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## CITIZENSHIP GAPS

D. Carolina Núñez\*

CARRIE HYDE, *CIVIC LONGING: THE SPECULATIVE ORIGINS OF U.S. CITIZENSHIP* (HARVARD UNIVERSITY PRESS 2018). Pp. 320. HARDCOVER \$45.00.

KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (CAMBRIDGE UNIVERSITY PRESS 2015). Pp. 272. HARDCOVER \$104.33. PAPERBACK \$26.99.

RICHARD SOBEL, *CITIZENSHIP AS FOUNDATION OF RIGHTS: MEANING FOR AMERICA* (CAMBRIDGE UNIVERSITY PRESS 2016). Pp. 240. HARDCOVER \$105.00. PAPERBACK \$30.99.

The concept of citizenship is undeniably powerful. The terms “citizenship” and “citizen” evoke notions of belonging, participation, equality, civic duty, democracy, and virtually any other term associated with a well-functioning polity.<sup>1</sup> In fact, the term “citizenship” often serves as a shorthand reference to an abstract sense of civic virtue and the right to exercise that civic virtue to shape the polity.<sup>2</sup> Citizenship, as popularly imagined, is a fundamental element of our democracy.<sup>3</sup>

These noble ideals, however, do not necessarily map onto any legal definition of citizenship, nor do they accurately depict the experience of many U.S. citizens who find

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1. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2008) [hereinafter *THE CITIZEN*]; D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 *BYU L. REV.* 1517, 1548 (doing corpus linguistics analysis on the word “citizen”).

2. See D. Carolina Núñez, *Mapping Citizenship: Status, Membership, and the Path in Between*, 2016 *UTAH L. REV.* 477.

3. See Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 *YALE J. INT’L L.* 103, 127 (2001) (“Status as a citizen is ongoing; it is the permanent truth of liberal democracy.”). See also James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 *WASH. U. L. Q.* 103, 135 (1996) (“Furthermore, in a democracy, government is the one sphere founded on simple equality: the equality of equal citizenship.”); Kelsey M. Jost-Creegan, *Debts of Democracy: Framing Issues and Reimagining Democracy in Twenty-First Century Argentine Social Movements*, 30 *HARV. HUM. RTS. J.* 165, 181 (2017).

themselves without equal access to the tools of civic engagement.<sup>4</sup> Indeed, the gaps between citizenship as we imagine it, citizenship as legally constructed, and citizenship as we experience it are wide.<sup>5</sup> Perhaps more concerning are the gaps between diverse groups' conceptions of citizenship, both in their imaginations and experiences of citizenship.<sup>6</sup> The gaps between how insider groups and outsider groups imagine citizenship and experience citizenship highlight the vast inequality of citizenship that has historically existed and continues to exist in the United States.<sup>7</sup> Carrie Hyde, Richard Sobel, and Kunal Parker help expose and illuminate these gaps in their individual examinations of U.S. citizenship.

In *Civic Longing: The Speculative Origins of U.S. Citizenship*, Carrie Hyde brings writings from a variety of genres together to extract a vision—or visions—of American citizenship that predates any formal legal conception of citizenship.<sup>8</sup> Hyde's work is, at its core, an in-depth analysis of the origins, both in time and conceptualization, of American citizenship. Hyde focuses on the period of U.S. history between the American Revolution and the Civil War, which comprise the formative years of American citizenship as an abstract concept, if not a legal structure. Unfortunately, this time period often escapes the serious consideration of citizenship scholars precisely because of the scant legal material available. But Hyde recognizes that while these early years may provide little in the form of legal citizenship structures, they are rich in its precursors: imagined citizenship. Thus, Hyde successfully describes the early notions of citizenship that informed future legal developments. She also hints at the gaps between this imagined citizenship and the realities inherent in a slave nation.

Richard Sobel begins, analytically, where Hyde concludes, though in a modern legal context. In *Citizenship as Foundation of Rights: Meaning for America*, Sobel examines the ways modern legal structures meant to protect citizenship actually undermine the more abstract notions of citizenship that gave rise to the formal legal structures in the first place.<sup>9</sup> Sobel provocatively suggests that the citizenship of the American imagination is distinctive and exceptional because it is based on a very real sovereignty of citizens. Laws that require citizens to prove their citizenship prior to exercising the fundamental rights of citizenship undermine that vision of citizenship. In essence, Sobel identifies a gap between an imagined citizenship and citizenship as legally constructed.

Kunal Parker adds a layer to the conceptualization of citizenship in *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000*.<sup>10</sup> While Hyde builds a foundation for an imagined citizenship and Sobel addresses the gap between

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4. See Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577, 616–17 (2015); Núñez, *supra* note 2, at 490 (“Scholars have documented the myriad ways in which U.S. citizens who are members of minority groups experience, as a matter of practical reality, limited citizenship rights.”) (footnote omitted).

5. Claire Benoit, *Force and Effect: A Look at the Passport in the Context of Citizenship*, 82 FORDHAM L. REV. 3307, 3311–12 (2014).

6. Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1305–06 (2002).

7. *Id.*

8. See CARRIE HYDE, *CIVIC LONGING: THE SPECULATIVE ORIGINS OF U.S. CITIZENSHIP* 11 (2018).

9. See RICHARD SOBEL, *CITIZENSHIP AS FOUNDATION OF RIGHTS: MEANING FOR AMERICA* (2016).

10. See KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (2015).

imagined citizenship and citizenship as legally constructed, Parker explores the gap between how different groups experience citizenship. In his insightful history of immigration and citizenship law, Parker highlights the ways in which the United States transformed groups that were nominal insiders into outsiders.

When read together, these three authors' works highlight our society's and government's repeated and disappointing failure to live up to the citizenship of our current and historical imagination. The authors, however, offer hope by illustrating the resiliency of our imagined citizenship, its potential positive influence on U.S. law, and the prospect of a narrowing gap in the way different groups experience citizenship.

#### CITIZENSHIP AS IMAGINED

In *Civic Longing: The Speculative Origins of U.S. Citizenship*, Carrie Hyde undertakes the difficult but important task of examining citizenship as imagined prior to the Civil War. Though the period between the Revolution and the Civil War constitutes the primordial soup from which our modern legal constructs surrounding citizenship would emerge, that period offers few descriptions of citizenship as a formal legal concept.

The Constitution scarcely mentioned the topic upon initial ratification. In fact, "citizenship" is entirely absent from the document, and the term "citizen" appeared only eleven times.<sup>11</sup> We learn from those few appearances in the Constitution that citizenship is a pre-requisite to certain political offices and a qualifier for access to certain courts.<sup>12</sup> Article IV gives a better glimpse into the importance, if not the contours, of citizenship: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>13</sup>

Congress had not done much to define who was a citizen besides undertaking the Constitution's grant of authority to create a "uniform rule of naturalization" with the Naturalization Act of 1790 and subsequent amendments.<sup>14</sup> The courts engaged in some efforts to sort citizens from noncitizens in the wake of the Revolutionary War.<sup>15</sup> This is not to say the concept of citizenship was outside popular cognizance or that we have nothing to learn about modern citizenship from that time period. As Hyde elegantly illustrates, the building blocks of citizenship as a concept existed in the popular imagination and appeared in a variety of extra-legal sources.<sup>16</sup> "The law may be the official language of governance," she notes, "but individuals are also governed by a

11. Further, citizenship was thought of as state citizenship until later in history. See *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) ("By the original constitution citizenship in the United States was a consequence of citizenship in a state."). See also PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008) [hereinafter *BEYOND CITIZENSHIP*]; Peter Spiro, *State Citizenship Has Roots in American History*, N.Y. TIMES (Jan. 30, 2017, 12:59 PM), <https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-has-roots-in-american-history>.

12. U.S. CONST. art. I, § 2, cl. 1.

13. *Id.* at art. IV, § 2, cl. 1.

14. J. Allen Douglas, *The "Priceless Possession" of Citizenship: Race, Nation and Naturalization in American Law, 1880–1930*, 43 DUQ. L. REV. 369, 384–86 (2005).

15. Carolina D. Núñez, *Beyond Blood and Borders: Finding Meaning in Birthright and Citizenship*, 78 BROOK. L. REV. 835, 858 (2013) ("[C]ourts sorted between citizens and noncitizens in the wake of the Revolution . . .").

16. HYDE, *supra* note 8, at 43, 117.

number of informal, extralegal traditions.”<sup>17</sup> Hyde examines “novels, tales, poems, sermons, Bible translations, philosophy, political ephemera, legislative debates, and unpassed bills”<sup>18</sup> to paint an insightful picture of a nascent and fractured citizenship as imagined in early U.S. history.

*Civic Longing* is extremely valuable for its exploration of genres that legal scholars would not traditionally turn to when tracing the ancestry of our modern conception of citizenship. These alternative sources offer some important insights into how imagined citizenship affects the development of legal constructs. One of the most counter-intuitive insights is this: Though citizenship is almost universally imagined in this period in terms of belonging, inclusion, and civic virtue, these imaginations can nonetheless reinforce structures to exclude individuals from the polity.

For example, Hyde juxtaposes two ways that Biblical traditions influenced contemporary notions of citizenship.<sup>19</sup> She shows how the citizenship ideal could be anchored to heavenly citizenship through Christian nationalism, with the Bible serving as an instruction manual of sorts for citizenship in the polity.<sup>20</sup> But a competing ideal of Christian estrangement valued renunciation of worldly citizenship as a guarantor of citizenship in heaven.<sup>21</sup> In other words, the very condition of slavery and non-citizenship ensured salvation in the after-life.<sup>22</sup> Hyde notes the inherent problem in this imagination of citizenship:

When heavenly citizenship is presented as a substitute for political citizenship, rather than a model for citizenship in the state and/or nation, it ceases to be a catalyst to reform and, instead, reinforces existing hierarchies by eviscerating the rationale for change.<sup>23</sup>

This Christian-estrangement-based imagination of citizenship highlighted and reinforced the enormous gap between how citizenship was imagined and how it was actually experienced.<sup>24</sup> While slave-owners and slaves alike claimed to aspire to this kind of citizenship in an afterlife, the reality of the pre-Civil-War era was not egalitarian belonging.<sup>25</sup> The reality was far from the imagined ideal, with one group of individuals legally owning the bodies of others.<sup>26</sup>

In addition to the gap between how citizenship was imagined and how citizenship was experienced generally, the gap between how slaves and free citizens imagined citizenship also reinforced the disparity of experiences. While slaves might take solace in the ideal of Christian estrangement, white Christian slaveholders imagined citizenship as including an obligation in this life to Christianize their slaves.<sup>27</sup>

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17. *Id.* at 11.

18. *Id.* at 12.

19. *Id.* at 43.

20. *Id.* at 48.

21. HYDE, *supra* note 8, at 48.

22. *Id.* at 52.

23. *Id.* at 76.

24. *Id.* at 49–50.

25. *Id.* at 51–52.

26. HYDE, *supra* note 8, at 51–52.

27. See Marcus W. Jernegan, *Slavery and Conversion in the American Colonies*, 21 AM. HIST. REV. 504, 509–10 (1916) (explaining that religious leaders pushed to have slaves converted to Christianity commanding the distribution of letters promoting conversion of slaves).

For all of its problems, the notion of Christian estrangement, Hyde argues, did set the stage for the emergence of an important element of imagined citizenship just prior to the Civil War and the ratification of the Fourteenth Amendment.<sup>28</sup> Christian estrangement gave rise to the idea that citizenship was something individuals chose, rather than something that was ascribed to them.<sup>29</sup> This represented a significant break with notions of ascribed citizenship that had previously governed in Britain.<sup>30</sup> Citizenship was not just a result of being born in certain geographical limits or to certain kinds of parents. Citizenship meant something more substantive. Hyde goes on to distill this voluntary element of the American imagination of citizenship from works by Nathaniel Hawthorne, who famously claimed, “I am a citizen of somewhere else.”<sup>31</sup> But here, again, the gap between citizenship as imagined and citizenship as experienced is wide. And it may be precisely this point, Hyde argues, that Hawthorne has in mind—though perhaps subconsciously—in many of his works.<sup>32</sup> Perhaps one of the most important conclusions to be drawn from Hyde’s detailed analysis of early to mid-nineteenth century extra-legal sources is that issues of consent were at the forefront of imaginative inquiries into citizenship and the more abstract notion of belonging. Who decides whether someone belongs and on what basis? May one relinquish belonging? Can one be exiled after once having belonged, and on what basis?

Interestingly, Hyde begins her project with the intention of showing the reader what citizenship meant in the pre-Civil-War imagination. But she does this by identifying the elements that are absent from imagined citizenship—what it is not. Imagined citizenship, much like the legal construct, is often easier examined with reference to what it cannot protect and whom it cannot include. From Christian estrangement<sup>33</sup> to Hawthorne’s artistic self-expatriation from political citizenship,<sup>34</sup> to historic narratives of exile,<sup>35</sup> and beyond, Hyde must often construct imagined citizenship from imagined exclusion.

Hyde’s analysis is sophisticated and detailed. Her mastery of her selected sources is impressive, and the conclusions she draws from these sources are persuasive. The question, however, that Hyde leaves unanswered is the extent to which the imagined notions of citizenship reflected or even drove popular contemporary understandings of citizenship. Though Hyde observes that “individuals are . . . governed by a number of informal, extralegal traditions,”<sup>36</sup> she fails to address whether and how many of the sources she selected percolated into and affected the development of popular understandings of citizenship. This may simply be a function of Hyde’s skepticism toward a historical contextualization that prioritizes a history divorced from contemporary artistic sources.<sup>37</sup> Or perhaps it is precisely the very detachment from reality that makes imagined

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28. HYDE, *supra* note 8, at 45.

29. *Id.* at 52–53.

30. *Id.* at 25–26.

31. *Id.* at 18.

32. *Id.*

33. HYDE, *supra* note 8, at 47.

34. *Id.* at 117.

35. *Id.* at 138.

36. *Id.* at 11.

37. *Id.* at 16.

citizenship worth exploring. It is that detachment from reality that creates the wide gap between citizenship as imagined and citizenship as experienced and hopefully gives citizens the motivation to propel reality toward something better.

#### CITIZENSHIP AS FORMALLY CONSTRUCTED (AND DECONSTRUCTED)

Though an aspirational imagined citizenship can be a driving force for reforms that bring legal constructs closer to that imagined citizenship, sometimes aspirational imagined citizenship can have quite the opposite effect. The more idealized the citizenship—or, more specifically, the citizen—of popular imagination, the greater the temptations to limit access to citizenship and reserve rights exclusively for citizens. Citizens are envisioned as the civic elites, with rights that are unavailable to others. Citizenship becomes an exclusive club to be guarded from imposters both to protect the citizenry and to protect the value of citizenship itself. After all, the argument might go, of what value is citizenship if everyone can have it or if it guarantees nothing that is not already available to everyone else?

The result is the modern obsession with identification and proof of citizenship. Governments build legal structures to ensure that only citizens have access to the rights associated with citizenship and to prevent noncitizens from fully participating in the polity. In *Citizenship as Foundation of Rights: Meaning for America*, Richard Sobel argues that these barriers to the exercise of rights impermissibly undermine and dilute an exceptional American citizenship that differs from European citizenship in its “empowering” nature.<sup>38</sup> Sobel goes so far as to say that identification requirements amount to forced denationalization in the American context.<sup>39</sup>

Sobel begins by identifying three fundamental rights of citizenship: the right to vote, the right to work, and the right to travel.<sup>40</sup> Sobel addresses each of these rights one by one, relying on Supreme Court precedent, as well as legal commentary and political theory on citizenship, to assert the fundamental nature of each right. Sobel’s descriptions of each of these three rights offer very helpful catalogues of landmark Supreme Court decisions in each of these areas and illustrate the connection between these rights and the concept of citizenship. Interestingly, Sobel does not argue that these rights are necessarily exclusive to citizenship, but that they inhere in citizenship. In doing this, Sobel raises some interesting questions about the very nature of citizenship. Is citizenship defined by the way that rights attach rather than by the specific rights that attach? Can a government offer any of the rights inherent in citizenship to other individuals within the polity by specific act? Can citizenship be unbundled and divided by an individual citizen’s consent?<sup>41</sup> These are not questions that are ultimately necessary to Sobel’s analysis, though the answers to these questions might have provided additional context to his conclusion.

Sobel’s thesis is that the modern identification regime, in which government entities

38. See SOBEL, *supra* note 9, at 131–50.

39. *Id.* at 8.

40. See *Id.* at 38–57 (discussing the Right to Vote); *id.* at 58–71 (discussing the Right to Employment); *id.* at 72–108 (discussing the Right to Travel).

41. Sobel’s discussion regarding the nature of citizenship raises questions addressed by other authors. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1951) (arguing that citizenship is “the right to have rights”); see also AYTEN GUNDOĞDU, *RIGHTLESSNESS IN THE AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS* (2015).

ask citizens to prove their citizenship prior to exercising the fundamental rights of citizenship he has identified, impermissibly infringes on citizenship.<sup>42</sup> Sobel's arguments in support of this thesis fall into two modes, and Sobel seems to sometimes blur the line between them.

At times, Sobel's critique is a constitutional one. Requiring proof of citizenship, he argues, conflicts with the constitutional guarantee of equal protection or the guarantee of privileges and immunities.<sup>43</sup> To put it more abstractly, this argument is about inconsistencies between two legal constructs surrounding citizenship—identification laws and the Constitution.<sup>44</sup> These kinds of arguments are attractive because they are anchored to familiar cases and follow a predictable format that is the bread and butter of litigation. These are, indeed, the kinds of arguments that courts are interested in. When Sobel's arguments fall in this mode, he provides an instruction manual for challenging identification laws in court.

Far more interesting, though, is what could be described as an argument about the gap between imagined citizenship and the formal legal constructs surrounding citizenship. Sobel argues that an identification regime is inconsistent with the theoretical and historical underpinnings of U.S. citizenship.<sup>45</sup> This argument focuses on the ways in which requiring proof of citizenship undermines a more abstract—or imagined—notion of American citizenship.<sup>46</sup> When Sobel writes in this mode, he suggests that the very act of requiring citizens to produce proof of citizenship inverts the American democratic enterprise. Citizens, he argues, should require the government to prove that an individual is not a citizen before stripping a citizenship right.<sup>47</sup> Citizens must hold the government accountable to them in a truly democratic government.<sup>48</sup>

Identification regimes . . . threaten the sovereignty of citizenship and self-government . . . .  
The policy consequences of making citizen[s] voting rights contingent, for instance, on identification documents constitute constructive disenfranchisement and denationalization by the state selecting which citizens can participate in elections. Identification regimes accomplish what government laws may not otherwise do: stripping citizens of their citizenship rights prior to producing identification, the constructive equivalent of denaturalization or exile.<sup>49</sup>

This argument is provocative and insightful. Much of this relationship is premised on the nature of birthright citizenship, whether *jus soli* or *jus sanguinis*. The government cannot and does not control birthright citizenship—individuals are born with no planning or direction from the government. The government must nonetheless remain accountable to anyone born into the status. Likewise, the government cannot remove birthright citizenship from an individual; citizens can only be expatriated voluntarily.<sup>50</sup> This, Sobel

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42. SOBEL, *supra* note 9, at 2.

43. *Id.* at 7–8.

44. *Id.* at 110.

45. *Id.*

46. *Id.* at 110–15.

47. SOBEL, *supra* note 9, at 115–20.

48. *Id.*

49. *Id.* at 8.

50. *Id.* at 6.



argues, is at the core of an empowering citizenship in which citizens may exercise fundamental citizenship rights “*per force*.”<sup>51</sup>

Equally intriguing is Sobel’s suggestion that American citizenship is peculiar and distinctive in its “empowering” nature.<sup>52</sup> Sobel presents a vision of American citizenship that elevates the individual over the government in a way that European citizenship, for example, does not.<sup>53</sup> American citizenship, he argues, is unique and exceptional and demands more from the government: “Because of the differences in the nature of other governments and their relationships to their citizens and subjects, the argument that people in other democratic countries have to carry and show identification does not support the proposition that this should occur here.”<sup>54</sup>

The distinction between a peculiarly American notion of citizenship and that of other democratic countries is not entirely clear, however. Sobel first argues that European citizenship is different from American citizenship because European states developed from “monarchical autocratic and authoritarian regimes.”<sup>55</sup> Sobel then catalogues various countries’ identification laws, but those examples raise more universal concerns about identification laws that are not tied to any particular abstract conception of citizenship.<sup>56</sup> Sobel critiques almost every example he raises as inimical to fundamental democratic ideals.<sup>57</sup> In that sense, it seems Sobel’s real argument is that identification regimes are at odds with a universal, core conception of citizenship, rather than with a peculiar American brand of citizenship.<sup>58</sup>

The lack of clarity in this piece of the argument does not undermine the larger point that modern legal developments are inconsistent with a more abstract notion of American citizenship. Sobel’s claim provocatively advances our understanding of American citizenship and hints at a re-imagination of citizenship—one based on its forgotten historical foundations—that could potentially call into question many legal constructs beyond those addressed in his book. Sobel’s argument, at its core, is a call to narrow the gap between an imagined citizenship ideal and the formal legal constructs that shape experienced citizenship. Sobel’s work reinvigorates the citizenship inquiry and invites further discussion.

#### CITIZENSHIP AS (UNEQUALLY) EXPERIENCED

Though the gap between imagined citizenship and citizenship as legally constructed can be wide, the rift between these two facets of citizenship and the everyday experience of citizens can be enormous. Our legal constructs often fail to live up to the idealized citizenship of our imagination. This is, in part, what Richard Sobel highlights in *Citizenship as Foundation of Rights*. But legal structures, even if approaching consistency

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51. *Id.* at 7.

52. SOBEL, *supra* note 9, at 7–8.

53. *Id.* at 5.

54. *Id.* at 131.

55. *Id.* at 132.

56. *Id.* at 132–48.

57. SOBEL, *supra* note 9, at 132–48.

58. *Id.* at 132–50.

with our imagined citizenship, often fail to protect individuals' exercise of citizenship. As a result, the lived experience of citizenship falls miserably short of the citizenship nominally guaranteed by law, as well as the idealized citizenship of our imagination. That this failure of citizenship most often affects women, people of color, and other marginalized groups exposes a particularly pernicious citizenship gap—the gap between how the privileged experience citizenship and how minority groups experience citizenship—that pushes groups into second-class citizenship.

In *Making Foreigners: Immigration and Citizenship Law in America, 1600-2000*, Kunal M. Parker exposes the enormity of this gap and shows how sometimes this gap is more accurately described as a chasm that strips marginalized groups of their very citizenship: “Second-class citizenship can shade off, and all too frequently *has* shaded off, into formal non-citizenship, into genuine foreignness.”<sup>59</sup> Parker documents a history that is at once familiar in the events and practices he describes but novel in the insights it offers.

In reading *Making Foreigners*, the reader must come to terms with a historical reality that is at odds with the popular narrative of the United States as a country of immigrants. The claim that the exclusion of outsiders is an important facet of American history is certainly not new. Indeed, the scholarship on U.S. immigration history is rich with examples of efforts to stop people from arriving on U.S. shores.<sup>60</sup> But Parker takes a different approach. Rather than focusing his lens on groups the United States has excluded from its shores, he traces the historical experience of groups with legitimate claims to membership that the U.S. government nonetheless marginalized and treated as outsiders: “Readers will readily understand the concept of the country’s absorption and rejection of outsiders,” Parker writes.<sup>61</sup> “They might find rather more unfamiliar the concept of rendering insiders foreign.”<sup>62</sup>

This approach allows Parker to bring together the experiences of American Indians, Black Americans, women, Asian Americans, Latino Americans, and the poor under a single analytical framework. To be clear, Parker’s claim is not that he has uncovered new historical sources that reveal events and circumstances previously unknown. The events that Parker describes are well documented and appear in a variety of scholarly commentaries.<sup>63</sup> The real value in Parker’s approach is that it persuasively connects these events and experiences in a meaningful way. As Parker joins these histories, which are conventionally relegated to separate tomes, the U.S. practice of targeted and intentional marginalization of minority groups comes into sharp focus. And while Parker’s conceptualization of the past is insightful on its own, the context it provides to the modern immigration enforcement regime is crucially important:

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59. PARKER, *supra* note 10, at 8.

60. See Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples From Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255 (2008); Denny Chin & Kathy Hirata Chin, *Asian Americans and the Law*, 11 JUD. NOTICE 6 (2016).

61. PARKER, *supra* note 10, at 4.

62. *Id.*

63. See Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMP. L. 1017 (2001) (criticism of treatment of Native Americans); Brando Simeo Starkey, *Jim Crow, Social Norms, and the Birth of Uncle Tom*, 3 ALA. C.R. & C.L. L. REV. 69 (2013) (criticism of treatment of black citizens).

As we look over the long span of American history, we see the multiple uses to which the category of “alien” has been put, not as simple reflections of the “fact” that an individual is from elsewhere, but rather as active strategies of management, control, and subordination. Given the fact that those once aliens are now citizens, that “we” were once “them,” might “we” identify differently with “them”? How might this lead us to rethink our responsibility to the immigrants in our midst and at our border?<sup>64</sup>

Parker begins his book by drawing an analytical line between the U.S. government excluding outsiders on the one hand and the government “making foreign” (or forcibly estranging) insiders on the other hand. This distinction, Parker argues, allows him to connect various histories of marginalization and mistreatment of groups that are now formally and substantively recognized as citizens and members of the polity.<sup>65</sup> This analytical framework is largely very successful as a means of organizing the narrative. On occasion, though, the framework sometimes obscures the larger point that Parker makes—that the marginalization of groups inside of the United States is not very different from the physical exclusion of outsiders. Some readers might be confused and distracted by the conceptual premise that the groups Parker describes are insiders, rather than outsiders.

Part of this confusion may be a result of a somewhat fuzzy line between who is an insider and who is an outsider. At times, Parker seems to define “insider” as anyone physically present within the territory of the United States.<sup>66</sup> At other times, Parker suggests that it is birth within the territory<sup>67</sup> or citizenship<sup>68</sup> that makes someone an insider. While the contours of outsider status are largely irrelevant to Parker’s larger goal, the lack of clarity risks undermining some of the examples presented in the book.

One group that Parker describes as having undergone forced estrangement was arguably not really an insider group to begin with under any sound definition of that term. American Indians had neither formal membership (through citizenship or otherwise) nor *de facto* membership (through the extension of rights) in the American polity until at least 1924, when Congress passed the Indian Citizenship Act.<sup>69</sup> In fact, American Indians guarded their noncitizen status as a way of preserving some sense of sovereignty, and the U.S. government rationalized its legal and physical marginalization of American Indians based on their very status as noncitizens.<sup>70</sup> Parker recognizes this formal noncitizen status but treats it as a kind of legal fiction.<sup>71</sup>

But this treatment of American Indians as outsiders was more than formal—tribes were substantive outsiders, whether as allies or as enemies of the U.S. government, depending on what was advantageous for the government at the time, even before the

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64. PARKER, *supra* note 10, at 225.

65. *Id.* at 16.

66. *Id.* at 17 (distinguishing between those “on the territorial outside and the territorial inside”).

67. *Id.* at 19.

68. *Id.* at 7.

69. See, e.g., Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 124 (1999); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 247 (2002).

70. PARKER, *supra* note 10, at 60.

71. *Id.* at 131.

Revolution.<sup>72</sup> In fact, that American Indians and immigrants have had to contend with the plenary power doctrine suggests these groups' commonality as outsiders.<sup>73</sup> The government might more accurately be described as having historically constructively excluded them as outsiders rather than as having "render[ed] insiders foreign."<sup>74</sup> Again, the designation of American Indians as insiders is quite unnecessary to Parker's larger point about the American conception of aliens and citizens, which is why Parker's strict adherence to his framework exceeds its usefulness in certain instances.

But these instances of historical examples undermining the framework are vastly outnumbered by historical practices and events that clearly fit into Parker's analytic framework. The experience of Japanese Americans during World War II is a paradigmatic example of an insider group being rendered foreign. The U.S. government's removal of Japanese American families to internment camps<sup>75</sup> amounted to a de facto denaturalization, if not a legal one. The targets of the government's efforts included citizens of the United States, many of whom had children serving in the U.S. armed forces.<sup>76</sup> They were formal and substantive citizens who had, up to that point, considered themselves to be fully entitled to every right offered to any other citizen of the United States. But these citizens were deported from their homes in much the same way immigrants—noncitizens—are deported from the United States.<sup>77</sup> Likewise, women's experiences of citizenship map perfectly onto Parker's framework. The early 20<sup>th</sup> century expatriation of women upon their marriage to a noncitizen, for instance, is an obvious example.<sup>78</sup> In this case, the government stripped women's formal citizenship against their will and without their consent.<sup>79</sup> This is the very essence of making insiders foreign.

Ultimately, Parker succeeds in a massive undertaking. He recounts a 600-year history of the United States under a framework that brings new insights into the past and the future. Parker shows how the United States has drawn and redrawn the lines that separate insiders from outsiders whether on the "out" side of the border or on the "in" side. Often, the lines have been race-based, and those lines have affected immigrants and people within territorial borders alike, with individuals being denied entry based on race and individuals within our borders being denied naturalization based on race.<sup>80</sup> Sometimes the

72. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25–80 (1999); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387 (2006).

73. See Cleveland, *supra* note 722.

74. PARKER, *supra* note 10, at 10.

75. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

76. See Taunya Lovell Banks, *Outside Citizens: Film Narratives About the Internment of Japanese Americans*, 42 SUFFOLK U. L. REV. 769, 772 (2009).

77. See Mark D. Friedman, *Say "Cheese." Uncle Sam Wants Your Photograph and Fingerprints or You Are Out of Here. Does America Have A Peace Time Constitution in Danger of Being Lost?*, 30 NOVA L. REV. 223, 252 (2006).

78. PARKER, *supra* note 10, at 177.

79. *Id.*

80. For general descriptions of Chinese exclusion and prohibition on naturalization for Asian immigrants, see *Chinese Exclusion Act (1882)*, OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=47> (last visited Sep. 6, 2018); see also *Chinese Immigration and the Chinese in the United States*, NATIONAL ARCHIVES, <https://www.archives.gov/research/chinese-americans/guide> (last visited Sep. 6, 2018); see also *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Sep. 6, 2018).

distinctions have been based on gender, social class, or political opinion. Those lines too have cut across and beyond U.S. territory as bases for excluding individuals from the United States<sup>81</sup> or marginalizing them when we cannot otherwise remove or ignore them.<sup>82</sup>

Today, the lines between citizen and noncitizen are stark. Noncitizens have been banned from traveling to the United States based on criteria that would be constitutionally infirm if applied to citizens.<sup>83</sup> Noncitizens within U.S. borders, especially those without formal authorization to be in the United States, likewise find their rights abridged in ways that citizens' rights' cannot be.<sup>84</sup> Undocumented immigrant refugee families are now routinely detained in facilities owned and operated by corrections companies.<sup>85</sup> The recent separation of immigrant children from their parents as a deterrent to further undocumented immigration will leave a lasting scar on our history.<sup>86</sup> Perhaps our past can lead us to re-examine our current treatment of aliens. If we recognize that the lines we have historically drawn between insiders and outsiders—citizens and aliens—have often merely been convenient tools to marginalize minority groups, then how might we avoid that very result in our current line-drawing? Parker offers some hope in his Coda, where he mentions the national DREAMer movement.<sup>87</sup> Young people, Americans in everything but formal

81. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 798–99 (1977) (denying entry based on gender); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (denying entry based on political opinion).

82. PARKER, *supra* note 10, at 7 (describing the “poor laws that did not adequately distinguish between the native-born poor and the foreign-born poor”). See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (discussing McCarthy era practices).

83. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (the travel ban case denying entry based on national origin).

84. See *Matthews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government’s power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’”); Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016) (discussing and advocating a change in the ways immigrants’ and non-citizens’ first amendment rights are abridged); Victor C. Romero, *Whatever Happened to the Fourth Amendment: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1000–03 (1992) (“While many [undocumented immigrants] seek acceptance by the majority, the new immigrants find that their undocumented status bars them from free association with mainstream society.”).

85. See Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1658 (2012); see also Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>.

86. For Jeff Sessions’ rationale of deterrence in his press conference, see Hugh Hewitt, *US Attorney General Jeff Sessions on Children Separated from Parents at Border, F-1 Visas for PRC Students, and Masterpiece Cakeshop Decision*, HUGH HEWITT (June 5, 2018), <http://www.hughhewitt.com/attorney-general-jeff-sessions-on-the-immigration-policies-concerning-children-apprehended-at-the-border-and-f-1-visas/> (“[I]t’s legitimate to warn people who come to the country unlawfully bringing children with them that they can’t expect that they’ll always be kept together.”); Eli Rosenberg, *Sessions Defends Separating Immigrant Parents and Children: ‘We’ve Got to Get This Message Out,’* WASH. POST (June 5, 2018), [https://www.washingtonpost.com/news/post-politics/wp/2018/06/05/sessions-defends-separating-immigrant-parents-and-children-weve-got-to-get-this-message-out/?utm\\_term=.087fe2aee8da](https://www.washingtonpost.com/news/post-politics/wp/2018/06/05/sessions-defends-separating-immigrant-parents-and-children-weve-got-to-get-this-message-out/?utm_term=.087fe2aee8da); see also Miriam Jordan et al., *As Migrant Families Are Reunited, Some Children Don’t Recognize Their Mothers*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-administration-catch-and-release-migrants.html>; César Cuauhtémoc García Hernández, *Cruel and Immoral: America Must Close the Doors of Its Immigration Prisons*, GUARDIAN (June 17, 2018, 8:00 AM), <https://www.theguardian.com/commentisfree/2018/jun/17/family-separation-family-detention-immigration>.

87. PARKER, *supra* note 10, at 230.

status, challenged the conventional assumption that noncitizens do not belong. It has been three years since the publication of Parker's book, and the DREAMer movement has not led to lasting immigration reform. But that the movement emerged and that it continues to drive discussion about membership and belonging is a silver lining.

#### CONCLUSION: MINDING THE GAPS

Hyde, Sobel, and Parker each make significant contributions to our understanding of citizenship, membership, and belonging. When read together, though, their books offer much more than that. They highlight the gaps between the imagined citizenship ideal and the legal structures surrounding citizenship, as well as the every-day lived experience of citizenship. The challenge is to mind those gaps—how can the gap between imagined citizenship and experienced citizenship be managed so that the noble citizenship ideal is an empowering force for continued improvement? Perhaps we can learn from our mistakes.

In executing the order that authorized Japanese internment—a *de facto* mass deportation of American citizens—during World War II, General John DeWitt offered a response to the argument that this was an impermissible undermining of citizenship: “It makes no difference whether [a person of Japanese descent] is an American citizen, he is still a Japanese [sic]. American citizenship does not necessarily determine loyalty.”<sup>88</sup> DeWitt's comment returns us to the gap between citizenship as imagined, citizenship as legally constructed, and citizenship as experienced. DeWitt alludes to a noble imagined conception of citizenship in which the citizen exhibits a fundamental civic virtue—loyalty. DeWitt was right that formal citizenship does not guarantee loyalty of the imagined citizenship ideal. DeWitt was wrong, however, about what that meant about Japanese Americans. The legal structures that confer the status of citizenship do not—and could not—adequately determine who is and who is not loyal, *regardless of race*. Citizenship status never guarantees loyalty from anyone. This is the gap between the imagined citizenship ideal and the legal structures that surround citizenship. DeWitt's—and our country's—failure was in allowing the gap to be a vehicle for wartime suspicions, racial bias, and forced internment of American citizens.

This is perhaps the most dangerous potential result of the gap between a lofty imagined citizenship and the legal structures of citizenship. There is a tension between the lofty ideals of citizenship as we imagine it and the principles of equality that we associate with that imagined concept. The higher the pedestal on which the imagined citizenship sits, the larger the risk that we use the almost other-worldly vision of citizenship to exclude people from citizenship based on biases. The more lofty the ideal, the more likely we are to believe that some category of people is unfit, and humans are notorious in their substitution of biases for more principled judgment. Citizenship, it seems, is as much a tool of exclusion as it is of inclusion. This is a gloomy forecast for the future.

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88. *Id.* at 180 n.57 (citing Testimony of Lt. General John L. DeWitt, Commanding General of Western Defense Command, *Investigation of Congested Areas, Hearings Before a Subcommittee of Naval Affairs, House of Representatives, Seventy-eighth Congress, First Session Pursuant to H. Res. 30, A Resolution Authorizing and Directing an Investigation of the Progress of the War Effort*, pt. III (Washington, D.C.: U.S. Government Printing Office, 1943).

But the gap between a lofty citizenship ideal can also serve as an aspirational model in which we continually strive to make citizenship the egalitarian and empowering concept of our imagination. Our track record suggests that this has often been the case. That more people have been able to access citizenship and that increasing numbers of those citizens have been able to exercise their rights, even if only after hard-won battles, suggests that citizenship endures in our imaginations as a noble, inclusive ideal that empowers its recipients with the right and obligation to make the United States better. Our failures have been tragic, but our trajectory is hopeful. Pursuing citizenship as we imagine it may be our best hope to redeem our past failures and avoid new ones. Citizenship as imagined promises nothing, of course, but it certainly offers a goal. And perhaps that is enough.