

# CITIZENSHIP AS ACCUMULATED RACIAL CAPITAL

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## INTRODUCTION

Despite persistent racial and economic inequality, many believe the United States is becoming a post-racial and classless society where race and class analysis are anachronisms. This Essay will contest that claim by way of a critical reading of citizenship as reflected in American law and culture and demonstrate the continuing relevance of race theory and Marxian analysis, notwithstanding their somewhat uneasy relationship.<sup>1</sup> It examines how law and culture construct and reflect, on the one hand, xenophobic and racist popular images of aliens—particularly refugees and undocumented aliens—and, on the other hand, enable and assure the accumulation of racial capital and value in the notion of deserving, legitimate, and racialized (white) citizenship.

As used here, citizenship does not merely refer to formal legal status but also to the abstract, ideal citizenship of political theory: the panoply of rights, duties, civic participation, and the sense of belonging accorded to those who are part of the polity, broadly speaking. The binary identities of citizen and alien may be enforced by violence or the threat of violence whenever the

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<sup>1</sup> The place of race in Marxist theory is contested and complex with some claiming that Marxism unfairly discounts racism as an epiphenomenon of class and economic dynamics. But sophisticated and complex readings of race within Marxism have emerged recently. See, e.g., Zeus Leonardo, *The Unhappy Marriage Between Marxism and Race Critique: Political Economy and the Production of Racialized Knowledge*, 2 POLY FUTURES EDUC. 483 (2004) (examines Marxism and race analysis theories in order to reconcile them into a new theory that maintains the integrity of each by integrating Marxism's objectivity and the subjectivity of race analysis.).

perception of these categories' stability weakens.<sup>2</sup> This occurs when, as in recent years, the accumulated and assumed material benefits of citizenship are brought into question through severe, prolonged economic recession and heightened unemployment.<sup>3</sup> Border vigilantism, attacks on migrant workers, deportations, and Arizona's new empowerment of local police to engage in immigration policing—all police the color line in citizenship.<sup>4</sup> This policing of identities accelerates during periods of economic or political crisis, such as the continuing deep global recession and the employment deficit that have accompanied trade liberalization and global economic restructuring.<sup>5</sup> Crisis exacerbates contradictions.

Domestic immigration law, policy, and discourse are ever more restrictive. International law also fundamentally embraces a normative commitment to state sovereignty and the state's right to determine membership through the power of exclusion<sup>6</sup> derived from that sovereignty.<sup>7</sup> The national border-driven, exclusive dimension of citizenship, thus, is well-established in both domestic and international law. To this premise, this Essay connects recent developments in American law, culture, and politics that reflect and

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<sup>2</sup> See Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 817-20 (1996).

<sup>3</sup> *Id.* at 818.

<sup>4</sup> See GLEN A. TOBIAS & ABRAHAM H. FOXMAN, ANTI-DEFAMATION LEAGUE, BORDER DISPUTES: ARMED VIGILANTES IN ARIZONA (2003), <http://www.adl.org/extremism/arizona/arizonaborder.pdf>; see also Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135 (2007); *Mexican Migrant Workers Savagely Attacked by Racists in San Diego, California*, LA VOZ DE AZTLAN (July 14, 2000), <http://www.aztlan.net/lynched.htm>; Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Legis. Serv. 369 (West) (2010), amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)) [hereinafter S.B. 1070].

<sup>5</sup> See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1541 (1995) (“The unpopularity of immigrants predictably waxes during times of relative economic uncertainty and hardship.”).

<sup>6</sup> See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker under United States Law*, 1988 WIS. L. REV. 955, 967 (1988) (exploring how national sovereignty defines the state's power to exclude outsiders) [hereinafter Bosniak, *Exclusion and Membership*].

<sup>7</sup> See, e.g., LINDA S. BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006) (discussing the problems of inclusion and exclusion inherent in the practices and institutions of citizenship).

help to construct the ideology of the “native,” deserving citizenship around the familiar pillars of race and class<sup>8</sup>: for example, the 2010 Arizona law targeting illegal aliens;<sup>9</sup> the Tea Party and Glenn Beck phenomena<sup>10</sup>; the whisper campaign about President Obama being foreign-born, socialist, and Muslim<sup>11</sup>; Proposition 187 in California in the 1990’s<sup>12</sup>; city ordinances in Hazleton, Pennsylvania<sup>13</sup>; and federal limits placed upon the entitlement to public benefits of even legal aliens.

This Essay argues that an analysis of the interplay of race and class in citizenship, informed by Marxian theorization<sup>14</sup> of economy, exploitation, and ideology, demonstrates the complex efficiencies of racialization<sup>15</sup> in framing an ideology of citizenship. It further argues that the net effect of this crystallization of power and interest through a coded elaboration of a system of racialized

<sup>8</sup> See Johnson, *supra* note 5, at 1542 (showing how race, sex, and class status are historical and present reasons for exclusion of “outsiders” or immigrants by the United States).

<sup>9</sup> See S.B. 1070.

<sup>10</sup> Amy Gardner, *Glenn Beck Rally Will Test Tea Party Strength*, WASH. POST, Aug. 26, 2010, available at <http://www.cbsnews.com/stories/2010/08/26/politics/washingtonpost/main6807659.shtml>.

<sup>11</sup> Lauren Green, *Nearly 1 in 5 Americans Thinks Obama is a Muslim, Survey Shows*, FOX NEWS, Aug. 19, 2010, <http://www.foxnews.com/politics/2010/08/19/nearly-americans-thinks-obama-muslim-survey-shows/>.

<sup>12</sup> See Peter H. Schuck, *The Message of Proposition 187*, 26 PAC. L.J. 989, 990 (1995) (Proposition 187 sought to encourage California’s illegal residents to leave by preventing them from receiving public social services, health care, or education). See also *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1245 (C.D. Cal. 1997) (repealing Proposition 187 on the basis of preemption and unconstitutionality; it nonetheless represents a vivid example of the overt exclusion of public benefits to “outsiders”).

<sup>13</sup> See *Lozano v. City of Hazleton*, 620 F.3d 170, 226-38 (3d Cir. 2010) (regulation forbidding employment of or renting property to undocumented aliens).

<sup>14</sup> See generally John Solomos, *Varieties of Marxist Conceptions of ‘Race’, Class, and the State*, in THEORIES OF RACE AND ETHNIC RELATIONS 84 (John Rex & David Madison eds., 1986); Stuart Hall, *Race, Articulation, and Societies Structured in Dominance*, in BLACK BRITISH CULTURAL STUDIES: A READER 16 (Houston Baker et al. eds., 1996); Leonardo, *supra* note 1; Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1996); Karl Marx, *On the Jewish Question*, in ‘NONSENSE UPON STILTS’: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron ed., 1987).

<sup>15</sup> FRANTZ FANON, BLACK SKIN, WHITE MASKS 77 (1967) (“The habit of considering racism as a mental quirk, a psychological flaw, must be abandoned.”).

citizenship amounts to amassing and accumulating racial capital.<sup>16</sup> Racial capital is the material and economic value of whiteness.<sup>17</sup> Whiteness is the surplus value generated by systemic denigration of non-whiteness in our law, policy, and public discourse.<sup>18</sup> Marxism as an explanatory model has not yet withered away.

## I. CRISIS CITIZENSHIP

In a crisis, elites typically accentuate inter-group differences to serve their own interests. The current global crisis is usually described as an economic one—a crisis of unemployment, poverty, and underdevelopment driven at least in part by trade liberalization and global patterns in financial markets.<sup>19</sup> But it is a political crisis too, at least in the United States, driven by the failure of late capitalism to generate even the legitimating symbolism of upward class mobility. Voter apathy, Tea Party anger, disgust with incumbents, revulsion at government itself, self-interested objections to health care reform that would better cover needy working Americans, visceral hatred of all forms of taxation, and the general headlong rush from public spiritedness—all indicate a general societal disappointment, even among the contented classes, with the postwar corporate-political alliance that has dominated American politics. The suspicion of and hostility toward illegal aliens mounted during this period, with extreme eruptions such as the 2010 Arizona law targeting illegal aliens.<sup>20</sup>

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<sup>16</sup> See generally Anthony P. Farley, *Accumulation*, 11 MICH. J. RACE & L. 51 (2005) (analyzing the intersection of class and critical race theory through the concept of accumulation); Anthony P. Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953 (2008).

<sup>17</sup> E. Christi Cunningham, *Identity Markets*, 45 HOW. L.J. 491, 507 (2002).

<sup>18</sup> See e.g., Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603 (1999).

<sup>19</sup> Arnold Bock, *The Current Global Financial & Economic Crisis*, GOLDSEEK.COM (Dec. 2, 2008), available at <http://news.goldseek.com/GoldSeek/1228229664.php> (last visited July 15, 2012).

<sup>20</sup> See S.B. 1070. Most of Proposition 187 was invalidated by federal preemption or as an improper assumption of federal regulatory authority. See Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1157-58 (citing League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1251 (C.D. Cal. 1997); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995)).

The attacks of September 11, 2001 intensified the “us versus alien” distinction.<sup>21</sup> The fear of terrorism has served as a new impetus for seeking out enemies within, driven by the paranoid rhetoric of the “War on Terror.” The perceived threat posed by the alien is today graver than mere obstruction of the “entitled” American’s access to the American dream. Instead, it is assumed to be an immediate and unpredictable threat posed to our physical and national security. The hunt is on for dangerous aliens within our borders and around the world. Our willingness to use extreme measures, including torture, indicates the extent to which we have dehumanized the alien in this atmosphere of panic.<sup>22</sup>

The attacks on 9/11 aside, the global economy is bleak and jobs are scarce.<sup>23</sup> With the legitimating glue of anti-communism no longer available, America has again turned inward in search of an enemy. Undocumented workers, refugees, and even legal aliens are once again the focus of people who feel shortchanged and marginalized. These feelings are not unfounded—the post-war social contract that promised every industrious American upward class mobility has been eradicated by economic globalism.<sup>24</sup> Globalization has accentuated group differences by increasing the stratification, polarization, and gendering of labor markets.<sup>25</sup> Labor migration, and consequently national membership and citizenship, have been placed firmly outside the sphere of free trade, leaving sovereign states selfishly policing their borders.<sup>26</sup>

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<sup>21</sup> Ian Urbina, *Federal Hate Crime Cases at Highest Level Since '01*, N.Y. TIMES, Dec. 18, 2009, at A23.

<sup>22</sup> Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge: Abu Ghraib Detainees' Statements Describe Sexual Humiliation and Savage Beatings*, WASH. POST, May 21, 2004, at A1.

<sup>23</sup> Peter Symonds, *OECD Paints Bleak Picture of Global Economy*, WORLD SOCIALIST WEB SITE (Apr. 1, 2009), <http://www.wsws.org/articles/2009/apr2009/oecd-a01.shtml> (last visited July 15, 2012).

<sup>24</sup> Jonathan T. Fried, *Joining Together, Standing Apart: National Identities After NAFTA*, 93 AM. J. INT'L L. 544, 545 (1999).

<sup>25</sup> Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL'Y 791, 800 (1995).

<sup>26</sup> Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411, 442 (2007) (“skepticism towards the idea that there is—or should be—such a thing as global citizenship is fierce.”); see generally Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES L. 489, 489 (2007) (“As states are increasingly unable to assert exclusive power in a range of policy domains, immigration and citizenship law are transformed into a last bastion of sovereignty.”).

The term “alien” certainly suggests nativism. It defines those who are “other” to us: intruders into our political and economic community.<sup>27</sup> The Arizona law targeting illegal aliens,<sup>28</sup> the “Buy American” provisions of the recent economic stimulus bills and “English only”<sup>29</sup> campaigns of recent years illustrate nativist fears of alien economic and cultural influences. Popular discourse about the Chinese “threat” from its trade and currency policies, foreign ownership of American industry,<sup>30</sup> documented Tea Party racism,<sup>31</sup> and smear campaigns against President Obama as a foreign, Muslim socialist<sup>32</sup> are other examples of nativist paranoia.<sup>33</sup>

## II. THE DESERVING CITIZEN

We should consider how the “us versus alien” construct has assisted the legal construction of “us” as citizens, and particularly, how citizenship has been constructed as a matter of exclusion and entitlement. The identity of the contented class is defined by entitlement and desert and it has employed a racialized nativism to justify this as “healthy” American patriotism.<sup>34</sup> In fact, intolerance of difference is implicit even in the assimilationist ideal of “universality” in American citizenship because difference must be

<sup>27</sup> Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 378-79 (1997) (“Noncitizens are not full members of the political community, and are legally referred to as ‘aliens,’ affirming that these persons in our midst are cast in the role of the other.”).

<sup>28</sup> See S.B. 1070.

<sup>29</sup> See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 16, 62 (1994) (discussing problems with using English-only ballots for linguistic minorities).

<sup>30</sup> *Id.* at 17.

<sup>31</sup> See Kate Zernike, *N.A.A.C.P. Report Raises Concerns About Racism Within Tea Party Groups*, N.Y. TIMES, Oct. 10, 2010, available at <http://www.nytimes.com/2010/10/21/us/politics/21naacp.html>.

<sup>32</sup> See Robert Schlesinger, *Party of Nuts: Poll Shows GOP Believes Obama is Muslim, Socialist*, US NEWS (Mar. 24, 2010), <http://www.usnews.com/opinion/blogs/robert-schlesinger/2010/03/24/party-of-nuts-poll-shows-gop-thinks-obama-is-muslim-socialist>.

<sup>33</sup> Chang, *supra* note 29, at 16; see also Robert S. Chang, *Reverse Racism! Affirmative Action, the Family, and the Dream that is America*, 23 HASTINGS CONST. L.Q. 1115, 1121 (1996) (“This desire to take back America might be called the ‘nativist’s dream of return.’”).

<sup>34</sup> See Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993) (stating that American patriotism is persuasive because it represents a “talisman[] of the deserving person”).

subsumed into a universal citizenship.<sup>35</sup> Immigration law has historically distinguished between groups, whether through outright exclusion of some Asian groups in the late nineteenth and early twentieth centuries, or more subtle continued exclusion of immigrants in polygamous family situations.<sup>36</sup>

We must interrogate the notion of “the citizen.” The citizen is the responsible social participant who, possessing rights but respecting duties, subscribes to shared national values and norms of membership and exhibits the virtues of public engagement.<sup>37</sup> As Linda Bosniak points out, citizenship is defined by two sets of normative commitments: to community on the one hand, with the right to exclude from community membership which it confers; and to equality on the other hand, conferring the substantive right of migrants to equality once here.<sup>38</sup>

It is useful to unpack the notions of community and equality to see how they inform our society’s thinking about aliens. In addition to determining who is excluded, community defines the parameters of the civic virtues which citizens are supposed to exhibit—the collective, normative commitments to shared “American” values.<sup>39</sup> Equality, on the other hand, informs the rights which citizens—and also migrants—have against the community for benefits.<sup>40</sup>

The relationship and tension between these two principles, community and equality, is what drives immigration law and policy, and the popular perceptions of aliens. Under the principle of community, aliens are outsiders subject to multiple borders even

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<sup>35</sup> Berta Esperanza Hernández-Truyol & Matthew Hawk, *Traveling the Boundaries of Statelessness: Global Passports and Citizenship*, 52 CLEV. ST. L. REV. 97, 107-08 (2005).

<sup>36</sup> Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 69-77 (2004); see also Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521 (2007) (discussing the concept of aliens who are citizens at birth and whose citizenship is considered suspect because of his/her racialized identity).

<sup>37</sup> See Bosniak, *Exclusion and Membership*, *supra* note 6, at 961-67.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; see also Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571 (2007) (analyzing how cultural difference and citizenship are conceived and the relationship between the two concepts); Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415 (2010) (exploring the relationship between the diverse classifications of narratives concerning sexuality).

once within national territory.<sup>41</sup> Under the principle of equality, aliens are entitled to benefits and protections like citizens. Why at times does the nation's immigration law and policy favor community, and at other times equality?

### III. NATIONALISM, POVERTY, AND RACIAL EXCLUSION

The answer may lie in the concept of "the American nation," in the forms of nationalism that control popular perception of who is a deserving citizen and who is not, to whom should be granted the full privileges of membership, and to whom should they be denied.<sup>42</sup>

Conventional accounts of American political theory hold that the nation is committed to individualism, equality, and tolerance.<sup>43</sup> The nation must justify to itself the incongruity between these ideals and the harsher reality of American society. Kenneth Karst has said that American public life has been defined from the beginning to exclude subordinated groups so that their non-participation is invisible.<sup>44</sup>

Poverty comes to seem abnormal among the "people of plenty."<sup>45</sup> For the poor, the failure to be self-sustaining becomes stigmatized as a moral failure: the poor live, symbolically outside the borders of society though within the national territory.<sup>46</sup> Those who are illegal aliens are doubly outside the borders: once in their legal status related to the national community, and again in their social

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<sup>41</sup> See, e.g., SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2008) (Applying for work can trigger removal). Discrimination, threat of removal, and intimidation all constitute forms of an intra-national borders standing between aliens and inclusion in national community.

<sup>42</sup> Arvin Lugay, "In Defense of Internment": *Why Some Americans Are More "Equal" Than Others*, 12 *ASIAN L.J.* 209, 224 (2005).

<sup>43</sup> See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1991) (offering a perspective on the concept of belonging for different cultural groups and arguing that the concept of equal citizenship is a unifying force in America's past and present).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 125; see also Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": *The Commerce Clause and State Residence Restrictions on Welfare*, 11 *YALE L. & POL'Y REV.* 147, 151 n.24 (1993) (citing Karst as "arguing that perception of non-working poor people as 'the Other' drives public policies").

<sup>46</sup> See, e.g., Leslie Espinoza Garvey, *The Race Card: Dealing with Domestic Violence in the Courts*, 11 *AM. U. J. GENDER SOC. POL'Y & L.* 287, 289 (2003).



status. Race and class, cemented by hierarchy and white privilege, combine to create an identity and social position from which escape is difficult—the racial underclass. Altogether these factors produce what Karst calls a powerful “culture of isolation” inside which the poor are completely cut off from access to remunerative jobs and political participation.<sup>47</sup>

The exclusivity of the American nation thus produced is jarring when exclusion is so at odds with the ideals of American citizenship. Consider the formal equality that underlies American liberal legalism.<sup>48</sup> Race-neutral patriotism, not a racialized understanding of the American nation, is the core American civic value. Americanization is, in theory, open to all who are willing to submit their differences to the American melting pot of individualism, equality, and tolerance.

But on the contrary, American nationalism defined by race is very much a reality. The recent Arizona law targeting illegal aliens,<sup>49</sup> California’s Proposition 187 in the 1990’s,<sup>50</sup> and the recent City Ordinances of Hazleton, Pennsylvania<sup>51</sup> were clearly attempts to restrict privileges of membership to existing national members on a primarily racial basis. As the history of American slavery and genocidal Indian wars demonstrates, American nationalism comprises notions of race and territory. The universality model of American citizenship is false—race and class are always already historically embedded in American nationalism. There are groups situated by virtue of race and class position such that the American values of individualism and hard work just will not pay off in terms of accession to the American ideal of citizenship. In access to full citizenship, this market structure facilitates the accumulation of racial capital by whites, the surplus value that whiteness represents at the expense of the suppressed value of non-whiteness.<sup>52</sup> Class and

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<sup>47</sup> KARST, *supra* note 43, at 125.

<sup>48</sup> See Peter Halewood, *Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1337 (1996).

<sup>49</sup> See S.B. 1070.

<sup>50</sup> See *supra* note 20 and accompanying text.

<sup>51</sup> See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (holding the Hazleton ordinances violated the Supremacy Clause).

<sup>52</sup> See Peter Halewood, *Whiteness*, in THE ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1896 TO THE PRESENT, FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY 121 (Paul Finkelman ed., 2009). A classic case on whiteness is *United States v. Thind*, 261 U.S. 204 (1923), holding that common knowledge is sufficient to determine that Asian Indians are not white.

race are indeed only relatively autonomous from each other: the hegemony and legitimacy conferred upon this racialized citizenship serves the interest of capital accumulation, and vice versa.

So the citizen is implicitly white.<sup>53</sup> Laws such as the Arizona law on illegal aliens<sup>54</sup> and the Hazleton ordinances<sup>55</sup> serve to construct and maintain the identity of the normal and the suspect, the deserving and the undeserving, so as to maintain the economic and political hierarchy when it is threatened by crisis. In this manner, law is continually constructing majorities and minorities and gerrymandering the borders of citizen legitimacy. Multiple layers of ineffective restrictions have fed both domestic market demand for cheap labor, and at the same time satisfied popular xenophobia.

#### IV. COMMUNITY AND EXCLUSION

Michael Walzer, returning to the concept of community and its role in facilitating nativism, argues that “communities of character”<sup>56</sup> are what define nations. These communities may be justifiably protected by careful selection of prospective members and exclusion of others, subject to concerns about fairness, national responsibility, and humanitarianism.<sup>57</sup> Walzer’s argument is one of the most important justifications for the immigration “restrictionist” position.<sup>58</sup> The interest of the state in regulating national membership is most compelling under a political system of popular sovereignty, where sovereignty is directly linked to citizenship.<sup>59</sup>

On Walzer’s model, the “character” of the community encompasses the shared values to which the community subscribes:

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<sup>53</sup> The recent “Tea Party” movement seems to promote this notion of white citizenship, consciously or unconsciously. See Zernike, *supra* note 31.

<sup>54</sup> See, e.g., S.B. 1070.

<sup>55</sup> See, e.g., *Lozano*, 496 F. Supp. 2d. at 477.

<sup>56</sup> MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61-63 (1983).

<sup>57</sup> *Id.*; see also Bosniak, *Exclusion and Membership*, *supra* note 6, at 963-65 (discussing Walzer’s theory); see generally Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (exploring the relation of community and equality in immigration law and policy while closely examining Walzer’s work).

<sup>58</sup> Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 587-90 (1996).

<sup>59</sup> See generally KARST, *supra* note 43 (discussing citizenship and inclusion in the national community).

by definition, that character can only be maintained by members committed to those same fundamental values.<sup>60</sup> And of course this is precisely where nativism enters. The process of exclusion tailors the national membership to the national character in a self-referential circle that defeats difference and equality.

Thus, one of the problems may be community itself. Iris Marion Young has argued that community, the refuge of progressive politics from alienating market individualism, itself excludes difference.<sup>61</sup> She asserts a radical multiculturalism that explodes conventional understandings of community.<sup>62</sup> Community is conceptually tied to conformity and homogeneity and is incompatible with radical assertions of identity politics, or with demands for substantive justice that take account of the historical and political specificities of group difference and group subordination.<sup>63</sup> In other words, in a society where groups are oppressed, a conception of citizenship that transcends group differences cannot sufficiently acknowledge or remedy that oppression. Like color-blindness in the context of race discrimination, universal citizenship reinforces the position of the privileged. Therefore, Young has proposed “differentiated citizenship” which would offer “explicit recognition and representation of oppressed groups,” and would serve to integrate members of subordinated groups into the political community not only as individuals but as members of groups as well.<sup>64</sup>

There are further contradictions. While the American political tradition has valued homogeneity in citizenship, it has vigorously advanced heterogeneity in the market sphere.<sup>65</sup> The only remaining “protected market” is in citizenship, where membership

<sup>60</sup> See Bosniak, *Exclusion and Immigration*, *supra* note 6, at 964 (“The unmembered presence of [immigrants and aliens], who exist as a permanently unfranchised population, undermines the democratic community.”).

<sup>61</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 226 (1990).

<sup>62</sup> *Id.*

<sup>63</sup> Hawly Fogg-Davis, *An Argument Against a Historical “Difference” in Feminist Political Theory*, 4 *CIRCLES: BUFF. WOMEN’S J.L. & SOC. POL’Y* 2, 3-4 (1996).

<sup>64</sup> *Id.* at 3-4. (“Young upholds what she calls democratic cultural pluralism, a political model that envisions the good society as ‘equality among socially and culturally differentiated groups, who mutually respect one another and affirm one another in their differences.’”).

<sup>65</sup> See WALZER, *supra* note 56, at 108-09 (discussing the American marketplace with an emphasis on how it promotes the heterogeneity of proffered goods and services).

selection and border enforcement are still thought to be legitimate concerns of the state.<sup>66</sup> But this sovereignty has not created or sustained homogeneity or community in any meaningful sense: the “we” invoked by Walzer is counterfactual; United States society is rife with domination and exclusion based on race, sex, class, sexuality, and other categories.<sup>67</sup> In any case, on the community principle underlying the model, when people enter illegally, they have violated not only a rule, but as Linda Bosniak has put it, they have violated “the community-as-nation” itself.<sup>68</sup> It is an easy step from this to a nativist backlash predicated in large part on maintaining accumulated racial capital in citizenship.

## V. CONCLUSION

Citizenship serves capital and runs parallel with it: citizenship is bestowed upon “others” only when they have proven their worth, while citizenship is guaranteed to those who are born within the geographical boundaries of the state or have requisite parentage.<sup>69</sup> This designation of citizenship status serves a “wealth-preserving” function in society, as it ensures that the “natural lottery” of birth circumstances (such as place of birth or parental origin) determines citizenship status and the benefits of political community membership that accompany it.<sup>70</sup> The natural lottery of race is likewise validated in a racialized citizenship, wherein one’s

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<sup>66</sup> See, e.g., Press Release, U.S. Border Patrol, U.S. Customs and Border Protection Officials Meet with U.S. Northern Command to Coordinate Security Efforts (Feb. 7, 2011), available at [http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/national/02072011\\_3.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/02072011_3.xml) (describing growing border patrol operations including the involvement of U.S. military assistance).

<sup>67</sup> See e.g., *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (declaring that, as property, Mr. Scott could neither sue for his freedom nor be protected by laws against assault); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (prohibiting separate but equal education for black students); U.S. CONST. amend. XIX, § 1 (finally granting women the right to vote in 1920); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (declaring a statute limiting civil marriage to only unions between a man and a woman unconstitutional). Many states still deny the right to marry based solely on sexual orientation.

<sup>68</sup> Bosniak, *Exclusion and Membership*, *supra* note 6, at 1002.

<sup>69</sup> Ayelet Scachar, *The Worth of Citizenship in an Unequal World*, 8 THEORETICAL INQUIRIES L. 367, 371 (2007) (“The almost casual acceptance of ascription as a basis for assigning political membership represents a ‘blind spot’ in contemporary citizenship theory: the assumption that reliance on birth is somehow a ‘natural’ and ‘apolitical’ event.”).

<sup>70</sup> *Id.* at 369-76.

whiteness represents surplus value skimmed from the denigration of nonwhites: racial capital accumulated.

It is important to recognize that the racialized conception of American citizenship is structurally flawed, and not simply that the benefits of American national membership are unfairly distributed. In other words, reformist tinkering with voting laws, for example, will probably not fix the problem because the problem is that citizenship has been racially constructed. American citizenship and citizen virtue are defined ultimately by whiteness: that amalgam of expectation and privilege that is invisible to its white beneficiaries. If there is a strategy for reinventing American citizenship it lies in reinventing whiteness as race-conscious and non-discriminatory. But, accumulated racial capital will not be easily dispersed or redistributed, and it is not clear that law can provide the tools with which to make the attempt.