Citizenship and Its EXCLUSIONS

A Classical, Constitutional, and Critical Race Critique

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For Katerina, Christian, Nicholas, and Andres

You are my Brilliant and Beautiful Blessings

Preface and Acknowledgments

I have long waited to undertake this project, and in fact it took more than a decade to complete. This apparently exceedingly long time frame was due in part to the fact that I needed such time to fully understand the scope and depth of this undertaking. It is a project that in various forms I have touched upon throughout most of my tenure as a legal academic, in a series of law review articles, book chapters, and a prior book entitled *The Other American Colonies: An International and Constitutional Examination of the United States' Overseas Conquests.* In many respects, this project began well before I first entered law school. It was inspired by a freshman English teacher at Hofstra University. Though I unfortunately have not been able to recall or uncover her name, like millions of unnamed educators around the world, she is an unnamed hero and was instrumental in encouraging me to have faith in my intellect. This confidence allowed me to question dominant and popular narratives. As I developed, I took inspiration from writings that questioned the ethos of American democracy as it applied to ethnic and racial minorities. I first was motivated to write about my own people. Specifically, I had always been troubled by the fact that my relatives who resided in an island that was part of the United States—Puerto Rico—did not enjoy the same rights I enjoyed living in New York City. While both they and I considered ourselves Puerto Rican, we were also American, but we enjoyed different rights associated with being American. Indeed, my family in Puerto Rico seemed less American because they could not vote to elect the leader of our land—the president of the United States—and they were without any representation in the legislative body of our land—the United States Congress. They also seemed in some respects to be part of a foreign land with their own Olympic team and national anthem.

After some preliminary research during college and then in law school, I came to learn that there were special rules—or, more accurately, laws—that applied for certain U.S. citizens. For some, the U.S. Constitution did not apply in the same way as it did for other Americans, like me, who hap-

pened to live in a state instead of a U.S. territory. This discovery, though informative, was troubling in that I had always understood that a basic tenet of democracy was that all citizens were supposed to be treated equally. Yet my relatives were less than equal, simply because they lived off-shore from the mainland United States. My research uncovered the folly of my idealistic vision of citizenship.

Over the years, I wrote several articles examining the anomalous status of the Puerto Rican people. These works touched upon other groups of outsiders within the American landscape, such as the inhabitants of the other U.S. overseas territories and even the first people of this land—the indigenous people of the continental United States, Hawaii, and Alaska. As I tried to reconcile the democratic ethos of equality and representative government with a repeated practice of exclusion, I uncovered more and more examples of groups that should have qualified as full citizens of this society but instead were denied such a privileged status. This, I learned, was a not-so-uncommon practice in other Western nation-states, and in fact it was a practice that was as old as the concept of citizenship itself.

After exploring these injustices in several shorter writings, I decided to write a book about the history of American citizenship in order to critically examine whether the democratic ethos of equality actually applied to disfavored groups within U.S. democracy. What those studies, along with more recent examinations, unearthed was a history of a concept that seemed to extol the virtues of equality for all members within a given society but actually legitimated a millennia-long practice of forbidding many members of those societies from enjoying that equality. This work seeks to examine that history and in many respects the history of democracy within Western thought. This is done with the ultimate goal of developing a model of membership in a society—a polity—that is truly inclusive. If for one reason or another this effort fails to meet its lofty goals, my aim is to nonetheless provoke debate over whether such inclusiveness in diverse societies can actually be achieved.

Like other descendents of dependent nations or territories, my family in Puerto Rico exists in what could be described as an alien-citizen paradox, feeling both American and culturally Puerto Rican, and at the same time often being reminded of their otherness. In other words, they are reminded of their status as something other than that of a "real" American. I seek to explore that paradox and similar markers of otherness that have historically followed disfavored groups, such as racial and ethnic minorities. This explo-

ration involves examining Western thought on citizenship over thousands of years, as well as the very construct of democracy itself. This in turn exposes an inordinately and unfortunately long pattern of subordination and discrimination of disfavored groups—including women and racial and ethnic minorities. This pattern has occurred despite the notion that equality is a core precept to the concept of citizenship and despite the fact that those who have essentially always been denied the full rights associated with citizenship have met the stated prerequisites required to achieve the status of full and equal members of society.

I trust this work and others I have written, as well as the works of an increasing number of scholars in the area, will one day have the effect of changing the inferior status of so many Americans who are labeled as different than the "typical" American by virtue of having non-Anglo-sounding names and, primarily, by virtue of speaking languages other than English. I am also hopeful that this examination will spark further debates on the value of citizenship in diverse societies and on whether other concepts or frameworks are needed. The inequality inherent in the citizenship construct and related social justice issues relating to the subordination of disempowered groups are among the reasons why I entered the legal academy and became one of the first mainland legal scholars to address the plight of what I refer to as "American Alien-Citizens."

Because it examines the genesis and evolution of the concept of citizenship in Western democracies, this study is broader than an examination of the subordinate status of one group in the twenty-first century. Indeed, the following analysis will examine the subordinate levels of membership throughout world history. Because it examines a construct as broad and fundamental as citizenship, this study could arguably be described as a study of history itself. In entering into such a study, one of my primary tasks is to continue to question the inferior status of my brothers and sisters not only from Puerto Rico but also in every society (and/or other conceptual legal locale) where labels such as "dependent territory," "dependent state," or "colony" continue to contain the inhabitants of those lands in an inferior status, at least when compared to other inhabitants of those very same societies.

In other words, my effort here is not only to raise the issue that millions of U.S. citizens live in subordination but also to change the landscape of citizenship discourse itself. While I may not be the first to make this attempt, I trust that my historical and legal account of citizenship's beginnings and evolution

will cause many readers to reexamine the romanticized notions of equality that emanate from the concept. While I have great admiration for the historians who have fairly recently attempted to address the exclusionary nature of membership, the concepts of citizenship and equality have for too long—indeed, from their very beginning—been theoretical siblings that have been extolled and praised in democratic discourse. Yet throughout history, often because of gender, racial, or ethnic bias, those whom one might think could and should be eligible for full membership in a society and therefore entitled to the label of "citizen" were denied the status and the rights associated with it.

While citizenship has always been associated with a certain idealistic basis, this work seeks to illustrate how the noble notion of equality has always been elusive for disfavored groups. On a basic level, this work seeks to document the evolution of the concept of citizenship in an effort to question whether citizenship was developed as an exclusive concept and whether it continues to be applied as such. This work also seeks to bring perspective and provide a historical basis for volatile contemporary debates concerning membership, including debates about the rights of undocumented workers and about marital rights of various groups.

During the classical or ancient period, when the first Western writings on citizenship developed, the concept, which seemed to suggest inclusivity, was nonetheless unavailable to various groups, such as women, those born outside of the city-state, and the poor. Throughout history, women continued to suffer from this marker of inferior membership. In the United States, it was only in the early part of the twentieth century that the basic rights associated with citizenship, such as suffrage, became available to women. Women's struggle for full membership rights, which will be discussed later in the book, provides but one vivid example of the fact that denials of access to citizenship are not novel, and, perhaps more importantly, have impacted disfavored groups for thousands of years.

Throughout this country's history, as well as the histories of other Western democracies, the labeling of inferior membership has also regrettably turned on constructions of race and ethnicity. The issue pertaining to the full and equal membership of racial and ethnic minorities continues to this day. Though the election of Barack Obama, the first African American United States president, casts doubt among some people as to whether there are in fact labels of inferiority for African Americans as well as other racial and ethnic minorities, the views of many people of color suggest that the election of one well-qualified, brilliant, and charismatic political leader

does not instantly change the everyday lives of millions of other minorities. His election is nonetheless a moment to relish, to take pride in, and to generate hope that it marks a beginning of dramatic change in perceptions and acceptance.

I am indebted to numerous traditional and critical scholars who have inspired me to enter the academy and to eventually become a scholar. Three of these scholars are particularly important. The first is Professor Michael Olivas, a champion of civil rights and Latino social justice. He has always been my role model and, where appropriate, my harshest critic. Through his efforts, such as his creation of the "Dirty Dozen List" that sought to shame American law schools into increasing Latino and Latina diversity, he singlehandedly changed the landscape of the legal academy. Scores of Latino and Latina professors, including me, owe our careers to his courage. He is a man with incredible intellect, credentials, and wisdom; but for what I believe are subtle but powerful assumptions about identity, he would have been one of the first Latino law deans in this country. For me, though, and I am sure for dozens of other Latino and Latina professors, he will always be my dean. Indeed, I can recall my proudest day in the academy, when Professor Angela Onuwachi-Willig, another scholar I greatly admire, suggested at the 2006 Southeastern Regional People of Color Conference that I was the next generation of Michael Olivas. While I suspect I could never fill those shoes, I will always seek to follow in his courageous, caring, selfless, and honorable footsteps.

The second scholar is an iconic figure whom I recall meeting during my first year of teaching law. As I was sitting in the back of a conference room at the first Annual LatCrit Scholarship Conference listening to a theoretical panel discussion that I must admit I did not fully comprehend, I noticed someone I was certain was either a runner who had just finished a workout and walked into the wrong room or a nonacademic who happened to decide to attend this particular lecture. In an effort to assist him, I introduced myself, ready to inform him of the nature of the meeting. When he introduced himself as Richard Delgado, whom I knew to be the most prolific scholar in the legal academy, I felt silly but did not want to let on that I had just mistaken him for a lost soul.

Over the years, I tried to keep up with his writings in the hopes of making a better second impression, but it seemed that he and his prolific coauthor on many works, Professor Jean Stefancic, wrote faster than I could read. Nonetheless, I sought to follow their model and tried to be fairly productive in my own right. My efforts were evidently fruitful because he soon became

familiar with my work, and I was thrilled when he offered to provide comments on some of my works-in-progress. Eventually this dialogue led to the opportunity to write this book, which will be part of his and Professor Stefancic's Critical America series. I am so proud to be one of the many outstanding scholars who have published in this series. I sincerely thank Professor Delgado for being my scholarly role model and for being the most prolific American legal scholar who happens to be Latino. I will always admire the way he has unabashedly and courageously continued to write amazing works on social justice and racial equality.

The third important scholar and academic leader I want to thank is Dean Kevin Johnson. In many ways, he is one of the leading brilliant voices of the Latina and Latino, and immigrant, communities. Even after my first public lecture, when I challenged him on a position he took in an earlier presentation, he generously offered to review one of my works-in-progress. He eventually proved to be a friend, an invaluable mentor, and someone on whose achievements I try to model my own. No matter how busy his schedule, he has always had time to advise me on my writings and on my career.

I also want to thank Dean Alfredo Garcia for being a friend, advisor, and good soul. Gratitude is also due to Deborah Gershenowitz of New York University Press for being a tough editor and brilliant reader who has pushed me to write this book. I look forward to a long and prosperous working relationship with such a talented professional.

I am also indebted to my colleague and friend Hannibal Travis for his invaluable and challenging comments on an earlier draft of this book. Though formally he is my mentee and I his mentor at our home institution, Florida International University College of Law, I often feel the labels should be reversed. I suspect his brilliance and work ethic will soon have him achieving great heights. A very special thank you is in order for my research assistant, Jarred Reiling, who with severe time constraints undertook incredible research efforts and was an utterly amazing editor of an earlier draft of this book. Finally, I want to thank the thousands of law students I have had the great honor to teach over the last dozen years at Florida International University College of Law, St. Thomas University School of Law, and American University Washington College of Law. Their intellect, energy, and wonderfully diverse and beautiful faces have kept me young on the inside; it's my children, and perhaps a dean or two, who have caused some of my grey hairs.

On a related personal side, I want to thank my beautiful wife, Christina Román, for being my best friend and for having the strength, the wisdom, and, when necessary, though often not requested, the ability to provide me

with sorely needed criticism. It is simply an amazing gift to get a chance to see the most beautiful woman in the world by my side every day. My blessings also overflow with my beautiful children. They inspire me and never cease to put proud smiles to my face. Katerina is my beautiful, proud Latina who as each day passes confirms that she is an amazing young woman: noble, accomplished, and kind. Christian is so like his father that it is scary. He has his father's spirit but is brighter, more beautiful, and more loving than his dad could ever aspire to be. He will certainly always make dad proud. Nicholas is a terribly handsome, sneaky, and impressive young man. He will inevitably be both popular and rich—two attributes he must have acquired from his mom. Andres Joaquin, aka AJ, is a ball of energy who will always surprise everyone with his stamina, charm, tenacity, ability, and beauty.

Finally, I want to thank my incredible parents for instilling in their son the pride and belief that he could achieve anything he wanted in this amazing land. Though economics and other obstacles may have limited their chances, they never allowed me to believe I was less than anyone. They instilled a deep pride in my culture, and that pride ensured that I would one day fulfill my dreams. Their teachings also armed me with the much-needed strength to overcome fear and insecurity when such emotions could have slowed or curbed my efforts as a scholar to challenge dominant narratives in this society.

I hope this work and other efforts I have undertaken provide an avenue for some to further engage in debates about membership, race, and ethnicity. In many respects this project was written during a time in my professional life when the value of productivity and academic engagement came into serious question. In other words, this book was written during a time when serious question arose as to whether merit really mattered or whether other reasons were the true basis for advancement. Fortunately, such debates only motivated me to work that much harder on this and other projects in an effort to remain optimistic about the value an academic may have in his or her field. Irrespective of whether my idealism is a function of good judgment or simply naïveté , I am hopeful that scholars and students of many different backgrounds and disciplines will find this project thoughtful, provocative, and useful. For my own purposes, I trust this effort will inspire me to continue to excel as a student of the law and as a scholar. In doing so, I pray that, for as long as I can take a breath, I can assist, and perhaps even inspire, as many as I can along the way.

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Introduction

The Citizenship Construct

A Tale of Three Terrorists

Imagine that you reside in a country not unlike the United States, with a similar cultural, economic, racial, and ethnic mix. As in many other countries, the events of September 11, 2001, dramatically changed the lives of the inhabitants of your land. Your country passed a series of special laws specifically designed to enhance national security, and has joined the United States in its military efforts in Afghanistan and Iraq. Your country's law enforcement and military officials, in several high-profile arrests that captured the attention of the populace, took three suspects into custody who allegedly were involved in terrorist-related activities. While these arrests occurred at slightly different times and in different places, their commonality is that the alleged wrongdoers were citizens of your country. However, the commonality ends there. As events have unfolded, your country's treatment of these individuals has varied greatly. Now, for the moment, put yourself in the place of each of these individuals.

In the first arrest, you are a young Caucasian man who grew up in a fairly affluent area of your country. You were captured fighting for the Taliban regime in Afghanistan. As a teenager, you had discovered Islam and allegedly had come to adopt Taliban and al-Qaeda beliefs. You traveled to Egypt and Yemen to learn Arabic, trained for *jihad* in several training camps, and were said to have interacted with Osama bin Laden. After your arrest, you were not subject to the limited-rights regime pursuant to the special laws' "enemy combatant" label. This label would have severely limited your constitutional rights and would have insured that you would have faced military and not civilian laws. You would have probably been detained in your country's offshore military base that held all "enemy combatants" for an indefinite amount of time. You instead proceeded through your country's traditional criminal

system. The official spokesperson for your president declared that "the great strength of this country is you will now have your day in court." Almost immediately after your arrest you had access to legal representation. You were able to meet with your family and had them with you throughout the criminal process. After engaging in fairly traditional judicial processes, such as a bail hearing and normal legal discovery procedures, you were allowed to decide whether you would enter into a plea agreement or fight the charges in a civilian criminal trial. After conferring with counsel and family members, you eventually entered a plea agreement, and you have begun to serve a twenty-year prison sentence. This treatment and the arrangement you eventually entered into was far more favorable than the potential of indefinite confinement as an "enemy combatant" or execution for treason.

Now consider for the moment that you are the second individual arrested. You, like the first individual, were born in this country but are of Saudi Arabian descent (though you have never lived in the land of your parents and are largely unfamiliar with it). You were captured in Afghanistan allegedly fighting with Taliban forces. Unlike the first individual, you were immediately treated as an "enemy combatant" and were quickly sent to a military jail. Your government argued that because you are an enemy combatant, it could detain you indefinitely without formal charges or proceedings. Your government decided that you would only be allowed the due process and access to counsel it deemed necessary. After a lengthy confinement in a military jail without any hearing or even charges leveled against you, the Supreme Court of your land ordered that you were entitled to a meaningful hearing and demanded that your government either produce evidence of your crimes or release you.

Your government never used your citizenship status as the basis for subjecting you to the traditional criminal laws and procedures of your land, as it did with the first individual. Instead, your government treated you as one of the scores of foreigners captured in Afghanistan. After weighing its options, ultimately your government declared that you no longer posed a threat to your country and offered you a plea agreement whereby, without ever being convicted of any crime, you would have your citizenship revoked, and you would agree to be deported to your parents' native land. You would also be required to pledge never to return to the land of your birth. Left with few reasonable alternatives, you begrudgingly agreed and left your family and your homeland for a country that was largely foreign to you.

Now put yourself in the place of the third individual. You are an ethnic minority of one of your country's overseas territories. You were arrested in

your land because you were suspected of preparing a terrorist attack. Despite being a citizen of your land by virtue of being born there, you were immediately held in indefinite detention as a material witness and later as an "enemy combatant." You were jailed in a military prison for several years without trial. You faced indefinite confinement and only recently have been given the chance to meet with counsel. Even after one of your country's federal judges ordered that you either be charged with a crime or released, your government and its attorney general continued to argue that it had the authority to continue to detain you indefinitely, without trial, for the duration of hostilities in the war on terror. Eventually, after years of detention and, essentially, isolation, a federal judge ordered that you be afforded the right to a civilian criminal trial to determine your guilt or innocence.

Arguably, in each of these three instances you allegedly waged war against your land, yet in each instance you faced dramatically different treatment. Though in each instance you were a citizen of your land, you were different by virtue of your racial or ethnic background. Perhaps by coincidence, in each instance you were treated differently. In the first scenario, you were Caucasian, were afforded your country's traditional criminal process, and almost immediately had your day in court, with right to counsel and other fundamental rights. You were also characterized by your land's media as "a confused young man." In the second scenario, you were of Arab descent, were subject to potentially indefinite confinement, ultimately were convicted of no crime, and were effectively forced to give up the citizenship of the land of your birth and shipped off to a land foreign to you. In the third scenario you were an ethnic minority, were immediately treated as an enemy combatant, a category typically reserved for foreign nationals captured in foreign lands, were imprisoned in an overseas military jail for several years with little or no access to counsel, and only recently faced traditional criminal prosecution.

As is evident to any newspaper reader, the above depiction is not based on fictional portrayals but on the actual events related to the arrests of John Walker Lindh,[1] Yaser Esam Hamdi,[2] and Jose Padilla.[3] While their cases are more complex than the above summaries suggest, the U.S. government's disparate treatment of these three similarly situated individuals has raised serious questions among critics of the judicial system concerning the reasons behind their disparate treatment and what exactly motivated it.[4] Though many believe that this disparity was largely due to racial and class biases,[5] few, if any, scholars have fully explored the subject.[6] Those scholars who have addressed these events typically have limited their analysis to the appropriate application of criminal laws relating to declared enemy com-

batants like Jose Padilla and Yaser Esam Hamdi.[7] Nonetheless, public criticisms of their treatment tend not to stem from distinctions in legal status established for different groups. Instead, public criticism, to the extent that there has been any, has focused on applying criminal constructs to ethnically diverse groups.[8] Little of the debate has focused on the membership status of those individuals. Ironically, all three alleged wrongdoers had the status of full members of our political community. In other words, they were all U.S. citizens.

Yet as the parable illustrates, they were treated in dramatically different ways. Lindh, a Caucasian, was not treated as a terrorist and was characterized as merely a misguided young man. Hamdi, an Arab American, was effectively forced to renounce his American citizenship and was expatriated to the land of his parents, even though he was born and raised in the United States. Padilla, of Puerto Rican descent, was immediately treated as an enemy combatant and terrorist, with the limited rights associated with such labels. The stark differences in their treatment illustrate the dichotomous and confounding nature of citizenship, particularly when applied to favored versus disfavored groups.

The Citizenship Construct and Its Complexity

The dominant narrative concerning U.S. citizenship does not, even in passing, suggest that some citizens are favored over others. On the contrary, citizenship is generally viewed as the most desired or preferred legal status a member of society can attain. It is a status that invokes the belief that one holding such a position can exercise and be protected by all of the provisions of the Constitution. It is a status that conveys a sense of full membership and inclusion. Yet this membership has historically been exclusive as well as illusory for those who did not fit within unwritten requirements established by those with the title.

Thus, the paradoxical nature and dialectic of citizenship embody both a norm of universal inclusion and one of exclusionary particularism. Perhaps because of the dichotomous nature of the topic as well as its significance in so many areas of study and debate, the subject of citizenship has enjoyed revitalization in academic circles. Accordingly, it has garnered considerable interest over the last few decades, particularly by scholars in legal studies, political theory, social theory, and cultural studies. The historical development of this concept, its importance to Western liberal theory, and its confounding paradoxical nature is the focus of this project.

Ostensibly, citizenship is the guarantee of certain rights and duties, including the right of suffrage and other important constitutional rights.[9] In terms of the citizenship ideal, its importance does not begin and end with the delineated rights identified by the courts and legislatures.[10] Citizenship is considered to define the relationship between the individual and the state.[11] And it is by virtue of an individual's citizenship status that he or she is a member of the political community and is supposed to have equal rights.[12]

The significance of citizenship, however, is not limited to a certain set of rights. Indeed, as Derek Heater explains, "very early in its history the term already contained a cluster of meanings related to a defined legal or social status, a means of political identity, a focus of loyalty, a requirement of duties, an expectation of rights and a yardstick of good social behavior."[13] The status of citizen recognizes that such a person is ordinarily one who possesses legal, social, and political power.[14] Consistent with liberal theory's precepts of liberty and equality, citizenship is thus linked to the notions of freedom and full participation in government.[15] Scholars have long argued that because equality and belonging are inseparably linked, to acknowledge citizenship is to confer "belonging" to the United States.[16]

There is also a long history of judicial pronouncements concerning the importance of citizenship and the centrality of equality to that concept. For instance, Justice Brandeis declared that the loss of citizenship was equivalent to the loss of everything that makes life worth living.[17] Chief Justice Rehnquist more recently observed, "in constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence."[18] Chief Justice Warren described citizenship as "that status, which alone, assures [one] the full enjoyment of the precious rights conferred by our Constitution."[19] Justice Harlan, following the classic Aristotelian construction, observed, "[the] citizenry is the country and the country is its citizenry."[20] Chief Justice Waite declared that citizenship "conveys the idea of membership of a nation."[21]

Citizenship is considered to be the most basic of all rights. As Hannah Arendt once explained, it is "the right to have rights."[22] Accordingly, citizenship is a broadly conceived concept that is typically deemed to be a central component of Western civilization. It has been described as the adhesive that bonds the Constitution[23]—that which binds the people to the republic. Citizenship embodies the strongest link between the individual and the government.[24]