

# WHO IS AN AMERICAN SOLDIER? MILITARY SERVICE AND MEMBERSHIP IN THE POLITY

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*The military is one of the most powerful institutions to define membership in the American polity. Throughout this country’s history, noncitizens, immigrants, and outsiders have been called to serve in exchange for the privileges of citizenship and recognition. At its height, the idea that service constitutes citizenship—which this Note calls “constitutive service”—successfully transformed a group of “perpetual foreigners” to “citizens.” Until 1952, individuals of Asian descent were categorically excluded from the polity, a barrier that ultimately crumbled after Asian Americans rendered a long history of military service, beginning with the War of 1812, to the Civil War, then to the two World Wars. Yet, precisely because military service is so transformative, the United States over the past decade has imposed both formal and informal restrictions barring certain groups of people from serving, among them individuals who are gay, transgender, undocumented—and to a lesser extent—women and Muslim Americans. These restrictions are reminders that the United States continue to debate who is fit to be an “American,” and therefore, an “American soldier.”*

INTRODUCTION . . . . . 1476

    I. CONSTITUTIVE SERVICE: MILITARY NATURALIZATION  
        FROM THE REVOLUTIONARY WAR TO VIETNAM . . . . . 1480

        A. *Origin* . . . . . 1481

        B. *Entrenchment* . . . . . 1483

        C. *Continuation* . . . . . 1489

    II. ASIAN-AMERICAN SERVICE IN THE U.S. MILITARY . . . . . 1491

        A. *Civil War* . . . . . 1492

        B. *World War I* . . . . . 1498

        C. *World War II* . . . . . 1504

        D. *From “Perpetual Foreigners” to “Citizens”* . . . . . 1510

    III. WHO IS AN “AMERICAN SOLDIER?” . . . . . 1513

CONCLUSION . . . . . 1520

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“[L]et him get an eagle on his button, and a musket on his shoulder, and bullets in his pocket, and there is no power on the earth . . . which can deny that he has earned the right of citizenship in the United States.”

—Frederick Douglass<sup>1</sup>

## INTRODUCTION

Few institutions have captivated American society like the military. Whether in schools,<sup>2</sup> sports,<sup>3</sup> arts,<sup>4</sup> or politics,<sup>5</sup> the American soldier is regarded as the “quintessential citizen” and the “ideal representative of the nation.”<sup>6</sup> President George W. Bush once described military service as “the highest form of citizenship.”<sup>7</sup> Political candidates frequently allude to their own military service to underscore their qualification and status as a kind of “super-citizen.”<sup>8</sup> Minorities similarly invoke their record of service to prove that they too are “Americans.” When then-candidate Donald Trump called to ban Muslim immigration as a way to combat terrorism, Khizr Khan, speaking in front of the portrait of his fallen son, delivered “one of the most powerful” speeches of the 2016 Democratic National Convention<sup>9</sup>: “Tonight, we are honored to stand here as the parents of

<sup>1</sup> Frederick Douglass, *The Civil War*, in FREDERICK DOUGLASS: SELECTIONS FROM HIS WRITINGS 72 (Philip S. Foner ed., new ed. 1964).

<sup>2</sup> See, e.g., Andrew Tilghman, *Trump Calls for Teaching “Patriotism” in Schools*, MIL. TIMES (Sept. 1, 2016), <https://www.militarytimes.com/2016/09/01/trump-calls-for-teaching-patriotism-in-schools>.

<sup>3</sup> See, e.g., Howard Bryant, *Veterans Speak Out Against the Militarization of Sports*, WBUR (July 20, 2018), <https://www.wbur.org/onlyagame/2018/07/20/military-sports-astore-francona>.

<sup>4</sup> See, e.g., Adam Nayman, “1917” and the Trouble with War Movies, RINGER (Jan. 29, 2020), <https://www.theringer.com/movies/2020/1/29/21112768/war-movies-1917-dunkirk-saving-private-ryan-apocalypse-now>.

<sup>5</sup> See, e.g., Barbara Goldberg, *U.S. House Freshman Class Includes Most Veterans in Nearly a Decade*, REUTERS (Nov. 7, 2018), <https://www.reuters.com/article/us-usa-congress-veterans/u-s-house-freshman-class-includes-most-veterans-in-nearly-a-decade-idUSKCN1NC2LW>.

<sup>6</sup> LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 6 (1996).

<sup>7</sup> President George W. Bush, Address at West Virginia Fourth of July Celebration (July 4, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/07/20020704-3.html>.

<sup>8</sup> See, e.g., *The Latest: Buttigieg Pitches Military Service to Veterans*, ASSOCIATED PRESS (Feb. 6, 2020), <https://apnews.com/2cad016d8aac27e4382f744f3e89a689>.

<sup>9</sup> Maggie Haberman & Richard A. Oppel Jr., *Donald Trump Criticizes Muslim Family of Slain U.S. Soldier, Drawing Ire*, N.Y. TIMES (July 30, 2016), <https://www.nytimes.com/2016/07/31/us/politics/donald-trump-khizr-khan-wife-ghazala.html>.

Captain Humayun Khan, and as patriotic American Muslims with undivided loyalty to our country.”<sup>10</sup>

However, the military has also become more exclusive. Over the last decade, the United States has implemented both formal and informal restrictions that bar or discourage specific groups of people from serving in the military, including those who are gay, transgender, undocumented, and—to a lesser extent—women, and Muslim Americans.<sup>11</sup> To understand the magnitude of these restrictions, one must look at the significance of the military as an institution deeply intertwined with the concept of who is an “American.”

As this Note will argue, membership in the military has historically defined membership in the American polity. Since the nation’s founding, noncitizens, minorities, and outsiders have been called to fight for this country in exchange for citizenship, a practice known as “military naturalization.”<sup>12</sup> The justification was intuitive: those who willingly bear arms for this nation prove their loyalty and worthiness for citizenship. For their part, immigrants of all backgrounds have served in every American war.<sup>13</sup>

The idea that military service constitutes citizenship for those who engage in it—which this Note calls “constitutive service”—is deeply rooted in American law. At its height, the constitutive ideal successfully transformed a group of “perpetual foreigners” to “citizens.” Until the mid-1900s, individuals of Asian descent were almost completely and categorically excluded from the American polity by law. Deemed “permanently foreign,”<sup>14</sup> “inassimilable,”<sup>15</sup> and “a race so different from our own,”<sup>16</sup> Asian immigrants were prohibited from

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<sup>10</sup> Khizr Khan, Address at the Democratic National Convention in Philadelphia (July 28, 2016), <https://abcnews.go.com/Politics/full-text-khizr-khans-speech-2016-democratic-national/story?id=41043609>.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See Angela M. Banks, *Precarious Citizenship: Asian Immigrant Naturalization 1918 to 1925*, 37 *LAW & INEQ.* 149, 149 (2019) (exploring the relationship between military naturalization and racial exclusion in the early 20th century); Deenesh Sohoni & Amin Vafa, *The Fight to Be American: Military Naturalization and Asian Citizenship*, *ASIAN AM. L.J.* 119, 119 (2010) (“[M]ilitary naturalization’ served as a powerful symbolic message: those willing to fight for the United States are worthy of its citizenship.”).

<sup>13</sup> See *infra* Part I.

<sup>14</sup> MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 8 (new ed. 2014) (“The legal racialization of [Asians’] national origin cast them as permanently foreign and unassimilable to the nation.”).

<sup>15</sup> See Neil T. Gotanda, *Citizenship Nullification: The Impossibility of Asian American Politics* (introducing the concept of “Asiatic inassimilability,” or associating Asians with permanent foreignness), in *ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS* 79, 80 (Gordon H. Chang ed., 2001).

<sup>16</sup> Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

naturalizing and obtaining citizenship.<sup>17</sup> Those who had acquired birth citizenship were consigned to the status of “alien citizens,” whose paper citizenship offered little protection from attitudes that still regarded them as foreign.<sup>18</sup> The exclusion of Asian Americans culminated in the Japanese Internment—or what historian Mae Ngai described as “the most extreme case of the construction and consequences of alien citizenship in American history.”<sup>19</sup> Asian Americans, however, ultimately overcame that barrier after a long history of military service, beginning with the War of 1812, to the Civil War, then to the two World Wars.<sup>20</sup> When Congress repealed the racial bar to naturalization in the mid-1900s, Asian Americans’ record of war service was cited as a key reason to abandon the archaic restriction.<sup>21</sup> Nativism failed when confronted by so many Asian servicepersons who so willingly gave the ultimate sacrifice.

The Asian-American story demonstrates the transformative power of the military. Yet, precisely because military service fundamentally alters a marginalized group’s position in the polity, the only effective way to stop the soldier-to-citizen transformation is to prohibit members of that group from serving in the first place. Seen this way, the contemporary restrictions to military service are so consequential because they prevent some people from accessing the power of constitutive military citizenship. These restrictions reflect enduring ways in which the nation continues to debate who is fit to be an “American,” and therefore, an “American soldier.”

This Note will bridge two existing branches of legal scholarship. First, scholars have written about Asiatic exclusion, or the association of Asian Americans with the “symbolic alien.”<sup>22</sup> Separately, an abundance of scholarship has scrutinized the connection between military service and citizenship, notably for Black Americans.<sup>23</sup> Yet few academics have written about Asian Americans in the military.<sup>24</sup> This

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<sup>17</sup> See *infra* Part II.

<sup>18</sup> NGAI, *supra* note 14, at 2 (explaining that the presence of “illegal populations” in the Asian-American community has historically contributed to a shared stigma of being “unassimilable foreigners”).

<sup>19</sup> *Id.* at 175.

<sup>20</sup> See *infra* Part II.

<sup>21</sup> See *infra* notes 259–62 and accompanying text.

<sup>22</sup> LOWE, *supra* note 6, at 6 (internal quotation marks omitted); see also *supra* notes 14–18 and accompanying text.

<sup>23</sup> See, e.g., RONALD R. KREBS, *FIGHTING FOR RIGHTS: MILITARY SERVICE AND THE POLITICS OF CITIZENSHIP* 116 (2006) (exploring the role played by military service during the two world wars in the struggle for civil rights for Black Americans).

<sup>24</sup> The three exceptions are: Banks, *supra* note 12; Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847 (2004); Sohoni & Vafa, *supra* note 12. There is also a rich literature regarding Filipino veterans’

Note seeks to put some of that research into the legal academic record.<sup>25</sup> Moreover, this Note will draw on the Asian-American experience and articulate a new way to understand the consequence of contemporary restrictions to serve. One dominant theme here is to understand citizenship less as a binary than as a continuum. A person can be a “citizen” for enjoying a particular legal status (a passport), for having certain rights (to vote), for fulfilling certain obligations (to register for the draft), or for possessing certain identities (to be an “American”).<sup>26</sup> Throughout American history, a person could be a citizen in one form but not the others—e.g., denying Black citizens the right to vote.<sup>27</sup> Military service provides a basis to assert both legal and symbolic citizenship. For this reason, contemporary restrictions eliminate more than just a professional opportunity; they deprive marginalized groups of a powerful mechanism for articulating a fuller recognition of citizenship.

This Note proceeds in three parts.<sup>28</sup> Part I will look at the history of military naturalization in the United States. This Part will argue that the military has always been a key institution to define membership in the American polity—i.e., service constitutes citizenship. Part II will then look at Asian participation in the American military, focusing on the Civil War and the two World Wars. This Part will argue that Asian Americans’ long history of military service played a significant role in changing the legal treatment of Asian persons, ultimately transforming the “perpetual foreigners” to “citizens.” Looking at legislative history, this Part will illustrate how constitutive service

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fight for recognition in the context of reparations for the government’s rescission of benefits for wartime service. See, e.g., Antonio Raimundo, *The Filipino Veterans Equity Movement: A Case Study in Reparations Theory*, 98 CALIF. L. REV. 575, 576 (2010); see also *infra* note 233 (providing more background on the status of Filipino veterans of World War II).

<sup>25</sup> Military history and narratives often blur the contributions by minority servicepersons. See Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html> (“The history of some of the military’s most storied combat units—the soldiers who landed on Omaha Beach or the Marines who stormed Iwo Jima—has largely excised the black and brown troops who fought alongside the white men.”); see also *infra* note 293 (describing a near total absence of portrayals of Asian Americans in war films).

<sup>26</sup> Cf. Leti Volpp, “*Obnoxious to Their Very Nature*”: *Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71 (2001) (articulating a similar breakdown of forms of citizenship).

<sup>27</sup> See, e.g., TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE* 19–22 (2012).

<sup>28</sup> This Note does not distinguish between volunteers and draftees. The term “Asian American” is broadly used to include all Asian and Pacific Islanders, including East Asian, South Asian, Southeast Asian, Hawaiian, etc.

prevailed over decades-long exclusion laws when Congress finally repealed the racial bar to naturalization. Finally, Part III will draw on the Asian-American experience and discuss the role the military continues to play today in defining who is an “American.”

## I

### CONSTITUTIVE SERVICE: MILITARY NATURALIZATION FROM THE REVOLUTIONARY WAR TO VIETNAM

Military service has typically been regarded as a citizen’s obligation to the nation-state as part of the social contract.<sup>29</sup> In exchange for the privileges of self-government, citizens have the obligation to serve during times of war. To Blackstone, a man “put[ ] not off the citizen when he enters the camp; but it is *because he is a citizen*, and would wish to continue so, that he makes himself for awhile a soldier.”<sup>30</sup> Even Machiavelli drew on this connection when he suggested that citizens make the best soldiers, because “when it is time to make war, [they] go to it willingly because of their love, and then when peace comes [they] return home more willingly.”<sup>31</sup>

In the United States, however, military service has also been viewed as a means to legitimize an individual’s claim of citizenship. In *Plessy v. Ferguson*, Justice John Marshall Harlan penned a harsh dissent against separate but equal and reminded his colleagues that the newly minted Black citizens had earned their place in the United States by “risk[ing] their lives for the preservation of the Union.”<sup>32</sup> Harlan’s argument echoes the longstanding American jurisprudential idea that those who demonstrate loyalty and worthiness will be rewarded with citizenship and recognition. Military service, or “putting one’s body on the line for the nation,” provides a compelling way to “earn the right to legally participate in the U.S. political and legal

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<sup>29</sup> See Meyer Kestnbaum, *Citizenship and Compulsory Military Service: The Revolutionary Origins of Conscription in the United States*, 27 *ARMED FORCES & SOC’Y* 7, 7 (2000) (“Military service is a responsibility incurred solely because of one’s membership in the political community of citizens.”). The Supreme Court has unanimously upheld compulsory military service by citizens, finding that selective service does not violate the Thirteenth Amendment. *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918) (“[T]he very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service . . . .” (emphasis added)).

<sup>30</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*408 (emphasis added).

<sup>31</sup> NICCOLÒ MACHIAVELLI, *ART OF WAR* 18 (Christopher Lynch ed. & trans., The Univ. of Chi. Press 2003).

<sup>32</sup> 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

calculus.”<sup>33</sup> In other words, “America [is] born in [us]” when we serve, whether or not “[we] were born in America.”<sup>34</sup>

This first Part will trace the origin of the concept that service constitutes citizenship. This Part will argue that constitutive service is a founding principle for the nation, and noncitizens have been called to fight every American war.

### A. Origin

The idea that military service constitutes citizenship began with the Revolutionary War. Initially, the American colonists had hoped to win independence by relying solely on the local militia, whose members included citizen-soldiers like the minutemen who stood at Lexington and Concord.<sup>35</sup> At the time, the colonial militia was an exclusive organization open only to citizens. For those “inside” the polity, serving in the militia was “one of the clearest expressions of political participation and civic engagement.”<sup>36</sup> Accordingly, at the onset of the war, only citizens—defined as “men of property,” including “freeholders or small farmers” and “merchants and manufacturing tradesmen”—could serve.<sup>37</sup> Excluded from citizenship—and thus from the militia—were landless persons, indentured servants, Blacks, Indians, and women.<sup>38</sup>

This citizen-soldier ideal wilted away soon after the conflict started. Although the initial Continental Army was still comprised of men “almost exclusively from the ‘middling classes’” who embodied the citizen-soldier ideal,<sup>39</sup> the Patriots had to enlarge the recruiting

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<sup>33</sup> See Sanda Mayzaw Lwin, “A Race So Different from Our Own”: Segregation, Exclusion, and the Myth of Mobility, in *AFROASIAN ENCOUNTERS: CULTURE, HISTORY, POLITICS* 17, 20–21 (Heike Raphael-Hernandez & Shannon Steen eds., 2006) (explaining the theory of citizenship underlying Justice Harlan’s *Plessy* dissent).

<sup>34</sup> Cf. 98 CONG. REC. 4306 (1952) (statement of Rep. Celler) (arguing that American identity derives from loyalty to the country and not place-of-birth).

<sup>35</sup> Kestnbaum, *supra* note 29, at 10, 13–14; see also ELIOT A. COHEN, *CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE* 122 (1985) (observing that “the Minutemen of Lexington Green” have long been identified with the label of “citizen-soldier”).

<sup>36</sup> Kestnbaum, *supra* note 29, at 11; see also COHEN, *supra* note 35, at 125 (“The type of military service that most closely matches the ideal of the citizen-soldier is that of militia duty.”); KREBS, *supra* note 23, at 17 (“Participation in the armed forces has, at least in the nation-state system, been depicted as a sign of one’s full membership in the political community . . .”).

<sup>37</sup> Kestnbaum, *supra* note 29, at 11.

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

<sup>39</sup> *Id.* at 17 (observing that early Continental Army recruitment was driven by “Congress’ explicit desire to make . . . soldiering the highest form of political participation entered into freely by men as citizens”).



roster following a series of military defeats in 1776.<sup>40</sup> In response, the Continental Congress approved a controversial measure allowing enlistments by individuals from “those social strata previously excluded from participation.”<sup>41</sup> This expansion included not only “[a]pprentices and servants . . . [and] other whites in good standing who lacked sufficient property,” but also “free blacks and ‘mulattos.’”<sup>42</sup> In doing so, the Continental Congress opened the door for those considered “outside” the polity to enter an institution that has been deeply intertwined with the concept of citizenship.

Ultimately, the victorious Continental Army, far from the homogeneous composition of the “virtuous citizenry” envisioned in the beginning,<sup>43</sup> included a rich diversity of people who more accurately represented the demographics of the colonies.<sup>44</sup> German immigrants, who during the colonial era confronted a strong “xenophobic outburst,”<sup>45</sup> comprised approximately twelve percent of George Washington’s total force.<sup>46</sup> A large number of Irish immigrants also served in the regiments of New Jersey, Pennsylvania, Delaware, and Maryland, comprising nearly forty-five percent of the strength of those four states.<sup>47</sup> Some five thousand Black Americans fought for the Patriots as well, many of whom earned their freedom after the war even though slavery as a national practice remained.<sup>48</sup> Among the immigrant-soldiers was Alexander Hamilton. Born on the Caribbean island of Nevis, Hamilton served as Washington’s aide-de-camp and led a bayonet charge at the decisive Battle of Yorktown.<sup>49</sup> Though already an ardent patriot by the time he had signed up, Hamilton’s

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<sup>40</sup> *Id.* at 18, 21.

<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 18; see also CHARLES PATRICK NEIMEYER, *AMERICA GOES TO WAR: A SOCIAL HISTORY OF THE CONTINENTAL ARMY* 3 (1996) (“Congress was notoriously unable to get enough American citizens to serve more than six months.”).

<sup>44</sup> See NANCY GENTILE FORD, *AMERICANS ALL!: FOREIGN-BORN SOLDIERS IN WORLD WAR I*, at 46–47 (2001) (describing the racial and ethnic diversity of the American colonies and its relationship to colonial military recruitment); see also NEIMEYER, *supra* note 43, at 4 (same).

<sup>45</sup> See THOMAS J. CURRAN, *XENOPHOBIA AND IMMIGRATION, 1820–1930*, at 12–16 (1975) (describing the xenophobic attitudes and treatment faced by immigrants of various nationalities, including Germans, during the colonial era).

<sup>46</sup> FORD, *supra* note 44, at 47.

<sup>47</sup> NEIMEYER, *supra* note 43, at 37.

<sup>48</sup> *Id.* at 82, 86. For more detail on the recruitment of Black soldiers during the Revolutionary War and the political debate surrounding it, see Pete Maslowski, *National Policy Toward the Use of Black Troops in the Revolution*, 73 S.C. HIST. MAG. 1 (1972).

<sup>49</sup> RON CHERNOW, *ALEXANDER HAMILTON* 7, 163 (2004).



wartime service “completed [his] rapid metamorphosis into a full-blooded American.”<sup>50</sup>

The legacy of recruiting noncitizens to fight did more than simply fast-tracking naturalization. Instead, it expanded the scope of eligibility in the first place. The Revolutionary War inaugurated a practice of permitting those “outside” the polity to legitimize their belonging by bearing arms for their adopted nation. In doing so, the United States has since its founding “inverted the historical relationship between military service and citizenship.”<sup>51</sup> Service was no longer solely the obligation of citizens, but the basis to constitute citizenship.

### B. Entrenchment

After the nation’s founding, the idea of constitutive service became slowly ingrained in the American legal tradition. Although legislation in the country’s early years technically restricted service to citizens,<sup>52</sup> these laws were “inconsequential” and rarely enforced against immigrants.<sup>53</sup> The army that marched off to war in 1812 was as diverse as the Continental Army, with some thirteen percent foreign-born enlistees.<sup>54</sup> The bulk of the immigrant-soldiers were Irish and German, but other groups—French, Polish, Scandinavian, and Latin American, among others—also served.<sup>55</sup> After the War of 1812, immigrants continued to enlist during both peacetime and wartime, with immigrants of Irish and German descents comprising some forty-seven percent of the army by the 1840s.<sup>56</sup>

The legality of alien enlistment was actually litigated in *United States v. Cottingham*.<sup>57</sup> In 1836, an Irish immigrant named George Cottingham volunteered for the army and served for several years, reenlisting in 1840. For some reason, a year after reenlisting, Cottingham decided that staying in the Army was no longer a good

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<sup>50</sup> *Id.* at 92.

<sup>51</sup> Kestnbaum, *supra* note 29, at 21; see also Morris Janowitz, *Military Institutions and Citizenship in Western Societies*, 2 *ARMED FORCES & SOC’Y* 185, 199 (1976) (noting that military service during the revolution “enlarge[d] the concept of who were effective members of the polity”).

<sup>52</sup> See Military Peace Establishment Act, ch. 9, § 11, 2 Stat. 132, 135 (1802) (permitting the recruitment of “effective able-bodied citizen[s] of the United States”); Second Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271 (requiring “every free able-bodied white male citizen” to enroll in the local militia).

<sup>53</sup> FORD, *supra* note 44, at 47; J.C.A. Stagg, *Enlisted Men in the United States Army, 1812–1815: A Preliminary Survey*, 43 *WM. & MARY Q.* 615, 627 (1986).

<sup>54</sup> See *infra* Figure 1.

<sup>55</sup> Stagg, *supra* note 53, at 628 (breaking down the birthplaces of foreign-born recruits during the War of 1812).

<sup>56</sup> FORD, *supra* note 44, at 48.

<sup>57</sup> 40 Va. (1 Rob.) 615 (1843).

idea.<sup>58</sup> Hoping for an early discharge, Cottingham petitioned the court for a writ of habeas corpus, arguing that his alienage had rendered his enlistment illegal, violating the Military Peace Establishment Act of 1802 that limited service to “able-bodied citizen[s] of the United States.”<sup>59</sup> The Supreme Court of Appeals of Virginia flatly rejected the claim.<sup>60</sup> The court concluded that the word “citizen” could not mean “a citizen entitled to all the privileges which appertain to citizenship in its *most enlarged signification*.”<sup>61</sup> Instead, “an alien under the protection of a foreign state is for some purposes and to a certain extent *to be regarded as a citizen*.”<sup>62</sup> In other words, while Cottingham had made no effort at naturalization and disavowed any intent to do so, the court still regarded him as a “citizen of the *United States*.”<sup>63</sup> This remarkable holding suggested a view of citizenship as a continuum rather than a binary, a perspective that would later haunt minority Americans whose paper citizenship could not protect them from being treated as second-class citizens.<sup>64</sup>

Arguably the only instance when the nation ignored the practice of exchanging service for citizenship was *Dred Scott*.<sup>65</sup> Concluding that Black people cannot be “citizen[s] of the United States,” the Supreme Court observed that “no one was permitted to be enrolled in the militia . . . but free white citizens . . . . Nothing could more strongly mark the entire repudiation of the African race.”<sup>66</sup> Ignoring the Revolutionary War practice of admitting noncitizens to the military, the Court then remarked that an alien, who “cannot be a member of the community,” was also excluded from the militia.<sup>67</sup> Therefore, a Black person, “not . . . numbered among [the] people,” surely could not “share in one of the highest duties of the citizen.”<sup>68</sup>

Notwithstanding *Dred Scott*’s broad proclamation that only citizens could serve, Congress legalized noncitizen service beginning in the mid-1800s, passing military naturalization laws in response to each successive conflict.<sup>69</sup> The first came a year after the start of the Civil

<sup>58</sup> *Id.* at 615–16.

<sup>59</sup> *Id.*; Military Peace Establishment Act, ch. 9, § 11, 2 Stat. 132, 135 (1802).

<sup>60</sup> *Cottingham*, 40 Va. (1 Rob.) at 638.

<sup>61</sup> *Id.* at 622 (emphasis added).

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> See *infra* notes 84–86, 227–33 and accompanying text (describing the historical experience of minority Americans during wartime).

<sup>65</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>66</sup> *Id.* at 406, 415.

<sup>67</sup> *Id.* at 415.

<sup>68</sup> *Id.*

<sup>69</sup> Cf. Sohoni & Vafa, *supra* note 12, at 127–29 tbl.1 (listing selected military naturalization in chronological order).

War.<sup>70</sup> The Act of July 17, 1862, provided a template used by nearly all subsequent renditions:

[A]ny alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been . . . honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen . . .<sup>71</sup>

The law's broad scope—applicable to “any alien”—reflected the prevailing belief that even those “outside” the polity could serve.

During the Civil War, numerous immigrants took up this offer, and some 543,000 noncitizens ultimately served in the Union army, representing a quarter of the total force.<sup>72</sup> The Northern states also actively solicited foreign-born recruits. The New York 39th Regiment, for example, printed recruitment posters in foreign languages, including one written almost entirely in German that urged its viewers to fight because “your country is in danger!”<sup>73</sup> Although most immigrant-soldiers were of German or Irish descent, the war also drew greater numbers of enlistees from Poland, Hungary, Latin America, and elsewhere.<sup>74</sup> Of course, Blacks were the largest noncitizen group to serve in the Civil War, for whom the war represented more than just a fight for symbolic freedom.<sup>75</sup> Permitted to serve only in segregated “color” regiments, 179,000 Black men answered the call in the Union army, plus another 19,000 in the navy.<sup>76</sup>

The practice of military naturalization continued beyond the Civil War. The Act of July 17, 1862, was codified into Title 30 of the Revised Statutes of 1875, section 2166.<sup>77</sup> The United States participated in several conflicts during the post-Civil War period, including hostilities along the Western frontier and the Spanish-American War, both of which involved service by immigrant-soldiers.<sup>78</sup>

The onset of World War I marked the next major change, when Congress amended section 2166 in response to the war effort's need and again authorized military naturalization. The Act of May 9, 1918,

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<sup>70</sup> Banks, *supra* note 12, at 165–66.

<sup>71</sup> Act of July 17, 1862, ch. 254, § 21, 12 Stat. 594, 597.

<sup>72</sup> DON H. DOYLE, *THE CAUSE OF ALL NATIONS: AN INTERNATIONAL HISTORY OF THE AMERICAN CIVIL WAR* 170 (2015).

<sup>73</sup> *See id.* at 161 (“Euer Land ist in Gefahr!”).

<sup>74</sup> *Id.* at 159.

<sup>75</sup> *See Black Soldiers in the U.S. Military During the Civil War*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/blacks-civil-war> (last visited May 25, 2020) (linking the issues of military service and emancipation during the Civil War).

<sup>76</sup> *Id.*

<sup>77</sup> 30 Revised Statutes of the United States § 2166 (1875).

<sup>78</sup> *See infra* text accompanying note 174.

was passed a year after the United States had entered the First World War and provided expedited naturalization to “any alien serving in the military or naval service of the United States during the time this country is engaged in the present war.”<sup>79</sup>

Several hundred thousand immigrants took up this offer of service—foreign-born men constituted roughly eighteen percent of the American Expeditionary Force sent to Europe, and some 307,529 ultimately earned citizenship.<sup>80</sup> Those who served included not only Polish or Dutch immigrants who fought previous American wars, but also newer immigrant groups: Cuban, Italian, Czech, Slovak, and Syrian, among others.<sup>81</sup> Even foreign-born German and Austrian immigrants, despite being “enemy aliens,” could serve in the military with proof of loyalty.<sup>82</sup> Several thousand enemy aliens provided such service, with some fighting in frontline combat divisions on the Western Front.<sup>83</sup> Surviving veterans were entitled to citizenship upon a showing of loyalty to the United States.<sup>84</sup> Finally, many Black Americans, though legally citizens since the Civil War, also volunteered to “prove their worthiness for full citizenship,” with some 380,000 Black men in uniform.<sup>85</sup> Tired of being treated as second-class

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<sup>79</sup> Act of May 9, 1918, ch. 69, § 1, 40 Stat. 542, 542; *see also* Salyer, *supra* note 24, at 852 (explaining that the law was motivated, in part, by a desire to rebut other countries’ objections to conscription of their nationals).

<sup>80</sup> DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS 51–52 tbl.20 (2006) [hereinafter DHS REPORT], [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2005.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2005.pdf); *see infra* Figure 1.

<sup>81</sup> *See* EDWARD E. CURTIS IV, MUSLIM AMERICANS IN THE MILITARY: CENTURIES OF SERVICE 24 (2016) (listing various immigrant communities that fought for the United States during World War I); FORD, *supra* note 43, at 141–42 (detailing immigrant soldiers’ experiences during the war).

<sup>82</sup> FORD, *supra* note 44, at 58, 60. Though technically exempt from the draft, many enemy aliens either volunteered or were mistakenly drafted. *Id.* at 59 (noting that “‘absolute prohibition’ on drafting enemy aliens did not work as planned because a large number of noncitizen enemy aliens continued to be drafted in the [army]”). The army “interviewed all enemy aliens [in the military] and noted their loyalty in reports to the camp commanders.” *Id.* at 58. Those who were determined to be “of undoubted loyalty” by their division commanders were given a choice: to stay in a combat division, to transfer to a noncombat division, or to receive a military discharge. *Id.* Those who stayed were warned of the danger of being caught on the battlefield and the accompanying risk of being “shot as a traitor.” *Id.* Internment did occur for disloyal individuals, but only after thorough investigation and “evidence tending to prove that, if at large, they would be dangerous to the country.” *Id.* at 61–62. The remarkable accommodation given to enemy aliens during World War I would sharply contrast with the treatment of Japanese Americans during World War II. *See infra* note 230 (discussing Japanese internment).

<sup>83</sup> FORD, *supra* note 44, at 58.

<sup>84</sup> *See id.* at 63 (describing the laws governing citizenship for immigrants serving in the United States military).

<sup>85</sup> KREBS, *supra* note 23, at 123, 126.

citizens, the Black community saw service as necessary for recognition: “The moment the American Negro failed to perform all the duties of citizenship, he immediately abdicated the right of claiming the full privileges of citizenship.”<sup>86</sup> Immigrant-soldiers thus dotted the American frontline during World War I. Of particular renown was the 77th Infantry, nicknamed the “Melting Pot Division” because immigrants from New York filled the majority of the ranks.<sup>87</sup>

World War I illustrates how far the idea of constitutive service had come since the Revolutionary War. At the time, to distinguish citizen-aspirants from transient visitors, the law required aliens seeking naturalization to first file a declaration of intent at least three years prior to petitioning for citizenship, in addition to a length-of-residency requirement.<sup>88</sup> For this reason, the Selective Service Act of 1917, which implemented the World War I draft, sorted immigrants into two different groups.<sup>89</sup> “Declarant immigrants”—those who had already filed their declaration of intent and were waiting out the residency period—could be drafted immediately;<sup>90</sup> nondeclarants were exempt.<sup>91</sup> A declarant could refuse by withdrawing his declaration of intent but doing so would permanently bar this person from American citizenship.<sup>92</sup> Considering the exclusivity of the colonial militia,<sup>93</sup> the obligatory service in the American Expeditionary Force backed by

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<sup>86</sup> *Id.* at 128 (quoting EMMETT J. SCOTT, SCOTT’S OFFICIAL HISTORY OF THE AMERICAN NEGRO IN THE WORLD WAR 413 (1919)). However, World War I did not prove to be the liberating force for Black Americans. Intense racism confined black enlistees to segregated units, some of which fought under French command and wore French helmets. See David Roza, *They Were Among the Fiercest American Soldiers in WWI. Here’s Why They Were Horribly Mistreated When They Returned Home*, TASK & PURPOSE (Mar. 11, 2020, 8:00 AM), <https://taskandpurpose.com/news/harlem-hellfighters-world-war-one-exhibit> (describing Black military involvement in World War I). Returning Black veterans faced “racism . . . with a vengeance,” far from the equality in citizenship many had hoped. KREBS, *supra* note 23, at 126. Nevertheless, many Black Americans “continued to believe that they could not expect to receive the fruits of first-class citizenship unless they were willing to bear its burdens.” *Id.* at 144.

<sup>87</sup> *The Immigrant Army: Immigrant Service Members in World War I*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/immigrant-army-immigrant-service-members-world-war-i> (last updated Mar. 5, 2020).

<sup>88</sup> See Banks, *supra* note 12, at 166–67 (comparing naturalization requirements for immigrant veterans and all other immigrants).

<sup>89</sup> See Selective Service Act of 1917, Pub. L. No. 65-12, § 2, 40 Stat. 76, 77–78 (1917) (sorting immigrants by whether they declared their intent to become American citizens).

<sup>90</sup> FORD, *supra* note 44, at 52.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 57; see also Salyer, *supra* note 24, at 867 (explaining that federal judges often extended this law to immigrants who withdrew their declarations of intent but were nonetheless drafted).

<sup>93</sup> See *supra* notes 35–38 and accompanying text.

“political excommunication” was a significant departure.<sup>94</sup> Far from the earlier sentiments that regarded the military as the province of citizens, the law now reflected the increasingly popular view that immigrants bear some responsibility to defend the United States.<sup>95</sup>

After World War I, those who had tried to dodge military service faced substantial difficulties in obtaining citizenship. Between 1920 to 1928, district judges denied naturalization to 31,147 applicants for failure to serve.<sup>96</sup> In one case, a Norwegian immigrant was inducted into the military despite having surrendered his declaration of intent.<sup>97</sup> The war ended while he was still in boot camp, but he promptly sought naturalization based on his brief stint in the army.<sup>98</sup> The district judge scornfully rejected his application, concluding that someone who had refused to “pledge his hands, his heart, *his life*, to the service . . . of the United States . . . is unworthy to be admitted to citizenship.”<sup>99</sup>

The practice of military naturalization took a brief respite during the Roaring Twenties,<sup>100</sup> but it was reanimated by Congress at the beginning of World War II. Using the now-familiar language, the Second War Powers Act of 1942, authorized naturalization of “any person not a citizen . . . who has served . . . honorably in the military or naval forces of the United States during the present war . . . .”<sup>101</sup> Some 306,298 immigrants served in the U.S. Army, about a third of whom ultimately became citizens during the war.<sup>102</sup> As in World War I, “enemy aliens” could serve if found sufficiently loyal by the armed forces, and some 109,517 Germans, Italians, Austrians, among others, took up arms for the United States.<sup>103</sup> In total, immigrants from more

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<sup>94</sup> Candice Bredbenner, *A Duty to Defend? The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946*, 24 J. POL'Y HIST. 224, 237 (2012).

<sup>95</sup> See FORD, *supra* note 44, at 53 (detailing the media response to earlier laws that exempted immigrants from the draft); Salyer, *supra* note 24, at 852, 867 (noting that military naturalization during World War I “reinforced the principles of martial citizenship as a mechanism of nation building”).

<sup>96</sup> Salyer, *supra* note 24, at 867.

<sup>97</sup> *In re Loen*, 262 F. 166, 166 (W.D. Wash. 1919).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 167–68 (emphasis added).

<sup>100</sup> Cf. GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 82 (2001) (“A series of anti-immigrant laws passed from 1917 to 1924 halted virtually all immigration on the part of southern and eastern Europeans and East and South Asians to the United States.”).

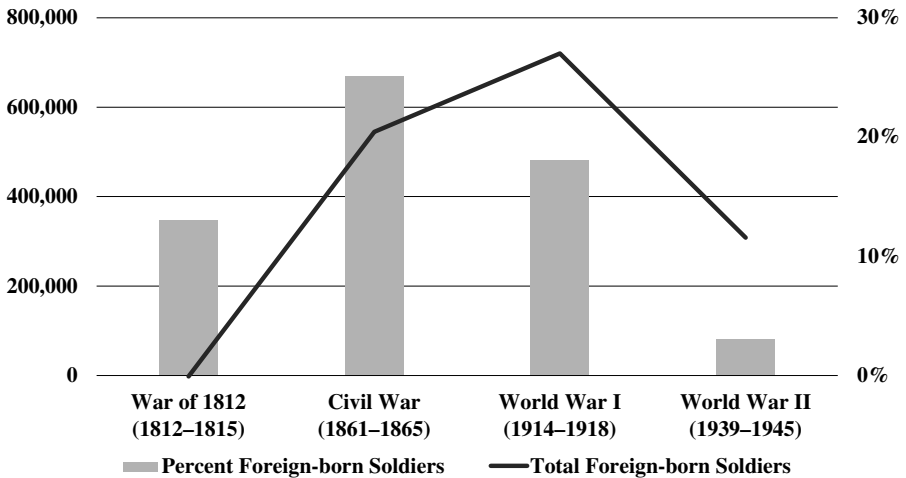
<sup>101</sup> Second War Powers Act of 1942, Pub. L. No. 77-507, § 701, 56 Stat. 176, 182 (1942).

<sup>102</sup> DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE MONTHLY REVIEW 48 tbl.1, 52 (1948) [hereinafter DOJ REPORT], <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/WWII/INSMRev1948.10.pdf>.

<sup>103</sup> *Id.* at 51 tbl.7.

than twenty countries fought in World War II, including those from Mexico, Cuba, Sweden, Lithuania, Romania, Turkey, among others.<sup>104</sup>

FIGURE 1. FOREIGN-BORN SOLDIERS IN THE U.S. ARMY<sup>105</sup>



### C. Continuation

Although World War II was the last time the United States had formally declared war against a nation-state, hostilities would continue in Korea and Vietnam.<sup>106</sup> The practice of military naturalization remained during those conflicts, and some 31,905 immigrant-veterans naturalized following the Korean War, plus another 92,525 following the Vietnam War.<sup>107</sup>

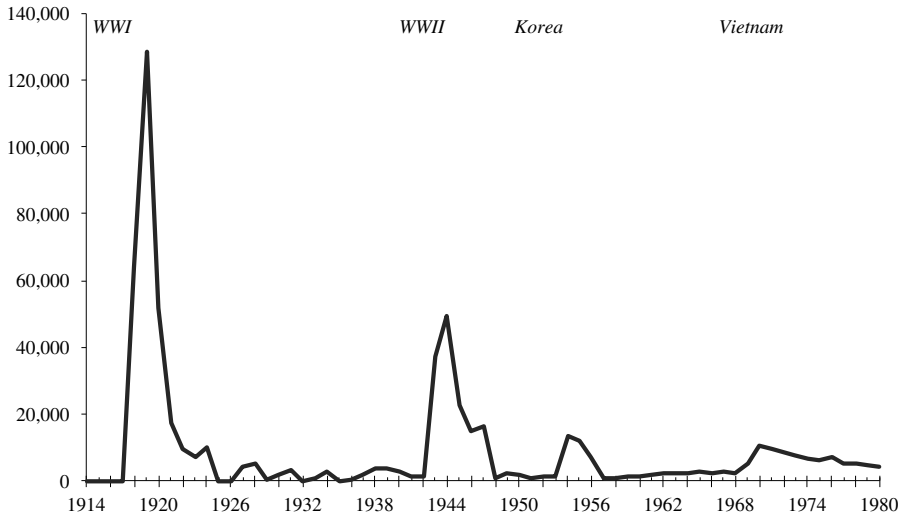
<sup>104</sup> See *id.* at 48 tbl.1, 53 tbl.10 (listing the nationalities of armed forces members who served during World War II).

<sup>105</sup> For data on the War of 1812, see Stagg, *supra* note 53, at 626, 628. For the Civil War, see Doyle, *supra* note 72, at 159, 170. For World War I, see Gerstle, *supra* note 100, at 84 and *Immigrants, THE UNITED STATES WORLD WAR ONE CENTENNIAL COMMISSION*, <https://www.worldwar1centennial.org/index.php/edu-home/edu-topics/588-americans-at-war/4993-immigrants.html> (last visited July 11, 2020). Note that “Total Foreign-born Soldiers” is estimated by multiplying the percent of foreign-born soldiers (eighteen percent) with the total number (four million). *The American Expeditionary Forces*, LIBR. OF CONGRESS, <https://www.loc.gov/collections/stars-and-stripes/articles-and-essays/a-world-at-war/american-expeditionary-forces> (last visited May 25, 2020). For World War II, see DOJ REPORT, *supra* note 102, at 48, 52. Note that the “Percent Foreign-born Soldiers” is estimated by dividing the number of foreign-born soldiers (306,298) by the total number (9,863,969).

<sup>106</sup> See *Official Declarations of War by Congress*, U.S. SENATE, [https://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_teasers/WarDeclarationsbyCongress.htm](https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm) (last visited May 25, 2020) (listing all occasions where Congress formally declared war).

<sup>107</sup> DHS REPORT, *supra* note 80.



FIGURE 2. MILITARY NATURALIZATION, 1918–1980<sup>108</sup>

In 1952, Congress permanently codified military naturalization under section 329 of the Immigration and Nationality Act.<sup>109</sup> The language is essentially the same as the one first adopted in 1862:

Any person who, while an alien or a noncitizen national of the United States, has served honorably . . . during either [World War I, World War II, Korea, and Vietnam] . . . or thereafter during any other period which the President by Executive order shall designate as a period . . . [of] armed conflict with a hostile foreign force . . . may be naturalized . . .<sup>110</sup>

As of 2008, some 65,000 immigrants serve on active duty, comprising roughly five percent of the total force.<sup>111</sup> Between 2001 and 2008, more than 37,250 immigrant-soldiers have naturalized, including 111 posthumously.<sup>112</sup>

In sum, the United States has since its founding viewed military service as constitutive of citizenship. Those who willingly bear arms for this country demonstrate their individual loyalty—notwithstanding some immigrants' broader association with an enemy nation-state—and earn the right to become Americans. For their part, immigrants have served in every American war. Although the bulk of immigrant-

<sup>108</sup> *Id.* No data was collected prior to 1918.

<sup>109</sup> *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/legal-resources/immigration-and-nationality-act> (last updated July 10, 2019).

<sup>110</sup> 8 U.S.C. § 1440(a) (2018).

<sup>111</sup> Jeanne Batalova, *Immigrants in the U.S. Armed Forces*, MIGRATION POL'Y INST. (May 15, 2008), <http://www.migrationpolicy.org/article/immigrants-us-armed-forces>.

<sup>112</sup> *Id.*

soldiers during the nation's early years were of European descent, Asian immigrants did not sit on the sidelines during those conflicts.

## II

### ASIAN-AMERICAN SERVICE IN THE U.S. MILITARY

This Part will look at the intersection of two American narratives. The first is the story of the Asian-American soldier, whose service with the U.S. military began with the War of 1812 when a group of Filipinos stood with General Andrew Jackson at the Battle of New Orleans.<sup>113</sup> Asian Americans have served—and fought—in nearly every war since the War of 1812, often in combat roles. Although early Asian-American veterans were largely invisible, many with names indistinguishable from their white peers,<sup>114</sup> Asian Americans today play a visible role in the defense of the nation. As of 2015, an estimated 69,291 Asian Americans serve in uniform, sixteen percent as military officers.<sup>115</sup> A total of thirty-two Asian Americans have received the Medal of Honor, the nation's highest military decoration.<sup>116</sup>

The second story is that of the Asian-American immigrant, who began settling in the United States in the 1800s.<sup>117</sup> Although Asian Americans today increasingly assume prominent positions in public,<sup>118</sup> Asian immigrants in the past have struggled with intense racial nativism and Asiatic exclusion.<sup>119</sup> The denial of citizenship to persons of Asian descent was a continuous practice until the mid-twentieth

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<sup>113</sup> *Asian American & Pacific Islander Heritage Month 2017*, U.S. DEP'T OF DEF., [https://dod.defense.gov/News/Special-Reports/0517\\_aapi-archive](https://dod.defense.gov/News/Special-Reports/0517_aapi-archive) (last visited May 25, 2020) [hereinafter DOD Special Report].

<sup>114</sup> See *infra* notes 133–36.

<sup>115</sup> *DOD Special Report*, *supra* note 113.

<sup>116</sup> Rudi Williams, *Medals of Honor Bestowed on 10 Asian Pacific Americans*, U.S. DEP'T OF DEF., <https://archive.defense.gov/news/newsarticle.aspx?id=42746> (noting that Jose Nisperos is the first Pacific Islander to be awarded the Medal of Honor); *DOD Special Report*, *supra* note 113 (listing the remaining thirty-one recipients).

<sup>117</sup> See BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990*, at 19–20 (1993) (explaining that few Asians migrated to the United States until the 1840s).

<sup>118</sup> See, e.g., Saleah Blancaflor, *5 Asian American Political Trailblazers Who Changed the United States*, NBC NEWS (May 6, 2019, 12:01 PM), <https://www.nbcnews.com/news/asian-america/5-asian-american-political-trailblazers-who-changed-united-states-n994606> (highlighting several Asian American politicians who have made “a lasting impact on the institutions of the United States”).

<sup>119</sup> See Gotanda, *supra* note 15, at 80 (discussing the rise of Asiatic racialization and permanent foreignness); Salyer, *supra* note 24, at 848 (noting the historical tension between military naturalization policies and racial nativism that excluded Asians).

century.<sup>120</sup> The Immigration and Nationality Act of 1952 finally declared that: “The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race . . . .”<sup>121</sup>

This Part will put these narratives together and look at Asian-American involvement in three major conflicts—the Civil War, World War I, and World War II. This Part will argue that the constitutive ideal triumphed for Asian Americans both at the individual and the group level as their military service ultimately transformed them from “perpetual foreigners” to “citizens.”

### A. *Civil War*

The Civil War is frequently remembered as a binary conflict between the North and the South, the Union and the Confederacy, slavery and states’ rights. This narrative is necessarily one of white Americans fighting to define the future of their nation. Yet, the period prior to the Civil War also coincided with the beginning of large-scale Asian immigration to the United States.<sup>122</sup> Chinese and Japanese immigrants were among the first Asians to arrive, both drawn by strong labor opportunities along the West Coast.<sup>123</sup> By the mid to late 1800s, immigrants of other nationalities, including Filipino and Indian, also began to settle in the United States.<sup>124</sup>

Although their numbers were small, 335 Asians also fought in the Civil War for both sides, representing countries like China, India, Japan, Malaysia, Indonesia, the Philippines, and Sri Lanka, among others.<sup>125</sup> On the Confederate side, they included names like Christopher and Stephen Bunker, children of the famous Siamese twins, Chang and Eng Bunker.<sup>126</sup> On the Union side, they included Felix Balderry, who was born in the Philippines and served with the 11th Michigan Infantry, marching to Atlanta with General William T.

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<sup>120</sup> See *infra* notes 227–32 and accompanying text (describing the citizenship nullification of Japanese Americans during World War II).

<sup>121</sup> Immigration and Nationality Act of 1952, § 311, 8 U.S.C. § 1422 (2018).

<sup>122</sup> See HING, *supra* note 117, at 19–20 (noting that Asian immigration in large numbers began in the 1840s).

<sup>123</sup> *Id.* at 20–21, 26–27.

<sup>124</sup> *Id.* at 30–31.

<sup>125</sup> NAT’L PARK SERV., LIST OF ASIAN & PACIFIC ISLANDERS BY COUNTRY OF ORIGIN [hereinafter NPS REPORT], <https://www.nps.gov/civilwar/upload/List-of-Asian-Pacific-Islanders-by-Country-of-Origin.pdf>.

<sup>126</sup> Ruthanne Lum McCunn, *Chinese in the Civil War: Ten Who Served*, in CHINESE AMERICA: HISTORY & PERSPECTIVES 149, 150–53 (1996).

Sherman;<sup>127</sup> Conjee Rustumjee Cohoujee Bey, who was born in Pakistan and served in the Navy, participating in the Union blockade;<sup>128</sup> and John Tomney, who was born in China and served with the 1st Regiment of Excelsior Brigade, participating in the Second Battle of Bull Run, Fredericksburg, Chancellorsville, and finally, Gettysburg, where he fell.<sup>129</sup> Tomney, whose experience earned him acclaim in an 1863 *New York Times* article, was admired for his inability to “know what fear was.”<sup>130</sup> When briefly captured as a prisoner of war, Tomney’s atypical appearance amused his Confederate interrogators, who asked how much he would take to join the Confederate Army.<sup>131</sup> Tomney’s response: “Not unless you would make me a Brigadier-General.”<sup>132</sup>

Not much is known about most of the three hundred or so Asian immigrant-veterans and their lives after the war,<sup>133</sup> except for three Chinese immigrants—Joseph Pierce, who stood with the 14th Connecticut Volunteer Infantry (“the Wooden Nutmeg”) and fired on Pickett’s Charge at Gettysburg;<sup>134</sup> Antonio Dardelle, who enlisted in the 27th Connecticut and was wounded at Fredericksburg;<sup>135</sup> and Edward Cohota, who marched with the 23rd Massachusetts and later enjoyed a thirty-year career in the army following the war.<sup>136</sup>

Pierce, Dardelle, and Cohota’s stories are particularly noteworthy, given that Pierce and Dardelle were among the few Asian veterans who successfully acquired citizenship.<sup>137</sup> Because their numbers were so few, most Asian soldiers fought alongside white peers in

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<sup>127</sup> Ted Alexander, *Felix Balderry*, in NAT’L PARK SERV., ASIANS AND PACIFIC ISLANDERS AND THE CIVIL WAR 101, 101–02 (Carol A. Shively ed., 2015) [hereinafter NPS HANDBOOK].

<sup>128</sup> Terry Foenander, *Conjee Rustumjee Cohoujee Bey (Antonio Francisco Gomez)*, in NPS HANDBOOK, *supra* note 127, at 107.

<sup>129</sup> Ruthanne Lum McCunn, *John Tomney*, in NPS HANDBOOK, *supra* note 127, at 43–45.

<sup>130</sup> *China at Gettysburg*, N.Y. TIMES, July 12, 1863, at 2, <https://www.nytimes.com/1863/07/12/archives/china-at-gettysburg.html>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Many Asian immigrants at the time assumed full American names, compounding the difficulty of identifying them in military records. Gloria Lee & Mike Weinstein, *Forgotten Warriors*, in NPS HANDBOOK, *supra* note 127, at 4; Jim Garamone, *Chinese Soldiers Fought in U.S. Civil War*, U.S. DEP’T OF DEF. (Apr. 24, 2001), <https://archive.defense.gov/news/newsarticle.aspx?id=44949>.

<sup>134</sup> McCunn, *supra* note 126, at 161–63; Zi Lin, *Chinese Soldiers of the American Civil War: The Stories of Edward Cohota and Joseph Pierce* 44 (Nov. 30, 2016) (unpublished manuscript) (on file with author) (providing detailed historical research on Cohota and Pierce’s lives before and after the war).

<sup>135</sup> McCunn, *supra* note 126, at 158–59.

<sup>136</sup> *Id.* at 153–58; Lin, *supra* note 134, at 6–20.

<sup>137</sup> Lin, *supra* note 134, at 23 n.162; McCunn, *supra* note 126, at 158–59.

integrated regiments.<sup>138</sup> This became relevant for those Asian warfighters, who found social acceptance among their ranks despite the general anti-Asian sentiment during the mid-1800s.<sup>139</sup> Pierce, for example, earned a promotion to corporal after Gettysburg, a significant accomplishment for a non-white enlistee at the time.<sup>140</sup> Referred to fondly by his unit as “Our Joe,” Pierce was later remembered as an “apt, capable, faithful, and brave soldier.”<sup>141</sup> When Pierce attended a veterans reunion years later, he was received with a “hearty, vociferous round of applause.”<sup>142</sup> Dardelle was similarly accepted, so much so that the Court of Common Pleas approved his application for military naturalization despite his failure to first file a declaration of intent.<sup>143</sup> The court found Dardelle’s mere possession of honorable discharge papers as having satisfied that requirement.<sup>144</sup>

Cohota had a different story. Despite a combined three decades of military service and the highest regard among his peers,<sup>145</sup> Cohota was told that “no court in this country could grant him citizenship papers.”<sup>146</sup> Part of the explanation may have been timing: while Pierce and Dardelle actively sought citizenship after the war,<sup>147</sup> Cohota merely presumed that he had already become a citizen, only to have his homestead application rejected years after his service.<sup>148</sup> The rejection was extremely ironic. The Homestead Act of 1862, which promised 160 acres of “virtually free western land” to willing settlers, was used by Union diplomats to recruit immigrant-soldiers abroad.<sup>149</sup> The pitch was simple: anyone who renders military service could, after obtaining the accompanying reward of citizenship, seek to settle in the west. Yet, Cohota’s homestead application—filed in 1912<sup>150</sup>—came

<sup>138</sup> See Ruthanne Lum McCunn, *The Numbers*, in NPS HANDBOOK, *supra* note 127, at 37.

<sup>139</sup> See *infra* notes 153–55.

<sup>140</sup> McCunn, *supra* note 126, at 163.

<sup>141</sup> *Personal*, NAT. TRIBUNE, Oct. 23, 1890, at 6, <https://chroniclingamerica.loc.gov/lccn/sn82016187/1890-10-23/ed-1/seq-6>.

<sup>142</sup> *Id.*

<sup>143</sup> McCunn, *supra* note 126, at 159.

<sup>144</sup> *General Notes*, N.Y. TIMES, Mar. 17, 1882, at 5, <https://timesmachine.nytimes.com/timesmachine/1882/03/17/96858787.html>.

<sup>145</sup> *A Chinese Veteran*, FAIRPORT HERALD, Nov. 12, 1890, at 4, <https://www.nyshistoricnewspapers.org/lccn/sn85026408/1890-11-12/ed-1/seq-4> (“Under fire Cohota proved that he was made of stern stuff, for his bravery was commented on during various engagements . . .”).

<sup>146</sup> Lin, *supra* note 134, at 23.

<sup>147</sup> *Id.* at 48 (noting that Pierce naturalized “shortly after” the war); *General Notes*, *supra* note 144 (noting that Dardelle naturalized in 1880).

<sup>148</sup> Lin, *supra* note 134, at 22; McCunn, *supra* note 126, at 156.

<sup>149</sup> DOYLE, *supra* note 72, at 177.

<sup>150</sup> McCunn, *supra* note 126, at 156.

thirty years after the Chinese Exclusion Act.<sup>151</sup> Although Cohota tried to petition Congress for citizenship, he ultimately went to his grave as an alien of his adopted nation.<sup>152</sup>

Cohota's experience was both unusual and predictable. It was unusual because his three-decade military career undoubtedly qualified him for military naturalization, just as it had for Pierce and Dardelle. As one newspaper account of Cohota's life described, his combat experiences "proved his fitness for the duties of American citizenship by taking up arms in defense of his adopted nation."<sup>153</sup> Indeed, the story deemed Cohota to have assimilated so much that in "speech and dress he is an ordinary citizen."<sup>154</sup>

Yet, the outcome was also predictable, because Cohota's case coincided with the rise of nativist sentiments. Although the United States at first welcomed Asian immigrants,<sup>155</sup> policies to restrict their participation in the polity began in the mid-1800s.<sup>156</sup> The decisive blow came with the Act of February 18, 1875, which explicitly added a racially restrictive clause to section 2169 of the Naturalization Act of 1870.<sup>157</sup> The amendment limited naturalization to "aliens *being free white persons*, and to aliens of African nativity and to persons of African descent."<sup>158</sup>

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<sup>151</sup> Act of May 6, 1882, ch. 126, § 13, 22 Stat. 58, 61 (1882) (repealed 1943). The Chinese Exclusion Act marked the beginning when Congress broadly excluded Asian persons—not only Chinese, but also Japanese, Filipino, and Indian persons—from immigrating to the United States. HING, *supra* note 117, at 1, 23–24, 29, 31, 33. For Chinese immigrants, however, these statutes went beyond merely barring entry or deportation, but also required universal registration with immigration officials, deprived bail to those in habeas proceedings, and imposed hard labor on violators. *Id.* at 25. The Supreme Court subsequently invalidated the third provision as unconstitutional but upheld the remainder. *Compare* Wong Wing v. United States, 163 U.S. 228, 237–38 (1892) (invalidating the hard labor provision, which imposed criminal sanction without jury trial, as a violation of due process under the Fourth and Fifth Amendment), *with* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1892) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

<sup>152</sup> McCunn, *supra* note 126, at 156–58; Chris Fuchs, *Since the Civil War, Asian Americans Have Served in the Military with Distinction*, NBC NEWS (May 24, 2019, 12:13 PM), <https://www.nbcnews.com/news/asian-america/civil-war-asian-americans-soldiers-have-served-distinction-n1008476> (noting that Cohota died in 1935 "following an unsuccessful decadeslong [sic] battle for citizenship").

<sup>153</sup> *A Chinese Veteran*, *supra* note 145, at 4.

<sup>154</sup> *Id.*

<sup>155</sup> HING, *supra* note 117, at 20, 27.

<sup>156</sup> See Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 40–41 (1998) (describing how miners and politicians in California sought to tax and make it difficult for Chinese immigrants to work prime mining sites during the 1850s).

<sup>157</sup> Act of Feb. 18, 1875, ch. 80, § 2169, 18 Stat. 316, 318 (amending the Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256).

<sup>158</sup> *Id.* (emphasis added).

Case law during this time illustrates the impossibility of overcoming section 2169's racially restrictive bar. The earliest case of an Asian immigrant seeking naturalization came in 1878 with *In re Ah Yup*.<sup>159</sup> Rejecting the petition of a Chinese immigrant, the court (the predecessor to the modern day Ninth Circuit) found that section 2169's language—"free white persons"—included only "an individual of the Caucasian race."<sup>160</sup> Similarly, when a Japanese immigrant sought to naturalize, the court (the predecessor to the modern day First Circuit) again rejected the petition, distinguishing between "Caucasian" and "Mongoloid."<sup>161</sup> Then, when an Indian immigrant applied for naturalization, this time arguing that Indian persons are scientifically "Caucasians," the petition was rejected for a third time.<sup>162</sup> In its opinion, the Supreme Court acknowledged the inherent ambiguity of the word "Caucasian," but emphasized that citizenship was reserved "only [for] the type of man whom [the original framers of the law] knew as white."<sup>163</sup>

On paper, the restriction did not appear to be exclusively based on race. In *Fong Yue Ting v. United States*, though not a naturalization case, the Supreme Court explained that the restriction was justified because Asian immigrants "remain[] strangers in the land . . . adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people."<sup>164</sup> Yet, the Court soon made clear that race, not assimilation, explained the differential treatment of Asian immigrants. When Takao Ozawa, a Japanese immigrant, appealed his denial of citizenship, a case going as far as the Supreme Court,<sup>165</sup> he anchored his argument on assimilation rather than race.<sup>166</sup> The *Ozawa* case was particularly notable, because Ozawa himself authored the original brief submitted to the district court, in which he declared: "In name, I am not an American, but at heart I am a true American."<sup>167</sup> As evidence, Ozawa pointed out his fluency in English, American education, non-affiliation with Japanese institutions, conversion to Christianity, and choice of spouse.<sup>168</sup> Yet, notwithstanding Ozawa's near complete

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<sup>159</sup> 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 3, 163 (1996).

<sup>160</sup> 1 F. Cas. at 224.

<sup>161</sup> *In re Saito*, 62 F. 126, 128 (C.C.D. Mass. 1894).

<sup>162</sup> *United States v. Thind*, 261 U.S. 204, 214-15 (1923).

<sup>163</sup> *Id.* at 213-14 (1923).

<sup>164</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1892).

<sup>165</sup> *Ozawa v. United States*, 260 U.S. 178 (1922).

<sup>166</sup> Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 648 (2009).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 648-50; see also Banks, *supra* note 12, at 161.



assimilation with American culture and disassociation with Japanese culture, Ozawa's appeal to the nation's highest court failed. Finding that section 2169 imported "a racial and not an individual test," the Court concluded that Ozawa was simply beyond the scope of the words "free white person."<sup>169</sup> *Ozawa* clearly articulated the principle that, for Asian immigrants, no amount of assimilation can overcome the racial bar.<sup>170</sup> In this context, Cohota unsurprisingly failed to obtain citizenship.

Cohota's experience also mirrors those of Buntaro Kumagai,<sup>171</sup> Namyō Bessho,<sup>172</sup> Eugenio Alverto,<sup>173</sup> and Knight,<sup>174</sup> four Asian veterans who also unsuccessfully sought citizenship following their military services in the years after the Civil War. Knight, in particular, had won a medal for his actions at the Battle of Manila Bay during the Spanish-American War.<sup>175</sup> All four brought their claims pursuant to section 2166 or its amended successors.<sup>176</sup> The courts, while recognizing Kumagai as a "gentleman"<sup>177</sup> and praising Knight's "intelligence and character,"<sup>178</sup> denied all four applications under section 2169.<sup>179</sup> The *Kumagai* court, drawing from *Ah Yup* and the belief that Congress intended to limit who was considered "white," simply excluded Asians from the benefits of military naturalization altogether.<sup>180</sup>

In many ways, section 2169's racial bar made no sense. Asian persons born in the United States could still obtain citizenship after *United States v. Wong Kim Ark*, in which the Supreme Court affirmed birthright citizenship under the Fourteenth Amendment for all per-

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<sup>169</sup> 260 U.S. at 197.

<sup>170</sup> The courts have found the following groups of people as "not white": Korean, *In re Easurk Emsen Charr*, 273 F. 207, 210 (W.D. Mo. 1921); Burmese, *In re Po*, 28 N.Y.S. 383, 384 (Albany City Ct. N.Y. 1894); Filipino, *In re Mallari*, 239 F. 416, 416–17 (D. Mass. 1916); Native American, *In re Burton*, 1 Alaska 111, 111–12 (D. Alaska 1900); Punjabi, *United States v. Ali*, 7 F.2d 728, 729–30 (E.D. Mich. 1925); and Afghan, *In re Feroz Din*, 27 F.2d 568, 568 (N.D. Cal. 1928). For a more complete list, see LÓPEZ, *supra* note 159, at 163–67.

<sup>171</sup> *In re Kumagai*, 163 F. 922 (W.D. Wash. 1908).

<sup>172</sup> *Bessho v. United States*, 178 F. 245 (4th Cir. 1910).

<sup>173</sup> *In re Alverto*, 198 F. 688 (E.D. Pa. 1912).

<sup>174</sup> *In re Knight*, 171 F. 299 (E.D.N.Y. 1909). Knight's first name is unknown.

<sup>175</sup> *Id.* at 300.

<sup>176</sup> *In re Kumagai*, 163 F. at 923; *Bessho*, 178 F. at 247; *In re Alverto*, 198 F. at 689; *In re Knight*, 171 F. at 300.

<sup>177</sup> *In re Kumagai*, 163 F. at 923.

<sup>178</sup> *In re Knight*, 171 F. at 300.

<sup>179</sup> *In re Kumagai*, 163 F. at 924; *Bessho*, 178 F. at 248; *In re Alverto*, 198 F. at 691; *In re Knight*, 171 F. at 301.

<sup>180</sup> *In re Kumagai*, 163 F. at 924.

sons regardless of race.<sup>181</sup> The Court anchored its rationale on the collateral effect of the opposite holding: “To hold [otherwise] . . . would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.”<sup>182</sup> Given so, denying naturalization to Asian veterans would similarly disturb military naturalization for other immigrants. Although no constitutional amendment preempts section 2169’s restrictive bar, the law’s race-based selectivity calls into question the founding principle that those “outside” the polity could earn their place by bearing arms. Moreover, section 2169 created an arbitrary divide between Asian immigrant-parents, who could never naturalize, and Asian native-born children, who became citizens. The effect would be to downgrade the significance of citizenship for all Americans of Asian descent.<sup>183</sup>

Nevertheless, the Pierce and Dardelle examples demonstrated that constitutive service had enough potency, even in the nineteenth century, to overcome at least some anti-Asian sentiments. Consider, for example, that Dardelle successfully naturalized despite having filed his petition two years after *Ah Yup*.<sup>184</sup> As Asian civilians began facing restrictions, Asian veterans could still persuade a court to naturalize them by appealing to constitutive military citizenship. Indeed, Asian veterans only failed to deploy the constitutive ideal when the law refused to treat them as individuals and imposed group-based restrictions like section 2169. However, as the following Sections will show, constitutive service ultimately prevailed.

### B. World War I

The two World Wars marked a significant transition for Asian immigrants, and this Section illustrates how change began in the early twentieth century and evolved into full legal acceptance in the mid-1900s.

As the United States entered World War I in 1917, the nation once again called on both its citizens and noncitizens to fight. Asian men enlisted “in the same rush of enthusiasm stirring other

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<sup>181</sup> 169 U.S. 649, 693 (1898) (relying upon the Amendment’s “clear words” and “manifest intent”).

<sup>182</sup> *Id.* at 694.

<sup>183</sup> By denying Asian parents citizenship based on their race, the law essentially downgrades Asian children’s native-born citizenship as well, because the same disability—being Asian—applies equally to children as to parents. This “downgrading” is most evident in the Japanese internment, when the law labeled native-born Japanese American as “non-alien” rather than “citizen.” See *infra* note 233 and accompanying text.

<sup>184</sup> See *supra* notes 147 and 159.

Americans and alien residents.”<sup>185</sup> Asian local organizations also actively encouraged enlistment, believing that service will lead to “inclusion in the American polity” and the “privileges of citizenship regardless of race restrictions.”<sup>186</sup> Moreover, the U.S. government actively recruited Asian immigrants. Like the Civil War recruitment posters printed in German and Italian,<sup>187</sup> draft posters were printed in Mandarin and Japanese to remind Asian immigrants of their obligation to serve.<sup>188</sup> Advertisements for war bonds were also distributed in Mandarin, Japanese, Korean, and Tagalog, imploring all to “own shares in the country that protects you.”<sup>189</sup>

Ultimately, thousands of Asian men answered the call. The precise number is unknown, and even the War Department confessed—in response to a congressional inquiry asking for a list of all Asian war veterans—that the only means of acquiring such data is by “examin[ing] the individual records of each of the 4,057,101 soldiers of the World War, which, on account of the time required and the expense involved, would be impracticable.”<sup>190</sup> The Selective Service classified at least two thousand Chinese and Japanese as eligible for the draft, and many were drafted while others volunteered.<sup>191</sup> Some Korean and Indian immigrants also served,<sup>192</sup> plus Filipino immigrants, who were classified differently given that the Philippines was an American colony at the time.<sup>193</sup>

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<sup>185</sup> Salyer, *supra* note 24, at 854.

<sup>186</sup> *Id.* at 854–55 (citing messages from Japanese immigrant newspapers and a political organization dedicated to first-generation Japanese immigrants).

<sup>187</sup> *See supra* note 73 and accompanying text.

<sup>188</sup> Salyer, *supra* note 24, at 854.

<sup>189</sup> *Id.* at 855.

<sup>190</sup> S. REP. NO. 74-823, at 4 (1935) (quoting Letter from George H. Dern, Sec’y, War Dep’t, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization of the House of Representatives (Apr. 17, 1935)).

<sup>191</sup> Salyer, *supra* note 24, at 847, 854.

<sup>192</sup> *See infra* notes 206–09 and accompanying text.

<sup>193</sup> *See infra* note 213 and accompanying text; *see also* Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 *ASIAN L.J.* 33, 50–51 (1995) (explaining the unique legal status of Filipinos in the years after the Spanish-American War).

FIGURE 3. COMPARISON OF RECRUITING POSTERS WRITTEN PARTIALLY IN FOREIGN LANGUAGES FROM THE CIVIL WAR (LEFT) AND WORLD WAR I (RIGHT)<sup>194</sup>



Most Asian soldiers served in integrated units and fought with their white counterparts, including in the famous 77th Division from New York.<sup>195</sup> World War I also produced its fair share of heroic stories. Sing Kee, a Chinese American, found himself as a runner in Mont-Notre-Dame on the Western Front in August of 1918.<sup>196</sup> Navigating through machine-gun fire, gas, and flamethrowers as the sole survivor of his unit, Kee continued to run messages for twenty-four hours until he was relieved by reinforcement.<sup>197</sup> For his actions, Kee was awarded the Distinguished Service Cross, the second highest military honor for an Army service member, and he became the first

<sup>194</sup> Compare DOYLE, *supra* note 72, at 161 (Civil War poster in German), with Salyer, *supra* note 24, at 855 (World War I poster in Mandarin).

<sup>195</sup> Salyer, *supra* note 24, at 854, 857. For more on the 77th “Melting Pot” Division, see *supra* note 87.

<sup>196</sup> *Id.* at 857.

<sup>197</sup> *Id.*; Andrew R. Chow, *Overlooked No More: Lau Sing Kee, War Hero Jailed for Helping Immigrants*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/obituaries/lau-sing-kee-overlooked.html> (noting that Kee, upon being asked by a reporter how he was able to keep running messages for that long, simply stated that “[t]here was nobody to do it but me”).

Chinese American to earn it.<sup>198</sup> Also enlisted was Tokutaro Nishimura Slocum, a Japanese immigrant, who found himself with the 328th Infantry in the famous battles at Meuse-Argonne.<sup>199</sup> Like many of his peers, Slocum struggled for the rest of his life with injuries caused by German gas.<sup>200</sup>

Both Kee and Slocum faced their own versions of postwar challenges. Although he was already a citizen before the war, Kee's well-decorated service did little to help him secure employment outside of the Chinatown circle.<sup>201</sup> Kee ultimately oscillated between various jobs before finding himself in the criminal justice system.<sup>202</sup> Slocum's story was slightly better. As a noncitizen, Slocum sought naturalization after his wartime service, yet faced the same fate as Asian veterans during and after the Civil War.<sup>203</sup> The Bureau of Naturalization, despite finding Slocum to have "an excellent character [with] an excellent army record," nevertheless denied his citizenship application under section 2169, the very same provision that had blocked the petitions of Kumagai, Bessho, Alverto, and Knight.<sup>204</sup>

Looking at the language of the military naturalization statute, Asian veterans were absolutely qualified. The Act of May 9, 1918, continued the practice of military naturalization and granted citizenship to "any alien" upon completion of wartime service.<sup>205</sup> Yet Slocum's story was unexceptional. Bhagat Singh Thind,<sup>206</sup> En Sk Song,<sup>207</sup> and Easurk Emsen Charr<sup>208</sup> were among the other Asian veterans who also could not naturalize. Thind was an immigrant from India, and both Song and Charr were immigrants from Korea.<sup>209</sup> Using the same analysis, the courts denied all three petitions by citing the group-based restriction under section 2169.<sup>210</sup> The *Charr* court,

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<sup>198</sup> Chow, *supra* note 197 (mentioning that Kee also received a Purple Heart and a promotion to color sergeant).

<sup>199</sup> Salyer, *supra* note 24, at 847.

<sup>200</sup> *Id.*

<sup>201</sup> See Philip Chin, *Sing Lau Kee: Forgotten Hero of World War I*, CHINESE AM. HEROES 3 (Nov. 17, 2014), <https://chineseamericanheroes.org/wp-content/uploads/2015/04/Sing-Lau-Kee.pdf> (highlighting how "whites refused to hire Chinese" at the time).

<sup>202</sup> See Chow, *supra* note 197 (noting that Kee helped Asian immigrants dodge the stringent immigration quota system, which constituted a criminal violation that led to prison time).

<sup>203</sup> Salyer, *supra* note 24, at 847.

<sup>204</sup> *Id.*

<sup>205</sup> Act of May 9, 1918, ch. 69, § 1, 40 Stat. 542, 542.

<sup>206</sup> *United States v. Thind*, 261 U.S. 204 (1923).

<sup>207</sup> *In re En Sk Song*, 271 F. 23 (S.D. Cal. 1921).

<sup>208</sup> *In re Easurk Emsen Charr*, 273 F. 207 (W.D. Mo. 1921).

<sup>209</sup> *Thind*, 261 U.S. at 206; *In re Charr*, 273 F. at 209; *In re Song*, 271 F. at 23.

<sup>210</sup> See *Thind*, 261 U.S. at 213 ("The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they

apparently tired of denying citizenship petitions over and over again, laid down a broad proposition: "It should be borne in mind that the policy of our law, from 1802 down to the present time, has had in view the prevention of all aliens, not free white persons, from becoming citizens."<sup>211</sup> Finding that Congress kept the racially restrictive section intact even though it had edited other sections of the naturalization statutes, the courts chose to maintain the status quo.<sup>212</sup>

There were some exceptions. Because the Philippines was an American colony, Congress deliberately included statutory provisions that permitted naturalizing Filipino veterans.<sup>213</sup> Asian veterans also had some luck in select districts. In December 1918, a lone federal district court judge in Hawaii, Judge Horace W. Vaughan, announced that he would start naturalizing Asian veterans returning from the war,<sup>214</sup> ultimately approving the citizenship petitions of some 398 Japanese, 99 Korean, and 4 Chinese immigrant-veterans.<sup>215</sup> Interestingly, Judge Vaughan, as the former district attorney of Honolulu (the predecessor title to the U.S. Attorney), had opposed Takao Ozawa's naturalization petition.<sup>216</sup> After World War I, the Judge had a change of heart and believed that he had a "duty to extend the protection [of] citizenship . . . to the Orientals in our service . . ." <sup>217</sup> Several other

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knew as white."); *In re Charr*, 273 F. at 212 ("The history of legislation upon this subject convincingly demonstrates the purpose of Congress to limit applicants for naturalization . . ."); *In re Song*, 271 F. at 25 ("It has never been held, . . . that [the phrase 'any alien'] was to be regarded as in any wise repealing the limitation placed upon the general right of naturalization expressed by the definite and limiting language of section 2169 . . .").

<sup>211</sup> *In re Charr*, 273 F. at 212.

<sup>212</sup> *See id.* at 211 (emphasizing section 2169's continued relevance); *In re Song*, 271 F. at 25–26 (same).

<sup>213</sup> The statutory mechanism to naturalize Filipino veterans was somewhat complex. Under the Naturalization Act of 1906, Section 30 extended naturalization to aliens "not citizens who owe permanent allegiance to the United States." Act of June 29, 1906, ch. 3592, § 30, 34 Stat. 596, 606. Section 30 was Congress's response to the unique legal status of Filipinos after the Philippines was acquired as a territory, as they were deemed to have owed allegiance to the United States despite not being citizens. *See, e.g., In re Bautista*, 245 F. 765, 768–69 (N.D. Cal. 1917); *In re Mallari*, 239 F. 416, 417–18 (D. Mass. 1916). Congress simplified this complex statutory regime during World War I, explicitly granting military citizenship to "[a]ny native-born Filipino." *See* Act of May 9, 1918, ch. 69, § 1, 40 Stat. 542, 542.

<sup>214</sup> Salyer, *supra* note 24, at 856 (describing how the announcement was particularly noteworthy due to the relatively high number of potential Asian applicants in Hawaii); *see also* Banks, *supra* note 12, at 174 (providing a contemporaneous newspaper's description of how Judge Vaughan interpreted the Act of May 9, 1918, as repealing section 2169).

<sup>215</sup> Banks, *supra* note 12, at 175 ("Judge Vaughan single handedly naturalized a large portion of the Asian immigrant servicepersons and veterans who became United States citizens between 1918 and 1925.").

<sup>216</sup> Salyer, *supra* note 24, at 856–57.

<sup>217</sup> *Id.* at 857.

districts followed suit, including judges in Los Angeles, Colorado, New Jersey, Boston, and Washington, D.C.<sup>218</sup>

The victory was short lived. In *Toyota v. United States*, the Supreme Court in 1925 reversed the grant of citizenship to a Japanese immigrant-veteran from the war.<sup>219</sup> Citing *Ozawa*, *Kumagai*, *Knight*, and *Bessho*, the Court repeated the same argument that, because Asians were not “white,” they were barred under the racially restrictive provision of section 2169.<sup>220</sup> Effectively, Asian veterans returning from World War I experienced the same hope, frustration, and denial of citizenship as Asian veterans returning from the Civil War—“no degree of . . . blood sacrifice could overcome the legal bar of being yellow.”<sup>221</sup>

With *Toyota*, the Supreme Court foreclosed the possibility of pursuing the issue of citizenship in the courts. The decision pushed Asian veterans anxious to naturalize to seek other legal redresses, including lobbying the legislature. Because so many more Asian veterans had served in World War I than in the Civil War, a sufficiently large group of veterans formed to push their claims in politics. Led by Slocum, who had been denied citizenship but later acquired it before *Toyota*, Asian veterans solicited the support of multiple prominent political organizations, including the American Legion.<sup>222</sup> Victory came in 1935 with the Nye-Lea Act, strategically written to naturalize only the war veterans without disturbing the larger issue of Asian immigration.<sup>223</sup> As the committee report cautioned, in no way would naturalizing roughly 515 Asian veterans “result in any immigration of persons, from oriental countries, who are now excluded under the immigration laws . . . .”<sup>224</sup>

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<sup>218</sup> *Id.* at 862; see also Banks, *supra* note 12, at 175 (noting that judges who approved Asian veterans’ naturalization applications shared Judge Vaughan’s reading of the 1918 legislation).

<sup>219</sup> 268 U.S. 402, 412 (1925).

<sup>220</sup> See *id.* at 408–09 (stating that “it had been held that the phrase ‘any alien,’ . . . did not enlarge the classes defined in section 2169”).

<sup>221</sup> Salyer, *supra* note 24, at 866; see also Banks, *supra* note 12, at 184 (“[Asian immigrants’] military service could not overcome a presumption of unassimilability.”).

<sup>222</sup> Salyer, *supra* note 24, at 866, 868.

<sup>223</sup> *Id.* at 873 (mentioning that Slocum had requested Congressman Clarence R. Lea, who had supported Japanese exclusion, to introduce the legislation in the House in order to demonstrate the bill’s limited nature); see also S. REP. NO. 74-823, at 1 (1935) (Conf. Rep.) (“There is no immigration question involved within the provisions of this bill . . .”).

<sup>224</sup> S. REP. NO. 74-823, at 1; see also *id.* at 5–6 (quoting Letter from Daniel W. MacCormack, Comm’r, Immigration & Naturalization Serv., to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization of the House of Representatives (Apr. 22, 1935)).



Although some historians see the Nye-Lea Act as leaving an “ambiguous heritage,”<sup>225</sup> the Act created a precedent that *some* Asians could be naturalized notwithstanding the racially restrictive provision under section 2169. Moreover, the justification for this break with precedent was grounded in the same constitutive service ideal that enabled other immigrant-veterans to naturalize. Indeed, as Congress debated the bill, no witness appeared to testify in opposition.<sup>226</sup> To the contrary, those who voiced support for it invoked a familiar constitutive service reasoning. Describing the bill as a “measure of justice,” the House committee noted that those Asian veterans who had rendered service were, in fact, so assimilated that their “return to their native country would be almost equivalent to a visit to a foreign or alien country.”<sup>227</sup> Although the racial barriers to naturalization remained, the incremental acceptance of some Asian veterans opened the door for full-scale change after the next world war.

### C. World War II

At the beginning of World War II, the United States maintained the racial bar to naturalization. The Nationality Act of 1940, which amended the prior immigration laws, transferred section 2169's racially restrictive bar to the new section 303: “The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere.”<sup>228</sup> As this Section will show, Asian Americans' military service continued to promote change. Within two decades, section 303's racial bar crumbled.

To be sure, by the time the nation again went to war in 1941, nearly half a century had passed since the Supreme Court upheld birthright citizenship in *Wong Kim Ark*.<sup>229</sup> A significant number of Asian individuals in the United States had already possessed paper citizenship, including many second-generation Japanese Americans (“Nisei”) along the West Coast who would soon be marched off to

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<sup>225</sup> Salyer, *supra* note 24, at 873–74 (viewing the Act as having curbed, at the time, “any hope or expectation that military service would be the entering wedge for a broader assault on racial nativism and the exclusionary legislation it spawned”).

<sup>226</sup> S. REP. NO. 74-823, at 3.

<sup>227</sup> *Id.* (quoting H.R. REP. NO. 74-801, at 3 (1935)).

<sup>228</sup> Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137, 1140. However, “native-born Filipinos having the honorable service in the United States [military]” continued to be eligible for citizenship. *Id.*

<sup>229</sup> 169 U.S. 649, 694 (1898).

internment camps.<sup>230</sup> Yet the fact that some Asian persons had citizenship meant very little when the rest of the nation still regarded Asians as “outside” the polity. As Neil T. Gotanda observed, perception of foreignness as a basis to deny the privileges of citizenship “remain[ed] true even for those persons of Asian ancestry who [were] legal U.S. citizens.”<sup>231</sup> This practice of “citizenship nullification” effectively denied “full political participation to any person of Asian ancestry.”<sup>232</sup> The Japanese Internment is perhaps the greatest example of citizenship nullification—the military evacuation orders addressed “all persons of Japanese ancestry, both alien and *non-alien*,”<sup>233</sup> indicating the strongest reluctance to confer the title of “citizens” to those being forcefully removed.

Nevertheless, Asian Americans’ participation in World War II surpassed their levels of involvement in any prior conflict. Compared to 74 Chinese, 55 Filipino, and just 2 Japanese involved in the Civil War,<sup>234</sup> some 13,499 Chinese Americans, 12,947 Filipino Americans,<sup>235</sup> and 21,949 Japanese Americans fought in World War

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<sup>230</sup> The Japanese Internment forcefully relocated some 120,000 persons of Japanese descent, two-thirds of whom were native-born citizens. NGAI, *supra* note 14, at 175. The categorical internment of Japanese Americans differed sharply from the individualized treatment given to persons of other hostile nations. For example, although 1393 German and 264 Italian persons were detained, all detainees received individual loyalty hearings, and many were subsequently released. *Id.*; *cf. supra* note 82 (noting similar individualized treatment of enemy aliens during World War I). Earl Warren, then California Attorney General, later testified and explained the justification for the differential treatment: “We believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them . . . . But when we deal with the Japanese we are in an entirely different field and we cannot form any opinion that we believe to be sound.” *Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones: Hearing on H.R. Res. 113 Before the H. Select Comm. Investigating Nat’l Def. Migration*, 77th Cong. 11015 (1942) (statement of Earl Warren, Att’y Gen. of California), <https://ia800209.us.archive.org/29/items/nationaldefensem29unit/nationaldefensem29unit.pdf>.

<sup>231</sup> Gotanda, *supra* note 15, at 83.

<sup>232</sup> *Id.*; *see also* Salyer, *supra* note 24, at 870 (stating that Japanese Americans “had long viewed the racial prerequisite for citizenship as particularly humiliating and its elimination as more vital than immigration reform”); *cf. NGAI, supra* note 14, at 191 (“For Asian Americans born in the United States [before World War II], birthright citizenship held certain tangible benefits . . . yet remained subject to enormous cultural denial by the mainstream of American society, which regarded ‘Asian’ and ‘American citizen’ as mutually exclusive concepts.”).

<sup>233</sup> *See Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting) (citing Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967, 3967 (May 3, 1942)) (emphasis added).

<sup>234</sup> *See* NPS REPORT, *supra* note 125.

<sup>235</sup> This number only includes Filipinos who were inducted into the official U.S. military. *See* DOJ REPORT, *supra* note 100, at 52. During World War II, more than 250,000 Filipino soldiers served under the American flag, many of whom later sought citizenship. Emil Guillermo, *Thousands of Filipino-American WWII Vets Make Appeals Over Equity Pay Denial*, NBC NEWS (Nov. 11, 2015, 8:14 AM), <https://www.nbcnews.com/news/asian->

II.<sup>236</sup> Although some Asian soldiers served with white peers,<sup>237</sup> the sheer number of Asian enlistees led to segregated units. For example, the Fourteenth Air Service Group (ASG) consisted of predominately Chinese Americans and saw action in the Pacific theater.<sup>238</sup> The most renowned Asian units were the 100th Infantry Battalion and the 442nd Regimental Combat Team (collectively “442nd”), with Japanese Americans occupying nearly all of the enlisted positions.<sup>239</sup> Other persons of Asian descent also served with the 442nd, notably Young Oak Kim, a Korean American who would later receive the Distinguished Service Cross.<sup>240</sup> Kim was initially being transferred out of the unit given concern about racial animosity, to which Kim responded: “We’re all Americans. And we’re all fighting for the same thing.”<sup>241</sup> The 100th and 442nd saw extensive actions in Italy and Germany, remaining today the most decorated unit in U.S. history, with over 9486 Purple Hearts, 4000 Bronze Stars, 29 Distinguished Service Crosses, and 21 Medals of Honor.<sup>242</sup> Among the recipients of

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america/thousands-filipino-american-wwii-vets-make-appeals-over-equity-pay-n460151. Yet, how the Filipino soldiers were categorized was extremely complex—those in the legendary “Philippine Scouts” were deemed part of the official U.S. army, while those in the Philippine army were not. See Michael A. Cabotaje, Comment, *Equity Denied: Historical and Legal Analyses in Support of the Extension of U.S. Veterans’ Benefits to Filipino World War II Veterans*, 6 *ASIAN L.J.* 67, 77–79 (1999). This difference formed the key basis for Congress to deny many “veteranos” promised benefits after the war, an issue unresolved until 2009. See Paul Daniel Rivera, Note, *We’ve Been Waiting a Long Time*, 7 *HASTINGS RACE & POVERTY L.J.* 447, 447–50 (2010).

<sup>236</sup> See DOJ REPORT, *supra* note 102, at 52; see also DEP’T OF VETERANS AFFAIRS, MINORITY VETERANS REPORT: MILITARY SERVICE HISTORY AND VA BENEFIT UTILIZATION STATISTICS 9 (2017) [hereinafter MINORITY VETERANS REPORT], [https://www.va.gov/vetdata/docs/SpecialReports/Minority\\_Veterans\\_Report.pdf](https://www.va.gov/vetdata/docs/SpecialReports/Minority_Veterans_Report.pdf) (summarizing Asian-American military service during World War II).

<sup>237</sup> See, e.g., K. SCOTT WONG, *AMERICANS FIRST: CHINESE AMERICANS AND THE SECOND WORLD WAR* 153–57 (2005) (reporting stories of Chinese-American soldiers serving alongside white soldiers during World War II).

<sup>238</sup> See *id.* at 162.

<sup>239</sup> See *Research on 100th/442nd Regimental Combat Team*, NAT’L JAPANESE AM. HIST. SOC’Y, <https://www.njahs.org/100th-442nd-regimental-combat-team>. Like their German and Italian counterparts, Japanese—citizens and immigrants—were categorized as “enemy aliens.” See NGAI, *supra* note 14, at 187 (“The Selective Service Reclassified Nisei with 1A Status (fit for duty) to IV-C (enemy alien).”). However, while the former could serve upon the completion of an investigation, *id.*, Japanese individuals were categorically barred from the military until 1942. See *id.* at 177; *Research on 100th/442nd Regimental Combat Team*, *supra* (noting that Japanese servicemembers were summarily discharged in 1941, but Nisei volunteers were able to form a battalion in 1942).

<sup>240</sup> See Martin Wright, *Korean-American Vet Fights in Famous “Go for Broke” Regiment*, VANTAGE POINT, <https://www.blogs.va.gov/VAntage/58513/korean-american-vet-fights-famous-go-broke-regiment>.

<sup>241</sup> *Id.*

<sup>242</sup> Act of Oct. 5, 2010, Pub. L. No. 111-254, § 1, ¶ 14, 124 Stat. 2637, 2638 (2010); *Research on 100th/442nd*, *supra* note 239. For biographies of the twenty-one Medal of

the nation's highest military honor was Sadao Munemori, who received his award posthumously after diving on top of an enemy grenade to save two fellow soldiers.<sup>243</sup> Munemori's mother would receive the telegram of her son's death while still interned at Manzanar.<sup>244</sup>

By the end of the war, Asian Americans had fought in every theater, in every branch, and in nearly all of the battles that Americans on the home front would come to know.<sup>245</sup> Asian Americans stormed Omaha Beach,<sup>246</sup> parachuted into Normandy,<sup>247</sup> pushed back the Bulge,<sup>248</sup> collected intelligence in the Pacific,<sup>249</sup> and fought in Guadalcanal, Iwo Jima, Okinawa, the Philippines, Burma, Anzio, Southern France, and Germany.<sup>250</sup> Asian Americans not only served as soldiers, rangers, and paratroopers, but also as fighter pilots. Wau Kau Kong, a Chinese American, served with the 353rd Squadron in England and named his P-51B Mustang "Chinaman's Chance."<sup>251</sup>

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Honor recipients, see *The Medal of Honor*, SMITHSONIAN, <https://cgm.smithsonianapa.org/honors/medal-of-honor.html>.

<sup>243</sup> See *Private First Class Sadao Munemori*, SMITHSONIAN, <https://cgm.smithsonianapa.org/stories/sadao-munemori.html>.

<sup>244</sup> See *id.*

<sup>245</sup> See, e.g., Act of Oct. 5, 2010, § 1, ¶¶ 10–11 (acknowledging that Japanese Americans fought in Italy, France, and Germany); Chinese-American World War II Veteran Congressional Gold Medal Act, Pub. L. No. 115-337, § 2, ¶¶ 9–10, 14, 16, 132 Stat. 5029, 5030 (2018) (acknowledging that "Chinese Americans who served in World War II served in all branches of the Armed Forces in all 4 theaters of war").

<sup>246</sup> See Chinese-American World War II Veteran Congressional Gold Medal Act § 1, ¶ 16 (recognizing the Chinese Americans who served at the Normandy D-Day invasion). See also Chris Fuchs, *Chinese American World War II Veteran Randall Ching Considered for Legion of Honor*, NBC NEWS (Nov. 10, 2019), <https://www.nbcnews.com/news/asian-america/chinese-american-world-war-ii-veteran-randall-ching-considered-legion-n1078851> (describing Randall Ching, a ranger who landed on Omaha Beach in 1944).

<sup>247</sup> See Montgomery Hom, *Forgotten Soldiers: The Bay Area's Chinese American War Heroes on D-Day*, S.F. CHRON. (June 5, 2019), <https://www.sfchronicle.com/opinion/openforum/article/Forgotten-Soldiers-The-Bay-Area-s-Chinese-13941492.php> (describing Leon Yee, a paratrooper who jumped into Normandy with the 82nd Airborne).

<sup>248</sup> See Chinese-American World War II Veteran Congressional Gold Medal Act § 1, ¶ 16 (recognizing the Chinese Americans who served at the Battle of the Bulge).

<sup>249</sup> See WON-LOY CHAN, *BURMA: THE UNTOLD STORY* (1986) (describing Won-Loy Chan, who served as an intelligence officer in Burma); RICHARD SAKAKIDA AS TOLD TO WAYNE KIYOSAKI, *A SPY IN THEIR MIDST: THE WORLD WAR II STRUGGLE OF A JAPANESE-AMERICAN HERO* (1995) (describing Richard Sakakida, who went undercover as a Military Intelligence Service officer in the Philippines).

<sup>250</sup> See Act of Oct. 5, 2010, § 1, ¶¶ 10–11 (listing locations in which the 100th Infantry Battalion and the 442nd Regimental Combat Team served during World War II); Filipino Veterans of World War II Congressional Gold Medal Act of 2015, Pub. L. No. 114-265, § 2, ¶¶ 5–9, 130 Stat. 1376, 1377 (listing locations in which Filipino veterans served during World War II); Chinese-American World War II Veteran Congressional Gold Medal Act § 1, ¶¶ 9–10, 14, 16 (listing locations in which Chinese-American veterans served during World War II).

<sup>251</sup> See *Our Veterans*, CHINESE AM. WWII VETERANS RECOGNITION PROJECT, <https://www.caww2.org/profile7> (last visited July 20, 2020).

Fred Ohr, a Korean American, served with the 52nd Fighter Group in Europe and later became the first Asian-American flying ace.<sup>252</sup> More impressively, Asian-American women—including Hazel Ying Lee and Maggie Gee—were among the few women pilots who served with the Women Airforce Service Pilots.<sup>253</sup>

With the close of World War II, Congress began to repeal all racial bars to naturalization through a series of statutes. In 1943, the Magnuson Act repealed the Chinese Exclusion Act and amended section 303, the racially restrictive section, to allow naturalization by “Chinese Persons or persons of Chinese descent.”<sup>254</sup> In 1946, section 303 was again amended to include “persons of races indigenous to India.”<sup>255</sup> The real change came with the Immigration and Nationality Act of 1952 (“INA”), under which section 311 provided: “The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race . . . .”<sup>256</sup> In 1965, the INA was amended to eliminate the national origin quota system,<sup>257</sup> giving birth to the contemporary immigration system.<sup>258</sup>

The legislative history of these statutes provides some insight into why Congress was persuaded to change. Certainly, these repeals were motivated in part by political concerns, as both China and India were wartime allies.<sup>259</sup> However, beginning with the statute that extended naturalization to Indian persons, legislators increasingly alluded to

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<sup>252</sup> See Robert Randall Ryder, *Remembering All Who Served on Veterans Day*, NORTHWEST Q. (Oct. 30, 2014), <http://oldnorthwestterritory.northwestquarterly.com/2014/10/remembering-all-who-served-on-veterans-day> (“[Ohr] earned the coveted title of ‘ace’ when he shot down his fifth enemy plane.”); Press Release, Museum of Flight, World War II American Fighter Aces at Museum (July 1, 2009), <https://www.museumofflight.org/News/2218/world-war-ii-american-fighter-aces-at-museum>.

<sup>253</sup> See Katie Hafner, *Overlooked No More: When Hazel Ying Lee and Maggie Gee Soared the Skies*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/obituaries/hazel-ying-lee-and-maggie-gee-overlooked.html>.

<sup>254</sup> See Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, § 3, 57 Stat. 600, 601 (repealed 1965).

<sup>255</sup> Act of July 2, 1946, Pub. L. No. 79-483, 60 Stat. 416.

<sup>256</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239.

<sup>257</sup> Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 201, 79 Stat. 911.

<sup>258</sup> See generally *U.S. Immigration Since 1965*, HIST., <https://www.history.com/topics/immigration/us-immigration-since-1965> (last updated June 7, 2019) (summarizing U.S. immigration policy since 1965). Although the INA repealed racial bars to naturalization, it maintained the national origin quota system that strongly discriminated against immigrants of Asian descent. Under the quota system, each foreign country is given a maximum quota per year, and Asian nations were allocated token quotas—for example, Indonesia (a quota of 200), Malaysia (400), Japan (185), China (105), and all other countries together (100). See 111 CONG. REC. 24,448 (1965) (statement of Sen. Fong).

<sup>259</sup> See 89 CONG. REC. 8582 (1943) (statement of Rep. Gossett) (acknowledging China as a war-time ally during the debate on repealing restrictions on Chinese immigration); 91 CONG. REC. 9519–20 (1945) (statement of Rep. Sabbath) (justifying repeal of restrictions on immigration from India in part because of India’s participation in the war).

immigrants' record of military service—including Asian Americans'—as justification for liberalizing the nation's immigration system. Representative Adolph J. Sabath, a Czech-born immigrant,<sup>260</sup> argued that “immigrants [in general] have shown true democratic spirit and love of our country and have proven their patriotism in the last and present war.”<sup>261</sup> Multiple representatives made similar references when the INA was being debated on the floor. Senator John Pastore remarked: “Where would the boys have come from who wore the American uniform and won the war in 1945 if it had not been for the sons of immigrants who fought and died for the United States?”<sup>262</sup> Delegate Joseph R. Farrington, representing Hawaii, made the most explicit reference:

The record of Americans of Japanese ancestry in World War II dramatically vindicates the soundness of the policy under which they were given the privilege of citizenship by reason of birth in this country. But, more than that, it gave great emphasis to the injustice of denying their parents and the parents of other races now ineligible to citizenship the privileges of naturalization.<sup>263</sup>

It is in this context that Representative Celler declared: “[i]t is not so much that you were born in America . . . [but that] America [has] been born in you.”<sup>264</sup> For those who have “gone through the valley of the shadow of death in . . . our wars,” it became “unfair to [their] memory . . . that we shall continue to say that . . . [they are] unworthy of becoming citizens of this country.”<sup>265</sup>

When Congress again convened in 1965, this time to debate whether to eliminate the national origin quotas, legislators again highlighted Asian veterans' wartime contributions. Senator Ted Kennedy praised the “Japanese Americans who fought and died in our Armed Forces . . . and the 400 or more aliens currently fighting in Vietnam [who] are continuing this fine tradition.”<sup>266</sup> Senator Robert F. Kennedy further argued that whether a person “came from Japan or China . . . makes no difference,” underscoring that the “most highly decorated [World War II] U.S. unit . . . were of Japanese origin.”<sup>267</sup> Among those who spoke in support of the bill was Senator Hiram Fong, a World War II veteran and the first Asian American elected to

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<sup>260</sup> *Sabath, Adolph Joachim*, U.S. HOUSE OF REP.: HIST., ART & ARCHIVES, <https://history.house.gov/People/Detail?id=21133> (last visited July 22, 2020).

<sup>261</sup> 91 CONG. REC. 9520 (1945) (statement of Rep. Sabath).

<sup>262</sup> 98 CONG. REC. 5768 (1952) (statement of Sen. Pastore).

<sup>263</sup> *Id.* at 4303 (statement of Del. Farrington).

<sup>264</sup> *Id.* at 4306 (statement of Rep. Celler).

<sup>265</sup> *Id.*

<sup>266</sup> 111 CONG. REC. 24,777 (1965) (statement of Sen. Kennedy).

<sup>267</sup> *Id.* at 24,779 (statement of Sen. Kennedy).



the Senate.<sup>268</sup> Arguing for the amendment, Senator Fong reminded his colleagues of the significant “[c]ontributions of our American citizens of Japanese, Chinese, Filipino, Korean and Polynesian ancestry, and others whose antecedents are native to [Asia] . . . in the building of our country . . . . They have achieved distinction in nearly every field of endeavor [including] . . . [the] military . . . .”<sup>269</sup>

World War II thus marked the turning point for Asian Americans. Both Asian veterans and civilians alike were recognized, for the first time, as full-fledged “citizens” under the law. Having rendered more than a hundred years of military service, Asians as a group moved from “outside” to “inside” the American polity.<sup>270</sup>

#### D. From “Perpetual Foreigners” to “Citizens”

The Asian-American example shows how constitutive service works for a minority group in the United States. The transformation operated both at the micro and macro level as Asian Americans pushed for greater recognition in a country that was beginning to realize the scope of their service.

At the micro level, military service gave Asian Americans a powerful basis to assert greater civil rights. For Asian veterans, service enabled them to solicit political support from powerful organiza-

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<sup>268</sup> See 111 CONG. REC. 25,566 (1965) (statement of Sen. Prouty) (describing Senator Fong’s election to the Senate as a “historical landmark in the annals of American political history”); see also Associated Press, *Hiram L. Fong, 97, Senator from Hawaii in 60’s and 70’s*, N.Y. TIMES (Aug. 19, 2004), <https://www.nytimes.com/2004/08/19/us/hiram-l-fong-97-senator-from-hawaii-in-60-s-and-70-s.html> (noting that Fong was the first Asian American elected to the Senate).

<sup>269</sup> 111 CONG. REC. 24,467 (1965) (statement of Sen. Fong).

<sup>270</sup> Asian Americans continued to serve after World War II. In Korea, many World War II veterans returned to the military, including Young Oak Kim, who became the first Asian-American officer to lead a combat battalion. See Robert Asahina, *Young Oak Kim, 100TH INFANTRY BATTALION VETERANS*, <https://www.100thbattalion.org/history/veterans/officers/young-oak-kim> (last visited July 22, 2020). See generally Julie Tamaki, *Japanese Americans Recall Role in Korean War*, L.A. TIMES (Feb. 16, 1997, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1997-02-16-me-29367-story.html> (recounting Japanese-American service during the Korean War). In Vietnam, some 35,000 Asian Americans served, including Sikh Americans. See MINORITY VETERANS REPORT, *supra* note 236, at 10; DAWINDER S. SIDHU & NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE 137 (2009) (recognizing Sikh-American service during the Vietnam War, World War I, World War II, and the wars in Iraq and Afghanistan). Hmong and Laotian soldiers, many of whom later came to the U.S. as refugees and received an expedited pathway to citizenship, were also recruited to fight in Laos. See Agnes Constante, *Congress Passes Law Allowing National Cemetery Burials for ‘Secret War’ Veterans*, NBC NEWS (Apr. 3, 2018, 12:14 PM), <https://www.nbcnews.com/news/asian-america/congress-passes-law-allowing-national-cemetery-burials-secret-war-veterans-n862346>.



tions,<sup>271</sup> to organize and campaign for legal recognition,<sup>272</sup> and to elect individuals of Asian descent into Congress and other government positions.<sup>273</sup> Indeed, of the first five Asian Americans ever elected to the Senate, four were veterans. In addition to Senator Hiram Fong, Senator Daniel Inouye,<sup>274</sup> Senator Spark Matsunaga,<sup>275</sup> and Senator Daniel Akaka<sup>276</sup> all served in World War II, establishing a tradition of veterans-in-Congress continued today by Senator Tammy Duckworth.<sup>277</sup> Similarly, of the first eight Asian Americans appointed and confirmed to the federal bench,<sup>278</sup> six were veterans, including Judge Herbert Choy (9th Cir.), Judge Dick Ying Wong (D. Haw.), Judge Robert M. Takasugi (C.D. Cal.), Judge Thomas Tang (9th Cir.), Judge A. Wallace Tashima (C.D. Cal., 9th Cir.), and Judge Ronald S.W. Lew (C.D. Cal.).<sup>279</sup> These behind-the-scenes milestones gave Asian Americans greater representation on legitimate national platforms, without which there would have been little chance to argue for either the repeal of the racial bar to naturalization or the elimination of national origin quotas.

At the macro level, the increasing Asian participation in the military, the visibility of Asian soldiers in the combat ranks, and the ever-expanding list of Asian casualties simply made the permanent exclusion of Asian people from citizenship an unsustainable policy in the

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<sup>271</sup> See Salyer, *supra* note 24, at 866 (listing the broad range of organizations that supported Asian-American veterans).

<sup>272</sup> See *supra* notes 222–24 and accompanying text.

<sup>273</sup> See *supra* notes 268–69 and accompanying text.

<sup>274</sup> See Inouye, Daniel Ken, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/15647> (last visited July 21, 2020).

<sup>275</sup> See Matsunaga, Spark Masayuki, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/17633> (last visited July 21, 2020).

<sup>276</sup> See Akaka, Daniel Kahikina, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/8354> (last visited July 22, 2020).

<sup>277</sup> See Rebecca Johnson, *Senator Tammy Duckworth on the Attack that Took Her Legs—and Having a Baby at 50*, VOGUE (Sept. 12, 2018), <https://www.vogue.com/article/tammy-duckworth-interview-vogue-october-2018-issue>.

<sup>278</sup> Article III Asian-American Judges by President, MINORITY CORP. COUNSEL ASS'N, <https://mcca.com/resources/reports/federal-judiciary/asian-american-judges-by-president> (last visited June 16, 2020) (excluding unconfirmed nominations).

<sup>279</sup> See, in order of appointment: Choy, Herbert Young Cho, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/choy-herbert-young-cho> (last visited June 16, 2020); Wong, Dick Yin, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/wong-dick-yin> (last visited June 16, 2020); Takasugi, Robert Mitsuhiro, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/takasugi-robert-mitsuhiro> (last visited June 16, 2020); Tang, Thomas, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/tang-thomas> (last visited June 16, 2020); Tashima, Atsushi Wallace, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/tashima-atsushi-wallace> (last visited June 16, 2020); Lew, Ronald S.W., FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/lew-ronald-s-w> (last visited June 16, 2020).

long run. From John Tomney,<sup>280</sup> who fell at Gettysburg, to Sadao Munemori,<sup>281</sup> who fell in Italy, Asian-American presence and personal sacrifice began to change public perception. Consider, for example, the 442nd's legendary rescue of the Lost Battalion in eastern France. Cut off from air, artillery, and armor support in the densely forested Vosges Mountains, 275 soldiers of the Texas National Guard were surrounded on all sides and on the brink of collapse.<sup>282</sup> As a last-ditch effort, the 442nd was ordered to charge up "Suicide Hill."<sup>283</sup> They did, rescuing 211 soldiers at the staggering cost of 800 casualties.<sup>284</sup> Years later, Marty Higgins, the Lost Battalion's grateful commander, would note that no American newspaper reporting the operation named the 442nd, "[p]erhaps [because] the U.S. government was too embarrassed that the sons of the people that lost their homes and were interned in barbed wire camps could be so brave."<sup>285</sup>

The difficulty with denying Asian Americans proper recognition is perhaps most obvious in the manner in which courts rationalized their decisions to reject Asian veterans' petitions of citizenship. In *Easurk Emsen Charr*, military naturalization was said to deal "not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those *elsewhere defined to be eligible*."<sup>286</sup> In *Alverto*, military service was described as "not intended to extend the benefit of the naturalization laws to those not coming within the *racial qualifications*."<sup>287</sup> In *En Sk Song*, military naturalization was "not to provide for the admission of aliens generally, who had served with us in the World War, but merely to . . . [facilitate naturalization for those] *who were otherwise eligible* . . ."<sup>288</sup> In *Toyota*, service was said to merely "facilitate the naturalization of ser-

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<sup>280</sup> See *supra* notes 129–32 and accompanying text.

<sup>281</sup> See *supra* notes 243–44 and accompanying text.

<sup>282</sup> See Andrew Lam, *Dramatic Rescue 75 Years Ago of World War II "Lost Battalion,"* MASSLIVE (Oct. 28, 2019), <https://www.masslive.com/living/2019/10/asian-american-soldiers-earned-reputation-for-valor.html> (summarizing the 442nd's rescue of the Lost Battalion).

<sup>283</sup> See *id.*

<sup>284</sup> *Id.*; see also *Rhineland Campaign-Vosges*, GO FOR BROKE NAT. EDU. CTR., [https://www.goforbroke.org/learn/history/combat\\_history/world\\_war\\_2/european\\_theater/rhineland\\_vosges.php](https://www.goforbroke.org/learn/history/combat_history/world_war_2/european_theater/rhineland_vosges.php) (last visited July 22, 2020) (discussing the 442nd's combat operations in the Vosges Mountains).

<sup>285</sup> Marty Higgins, Address at Dedication of National WWII Memorial Reunion (May 27, 2004), in *Marty Higgins Praised the 100th/442nd Rct*, 100TH INFANTRY BATTALION VETERANS EDUC. CTR., <https://www.100thbattalion.org/archives/puka-puka-parades/european-campaigns/french-campaign/lost-battalion/marty-higgins-praised-the-100th442nd-rct> (last visited July 22, 2020).

<sup>286</sup> *In re Easurk Emsen Charr*, 273 F. 207, 211 (W.D. Mo. 1921) (emphasis added).

<sup>287</sup> *In re Alverto*, 198 F. 688, 690 (E.D. Pa. 1912) (emphasis added).

<sup>288</sup> *In re En Sk Song*, 271 F. 23, 26 (S.D. Cal. 1921) (emphasis added).

vice men of the *classes specified*,” not to “eliminate from the definition of eligibility . . . the distinction based on color or race.”<sup>289</sup> In other words, American courts had to disavow constitutive service, a founding principle of the United States, to maintain the group-based exclusion.

Together, these two forces—Asian veterans sallying forth and pushing for their rights, combined with the manifest unfairness of violating the constitutive ideal at the retail level—ultimately overturned the wholesale ban on Asians as a group.<sup>290</sup> Faced with so many worthy servicepersons who have been through “[b]aptism by [f]ire,”<sup>291</sup> the racial bar to citizenship fell apart.<sup>292</sup>

### III

#### WHO IS AN “AMERICAN SOLDIER?”

For a “[n]ation of [i]mmigrants,”<sup>293</sup> military service has always been a pathway for noncitizens and outsiders to earn citizenship and recognition. Beginning with the Revolutionary War, those who were “outside” the polity could legitimize their belonging by “putting

<sup>289</sup> *Toyota v. United States*, 268 U.S. 402, 409–10 (1925) (emphasis added).

<sup>290</sup> Certainly, the causation between service and citizenship is not always linear. Historians have identified various factors that determine whether and to what extent minorities can successfully argue for greater civil rights following their wartime service. See generally KREBS, *supra* note 23, at 27–34 (arguing that a minority group’s success depends on, among other factors, their objective, timing, and strategy).

<sup>291</sup> Salyer, *supra* note 24, at 847.

<sup>292</sup> Notwithstanding their service, Asian Americans have seldom been portrayed in war films. As far as I am aware, Asian Americans are wholly absent from *A BRIDGE TOO FAR* (United Artists 1977), *FLAGS OF OUR FATHERS* (DreamWorks Pictures 2006), *FULL METAL JACKET* (Warner Bros. 1987), *FURY* (Sony Pictures 2014), *GETTYSBURG* (New Line Cinema 1993), *PLATOON* (Orion Pictures 1986), *THE BRIDGE ON THE RIVER KWAI* (Columbia Pictures 1957), *THE THIN RED LINE* (20th Century Fox 1998), or the miniseries *Band of Brothers* (HBO 2001) and *The Pacific* (HBO 2010). There are two exceptions: *SAVING PRIVATE RYAN* (DreamWorks Pictures 1998) (showing briefly a soldier of Asian descent on Omaha Beach), and *WE WERE SOLDIERS* (Paramount Pictures 2002) (introducing a Japanese American marine at Ia Drang). To my knowledge, even the renowned 442nd had only three cinematographic depictions: *GO FOR BROKE!* (MGM 1951), *GO FOR BROKE* (Cedar Grove Productions 2017), and *ONLY THE BRAVE* (Indican Pictures 2006), although the latter two were independent films with limited screenings. *Go for Broke*, IMDB, <https://www.imdb.com/title/tt6350786>; *Only the Brave*, IMDB, <https://www.imdb.com/title/tt0410403>. This is not surprising, as the film industry has generally overlooked minorities in service, a defect which more recent films have begun to address. See, e.g., 1917 (DreamWorks Pictures 2019) (showing images of Black and Sikh soldiers in British uniforms); *DUNKIRK* (Warner Bros. Pictures 2017) (showing multiple Black soldiers in French uniforms); *THEY SHALL NOT GROW OLD* (Warner Bros. Pictures 2018) (showing documentary footage of British-Indian soldiers).

<sup>293</sup> Miriam Jordan, *Is America a ‘Nation of Immigrants’? Immigration Agency Says No*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html>.

[their] body on the line for the nation.”<sup>294</sup> As the United States developed, the idea that service constitutes citizenship became entrenched in American law, giving rise to a near continuous practice of naturalizing immigrant-soldiers.<sup>295</sup>

Certainly, the constitutive ideal also battled with nativist attitudes that sought to exclude those who were deemed too “foreign.” Yet, as the Asian-American example demonstrated, the constitutive ideal prevailed at both the individual and group level. Constitutive service was potent enough, even during the nineteenth century, to naturalize Joseph Pierce and Antonio Dardelle.<sup>296</sup> Indeed, Asian veterans only failed to naturalize when the law stopped treating them as individuals and imposed group-based restrictions, as in the case of Edward Cohota and the scores of Asian veterans who came after.<sup>297</sup> Even then, the constitutive ideal endured as successive generations of Asian servicepersons returning from war pushed for their rights. By the end of World War II, to deny Asian people citizenship and recognition would require answering the nearly impossible question why “bar[ring your] breast to the bayonet of the enemy”<sup>298</sup> was insufficient.<sup>299</sup>

As the Asian-American experience shows, the military is often a proxy for who is, or can be, an “American.” Military service offers marginalized groups a powerful mechanism to articulate demands for greater rights. Indeed, the most effective—perhaps the only—way to deprive constitutive service of its force is to prevent the “outside” group from joining the military in the first place. For this reason, the contemporary restrictions to serve—whether formal or informal—are

<sup>294</sup> LWIN, *supra* note 33, at 20–21.

<sup>295</sup> See *supra* Part I.

<sup>296</sup> See *supra* notes 137–44.

<sup>297</sup> See *supra* notes 145–52, 171–80, 206–12.

<sup>298</sup> *In re En Sk Song*, 271 F. 23, 25 (S.D. Cal. 1921).

<sup>299</sup> Of course, the legal changes in 1952 and 1965 in no way marked the end of the civil rights struggle, whether for Asian Americans or other minorities. Nevertheless, the legal transformation legitimized the position of Asian “foreigners” in the American political community. As “citizens,” Asian Americans began to advocate for greater recognition on legitimate national platforms. The Civil Liberties Act of 1988, which implemented the internment reparations program, were spearheaded by two Japanese American congressmen, Representative Robert Matsui and Representative Norm Mineta, with the latter being a Korean war veteran. See Pub. L. No. 100-383, 102 Stat. 904; Bilal Qureshi, *From Wrong to Right: A U.S. Apology for Japanese Internment*, NPR (Aug. 9, 2013, 4:24 PM), <https://www.npr.org/sections/codeswitch/2013/08/09/210138278/japanese-internment-redress>; Mineta, Norman Y., U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/People/Detail/18323>. Beginning in 2010, Congress officially recognized some Asian-American service by collectively conferring the Congressional Gold Medal on Japanese American, Filipino American, and Chinese American veterans of World War II. See *supra* notes 242, 250. These changes, though incremental, would have been impossible without the acknowledgement of citizenship.

so consequential because they operate as a barrier for those seeking the privilege of constitutive military citizenship.

Until its repeal in 2011, “Don’t Ask, Don’t Tell” prohibited openly gay persons from joining the military.<sup>300</sup> Gay, lesbian, and bisexual Americans hoping to serve had to hide their sexual orientation, and those admitted were forced to remain closeted or face a discharge.<sup>301</sup> Since March 2019, DTM-19-004 imposes a total prohibition on military service by transgender individuals,<sup>302</sup> a policy that was allowed to go into effect in *Trump v. Karnoski*.<sup>303</sup> Those already in the armed forces are required to comply with an effectively “don’t ask, don’t tell” policy to hide their gender identity.<sup>304</sup> Both policies are driven by an underlying reluctance to accept certain groups of people into the polity, or demand that they mute qualities—i.e. “cover”<sup>305</sup>—that society regards as undesirable.

Informal barriers also exist. Although Muslim Americans can enlist, many are pressured to hide their religion.<sup>306</sup> As of 2015, only 0.27% of American servicepersons self-identify as Muslim, even though studies estimate a far larger number.<sup>307</sup> Much like the

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<sup>300</sup> Fred L. Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189, 191 (2010); Renae Reints, ‘Don’t Ask, Don’t Tell’ Was Announced by Bill Clinton 25 Years Ago, FORTUNE (July 19, 2018, 12:03 PM), <https://fortune.com/2018/07/19/dont-ask-dont-tell-25-anniversary>.

<sup>301</sup> RAND NAT’L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 3–4 (2010) [hereinafter RAND REPORT] (stating that gay persons have been banned from serving in the armed forces since World War I), [https://www.rand.org/pubs/monograph\\_reports/MR323.html](https://www.rand.org/pubs/monograph_reports/MR323.html).

<sup>302</sup> See PALM CTR., THE MAKING OF A BAN: HOW DTM-19-004 WORKS TO PUSH TRANSGENDER PEOPLE OUT OF MILITARY SERVICE 1–2 (2019), <https://www.palmcenter.org/publication/the-making-of-a-ban-how-dtm-19-004-works-to-push-transgender-people-out-of-military-service>; Michelle Goodwin & Erwin Chemerinsky, *The Transgender Ban: Preservation of Discrimination Through Transformation*, 114 NW. U. L. REV. 751, 752–53 (2019).

<sup>303</sup> 139 S. Ct. 950 (2019) (mem.).

<sup>304</sup> See *Transgender Military Service*, HUMAN RTS. WATCH, <https://www.hrc.org/resources/transgender-military-service> (last updated Mar. 2, 2020).

<sup>305</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772, 781 (2002) (defining “covering” as downplaying an underlying identity that is the source of stigma and arguing that “the contemporary forms of discrimination to which [stigmatized groups] are most vulnerable often take the guise of enforced covering”).

<sup>306</sup> See, e.g., Robin Wright, *Humayun Khan Isn’t the Only Muslim American Hero*, NEW YORKER (Aug. 15, 2016), <https://www.newyorker.com/news/news-desk/humayun-khan-isnt-the-only-muslim-american-hero> (“For fear of the consequences, either at home or abroad, many Muslims opt not to identify their faith on military forms . . .”).

<sup>307</sup> Thomas Gibbons-Neff, *For Muslims in the U.S. Military, a Different U.S. than the One They Swore to Defend*, WASH. POST (Dec. 9, 2015, 12:53 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2015/12/09/for-muslims-in-the-u-s-military-a-different-u-s-than-the-one-they-swore-to-defend>; Mariam Khan & Luis Martinez, *More than 5,000 Muslims Serving in U.S. Military, Pentagon Says*, ABC NEWS (Dec. 8, 2015, 4:21 PM), <https://abcnews.go.com/US/5000-muslims-serving-us-military-pentagon/>

Japanese Americans who enlisted to fight World War II to prove themselves as “200% Americans,”<sup>308</sup> Muslim Americans today find their loyalties questioned in light of contemporary conflicts in the Middle East.<sup>309</sup> These “invisible wounds”<sup>310</sup> put those in uniform in a paradox: to defend a nation that may not be able to accept who they are.<sup>311</sup>

In some ways, these barriers cause more harm than those confronted by Asian Americans. Because sexual orientation, sexual identity, and religion are all non-discrete qualities that a person can easily hide,<sup>312</sup> those in uniform may never receive proper recognition for their service. For example, because soldiers are not required to declare their religion when they enlist, historians could only speculate—using clues like names and national origin—that Muslims have served in the military as early as Bunker Hill.<sup>313</sup> Even as large numbers of Syrian Americans fought in World War I,<sup>314</sup> many Muslim

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story?id=35654904 (citing Department of Defense statistics and noting that the “total number of Muslims currently serving in the U.S. military is likely higher”).

<sup>308</sup> Salyer, *supra* note 24, at 876.

<sup>309</sup> See Liz Halloran, *Military Service a Challenge for Muslim Americans*, NPR (Nov. 6, 2009, 4:31 PM), <https://www.npr.org/templates/story/story.php?storyId=120185651>; cf. Brief of Karen Korematsu et al. as Amici Curiae Supporting Respondents at 3, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1586445 (“Guilt, loyalty, and threat are individual attributes. Courts must be vigilant when these attributes are imputed to entire racial, religious, and/or ethnic groups.”).

<sup>310</sup> Wright, *supra* note 306.

<sup>311</sup> Religious discrimination also spills over into a different area: dangerous delays for Afghan and Iraqi interpreters waiting for lawful admissions into the United States. Under current law, Afghans and Iraqis who aid the U.S. military and provide critical language support qualify for “special immigrant visas.” ANDORRA BRUNNO, CONG. RESEARCH SERV., R43725, IRAQI AND AFGHAN SPECIAL IMMIGRANT VISA PROGRAMS 3–4 (last updated Apr. 2, 2020), <https://fas.org/sgp/crs/homesecc/R43725.pdf>. Although technically not members of the military, interpreters—often treated “like a Marine” by their American counterparts—embed with combat units, engage in firefights, and face life-threatening danger from militant groups who regard them as traitors. Phil Klay, *Opinion, The Soldiers We Leave Behind*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/interactive/2019/11/09/opinion/veterans-war-immigration.html>. Over the past five years, the number of admissions decreased sharply, creating a backlog of more than one hundred thousand applications and prompting a class action currently pending in the D.C. Circuit. See *Afghan & Iraqi Allies v. Pompeo*, No. 18-cv-01388 (TSC), 2020 WL 590121, at \*41–42 (D.D.C. Feb. 5, 2020) (granting class certification to Iraqi and Afghan applicants for admission to the United States awaiting government action for over nine months); Letter from Cong. to Sec’y Michael R. Pompeo et al. (Mar. 8, 2019), <https://blumenauer.house.gov/sites/blumenauer.house.gov/files/Afghan%20SIV%20Processing%20Letter.pdf> (stating that there is a one hundred thousand application backlog).

<sup>312</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (noting that “prejudice against discrete and insular minorities may be a special condition” to trigger a “more searching judicial inquiry”).

<sup>313</sup> See CURTIS, *supra* note 81, at 13–14.

<sup>314</sup> See *id.* at 24.



enlistees chose to hide their religion.<sup>315</sup> Similarly, although many gay Americans served during World War II, no accurate record exists to document the scope of that service.<sup>316</sup> Accommodation practices, like those that permit Sikh Americans<sup>317</sup> and Muslim women<sup>318</sup> to wear religious garments, promote acknowledgement and recognition, but group-based exclusionary policies like DADT and the transgender ban curtail these advancements.<sup>319</sup>

Restrictions also exist for other groups. Because current law prohibits noncitizens without green cards from serving, all undocumented immigrants are barred from the military.<sup>320</sup> For a time, recipients of the Deferred Action for Childhood Arrivals (DACA) could serve through the Military Accessions Vital to National Interest (MAVNI) program, which recruited specific categories of noncitizens with certain skills into the military in exchange for citizenship.<sup>321</sup> In 2016, the Department of Defense suspended the MAVNI program pending new security screening requirements. Since then, the program has been “all but shuttered,”<sup>322</sup> prompting two ongoing class action lawsuits in the D.C. Circuit.<sup>323</sup> In 2017, former Representative Jeff Denham (R-CA) introduced a bill allowing some undocumented immigrants to serve.<sup>324</sup>

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<sup>315</sup> See *id.* at 23.

<sup>316</sup> See ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* 3, 256 (1990).

<sup>317</sup> See Corey Dickstein, *Army Allows Sikhs Permanent Exemptions to Wear Beards and Turbans*, MILITARY.COM (Jan. 6, 2017), <https://www.military.com/daily-news/2017/01/06/army-allows-sikhs-permanent-exemptions-to-wear-beards-turbans.html>.

<sup>318</sup> See Heather L. Weaver, *ACLU Client Makes History as First Air Force JAG Corps Officer to Wear Hijab*, ACLU (May 16, 2018, 5:45 PM), <https://www.aclu.org/blog/religious-liberty/free-exercise-religion/aclu-client-makes-history-first-air-force-jag-corps>. But see Meghann Myers, *A Muslim Soldier Says Her Command Sergeant Major Forced Her to Remove Her Hijab*, ARMY TIMES (Mar. 12, 2019), <https://www.armytimes.com/news/your-army/2019/03/12/a-muslim-soldier-says-her-command-sergeant-major-forced-her-to-remove-her-hijab>.

<sup>319</sup> See, e.g., Richard Brookshire, *Serving in the Army as a Queer Black Man Opened My Eyes to Racism in America*, N.Y. TIMES MAG. (June 4, 2020), <https://www.nytimes.com/2020/06/04/magazine/army-veteran-racism-protest.html> (“I was under constant pressure to hide in plain sight as a black queer person in a mostly all-white infantry unit getting ready to go to Afghanistan.”).

<sup>320</sup> See WILLIAM A. KANDEL & LAWRENCE KAPP, CONG. RESEARCH SERV., IF10884, *EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE* (2018), <https://fas.org/sgp/crs/homesecc/IF10884.pdf> (stating the qualifications for U.S. military service).

<sup>321</sup> See *id.* (stating the requirements of the MAVNI program).

<sup>322</sup> Loren DeJonge Schulman, *The Military Needs Immigrants. The Trump Administration Wants to Keep Them Out*, WASH. POST (Nov. 21, 2019, 5:00 AM), <https://www.washingtonpost.com/outlook/2019/11/21/military-needs-immigrants-trump-administration-wants-keep-them-out>.

<sup>323</sup> See MAVNI FEDERAL CLASS ACTION LITIGATION, <https://dfederalcourtmavniclasslitigation.org> (last visited July 5, 2020).

<sup>324</sup> H.R. 60, 115th Cong. (2017).



His successor, a Democrat, made the “unusual move” to reintroduce the same bill, but with no hope of passing.<sup>325</sup>

Although permitted to serve since 1948, women were categorically barred from combat positions until 2016.<sup>326</sup> Feminist scholars have long viewed “combat exclusion” as an impediment for women to realize full citizenship.<sup>327</sup> Excluding women from “the main task, the *raison d’être*, of the military”<sup>328</sup> prevented them from the fulfilling a citizen’s “unique political responsibility.”<sup>329</sup> To many women, the opportunity to fully participate in the military—in whatever role preferred—was nothing less than the “indicia of full citizenship.”<sup>330</sup> Yet, just last year, some have argued to reimpose the exclusion.<sup>331</sup>

To be sure, the strong emphasis on military service presents enormous normative concerns. For one, constitutive service is deeply problematic if only marginalized people feel pressured to serve.<sup>332</sup> Those in established positions seldom believe they need to prove their belonging by exposing themselves to danger.<sup>333</sup> Moreover, the nation

<sup>325</sup> Kate Irby, *A New Bill Would Offer Undocumented ‘Dreamers’ US Citizenship in Exchange for Military Service*, TASK & PURPOSE (June 21, 2019, 6:00 AM), <https://taskandpurpose.com/undocumented-dreamers-citizenship-military-service-legislation>.

<sup>326</sup> See *TIMELINE: A History of Women in the U.S. Military*, TASK & PURPOSE (Mar. 8, 2017, 10:50 AM), <https://taskandpurpose.com/history/timeline-history-women-us-military>.

<sup>327</sup> Lucy V. Katz, *Free a Man to Fight: The Exclusion of Women from Combat Positions in the Armed Forces*, 10 L. & INEQ. 1, 3 (1992); Jill Laurie Goodman, *Women, War, and Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN’S RIGHTS L. REP. 243, 244 (1980).

<sup>328</sup> Katz, *supra* note 327, at 17.

<sup>329</sup> Goodman, *supra* note 327, at 246.

<sup>330</sup> *Id.* at 248.

<sup>331</sup> See, e.g., Heather Mac Donald, *Women Don’t Belong in Combat Units*, WALL ST. J. (last updated Jan. 16, 2019, 1:38 PM), <https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638>.

<sup>332</sup> This problem is compounded by empirical evidence that a significant “casualty gap” exists between Americans of different communities, particularly those divided by socioeconomic status, education, and race. See, e.g., DOUGLAS L. KRINER & FRANCIS X. SHEN, *THE CASUALTY GAP: THE CAUSES AND CONSEQUENCES OF AMERICAN WARTIME INEQUALITIES* 22–26, 29, 40 (2010); see also Gene Grove, *The Army and the Negro*, N.Y. TIMES, July 24, 1966, at 5 (noting that Black Americans accounted for 18.3% of the American fatalities in Vietnam, which was 5% higher than the percentage of Blacks in the army and 7% higher than their percentage in the population). *But see* Andrea Asoni, Andrea Gilli, Mauro Gilli & Tino Sanandaji, *A Mercenary Army of the Poor? Technological Change and the Demographic Composition of the Post-9/11 U.S. Military*, J. STRATEGIC STUD. (Jan. 20, 2020), at 12, 39, <https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1692660> (postulating that changes in modern wars, such as greater reliance on technology and special operations tactics, may alter the demographics of the military).

<sup>333</sup> See Mariana Alfaro, *Donald Trump Avoided the Military Draft 5 Times, but It Wasn’t Uncommon for Young Men from Influential Families to Do So During the Vietnam War*, BUS. INSIDER (Dec. 26, 2018, 11:21 PM), <https://www.businessinsider.com/donald-trump-avoided-the-military-draft-which-was-common-at-the-time-vietnam-war-2018-12/commerce-on-business-insider> (“Draft deferment wasn’t uncommon during the Vietnam

ought to be extremely cautious about rhetoric that treats military service as necessary for full citizenship.<sup>334</sup> It is one thing for citizen-aspirants to argue their cases by first assuming the service obligation of citizens, and quite another for society as a whole to condition entry into the polity by first demanding that service.<sup>335</sup>

More importantly, constitutive service may also be indefensible because it naturally prohibits some people from accessing it. Individuals with physical or mental disability, conscious objectors, or those who simply do not meet the physical demand of the armed services<sup>336</sup> should have other legitimate pathways to recognition, perhaps through a form of civil service.

Nevertheless, the question of *how* we choose to initiate those who wish to be part of the “last great experiment”<sup>337</sup> stands independent from the question of *who* is eligible. More than just depriving a career option,<sup>338</sup> the contemporary restrictions to serve in the military reflect enduring ways in which the United States continues to debate who is fit to be an “American,” and therefore, an “American soldier.”

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era — but it frequently benefited a specific group of young men, particularly those who had the means to afford a college education or enough family influence to obtain a deferment.”).

<sup>334</sup> See *supra* notes 293–330 and accompanying text.

<sup>335</sup> Certainly, removing obstacles to serve on the front end does not resolve the problem of unequal treatment on the back end. For women and people of color in uniform, visibility in the military in no way guarantees opportunities for leadership or advancement. In 2020, of the forty-one senior military commanders (i.e., those with four-star ranks), there are only two Black, one Asian, and one female generals, all of whom serve in the Army, Navy, or Coast Guard; the Marine Corps has never in its 244 years had a four-star general who was not a white male. Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html>.

<sup>336</sup> See Tim Kirkpatrick, *9 of the Biggest Mistakes Sailors Make While at BUD/S, WE ARE THE MIGHTY* (May 14, 2018, 1:22 PM), <https://www.werehemighty.com/most-common-buds-mistakes?rebelltitem=10#rebelltitem10> (noting a seventy-five percent dropout rate for SEAL training).

<sup>337</sup> Letter from George Washington to Catharine Sawbridge Macaulay Graham (Jan. 9, 1790), <https://founders.archives.gov/documents/Washington/05-04-02-0363>; see also *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (“All residents of this nation are kin in some way by blood or culture to a foreign land . . . . [They] must accordingly be treated at all times as the heirs of the American experiment . . . .”).

<sup>338</sup> The military has typically framed exclusion policies as legitimate qualification requirements. See, e.g., RAND REPORT, *supra* note 301, at 137 (noting DADT’s exclusion of gay Americans as based on alleged risks to unit cohesion); Goodman, *supra* note 327, at 254 (noting exclusion of women from combat as based on belief that “women cannot fight”); Goodwin & Chemerinsky, *supra* note 302, at 772 (noting the transgender ban as based on the alleged impairments to military readiness).

## CONCLUSION

We may never know why people march off to war so willingly.<sup>339</sup> Certainly, many aliens, noncitizens, immigrants, and outsiders enlisted for the same reason as everyone else—a sense of adventure, a fear of missing out, a path to nobility, or “[t]he chance to exist for an intense and overpowering moment . . . .”<sup>340</sup> Yet, they also volunteered in hope of acquiring a more meaningful citizenship.

Constitutive service, as a powerful force, has changed the position of many immigrants coming to the United States. At its height, constitutive service transformed a group of “perpetual foreigners” to “citizens.” Yet, precisely because the military holds so much influence in defining membership in the American polity, contemporary restrictions that bar certain groups from serving ought to raise alarm. As the United States continues to debate who is fit to be an “American,” the nation should remember the remarkable draw that it has—for so many people, who so willingly come, and who are so eager to defend a place that has yet to recognize them for who they are.

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<sup>339</sup> Cf. *THEY SHALL NOT GROW OLD*, *supra* note 292 (“Well I can only say one thing, I wouldn’t have missed it. It was terrible at times, but I wouldn’t have missed it.”).

<sup>340</sup> CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* 5 (2002).