which are racially discriminatory in practice, and the collision of logics of selection based on ascriptive and acquired social characteristics.

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