

THE RACIALISED NON-BEING OF NON-CITIZENS: SLAVES, MIGRANTS AND THE STATELESS

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Proponents of barring the children of undocumented immigrants from birthright citizenship allege that the United States ('US') Constitution's 14th Amendment was intended to give full citizenship to former slaves and their progeny, and not to benefit the children of foreign-born people. A real-world example that illustrates the dangers of so restricting birthright citizenship is the Dominican Republic, where legal measures have already excluded the children of out-of-status immigrants (who are mostly of Haitian ancestry) from eligibility for birthright citizenship. The effect of this has not been ethnically cleansing Haitian descendants from the Dominican Republic so much as confining them within the country as a stateless underclass of people. The Dominican case therefore shows that US opponents of birthright citizenship for the children of out-of-status non-citizens must answer to the danger that their proposal would create a legally approved hereditary underclass on US soil, more than a century after the abolition of chattel slavery.

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I INTRODUCTION

Millions of people are in the country through no fault of their own. Many are brought here against their will. Many as children. They are in America but are not citizens of America. Some people want to send them back to where they came from. Others want to make them American.

That was the situation for many Black people in this country in the wake of the Civil War, when they had been freed and slavery outlawed, but they were not truly citizens. Black people were the United States' original Dreamers.

— Charles M Blow, 'Thaddeus Stevens and the Original Dreamers', 2021.¹

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¹ Charles Blow, 'Thaddeus Stevens and the Original Dreamers', *New York Times* (online, 7 July 2021) <<https://www.nytimes.com/2021/07/07/opinion/citizenship-dreamers-united-states.html>>, archived at <<https://perma.cc/X3Q4-RC7F>>.

Proponents of barring the children of undocumented immigrants from birthright citizenship allege that the United States ('US') Constitution's 14th Amendment was not meant by its authors to benefit the children of foreign-born people.² According to these advocates of restricting immigration (herein, 'restrictionists'), the authors of the 14th Amendment solely aimed to give full citizenship to former slaves and their progeny. This error, according to the restrictionists, is made more consequential by the inducement to undocumented immigration produced by granting the right to citizenship to all US-born people. Restrictionists say that out-of-status non-citizens are motivated to stay and work in the United States by the prospect of endowing their children born there with US citizenship. For restrictionists, then, the 14th Amendment's historical context and the United States' sovereign right and interest in regulating immigration both demand restricting birthright citizenship (*jus soli*) solely to the children of US citizens or legal permanent residents.

The restrictionists seem to be unaware that a highly similar move to narrow eligibility for birthright citizenship, with precisely the same immigration control premise, has been made in another country of the Americas; the Dominican Republic. The Dominicans have modified their country's basically similar principle of *jus soli* citizenship with disastrous effects. Over a span of three decades, a series of laws, court rulings, bureaucratic edicts and an amendment of the Constitution of the Dominican Republic ('Dominican Constitution') have excluded the Dominican-born children of out-of-status immigrants from eligibility for birthright citizenship. Representatives of the Dominican State insist that no one is being left stateless, because the children of out-of-status non-citizens can claim citizenship in their parents' countries of birth.³ In spite of this, social researchers and human rights monitors have found that tens of thousands of people have been excluded from Dominican citizenship as a result of the new provisions narrowing eligibility for birthright.⁴ These people have either been left stateless (citizens of no country), or suffered important limitations to their rights and entitlements after giving up their claim of being Dominican citizens by becoming citizens of Haiti.⁵ In short, the Dominican Republic has gone where restrictionists want to take the United States.⁶

Racial discrimination worsens the wrong in as much as the vast majority of the people who suffer rights deficits as a result of the Dominican Republic's new citizenship policies are Black. The Government of the Dominican Republic's ('the Dominican Government') new legal measures never specify nationalities while

² See generally Leo Chavez, *Anchor Babies and the Challenge of Birthright Citizenship* (Stanford University Press 2017) 13–40. See, eg, 'Citizenship without Consent' *The Social Contract* (Fall 1996) 22.

³ See, eg, Speech by President Danilo Medina at the Summit of Leaders in the Central American Integration System ('SICA') (Guatemala, 26 June 2015).

⁴ See, eg, 'Situation of Human Rights in the Dominican Republic' (Report, Inter-American Commission on Human Rights, 31 December 2015); Eve Hayes de Kalaf, *Legal Identity, Race and Belonging in the Dominican Republic: From Citizen to Foreigner* (Anthem Press 2022); Bridget Wooding, 'Upholding Birth Right Citizenship in the Dominican Republic' 44 (2016) *Iberoamericana – Nordic Journal of Latin American and Caribbean Studies* 99.

⁵ Kristy A Belton, *Statelessness in the Caribbean: The Paradox of Belonging in a Postcolonial World* (University of Pennsylvania Press 2017) 110–12.

⁶ Ediberto Román and Ernesto Sagás, 'Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of US Exclusion' (2017) 66(6) *American University Law Review* 1383.

obviously targeting Haitians. A controversial High Court ruling in 2013 set in motion a largely failed effort to regularise the residency status of both undocumented Haitian immigrants and the Haitian-ancestry Dominicans whom the Court had stripped of citizenship.⁷ Matters took a turn for the worse in November 2022, when Dominican President, Luis Abinader, decreed that foreigners illegally occupying State or private land would be expelled from the country.⁸ This move imperilled the livelihoods of tens of thousands of Haitian descendants who had for generations been housed in sugar plantation, barrack-style dwellings for free as a condition for employment in the sugar cane harvest.⁹ Under this veneer of legal normativity, rule of law mechanisms usually associated with the defence of individual rights have been made instruments of de facto racial exclusion, eventuating in a situation that has variously been called ‘civil genocide’,¹⁰ ‘administrative violence’¹¹ and ‘reactionary juridification’.¹²

Similarly, in the United States an aggravating circumstance is that barring low-wage non-citizen workers from political belonging constitutes de facto racial injustice. Among the millions of low-wage foreign workers effectively blocked from getting legal status in the United States, poorer immigrants of colour from countries of the Global South are disproportionately burdened.¹³ If out-of-status non-citizens’ exclusion from belonging were to be passed on to their US-born children through the suspension of *their* eligibility for citizenship, a racialised, hereditary underclass of rights-impaired people would then be reconstituted by law a century-and-a-half after the end of chattel slavery in the United States. Seen through this lens, it is particularly questionable for restrictionists to contend that these two populations encompassed by the birthright citizenship provisions of the 14th Amendment — formerly enslaved people following emancipation and undocumented migrants today — are utterly different and unconnected. I make the case here that these two groups instead occupy functionally similar positions and are historically entangled. Politically and economically, low-wage undocumented workers occupy a niche analogous to that formerly occupied by the enslaved; they are people whose labour is to be exploited, but who are never to be

⁷ Sentencia TC/0168/13, Tribunal Constitucional (2013). Samuel Martínez and Bridget Wooding, ‘El antihaitianismo en la República Dominicana ¿un giro biopolítico?’ [Anti-Haitianism in the Dominican Republic, a Biopolitical Turn?] (2017) 15 *Migración y Desarrollo* [Migration and Development] 95, 98–100.

⁸ ‘Decretos 668-22’, *Presidencia de la República Dominicana* (Web Page, 12 November 2022) <<https://presidencia.gob.do/decretos/668-22>>, archived at <<https://perma.cc/7A7T-WSQQ>>.

⁹ United States (‘US’) Customs and Border Protection responded by placing an embargo on the importation of sugar from the Dominican Republic’s largest producer, the US-owned Central Romana Corporation: Ana Swanson, ‘U.S. Blocks Dominican Republic Sugar Imports, Citing Forced Labor’, *New York Times* (online, 23 November 2022) <<https://www.nytimes.com/2022/11/23/business/economy/us-sugar-imports-forced-labor.html>>, archived at <<https://perma.cc/HAV7-GQY3>>.

¹⁰ Juan Bolívar Díaz ‘JCE suspende su “genocidio civil”’ [JCE Suspends its ‘Civil Genocide’] *Juan Bolívar Díaz Santana* (online, 29 October 2011) <<https://juanbolivardiaz.com/2011/10/>>, archived at <<https://perma.cc/T9VL-K5R7>>.

¹¹ José-María Arraiza, Phyu Zin Aye and MA Shakirova, ‘Fighting Imagined Invasions with Administrative Violence: Racism, Xenophobia and Nativism as a Cause of Statelessness in Myanmar, the Dominican Republic and Assam (India)’ (2021) 2(2) *Statelessness and Citizenship Review* 219.

¹² Samuel Martínez, ‘Upstreaming or Streamlining? Translating Social Movement Agendas into Legal Claims in Nepal and the Dominican Republic’ in Tine Destrooper and Sally Engle Merry (eds), *Human Rights Transformation in Practice* (University of Pennsylvania Press 2018) 128, 145 (‘Upstreaming or Streamlining?’).

¹³ Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York University Press 2012) 5–6.

permitted to belong fully to the polity.

Secondly, the Dominican case suggests that something more than preventing statelessness may be needed to assure the rights of the native-born offspring of out-of-status non-citizens. In spite of decades of struggle against statelessness led by a coalition of Dominican-based and international rights defenders, pushback from Dominican governments representing three different political parties has resulted in an impasse, leaving tens of thousands of Haitian descendants with their citizenship status unresolved.¹⁴ Scholars of statelessness insist that such citizenship redirection is illegitimate and that states cannot legitimately expect native-born non-citizens to accept their ancestors' citizenship if that would not give them functional citizenship.¹⁵ Yet that well-reasoned principle is being flouted on the ground. Events in the Dominican Republic suggest that the norm of preventing statelessness is too vulnerable to defeat by nativist policymakers who insist that they are leaving no one stateless if the children of immigrants can get papers from their parents' country of birth. With this in mind, the Dominican case begs asking what more international norms and state bodies of law can and should do to protect non-citizens' rights.

This spurious claim that 'no one is being left stateless' points to the need for a more broadly encompassing international legal norm of membership for low-wage non-citizens who have effectively earned belonging through their essential labour and other years-long contributions to their host societies. In both countries, a new international norm that is more robust than preventing statelessness is needed to deal with the underlying problem, which is the rights deficits endured by out-of-status non-citizens who have over time become *de facto* residents. This norm would involve a right of *effective membership*, which affirms that you have a right to belong specifically to the state in which you have set down social and economic roots.¹⁶ Justice for the native-born offspring necessitates justice for their out-of-status parents. Restrictionists' efforts to set back the clock to an era of hereditary caste derogation can be countered, then, not just passively, by defending *jus soli* citizenship, but assertively, by militating for the additional adoption of a principle of *jus nexi* citizenship, which 'focuses on the social fact of membership or the actual ties that an individual has to a society'.¹⁷

In sum, the Dominican crisis of statelessness points to the potential dangers of similarly restricting birthright citizenship in the United States. As more host states

¹⁴ Samuel Martínez, 'The Price of Confrontation: International Retributive Justice and the Struggle for Haitian-Dominican Rights' in George Andreopoulos and Zehra Arat (eds), *The Uses and Misuses of Human Rights: A Critical Approach to Advocacy* (Palgrave 2014) 89 ('The Price of Confrontation').

¹⁵ As leading statelessness experts, Tendayi Bloom, Katherine Tonkiss and Phillip Cole, write, citizenship is not just something written on a paper but comprises 'an active and mutually beneficial relationship with a government': Tendayi Bloom, Katherine Tonkiss and Phillip Cole, 'Introduction: Providing a Framework for Understanding Statelessness' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 7.

¹⁶ Anna Triandafyllidou, while not defining 'effective membership', usefully makes note that the COVID-19 pandemic brought the issue to the fore when it 'forced governments to ask where people live habitually, where they send their kids to school, where they pay taxes or have health coverage': Anna Triandafyllidou, 'Spaces of Solidarity and Spaces of Exception: Migration' in Anna Triandafyllidou (ed), *Migration and Pandemics: Spaces of Solidarity and Spaces of Exception* (Springer 2022) 7.

¹⁷ Angela M Banks 'The Continuing Legacy of the National Origin Quotas' (2020) 27 *William & Mary Journal of Race, Gender, and Social Justice* 1, 3. See also Elizabeth Keyes, 'Defining American: The DREAM Act, Immigration Reform and Citizenship' (2013) 14 *Nevada Law Journal* 101.

worldwide move to close off access to citizenship to the children of undocumented migrants or guest workers, it seems more timely than ever for students of statelessness to engage in comparative analysis of the nexus between undocumented migration, racial discrimination and impaired citizenship. The Dominican case shows that US opponents of birthright citizenship for the children of out-of-status non-citizens must answer to the danger that their proposal would create a legally-approved hereditary underclass, turning the clock back to antebellum and Jim Crow eras, when racial subordination was a legal axis of profit.

II BIRTHRIGHT CITIZENSHIP AND ITS ENEMIES

In her theatrical monologue, *What the Constitution Means to Me*, Heidi Schreck humorously re-enacts the speeches she gave as a 15 year old in American Legions and other benevolent voluntary society meeting halls around the United States, competing for prizes for patriotically-themed speeches.¹⁸ Early in the play, voicing her former teenage constitutional ‘zealot’ self, Schreck gushes, ‘So the 14th Amendment is like a giant, supercharged force field, protecting *all* of your human rights!’¹⁹ Much of her play highlights the opposite of this rosy assertion, recounting examples of US lawmakers’ and judges’ failures to ‘activate the force field’ and the struggles of women and people of colour to claim equal protection.²⁰ Schreck gives particular attention to the effects of flawed constitutional protection for four generations of women in her family and celebrates victories won to correct those gaps. In spite of this checkered history, there is a kernel of truth to likening the 14th Amendment to a legal force field; it guarantees ‘mother rights’ of a nationality and a legal identity, upon which the exercise of other rights may depend.²¹

The 14th Amendment to the US Constitution was passed by Congress on 13 June 1866, and ratified 9 July 1868.²² While the Amendment has three sections, it is Section I that bears direct relevance to this discussion:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²³

While the meaning is not as clear as it could be, the weight of historical evidence favours an expansive interpretation;²⁴ except for the children of foreign diplomats and members of American Indian tribal nations — who were not subject to the laws of the United States — everyone born on US soil would henceforth qualify for birthright citizenship.

¹⁸ *What the Constitution Means to Me* (Theatre Communications Group 2020).

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ See Román and Sagás (n 6) 1385.

²² Citizenship Rights, Equal Protection, Apportionment, Civil War Debt: 14th Amendment’ *National Constitution Centre* (Web Page) <<https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv>>, archived at <<https://perma.cc/74PT-SBZ6>>.

²³ *ibid.*

²⁴ Garrett Epps, ‘Interpreting the Fourteenth Amendment: Two Don’ts and Three Dos’ (2007-2008) 16 *William & Mary Bill of Rights Journal* 433.

Equally certain is that US law had earlier defined eligibility for citizenship in blatantly racist terms. Prior to the 14th Amendment, the closest the Constitution came to addressing the citizenship question was through defining ‘natural born’ US citizens. Originally defined as someone born on US soil, ‘natural born’ was expanded by the *Naturalization Act of 1790*²⁵ to include the children of US fathers.²⁶ The Act limited citizenship eligibility along explicitly racial lines; only Whites, including white immigrants, could be entitled to citizenship, while enslaved Blacks and American Indians were not.²⁷ The principle that Blacks, because of their race, could never be US citizens, was affirmed as late as 1857 by the Supreme Court’s *Dred Scott* decision.²⁸

Soon after the Civil War, Congress would take an ugly turn toward nativism through its immigration restriction laws of the 1870s and 1880s, among which the *Chinese Exclusion Act* (1882) would play a prominent role in the story of birthright citizenship.²⁹ Chinese Exclusion barred the entry of Chinese nationals without family into the United States and prohibited them from ever gaining US citizenship.³⁰ Yet even Chinese Exclusion would not be interpreted by the highest US courts to circumscribe birthright citizenship for the US-born. Starting with the 1898 decision of the US Supreme Court in the case of *United States v Wong Kim Ark*,³¹ federal courts have upheld the liberal interpretation of the Amendment’s birthright citizenship proviso. Wong Kim Ark was denied entry into the United States in 1895 upon returning from a trip to China and was detained for removal under the terms of the *Chinese Exclusion Act*, in spite of his having been born in San Francisco in 1873 to Chinese parents. The Court decided in 1898 in Wong Kim Ark’s favour, finding that he qualified for US citizenship on account of the fact that he was born in the United States and was fully subject to its jurisdiction; his parents having been subject to US law at the time of his birth.³² The *United States v Wong Kim Ark* decision set a precedent relevant to all subsequent legal challenges to birthright citizenship based on the 14th Amendment.³³

In writing ‘all persons born ... in the United States’ are citizens, the authors of the Amendment made a momentous choice, and they did so consciously.³⁴ This choice of words makes the 14th Amendment benefit not just Afro-descendants but any US-born person who might fall victim to a new legal system of heritable non-citizenship. The authors could well have decided to delimit the Amendment’s benefits to former slaves and no one else, but they did not. Nor did they word the Amendment retrospectively to narrow it only to providing reparation for Afro-descendants. Study of the debates surrounding the drafting of the 14th Amendment does not sustain restrictionists’ claim that the authors did not intend to benefit

²⁵ *Naturalization Act of 1790* (1790) Pub L No 1–3, 1 Stat 103 (USA).

²⁶ Chavez (n 2) 42.

²⁷ Kevin Johnson, ‘Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons’ 28 (1996–7) *University of Miami Inter-American Law Review* 263, 266–7.

²⁸ Jack Balkin and Sanford Levinson, ‘Thirteen Ways of Looking at *Dred Scott*’ (2007) 82(1) *Chicago-Kent Law Review* 49, 53.

²⁹ US Congress, ‘An Act to Execute Certain Treaty Stipulations Relating to Chinese’ *US National Archives and Records Administration* (Web Page, 17 January 2023) <<https://www.archives.gov/milestone-documents/chinese-exclusion-act#transcript>>, archived at <<https://perma.cc/7BSL-BCVP>> .

³⁰ *Chinese Exclusion Act* (1882) 8 United States Code 7 (USA).

³¹ *United States v Wong Kim Ark*, 169 US 649 (1898).

³² Chavez (n 2) 46–7.

³³ Román and Sagás (n 6) 1403–7.

³⁴ *ibid* 1402–3 (emphasis added).

immigrant descendants; members of Congress discussed whether the children of Chinese or ‘Gypsy’ immigrants should qualify for *jus soli* citizenship and knew when they voted for the 14th Amendment that immigrant descendants as well as Black Americans would benefit.³⁵

Since those early debates, opposition to birthright citizenship for the children of out-of-status non-citizens has taken two tacks. One has been the direct strategy of proposing to amend the Constitution; an agenda which would be time-consuming and probably unpopular.³⁶ The other approach has been to argue through litigation or lawmaking that the authors did not really mean for all persons born in the US to be eligible for birthright citizenship. One such attempt to work around the Constitution was *Representative Steve King’s Birthright Citizenship Act of 2011*,³⁷ which sought to limit ‘persons ... subject to the jurisdiction’ of the United States (whose US-born children are eligible for birthright citizenship) to exclude out-of-status non-citizens.³⁸

In actuality, restrictionist interpretations of *jus soli* citizenship are rarely couched in rational or principled terms; they are, rather, most often casually tossed out as innuendo, slurs and emotion-provoking anecdotes. As anthropologist and migration studies expert, Leo Chavez, finds, it is perhaps most often through the figure of the ‘anchor baby’ that restrictionists stoke fears that the United States is being overwhelmed by masses of people from the Global South, who unfairly secure a foothold by having a baby on US soil.³⁹ The anchor baby premise is already weakened by the fact that legally US-born children of out-of-status non-citizens cannot seek the admission of their parents to the United States until the former turn 21.⁴⁰ Descriptive studies done by sociologists and anthropologists poke further holes in the anchor baby narrative; having a baby on US soil in no way secures legal permanent residence for immigrant parents.⁴¹ Parents of US citizen children have been deported in the hundreds of thousands in the first decades of the twenty-first century, resulting either in family separation or the de facto deportation of US citizens when deported parents decide to return to their home countries with their dependent US citizen children.⁴² Being a parent of a US citizen only exceptionally wins people relief from deportation. The law stipulates

³⁵ *ibid* 1403–7.

³⁶ Notably, US Congressional Representative, Elton Gallagly, did not get far with his 1991 proposal to amend the United States Constitution to deny citizenship to US-born children with undocumented parents. Support for such an amendment was included in the GOP (Republican) party platform of 1996 but was repudiated by the party’s presidential candidate, Bob Dole: Chavez (n 2) 17, 21.

³⁷ *Birthright Citizenship Act of 2011* (2011) HR 140, 112th Congress (USA).

³⁸ Chavez (n 2) 35.

³⁹ *ibid* 5.

⁴⁰ In s 2A(b) of 8 United States Code §1151 ‘Worldwide level of immigration’, ‘immediate relatives’ is defined as ‘the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age’: *Aliens and Nationality* (2011) 8 United States Code §1151 s 2A(b) (USA) <<http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1151&num=0&edition=prelim#0-0-0-178>>, archived at <<https://perma.cc/95US-ZVNW>>.

⁴¹ See, eg, Deborah Boehm, *Returned: Going and Coming in an Age of Deportation* (University of California Press 2016).

⁴² See American Immigration Council, ‘US-citizen Children Impacted by Immigration Enforcement’ (Fact Sheet, June 2021); Madeline Buiano, ‘ICE Data: Tens of Thousands of Deported Parents have US Citizen Kids’, *The Center for Public Integrity* (online, 12 October 2018) <<https://publicintegrity.org/inequality-poverty-opportunity/immigration/ice-data-tens-of-thousands-of-deported-parents-have-u-s-citizen-kids>>, archived at <<https://perma.cc/9L68-PTYU>>.

that removal can be stayed only if it would create ‘extreme hardship’; an argument that rarely wins in immigration court.⁴³ In short, US-born babies are hardly an effective legal ‘anchor’.

An overwhelming preponderance of legal precedent then confirms the expansive interpretation of the meaning of the 14th Amendment, while the sociological evidence debunks the anchor baby narrative.

All this has left restrictionists unconvinced. The attack on *jus soli* has not only been renewed; it has won powerful new endorsement. On the campaign trail in 2016, then presidential candidate, Donald Trump, professed to be ‘disgusted when a woman who’s nine months pregnant walks across the border, has a baby and you have to take care of that baby for the next 85 years’.⁴⁴ Trump vowed days before the 2018 mid-term elections to issue an executive order rescinding the right to citizenship of US-born children of out-of-status non-citizens.⁴⁵ Even though this proposal was rejected by some mainstream Republican lawmakers,⁴⁶ Trump’s endorsement of conditioning birthright citizenship appeared menacing, coming as it did amid a barrage of anti-immigrant messaging, through which the President sought to appeal to voters with nativist sympathies. As incongruent as the proposal seems from the standpoint of established legal interpretations of the 14th Amendment, excluding the offspring of out-of-status non-citizens from eligibility for birthright citizenship seems as likely as ever of being adopted as US law.

III THE UNDOCUMENTED AND THE ENSLAVED

A key contribution of my paper is not just to place the US debate in a regional comparative context but to theorise the global struggle against statelessness as an anti-racist cause. Politically and economically, the situation of irregular immigrants is analogous to that formerly occupied by enslaved Afro-descendants; both are classes of people whose labour is to be exploited but never given political voice and thus never fully endowed with rights. Both undocumented immigrants today and chattel slaves of the past are, as political theorist, Jane Gordon, puts it, labourers who are ‘valuable for their work but ineligible for social and political belonging’.⁴⁷ In this way, I take my account beyond comparative sociology to theorise the racial coordinates of citizenship law and the global struggle against statelessness.

Perhaps the first thing to be noted when comparing the enslaved of the past

⁴³ Victor Romero, *Everyday Law for Immigrants* (Routledge 2016) 51.

⁴⁴ Chavez (n 2) 5.

⁴⁵ Julie Hirschfield, Davis ‘President Wants to Use Executive Order to End Birthright Citizenship’, *New York Times* (online, 30 October 2018) <<https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>>, archived at <<https://perma.cc/7VZY-8GVX>>.

⁴⁶ See, eg, Bill Chappell and Vanessa Romo, ‘Paul Ryan Dismisses Trump Plan to Void Birthright Citizenship Law by Executive Order’, *NPR* (online, 30 October 2018) <<https://www.npr.org/2018/10/30/662043904/trump-says-he-will-void-birthright-citizenship-law-through-executive-order>>, archived at <<https://perma.cc/77XS-ZBAG>>; Adam Beam, ‘Barr Opposes Trump’s Plan to End Birthright Citizenship’, *The Washington Times* (online, 30 October 2018) <<https://www.washingtontimes.com/news/2018/oct/30/barr-opposes-trumps-plan-to-end-birthright-citizen>>, archived at <<https://perma.cc/583W-6XZT>>; Scott Horsley, ‘Trump Continues Rhetoric on Immigration Ahead of Election’, *NPR* (online, 31 October 2018) <<https://www.npr.org/2018/10/31/662560162/in-campaign-sprint-trump-focus-on-immigration-not-a-winner-for-all-gop-candidate>>, archived at <<https://perma.cc/SM5K-MRU2>>.

⁴⁷ Jane Gordon, *Statelessness and Contemporary Enslavement* (Routledge 2020) 76.

with the undocumented of today is the limits of this analogy. Legal scholar, Maria L Ontiveros, claims that undocumented migrants are ‘a caste of workers laboring below the floor set for free labor’.⁴⁸ She argues on this basis that the 13th Amendment’s proscription on slavery should be used as a legal doctrine for defending migrant rights.⁴⁹ That claim seems indisputable when it relates to those immigrants who are trapped in captive exploitation. Yet, beyond the relative few immigrants who are truly enslaved, I do not think it is accurate or helpful to draw categorical equivalence between today’s out-of-status immigrants and yesterday’s captive Africans. The problem with Ontiveros’ comparison is that it equates low-income non-citizens with captive workers. This equation is of questionable utility; even as immigration restrictions no doubt render the undocumented more vulnerable to enslavement, the vast majority of migrants are not being held captive.⁵⁰ Thus, here I am not talking about either modern slavery, nor the 13th Amendment; neither of which reflects the condition of most undocumented migrants.

Rather, the situation of low-wage non-citizen workers does not re-enact enslavement as often as it echoes it. Out-of-status workers resemble the enslaved not in condition but in context. Economically and politically, they occupy a position analogous to that formerly occupied by the enslaved. The undocumented (along with legally admitted guest workers who have no path to citizenship) are people who contribute to the polity’s wealth through their labour, but who politically remain eternally outsiders. While neither the character of their subordination nor the degree of their rightlessness is as absolute as slavery, the out-of-status low-wage worker resembles the chattel slave in their never-ending lack of membership.⁵¹ The undocumented immigrant or guest worker’s condition, then, is perpetual voicelessness; the undocumented are forever outsiders, barred from any say in the enactment of policies that affect them and their children.

At issue here is Hannah Arendt’s usefully imprecise dictum that citizenship is ‘the right to have rights’.⁵² Against the claim that all humans intrinsically have rights as humans, Arendt ‘declared that before individuals can enjoy any civil, political, or social rights, they must first possess the right to be a citizen of a nation-state, or at least a member of some kind of organized political community’.⁵³ Without membership in a political community, any person’s rights are precarious, never fully realisable, because non-citizenship impedes a person from realising ‘politico-linguistic existence, namely, her capacities of speaking, judging, and acting’.⁵⁴ Similarly, statelessness, as political theorist Anne McNevin writes, ‘is typically understood as the negation of political subjecthood associated with

⁴⁸ Maria Linda Ontiveros, ‘Immigrant Workers and the Thirteenth Amendment’ in Alexander Tsesis (ed), *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (Columbia University Press 2010) 279, 282.

⁴⁹ *ibid* 279–280.

⁵⁰ See generally Genevieve LeBaron and Nicola Phillips, ‘States and the Political Economy of Unfree Labour’ 24(1) *New Political Economy* 1.

⁵¹ Gordon (n 47) 53.

⁵² Hannah Arendt, *The Origins of Totalitarianism* (Harvest Book 1994) 269.

⁵³ Stephanie DeGooyer and Alastair Hunt, ‘The Right to Have Rights’, *Public Books* (online, 3 May 2018) <<https://www.publicbooks.org/the-right-to-have-rights>>, archived at <<https://perma.cc/K6LW-T5SP>>; Arendt (n 52) 297.

⁵⁴ Leila Faghfour Azar, ‘Hannah Arendt: The Right to Have Rights’, *Critical Legal Thinking* (online, 12 July 2019) <<https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights>>, archived at <<https://perma.cc/28RL-QXHD>> .

citizenship'.⁵⁵ As legal scholar, Michiel Bot, observes:

Arendt understood the predicament of stateless people to be that they are excluded from participating as equals in a political space where their speech can appear as meaningful and their actions have consequences, which leaves them without agency and without effective legal protection and thus exposes them to arbitrary force.⁵⁶

Citizenship opens passage from marginality to voice in ways that mere recognition of being human does not.

Race should not go missing from discussion of the problem of statelessness and its challenges to human rights today. According to leading de-colonial theorist, Aníbal Quijano, race is a mental category of colonial modernity, 'a way of granting legitimacy to the relations of domination imposed by the conquest'.⁵⁷ A basic colonial disposition was to categorise humans according to social and racial species types, providing '[s]ociological shorthands' that reduced the cognitive cost of governing by lessening 'how much of certain kinds of information one need[s] to operate and how much one need[s] to know'.⁵⁸ A legacy of colonial taxonomic states lingers into our time, then, in a larger disposition to taxonomise others — Black, Native, refugee, 'illegal alien'. Above all, 'race became the fundamental criterion for the distribution of the world population into ranks, places, and roles in the new society's structure of power'.⁵⁹ After colonisers abandoned the land to newly sovereign postcolonial states, they left racist concepts of citizenship and institutions of governance strewn about in their retreat. Race and racism are thus legacies of 'coloniality', responses to the colonialist urge to simplify the task of governing subalterns and extracting profit from them by denying them critical aspects of their being as humans; their voices and complex desires. These racial coordinates are implied in Arendt's concept of citizenship as the right to have rights but may need unpacking to be understood clearly in today's more literal-speaking social justice languages. Bot argues that if we read Arendt's chapter on statelessness against the backdrop of the whole of *The Origins of Totalitarianism*, then 'connections between the political production of statelessness and the political production of race'⁶⁰ would come to the fore through situating the politics of citizenship 'within the history of imperialism and post-colonialism'.⁶¹

Frantz Fanon's concept of 'non-being' may take us a step further still toward theorising the object-like status of the undocumented as a mutation of the anti-Black racism that grew in the West during the colonial era. For Fanon, multiple conflicts — psychological, social and political — emerge from the contradictions between the Black subject's 'will to find a meaning in things' and their reduction in the White gaze to the status of 'an object in the midst of other objects'.⁶² As an

⁵⁵ 'Statelessness Reconsidered' (Paper, presented at the Online Seminar, 'Race, Migration and Human Rights,' Vrije Universiteit, 19–20 November 2020).

⁵⁶ Michiel Bot, 'The Conditions of "Savages"? Statelessness, Politics and Race in Hannah Arendt's *The Origins of Totalitarianism*' (2019) 1(2) *Statelessness and Citizenship Review* 196, 206.

⁵⁷ Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1(3) *Nepantla* 533, 534.

⁵⁸ Ann Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (University of California Press 2002) 207.

⁵⁹ Quijano (n 57) 535.

⁶⁰ Bot (n 56) 197.

⁶¹ *ibid* 208.

⁶² Frantz Fanon, *Black Skin, White Masks* (Grove Press 1982) 109.

object, not a subject, ‘the Black’ is to be measured in the eyes of White society through the value of their physical being and not their cultural wealth or perspectives on the self, other and world. Even so, for Fanon, Black people’s non-being is rooted primarily in the visible difference of race, the ‘fact of Blackness’.⁶³ Racialised non-being is in the skin, an inescapable objectification. Fanon writes that, as a Black man, ‘I am the slave not of the “idea” that others have of me but of my own appearance’.⁶⁴ Fanon’s choice of the metaphor of ‘slavery’ here is playful but not gratuitous, alluding as it does to the historical origins of Blackness and its association with non-being in chattel slavery. Even so, Fanon is remarkably idealistic in asserting that what is at issue is not just Blacks’ rights to life and liberty but also their ‘will to find a meaning in things’.⁶⁵ Non-being, for Fanon, is at base the denial of the Black Other’s subjectivity. Though its racial coordinates are more varied, the subordination of low-wage migrant workers is comparable to enslavement as an extreme denial of political subjecthood to nationally defined Others.

IV THE COLOUR OF LAW

A torrent of media commentary was unleashed when then President Trump asked, ‘Why are we having all these people from shithole countries come here?’ during an 11 January 2018 Oval Office talk with US senators about ending Temporary Protected immigration status for people from Haiti, El Salvador and more than one African country.⁶⁶ The focus of that commentary was the specific character of Trump’s malevolence: was the president racist, anti-immigrant or both?⁶⁷ From my standpoint as a scholar of migration, that focus on the President’s individual mindset seems naïve; left unremarked was that the law does not treat lower-income would-be immigrants anywhere nearly as well as more educationally and economically advantaged applicants. US immigration law already functions with a bias of the kind Trump thought it lacked against people of colour from lesser-developed countries. Whether or not Trump knew enough to say why, US immigration law is tacitly built upon the assumption that most people from Haiti, El Salvador and other lesser-developed countries should not get the same chance to enter the United States as wealthier citizens of countries populated predominantly by Euro-descendant people.

While the 1965 revision of the *Immigration and Nationality Act* (‘INA’) eliminated the nationality criteria that previously favoured Northern European immigrants⁶⁸ and supposedly put people of all nations on an equal footing for

⁶³ *ibid* 109.

⁶⁴ The Black person differs, he writes, from the Jew, who ‘can be unknown in his Jewishness’: *ibid* 115–6.

⁶⁵ *ibid* 109.

⁶⁶ Josh Dawsey, ‘Trump Derides Protections for Immigrants from ‘Shithole’ Countries’, *Washington Post* (online, 12 January 2018) <https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html>, archived at <<https://perma.cc/RPA9-8MF5>>.

⁶⁷ See, eg, Ibram X Kendi, ‘The Day *Shithole* Entered the Presidential Lexicon’ *The Atlantic* (online, 13 January 2019) <<https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054>>, archived at <<https://perma.cc/4WWU-26F6>>.

⁶⁸ *Immigration and Nationality Act*, (1965) Pub L 89-236, 79 Stat 911 (USA).

immigration to the United States,⁶⁹ it has a dark side of colourblind racism much like the proposal to restrict birthright.⁷⁰ It has been forgotten that one condition for persuading social conservatives of both parties to vote for the 1965 revision of the *INA* was a promise made by the Bill's backers that it would not, in fact, darken the racial makeup of the United States.⁷¹ By giving first priority to citizens to bring in relatives through family reunification and giving legally-resident non-citizens an appreciably slower track, it was intended for newly admitted immigrants to mirror the mainly Euro-descendent racial composition of the immigrant population already in the United States in 1965.⁷² In terms of nationality and race, then, the law was designed to reproduce the existing US racial composition, and not transform it. Country quotas and restrictions on non-citizens' sponsorships have set family reunification on a much slower pace than would be the case if the law gave extended family members similar priority for entry as lineal relatives (parents, spouses and offspring of the claimants) and accorded legal permanent residents the same standing as citizens to seek admission of their relatives.⁷³ As a result, it takes many years for legally-resident non-citizens to bring in relatives from the countries where immigration is most prevalent, all of which are poorer, non-White countries of the Global South.

For most immigrants, bringing a sibling to the United States, for example, would take half a lifetime.⁷⁴ The 'browning' of the United States has, in these ways, been slowed and not hastened by the limits the *INA* places on family reunification, even as the *INA* preserves a veneer of colour-blindness by not specifying any world region or country as a no-entry area.

More than any other factor, however, racially discriminatory effects flow from the *INA*'s failure to provide for work-based permanent immigration visas for low-wage jobs that immigrants are much more eager to take than native-born workers are. The *INA* fails to provide permanent residence visas for anywhere close to the number of immigrants who have taken up low-wage labour in the United States, creating a gap between visa availability and job availability, which has been filled through a major expansion of 'undocumented immigration' during the late twentieth and early twenty-first centuries.⁷⁵ Once the *National Origins Act of 1924*⁷⁶ curtailed legal immigration into the United States, unauthorised workers, mostly from Mexico, began to take up the bottommost jobs in construction, service, manufacturing and agriculture.⁷⁷ There was no legal cap on Western

⁶⁹ See, eg, *Congressional Record*, (25 August 1965, House of Representatives), 21755 (Mr Celler) and 21759 (Mr Barrett).

⁷⁰ Elizabeth Keyes, 'Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals' (2014) 57(3) *Howard Law Journal* 899.

⁷¹ Alina Das, *No Justice in the Shadows: How America Criminalizes Immigrants* (Bold Type Books 2020) 64.

⁷² *ibid.*

⁷³ Dara Lind, 'What "Chain Migration" Really Means — And Why Donald Trump Hates It So Much', *Vox* (online, 30 January 2018) <<https://www.vox.com/policy-and-politics/2017/12/29/16504272/chain-migration-family-how-trump-end>>, archived at <<https://perma.cc/G9Q6-YFWE>>.

⁷⁴ *ibid.*

⁷⁵ Douglas Massey, Jorge Durand and Karen Pren, 'Why Border Enforcement Backfired' (2016) 121(5) *American Journal of Sociology* 1557, 1559–60.

⁷⁶ *Immigration Act of 1924*, (1924) Pub L 68-139, 43 Stat 153 (USA).

⁷⁷ Adam Goodman, *The Deportation Machine: America's Long History of Expelling Immigrants* (Princeton University Press 2020) 34.

Hemisphere immigration but neither did this latitude for free entry protect Mexican nationals from deportation or expulsion.⁷⁸ The *INA* did nothing to end this; it created no permanent resident visa category for low-wage workers, making it most often insurmountably difficult for lower-income non-citizens to get legal status, even as ever more non-citizens would be drawn to the United States by abundant low-wage jobs. It bears stating the obvious: if there are millions of out-of-status non-citizen workers in the United States, that is because the law provides no legal channels for people willing to accept low-wage employment. The *INA* thus bears much of the responsibility for creating the large out-of-status immigrant population which restrictionists seek to diminish by making birthright citizenship conditional upon legal residency.⁷⁹

Adding insult to injury, the law has encouraged the public to equate ‘illegality’ with immigration from the Global South. The racial geopolitics is clear: of the tens of millions of people deported, summarily expelled or ‘self-removed’ from the United States over a span of more than a century, roughly 90 percent have been Mexican.⁸⁰ In economic terms, low-wage out-of-status non-citizens are ‘taxed’ twice; first, through the substandard wages and conditions that legal precarity permits employers to get away with, and secondly, by carrying all the risk of working without legal authorisation, while employers bear almost no legal risk. In social terms, out-of-status migrants have endured years of living with the fear that they might at any moment be deported and thus separated from their families, neighbourhoods and livelihoods. In cultural terms, stigma has been borne by low-wage non-citizens of colour as a result of being casually assumed to be undocumented.⁸¹

As the Dominican case (to be considered next) will show, the imbrication of race, migration and citizenship is in no way unique to the United States. On the global scale, the correlation of racial discrimination with restrictionism has been commented on by legal scholar and United Nations (‘UN’) Special Rapporteur on Contemporary Forms of Racism, E Tendayi Achiume, in her letter of 18 December 2019 to the Coordinator and Executive Committee of the United Nations Network on Migration:

[I]mmigration law and policy and their enforcement are too often means through which migrants are discriminated against on the basis of their race, ethnicity, national origin and religion. Furthermore, it is not migrants alone who experience or are at risk of discriminatory treatment in immigration policy and enforcement. Often racial profiling, prejudice, and even administrative barriers to proving citizenship combine such that racial, ethnic and religious minority communities fully entitled to citizenship and even in possession of it are targeted through immigration enforcement.⁸²

Achiume asks why the Global Compact for Safe, Orderly and Regular Migration (‘GCM’) does not include an explicit and systematic discussion of

⁷⁸ *ibid* 33–4.

⁷⁹ Massey, Durand and Pren (n 75).

⁸⁰ Goodman (n 77) 6.

⁸¹ Cacho (n 13) 59.

⁸² Tendayi Achiume, ‘Open Letter to the Coordinator and Executive Committee of the United Nations Network on Migration from the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the United Nations Network on Migration Workplan’, *OHCHR* (Open Letter, 18 December 2019) <<https://www.ohchr.org/Documents/Issues/Racism/OpenLetterUNNetworkMigrationFinal.pdf>>, archived at <<https://perma.cc/4438-ULGY>>.

racism in immigration limits and the stigmatising effects this has on all who, as previously described, ‘look’ like immigrants.⁸³ The GCM’s sidestepping of the racially discriminatory effects of immigration, alienage, naturalisation and citizenship laws may be but the latest manifestation of what critical legal theorist, Debra Thompson, calls ‘racial aphasia’; ‘a calculated forgetting, an obstruction of discourse, language and speech,’ through which international law formulates ‘race-free discourses that keep international and domestic racial orders firmly entrenched’.⁸⁴ Struggles against racial injustices in international mobility and citizenship regimes can be fully joined not just by combatting statelessness among the offspring of immigrants, but also by resolving the baseline problem of out-of-status non-citizens’ and guest workers’ perpetual political disenfranchisement.

V THE SENTENCIA, ITS ANTECEDENTS AND OUTCOMES

One irony of looking to the Dominican present for clues about a possible US future is that US fingerprints are all over the history of the country’s statelessness crisis. Following the United States’ military invasion and seizure of power in the Dominican Republic in 1916, the military occupation authorities set up a labour recruitment system to bring seasonal workers from Haiti to mostly foreign-owned sugar plantations on the Dominican side of the border. That system would undergo changes but endure in its basic contours for the rest of the twentieth century.⁸⁵ Most of the seasonal workers returned to Haiti after short stays, but every year a small minority of them stayed after the cane harvest’s end and eventually settled in the sugar companies’ compounds for agricultural workers.⁸⁶ They and their Dominican-born offspring snowballed into a population of uncertain size. Official estimates from the National Statistics Office in 2012 put the Haitian collective (including both Haitian nationals and their Dominican-born children) at some 458,233 persons; the vast majority of whom lacked a positive migration status.⁸⁷ Viewed historically, footloose core country capitalists and US agents of neo-imperialism must therefore be added to the list of those responsible for creating today’s statelessness crisis.

The Dominican Republic is understood by many scholars to contrast with the rest of the Americas in its racial ideology: Dominicans commonly perceive ‘Black’ to be synonymous with ‘Haitian’ because they regard their own country’s Afro-descendants to be mixed race people, but look upon Haitians as people of more purely African stock.⁸⁸ Mixture is the Dominican racial norm, in other words, while Haitians and Europeans who immigrate to the Dominican Republic are ‘considered to represent “pure” racial groups (*negro* [Black] and *blanco*

⁸³ *ibid.*

⁸⁴ Debra Thompson, ‘Through, Against and Beyond the Racial State: The Transnational Stratum of Race’ (2013) 26(1) *Cambridge Review of International Affairs* 133, 135.

⁸⁵ Samuel Martínez, ‘A Postcolonial Indemnity? New Premises for International Solidarity with Haitian-Dominican Rights’ (2016) 44(1–2) *Iberoamericana: Nordic Journal of Latin American and Caribbean Studies* 173, 183.

⁸⁶ Samuel Martínez, *Peripheral Migrants: Haitians and Dominican Republic Sugar Plantations* (University of Tennessee Press 1995) 80–1.

⁸⁷ Oficina Nacional de Estadística, ‘Primera encuesta nacional de inmigrantes en la República Dominicana’ [First National Survey of Immigrants in the Dominican Republic] (General Report, No *ENI-2012*, April 2013) <<https://dominicanrepublic.unfpa.org/sites/default/files/pub-pdf/InformeENI-2012-General.pdf>>, archived at <<https://perma.cc/MRP5-7FYW>>.

⁸⁸ Kimberly E Simmons, *Reconstructing Racial Identity and the African Past in the Dominican Republic* (University Press of Florida, 2009) 117.

[White])'.⁸⁹ If you couple this denial of Blackness with a Dominican intellectual legacy of silence about the country's African heritage, then there may be good reason to say that Dominican racial attitudes present a paradox: among the most racially mixed peoples of Latin America, they are nonetheless also perhaps the region's most passionate Hispano-philes and Afro-phobes.⁹⁰ Space does not permit in-depth consideration of the complex and intertwined histories of slavery, resistance and abolition in Haiti and the Dominican Republic. It suffices to note that public education, state-sponsored historical commemorations and commercial media in the Dominican Republic downplay the racial justice elements of the country's anti-colonial struggles and ignore instances of solidarity with Haiti, while highlighting moments of conflict and manifestations of animosity toward Haiti.⁹¹ Nationality and perceived race are bound together, then, through both the historical accident of sharing the island of Hispaniola with Haiti and the Dominican elites' determination to cast the Dominican Self in opposition with the Haitian Other.

While it has always been made difficult by this anti-Black racism, obtaining Dominican citizenship was still facilitated for decades by compliant civil registry officials. Prior to the 1990s, these local-level officials approved the issuance of tens of thousands of valid birth certificates to the Dominican-born children of Haitian nationals, even though the latter often bore no proof of identity other than the 'temporary' identity cards (*carnets temporeros* or *fichas*) issued to seasonal workers by the sugar companies upon arrival from Haiti.⁹² Dominican dictator, Rafael Leonidas Trujillo, placed great faith in the civil registry as a tool for tracking the movements of foreign nationals within the country⁹³ and after his overthrow, electoral politics and the creation of small pockets of grateful voters may have helped sustain a liberal interpretation of *jus soli* for decades. Over the 1990s and 2000s, prospects for sugar's future went from buoyant to depressed, Haitian descendants scattered from the sugar plantations to other parts of the country and official permissiveness was replaced by growing restrictiveness.⁹⁴

Even as Haitian descendants' rights to citizenship had been legally chipped away for years prior, the Dominican Republic drew the eyes of the world to its migration and citizenship policies on 23 September 2013. On that day, the Dominican Republic's highest court of justice, the Tribunal Constitucional, issued a ruling, the Sentencia 168, which effectively annulled the citizenship of tens of thousands of Dominicans of Haitian ancestry.⁹⁵ The Sentencia 168 pertained to a case that had been brought by a Haitian-ancestry Dominican, Juliana Deguis

⁸⁹ *ibid.*

⁹⁰ 'Black in Latin America', *Haiti and the Dominican Republic: An Island Divided* (Public Broadcast Network 19 April 2011).

⁹¹ Anne Eller, *We Dream Together: Dominican Independence, Haiti, and the Fight for Caribbean Freedom* (Duke University Press, 2016) 18–20; Samuel Martínez 'Not a Cockfight: Rethinking Haitian-Dominican Relations' (2003) 30(3) *Latin American Perspectives* 80; Edward Paulino, *Dividing Hispaniola: The Dominican Republic's Border Campaign Against Haiti, 1930-1961* (University of Pittsburgh Press, 2016) 1–12.

⁹² Interview with Movimiento de Mujeres Dominicano-Haitianas staffers (Samuel Martinez, 22 May 2002); Michelle Garcia, 'No Papers, No Rights' *Amnesty International Magazine* (Fall 2006) 26. Author's files.

⁹³ Amelia Hintzen "'A Veil of Legality": The Contested History of Anti-Haitian Ideology under the Trujillo Dictatorship' (2016) 90(1–2) *New West Indian Gyude* 35, 35–7.

⁹⁴ Martínez, 'The Price of Confrontation' (n 14) 93.

⁹⁵ Sentencia TC/0168/13 (2013), Tribunal Constitucional, República Dominicana, <<http://noticiasmicrojuris.files.wordpress.com/2013/10/sentenciatc0168-13-c.pdf>>, archived at <<https://perma.cc/3UUP-ZQJS>>.

Pierre. She challenged the constitutionality of a bureaucratic edict, widely known as the *Resolución 12/07*, which ordered Dominican civil registry officials to refuse to issue documents to Dominican-born people whose parents may have been out-of-status non-citizens.⁹⁶ Deguis, born in 1984 to Haitian parents in the Dominican Republic, had gone to a civil registry office in 2008 with her birth certificate to request a *Cédula de Identidad y Electoral*, the national identity card required for a broad range of legal and administrative functions in the Dominican Republic. At the registry office, officials had seized her birth certificate and refused to issue her the cédula card. The Sentencia upheld this, stating that the Junta Central Electoral ('JCE' or Central Electoral Board), the agency that manages the Dominican civil registry system, was correct in refusing to issue Deguis a cédula, on the basis of the *Resolución 12/07*. The Court sustained the determination of the JCE that Deguis had been incorrectly registered as a Dominican at birth, had never rightly possessed Dominican citizenship and may be legally stripped of it.⁹⁷ The High Court stipulated as well that its ruling applied not just to Deguis but to all people who shared her status.⁹⁸ Problematically, the ruling was also made retroactive to all people born in the Dominican Republic since 1929. According to the Inter-American Commission on Human Rights, the retroactivity of the Sentencia led 'to the mass denationalization of more than 200,000 Dominicans of Haitian descent who, because they have no other nationality, have been left stateless'.⁹⁹ The Dominican High Court's ruling also went beyond the case brought to it by requiring several branches of government not just to resolve the citizenship status of Haitian-ancestry Dominicans like Deguis, but also to regularise the residency of out-of-status non-citizens.

On the administrative front, Dominican President, Danilo Medina, issued the first official response to the Sentencia in November 2013, when he decreed a National Plan of Regularisation of unauthorised resident foreigners (Plan Nacional de Regularización de Extranjeros, 'PNRE').¹⁰⁰ The aim of the PNRE was to give legal residency and work permits to undocumented foreign nationals who could prove long term residence and employment.¹⁰¹ In May 2014, the Dominican Congress issued its response to the Sentencia by passing *Law 169-14*.¹⁰² This law established a special protocol to affirm the Dominican citizenship of all descendants of irregular immigrants who had been granted official identity

⁹⁶ Resolución No.12/2007 (December 2007) Junta Central Electoral, República Dominicana, <<https://www.acnur.org/fileadmin/Documentos/BDL/2012/8899.pdf>>, archived at <<https://perma.cc/R2L9-GQF4>>.

⁹⁷ 'Dominican Republic Must Retract Ruling that Could Leave Thousands Stateless', *Amnesty International* (online, 18 October 2013) <<https://www.amnesty.org/en/latest/news/2013/10/dominican-republic-must-retract-ruling-could-leave-thousands-stateless>>, archived at <<https://perma.cc/W7MR-3K6R>>.

⁹⁸ *ibid.*

⁹⁹ Inter-American Commission on Human Rights (n 4) 99 [228].

¹⁰⁰ Decreto No 327-13 (2013) Oficina de la Presidencia (Dominican Republic) <<https://www.refworld.org/pdfid/52fc984.pdf>>, archived at <<https://perma.cc/5MA9-2CG9>>.

¹⁰¹ Centro para la Observación Migratoria y el Desarrollo Social en el Caribe ('OBMICA'), 'Evolución de las Políticas Migratorias' [Evolution of Migration Policies] in *Estado de las Migraciones que Atañen a la República Dominicana* [The State of Migrations that Concern the Dominican Republic] (Yearbook, 2015) <<http://estadomigracionesrd.obmica.org/evolucion-de-las-politicas-migratorias/103-regularizacion-migratoria/209-plan-nacional-de-regularizacion-de-extranjeros-as.html>> archived at <<https://perma.cc/D4FB-ADTD>>.

¹⁰² *Ley No 169-14* of 21 May 2014 (Dominican Republic) <<https://migracion.gob.do/transparencia/wp-content/uploads/2019/10/Ley-No-169-14-de-Naturalizaci%C3%B3n.pdf>>, archived at <<https://perma.cc/7HTZ-ZHXR>>.

documents prior to 2007 on the basis of the registration of their birth on Dominican soil.¹⁰³ The law established that every Dominican-born descendant of an irregular migrant would first be issued new official Dominican identity papers identifying them as Dominican-born *foreign* nationals¹⁰⁴ and then go through a two year long naturalisation process to regain their Dominican citizenship.¹⁰⁵

As I write this, nearly ten years later, controversy still swirls around how many people have actually received identity papers that protect their permanent residency or restore their citizenship. Also unknown is the number of Dominican-born people who accepted the second best option of getting Haitian citizenship documents. What is sure is that most petitioners were left on their own to figure out the Laws' unreasonable documentation requirements with inadequate legal professional support, triggering feelings of isolation, confusion, anxiety and frustration.¹⁰⁶

It bears repeating that the Sentencia was not a sudden development, but rather the culmination of a decades long process of anti-immigrant legal reaction. Since the early 2000s, rule of law processes in which international human rights invest faith — legislative deliberation, the vesting of authority in courts of law, and a rejection of arbitrary and overt discrimination in favour of apparently non-discriminatory procedures — were bent by the Dominican executive, legislative and judicial branches toward reactionary aims.¹⁰⁷ Through bureaucratic edicts, laws and court rulings, a *reactionary juridification* of the country's migration and citizenship policies took place.¹⁰⁸ In a reverse mimicry of the international human rights principle of non-discrimination, none of these legal instruments specify that their target is Haitians, but rather refer to out-of-status immigrants generally. This is prejudice modernised; the application of a façade of legal normativity over a pre-existing architecture of national/racial exclusions.

VI THE RIGHTS TO AN IDENTITY AND A NATIONALITY

The extent of the harms suffered by de-nationalised people also deserves attention. Nationality and legal identity are mother rights, without which a range of other rights are put in peril. In the Dominican Republic, official copies of identity documents are required to be presented to carry out a range of legal functions, such as obtaining a passport, enrolling a child in school or renewing one's *cédula*.¹⁰⁹ The *cédula* is in turn routinely required as a verification of identity for a range of other tasks, such as claiming a money order sent from overseas.¹¹⁰ The *Resolución 12/07* itself amplifies the *cédula*'s importance by making the presence of a parent's valid *cédula* number on the birth certificate a criterion for deciding whether to honour a citizen's request for an official copy of a civil registry document or place that person's citizenship under investigation. At stake in access to the *cédula* is

¹⁰³ *ibid* ch 1, art 1.

¹⁰⁴ *ibid* ch 2, art 6.

¹⁰⁵ *ibid* ch 3, art 8.

¹⁰⁶ *If God Wants Yuli* (Soup Joumou Films 2015); *Massacre River* (Reel Thing Productions 2019).

¹⁰⁷ Martínez, 'The Price of Confrontation' (n 14).

¹⁰⁸ Martínez, 'Upstreaming or Streamlining?' (n 12) 141–2.

¹⁰⁹ See David C Baluarte 'Inter-American Justice comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash' (2006) 13(2) *American University Human Rights Brief* 28.

¹¹⁰ de Kalaf (n 4) 24–5. See also Baluarte (n 109).

thus not just the capabilities it enables for its bearer, but the legal belonging that it establishes for the next generation and all subsequent descendants. Parents without cédulas can foresee that their children and their children's children, too, will lack Dominican identity papers, without which they cannot go to college or obtain a passport to travel overseas. Conduits through which hundreds of thousands of Dominicans have sought a better life will be closed to them and their descendants, possibly in perpetuity.

All this was already made evident in the early 2000s through the landmark Inter-American Human Rights System case, *Yean and Bosico v Dominican Republic*.¹¹¹ Starting in the 1990s, Dominican-born children of Haitian ancestry were denied birth certificates under the pretext that the Dominican Constitution exempted the children of persons 'in transit' from the *jus soli* right to Dominican nationality.¹¹² Dominican constitutions since 1929 have excluded the Dominican-born children of foreign diplomats and people in transit through Dominican territory from eligibility for birthright citizenship.¹¹³ It is obviously nonsensical to hold that a foreign national who has lived in the country without authorisation for years or even decades, and has been subject to its laws the whole time, is 'in transit'. Just so, Dominican law clarified in 1939 that the period under which a person could be considered in transit would normally be no longer than 10 days.¹¹⁴ Weakly grounded though it was in law, this official equation of 'undocumented' with 'in transit' led to the denial, on 5 March 1997, of late registration birth certificates to two girls, Dilcia Yean and Violeta Bosico, by the civil registry office in the sugar-producing town of Sabana Grande de Boyá. That official act set in motion litigation that ultimately moved to the Inter-American Court of Human Rights ('IACHR') after the plaintiffs failed to get justice in Dominican courts.

Yean and Bosico's legal representatives — the Berkeley Law International Human Rights Law Clinic Professor, Laurel Fletcher, Dominican human rights lawyer, Genaro Rincón, and the Inter-American Commission¹¹⁵ — presented an expansive case. Their original petition cited the Dominican Republic for violating

¹¹¹ *Case of the Girls Yean and Bosico v Dominican Republic* (Judgment, Inter-American Court of Human Rights, 8 September 2005) <https://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf>, archived at <<https://perma.cc/98MZ-6L8R>>.

¹¹² Carmen Cedeño, 'La nacionalidad de los descendientes de haitianos nacidos en la República Dominicana' [The Nationality of Haitian Descendants born in the Dominican Republic] in Wilfredo Lozano (ed), *La cuestión haitiana en Santo Domingo: Migración internacional, desarrollo y relaciones inter-estatales entre Haití y República Dominicana* [The Haitian Question in Santo Domingo: International Migration, Development and Inter-state Relations between Haiti and the Dominican Republic] (FLACSO-Programa República Dominicana and Centro Norte-Sur 1992) 139; Lawyers Committee for Human Rights, *A Childhood Abducted: Children Cutting Sugar Cane in the Dominican Republic* (Lawyers Committee for Human Rights 1991) 13–4. By 1997, the Centro Cultural Dominicano-Haitiano ('CCDH', Haitian-Dominican Cultural Center) found evidence that younger people were being hampered in getting their cédulas: an estimated 80 percent of Haitian-Dominicans over the age of 30 possessed a cédula but only 30 percent of those under 30 had this document: *Análisis de la Situación Inmigrantes Haitianos en la República Dominicana* [Analysis of the Haitian Migrant Situation in the Dominican Republic] (CCDH 1997) 16.

¹¹³ Constitution of the Dominican Republic 2015, art 18(3). See also Monique A Hannam, 'Soy Dominicano: The Status of Haitian Descendants Born in the Dominican Republic and Measures to Protect Their Right to a Nationality' (2014) 47(4) *Vanderbilt Journal of Transnational Law* 1123, 1127.

¹¹⁴ Inter-American Commission on Human Rights (n 4) 71–2 [148]–[149].

¹¹⁵ Which at that moment in history would join in arguing the petitioners' case, if it referred a case to the Court.

nine articles of the American Convention on Human Rights.¹¹⁶ Rights to a legal identity and a nationality were always the central issues; without a birth certificate, the girls' names and nationality would have been completely absent from any official register. But to index the gravity of these wrongs, the girls' representatives described a cascade of other rights that would be blocked if the girls could not get birth certificates. Their free mobility would be impaired (every Dominican is required by law to carry a *cédula*).¹¹⁷ Travel abroad would be made impossible by their inability to obtain a passport. Registering for secondary and post-secondary schools would be precluded. Without legal identity documents, the girls would be barred from even opening a bank account or getting legally married. It would all add up to an erasure of legal personhood, with crippling social and economic effects.

The case presented by the Dominican State consisted of little more than asserting that it had the right as a sovereign state to set rules of citizenship as it pleased. Evidence emerged in the proceedings that the state was haphazardly enforcing its rules: government lawyers presented the Court at different times with distinct and incompatible lists of official criteria for issuing late registration of births.¹¹⁸ It was, in any case, the State's contention (and it has been ever since) that no one, in fact, would be made stateless by denying the Dominican-born offspring of non-citizens the right to Dominican citizenship. The risk of leaving people stateless was argued to be inexistent, because every immigrant descendant who was denied Dominican citizenship would, in principle, be able to claim the citizenship of their parents' natal state.¹¹⁹ Neither did the State recognise any special duty if a Dominican-born 'non-citizen' could not gain possession of documents affirming their parents' nationality: that was held to be the fault of the *other* country's government, and not a matter that the Dominican State should be required to resolve.¹²⁰ Then as now, the Dominican State has sought to sidestep its obligation, as a signatory to relevant UN and Inter-American human rights instruments, to grant citizenship to every person born on its territory who would otherwise be left stateless.

The ruling of the Court, in turn, traced a middle ground, not troubling the precept that the Dominican State holds a sovereign right to set its citizenship rules, even as the Court found the Dominican State in contravention of the country's international legal obligations under the *American Convention on Human Rights* ('*American Convention*')¹²¹ and the 1961 *UN Convention on the Reduction of Statelessness*,¹²² to protect individuals' rights to a legal identity and a

¹¹⁶ Author's interview with Laurel Fletcher, 4 February 2005, New Haven, Connecticut.

¹¹⁷ *Ley No 17 que Introduce Modificaciones a la Ley No 6125, sobre Cedula de Identificacion Personal* [Law No 17 that Introduces Modifications to Law No 6125 on Personal Identification Cards] (7 December 1962) art 1 (Dominican Republic).

¹¹⁸ Martínez, 'The Price of Confrontation' (n 14) 93–4.

¹¹⁹ *Case of the Girls Yean and Bosico v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, 8 September 2005) [121].

¹²⁰ In its response to the Inter-American Commission's report of 2015, the State asserted that the obligation of not fostering statelessness 'is not exclusive to the Dominican State, but also pertains to the Haitian State, which is apparently not being subject to the same scrutiny as the Dominican State when assessing fulfillment of this obligation': Inter-American Commission on Human Rights (n 4) 117–18 [274].

¹²¹ *American Convention on Human Rights, 'Pact of San José, Costa Rica'*, opened for signature 22 November 1969, Organization of American States (entered into force 18 July 1978).

¹²² *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

nationality.¹²³ Conservative though its judgment was, the Court made detailed reference to the range and seriousness of the other rights infringements to which Yean and Bosico were being exposed. Additionally, the ruling highlighted that thousands of other Haitian-ancestry Dominicans were being wronged in a like manner and ordered the state to take sweeping corrective measures.¹²⁴

Perhaps more significantly still, the Court winnowed the normative basis of its judgment down to the rights to a legal identity and to a nationality. Here, they defined the wrong clearly: the Dominican State had left Yean and Bosico stateless. The relevant principles of the *American Convention* set forth rules that seek to protect the right of each person to have rights.¹²⁵ Article 3 of the *American Convention* is the right to juridical personality: ‘Every person has the right to recognition as a person before the law’. Article 20 ‘Right to Nationality’ reads:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

These are ‘mother rights’ on which other individual human rights depend, constraining states’ sovereign discretion to place conditions on citizenship that would leave individuals in a condition of legal non-being.

Euphoria triggered by the Yean and Bosico victory in 2005 quickly faded. In anticipation of a negative ruling from the IACHR in the Yean and Bosico case, the Dominican Government had already moved the year before to lay down a legal foundation for blocking birthright citizenship for children of out-of-status non-citizens. In 2004, the Dominican Congress passed the *Ley General de Migración* (General Migration Law), in which s 7, art 10 makes it official that anyone who is not a legal resident is for the purposes of the law ‘in transit’, making their Dominican-born offspring ineligible for birthright citizenship.¹²⁶ The semantic contortion of confusing people who are not officially residents with people who are in transit has since become the basis for tens of thousands of Dominicans of Haitian descent to be stripped of their citizenship.¹²⁷

Worse still, the future disqualification of Haitian descendants from birthright citizenship has been guaranteed by a new article of the Dominican Constitution. Article 18, s 3 of the Constitution of 2010 adds ‘foreigners ... residing illegally in the Dominican territory’ to the categories of people whose Dominican-born children will not be eligible for birthright citizenship. Henceforth, everyone born on Dominican soil will have the right to Dominican citizenship, excepting ‘the sons and daughters of foreign members of diplomatic and consular delegations, and of foreigners in transit *or residing illegally* in the Dominican territory’.¹²⁸

¹²³ Inter-American Commission on Human Rights (n 4) 64–9 [166]–[192].

¹²⁴ *ibid* 77–8 [232].

¹²⁵ *ibid* 79–90 [236]–[40].

¹²⁶ Ley General de Migración [General Migration Law] No 285-04 (2004) *Gaceta Oficial*, 10291(27) 22 (Dominican Republic) <https://www.comillas.edu/images/institutos/migraciones/Documentaci%C3%B3n/legislacion/Republica%20Dominicana/Ley%20General%20de%20Migraci%C3%B3n_No.285-04.pdf>, archived at <<https://perma.cc/F95H-5NAC>>. See also Baluarte (n 109).

¹²⁷ Martínez, ‘The Price of Confrontation’ (n 14) 96.

¹²⁸ An English translation can be accessed from Constitute Project: ‘Dominican Republic’s Constitution of 2010’, *Constitute Project* (English Translation, 2012) (emphasis added) <https://www.constituteproject.org/constitution/Dominican_Republic_2010.pdf>, archived at <<https://perma.cc/UF7Y-VVM7>>.

Even as it panders to the opinions of an ethnonationalist extreme, the Sentencia and its allied edicts and laws do not prescribe the physical elimination of the Haitian presence from the Dominican Republic, whether through ethnic cleansing or mass expulsion. It sooner inaugurates a new style of migrant/minority control, better suited to a neoliberal political economy. The new system of control, augured by Sentencia 168, seeks to install institutional fences to restrict the socioeconomic mobility of Haitian immigrant and minority group members. No longer is the aim to block migrants from fleeing plantations; the new system instead lets migrants circulate where their labour is needed, while blocking them from escaping lives of drudgery. As political scientist, Rosario Espinal, writes, ‘the majority of Haitians [on Dominican territory] will not leave, nor be legalized, because the Dominican Government and many employers need that cheap labour in order to exploit it’.¹²⁹ Invisible fetters of bureaucratic disablement are to replace fences and watchmen, guaranteeing Dominican elites the benefits of Haitian labour while squashing the aspirations to betterment of Haitian-descendant Dominicans by relegating them eternally to non-citizenship.¹³⁰ If the Sentencia sets back the clock, then, it is not by returning the country to acts of ethnic cleansing but by making Haitian-descendant Dominicans once more nothing more than labourers to whom no Dominican official is obligated to listen.

More likely than mass deportation, then, but almost as scary, is the prospect of a new class of citizenship-impaired people steadily growing on Dominican territory who are culturally Dominican but hold either Haitian citizenship or no citizenship at all. Many of the *de jure* Haitian nationals will be functionally stateless: their whole lives are in the Dominican Republic, not Haiti, a country from which they can claim no real benefits. The formally stateless will of course be even more limited, for they ironically will *never be able to leave* Dominican territory, unless expelled from it; they are trapped in place by having no legal basis to claim any country’s passport. Thus, the nationality reforms that Dominican nationalists defend as a means to curtail the Haitian presence will in all likelihood expand that presence by blocking all legal exit roads to Haitian descendants.

VII DISCUSSION

Clearly, the sociolegal situation of out-of-status non-citizens and their native-born offspring in the United States does not in all ways resemble that of Haitian descendants in the Dominican Republic. Other than those who are outright stateless, not possessing national identity documents does not usually impair non-citizens as drastically in the United States as in the Dominican Republic. The wider range of nations represented among out-of-status non-citizens in the United States also complicates the correlation between undocumented-hood and membership in derogated racial/national groups. Even so, US immigration enforcement as well as the popular imagination hangs a presumption of deportability disproportionately over lower-income immigrants of colour.¹³¹ The idea that the US is superior in all this is troubled also by the US Government’s seeming inability to enact immigrant regularisation measures of the kind adopted in the Dominican Republic after

¹²⁹ Rosaria Espinal, ‘El avispero con los Haitianos’ [The Hornet’s Nest with the Haitians], *Hoy* (online, 1 July 2015) <<http://hoy.com.do/el-avispero-con-los-haitianos>>, archived at <<https://perma.cc/FEK3-SKK3>> (author’s translation).

¹³⁰ Martínez and Wooding (n 22) 116.

¹³¹ See Cacho (n 13) ch 1.

Sentencia 168.¹³² Flawed though the regularisation ordinance and implementation were, the Medina administration and the Dominican Congress at least recognised that many long-resident non-citizens deserved a positive immigration status. In sum, no perfect matches are likely to be found for comparative analysis even among the mainly *jus soli* countries of the Americas, and greater caution still is called for in generalising to countries outside the Western Hemisphere. Yet lessons of value to scholars and activists alike may even so be drawn by comparing US and Dominican moves to make *jus soli* conditional upon the parents' legal residency.

A first lesson is that the same rule of law processes and mechanisms in which international human rights invest faith may be turned toward exclusionary aims. When it became clear that the practice of denying birth certificates to Haitian descendants could not be defended at the IACHR, Dominican leaders responded not by liberalising the country's migration/citizenship regime but by seeking firmer legal foundations to deny Dominican nationality to the offspring of out-of-status immigrants. International litigation and naming and shaming not only failed to deter infringement of the rights to a nationality and a legal identity but moved the Dominican State to adopt a reactionary juridification, in which superficially non-discriminatory and legally normative means were taken to defend illiberal aims.

A second lesson is that placing legal residency conditions on *jus soli* does not deter undocumented immigration but does place extraordinary new burdens on immigrant descendants. The adoption of a reactionary citizenship policy has yielded no anti-immigration dividends, but sooner confined Haitian descendants *within* the country as a stateless underclass of people. The Dominican case therefore shows that US opponents of birthright citizenship for the children of out-of-status non-citizens must answer to the danger that their proposal would be ineffective for its stated aim of curbing undocumented immigration but would cruelly create a legally approved hereditary underclass.

The third and perhaps broadest lesson is that unjust immigration and alienage regimes, class/racial biases, and naturalisation and nationality controversies are linked problems. Considering that the starting point of controversies about birthright is racially inflected animus against the unauthorised presence of large numbers of immigrants of colour, it seems something like a band-aid on a haemorrhage to seek justice for immigrant descendants solely within the parameters of preventing statelessness. In both countries, a new deal for out-of-status non-citizen workers seems primordial. More specifically, a more robust norm than the prevention of statelessness may be needed to guarantee immigrant descendants access to citizenship. International denunciations have focused on the flagrant 'red card' wrong of stripping citizenship from people who have been Dominican citizens their whole lives. But the Dominican State has gotten something like a pass from the international human rights community about the new provision added to the Dominican Constitution in 2010, which sidesteps the contorted claim that unauthorised residents are 'in transit' by instead limiting

¹³² If anything, comprehensive immigration reform has become much less likely since the George W Bush-backed package of 2007 because it has gone from a matter of exceptional concern to 'a fully polarized highly partisan issue': Matt Yglesias, 'Immigration Reform Died Because it has Become a Normal Political Issue' *Vox* (online, 1 July 2014) <<https://www.vox.com/2014/7/1/5858120/immigration-reform-died-because-its-become-a-normal-political-issue>>, archived at <<https://perma.cc/T4EZ-YB8D>>.

eligibility for *jus soli* citizenship to people whose parents were legal residents at the time of their birth.¹³³ Whereas stripping a person of their citizenship retroactively seems legally atrocious, barring certain newborns from becoming citizens may look, by contrast, like a legitimate exercise of a state's sovereign power to set rules about citizenship, even when the net outcome is the same. More assertively questioning states' sovereign right to set nationality rules as they please may be the next frontier for international law on migration and citizenship.

VIII CONCLUSION

Sceptics may ask how much effort is worth spending on defending citizenship for all US-born people, when other bread and butter rights challenges seem more pertinent to the day to day struggles of low-wage non-citizen workers. Immigrants above all need the rights to reside and work in the United States to be safe from assault and theft, and to benefit from the nation's social safety net. In response to that I would ask: why not defend both economic/social rights for migrants and citizenship rights for immigrant descendants? It would be overly cynical to see these rights claims as rivals when entitlements in each add to the chances of victory in the other. Politicians and opinion-shapers already show little regard for immigrant voices but imagine how much worse it would get if it were to be legally affirmed that out-of-status immigrants' descendants will never become citizens. Excluding out-of-status non-citizens indefinitely from belonging already exposes them to human rights abuses. Imposing that condition on their offspring in perpetuity would irreparably impair their communities' ability to defend their most vulnerable members. While citizenship is not a panacea, neither is it insignificant.

Nor is it necessary to choose between migrant rights and anti-racist struggle. Adding migrant rights and the struggle against statelessness to a US anti-racist agenda should not imply turning our backs to the fight against anti-Black racism. Migrant rights advocates would even so do well to rally awareness of how closely their cause is linked to the United States' unpaid debt to Black Americans. Helping immigrant descendants ascend the socioeconomic and political ladder while leaving Blacks in shameful numbers at the bottom would unacceptably recapitulate the original sin of US immigration history: that of white immigrants winning full belonging in the United States 'on the backs of Blacks'.¹³⁴

It perhaps adds up to this: defending every person's right to a nationality and a legal identity and refuting newly emboldened nationalist attacks may depend on generating new vistas for anti-racist and de-colonial futures. Specifically, while the prevention of statelessness is settled international law, there is as yet no larger positive right to be a citizen of the state where you reside and work, upon which you depend for retirement security and health care insurance, and whose politicians enact laws that affect you and your children. Legal scholars, Elizabeth Keyes and Angela Banks, advocate a related principle of *jus nexi* citizenship, which 'focuses on the social fact of membership or the actual ties that an individual

¹³³ Wendy Hunter and Francesca Reece, 'Denationalization in the Dominican Republic: Trapping Victims in the State's Administrative Maze' (2022) 57 *Latin American Research Review* 590.

¹³⁴ Toni Morrison, 'On the Backs of Blacks' *Time* (online, 2 December 1993) <<http://content.time.com/time/subscriber/article/0,33009,979736-2,00.html>>, archived at <<https://perma.cc/4ABN-RWCN>>.

has to a society'.¹³⁵ A yet to be enacted right of effective membership, based on *jus nexi* citizenship, merits inclusion on the international agenda as a means to undo the injustice of immigrant descendants being denied membership in the state to which they truly belong, and seeing their citizenship claims redirected to their parents' state of birth. The promotion of *jus nexi* may be a next step in the global struggle against statelessness if we are to head off the spread of citizenship redirection practices that leave the children of out-of-status non-citizens in possession of a passport from their ancestors' country and little else. If the United States turns punitive in immigration and citizenship policy by limiting birthright, how much more effectively will human rights defenders be able stand up to it than they have against the relatively weak state of the Dominican Republic? A more ambitious international legal strategy may be needed to challenge the racialised non-being of hereditary non-citizens, one which upholds the right to claim citizenship not just in any state, but specifically in the state in which workers and their families have put down roots.

¹³⁵ Banks (n 17) 3. See also Keyes (n 17).