

PURSUING CITIZENSHIP DURING COVID-19

MING HSU CHEN*

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* University of Colorado, Professor of Law and Faculty-Director Immigration and Citizenship Law Program. Author of *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* (2020). This symposium issue represents the key voices who shaped my thinking for this book and have kept challenging me to think beyond it. A special thanks to Suzette Malveaux, David Cook-Martin, John Griffin, Hunter Knapp, Melissa Schenter, Seema Sohi, and Doug Spencer, who organized the conference, and to law review editors Quentin Morse, Ming Lee Newcomb, and Stacey Weber, who organized the symposium issue. My sincere appreciation and admiration goes to our symposium speakers, especially keynote speaker Hiroshi Motomura, and the MOTUS Theater Monologists as well.

INTRODUCTION

Citizenship is a subject of growing interest in scholarly and policy discussions that aim to go beyond repairing the exclusionary immigration laws of the last several years to building a more inclusionary society. The essays in this symposium issue represent some of the best and brightest voices on citizenship. Their voices hail from law, sociology, political science, and history. They include university scholars, immigration practitioners, and immigrants living their lives in American society. As I shared in the keynote address, it was a pleasure—indeed, a career highlight—to launch *Pursuing Citizenship in the Enforcement Era* in September 2020 and to see it land at the Rothgerber Conference in April 2021.¹ It is equally a pleasure to respond to the essays generated by the fruitful discussion at the conference.

The book is about “why immigrants pursue citizenship in the enforcement era and how the experience varies for immigrants with different legal statuses.”² The key ideas of *Pursuing Citizenship in the Enforcement Era* are reflected in the title of the book. First, the broad conception of citizenship defies legal binaries and instead functions as a spectrum of citizenship, with formal and substantive dimensions. The formal dimensions include legal statuses (plural) ranging from naturalized citizenship, to permanent residence, to temporary visas, to undocumented presence. The substantive dimensions include immigrants’ economic, social, and political engagement. Citizenship in all of its dimensions is what immigrants are “pursuing” as they seek full membership and belonging: to be “Americans in Waiting,” as Hiroshi Motomura has said.³ The limits of this multidimensional concept of citizenship take on heightened meaning in “the enforcement era,” a time marked by vigorous implementation of exclusionary immigration policies.⁴

In this Epilogue, I pick up the conversation where the book and the symposium left off. I begin with the key themes in the

1. Colorado Law, *29th Annual Ira C. Rothgerber Jr. Conference: Pursuing Citizenship*, YOUTUBE (Apr. 15, 2021) [hereinafter *Rothgerber Conference: Panel 1*], https://www.youtube.com/watch?v=pmJaoQ5TcXA&list=PLwFq2GL-i5UjCVSa6WJdiWG5XgurPRweJ&ab_channel=ColoradoLaw [https://perma.cc/G8DY-Q2TP].

2. MING H. CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 3 (2020).

3. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2007).

4. See *infra* Subsection I.C.

book and how the symposium places the book in broader conversations about citizenship. Then, I survey policy developments and political conditions since the publication of the book, focusing especially on the prospects for immigration reform presented by a new presidential administration and COVID-19. In light of this shifting landscape, I present a theoretical justification for expanding citizenship to essential workers on the basis of *jus meritum* (the right of merit) and a recognition of the civic character of civilian service. In comparison to the Citizenship Act of 2021 and stand-alone proposals to legalize essential workers, my Citizenship for Essential Service proposal would expand the spectrum of immigrants who are eligible to legalize and would incorporate a self-updating mechanism lodged in a service-based agency, rather than letting an enforcement agency decide who qualifies for a green card. My proposal serves as an illustration of where the changed conditions might lead to a transformation of national immigrant-integration policy. The Epilogue concludes with thoughts on how bold reforms can and should be to meaningfully advance service as a basis for citizenship in the United States.

I. BUILDING PATHWAYS TO CITIZENSHIP

The essays in this symposium demonstrate the reach of the core ideas in *Pursuing Citizenship in the Enforcement Era* and also delimit their bounds. Throughout the conference and in these essays, the contributors highlighted the incongruity of the citizen-noncitizen binary with the lived experiences of people in the United States and the need to promote integration in an enforcement era. In my book, I say that immigrants live on a spectrum of citizenship. In order to travel from one end to the other, they need to attain both formal and substantive citizenship. However, the reality of pursuing citizenship in the enforcement era is that immigrants from end to end of the citizenship spectrum lack full citizenship and belonging.

These shortcomings were discussed in the conference and developed in these essays. The next Section describes the meaning of citizenship beyond legal status. It then considers how institutions contribute to the task of pursuing citizenship and the centrality of the federal government. It concludes by noting the enduring tensions between integration and enforcement that complicate efforts to include immigrants fully in the United States.

A. *Meaning of Citizenship*

The notion of immigrants experiencing less than full citizenship is a common theme in my interviews and in the symposium essays. I mean this both formally and substantively. Formal citizenship consists primarily of rights. Substantive citizenship consists of several strands—from social belonging to civic engagement—that combine with rights to provide full belonging. Theorists from law and political theory highlight the deficiencies in both formal and especially substantive citizenship as part of their description of the experience of being a noncitizen or partial citizen in America.⁵

The deficiencies in formal status condition the substantive experiences of immigrants—usually to constrain them, but not always. Critical theorists warn against the assumption that formal legal status is (or should be) the gatekeeper for other forms of belonging. This is where the interdisciplinary nature of these essays is especially valuable. Theorist Elizabeth Cohen hints that “legal nationality” is partial and that other substantive dimensions of belonging need not be contingent upon it.⁶ Historian Niambi Carter points out that Black Americans continued to face substantive inequality long after the passage of the Reconstruction Amendments and modern civil rights statutes granted them formal citizenship.⁷ Sociologists point out that immigrants remain similarly unequal, especially undocumented immigrants

5. ELIZABETH COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS (2009). Cohen’s *Semi-Citizenship* connects the book’s case studies of immigrants in varying legal categories to core concepts in citizenship theory. See CHEN, *supra* note 2, at 27. Other accounts are collected in THE OXFORD HANDBOOK ON CITIZENSHIP (2017) and references are contained in chapter four of ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: POLICIES AND PROCESS (9th ed. 2000).

6. COHEN, *supra* note 5; Rothgerber Conference: Panel 1, *supra* note 1, at 1:24:46 (arguing that rights need not be contingent on legal status such that an undocumented immigrant could receive healthcare or a green-card holder could face travel constraints yet be able to vote).

7. Among many, some examples include the works collected in THE OXFORD HANDBOOK OF AFRICAN AMERICAN CITIZENSHIP, 1865–PRESENT (Henry Louis Gates, Jr. et al. ed., 2012); Rothgerber Conference: Panel 1, *supra* note 1, at 1:10:18–1:20:42 (remarks by Niambi Carter).

and those whose racial identities replicate disadvantaged minority groups.⁸ Political scientists point out that states and localities have been active partners in the integration and restriction of immigrants.⁹ Think state DREAM Acts and driver's licenses; also think about state 287(g) policies deputizing local law enforcement to participate in immigration enforcement and state e-Verify programs to dissuade employment of undocumented immigrants.¹⁰ Still more scholars have pointed out the role of civil society or higher education in immigrant integration.¹¹ I would add that when the strands of substantive citizenship are untangled, it is the political one that provides a way back to full integration. Each of these perspectives recognizes that formal legal structures shape the substantive experiences of immigrants.

These academic perspectives on the limitations of formal citizenship are reflected in the personal stories of immigrants that were set to the stage by the Motus Theater and republished in this symposium issue. Cristian Solano-Cordova described the emotional burdens of undocumented migration in mixed-status immigrant families. His U.S.-citizen sister worried about her undocumented parents and siblings. He worried inwardly, but out-

8. THE NAT'L ACAD. OF SCI., ENG'G, & MED., *THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY* 385 (2015); Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANN. REV. SOCIO. 105 (2005).

9. PRATHEEPAN GULASEKARAM & KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015); ALAN COBURN & S. KARTHICK RAMAKRISHNAN, *CITIZENSHIP REIMAGINED* (2020).

10. *Tuition Benefits for Immigrants*, NAT'L CONF. STATE LEGISLATURES (Mar. 1, 2021), <https://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> [<https://perma.cc/3H56-ETNX>]; *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. STATE LEGISLATURES (Aug. 9, 2021), <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> [<https://perma.cc/98W5-4VNR>]; *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIG. & CUSTOMS ENFT, <https://www.ice.gov/identify-and-arrest/287g> [<https://perma.cc/5VG2-JCHP>]; *State E-Verify Action*, NAT'L CONF. STATE LEGISLATURES (Aug. 19, 2015), <https://www.ncsl.org/research/immigration/state-e-verify-action.aspx> [<https://perma.cc/MHE7-WYNU>].

11. Irene Bloemraad, Els de Graauw & Shannon Gleeson, *Immigrant Organizations: Civic Voice, Civic (In)equality, and Civic (In)visibility*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 294 (Walter M. Powell & Patricia Bromley eds., Stanford Univ. Press 2020) (1987); SAMEER M. ASHAR ET AL., U.C. IRVINE SCH. L., *NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS* (2016), <https://ssrn.com/abstract=2733860> [<https://perma.cc/FJC3-LA5U>].

wardly, he told his baby sister that “I promise, whatever happens, we’ll be together.”¹² The basis for his claim was more emotional than logical. He told her with feigned confidence, “You are an American citizen. . . . I’m not a citizen, but I’ve got [Deferred Action for Childhood Arrivals] DACA. . . . I know Mom doesn’t, but Mom is going to be okay. She has lived here for decades. She is not going anywhere.”¹³ That he could not be certain that he would keep the promise speaks to the disconnect between lacking formal status and feeling substantively included in the United States. In another narrative, Armando Peniche spoke about his confusion in feeling he belonged in his school and yet being stopped by police. When a police officer startled him with a call to stop and freeze on his walk home from school, he initially asked himself, “What did I do? What could it be?”¹⁴ After considering trivial breaches—his bad haircut, his bus fare, and whether he had violated traffic laws on his walk—he realized: “They stopped me because of the color of my skin. They think I’m some criminal.”¹⁵ His experience showed him that good behavior would not protect him from the blunt execution of law enforcement or the assessment that the dark skin color he inherited from his Mexican grandfather marked him as “trouble.”¹⁶

These two personal narratives speak to the dueling tasks of integration and enforcement in immigration law. The next Section delves into each task and explores the enduring tension between them.

B. Integration

Integration is a core function of substantive citizenship. Social scientists elaborate on how integration works—socially, economically, politically, and legally—in a prominent report by the National Academy of Sciences blue-ribbon commission led by Mary Water. This and prior research with symposium presenter

12. MOTUS MONOLOGUES: UNDOCUAMERICA SERIES, *The Meaning of Courage*, MOTUS THEATER, at 3:45 (Apr. 8, 2021), <https://www.motustheater.org/motusmonologuespodcast> [https://perma.cc/SQ67-HM4H].

13. *Id.*

14. MOTUS MONOLOGUES: UNDOCUAMERICA SERIES, *Stories from Our Undocumented Neighbors w/ Colorado Law’s Byron R. White Center*, MOTUS THEATER, at 40:17 (April 13, 2021), <https://www.youtube.com/watch?v=oV3VHJ4W9cE> [https://perma.cc/XET3-QK4R].

15. *Id.*

16. *Id.*

Tomás Jiménez explain the trajectories of immigrant integration.¹⁷ These tasks are primarily facilitated by a federal agency: the United States Citizen and Immigration Services (USCIS). However, the federal government takes a laissez-faire approach to integration at best, and at worst, excludes immigrants in contravention to its statutory mission. Research suggests that increased efforts to integrate immigrants would bear out in naturalization rates.¹⁸ Stella Burch Elias's perspective on changes in the USCIS citizenship tests¹⁹ and Zachary New's perspective on the numerous policies that cut back on opportunities to obtain a green card or naturalize²⁰ illustrate the lapses in the federal government's outreach.

What can be done to integrate immigrants in the absence of federal assistance? Alan Coburn and Karthick Ramakrishnan's reimagining posits a progressive state citizenship that encompasses multiple dimensions of belonging.²¹ Edeline Burciaga gives us an example in DACA, a federal program to provide temporary protection to undocumented immigrants who migrated to the United States at a young age.²² These young immigrants' civic engagement is especially strong. Hunter Knapp, Shannon

17. Waters & Jiménez, *supra* note 8.

18. CHEN, *supra* note 2, at 12.

19. At the Rothgerber Conference, Stella Burch Elias described the potholes in the path to citizenship revealed by citizenship tests administered by the U.S. Citizenship and Immigration Services, whose orientation shifted toward exclusion during the Trump Administration. Colorado Law, *29th Annual Ira C. Rothgerber Jr. Conference: Pursuing Citizenship*, YOUTUBE, at 24:36 (Apr. 15, 2021) [hereinafter *Rothgerber Conference: Panel 2*] https://www.youtube.com/watch?v=By8F7STK2Ns&list=PLwFq2GL-i5UjCVSa6WJdiWG5XgurPRweJ&index=2&ab_channel=ColoradoLaw [https://perma.cc/DLC7-B5VF] (remarks by Stella Burch Elias); see also Stella Burch Elias, *Testing Citizenship*, 96 B.U. L. REV. 2093 (2016).

20. Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549 (2019).

21. ALLAN COBURN & S. KARTHICK RAMAKRISHNAN, *CITIZENSHIP REIMAGINED* (2020); *Rothgerber Conference: Panel 1*, *supra* note 1, at 1:49:11 (remarks by Allan Coburn); see also *Rothgerber Conference: Panel 1*, *supra* note 1, at 1:20:50 (remarks by Elizabeth Cohen).

22. Edeline Burciaga & Aaron Malone, *Intensified Liminal Legality: The Impact of the DACA Rescission for Undocumented Young Adults in Colorado*, L. & SOC. INQUIRY, May 2021, at 1–23, <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/98562D10497E7DCF3028EE3962A18D1B/S0897654621000083a.pdf/intensified-liminal-legality-the-impact-of-the-daca-rescission-for-undocumented-young-adults-in-colorado.pdf> [https://perma.cc/ZHE2-KG7H]; Edeline Burciaga & Lisa Martinez, *How Do Political Contexts Shape Undocumented Youth Movements? Evidence from Three Immigrant Destinations*, 22 MOBILIZATION: AN INT'L Q. 451 (2017).

Gleeson, and Xóchitl Bada go beyond this traditional focus of integration to highlight the incorporation of immigrant workers into the U.S. economy.²³ Each of these perspectives highlights the need for substantive integration and the critical role institutions outside the federal government play in attaining it.

C. Enforcement

But these efforts to integrate immigrants operate against an exclusionary background. Immigration law determines who can enter the country and who cannot; the federal government enforces these laws by reviewing applications for visas, adjudicating the grounds for an immigrant to stay in the United States, and deporting those who do not meet these grounds. Immigration enforcement has waxed and waned throughout history: it peaked during the Red Scare, the economic conservatism of the 1980s, the anti-terrorist efforts following September 11, and again during the global pandemic of COVID-19.²⁴ Though immigration policy has softened in the first year of the Biden Administration, the federal government will continue to enforce immigration laws, even as it smooths the rough edges from the Trump Administration's enforcement efforts.

The most conspicuous enforcement policies protect the nation from security threats following September 11. Some relate directly to wartime efforts in Iraq and Afghanistan, such as policies relating to suspected terrorism and directed at immigrants from Muslim-majority countries.²⁵ Terrorism is a breach of both

23. Hunter Knapp, *Economic Incorporation of Agricultural Workers*, 93 U. COLO. L. REV. 457 (2021).

24. I was reminded of the open-ended periodization of US immigration enforcement by Adam Goodman, whose research traces the origins of the U.S. deportation machinery, and the Honorable Mimi Tsankov, whose perspectives on adjudicating removal cases in immigration court speak to contemporary pressures. See Colorado Law, *29th Annual Ira C. Rothgerber Jr. Conference: Pursuing Citizenship*, YOUTUBE, at 10:57 (Apr. 15, 2021) [hereinafter *Rothgerber Conference: Panel 3*], https://www.youtube.com/watch?v=sy7FoSCe9Ug&list=PLwFq2GL-i5UjCVSa6WJdiWG5XgurPRweJ&index=3&ab_channel=ColoradoLaw [https://perma.cc/8SY6-38XJ]; Adam Goodman, *THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS* (2020); Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303 (2021).

25. One example is the National Security Entry-Exit Registration System (NSEERS) or Special Registration that required Muslims to register themselves with the federal government as part of its counterterrorism effort. Individuals who registered were required to provide detailed information about their plans to ICE. See generally SHOBA WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME*

law and social norms, of course. But other policies distinguish noncitizens from citizens based on less clear distinctions. Undocumented immigration is a civil violation, but it is one that has become laden with socially undesirable meanings and grouped with criminal acts. Against this enforcement background, numerous policies punish unauthorized status; protections for those with twilight or other humanitarian statuses are predictably thin and frequently contested.²⁶ Other enforcement policies are based on tenuous claims of national security or public health. Trump Administration restrictions placed on international students, reductions in refugees admissions, and rejections of asylum seekers without a hearing can be understood in this context.²⁷ The sympathetic nature of these immigrants signifies how bad the situation has become. The exclusionary tenor of citizenship laws during the Trump Administration is evident from the admission of immigrants (in USCIS) to their removal (in immigration court).²⁸

The excess of exclusionary enforcement policies can also be seen in the integration and naturalization of lawfully admitted immigrants. These immigrants are beyond the reach of my book, but they fit on the citizenship spectrum as well. The federal government decides who can become a naturalized citizen based on specified inclusion criteria. Officially, naturalized citizenship requires that a noncitizen meet threshold statutory criteria such as age or length of continuous residence. It requires that a noncitizen articulate political loyalty by taking an oath of allegiance. Unofficially, social and cultural fitness (or the prospect of assimilation) needs to be shown through passage of a civics and English language test. Stella Burch Elias explains how these citizenship test requirements reflect societal values and

OF TRUMP (2019) [hereinafter WADHIA, BANNED]; SHOBA WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) [hereinafter WADHIA, BEYOND DEPORTATION]; *see also* Shoba Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2017).

26. WADHIA, BANNED, *supra* note 25; WADHIA, BEYOND DEPORTATION, *supra* note 25; *see also* Wadhia, *supra* note 25.

27. REBECCA HAMLIN, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE (2021). This theme was elaborated in a breakout room during the virtual reception led by Meg Sagaria-Barritt of the Colorado Refugee Services Program. *See also Rothgerber Conference: Panel 2*, *supra* note 19, at 24:36 (discussing the No BAN Act, which counters policies excluding Muslim and African immigrants, policy writings on international students, and DACA, with Shoba Wadhia).

28. Tsankov, *supra* note 24; *see also* Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling*, 56 CAL. W. L. REV. 35 (2020).

how recent changes to the citizenship test reflect a cramped view of what it takes to become American.²⁹ Negative criteria for exclusion from citizenship exist as well. For example, an inability to show “good moral character” can disqualify an otherwise eligible noncitizen from being able to naturalize. Zachary New shows how the more restrictive conception of the good moral character requirement for naturalized citizenship indicates a shift from selecting members toward excluding outsiders.³⁰ The efforts to exclude those who have already been admitted is further described in Shoba Wadhia and Margaret Hu’s essay on the “decitizenship” of Asian American women and Amanda Frost’s study of the revival of denaturalization.³¹

COVID-19 constitutes another period of intensive enforcement. The National Immigration Forum reports that there were forty-eight changes in immigration policy during the first year of the COVID-19 pandemic between March and November of 2020—nearly one each week.³² Documenting all of the incremental policy changes was a monumental task requiring teams of attorneys and law students, so likely there were even more.³³ At least five policy changes in the first year of COVID-19 related to travel restrictions or border closures of either a temporary or permanent nature, and some of these policies were only tangentially related to health and public safety.³⁴

29. Burch Elias, *supra* note 19.

30. Zachary New, *The Failure of Good Moral Character Determinations for Naturalization*, 93 U. COLO. L. REV. 365 (2021).

31. Shoba Wadhia & Margaret Hu, *Decitizenship Asian Pacific American Women*, 93 U. COLO. L. REV. 323 (2021); AMANDA FROST, *YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS* (2021).

32. Danilo Zak, *Immigration-Related Executive Actions During the COVID-19 Pandemic*, NAT’L IMMIGR. F. (Nov. 18, 2020), <https://immigrationforum.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic> [<https://perma.cc/F5SQ-5Q6R>]; Jorge Loweree et al., *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system>. [<https://perma.cc/6TDH-5XPU>].

33. The most comprehensive effort was made by ACLU Attorney Lucas Guttentag and Yale Law School Immigration clinic students. See Lucas Guttentag, *1059 Trump-Era Immigration Policies (and Their Current Status)*, IMMIGR. POL’Y TRACKING PROJECT, <https://immpolicytracking.org/home> [<https://perma.cc/BV76-FUGW>] (Aug. 23, 2021).

34. The countries impacted by COVID-19 border closures include China, Iran, the Schengen Area, the United Kingdom, Ireland, and later for variants in Brazil, South Africa, and India. See, e.g., Proclamation No. 9,984, 85 Fed. Reg. 6,709 (Feb. 5, 2020) (titled the “Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk”); Bureau of Consular Affairs, U.S. Dep’t of

But the tension of inclusion and exclusion is not time-bound: it is an ever-present condition of being a noncitizen in a world that consists of bounded nation-states. During the Rothgerber conference, panelists asked when the enforcement era began and when it will end. My response in the book is that it began at least forty years ago with the last major immigration reform in 1986, or possibly with the creation of the Department of Homeland Security (DHS) in 2002 as a legacy of Immigration and Naturalization Services (INS) following the September 11 terrorist attacks.³⁵ My answer at the conference was that the enforcement era did *not* end with the expiration of the Trump Administration, since integration and enforcement are both necessary components of immigration law.

Because of the ever-present risk of enforcement, formal citizenship is “necessary, but not sufficient” for full inclusion.³⁶ The increase in denaturalization and advocacy to end birthright citizenship for the children of immigrants demonstrates this persistent threat for foreign-born Americans.³⁷ So, too, does the historical experience of African Americans who attained formal citizenship in 1868 through the Fourteenth Amendment or women who attained it in 1920 through the Nineteenth Amendment; both groups still struggle to be full citizens, despite their legal status. Some groups get further than others; progress is not linear. As I say in *Pursuing Citizenship*, “integration proceeds steadily but unevenly” in the lives of immigrants.³⁸

State, *National Interest Exceptions for Certain Travelers from China, Iran, India, Brazil, South Africa, Schengen Area, United Kingdom, and Ireland*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-for-certain-travelers-from-china-iran-india-brazil-south-africa-schengen-area-united-kingdom-and-ireland.html> [https://perma.cc/L58S-GQ5M]; *but see* Proclamation No. 10,143, 86 Fed. Reg. 7,467 (Jan. 25, 2021).

35. See Adam Goodman, *supra* note 24 (discussing the origins of deportation); *Rothgerber Conference: Panel 3*, *supra* note 24.

36. CHEN, *supra* note 2, at 5.

37. This recognition extends the findings about legal liminality to say that it befits *all immigrants*. It is not just the undocumented experience. It is the condition of being a noncitizen during an era of enforcement. *Id.* at 33 (“This underlying sense of citizenship insecurity affects all immigrants and binds them together by virtue of their shared status as noncitizens.” (citing Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOCIOLOGY 999 (2006))).

38. CHEN, *supra* note 2, at 50.

This uneven integration shows the limits of the law for the project of immigrant integration and also the prospect of citizenship laws being used for exclusionary ends.³⁹ In particular, it shows the continuing significance of race and class in immigrant experiences of inequality. True to the lessons of critical theory and socio-legal scholarship, citizenship law and the dynamics of inequality are mutually constitutive: becoming a citizen is a social process that imbues legal categories with meaning that, in turn, can lead to literal rewriting of the formal categories.⁴⁰ The social construction of citizenship can run both ways—to integrate or to disintegrate, to include or exclude. In my book, these are described as “contradictory effects” and elaborated in a chapter on defensive citizenship.⁴¹ I am not making the case that legal status is more important than other markers of disadvantage. We need to pay attention to both during the enforcement eras that magnify the importance of formal citizenship for full inclusion.⁴²

II. SHIFTING POLITICAL CONDITIONS AND IMPLICATIONS FOR THE PATHS NOT TAKEN

While this symposium is for a law review, the scope and findings of the commentary are socio-legal. This Section begins by describing the federal government’s recent efforts to extend citizenship as a type of integration. It analyzes the Biden Administration’s preliminary proposals to extend access to formal citizenship and notes the measures aimed at deepening substantive belonging. As a whole, my assessment of these policies is cautiously optimistic: it acknowledges progress, even while laying bare the gap between the “law on the books” and the “law in action.”⁴³ Most politicians understandably focus on legalization,

39. *Id.* at 15 (referring to immigration law as a sword, not a shield—the “darker side of the law”); *see also* DIMITRY KOCHENOV, *CITIZENSHIP* (2019); Rose Cuison Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. (forthcoming 2022).

40. CHEN, *supra* note 2, at 33–38 (“[E]nforcement climate produces a social category of noncitizen defined by legal insecurity and . . . this category is expanding.”).

41. *Id.* at 57, 61–86.

42. *See id.* at 52. In future research, I will talk more about the processes and relationships between citizenship, race, and nationalism.

43. This gap is variously described as “bottom-up” versus “top-down,” law in action, and “new legal realism.” *See, e.g.*, RESEARCH HANDBOOK ON MODERN LEGAL REALISM (Shauhin Talesh et al. eds., 2021).

which creates new pathways to formal citizenship.⁴⁴ This emphasis is sensible since the failures of prior attempts to manage undocumented migration contribute to the challenge of immigrant integration. Though political futures are hard to predict, there is optimism that some new paths to permanent residence will be tread—perhaps first for DREAMers, and then for farmworkers who have waited years to be included in legislative reforms.

The election of President Joe Biden means these prospective citizens are in the spotlight. In his first weeks in office, President Biden issued an executive order that articulated appreciation for the contributions of immigrants:

New Americans and their children fuel our economy, working in every industry, including healthcare, construction, caregiving, manufacturing, service, and agriculture. They open and successfully run businesses at high rates, creating jobs for millions, and they contribute to our arts, culture, and government, providing new traditions, customs, and viewpoints. They are essential workers helping to keep our economy afloat and providing important services to Americans during a global pandemic. They have helped the United States lead the world in science, technology, and innovation. And they are on the frontlines of research to develop coronavirus disease 2019 (COVID-19) vaccines and treatments for those afflicted with the deadly disease.⁴⁵

The executive order stresses the need to “encourage full participation by immigrants, including refugees, in our civic life.”⁴⁶ To bolster participation in civic life, it sets an expectation that the federal government “should develop welcoming strategies that promote integration, inclusion, and citizenship, and it should embrace the full participation of the newest Americans in our democracy.”⁴⁷ To that end, it mandates an interagency strategy “to develop a plan to improve and expedite the naturalization

44. See *infra* notes 54–55, 91 and accompanying text.

45. Exec. Order No. 14,012, 86 Fed. Reg. 8,277 (Feb. 2, 2021) (titled “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans”).

46. *Id.*

47. *Id.*

process” that involves the Secretary of State, Attorney General, and Secretary of Homeland Security.⁴⁸

The President’s executive order is being implemented through an ambitious, across-government effort to boost naturalized citizenship. Most of these reforms involve reversals of Trump policies and incremental fixes within the USCIS: softening the tone and terminology used by the federal agency, restoring the long-standing citizenship test, and keeping down costs for these and other immigration benefits. The across-government efforts also encourage stronger partnerships with agencies outside of USCIS, including outreach to other federal agencies, local government, and nonprofit institutions. Some of the proposed fixes could have been lifted directly from my book—for example, notifications of eligibility to naturalize at key milestones, enlisting the post office and civil rights agencies in community outreach, insulating immigration agencies from politicization, and creating a centralized office in the White House to oversee immigrant integration—and I would be gratified, if so.⁴⁹ Other ideas were not contemplated in the book. I particularly like the idea of labeling green-card holders “Americans by Choice” (ABCs), because it recasts those seeking to affiliate with the United States in positive ways that emphasize their agency in becoming citizens.⁵⁰

The next Section will explain the Biden Administration and Congress’s key proposals to extend formal citizenship. After summarizing proposed legislation, it will walk through the implications of the proposals for substantive citizenship: social, economic, political, and legal. It will then compare these proposals with my own original proposal to provide expedited citizenship for essential service in the midst of a raft of exclusionary policies prompted by COVID-19.

48. *Id.*

49. See *Interagency Strategy for Promoting Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS.: NEWS (July 2, 2021), <https://www.uscis.gov/news/news-releases/dhs-releases-interagency-strategy-for-promoting-naturalization> [<https://perma.cc/FDW5-5CZW>].

50. Another promising idea is the collection of private donations to supplement user fees that have been shown to be problematic. Daimeon Shanks, *Entrance Fees: Self-Funded Agencies and the Economization of Immigration*, 93 U. COLO. L. REV. 403 (2022) (highlighting the erosion of democratic norms and public accountability as problems with user fees).

A. *Formal Paths to Citizenship*

On Capitol Hill, where new paths to citizenship must be created through federal legislation for the immigrants who are statutorily ineligible, hopes of legalization had been largely abandoned after more than a decade of failed attempts.⁵¹ For the moment, it appears the tide is turning.⁵² The question is whether it will crest or crash on the shores of political polarization. At the start of 2022, Congress is considering several bills that would accomplish this for certain groups of immigrants. The Citizenship Act of 2021 is the most comprehensive, and it would create expedited paths for DREAMers, Temporary Protected Status (TPS) beneficiaries, and agricultural workers, in addition to a general legalization provision for undocumented immigrants and some temporary workers.⁵³ Separate legislation has been introduced for DREAMers and those with TPS.⁵⁴ Another lesser-known bill addresses Citizenship for Essential Workers.⁵⁵ As of fall 2021, some of these provisions had been introduced as stand-alone legislation, and others had been introduced as amendments to existing legislation or components of the budget reconciliation process, with passage pending going into the end of the year.⁵⁶ Whichever provision becomes the vehicle for legis-

51. As one example, public debate used to focus on comprehensive immigration reform, but the discussion now centers on piecemeal legislation and federal executive action. *See generally* MARC R. ROSENBLUM, MIGRATION POLY INST., U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM (2011), <https://www.migrationpolicy.org/sites/default/files/publications/RMSG-post-9-11policy.pdf> [<https://perma.cc/LBM3-VFKN>]. To learn more about President Joe Biden's plan, see *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system> [<https://perma.cc/8LD5-8RM2>].

52. *See* DONALD KERWIN, ROBERT WARREN & CHARLES WHEELER, CTR. FOR MIGRATION STUDS., MAKING CITIZENSHIP AN ORGANIZING PRINCIPLE OF US IMMIGRATION (June 2021), <https://cmsny.org/wp-content/uploads/2021/06/Making-Citizenship-an-Organizing-Principle-of-the-US-Immigration-06-02-2021.pdf> [<https://perma.cc/4HME-VFGW>].

53. U.S. Citizenship Act, H.R. 1177, 117th Cong. § 1101 (2021); S. 348, 117th Cong. (2021).

54. American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021).

55. Citizenship for Essential Workers Act, S. 747, 117th Cong. (2021); Citizenship for Essential Workers Act of 2021, H.R. 1909, 117th Cong. (2021).

56. The Registry Act of 1929, 8 U.S.C. § 1259. But the Senate Parliamentarian rejected the effort to use budget reconciliation to incorporate a DREAM Act. *See*

lative reform on immigration, a path to citizenship could be created for at least some of these groups of otherwise undocumented immigrants.

Still, there are other dimensions of belonging and other types of citizenship missing from the legislative agenda. Missing from the policy agenda are the polar extremes—especially low-wage workers and “super-undocumented immigrants”⁵⁷ who are ineligible for temporary protections like DACA. Also missing are the foreign-born citizens who have already naturalized. The immigrants at these extremes need also to be part of the effort to expand pathways to citizenship.

B. Substantive Paths to Citizenship

Not only do immigrants need access to formal citizenship, but they also need access to social, economic, and political belonging. This Section considers how well the Biden Administration’s and Congress’ proposals tend to each dimension of substantive citizenship and suggests improvements to those proposals.

1. Social: From Alien to Noncitizen to Citizen

The official language used to refer to immigrants was divisive and damaging during the Trump Administration. President Trump and his political allies referred to “illegal aliens” and appealed to the darker sides of human nature with thinly veiled, dehumanizing references to criminal aliens, enemy combatants, and foreign workers.⁵⁸ President Biden sought to change the tone in big and small ways. Although he has not commanded his agencies to revise every federal immigration regulation, he has

Lisa Desjardins, *Read the Senate Rules Decision that Blocks Democrats from Putting Immigration Reform in Budget*, PBS NEWS HOUR (Sept. 20, 2021), <https://www.pbs.org/newshour/politics/read-the-senate-rules-decision-that-blocks-democrats-from-putting-immigration-reform-in-budget> [https://perma.cc/PNB2-NQ3G].

57. This term was coined by Michael Wishnie at an Immigration Law Teachers Conference. *ALBA Roundtable on Immigration Reform: What Can Be Done*, VOLUNTEER (June 15, 2013), <https://albavolunteer.org/2013/06/alba-roundtable-on-immigration-reform> [https://perma.cc/56M7-U4Q9].

58. Eugene Scott, *Trump’s Most Insulting – and Violent – Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants> [https://perma.cc/7A5S-ACKU].

ordered the federal government in its official communications to begin using the terms “noncitizen” or “immigrant” instead of “alien.”⁵⁹ He himself has been using this inclusionary language. President Biden made this change for the executive branch. The next step is to enlist cooperation from Congress to revise the terminology in the immigration statute.

Another example is the rewriting of the USCIS mission statement to reincorporate “customer service” and references to the United States as a “nation of immigrants,” a matter that is under review at the time of this writing.⁶⁰ The USCIS is responsible for administering immigration benefits, but immigrant advocates have noted the agency needs to be reoriented to reflect service to immigrants, rather than duplicating enforcement efforts through divisions focused on fraud and national security.⁶¹ President Biden has ordered both a full review of USCIS policy changes and sweeping actions to reduce the backlog and waiting time for immigration benefits at USCIS.

President Biden has used political speeches and executive orders to emphasize the dignity of immigrants, noting their cultural and economic contributions. He has made less progress in Congress, largely due to pressures working against the White

59. Memorandum from Troy A. Miller, Senior Off. Performing the Duties of the Comm’r, to U.S. Customs and Border Patrol (Apr. 19, 2021), <https://lawprofessors.typepad.com/files/4-19-21-cbp-memo.pdf> [<https://perma.cc/TRY8-47T>]; see generally Hamed Aleaziz, *Illegal Alien Will No Longer Be Used in Many U.S. Government Communications*, BUZZFEED NEWS (Feb. 16, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/illegal-alien-uscis-biden-term> [<https://perma.cc/F3MD-GJFJ>]; Joel Rose, *Immigration Agencies Ordered Not to Use Term ‘Illegal Alien’ Under New Biden Policy*, NPR (Apr. 19, 2021), <https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-policy> [<https://perma.cc/J7VW-FXMY>].

60. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T HOMELAND SEC., USCIS POLICY MANUAL 2019 EDITION 8 (Liberty Legal Publishing rev., 2019). The mission statement was changed under Acting Director Francis Cissna. The reversal is being taken in small steps with a survey being administered to employees. Stef W. Kight, *USCIS Using Internal Survey to Help Rewrite Immigration Agency’s Mission Statement*, AXIOS (Mar. 31, 2021), <https://www.axios.com/immigration-agency-change-mission-statement-survey-1fc0b5e4-e70d-459c-af19-2882cfaf5afc.html> [<https://perma.cc/C98G-78XV>]. Notice is being circulated to the public in the Federal Register calling for comments on lowering barriers to naturalization. Seventy-five-thousand responses were filed. *DHS Seeks Public Input to Identify Barriers that Limit or Prevent Access to Immigration Benefits and Services*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 19, 2021), <https://www.uscis.gov/news/news-releases/dhs-seeks-public-input-to-identify-barriers-that-limit-or-prevent-access-to-immigration-benefits-and> [<https://perma.cc/NWX7-BTL2>].

61. *DHS Seeks Public Input to Identify Barriers that Limit or Prevent Access to Immigration Benefits and Services*, *supra* note 60.

House. Lawyers and immigrants' advocates play an especially important role in changing the tenor and rhetoric around immigrants in the United States and pushing back against these pressures.

2. Economic

Economic incorporation is critical to immigrants' individual success and societal acceptance. Building self-sufficiency with English and job training—directly or through partnerships and grants to local entities, as called for in the Citizenship Act of 2021—will alleviate the need for the class-based distinctions.

On March 15, 2021, DHS Secretary Mayorkas vacated a Trump-era rule making it harder for immigrants who receive public benefits like Medicaid to receive a green card.⁶² With the removal of the expanded public charge rule, DHS is now applying the 1999 Interim Field Guidance issued by INS interpreting the public charge ground of inadmissibility and the associated Department of State memo.⁶³ This means that applicants for adjustment of status or immigrant visas are no longer affected by past enrollment in welfare programs.⁶⁴ The Biden Administration and Congress took further action to increase the economic integration of immigrants by ensuring that mixed-status families qualified for the third round of stimulus checks after being excluded from the first two COVID-relief bills.⁶⁵

62. See Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). USCIS stopped applying the public charge rule to pending applications on March 9, 2021. For more information about the public charge rule and related litigation, see generally *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> [<https://perma.cc/7C5C-3FHS>] (summarizing the rule and related USCIS litigation); see also *DHS Confirms It Is No Longer Enforcing the 2019 Public Charge Rule*, GOLDBLUM & POLLINS IMMIGR. L. (Mar. 9, 2021), <https://www.goldblumfirm.com/news-alerts/2021/3/9/supreme-court-dismisses-case-related-to-trump-era-public-charge-rule-mar-9-2021> [<https://perma.cc/M4CL-NSEX>] (same).

63. Charles Wheeler, *DHS Public Charge Rule is Dead: Hurrah!!*, CLINIC LEGAL (Mar. 17, 2021), <https://cliniclegal.org/resources/ground-inadmissibility-and-deportability/public-charge/dhs-public-charge-rule-dead-hurrah> [<https://perma.cc/YF44-4XJX>].

64. *Id.*

65. Clifford Colby, *Mixed-Status Families Qualify for the Third Stimulus Check. Here's What That Means*, CNET (Mar. 11, 2021), <https://www.cnet.com/personal-finance/mixed-status-families-qualify-for-the-third-stimulus-check-heres-what-that-means> [<https://perma.cc/5PA8-YN6W>].

Another facet of economic incorporation is educational attainment. Universities need to take stock of travel policies that restrict international students. For example, as colleges return to in-person operations and impose mandatory vaccination, international students are being left out of the plans.⁶⁶ Many of these policies are still in place at the time of this writing.

The government's response to the global pandemic excluded immigrants from entering the United States in both formal and substantive terms. At least two of these policies banned foreign workers in an effort to reduce competition for domestic workers during an economic downturn. These bans illustrate a reluctance to protect immigrant workers during a time of national protection.⁶⁷ Even when immigrant workers were offered protection, the government showed disregard for immigrant worker lives. For example, President Trump ordered meatpacking plants to stay open in the face of rising COVID-19 cases on grounds that these predominantly undocumented immigrant workers in food supply were "essential," even though they had not qualified for other coronavirus protections or benefits.⁶⁸ The post-election administration has leveled some of these barriers against poor immigrants, international students, and foreign workers, but barriers remain at each phase of integration: entry, education, employment, and workplace protection. Thus, even in this improved political climate, immigrants continue to face hurdles to economic integration and societal acceptance.

66. Rukmini Callimachi, *Colleges Say Students Must Get a Covid Vaccine. But No, Not That One*, N.Y. TIMES (June 3, 2021), <https://www.nytimes.com/2021/06/03/us/coronavirus-vaccine-college-students.html> [<https://perma.cc/4T95-Q9S9>].

67. See Proclamation No. 10,014, 85 Fed. Reg. 23,441 (Apr. 27, 2020). The Proclamation, titled "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," suspended entry for most individuals not already in the United States seeking to immigrate. *Id.*; see also Proclamation No. 10,052, 85 Fed. Reg. 38,263 (June 25, 2020) (Trump extending the ban to temporary workers holding H-1B, H-2B, L-1, and some J visas); Proclamation No. 10,131, 86 Fed. Reg. 417 (Jan. 6, 2021) (re-extending Trump's bans until March 31, 2021). President Biden revoked the economic-oriented immigrant ban and extensions on February 24, 2021, and let the nonimmigrant ban expire. *Proclamation Suspending Entry of Certain H, J, and L Nonimmigrants*, NAT'L ASSN. FOR FOREIGN STUDENT AFFS. (Apr. 1, 2021), <https://www.nafsa.org/regulatory-information/proclamation-suspending-entry-certain-h-j-and-l-nonimmigrants> [<https://perma.cc/R89Q-WKN8>].

68. See Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (May 1, 2020). Trump ordered the meatpacking industry to remain open, even while acknowledging such plants are especially prone to COVID outbreaks, in order "to ensure a continued supply of protein for Americans."

3. Political

Immigrant exclusion fortifies the boundaries of political membership. The Trump Administration used executive agencies to target and discriminate against immigrants by attempting to introduce a question on the decennial census form asking about the individual's citizenship status.⁶⁹ This decision ran contrary to the consistent stance of the Census Bureau, which "recommended against addition of a citizenship question to the census questionnaire."⁷⁰ From 1980 through 2018, the Census Bureau argued that adding a citizenship question would reduce response rates and compromise the accuracy of the decennial enumeration, so the sudden and poorly justified reversal of the Bureau's position could not withstand judicial review.⁷¹ With the Trump Administration's attempt to obtain citizenship through the census questionnaire blocked, it decided to seek the information through Executive Order 13,880, "Collecting Information About Citizenship Status in Connection with the Decennial Census."⁷² Executive Order 13,880 ordered that "all executive departments and agencies provide the Department [of Commerce] the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country, including . . . any access that the Department may request to administrative records that may be useful in accomplishing that objective."⁷³ A protracted legal battle over the inclusion of immigrants in the census has been resolved in favor of keeping noncitizens part of the total population—at least for now.

President Biden moved quickly to quash efforts to exclude immigrants from the census and appointed a Latino census director with statistics expertise and involvement in prior efforts to investigate inaccuracy in the collection of census data, given

69. See Letter from Wilbur Ross, Sec'y of Com., U.S. Dep't of Com., to Karen Dunn Kelley, Under Sec'y for Econ. Affs., U.S. Dep't of Com. (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf [<https://perma.cc/623C-Q3JN>].

70. *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 530 (S.D.N.Y. 2019), *cert. granted*, 139 S. Ct. 953 (2019), *aff'd in part, rev'd in part*, 138 S. Ct. 2551 (2019).

71. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

72. Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (Jul. 11, 2019).

73. *Id.*

the highly irregular processes.⁷⁴ He has also urged Congress to enact bipartisan legislation expanding ballot-box access and oppose state-level restrictions in reaction to what conservatives consider an invasion of immigrants who will shift electoral outcomes toward the Democratic Party.⁷⁵ This has salutary effects for reapportionment, redistricting, and ultimately *political* representation.⁷⁶

4. Legal

The centerpiece of President Biden's proposed legislation is the Citizenship Act of 2021 and its legalization provisions for millions of undocumented immigrants.⁷⁷ The legislation includes an eight-year path to citizenship for immigrants who meet statutory criteria.⁷⁸ It also includes expedited paths to citizenship for DREAMers and agricultural workers.⁷⁹ Essential workers would fall into the general legalization provision unless they are already part of the subset who qualify for expedited citizenship as agriculture workers. Or essential workers may qualify for the general legalization provision through a waiver for nonimmigrants on temporary work visas.

Buried deeper in the legislation are ideas to smooth the pathway to citizenship by reversing some of the more damaging regulatory and policy changes at USCIS. For green-card holders,

74. Hansi Lo Wang, *Biden to Make Historic Census Director Pick with Latinx Statistician Rob Santos*, NPR (Apr. 13, 2021), <https://www.npr.org/2021/04/13/986612530/biden-to-make-historic-census-director-pick-with-latinx-statistician-rob-santos> [https://perma.cc/WBG7-TAG7].

75. See e.g. For the People Act of 2021, H.R. 1, 117th Cong. (2021). In January 2021, Democrats in the 117th Congress re-introduced the bill as part of the For the People Act of 2021 to continue the effort to improve election processes and prevent voter suppression. S. 1, 117th Cong. (2021). It was voted down in the Senate in January 2022. More modest proposals are being considered as of this printing..

76. Beyond the census, political membership is also at stake in policies that extend citizenship on the basis of *jus meritum*, or the right of merit. See *infra* Section III.B.

77. U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021). Piecemeal legislation, such as the American Dream and Promise Act and the Citizenship for Essential Workers Act, have also been introduced. A comparison of their legalization provisions to the Citizenship Act of 2021 appears in the text accompanying *supra* notes 51–55, and *infra* 131–132.

78. U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 1106 (2021).

79. *Id.* at §§ 1103, 1105 (legalization programs for DREAMers and agricultural workers). Other protected groups include beneficiaries of TPS, DED, and LGBT partners of US citizens and LPRs. *Id.* at §§ 1104, 3109.

USCIS is reconsidering intensified scrutiny and fraud investigations, as well as the public charge rule that deterred immigrants from seeking public benefits to which they are legally entitled for fear of being barred in the future.⁸⁰ With urging from the Biden Administration, the agency rolled back changes to the citizenship test that would have been especially difficult for those with limited English proficiency and disabilities.⁸¹ The agency also stood by a federal court decision to roll back dramatic increases in citizenship application fees.⁸² The legislation calls for increased attention and funding for naturalization to clear backlogs, recapturing unused visas to speed the long waits for employment and family-sponsored visas, and elimination of unlawful presence bars to encourage consular processing once an immigrant becomes eligible.

Some of President Biden's ideas overlap with the proposals suggested in *Pursuing Citizenship*, including clearing numerous obstacles that lawful permanent residents confront on their path to citizenship.⁸³ Several technical fixes have been made through executive orders or through regulatory changes in the first one-hundred days of the Biden Administration.⁸⁴ Many of them are specific to USCIS operations. There is pressure on the USCIS to restore normal vetting for lawful permanent residents and other legal immigrants, rather than the heightened vetting and interviews for immigrants applying based on employment or refugee

80. See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). As of this writing, the Biden Administration has dropped challenges to the rule in multiple federal courts and is reverting to the 1999 Interim Field Guidance that is more immigrant friendly. 64 Fed. Reg. 24,689 (Mar. 26, 1999). The DOS public charge rule, in turn, had been enjoined by a district court in New York since July 29, 2020; the State Department updated its Foreign Affairs Manual in March 2021 to provide guidance on the agency interpretation of inadmissibility for public charge in keeping with inclusionary principles. DEP'T OF STATE, 9 FAM 302.8: (U) *Public Charge - INA 212(A)(4)*, FOREIGN AFFS. MANUAL (Mar. 25, 2021), <https://fam.state.gov/FAM/09FAM/09FAM030208.html> [<https://perma.cc/C9BG-P24F>].

81. See *The 2020 Version of the Civics Test*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 23, 2021), <https://www.uscis.gov/citizenship/2020test> [<https://perma.cc/JX7G-BL6U>]; Chen & New, *supra* note 20.

82. *Featured Issue: Changes to the USCIS Fee Schedule*, AM. IMMIGR. LAW. ASS'N (Jan. 29, 2021), <https://www.aila.org/advo-media/issues/all/changes-to-uscis-fee-schedule> <https://www.aila.org/advo-media/issues/all/changes-to-uscis-fee-schedule> [<https://perma.cc/B6FJ-F4DY>].

83. CHEN, *supra* note 2, at 115–16.

84. *Interagency Strategy for Promoting Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS.: CITIZENSHIP RES. CTR., <https://www.uscis.gov/promotingnaturalization> [<https://perma.cc/V5AG-T8BP>].

statuses that render them prescreened.⁸⁵ There are calls to insulate the adjudication of visas from enforcement wings of the immigration bureaucracy, which would allow immigrants to apply for or renew immigration benefits that put them on a path to permanent residence at the USCIS without fear that an unsuccessful application would lead to a summons to immigration court.⁸⁶

Other repairs to the naturalization process still require implementation. The USCIS backlog persists.⁸⁷ Legislators need to think beyond permanent residents to those who are in the pipeline for citizenship but who do not yet possess a green card. Studies show that 80 percent of immigrants who obtained employment-based green cards adjusted from a temporary visa with which they were already working in the United States.⁸⁸ Recognizing that most of these workers do not enter directly with a green card more accurately reflects how immigration and labor markets already operate and ensures that immigrants can keep moving through the pipeline for citizenship. As one example, high-skilled workers who enter on a temporary visa, such as an H-1B high-skilled worker visa, can also express an intention to become green-card holders once eligible. The same is not true for lower-skilled workers, who typically enter the United States on temporary work visas that do not permit them to adjust status later on. Some hold temporary visas that lapse; others choose to work without authorization. These transgressions block them from being able to get back on a path to citizenship unless they find an exception that enables them to adjust status inside the United States or leave the country and return to resume work after a period of time. Devising new bridge visas to facilitate the

85. *Id.*; KERWIN, WARREN & WHEELER, *supra* note 52; U.S. Citizenship & Immigr. Serv., *supra* note 78; CHEN, *supra* note 2, at 115–16; *Immigrants Serving in the Military Have Earned Their Citizenship*, *infra* note 126.

86. KERWIN, WARREN & WHEELER, *supra* note 52, at 14.

87. GOV'T ACCOUNTABILITY OFF., ACTIONS NEEDED TO ADDRESS PENDING CASELOAD, GAO-21-529 (2021), <https://www.gao.gov/assets/gao-21-529.pdf> [<https://perma.cc/36WZ-F4UE>]; *cf.* U.S. CITIZENSHIP & IMMIGR. SERVS., INTERAGENCY STRATEGY FOR PROMOTING NATURALIZATION (2021), https://www.uscis.gov/sites/default/files/document/reports/Interagency_Strategy_for_Promoting_Naturalization_Final.pdf [<https://perma.cc/DW96-USLA>].

88. Table 6. *Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2017 to 2019*, DEP'T HOMELAND SEC. (Oct. 28, 2020), <https://www.dhs.gov/immigration-statistics/yearbook/2019/table6> [<https://perma.cc/6X9P-DE6G>]; *see also The New Immigration Survey*, WALLACE HALL, PRINCETON UNIV. (2005), <https://nis.princeton.edu> [<https://perma.cc/TY3M-MGUD>].

transition from unauthorized or temporary work visas to permanent visas would keep the pipeline flowing. The bridge visas could be granted without exceeding Congressional allotments by recapturing unused visas in the normal employment- and family-based admissions.⁸⁹ Direct admission could remain for the smaller number of immigrants who already qualify for a green card at entry.⁹⁰

Temporary workers have remained on the periphery of the legislative agenda, but they get more attention in the Citizenship Act of 2021, which includes provisions to legalize agricultural and critical infrastructure workers who may have been initially admitted on temporary visas and provides waivers from statutory exceptions to the general legalization procedures. The statutory list of qualifying jobs focuses mostly on “critical infrastructure workers” in agriculture, food service, and construction. The statutory list specifies that the workers must have worked for “at least 2,300 hours or 400 workdays during the 5-year period preceding the application,” must clear background checks, and must pay penalties, among other provisions.⁹¹

If enacted, this bill would benefit millions of immigrants. Yet the categories of employment recognized for legalization in the statute are contingent on the ever-evolving list in the four versions of the “Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID–19 Response” that was initially used to determine whose work should

89. Muzaffar Chishti, Julia Gelatt, & Doris Meissner, *Rethinking the U.S. Legal Immigration System: A Policy Road Map*, MIGRATION POL’Y INST. (May 2021), https://www.migrationpolicy.org/sites/default/files/publications/Rethinking-Legal-Immigration-Roadmap_FINAL.pdf [<https://perma.cc/G7CE-UWYY>]. The bridge visa, as conceived by MPI, would do four things: (1) expand employment-based immigration pathways for needed workers across the skills spectrum, (2) align temporary and permanent immigration streams, (3) expand labor rights beyond what current temporary workers may currently claim, and (4) provide options for shorter-term and longer-term migration. *Id.*

90. *Id.*

91. U.S. Citizenship Act, H.R. 1177, 117th Cong. § 245F (2021); S. 348, 117th Cong. (2021). Specific provisions pertaining to certain sectors are adapted from piecemeal legislation, such as the Farm Workforce Modernization Act of 2019. In addition to enhancing the ability of H-2A workers to obtain green cards, the Farm Workforce Modernization Act would create a Certified Agricultural Worker status as a limited protection against deportation that can be renewed indefinitely. Farm Workforce Modernization Act of 2019, H.R. 5038, 116th Cong. (2019–2020). In May 2020, the Healthcare Workforce Resilience Act was introduced in the House and Senate to permit immigrant nurses and physicians to apply for unused employment-based visas during the COVID-19 emergency declaration. S.3599 116th Cong. (2020).

remain open during initial lockdown periods.⁹² The Cybersecurity and International Security Agency (CISA) list was subsequently revised to accommodate specialized risk management strategies that promote workplace safety and protections for the workers, such as vaccination. For example, Versions 1 and 2 of the CISA guidance focus on healthcare workers but *exclude* teachers and dependent caregivers who were not originally seen as essential workers.⁹³ Version 3 adds teachers and caregivers to the significantly expanded list of workers involved in continuity of government functions and infrastructure supports.⁹⁴ The Version 3 guidance itself notes the list is “overinclusive.”⁹⁵ Yet by Version 4, which allocated a limited supply of vaccines to critical workers, the revised list of critical workers grew even larger.⁹⁶ By then, the term “critical infrastructure” *included* financial services, realtors, and other types of work peripherally

92. For example, the U.S. Citizenship Act of 2021 § 245G(c)(2)(A)(IV) specifically exempts CISA-designated “essential workers” from inadmissibility bars that would normally apply. U.S. Citizenship Act, H.R. 1177, 117th Cong. § 245G(c)(2)(A)(IV) (2021); S. 348, 117th Cong. (2021).

93. The DHS Cybersecurity and Infrastructure Security Agency has issued multiple versions of its guidance since its introduction on March 19, 2020 (CISA Guidance Version 1). Memorandum from Christopher C. Krebs, Dir., CISA, on Identification of Essential Infrastructure Workers During COVID-19 Response (Mar. 19, 2020) [hereinafter CISA Guidance Version 1], <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf> [<https://perma.cc/8F2N-2NNL>]; Advisory Memorandum from Christopher C. Krebs, Dir., CISA, on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 28, 2020) [hereinafter CISA Guidance Version 2], https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf [<https://perma.cc/WJ3V-N5MY>].

94. Advisory Memorandum from Christopher C. Krebs, Dir., CISA, on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (April 17, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf [<https://perma.cc/2STV-DLUG>].

95. *Id.*

96. Advisory Memorandum from Brandon Wales, Acting Dir., CISA, on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (May 19, 2020), https://www.cisa.gov/sites/default/files/publications/ECIW_4.0_Guidance_on_Essential_Critical_Infrastructure_Workers_Final3_508_0.pdf [<https://perma.cc/42AL-4SHN>]. The DHS Cybersecurity and Infrastructure Security Agency has since released another version, CISA Guidance Version 4.1. Advisory Memorandum from Jen Easterly, Dir., CISA, on Ensuring Essential Critical Infrastructure Workers’ Ability to Work During the COVID-19 Response (Aug. 10, 2021), <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> [<https://perma.cc/6DQM-WJ5U>].

related to public safety or economic recovery.⁹⁷ Beyond legalization, the commitment to essential workers' integration has only been partial: other than facilitating their labor, there has been continuing resistance to their eligibility for COVID-19 vaccination and stimulus relief.⁹⁸

The statutory list of essential workers that can adjust to permanent-resident status is more fixed in the Citizenship for Essential Workers Act.⁹⁹ It includes nineteen occupations in healthcare, emergency response, sanitation, food supply, and domestic work in child care, home care, or house cleaning among others.¹⁰⁰ It also includes immigrants who lost jobs or stopped working due to a high degree of risk to the immigrant's health and safety, or whose immediate family members were essential workers and died due to COVID-19.¹⁰¹ This list of qualifications is crafted by legislators. While it permits greater precision than the CISA guidance, there is less flexibility to adapt the list to the changing circumstances of the pandemic—for example, teachers who were not included in March 2020 could not be easily added in March 2021 when a greater number returned to the classroom and sought priority for vaccination.

Pursuing Citizenship in the Enforcement Era argues that temporary visitors need “on-ramps” to citizenship that ease the transitions between legal statuses. The Citizenship Act of 2021 and the Essential Workers Act provide these kinds of on-ramps, but they are not reflective of the lists of included workers. More

97. *Id.*

98. For many temporary workers, integrative policies have long been elusive, and past policies have not always covered them. For example, registry programs have not been widely used since 1921. See Registry Act of 1929, 8 U.S.C. § 1259 (2018). For another example, IRCA amnesty in 1986 applied only to “special agricultural workers.” Immigration Control and Reform Act of 1986, Pub. L. No. 99-603 (1986). The latest HEROES Act, aimed at helping Americans recover during COVID-19, includes not only financial support but automatic extensions of work authorization for DACA and TPS recipients and temporary protection from deportation for undocumented immigrants who are doing essential work. *Building a More Dynamic Economy: The Benefits of Immigration: Hearing Before the H. Comm. on the Budget*, 116th Cong. 123, 127–28 (2019) [hereinafter Jawetz Statement], https://cdn.americanprogress.org/content/uploads/2020/09/28102223/JawetzImmigrantsCOVID-testimony1.pdf?_ga=2.157819187.824041349.1631243071-1491604451.1631243071 [https://perma.cc/U5HY-SVNJ] (containing the statement of Tom Jawetz, Vice President for Immigration Policy, American Progress); The Heroes Act, H.R. 6800, 116th Cong., 2d Sess. (2020).

99. Citizenship for Essential Workers Act, H.R. 1909, 117th Cong. (2021); Citizenship for Essential Workers Act, S. 747, 117th Cong. § 245B (2021).

100. *Id.*

101. *Id.*

generally, the United States needs to rethink its biases against noncitizen workers, acknowledge the complicated needs of the industries that employ them, and reflect on the purpose of citizenship. These blind spots impede the integration of immigrants and discourage much-needed workers from coming to, or remaining in, the United States. The next Part examines the theoretical underpinnings of citizenship and advances a specific proposal to extend expedited citizenship for essential service based on *jus meritum*, or the law of merit. It first defines essential workers and enumerates what rights and obligations flow from being classified an essential worker. It then considers the ethics of extending citizenship to essential workers for their service. It concludes by considering some of the operational details of how best to deliver citizenship for essential service, making comparisons between my proposal and the others under consideration.

III. AN IMMIGRANT INTEGRATION AGENDA FOR ESSENTIAL WORKERS

Up until now, this Epilogue has pointed out ways that President Biden's proposals fulfill the integrative principles identified in *Pursuing Citizenship in the Enforcement Era* to achieve more equitable results for lawful permanent residents and undocumented immigrants. This Part goes a step further: it sets forth a theoretical foundation for a proposal to extend expedited citizenship to the five-million immigrants who are essential workers and a proposal for a self-updating mechanism to keep the list of workers attuned to changing economic needs and public health conditions.¹⁰² As described in the prior Part, these immigrant workers mostly labor in agriculture, construction, hospitality, domestic care, and healthcare.¹⁰³ Many of these

102. See Claudia Montecinos, *RELEASE: Immigrant Essential Workers Who Lack Permanent Legal Status Have Earned a Pathway to Citizenship, Says CAP's Tom Wong in Congressional Hearing*, CTR. FOR AM. PROGRESS (May 12, 2021), <https://www.americanprogress.org/press/release/2021/05/12/499469/release-immigrant-essential-workers-lack-permanent-legal-status-earned-pathway-citizenship-says-caps-tom-wong-congressional-hearing> [https://perma.cc/X6J7-JAU8] (summarizing Tom Wong's testimony before the Senate Judiciary Subcommittee on Immigration, Citizenship, and Border Hearing on "The Essential Role of Immigrant Workers in America").

103. According to Center for America Progress estimates, 389,000 immigrants work in agriculture and food processing; 225,999 work in healthcare; 190,000 work in custodial or administrative job functions within essential workplaces; and millions more work in education, dependent care, and critical infrastructure. Jawetz Statement, *supra* note 98, at 1–2.

immigrants are temporary workers or undocumented workers who are not eligible to become permanent residents and do not have a path to citizenship. Nannies and housekeepers who work informally to keep American families afloat cannot obtain lawful status or draw public benefits. Even legal immigrants with visas, such as healthcare workers who qualify as international medical graduates or farmworkers on temporary work visas, do not have a way to become citizens. The result is insufficient legal protection for immigrant workers and labor shortages in areas of need.¹⁰⁴

The chronic problems of immigrant workers became more acute during the global pandemic. In the year between the completion of *Pursuing Citizenship in the Enforcement Era* and the Rothgerber Symposium (March 2020 to April 2021), the pandemic fueled restrictions in nearly every sphere of life. From the outset of the pandemic, COVID-19 led to border closures on the West Coast (to China), and the closures spread to the East Coast (to the United Kingdom and Europe), the U.S.-Mexico and U.S.-Canadian borders, and to all the airports in between as COVID-19 variants persisted.¹⁰⁵ The Trump Administration implemented some of its most draconian immigrant-worker bans during this time period. While these worker bans were initially justified as an emergency response to the pandemic, they proved to be a convenient means of effectuating long-sought worker restrictions. Only some of these restrictive policies were rolled back as the pandemic continued into the Biden Administration. In short, COVID-19 became a period of intensive enforcement against immigrants generally and immigrant workers especially.

For this reason, COVID-19 provides a stress test for new proposals to rebalance integration and enforcement. As already described, the legalization provisions of the Citizenship Act of 2021 are directed at formal citizenship for many groups, including some groups of essential workers specified by Congress or by

104. More discussion of the cross-cutting effects of economics during COVID-19 appears *infra*, Sections III.C–D.

105. See, e.g., Proclamation No. 9,984, *supra* note 34; Michelle Hackman, Andrew Restuccia & Stephanie Armour, *CDC Officials Objected to Order Turning Away Migrants at Border*, WALL ST. J. (Oct. 3, 2020), <https://www.wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601> [<http://perma.cc/8S4F-H2WW>] (describing Stephen Miller's role in the Title 42 policy).

CISA. Put next to the provisions for DREAMers and TPS recipients, the essential-worker provisions read as part of a wish list of expanded pathways for citizenship that has been the subject of years of lobbying. For these provisions to obtain public support and withstand the shifting terrain of political and economic windstorms and a public health crisis, they need a more principled basis. My proposal to extend expedited citizenship for essential service makes *jus meritum* the theoretical justification for the list of covered workers, and it provides a self-updating mechanism for adapting the list to changing political, economic, and public health conditions.

A. Who Is an Essential Worker?

On March 19, 2020, the U.S. government began to issue orders closing schools, businesses, and nonessential services to slow the spread of COVID-19, which the World Health Organization had one week prior declared a global pandemic.¹⁰⁶ The U.S. Department of Homeland Security's CISA, tasked with "providing strategic guidance" and "promoting a national unity of effort" to ensure public health, safety, and community well-being, issued a memorandum to identify "essential critical infrastructure workers."¹⁰⁷ These essential workers would continue working, in exception to the general restrictions, during the COVID-19 response. The guidance stated, "If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule."¹⁰⁸

CISA developed an initial list to help state and local officials "protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security."¹⁰⁹ The list of workers included workers in medicine, law enforcement, telecommunications, food and agriculture, transportation, and public works. The CISA guidance contained caveats stating the list was not exhaustive and that

106. WHO Director-General's Opening Remarks at the Media Briefing on COVID-19, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> [https://perma.cc/87J3-DWK9].

107. CISA Guidance Version 1, *supra* note 93.

108. *Id.*

109. *Id.*

the state and local governments who would be ultimately in charge of implementing response activities should exercise their own judgment about how best to balance public safety and continued delivery of critical services.

B. COVID-19 as a Stress Test for Extending Citizenship to Immigrant Workers

Given the breadth of activities impacting public health and safety, national security, and community well-being, COVID-19 transformed nearly every facet of immigration law. The scale of change was similar to the government response following the September 11 terrorist attacks and led to wartime analogies. The federal government included language in Version 1 of the CISA guidance about the coronavirus's impact on "community well-being."¹¹⁰ The term "community well-being" is undefined in the guidance itself, and "community well-being" is not a defining characteristic of the jobs on the list, which includes not only keeping public institutions running but also filling gaps in private services. While the CISA guidance was devised in the context of "critical infrastructure," both public and private institutions have adopted its job classifications and now use them for many purposes. The CISA guidance determines who has permission to work in person; what type of protective equipment is required to work; and how much COVID testing, vaccination, and sick leave will cost.¹¹¹ It shapes protections from deportation and conditions in detention. It influences social ties by imposing isolation, nurturing trust in government, and establishing the inclusion of immigrants in communities.

In essence, COVID-19 serves as a stress test for the principles espoused in the book: the United States owes noncitizens the opportunity to integrate while living in the United States for the betterment of the individual and society.¹¹² COVID-19 magnified the enduring challenge of immigrant integration during

110. *Id.*

111. Some of these manifested themselves in pretextual policies, and others were blatant exploitations of demonstrable national emergency. See Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and COVID-19*, 169 U. PA. L. REV. 313 (2021); Cecilia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J.F. 620 (2020); Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 590 (2020). I am also working on an article (with Daimeon Shanks) about regulatory policymaking dysfunctions that emerge from the politicization of national emergencies.

112. CHEN, *supra* note 2, at 41.

an enforcement era. Consequently, the core questions in the book are placed in stark relief: What are the prospects for formal citizenship in promoting integration during global emergencies? What are the limitations? What kind of a policy could thread the needle of building the nation and ensuring public safety during a global pandemic?

C. Ethics of Extending Citizenship to Essential Workers

In this Section, I argue that the U.S. government has affirmative responsibilities to integrate newcomers and has a special responsibility toward those who serve the nation in times of need, regardless of their legal status. Key among these responsibilities is the provision of opportunities for formal and substantive citizenship for those who seek them and meet certain qualifications. My proposal to expand citizenship for essential service illustrates one way to reconcile the dueling purposes of citizenship.

As many scholars have noted, citizenship consists of a bundle of rights and duties, legal status, and civic engagement.¹¹³ Formal citizenship is dispensed by the federal government, and it is typically based on birthplace and family ties.¹¹⁴ In the United States, citizenship most often is acquired through birth in the territory of the United States (*jus soli*).¹¹⁵ Citizenship can also be acquired through naturalization, typically after a specified period of residence and satisfaction of other statutory requirements.¹¹⁶ There is often a wait time of several years for a green card, and then an additional wait of five years before permanent residents can obtain naturalized citizenship. It may take another year for the government to process their application and administer the citizenship oath. The current wait time for legal migration of immigrants from Mexico to enter the United States is twenty-five years if those immigrants are the unmarried sons and daughters of U.S. citizens.

113. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 17–36 (2006).

114. Immigration and Nationality Act, 8 U.S.C. § 1153(a) (2018).

115. U.S. CONST. amend. XIV §1; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

116. U.S. CONST. amend. XIV §1; 8 U.S.C. §§ 1422–40.

In some instances, immigrants can obtain naturalized citizenship following acquisition of a green card granted on the basis of employment.¹¹⁷ The wait times for employment-based admissions and processing are usually shorter than for family-sponsored green cards, which can also lead to naturalized citizenship. But the educational or occupational qualifications required for these employer-based green cards are not always attainable—especially if an applicant comes from a country with less generous provisions of public education, a less developed economy, or an emphasis on jobs that are not valued in America—rendering them less democratic, even if they are not ascriptive in the way family-sponsored visas may be.

There is another way to obtain citizenship that is more democratic than naturalization and less ascriptive than birthright. In special circumstances, immigrants can obtain citizenship through military service.¹¹⁸ Citizenship for military service provides citizenship outright on the basis of *jus meritum*, or the law of merit. The foundation of *jus meritum* as the basis for citizenship not only describes *who* is born an American but also *how* an immigrant can be transformed into an American. In addition to legal qualifications for becoming Americans in the sense of naturalization, *jus meritum* recognizes civic qualifications and activities that demonstrate the fulfillment of public duties to pay taxes, serve jury duty, and serve military duty.¹¹⁹ These civic activities align with the sense of public interest or community well-being in other parts of the law or the notion of democratic participation acknowledged in ancient Greece as a marker of citizenship.

The civic character of *jus meritum*, mostly stressed by political scientists, can be distinguished from public rhetoric of earned citizenship, which typically refers to payment of monetary penalties, such as unpaid taxes, or to politicians' invocation of the moral virtues of "good immigrants" who make positive contributions in contravention to "bad immigrants."¹²⁰ *Jus meritum*

117. INA, 8 U.S.C. § 1153(b).

118. INA, 8 U.S.C. § 1439.

119. Cara Wong & Grace Cho, *Jus Meritum: Citizenship for Service*, in TRANSFORMING POLITICS, TRANSFORMING AMERICA: THE POLITICAL AND CIVIC INCORPORATION OF IMMIGRANTS IN THE UNITED STATES 70 (S. Karthick Ramakrishnan et al. eds., 2006); Cara Wong & Jonathan Bonaguro, *The Value of Citizenship and Service to the Nation*, 6 RSF FOUND. J. SOC. SCI. 96 (2020).

120. Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 257 (2017); cf. MICHAEL J. SULLIVAN, EARNED CITIZENSHIP

citizenship is reflected in noncitizen participation in American wars since the Revolutionary War and in every war since. The immigration statute provides an expedited path to citizenship for noncitizens who serve in the military during wartime, which lets service members obtain citizenship in less than a year without imposing additional hurdles or a five-year or more wait.¹²¹ The Department of Defense's Military Accessions Vital to the National Interest (MAVNI) program permits noncitizens with critical skills or language abilities useful to military operations to enlist and obtain citizenship, even if these noncitizens would otherwise be ineligible for citizenship.¹²²

There are several reasons for rewarding military service with citizenship. First, an immigrant demonstrates political allegiance to America by their willingness to represent the nation and make the ultimate sacrifice—risking their life in battle. Also, the service member becomes socially integrated through the traditions and time spent on collective endeavors. Economically, the service is valuable and would otherwise require contracted labor. Legally, the immigrant who obtains security clearance for military service is prescreened and vetted for citizenship as well; consequently, the government figures there is little reason to require a lengthy waiting period before granting a green card or citizenship. Unfortunately, the traditional citizenship-for-service program is not operating well due to unduly burdensome procedures instituted by the Defense Department and severe backlogs, and MAVNI was discontinued in 2016.¹²³ However, the theoretical foundation serves as a useful template for a new citizenship-for-service program outside the military context, such as the one I propose for essential service.

(2019) (placing debates about immigration policy and earned U.S. citizenship in a historical and comparative perspective).

121. Military naturalization during peacetime and periods of hostilities differs mostly by speed. These differences are detailed in the INA at 8 U.S.C. §§ 1439–40.

122. While green card holders have long been part of the U.S. military, temporary visa holders and those in protected statuses, such as TPS or DACA, can serve through MAVNI. *Military Accessions Vital to the National Interest (MAVNI) Recruitment Pilot Program*, DEP'T OF DEF., <https://dod.defense.gov/news/mavni-fact-sheet.pdf> [<https://perma.cc/TF3K-ZRN9>]. MAVNI effectively ended in 2016 when the Obama Administration stopped taking new applications.

123. The erosion of these policies is discussed in Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L.J.F. 552 (2019); Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 98 DENV. L. REV. 669 (2020). See generally MARGARET D. STOCK, *IMMIGRATION LAW & THE MILITARY* (2d ed. 2015) (explaining how the military interacts with noncitizens and the naturalization process).

Other than military service, other types of work that meet national needs are given priority status in U.S. immigration law. For example, procedural shortcuts are given to Schedule A job-holders like nurses and healthcare workers¹²⁴ and workers in areas with critical shortages like agriculture. Waivers to labor certification exist for some immigrant workers if it is in the “national interest.”¹²⁵ While none of these privileges rise to the level of obtaining citizenship where it would not otherwise be possible, they demonstrate immigration law’s willingness to reward or encourage public-minded behavior in exchange for some of the rights of membership.

With the advent of a new political moment, there is an opportunity for a new policy providing citizenship for essential service. Voters are largely supportive of citizenship-for-service programs for the military.¹²⁶ They are likely to show similar openness to immigrants who provide essential service during the pandemic. Voters recognize that immigrant workers show allegiance to the American public good with their willingness to expose themselves to risk of disease during the pandemic. A national poll conducted for the Center for American Progress in July 2020 showed strong support (73 percent in favor, 22 percent opposed) for providing a path to citizenship for undocumented

124. See 8 C.F.R. § 204.5 (2020) (listing petitions for employment-based visas). Schedule A only applies to professional nurses, physical therapists, and persons of exceptional ability in the performing arts. 20 C.F.R. § 656.5 (2020) (Schedule A occupations). In contrast, my proposal would cover a broader range of healthcare and essential workers.

125. Criteria for a national-interest waiver includes that the proposed endeavor has both substantial merit and national importance, that the individual is well-positioned to advance the proposed endeavor, and that the performance of the endeavor will be beneficial to the United States. *Employment-Based Immigration: Second Preference EB-2*, U.S. CITIZENSHIP & IMMIGR. SERV. (Dec. 2, 2020), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> [<https://perma.cc/DBF4-MRGS>].

126. One advocacy group seeks reinstatement of the Basic Training Initiative to promote naturalization for noncitizens enlisted in the military, reinstatement of MAVNI, acceleration of security clearances to clear processing backlogs, and waiver of penalties for soldiers who fall out of status while waiting for their naturalization applications to be processed. *Immigrants Serving in the Military Have Earned Their Citizenship: Their Path to Naturalization Should Be Clear*, FWD.US (June 4, 2021), <https://www.fwd.us/news/increasing-naturalizations-for-immigrants-serving-in-the-military> [<https://perma.cc/47F2-MB6D>].

essential workers.¹²⁷ Other survey experiments suggest Americans are willing to use citizenship eligibility as a means of expressing gratitude for service, both for lawfully admitted immigrants and for undocumented immigrants.¹²⁸

D. Policies to Provide Citizenship for Essential Service

The policy I set forward would adapt the legalization provisions in the proposed Citizenship Act of 2021 and Essential Workers Act of 2021 to the evolving global pandemic. More specifically, I would broaden the definition of essential service that the Citizenship Act of 2021 currently covers and keep it flexible for changing national needs. These benefits would be awarded to essential workers partly based on the usefulness of their job skills and their economic contributions during a crisis, in keeping with the spirit of existing legislative proposals that rewarded healthcare workers who could heal the sick. However, my proposal—with the slight, but significantly amended, terminology “citizenship for essential *service*,” rather than citizenship for essential *workers*”—underscores the distinctive civic character of granting expedited citizenship on the basis of *jus meritum*.

In its current formation, the proposed Citizenship Act of 2021 covers a list of occupations that CISA deemed essential operations during the early waves of the pandemic: healthcare workers, grocery-store workers, and security guards for businesses that were permitted to stay open when others were restricted from work.¹²⁹ CISA first issued this nonbinding guidance in March 2020 for the purpose of granting employees access to workplaces during closures. It has since revised it three times for varying purposes. For example, teachers and dependent care-

127. *Winning the Immigration Debate During COVID-19*, CTR. FOR AM. PROGRESS ACTION FUND 11 (2020), <https://cdn.americanprogressaction.org/content/uploads/sites/2/2020/07/22050052/E-12792c-CAPAF-WEBSITE-FINAL.pdf> [<https://perma.cc/PJC8-NMPJ>].

128. Wong & Bonaguro, *supra* note 119, at 106–07. The survey experiments suggest stronger support for rewarding military service by immigrants (upwards of 60 percent) than nonmilitary service such as AmeriCorps service (30 percent). However, support exists in both scenarios, and the notion of risk inherent in frontline work during COVID-19 may make the analogy of essential work during the pandemic more similar to military service than other types of civilian volunteer work.

129. CISA Guidance Version 1, *supra* note 93.

givers were added to the list so that they could more quickly receive vaccines and support the reopening of public schools.¹³⁰ Collectively, these job functions were not only sources of economic compensation: they involved personal sacrifice and a willingness to accept personal risk in order to contribute to the public interest during a time of national need. These workers assumed the risk of exposure to disease for themselves, spent time away from their families to prevent exposing them, and showed up for work every day to make sure that other Americans had the food, product deliveries, and services they needed while sheltering in place. In other words, these are the heroes and frontline workers for whom New Yorkers clanged pots and Coloradans howled, saying, “With thanks from a grateful nation.”¹³¹

The Essential Workers Act incorporates a list of essential workers that Congress deemed important to surviving a pandemic.¹³² The proposed Essential Workers Act was introduced in the Senate either for inclusion in the Protecting Critical Infrastructure Act or as a standalone legalization provision. Its provisions mirror many of the terms of the legalization provision

130. Although caregivers were not included in the initial government guidance, Michael J. Sullivan writes about the extension of earned citizenship to caregivers. SULLIVAN, *supra* note 120. Though caregiving may or may not involve personal risk, the justification for citizenship is about national contribution. Similar notions of civilian service to the nation are the impetus behind volunteer community service programs such as Peace Corps, AmeriCorps, Senior Corps, or RefugeeCorps that lead to tuition reimbursement, income, and training. For program particulars, see 42 U.S.C. § 12655i (requiring enrollees in programs that receive AmeriCorps funding be “citizens or nationals of the United States or lawful permanent resident aliens of the United States”). E.J. DIONNE ET AL., UNITED WE SERVE: NATIONAL SERVICE AND THE FUTURE OF CITIZENSHIP (2003). Other programs have been unsuccessfully proposed for uniform national service, both military and civilian, although they have never been adopted. See Universal National Service Act, H.R. 748, 113th Cong. (2013); Conor Friedersdorf, *The Case Against National Service*, ATLANTIC (June 26, 2013), <https://www.theatlantic.com/politics/archive/2013/06/the-case-against-universal-national-service/277230> [<https://perma.cc/U4PE-NRY8>]; Doug Bandow, *Mandatory Universal National Service: A Dystopian Vision for a Free Society*, CATO INST. (Feb. 21, 2019), <https://www.cato.org/testimony/mandatory-universal-national-service-dystopian-vision-free-society> [<https://perma.cc/Z3K9-KVTK>]. Whether military or civilian and voluntary, each of these programs are reserved to U.S. citizens so that the benefit of legalization does not arise.

131. Peggy Noonan, *New York Is the Epicenter of the World*, WALL ST. J. (Apr. 2, 2020), <https://www.wsj.com/articles/new-york-is-the-epicenter-of-the-world-11585869852> [<https://perma.cc/UBZ6-ZN37>].

132. Citizenship for Essential Workers Act, H.R. 1909, 117th Cong. (2021); Citizenship for Essential Workers Act, S. 747, 117th Cong. § 245B (2021).

from the broader Citizenship Act of 2021. However, the Essential Workers Act includes a more specific list of enumerated workers in section 245B(b)(A)–(S): healthcare, emergency response, sanitation, restaurant ownership and food preparation, hotel or retail, meat processing, agricultural work, commercial or residential landscaping, commercial or residential construction, housing or public works construction, domestic work, natural-disaster recovery, and home- and community-based work including home health aides, family care, manufacturing, warehousing, transportation, janitorial, and laundromat work. The list reflects national priorities during early waves of the pandemic, but it does not contain a mechanism to adapt to changing conditions.

I propose making the classification of essential service more flexible in two ways: first, by articulating *jus meritum* as the basis for extending citizenship, and second, by keeping the determination of essential service in the hands of a service-oriented agency, such as the USCIS or a White House Office of Immigrant Integration. The principle of *jus meritum* would guide the list of covered workers, rather than letting lobbyists designate spoils to the wealthiest employers or self-interested worker groups seeking to advantage their own members. The shifted decision-making authority would permit the expert judgment of the government agencies best positioned to assess whether an individual is serving the common good (similar to USCIS national-interest waivers for admissions) or whether a job function is still essential (similar to the Department of Labor designating Schedule A jobs based on work shortages for the lesser interest of labor certification). It would also create distance from private lobbyists. Changing the locus of decision-making would also insulate the classification process from the enforcement-minded bias of the CISA; instead of government officials trained to exclude immigrants, the classification process would be entrusted to a trained cadre of civil servants who have backgrounds in serving immigrants and facilitating the immigrant workforce.¹³³

133. While these civil servants would report to politically appointed leadership, the prospect of political influence is an ever-present possibility in an executive agency and would be present in CISA. Indeed, political accountability depends on it. However, the service mission of the USCIS or the Department of Labor, rather than national-security interests, would guide agency actions, and the political leadership for these agencies would have been confirmed based on qualifications related to service to immigrants and the workforce, notwithstanding vacancies that have permitted unconfirmed immigration restrictionists to take the helm at the USCIS.

Essential workers identified through my amended process could become eligible for an expedited path to citizenship, similar to what used to be available for noncitizens serving in the military under MAVNI¹³⁴ or what would be available for agricultural workers¹³⁵ and DREAMers in the proposed Citizenship Act.¹³⁶ An undocumented worker performing an essential job function (outside of agriculture) or a low-skilled worker on a temporary visa (outside of agriculture) would have a faster path to citizenship than otherwise available—for example, this process would apply to an undocumented custodian or cook working in a school. More critically, some immigrants who may not otherwise qualify under the targeted or general provisions may become eligible on the merit of their essential service—for example, an au pair or housekeeper working on a temporary-worker visa or an international student or postdoctoral researcher engaged in critical research.¹³⁷

While undocumented immigrants comprise a critical portion of essential workers, the reasons for legalizing them are different from the reasons for legalizing essential workers *per se*. So, the design of policies to legalize them needs to be different as well. My proposed citizenship-for-essential-service policy rests on the premise that citizenship can be earned by anyone willing to make a civic contribution, not merely based on the circumstances of arrival—such as one’s date of entry, country of origin, or age at time of migration—or the amount of time living inside the United States.¹³⁸ After arrival, the circumstances of arrival

134. In essence, this proposal is modeled on the MAVNI program, which rewards noncitizens who complete military service and who possess critical skills, such as foreign languages, cultural competencies, or occupational skills, in areas of shortfall.

135. U.S. Citizenship Act, H.R. 1177, 117th Cong. § 1105 (2021); S. 348, 117th Cong. (2021).

136. *Id.*

137. A postdoctoral researcher or au pair would work on a J-visa for cultural exchange, and a housekeeper would work on an H-2B visa for nonagricultural seasonal work. An international student on an F-visa could be helped to the extent they are permitted to work under the terms of their visa—campus work or work during the OPT-portion of their education. Another possibility is that an immigrant who was paroled while awaiting asylum adjudication may exceed the six-month waiting period for an EAD with the backlog and court closures. That person could serve in an “essential” worker role which could merit an expedited pathway even if their asylum application is unsuccessful.

138. This should be distinguished from “earned” in the sense of moral desert. Critics have pointed out that the implication of stressing earned legalization is that others do not deserve it. *See, e.g.,* Ahmad, *supra* note 120.

and time passed in the United States are unchangeable characteristics. An undocumented immigrant cannot unwind the clock to change their time of arrival nor can they alter the length of time they have spent in the United States retrospectively. Yet a good deal of the public conversation around legalizing undocumented immigrants revolves around the past. Politicians view DREAMers as deserving of legalization because they were too young at the time to have actively participated in the family decision to cross the border. Lawyers plead that long-time residents of the United States have built ties in the communities where they have lived for the last decade or more. Legalization policies for undocumented immigrants writ large hinge on equitable consideration of past circumstances. These policies typically do not focus on the immigrants' present circumstances. These proposals are retrospective because they do not aim to shape future migration decisions, but they all have a whiff of arbitrariness—a sense of being in the right place at the right time.

In contrast, my proposal to extend citizenship for essential service is prospective. It weighs the present importance of an immigrant's service contribution against urgent national needs. It also considers the intention of the immigrant to continue providing essential service to the nation precisely because the proposal hopes to cultivate civic behavior. The nature of the service might evolve over time, but the basic terms of providing civic service for a specified period of years would complete the contract for citizenship. The distinction between retrospective and prospective legislation matters because past circumstances are unchangeable, but future work can be chosen. An immigrant living inside the United States has agency to choose service work that is valuable to the nation and can expect to be rewarded for it.

Accordingly, my prospective policy helps immigrants transition into fuller citizenship in the United States by enhancing their civic participation and adjusting their formal legal status. Pathways are all about *transitions* between various footholds on the spectrum of citizenship. Civic participation can feed into official recognition and formal status; formal citizenship can spill over into economic, social, and continued political belonging. Citizenship for essential service is keeping with the spirit of *jus meritum*. It is also in keeping with existing proposals to permit immigrant workers on temporary visas or those who lack au-

thorization to be eligible for a green card or other economic benefits (stimulus relief, emergency student loans, COVID testing and vaccination) in exchange for their economic contribution in the midst of a crisis.¹³⁹ The prize of citizenship would be even more valuable than other forms of economic relief and has the potential to endure as it adapts with and beyond the pandemic.¹⁴⁰

Another difference between retrospective policies to legalize undocumented immigrants writ large versus my prospective policy for essential service is in the political value of time.¹⁴¹ This time-bound feature of legalization proposals is embodied in a fundamental premise: immigrants who are long-time residents lay down roots in their communities, which would be upended by departure, regardless of documentation status, and they require protection from the United States because they have abandoned their foreign homes. In contrast, guest workers on temporary visas come to the United States understanding that their homes are elsewhere and that their long-term economic and political needs will be met abroad.¹⁴² For this reason, guest workers do not pay the same taxes, and they do not receive the same public benefits. Guest workers retain the diplomatic protections of their home country and do not participate in domestic politics by voting, making campaign donations, or holding elected office. But practically, these time-based distinctions do not hold up. Many long-time residents retain ties in both their host and their home countries. Many guest workers wind up living in the United States for many decades and building community ties, too. So it is not true that guest workers need less protection from

139. Some of the other economic benefits emulate the G.I. Bill. Suzanne Mettler, *The Creation of the G.I. Bill of Rights of 1944: Melding Social and Participatory Citizenship Ideals*, 17 J. POL'Y HIST. 345 (2005); see also Theda Skocpol, *The G.I. Bill and U.S. Social Policy, Past and Future*, 14 SOC. PHIL. & POL'Y 95 (1997).

140. Hypothetically, citizenship for service could be adapted to a new crisis such as a cybersecurity attack by elevating the civic contribution of computer engineers. This would bear similarity to the G.I. Bill's and MAVNI's encouragement of military service and also programs to cancel student loans for public interest legal service or the primary practice of medicine in underserved parts of the country. AmeriCorps repays civilian service with student loan forgiveness as well.

141. See generally ELIZABETH COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018).

142. The increased reliance of the United States on temporary workers, notwithstanding their lack of legal protection, is discussed by David Cook-Martín, *Temp Nations? A Research Agenda on Migration, Temporariness, and Membership*, 63 AM. BEHAV. SCIENTIST (2019).

the United States than immigrants who arrive hoping to make a life in the United States.

My policy reconsiders the notion of immigrant intent, which separates legally permanent and legally temporary immigrants. While immigration law currently presumes that legally temporary workers cannot and should not stay, my policy recognizes the practical possibility that nonimmigrants may subsequently become permanent residents and eventually citizens. To permit them to change their intent is not to permit a legal deception. It is a practical recognition of the reality that intentions change over time and that decisions to migrate can have multiple purposes that extend beyond school or work. The high-skilled worker visas (such as H-1B, O, and L visas) that permit dual intent already recognize these realities, and there is no reason to limit recognition only to high-skilled workers.¹⁴³ In contrast, lower-skilled visas and student visas (such as the H-2B or J) do not recognize the possibility of transition. Past practice has recognized “intending immigrants” even earlier in their arrival.¹⁴⁴ Another advantage of my proposal is that it provides a prospective path of employment open to many, rather than being based on ascriptive family ties or a narrow set of educational or employment credentials that not everyone can access and that may grow stale with changing national needs.

A final component of my prospective policy is reframing citizenship as a reward for service, rather than viewing essential work purely as an economic contribution meriting financial reward. These contributions are civic in nature,¹⁴⁵ and they are made to supplement government efforts. This distinguishes them from being a purely economic contribution that could otherwise be performed in the private sector. As E.J. Dionne and his colleagues at the Brookings Institution say, “[S]ervice . . . [is]

143. Chishti et al., *supra* note 89, at 8. The proposed bridge visa would allow a way to adjust status for lower- and middle-skill jobs, in addition to high-skilled ones that “dominate current adjustments from temporary to permanent visas,” and “would avoid the mismatches in numbers and national origins that currently exist between temporary and permanent immigration streams.” *Id.*

144. HIROSHI MOTOMURA, *AMERICANS IN WAITING* (2006) (explaining a provision in the immigration statute that acknowledges “intending immigrants” from their initial arrival, which remains on the books but has fallen out of use).

145. Judith Shklar and Michael Sullivan write about work as a constitutive element of citizenship. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991); Michael Sullivan, *Labor Citizenship for the Twenty-First Century*, 19 SEATTLE J. SOC. JUST. 809 (2021).

a genuine summons for national sacrifice or a fair apportionment of burdens among the more and less powerful, the more and less wealthy.”¹⁴⁶ By recognizing service as apportioning burdens, service is understood to be a necessity, and its reward is more than monetary compensation. The provision of expedited pathways to citizenship for workers performing essential service should be seen as a national investment in the American people that can itself revitalize participatory citizenship.

E. Politics to Support Essential Workers

Given that a citizenship-for-essential-service program would expand on legalization programs that are currently in retreat, could it be enacted in American politics?¹⁴⁷ History and comparisons abroad suggest that it could. Interest in national service piques after national conflict. Typically, this interest arises in wartime. Abraham Lincoln called on military volunteers and other supporters who would become the American Red Cross to stand together against secession in 1861. The federal government relied on voluntary groups like these to sell Liberty Bonds and to conduct campaigns for economic production and military recruitment in World War I and World War II. The Civilian Conservation Corps was built by Franklin D. Roosevelt in 1933. The G.I. Bill was enacted after World War II in 1944. The Peace Corps was created by John F. Kennedy in 1961 to improve foreign relations with developing countries, and AmeriCorps VISTA was created in 1965 as its domestic counterpart to address a variety of problems associated with urban poverty. More

146. UNITED WE SERVE: NATIONAL SERVICE AND THE FUTURE OF CITIZENSHIP 5 (E.J. Dionne et al. eds., 2003).

147. The closest comparisons may be volunteer programs that incorporate service of U.S. citizens to immigrants. Successful Senior Corps programs in Minneapolis/St. Paul and Boston engage “older immigrants as ‘foster grandparents’ to mentor immigrant youth who may be struggling with the transition to the U.S. educational system.” TASK FORCE ON NEW AMERICANS, STRENGTHENING COMMUNITIES BY WELCOMING ALL RESIDENTS: A FEDERAL STRATEGIC ACTION PLAN ON IMMIGRANT & REFUGEE INTEGRATION 26 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/final_tf_newamericans_report_4-14-15_clean.pdf [<https://perma.cc/66DE-KWKX>]. During the Obama Administration, the White House Task Force on New Americans referenced these Senior Corps programs and recommended the implementation of a “Refugee AmeriCorps Program” to assist communities with integration of refugee populations, in part by recruiting former refugees as AmeriCorps members “who will ensure that services are delivered in a culturally and linguistically appropriate manner.” *Id.* at 30.

volunteer programs were introduced under Jimmy Carter, Ronald Reagan, George H.W. Bush, and Bill Clinton. Community service gained renewed support under George W. Bush, a proponent of faith-based civic engagement especially, in the immediate aftermath of September 11, 2001.¹⁴⁸ In 2021, Senator Dick Durbin proposed a revival of Roosevelt's Civilian Conservation Corps (CCC) with new legislation that provides job training, paid work experience, and college tuition credit for a year's service restoring and maintaining national parks.¹⁴⁹ This revived CCC program could be the font for a renewed appreciation of national service and the foundation for continuing expansion of *jus meritum* paths to citizenship if noncitizens could participate.¹⁵⁰ Whether paid or volunteer work, it was critical in each moment that Americans viewed service neither as individual effort or big government. Instead, they needed to view national service and government as complementary efforts for the common good. These same truths need to be recognized to enact a citizenship-for-essential-service program today.

Surges in national service and a willingness to promote the common good can arise in circumstances other than military conflict and war. Early survey data suggest that COVID-19 is one of those circumstances that could build support for the idea that immigrants performing essential work should be rewarded. President Biden has analogized the cooperation among rival pharmaceutical companies to develop an effective vaccine in the fight against COVID-19 to wartime efforts, and he renewed the war analogy in a meeting with global leaders about vaccination

148. Each of these examples of service arising in wartime comes from Theda Skocpol, *Will September 11 Revitalize Civic Democracy*, in UNITED WE SERVE: NATIONAL SERVICE AND THE FUTURE OF CITIZENSHIP, *supra* note 139, at 20.

149. RENEW Conservation Corps Act, S. 4538, 116th Cong (2020); *Durbin Introduces Bill to Create Civilian Conservation Corps*, DURBIN.SENATE.GOV (Sept. 9, 2020), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-introduces-bill-to-create-civilian-conservation-corps> [<https://perma.cc/4CXZ-UBFN>].

150. Most of the prior national-service programs prohibited noncitizen participation. While it has not been publicly discussed, Senator Durbin might be willing to incorporate immigrants, given his concurrent sponsorship of the DREAM Act and support for immigrant integration.

distribution.¹⁵¹ Just as survey data showed increased patriotism, gratitude, and volunteerism following September 11,¹⁵² national polls show 69 percent of Americans support a pathway to citizenship for undocumented immigrants¹⁵³ and 73 percent favor a path to citizenship for undocumented immigrants doing essential work specifically.¹⁵⁴ Providing expedited citizenship for essential service would be appealing to immigrants because citizenship is valuable along many dimensions, and also because it is valuable in *exactly* the right way: it awards the value of serving the nation with a stronger connection to the government that is responsible for granting formal citizenship. Even when the public health crisis recedes, there will be moral, economic, and practical reasons to recognize national service performed by noncitizens. At the same time that citizenship is distinctively valuable to the immigrant, it provides value to U.S. citizens in the form of public service. The mechanism I propose is self-updating and has the potential to permit ongoing adaptation by the USCIS as emergency declarations end, CISA designations ex-

151. President Joseph Biden, Remarks on the Administration's COVID-19 Vaccination Efforts (Mar. 2, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/02/remarks-by-president-biden-on-the-administrations-covid-19-vaccination-efforts> [https://perma.cc/2Q5H-ZMGM] ("As I've always said, this was a wartime effort, and every action has been on the table, including putting together breakthrough approaches."). President Biden repeated the analogy during a G7 meeting about the need for global cooperation and the leadership role of the United States on vaccination on June 11, 2021. Kevin Liptak, *Biden Joins the World Leaders Club at G7 with Call for Wartime Effort Against COVID-19*, CNN (June 11, 2021), <https://www.cnn.com/2021/06/11/politics/president-biden-g7-summit-day-1/index.html> [https://perma.cc/VUE7-AM22].

152. Robert D. Putnam, *Bowling Together: The United States of America*, 13 AM. PROSPECT 20 (2002).

153. *POLLING UPDATE: Pathway to Citizenship for Undocumented Immigrants Remains Overwhelmingly Popular*, FWD.US (Mar. 24, 2021), <https://www.fwd.us/news/polling-update-pathway-to-citizenship-for-undocumented-immigrants-remains-overwhelmingly-popular> [https://perma.cc/7DMB-F985]; see also Nicole Narea, *Poll: Most Americans Support a Path to Citizenship for Undocumented Immigrants*, VOX (Feb. 4, 2021, 8:30 AM), <https://www.vox.com/policy-and-politics/2021/2/4/22264074/poll-undocumented-immigrants-citizenship-stimulus-biden> [https://perma.cc/NSY6-EXY8]; cf. MORNING CONSULT & POLITICO, *National Tracking Poll #2102103* (2021), https://assets.morningconsult.com/wp-uploads/2021/02/24092632/2102103_cross-tabs_POLITICO_RVs_v1_AUTO.pdf [https://perma.cc/3M6A-YHLH] (finding 60 percent support for providing a pathway to citizenship).

154. Hart Rsch. Assocs., *Winning the Immigration Debate During COVID-19*, CTR. FOR AM. PROGRESS ACTION FUND (2020), <https://cdn.americanprogressaction.org/content/uploads/sites/2/2020/07/22050052/E-12792c-CAPAF-WEBSITE-FINAL.pdf> [https://perma.cc/8ADY-RKNJ].

pire, and the economic and political landscape shifts. More generally, granting citizenship to immigrants who provide essential service increases immigrant investments in their community, invigorates civic life, and changes the rhetoric around unearned “amnesty”¹⁵⁵ by emphasizing immigrants’ choices to serve the nation without regard for their legal status or formal affiliation.¹⁵⁶

For all the benefits of building a nation, rewarding national service can be fraught. This much we learned in the still-contentious military draft. However, the success of the G.I. Bill (an ambitious bill to reintegrate World War II veterans through the provision of a readjustment salary, education, job training, and employment placement services) suggests that it can be done.¹⁵⁷ In *Soldiers to Citizens*, Suzanne Mettler conveys that the G.I. Bill fueled economic growth and democratized educational opportunity for service members. More importantly, for those interested in citizenship, she believes the G.I. Bill spurred veterans’ active participation in civic and political groups in response to veterans’ feeling they were “first-class” citizens, worthy of the government’s interest and investment.¹⁵⁸ The commended service must be vital to the national interest and involve some level of sacrifice. The federal government must value it as real work rather than charity. The same would be true for frontline and other essential workers. These workers make personal sacrifices for the good of themselves and their families, but also for the common good of the nation where they reside; that is, they do it to support themselves, their families, and their nation. Moreover, their service must be understood to be civic in nature.

This understanding of essential service explains the motivation of service and its civic character. It is *why* laborers instead become citizen laborers: working together to make the

155. The term “amnesty” used in this context connotes derision toward broad legalization provisions in the Immigration Reform and Control Act of 1986, which some believed were unearned. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

156. See Montecinos, *supra* note 102.

157. Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944) (codified as amended at 38 U.S.C. § 3701).

158. See SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* 361 (2005).

economy work,¹⁵⁹ satisfying the participatory traditions of citizenship in classical Athens,¹⁶⁰ and reinforcing paid work as a defining characteristic of citizenship in America.¹⁶¹ Michael Sullivan makes a case for recognizing a variety of work through a grant of citizenship, whether military or domestic, and whether paid or unpaid.¹⁶² But can the sense of national gratitude extend to *immigrant* essential workers and can it be sustained once the pandemic recedes? Skeptics may say that the reward for economic work is wages paid and no more. Immigrant workers should consider themselves lucky to keep the wages for the hours they worked, especially if they lacked work authorization in the first place. Yet the labor and employment laws recognize that payment is owed for hours worked, regardless of citizenship status, lest indentured servitude or even slavery be replicated.¹⁶³ Immigrant workers should be recognized and rewarded for their essential service in areas of national need.

Moreover, the implication of the U.S. border closures during COVID-19 is that individuals' fates were tied to the communities where they resided when the pandemic hit, not where their ancestors lived or where their papers said they belonged legally or politically. One sickened person meant a community at risk.¹⁶⁴ This public health aspect of the pandemic is distinct from more conventional wars that pit one nation against another, as all nations worked against the common enemy of disease. Public health is a special kind of common good and service to the nation that may be able to avoid nativism.

To be sure, politicizing the public health crisis and pitting us (Americans) against them (foreigners) makes it more difficult to come together as a nation. Personal protective equipment, such as masks for doctors and nurses or the distribution of vaccines for the general public, need not have been political, yet copious evidence shows that supporters of President Trump who expressed doubt about pandemic-relief efforts became less willing to mask and less willing to take a jab in the arm once the

159. See Sullivan, *supra* note 145, at 821.

160. See J.G.A. POCKOCK & RICHARD BELLAMY, CITIZENSHIP: A VERY SHORT INTRODUCTION 33–34 (2008) (summarizing Aristotle's view on citizenship and providing a primer on the subject).

161. JUDITH SHKLAR, *supra* note 145, at 98.

162. SULLIVAN, *supra* note 120, at 168–69.

163. U.S. CONST. amend. XIII § 1.

164. Ming H. Chen, *A New Way to Think About American Citizenship*, YOUTUBE: TEDXMILEHIGH (Dec. 17, 2020), <https://www.youtube.com/watch?v=H9MCqshB8l4> [<https://perma.cc/PPW5-2SXS>].

vaccines became available.¹⁶⁵ Partisan differences could be seen in views about the outbreak at many stages, including vaccine intent, with Democrats “27 percentage points more likely than Republicans to say they plan to get, or have already received, a coronavirus vaccine (83% to 56%).”¹⁶⁶ Rewarding essential workers for their service may be polarizing as well, especially if the workers are immigrants at a time when some blame immigrants for bringing the virus to America.¹⁶⁷

Still, it may be possible to provide a targeted path to citizenship for essential service. Thirty years ago, the Immigrant Nursing Relief Act of 1989 provided noncitizen nurses temporary work visas and the prospect of adjusting status to citizenship after three years. The program was small, benefitting only eight-

165. Anya van Wagtenonk, *The Partisan Divide on Vaccination, Explained in 3 Charts*, VOX (Mar. 21, 2021), <https://www.vox.com/2021/3/21/22342184/democrats-republicans-covid-19-vaccine-hesitancy-polls> [<https://perma.cc/4L7V-W97V>].

166. Cary Funk & Alec Tyson, *Growing Share of Americans Say They Plan to Get COVID-19 Vaccine – or Already Have*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/science/2021/03/05/growing-share-of-americans-say-they-plan-to-get-a-covid-19-vaccine-or-already-have> [<https://perma.cc/L93T-LWWY>]; see also Yahoo! News, *Yahoo! News COVID-19 Vaccination Survey Feb. 20–22, 2021*, YOUTV, https://docs.cdn.yougov.com/b7tjs9k8au/20210222_yahoo_vaccine_tabs.pdf [<https://perma.cc/9WX5-TAC3>] (finding Republicans and Democrats had been almost equally likely to want a vaccine in a November survey, but a thirty-one point partisan gap has developed, with 78 percent of Democrats now planning to get inoculated compared to 47 percent of Republicans). *Compare Coronavirus: Vaccination Nov. 9, 2020–June 28, 2021*, CIVIQS, https://civiqs.com/results/coronavirus_vaccine?uncertainty=true&annotations=true&zoomIn=true&party=Republican [<https://perma.cc/W8ZC-3ZGD>] (showing 42 percent of Republicans have no intention of getting vaccinated), *with Coronavirus: Outbreak Concern Nov. 9, 2020–June 28, 2021*, CIVIQS, https://civiqs.com/results/coronavirus_concern?uncertainty=true&annotations=true&zoomIn=true&party=Republican [<https://perma.cc/3NT3-YXSY>] (showing that 46 percent of Republicans say they are “not concerned at all” about a potential outbreak in their area).

167. This trope has been seen throughout U.S. history and extends to Asian Americans and immigrants generally. See, e.g., Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 MILBANK Q. 757, 766 (2002); *Illness and Racism: Responding to Anti-Asian Racism During the Novel Coronavirus Pandemic*, IMMIGR. HIST. INITIATIVE (2021), <https://www.immigranthistory.org/covid19.html> [<https://perma.cc/8AVH-QAH5>]. The divisive role played by Donald Trump in the nation’s coronavirus response permitted the response to workers and the response to immigrants to be conflated in similar fashion, with reports that his advisors intentionally used the pandemic to promote policies that had been long-term goals of the administration. Nick Miroff & Josh Dawsey, *Stephen Miller Has Long-Term Vision for Trump’s “Temporary” Immigration Order, According to Private Call with Supporters*, WASH. POST. (Apr. 24, 2020, 2:23 PM), https://www.washingtonpost.com/immigration/stephen-miller-audio-immigration-coronavirus/2020/04/24/8eaf59ba-8631-11ea-9728-c74380d9d410_story.html [<https://perma.cc/EYU6-AEX2>].

thousand nurses from specific countries.¹⁶⁸ The general legalization program that creates a “lawful prospective immigrant” status in the proposed U.S. Citizenship Act of 2021 would provide pathways for more workers, but it could be more targeted.¹⁶⁹ For example, the Citizenship Act of 2021 limits legalization to agricultural workers who performed agricultural labor or services for at least 2,300 hours or 400 work days during the five-year period preceding the application, among other workers.¹⁷⁰ Well-specified criteria and a clear articulation of purpose for other worker categories could help delineate the bounds of legalization for other essential workers, even if offered prospectively as a beacon for immigrants seeking a way to come to the United States and serve.

The United States can also look to other parts of the globe for inspiration and affirmation. Many Western countries are considering or enacting legalization programs in response to the essential work provided by immigrants during COVID-19. France was one of the first to do so. In December 2020, France began making citizenship available to foreigners working in professions particularly exposed or essential to the continuity of the nation during the COVID-19 pandemic if they had resided regularly in France for at least two years and met the other conditions under French law.¹⁷¹ The list of covered professions includes many workers who would qualify as essential workers under the CISA guidance, such as teachers and agricultural workers.¹⁷² By the end of December 2020, 74 frontline workers in France had been awarded French citizenship, with another 693 workers being processed.¹⁷³ On April 14, 2021, the Cana-

168. This program was later incorporated as a part of the H-1A visa program before breaking off into the H-1C visa program and subsequently becoming defunct in 2012.

169. U.S. Citizenship Act, H.R. 1177, 117th Cong. § 1101 (2021); S. 348, 117th Cong. (2021).

170. U.S. Citizenship Act, S. 348, 117th Cong. § 245F. The provision is modeled on the Agricultural Bills that were part of comprehensive immigration reform proposals throughout the 2000s.

171. Ministère de L'Intérieur, *Recognition of the Engagement of Foreign Nationals During the COVID-19 State of Emergency*, MINISTÈRE DE L'INTÉRIEUR (Dec. 7, 2020), <https://www.immigration.interieur.gouv.fr/Accueil-et-accompagnement/La-nationalite-francaise/Reconnaissance-de-l-engagement-des-ressortissants-etrangiers-pendant-l-etat-d-urgence-de-la-COVID-19> [<https://perma.cc/LWZ9-QW26>].

172. *Id.*

173. *France Grants with Citizenship COVID-19 Frontline Immigrant Workers*, SCHENGENVISAINFO (Dec. 29, 2020), <https://www.schengenvisa.info/news/>

dian Minister of Immigration, Refugees, and Citizenship announced a pathway to permanent-resident status for more than ninety-thousand essential workers and international graduates.¹⁷⁴ The program requires “1 year of Canadian work experience in a healthcare profession or another preapproved essential occupation,” including food production and distribution, or completion of “an eligible Canadian post-secondary program within the last 4 years.”¹⁷⁵ On May 18, 2020, in response to the COVID-19 pandemic, the Italian agriculture minister announced a targeted regularization program for migrant farm workers.¹⁷⁶ Australia¹⁷⁷ and the United Kingdom¹⁷⁸ have proposed, but have not enacted, citizenship for essential workers during COVID-19.

france-grants-with-citizenship-covid-19-frontline-immigrant-workers [https://perma.cc/BX64-BZQ8].

174. Immigr., Refugees, & Citizenship Can., *New Pathway to Permanent Residency for over 90,000 Essential Temporary Workers and International Graduates*, GOV'T CANADA (Apr. 14, 2021) [hereinafter Immigr., Refugees, & Citizenship Can., *New Pathway*], <https://www.canada.ca/en/immigration-refugees-citizenship/news/2021/04/new-pathway-to-permanent-residency-for-over-90000-essential-temporary-workers-and-international-graduates.html> [https://perma.cc/9A9K-QJQJ]; see also Immigr., Refugees, & Citizenship Can., *Public Policies*, GOV'T CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies.html> [https://perma.cc/PM79-B7Z9] (full regulatory policies).

175. Immigr., Refugees, & Citizenship Can., *New Pathway*, *supra* note 174.

176. *Italian Government Adopts Targeted Regularisation for Migrant Workers*, EUR. COMM'N: EUR. WEB SITE ON INTEGRATION (May 18, 2020), <https://ec.europa.eu/migrant-integration/news/italian-government-adopts-targeted-regularisation-for-migrant-workers> [https://perma.cc/Y969-G5BB].

177. Australia, which has previously introduced temporary visas to address labor shortages without extending a path to citizenship, is now considering a new proposal. The recently released “National Agricultural Workforce Strategy,” created by the Australian Department of Agriculture, Water, and the Environment, includes the recommendation of a “one-off regularisation of [60,000 to 100,000] undocumented AgriFood workers” based on “the Committee’s view that the current pandemic provides a unique chance to design a one-off regularisation program for social health reasons.” AUSTL. NAT’L AGRIC. LAB. ADVISORY COMM’N, NATIONAL AGRICULTURAL WORKFORCE STRATEGY 190 (2020), <https://www.agriculture.gov.au/sites/default/files/documents/national-agricultural-workforce-strategy.pdf> [https://perma.cc/VB3V-NMMB]. Though it has not been adopted, several ministers of Parliament have endorsed it. Nick Bonyhady, *National MPs Endorse Amnesty for Illegal Migrant Farm Workers*, SYDNEY MORNING HERALD (Feb. 26, 2021), <https://www.smh.com.au/politics/federal/nationals-mps-endorse-amnesty-for-illegal-migrant-farm-workers-20210225-p575xy.html> [https://perma.cc/L2FY-D4V2].

178. In April 2020, one minister of Parliament called for all non-British nurses and frontline workers “from doctors to hospital cleaners and from nursing home aides to paramedics” to receive U.K. citizenship and analogized their service to the military service of the Gurkhas, which was rewarded with citizenship. However, the U.K. government merely provided an automatic one-year extension to the visas

IV. CONSTRUCTING CITIZENSHIP: REFORM OR REVOLUTION?

Pursuing Citizenship asks why immigrants seek formal citizenship and how they manage to belong in the United States. It proposes an ethic of inclusion, as well as transitional and pragmatic policies that could implement the ethic, notwithstanding historical, political, and institutional pressures.

The election of President Joe Biden creates new possibilities to make the expanded notion of citizenship into workable policy. There is an increasing sophistication about how we will get there. Yet some provisions are more likely than others to be enacted: DREAMers and undocumented immigrants with temporary protected status seem to be the intended beneficiaries. The future is less certain for temporary workers. These semi-citizens will continue to live in limbo or persistent precarity unless and until reforms are enacted. This Epilogue has charted the territory of these immigration reforms. Moreover, COVID-19 has fortified borders and intensified regulation of migration and enforcement against noncitizens. It is against the background of the COVID-19 stress test that this Epilogue has proposed a policy to protect essential workers who served the country during COVID-19 as an application of the principles in *Pursuing Citizenship*.

In conclusion, the government is making positive strides on behalf of those whom we can imagine as part of our communities as future Americans. How ambitious should it be in its reforms? Should the federal government dramatically decrease or even abolish immigration enforcement for immigrants already in the interior, as advocates who call for abolishing detention or defunding of ICE would recommend?¹⁷⁹ If so, should immigrants granted repose from enforcement—for example, in a statute of limitations or a renewable twilight status—be granted durable relief and legalization? If so, should every immigrant be given a

of eligible health professionals. Megan Ford, *MP Calls for Free British Citizenship for Frontline Nurses amid Covid-19*, NURSING TIMES (Apr. 21, 2020), <https://www.nursingtimes.net/news/coronavirus/mp-calls-for-free-british-citizenship-for-frontline-nurses-amid-covid-19-21-04-2020> [https://perma.cc/XER8-DGA7]. The British Parliament subsequently debated the topic on June 25, 2020, but ultimately did not resolve to take any action to reward noncitizen health workers. *Petition: Give Non-British Citizens Who Are NHS Workers Automatic Citizenship*, UK GOV'T & PARLIAMENT, <https://petition.parliament.uk/petitions/305129> [https://perma.cc/99FF-VQB4].

179. See CESAR GARCIA-HERNANDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* 149 (2010).

chance to become a citizen? For that matter, beyond expanding the class of immigrants under legalization programs, should every person be given a chance to come to the United States, knowing their contribution will increase demands for increased equality and economic justice while challenging the notion of sovereign borders?

Citizenship for essential service is a more modest proposal than what has been tried abroad. It maintains a system of borders and border enforcement. This is because *Pursuing Citizenship* is pragmatic. At the risk of being less visionary by setting aside a wholesale remaking of immigration law, I say in the book's introduction that "I am [a] realist and believe that enforcement is an enduring feature of a bounded society rather than a feature peculiar to our times," even though I am sympathetic to the claims of those who prefer a world where citizenship matters less.¹⁸⁰ Some may feel this is not enough and that the proposals do not go far enough. However, my pragmatism is entwined with a desire for institutional commitment to noncitizen justice. My goals are modest insofar as they seek to improve the implementation of policies on the books. However, they are bold in that they mean to make change happen. One reviewer of the book understood this midway ambition, commending the book for seeking to engage in a policy discussion that has been taken over by immigration restrictionists and somewhat abandoned by immigration advocates seeking a revolution, or scholars refusing to engage with unprincipled politics. She writes that I jump "into the fray to force a long overdue conversation" with hopes that migration scholars "stake a deeper claim in the changes that are needed."¹⁸¹ She is correct. I am open to hearing we need more for those engaged in the fray of immigration reform, though I'm reluctant to accept less because the proposals are deemed too lofty to be unattainable. As such, I end this Epilogue the same way I began: looking beyond mere repair of exclusionary immigration laws toward building a more inclusionary society that embraces integration and the full spectrum of citizenship.

180. CHEN, *supra* note 2, at 35.

181. Shannon Gleeson, *Pursuing Citizenship in the Enforcement Era*, RUTGERS CTR. FOR CRIM. JUST. (May 2021), <https://clcjbooks.rutgers.edu/books/pursuing-citizenship-in-the-enforcement-era> [https://perma.cc/RG89-E5WT] (reviewing MING HSU CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* (2020)).