A COMPARATIVE ANALYSIS OF HOW THE FRAMING OF THE *JUS SOLI* DOCTRINE AFFECTS IMMIGRANT INCLUSION INTO A NATIONAL IDENTITY

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INTRODUCTION

This paper builds upon a previous study that analyzed how the doctrine of *jus soli* affects racial and ethnic immigrant minority inclusion into citizenship and a national identity.[1] In the aforementioned study, particular focus was given to how the principle of *jus soli* embedded in the U.S. Constitution has been judicially interpreted in a manner that allows for an expansive legal inclusion of racial and ethnic immigrant minorities into U.S. citizenship, while on the other hand this principle, as espoused in the Constitution of the Dominican Republic, has been judicially interpreted in a manner that tends to limit inclusion into Dominican citizenship based upon skin color. The main hypothesis of this investigation is that the language qualifying the *jus soli* doctrine in each country's constitution ("subject to the jurisdiction thereof" in the U.S. Constitution and "in transit" in the Dominican Republic constitution) has implications for how each country's legal and political institutions define and socially construct who can enjoy holding the status of being a citizen.

Of particular concern in the previous investigation was how the operation of the *jus soli* doctrine affected immigrant minority inclusion into nationality and citizenship. The investigation opined that the U.S. Supreme Court has interpreted the "subject to the jurisdiction thereof" clause in a manner that allows for a relatively expansive legal inclusion of racial and ethnic immigrant minorities into U.S. citizenship. Under the U.S. constitutional construct, individuals born on U.S. soil, even to parents who are unlawfully present, are U.S. citizens. On the other

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1. Portions of this research are reproduced from author Middleton's own research in their original sources of publication: *Institutions, Inculcation, and Black Racial Identity: Pigmentocracy vs. the Rule of Hypodescent*, 14 SOC. IDENTITIES 567 (2008) [hereinafter Middleton, *Institutions*] and *The Operation of the Principle of* Jus Soli *and Its Effect on Immigrant Inclusion into a National Identity: An Analysis of the United States and the Dominican Republic*, RUTGERS RACE & L. REV. (forthcoming).

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hand, the Dominican constitution provides for birthright citizenship to any person except those born to individuals who are "in transit" in the Dominican Republic.[2] Under Dominican immigration law, all non-residents are deemed to be "in transit"—including the notable categories of "temporary foreign workers" and "undocumented migrant workers," most of whom are Black Haitians.[3] From this legislative definition, the Supreme Court of Justice of the Dominican Republic has held that undocumented immigrants, the lion's share of whom are Black Haitians, are also "in transit" within the meaning of the law.[4] As such, *jus soli* as a legal criterion for Dominican citizenship is narrowly construed in its application to circumvent inclusion of Black Haitians.

In this paper, we expand upon our previous investigation by including the Chilean constitutional construct of citizenship in our analysis. Analysis of the Chilean constitutional model of citizenship has been largely uncharted in literature outside of that jurisdiction and thus is fertile ground for exploration. The inclusion of Chile provides the opportunity for a unique juxtaposition to the U.S. and Dominican cases given that its constitutional language outlining inclusion into Chilean citizenship espouses the *jus soli* doctrine but also includes a qualifying clause that limits inclusion into Chilean citizenship (as with the constitutions of the United States and Dominican Republic). Thus, it is important to analyze whether the operation of the constitutional approach to citizenship in Chile provides the grounds for an expansive inclusion of racial and ethnic minorities into citizenship as in the case of the United States, is a middle-ground approach, or functions in a limiting manner as in the case of the Dominican Republic.

This study proceeds with a discussion of the importance of citizenship for racial and ethnic immigrant minority inclusion into a national identity. In doing so, we touch upon how holding the status of being a citizen brings with it various rights and privileges. From this, we discuss how the U.S. constitutional construct of citizenship espoused in the Fourteenth Amendment provides for birthright citizenship to any person "subject to the jurisdiction" of the United States. We argue that the U.S. Supreme Court's holding in *United States v. Wong Kim Ark*,[5] in which the "subject to the jurisdiction" clause was a central issue, provides the basis for an expansive constitutional inclusion of racial and ethnic immigrant minorities into U.S. citizenship. From this, we analyze how, on the contrary, the *jus soli* principle in the Dominican constitution (as revised on July 25, 2002) has been expounded upon by Dominican immigration law and the Dominican supreme court in a manner that narrowly construes its meaning in order to evade inclusion of Black Haitians. Finally, we conclude with an analysis of the Chilean constitutional

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2. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [DOM. REP. CONST.] Jan. 26, 2010, tit. 1, ch. V, § 1, art. 18, cl. 3.

3. Ley General de Migración [Migration Law] No. 285-04 ch. III, § 7, art. 36 (Dom. Rep.); *see* JAMES FERGUSON, MINORITY RIGHTS GROUP INTERNATIONAL, MIGRATION IN THE CARIBBEAN: HAITI, THE DOMINICAN REPUBLIC AND BEYOND 14-21 (2003) (discussing the large number of Haitian workers required and used in the Dominican Republic).

4. Suprema Corte de Justicia [S.C.J.] [Supreme Court] Dec. 14, 2005, No. 1141 Boletín Judicial 9 (Dom. Rep.), *available at* http://www.suprema.gov.do/consultas/consultas_sentencias/detalle_info_sentencias.aspx?ID=114110009.

5. 169 U.S. 649 (1898).

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construct of citizenship. In this discussion, we note that although the Chilean construct of citizenship does allow children born within the Chilean territory who cannot claim Chilean citizenship at birth to "opt for" citizenship at the age of twenty-one, in practice, the "opt for" allowance still does not make it possible for a child of non-Chilean parents who is born in Chile to enjoy the rights and privileges of a Chilean citizen *during* childhood. Further, we argue that the application of Chile's constitutional construct of citizenship has been wrought with the opportunity for racial and ethnic bias in its operation and created de facto discriminatory effects on racial and ethnic immigrant minorities.

I. THE IMPORTANCE OF CITIZENSHIP FOR RACIAL AND ETHNIC IMMIGRANT MINORITY INCLUSION INTO A NATIONAL IDENTITY

Citizenship is the apex of an individual's legal membership in a state. Holders of this special status retain certain rights and privileges that are not afforded to non-holders. Citizenship, according to Kate Nash, is:

> [A] legal status . . . that is conferred by a state at birth or through naturalization and which also confers specific rights and responsibilities in relation to that state . . . . [C]itizenship enables opportunities for political participation by means of formal procedures of voting, lobbying and standing for office or in more spontaneous 'acts of citizenship' and political mobilizations in civil society.[6]

In addition to the identifiable aspects of the rights and privileges commensurate with citizenship, the status of being a citizen of a state has the potential to serve as the basis by which individuals reify a broader sense of community—what Benedict Anderson refers to as an "imagined political community" or "the nation."[7]

In an article investigating citizenship, Engin Isin and Bryan Turner put forward the contention that citizenship has elements of both a legal status and a social status.[8] They argue that citizenship confers an identity on those who possess it and affects "how economic and cultural capital are *redistributed* and *recognized* within [a] society."[9] In addition, Isin and Turner note that citizenship involves an education in a state's civic culture; it provides the basis for those who hold this status to be "patriotically proud of the society to which they belong."[10] Isin and Turner view this sense of patriotism as serving as a foundation for creating a sense of loyalty to the state and a context whereby members are more likely to defend a state's institutions.[11]

6. Kate Nash, *Between Citizenship and Human Rights*, 43 SOC. 1067, 1067 (2009) (citations omitted).

7. BENEDICT ANDERSON, IMAGINED COMMUNITIES 15-16 (1983).

8. Engin F. Isin & Bryan S. Turner, *Investigating Citizenship: An Agenda for Citizenship Studies*, 11 CITIZENSHIP STUD. 5, 14 (2007).

9. *Id.*

10. *Id.* at 16.

11. *Id.*

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Holding the status of being a citizen is, at its core, the driving force behind an individual's feeling a sense of belonging and membership in a national community; it drives one's sense of a national identity. As Nash notes:

> In any case, citizenship also involves identity. Citizens belong to a bounded and exclusive political community with a shared history and prospective future. For the last 200 years, the basis of the common bond between citizens has been assumed to be the nation: citizenship is experienced through belonging to a national community with shared memories, values and purposes.[12]

However, because citizenship affords its members with various public goods that can only be denied to non-members, citizenship also retains a discriminatory element. Thusly, denial of citizenship is one method by which a state can attempt to exclude individuals from feeling a sense of belonging and membership in the national community. This is particularly relevant when the lines are drawn in a manner to exclude racial and ethnic immigrant minorities given that such individuals typically face the challenge of working to be accepted as part of the in-group.

In an article on citizenship and the U.S. Constitution, Earl Maltz finds that "important rights are linked to the legal status of citizenship" and, because of this nexus, governmental entities "may appropriately discriminate between citizens and [non-citizens] in a variety of contexts."[13] Brook Thomas, citing Peter Riesenberg, points out that the robustness of citizenship is often linked to its exclusionary nature.[14] Thomas notes that one of the main functions of citizenship "has been as an agent or principle of exclusion . . . . It has encompassed and defined privilege and constituted the means to discriminate against non-citizens."[15] Isin and Turner, citing Hannah Arendt, further note that "once the rights of citizenship have been removed, there is no authority left to protect people as human beings."[16]

II. THE UNITED STATES' CONSTITUTIONAL CONSTRUCT OF BIRTHRIGHT CITIZENSHIP AND THE U.S. SUPREME COURT'S HOLDING IN *UNITED STATES V. WONG KIM ARK*

The topic of birthright citizenship in the United States has come to the forefront of attention in recent years. Illustrative of this is legislation proposed in the 112th U.S. Congress on April 5, 2011. United States Senator David Vitter, a Republican from the State of Louisiana, introduced Senate Bill 723. Senator Vitter's proposal sought to amend U.S. immigration law to define a person born in the United States as "subject to the jurisdiction" of the United States at birth only if

12. Nash, *supra* note 6, at 1067-68.

13. Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1137 (1996).

14. Brook Thomas, *China Men,* United States v. Wong Kim Ark*, and the Question of Citizenship*, 50 AM. Q. 689, 694 (1998).

15. *Id.* (quotation marks omitted).

16. Isin & Turner, *supra* note 8, at 12.

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that person is born to at least one parent who is a U.S. citizen or national, a lawful permanent resident of the United States, or an alien performing active service in the U.S. Armed Forces.[17] The bill, which did not become law, would have altered the fundamental application of the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment, adopted on July 9, 1868, provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[18] This amendment overturned the U.S. Supreme Court's 1857 decision in *Dred Scott v. Sandford*[19] in which the Court held that persons of African heritage in the United States could not be U.S. citizens and did not have rights under the U.S. Constitution which a white man was bound to respect. The Fourteenth Amendment's Citizenship Clause provided a more durable and insular guarantee of birthright citizenship to persons of African heritage in the United States than did other legislative attempts (e.g., Civil Rights Act of 1866).[20]

A reading of the plain meaning of the Citizenship Clause demonstrates that its framers did not intend that all persons born or naturalized in the United States be U.S. citizens. The qualifying language of "subject to the jurisdiction thereof" provides the basis for governing institutions in the United States to limit who can enjoy holding the status of being a U.S. citizen. Consequently, it is necessary to understand how this phrase has been interpreted in order to understand its impact on racial and ethnic immigrant minorities' inclusion into American national identity.

One of the first tests of the meaning of the "subject to the jurisdiction thereof" language in the Fourteenth Amendment to the U.S. Constitution came via the case of *Elk v. Wilkins*.[21] In this case, John Elk, a Native American, was denied the right to register to vote in a local city council election on grounds that he was not a U.S. citizen.[22] Elk was born in the United States as a member of a Native American tribe, but he had later severed his relationship to that tribe.[23] Elk argued that in doing so, he had fully and completely surrendered himself to the jurisdiction of the United States and devoted his full allegiance to the same.[24] The Court found the key question to be:

> [W]hether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the

17. Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011).
18. U.S. CONST. amend. XIV, § 1, cl. 1.
19. 60 U.S. 393 (1857).
20. *See* Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 507-08 (2008) (explaining how the Fourteenth Amendment secured and broadened the protections of the Civil Rights Act of 1866).
21. 112 U.S. 94 (1884).
22. *Id.* at 95-96, 109.
23. *Id.* at 98-99.
24. *Id.*

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> first section of the Fourteenth Amendment of the Constitution.[25]

The Court held that Elk was not a U.S. citizen and provided the following analysis relevant to the "subject to the jurisdiction thereof" principle:

> The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.
>
> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[26]

As a result of its holding, the Court abrogated the *jus soli* principle espoused in the Fourteenth Amendment to exclude Native Americans born on U.S. soil who owed immediate allegiance to their particular tribe. Native Americans would not realize the full protection of being U.S. citizens until Congress passed the Indian Citizenship Act of 1924; however, this Act did not overturn the Court's logic relative to the "subject to the jurisdiction thereof" language.[27] Given that the U.S. Supreme Court qualified the principle of *jus soli* to exclude certain Native Americans born on U.S. soil, it is important to understand whether other racial and ethnic minorities are also excluded from the protection of this doctrine. The U.S. Supreme Court case of *United States v. Wong Kim Ark* is instructive in achieving this endeavor.

In *United States v. Wong Kim Ark*, the plaintiff, Wong Kim Ark, was born in the United States to parents who were Chinese nationals lawfully residing in the United States.[28] His parents later moved to China having never become U.S. citizens.[29] In 1895, upon returning to the United States from a visit to China, Wong

25. *Id.* at 99.

26. *Id*. at 102 (quoting U.S. CONST. amend. XIV, § 1, cl. 1).

27. *Cf.* 8 U.S.C. § 1401 (2006) (defining nationals and citizens, and distinguishing people "born in the United States, and subject to the jurisdiction thereof" from people born in the United States to members of Indian tribes).

28. 169 U.S. at 652.

29. *Id.*

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Kim Ark was not allowed to reenter the country by a U.S. customs officer.[30] The U.S. government argued that Wong Kim Ark, "although born in the city and county of San Francisco, State of California, United States of America, is not, under the laws of the State of California and of the United States, a citizen thereof."[31] Further, the U.S. government argued that under the Chinese Exclusion Acts (which significantly limited Chinese immigration), Wong Kim Ark was not a member of any class of persons exempted from the statute and privileged to enter the United States.[32] The Chinese Exclusion Act of 1882 also prevented state and federal courts from granting citizenship to Chinese resident aliens.[33]

The central issue in the case was whether under the Fourteenth Amendment's Citizenship Clause:

> [A] child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States.[34]

The Court turned to English common law as a source of authority to formulate its holding. The Court argued the following with regard to the "subject to the jurisdiction thereof" qualifying principle:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.[35]

Using the English common law approach to birthright citizenship, the Court

30. *Id.* at 653.
31. *Id.* at 650.
32. *Id.*
33. Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61.
34. *Wong Kim Ark*, 169 U.S. at 705.
35. *Id*. at 655.

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argued that none of the common law exceptions to the "subject to the jurisdiction thereof" doctrine applied to Wong Kim Ark.[36] The Court, in speaking of Wong Kim Ark's parents, noted that "during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China."[37] Thus, Wong Kim Ark was deemed to be a citizen of the United States.[38] The Court's stance came despite the U.S. Congress' disdain for Chinese immigration—as evidenced by the Chinese Exclusion Act of 1882.[39]

The U.S. Supreme Court's decision in *Wong Kim Ark*, along with *Elk v. Wilkins*, established the scope of the "subject to the jurisdiction thereof" language that qualifies the *jus soli* principle in the U.S. Constitution. Specifically, all persons born on U.S. soil are deemed to be U.S. citizens except for those who are: (1) born to foreign ambassadors or other diplomatic agents, (2) born to enemy forces engaged in hostile occupation of the United States, or (3) born to an Indian tribe not paying taxes and owing immediate allegiance to their particular tribe.[40] The effect of these decisions, most notably *Wong Kim Ark*, is profound. As Thomas notes, *Wong Kim Ark* is so important because it "denied a racial determination of citizenship by birth."[41] As it relates to this paper's overall thesis, *Wong Kim Ark* is critical because it demonstrates that the doctrine of *jus soli* espoused in the U.S. Constitution is interpreted in a fashion that allows for a relatively expansive legal inclusion of racial and ethnic immigrant minorities into U.S. citizenship. In fact, the U.S. Supreme Court has even gone as far as to use the birthright citizenship logic it articulated in *Wong Kim Ark* to rationalize that children who are born on U.S. soil to parents who are unlawfully present in the country are U.S. citizens.[42]

III. THE DOMINICAN REPUBLIC'S CONSTITUTIONAL CONSTRUCT OF CITIZENSHIP, IMMIGRATION GENERAL LAW NO. 285-04, AND THE DOMINICAN REPUBLIC SUPREME COURT'S HOLDING IN *APPEAL AGAINST THE UNCONSTITUTIONALITY OF THE GENERAL LAW OF MIGRATION NO. 285-04*

An analysis of how the constitutional construct of citizenship in the Dominican Republic shapes racial and ethnic immigrant minority inclusion into Dominican national identity must first be placed in the context of the racially-driven political history between the Dominican Republic and Haiti.[43] It is important to understand the general disdain many Dominicans, particularly elites, have for

36. *Id.* at 655-58 ("[E]very child born in England of alien parents was a natural-born subject . . . .").

37. *Id.* at 652.

38. *Id.* at 705.

39. *See* § 1, 22 Stat. at 58 ("[I]n the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory . . . .").

40. *See Wong Kim Ark*, 169 U.S. at 682 ("The real object of the Fourteenth Amendment . . . [was] to exclude . . . children of members of the Indian tribes . . . [as well as] children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State [from citizenship].").

41. Thomas, *supra* note 14, at 694.

42. *See, e.g.*, INS v. Rios-Pineda, 471 U.S. 444, 446 (1985) (noting that a child born in the United States to parents who were smuggled illegally into the country was still a U.S. citizen).

43. This portion of the article is largely derived from author Middleton's previous article. *See* Middleton, *Institutions*, *supra* note 1, at 574-75.

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Haiti and Haitians as well as the nationalization of an anti-black identity during the reign of former dictator president Rafael Trujillo.[44] Trujillo's disdain for Haitians led to increased social rejection of black identity in culture as well as an overall institutionalization of anti-blackness in Dominican society. Under his administration, there was a strategic *blanqueamiento* (whitening) of the nation with the racial category "negro" becoming synonymous with Haitian.[45]

Dominicans were taught in school not to refer to themselves as black.[46] In social circles, to call someone "*negro*" was the ultimate insult. Lighter skin was favored to darker skin and straight hair to kinky hair. With the denigration of blackness solidly entrenched in Dominican culture, blackness was further relegated to lower-class status through the legal classification of the majority of Dominicans as "*indio*."[47] As opposed to *negro* or *mestizo*, *indio* was a term used to mean a person of brown skin color. The classification of Dominicans as *indio* instead of *negro* is still used today.[48] To corroborate this contention, one need only ask a Dominican to see his *cédula* (government-issued identification card). A profound statement by Dr. Silvio Torres-Saillant characterizes the conventional view of race in the Dominican Republic:

> Blacks and mulattos make up nearly 90 percent of the contemporary Dominican population. Yet, no other country in the [western] hemisphere exhibits greater indeterminacy regarding the population's sense of racial identity. To the bewilderment of outside observers, Afro-Dominicans have traditionally failed to flaunt their blackness as a collective banner to advance economic, cultural, or political causes. Some commentators would contend, in effect, that Dominicans have, for the most part, denied their blackness.[49]

44. *See* Jorge Duany, *Reconstructing Racial Identity: Ethnicity, Color, and Class Among Dominicans in the United States and Puerto Rico*, 25 LATIN AM. PERSP. 147, 151 (1998) ("Under Rafael Trujillo's dictatorship (1930-1961), the pro-Hispanic and anti-Haitian discourse became the official ideology of the Dominican state.").

45. *See, e.g.*, *id.* at 152 ("[T]he Dominican system of racial classification has two peculiar features in a comparative Caribbean context. First, it does not identify local blacks as a separate category within the color spectrum but instead reserves that category for Haitians."); DAVID HOWARD, COLORING THE NATION: RACE AND ETHNICITY IN THE DOMINICAN REPUBLIC 132 (2001) ("The immigration policy of *blanqueamiento* during the regime of Trujillo is similar. White immigration aimed to develop a pigmentocracy in which social status correlated with skin color and body aesthetics.").

46. *See* Sheridan Wigginton, *Blackness as a Barrier to Citizenship and Education: Situating the Example of Dilcia Yean and Violeta Bosico*, 5 EDUC., CITIZENSHIP & SOC. JUST. 163, 165 (2010) ("Dominican students were taught that the dark complexion of more than 90 per cent of the nation was a color named *indio* (Indian) . . . .").

47. *See* HOWARD, *supra* note 45, at 41 ("Historically, *indio/a* has been used as a term to describe a brown skin color, and it was not until the dictatorship of Trujillo that *indio/a* was established as an official and popular description of Dominican race."); Duany, *supra* note 44, at 151 ("[E]ven the darkest-skinned Dominican is considered not black but *indio oscuro* (dark Indian) . . . .").

48. *See* HOWARD, *supra* note 45, at 41 (citing recent studies in Santiago and Santo Domingo where over fifty percent and forty-three percent described themselves as *indio*, respectively); Middleton, *Institutions*, *supra* note 1, at 574 ("The classification of Dominicans as indio instead of negro is still used today.").

49. Silvio Torres-Saillant, *The Tribulations of Blackness: Stages in Dominican Racial Identity*, 25 LATIN AM. PERSP. 126, 126 (1998).

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The process of inculcation in the racially discriminatory context in the Dominican Republic involves exposure to and instruction in the country's racial social structure at an early age. Public schools in the Dominican Republic use social science textbooks that teach students that an implicit racial hierarchy exists in Dominican society.[50] Caricatures are used to teach Dominican youth that their race is a mixture of indigenous (*Taíno*), Spanish, and black African bloodlines.[51] Students are also taught that in addition to the white, black, and indigenous populations, race mixing in the Dominican Republic has created additional racial categories. In particular, young Dominicans are taught that race mixing indigenous and white bloodlines produces *mestizo*, and race mixing black and white bloodlines yields *mulatto*.[52] Some textbooks used in the public schools of the Dominican Republic also teach that a mixture of black and indigenous bloodlines produces *zambo*.[53] Co-author Wigginton finds that these textbooks teach students the basic elements of the country's racial hierarchy—in particular that blackness represents a less desirable social status and that whiteness is the most desirable social status.[54] Wigginton also finds that Dominicans are taught that blackness can be prevented through generational whitening of the "race" and is characterized by negative and exaggerated stereotypes.[55]

Dominicans are exposed to their country's racial hierarchy through formal educational constructs and are further inculcated by social networks and political rhetoric rooted in racist attitudes towards Haitians and blackness. For example, former Dominican president Joaquín Balaguer once campaigned on a platform that his competitor, José Francisco Peña Gómez, although Dominican, was of Haitian ancestry.[56] As discussed earlier, in the Dominican Republic, Haitian ancestry symbolizes black African heritage—the status that is least desired. Balaguer, on the other hand, emphasized that he was the "whiter" candidate, and thus closer to the most desired status.[57] Also discussed earlier was the effort of the former Dominican

50. *See* Sheridan Wigginton, *Character or Caricature: Representations of Blackness in Dominican Social Science Textbooks*, 8 RACE ETHNICITY & EDUC. 191, 198-201 (2005) ("In [illustrations in the textbooks studied], fairer complexioned Dominicans are represented as members of a more highly educated workforce than Dominicans of a darker complexion.").

51. *See id.* at 204-06 (including pictures of individuals in each category drawn using "exaggerated stereotypes").

52. *See id.* at 206-09 ("[The textbook uses caricatures when it] describes in picture form how the indigenous, Spanish and African populations intermarried and had offspring; thus, giving rise to '*mestizo*' and '*mulato*' populations.").

53. Wigginton, *supra* note 46, at 164.

54. *See* Wigginton, *supra* note 50, at 210 ("The extreme caricatures in the textbook images either dehumanize blackness altogether, or position blackness at the very bottom of the social, economic and aesthetic ladders.").

55. *Id.* at 210.

56. *See* Jana Morgan et al., *Dominican Party System Continuity amid Regional Transformations: Economic Policy, Clientelism, and Migration Flows*, 53 LATIN AM. POL. & SOC'Y 1, 12 (2011) ("When it seemed that the dark-skinned José Francisco Peña Gómez . . . might win, his opponents [including Joaquín Balaguer] made his Haitian ancestry a campaign issue and 'implied that the country's cultural identity, economic well-being—and even its very existence as a sovereign state would all be threatened by his victory.'" (quoting JONATHAN HARTLYN, THE STRUGGLE FOR DEMOCRATIC POLITICS IN THE DOMINICAN REPUBLIC 237 (1998))).

57. *See id*. (explaining that vilifying a political opponent by emphasizing his relatively darker

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dictator president Trujillo, who attempted to "whiten" Dominican society by nationalizing the Dominican race as *indio* and marginalizing blackness.[58] These historical accounts are familiar to most Dominicans, young and old, due to their being passed on through social networks.[59]

A. Immigration General Law No. 285-04 of the Dominican Republic

The Dominican constitution, up until January 26, 2010, had bestowed Dominican nationality upon all individuals born in the country—except for legitimate children born to foreign diplomats and to persons who were "in transit" at the time of the child's birth.[60] Under Dominican immigration law, specifically Immigration Act No. 95 of April 14, 1939, and Immigration Regulation No. 279 of May 12, 1939, "in transit" was defined to include those persons who entered the Dominican Republic with the main objective of traveling through to another destination outside the country, engaging in leisure or business travel, and foreign diplomats.[61] These laws were interpreted in a fashion as to not apply the "in transit" language to those who stayed in the country more than ten days.[62] Thusly, children born to individuals staying in the country longer than ten days had a right to Dominican nationality.[63]

In August 2004, the Dominican Republic passed General Law on Migration 285-04. According to a report by the Open Society Foundations, this law "effectively put an end to the automatic right of Dominican nationality granted to Dominicans of Haitian descent under the constitution's *jus soli* guarantee."[64] General Law on Migration 285-04 mandated that all "non-residents" be considered in transit; among those considered to be "non-residents" were tourists, temporary foreign workers, those having expired residency visas, and undocumented migrant workers.[65] According to extant scholarship, this law targets the Haitian population in the country, an estimated 1 to 1.5 million people comprised mainly of undocumented immigrants and their descendants—many of whom live and work in

complexion was a winning campaign strategy for Balaguer).

58. *See* Peter Wade, *Afro-Latin Studies: Reflections on the Field*, 1 LATIN AM. & CARIBBEAN ETHNIC STUD. 105, 112 (2006) ("[The] term *indio* became current, especially during Trujillo's dictatorship, to . . . clearly distinguish [Dominican citizens] from neighboring 'black' Haiti.").

59. Middleton, *Institutions*, *supra* note 1, at 575 ("In addition to being exposed to the Dominican Republic's racial hierarchy through formal educational constructs, Dominicans are further inculcated by social networks as well as political rhetoric rooted in racist attitudes toward Haitians and blackness.").

60. OPEN SOC'Y FOUNDS., DOMINICANS OF HAITIAN DESCENT AND THE COMPROMISED RIGHT TO NATIONALITY 3 (2010), *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/dominicans-haitian-descent-20101028/Dominican-Republic-Nationality-Report-ENG-20110805.pdf [hereinafter OPEN SOC'Y FOUNDS., DOMINICANS]. Note that the Open Society Foundations were previously known as the Open Society Institute prior to a name change in 2010. Hereinafter we will use the present name.

61. *Id.* at 3 n.4.

62. *See id.* at 3 ("Long-standing authoritative legal interpretations limited the temporal scope of the 'in transit' exception to a period of less than ten days, meaning that children born in the Dominican Republic to migrants and other temporary and permanent residents whose stay in the country exceeded ten days had a constitutional right to Dominican nationality.").

63. *Id.*

64. *Id.* at 7.

65. *Id.*

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batey slums.[66]

Under General Law on Migration 285-04, children born on Dominican soil to "non-resident" parents inherited their parents' status and thusly were denied Dominican nationality—despite the *jus soli* principle in the Dominican constitution.[67] The law also required that "non-resident" mothers would be issued "certifications of foreigner live birth"—a document that could not be used to obtain a Dominican Republic birth certificate from a civil registry in the country.[68] Not having a Dominican birth certificate also meant that an individual, upon turning eighteen years old, could not obtain a *cédula de identidad y electoral*—a document that is required, under Dominican law, to be carried by Dominicans and which serves as proof of a person's legal standing to enjoy the political, economic, and civil rights afforded by the country's governing institutions.[69] As noted by the Open Society Foundations, citing the Inter-American Court of Human Rights, for an individual who does not hold a *cédula*, "it is impossible . . . to 'acquire and exercise [the] rights and obligations inherent in membership in [the Dominican Republic's] political community.'"[70] The effect of General Law on Migration 285-04 can be summed up by the following statement:

> In the Dominican Republic, enjoyment of the right to nationality has become all but impossible for persons of Haitian descent. Following decades of *ad hoc* discrimination in access to the identity documents that recognized them as lawful citizens, Dominicans of Haitian descent have since 2004 faced an avalanche of hostile legislative changes and administrative policies that have restricted their ability to enjoy [Dominican] nationality . . . . Singled out because of their national origin and their skin color, thousands of Dominicans of Haitian descent have been left effectively stateless and permanently excluded from the political, economic social and cultural life of their

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66. *See* FERGUSON, *supra* note 3, at 11 (2003) ("[Haitian sugar-plantation workers] settled in the squalid work camps that had been constructed in the early twentieth century to house temporary contract workers. [These work camps were k]nown as *bateyes* . . . ."); Emmanuel Santos, *A Constitution to Impose Injustice*, SOCIALISTWORKER.ORG, Aug. 26, 2009, http://socialistworker.org/2009/08/26/constitution-to-impose-injustice ("The constitution also targets the Haitian population in the country, which numbers approximately 1 million and is mainly comprised of undocumented immigrants and their descendents [sic] . . . . Under a 2004 immigration law, the children of Haitian immigrants are denied birth certificates, which prevents them from enrolling in school, traveling abroad and voting.").

67. OPEN SOC'Y FOUNDS., DOMINICANS, *supra* note 60, at 7.

68. *Id.*; *see also* Solange Pierre, *Equality, Protection, Nationality: The Human Rights of Migrants in the Dominican Republic*, 4 WOMEN'S HEALTH J. 55, 56 (2006) ("Article 8 of Law 285-04 states: 'All children born of 'illegal' parents shall be granted a pink-colored birth certificate that is different from that issued to a child born of a parent who is a Dominican national.' The violation of their rights continues when children are unable to attend school because they do not have an official birth certificate, when they cannot access health care because they have no identity papers and when they have no roof over their heads because their parents are placed in dwellings that are unsuitable for human habitation.").

69. OPEN SOC'Y FOUNDS., DOMINICANS, *supra* note 60, at 4.

70. *Id.* (quoting Yean & Bosico v. Dominican Republic, Judgment, Inter-Am Ct. H.R. (ser. C), No. 130, ¶ 137 (Sept. 8, 2005)).

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country of birth and residence.[71]

In 2005, the Supreme Court of Justice of the Dominican Republic, sitting as the Constitutional Council, reviewed a challenge to General Law of Migration No. 285-04. On December 14, 2005, the court handed down its decision in a case styled *Appeal Against the Unconstitutionality of the General Law of Migration No. 285-04*, holding that the legislature of the Dominican Republic had authority to interpret Title III, Section 1, Article 11, Clause 1, of the 2002 Dominican constitution as the legislature deemed proper.[72] The court went on to ratify the Congress' interpretation that children born to non-resident migrants were excluded from the guarantee of Dominican citizenship otherwise afforded under the constitution's *jus soli* principle.[73] In addition, the "in transit" provision of Migration Law 285-04 was applied retroactively—effectively stripping away Dominican citizenship from thousands of Haitians of Dominican descent who had once enjoyed Dominican citizenship.[74]

The Dominican supreme court's decision went counter to the holding handed down by the Inter-American Court of Human Rights in the case of *Dilcia Yean and Violeta Bosico v. Dominican Republic*.[75] In that case, two girls, ages ten months and twelve years old,[76] respectively, who were born in the Dominican Republic to Dominican mothers of Haitian descent, were denied Dominican birth certificates despite the fact that their mothers were born in the country and held valid *cédulas*.[77] Because the girls could not obtain Dominican Republic birth certificates, they could not go to school in the country.[78]

The Inter-American Court of Human Rights held, inter alia, that the Dominican Republic had denied Yean and Bosico their "rights to nationality, equality before the law, a juridical personality, a name, and special protection as children."[79] The Court also ruled that, given that the Dominican constitution incorporates *jus soli* as a principle, granting Dominican nationality to persons born on Dominican soil could not be abridged any more than the exceptions found

71. *Id.* at 2.

72. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 14 diciembre 2005, "Sentencia sobre la action en inconstitucionalidad intentada por el Servicio Jesuita a Refugiados y Migrantes," (Chile), *available at* http://www.suprema.gov.do/consultas/consultas_sentencias/detalle_info_sentencias.aspx?ID=114110009.

73. *Id.*

74. OPEN SOC'Y FOUNDS., DOMINICANS, *supra* note 60, at 9.

75. *Yean & Bosico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130.

76. David C. Baluarte, *Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash*, 13 HUM. RTS. BRIEF, no. 2, 2006 at 25, 26.

77. OPEN SOC'Y FOUNDS., DOMINICANS, *supra* note 60, at 6.

78. *See* Baluarte, *supra* note 76, at 26 ("Although the girls appealed this decision [by the Dominican civil registry to not issue them birth certificates] to the Dominican judicial system, the refusal was upheld, ultimately leading to Bosico's expulsion from school."); Wigginton, *supra* note 46, at 163 ("[T]his undue burden of documentation results in restricted access to public schooling. Each of these issues is at play in the tangled international court battle of two black Dominican girls, Dilcia Yean and Violeta Bosico, who sought to force the Dominican government to grant them birth certificates, and in turn, an education.").

79. Baluarte, *supra* note 76, at 27.

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within the country's constitution.[80] In addition, the Court found that "[r]acial [d]iscrimination in [a]ccess to [n]ationality [v]iolates Articles 1(1) and 24, [t]aken [t]ogether with Article 20(1) of the American Convention on Human Rights."[81] The Court also found that the Dominican Republic's "discriminatory application of nationality and birth registration laws rendered children of Haitian-descent stateless."[82]

Shortly after the Inter-American Court of Human Rights handed down its decision in *Yean and Bosico v. Dominican Republic*, the Dominican Senate issued a resolution rejecting the Court's decision.[83] And, as previously mentioned, in December 2005, the Supreme Court of Justice of the Dominican Republic held that the Congress of the Dominican Republic had power to broadly construe the meaning of the "in transit" clause of the Dominican constitution in a manner that excludes Haitians from Dominican citizenship and nationality.[84] Finally, in 2010, the Dominican Republic revamped its constitution in Article 18 to more heavily espouse the doctrine of *jus sanguinis*.[85] Notably, the doctrine of *jus soli* was abrogated to exclude from birthright citizenship those born to foreign diplomats and consulates, foreigners "in transit," or illegal residents.[86] Persons in transit were defined in accordance with Dominican laws.[87]

IV. PARALLELS BETWEEN CHILE'S CONSTITUTIONAL CONSTRUCT OF CITIZENSHIP AND THAT OF THE UNITED STATES AND THE DOMINICAN REPUBLIC

The constitutional construct of citizenship in Chile provides the opportunity for a unique juxtaposition of the operation of the *jus soli* doctrine in the cases investigated in this study. This is due to the fact that the Chilean constitutional construct of citizenship has parallels to both the constitutions of the United States and the Dominican Republic. In this section, we analyze the constitutional construct of Chilean citizenship and the operation of the principle of *jus soli* at the Supreme Court of Justice of Chile level and its associated effects on racial and ethnic immigrants in Chile.

Chapter II, Article 10, Number 1, of the Political Constitution of the Republic of Chile reads:

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80. *Id.*

81. Written Comments on the Case of Dilcia Yean and Violeta Bosico v. Dominican Republic: A Submission from the Open Society Justice Initiative to the Inter-American Court of Human Rights at 13, Yean & Bosico v. Dominican Republic, No. 130 (2005), *available at* http://www.soros.org/initiatives/justice/litigation/yean/yean_20050401.pdf.

82. OPEN SOC'Y FOUNDS., *Litigation: Yean and Bosico v. Dominican Republic*, http://www.soros.org/initiatives/justice/litigation/yean (last visited Apr. 4, 2012).

83. Baluarte, *supra* note 76, at 28.

84. *See* OPEN SOC'Y FOUNDS., DOMINICANS, *supra* note 60, at 9 ("[The U.S. Supreme Court's judgment] refused to set any reasonable temporal limits on the 'in transit' status.").

85. *See id.* at 16 ("Article 18 of the new constitution identifies as Dominican citizens . . . [p]ersons born on national territory, with the exception of the sons and daughters of foreign members of diplomatic and consular delegations, and foreigners who find themselves in transit or reside illegally on Dominican territory. Foreigners shall be considered as being in transit as defined in Dominican laws . . . .").

86. *Id.*

87. *Id.* (citing CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA as revised Jan. 26, 2010).

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> Chileans are:
>
> 1.- Persons born in the territory of Chile, with the exception of those children of foreigners who are in Chile serving their government, as well as those children of transient foreigners. However, all may opt for the Chilean nationality.[88]

As evidenced by the language conferring Chilean citizenship and nationality upon "persons born in the territory of Chile," the doctrine of *jus soli* is firmly implanted in the Chilean constitution. The Chilean supreme court has also recognized that the *jus soli* doctrine is a fundamental principle espoused by the Chilean constitution.[89] However, further examination of the *jus soli* principle unravels a unique constitutional construct of citizenship that, while prima facie seeming expansive, actually has a limiting clause that simultaneously creates confusion and lends itself to the possibility of discriminatory exclusion of racial and ethnic minorities from Chilean citizenship and nationality.

The Chilean constitution, in similar construct to the Dominican constitution, excludes from Chilean citizenship those persons born to foreigners "in transit."[90] However, while the Chilean constitution limits inclusion into Chilean citizenship and nationality via its "in transit" clause, it simultaneously provides for a more expansive inclusion into Chilean citizenship via an "opt-for" provision. Under Chilean law, the children of foreign citizens who are in Chile in the service of their government and children of "in transit" foreigners can opt for Chilean nationality.[91] People who desire to opt for Chilean nationality have to do this through a "Declaration to Opt to the Chilean Nationality" (Form M-2), a formality that must be completed in a one-year period counted beginning from the date the applicant becomes twenty-one years of age.[92] The request must be submitted to "the corresponding Intendant or Governor, or to the Alien Status and Immigration Department of the Ministry of Interior in Chile, or to the Chilean Consul or Diplomatic Agent abroad . . . that is stationed in the place of residence of the applicant."[93] In any of these cases, a fee must be paid.[94] Once the applicable

88. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. II, art.10, no. 1, *translated in* CONSTITUTION OF THE REPUBLIC OF CHILE, CONSTITUTION FINDER, http://confinder.richmond.edu/admin/docs/Chile.pdf.

89. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 28 diciembre 2009, "Nestares Alcántara, Helvi c. Departamento de Extranjería y Migración, del Ministerio del Interior y del Registro Civil," Rol de la causa: 6073-2009, extranjería, (Chile), *available at* http://www.poderjudicial.cl/modulos/TribunalesPais/TRI_esta402.php?rowdetalle=AAANoPAANAACta9AAB&consulta=100&glosa=&causa=6073/2009&numcua=45405&secre=UNICA.

90. *Compare* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. II, art.10, *translated in* CONSTITUTION OF THE REPUBLIC OF CHILE, CONSTITUTION FINDER, http://confinder.richmond.edu/admin/docs/Chile.pdf, *with* CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [DOM. REP. CONST.] Jan. 26, 2010, tit. I, ch. V, § I, art. 18, no. 3.

91. *See Option for the Chilean Nationality*, DEPARTAMENTO DE EXTRANJERÍA Y MIGRACIÓN DEL MINISTERIO DEL INTERIOR, REPÚBLICA DE CHILE, http://www.extranjeria.gov.cl/ingles/opcion_nacionali.html (last visited Apr. 4, 2012).

92. *Id.*

93. *Id.*

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governmental authority determines whether the applicant fulfills the requirements, he or she is then informed whether he or she is documented as a Chilean.[95]

The Chilean constitution's "opt-for" provision suggests that the Chilean constitutional construct of citizenship should be situated closer to the expansive operation of the interpretation of the United States' "subject to the jurisdiction thereof" clause than that of the Dominican Republic's "in transit" provision. As we argue in the next section, however, the Chilean constitutional construct of citizenship can be understood as one that is built on a fluid foundation and laden with the possibility of discrimination when bureaucratically administered.

The Chilean constitutional construct of citizenship does not neatly fit between the U.S. and Dominican Republic constitutional constructs because of the bureaucratic discretion afforded in the legal and administrative application of the doctrine. The application of Chile's constitutional construct of citizenship has been wrought with the opportunity for racial and ethnic bias in its operation and has created de facto discriminatory effects on racial and ethnic immigrant minorities. As with the case of the Dominican Republic, the definition of "in transit" or "transitory" is at the heart of Chile's difficulty in developing a bright-line rule for conferring constitutionally protected Chilean citizenship and nationality. The case of the minor child Valentina Meiling Alcántara Nestares is illustrative.[96]

Helvi Claudia Nestares Alcántara, a citizen of Peru, illegally entered Chile in 2006.[97] Helvi gave birth to Valentina Meiling Alcántara Nestares in Santiago, Chile, on October 30, 2007.[98] Later that year, on November 14, Valentina's mother attempted to register her with the Ministry of Interior and the Department of Civil Registry as a Chilean citizen.[99] However, the attending official indicated that Valentina was the child of a "foreigner in transit" due to her mother's inability to provide documentation of legal residency in Chile.[100] Helvi provided evidence that—during her pregnancy and at the point of filing suit—she had continuously remained in Chile and by 2008 acquired one-year lawful residence in Chile.[101]

Helvi's legal claim was that the head of the Department of Immigration and Migration, Ministry of Interior, wrongly denied Valentina Chilean nationality and infringed upon Valentina's rights.[102] Under the Aliens Act of Chile, the Ministry of Interior has the power to define which documents are sufficient to establish the legal residence of parents whose children require birth registration in Chile.[103] On the other hand, the Department of Immigration and Migration has the power to determine what nationality attaches to the child.[104] Under a 1998 opinion of the Comptroller General of the Republic, the Department of Civil Registry cannot

94. *Id.*
95. *Id.*
96. *Nestares Alcántara*, C.S.J., 6073-2009.
97. *Id.*
98. *Id.*
99. *Id.*
100. *See id.* ("[E]n el momento de la inscripción ella solamente tenía su pasaporte." [Because at the time of registration she just had her passport.]).
101. *Id.*
102. *Nestares Alcántara*, C.S.J., 6073-2009.
103. *Id.*
104. *Id.*

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refuse to register a child born to parent(s) in transit; determining the transient status of the parents is the responsibility of the Department of Immigration and Migration.[105] The Department of Immigration and Migration denied Valentina Chilean citizenship because it found Valentina's mother was illegally in the country at the time of Valentina's birth.[106] The government argued that Helvi illegally entered Chile and stayed in hiding; furthermore, the government argued, the fact that Helvi stayed continuously in Chile during her pregnancy did not confer domicile in Chile on her daughter.[107] The government also argued that the one-year legal status Helvi gained after her pregnancy did not apply retroactively to her daughter.[108] On December 28, 2009, the Supreme Court of Justice of Chile reached a landmark decision in this novel case. Chile's supreme court reasoned that because "transient" is not defined in the relevant Chilean law, the term:

> under the provisions of Article 20 of the Civil Code, must be understood in its natural and obvious meaning. In this regard, the Dictionary of the Royal Academy defines the term "transient" as meaning "one who travels or goes through a place, that is on the way, who does not reside only transiently in one place."[109]

From this logic, Chile's supreme court looked at facts surrounding Helvi's status in Chile. The court noted that Helvi had shown a long-standing interest in remaining in Chile and in holding property for the purpose of sharing it with a family, and undisputedly leased this property for a long period.[110] The court also found that Helvi sought and obtained a temporary visa, which was in force at the time she filed the complaint, as well as obtained an identity card.[111] The court opined that these facts could only lead to the conclusion that, despite Helvi's illegal entry in the country in 2006, she had remained in the country precisely with the intention of remaining in Chile, leading her to hold the status of a temporary resident; thus she could not be regarded as a transient foreigner.[112] Therefore, the court ruled Valentina Meiling Alcántara Nestares did not fall under the child of transient foreigner provisions of No. 1 of Article 10 of the Chilean constitution.[113] The court ruled in favor of Helvi and ordered the language "child of a transient foreigner" to be removed from the minor child Valentina's birth certificate.[114]

The Chilean supreme court's decision in the *Alcántara* case reflects an observation made by Miguel Angel Fernández González, a Chilean constitutional law scholar and professor. In his article, *La nacionalidad en la constitución*, he outlines how Chilean citizenship can be gained, lost, and petitioned for by non-

105. *Id.*
106. *Id.*
107. *Id.*
108. *Nestares Alcántara*, C.S.J., 6073-2009.
109. *Id.* at considerando no. 5.
110. *Id.* at considerando no. 8.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Nestares Alcántara*, C.S.J., 6073-2009 at considerando no. 8.

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citizens.[115] He asserts that because the constitution's specific language of "in transit" is the foundational issue in determining the nationality of a child born to a non-Chilean, the court should review such cases individually.[116] Fernández González specifically points to whether the parent's stay in Chile is uninterrupted and to the duration of the parent's stay in Chile as the most important factors to the case, which should be determined by the court on a case-by-case basis.[117]

The *Alcántara* case also raises issues of discrimination and racism within Chilean society, particularly toward Peruvian immigrants to the country. Similar to the previous narrative regarding the Dominican Republic, Chilean policymakers have used the country's constitutional language surrounding citizenship as a tool for protecting not only the country's national identity but also its cultural, racial, and economic identities. Although immigration is not a new phenomenon in Chile, today's immigrants are coming from new countries, which is why Chileans have dubbed the increased wave of mostly poor immigrants the "New Immigration."[118] As compared to the more middle class Europeans that Chile welcomed in the 19th and early 20th centuries, the "New Immigration" is comprised largely of indigenous Peruvians and Bolivians seeking work as unskilled laborers or as domestic help.[119] This more conspicuous population of immigrants has documented many instances of racial discrimination while in Chile, and they often attribute their poor treatment to their darker skin and low socio-economic status.[120] Many from the "New Immigration" note that previous waves of immigrants were able to assimilate into mainstream Chilean society.[121] Their white skin color made their place in society even more welcomed by many native-born Chileans who already considered themselves to be white. In a recent article detailing Chile's difficulty with the "New Immigration," Chilean congresswoman María Antonieta Saa Díaz is quoted as opining, "Chileans have always received the blond, blue-eyed immigrants with their arms open. Not so the dark-skinned workers from our closest

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115. Miguel Angel Fernández González, *La nacionalidad en la constitución*, 12 REVISTA DE DERECHO (UNIVERSIDAD AUSTRAL DE CHILE), no. 2, 2001 at 175, *available at* http://mingaonline.uach.cl/pdf/revider/v12n2/art12.pdf.

116. *Id.* at 179.

117. *Id.*

118. Pascale Bonnefoy, *Chile's Changing Demographics*, GLOBALPOST (Jan. 28, 2011, 7:04 AM), http://www.globalpost.com/dispatch/chile/110127/chile-immigration-demographics-peruvians-bolivians.

119. *See id.* (comparing impoverished migrants of the "New Immigration," most of whom work in construction or as domestic help, with the European migrants Chile encouraged to immigrate, hoping they would improve agricultural production and commerce); s*ee also* WILLIAM EDMUNDSON, A HISTORY OF THE BRITISH PRESENCE IN CHILE 107 (2009) ("[T]he greatest impact of immigration on the social structure of Chile . . . was the rapid emergence of a middle class in the second half of the nineteenth century, composed mainly by foreigners and their descendents [sic] . . . . The 1895 census in Chile shows that 4,120 out of the 6,555 members of the Chilean middle class were Europeans.").

120. *See* Lorena de los Angeles Núñez Carrasco, Living on the Margins: Illness and Healthcare Among Peruvian Migrants in Chile 159-161 (Sept. 16, 2008) (unpublished doctoral thesis, Leiden University), *available at* https://openaccess.leidenuniv.nl/bitstream/handle/1887/13105/Drukker%20AR_Lorena%20_def1.pdf?sequence=4 (offering a story in which Peruvians in Chile are called "Peruvian leeches" and "starving Peruvian[s]," presumably by Chileans).

121. Bonnefoy, *supra* note 118.

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neighbors . . . . Just now we are beginning to realize we live among immigrants."[122] The article also states that "[a] 2008 government survey on immigrants in three regions of the country found that on average one-third of immigrants had suffered some sort of discrimination. Among Peruvians and Bolivians in the north of the country, the proportion was much higher."[123]

The Chilean case shares similar key features with the Dominican case: a mother who was a member of a racial minority historically discriminated against was considered by street-level bureaucrats to be "in transit" and was forced to turn to the courts to have her child's constitutionally guaranteed *jus soli* rights conferred and enforced.[124] The Dominican-born mothers of daughters Yean and Bosico were not only battling negative stereotypes and discrimination against Haitians and those of Haitian descent but also the constitution's limiting clause of "in transit" that was specifically used to block the granting of Dominican citizenship to persons anecdotally deemed to have a skin tone too dark to be Dominican. People of darker skin phenotype, as noted earlier in this piece, are often thought to be Haitian rather than Dominican—despite actually having been born on Dominican soil. Similarly, in the Chilean case of Valentina Meiling Alcántara Nestares, her mother Helvi, a Peruvian citizen who unlawfully entered Chile, was deemed to be "in transit" despite evidence to the counter.[125] Helvi should have been able to seamlessly register her daughter as a Chilean citizen—thus guaranteeing her the rights and benefits commensurate with Chilean nationality and citizenship. Despite evidence of her presence and intent to remain within Chile, she found herself fighting the Department of Civil Registry's inaccurate determination of her transient residence status as well as an ingrained resistance to and discrimination toward Peruvian immigration into Chile.

Although the Chilean construct of citizenship does allow children born within the Chilean territory who cannot claim Chilean citizenship at birth to "opt for" citizenship at the age of majority,[126] in practice, the "opt for" allowance does not make it possible for a child of non-Chilean parents who is born in Chile to enjoy the rights and privileges of a Chilean citizen *during* childhood. Only after the "fatal period" of reaching the age of twenty-one may the person choose to become a Chilean citizen—long after the guarantees and protections of government benefits such as public education and health care become claimable by citizens.[127] While the Chilean constitution does espouse the *jus soli* doctrine, the limiting clause of "in transit" works to create the potential for discriminatory situations similar to that of the Dominican Republic. However, the "opt-for" clause, once coupled with Chilean

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122. *Id.* (internal quotation marks omitted).

123. *Id.*

124. *Compare Nestares Alcántara*, C.S.J., 6073-2009, *with Yean & Bosico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, at ¶ 85.

125. *Nestares Alcántara*, C.S.J., 6073-2009.

126. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. II, art.10, *translated in* CONSTITUTION OF THE REPUBLIC OF CHILE, CONSTITUTION FINDER, http://confinder.richmond.edu/admin/docs/Chile.pdf.

127. The "fatal-period" language is found in Decree No. 5142, Octubre 29, 1960, DIARIO OFICIAL [D.O.] (Chile), *translated in Legal and Regulatory Texts*, DEPARTAMENTO DE EXTRANJERÍA Y MIGRACIÓN DEL MINISTERIO DEL INTERIOR, REPÚBLICA DE CHILE, 82 (July 7, 2000), http://www.extranjeria.gov.cl/ingles/filesapp/LEGAL_AND_REGULATORY.pdf.

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immigration law, allows for cases couched in the muddy waters of "in transit" and legal immigration status to be "partially" remedied. We say partially remedied because the "opt-for" provision does not operate as expansively as the judicial interpretation of the U.S. Constitution's "subject to the jurisdiction thereof" clause. Under the U.S. constitutional construct, the interpretation of the limiting clause functions to allow children born to persons unlawfully present in the United States to realize U.S. citizenship at the point of birth.[128] The Chilean model only allows such persons to realize Chilean citizenship and nationality long after childhood.[129] The Dominican Republic's constitutional constructs of citizenship and immigration laws, on the other hand, do not have a remedy for bureaucratic discriminatory practices that keep racial and ethnic minorities out of citizenship and nationality. Instead, the Dominican Republic's legal approaches operate to encourage excluding racial and ethnic minorities from cradle to grave.[130]

CONCLUSION

In this paper, the contention was made that citizenship is the apex of an individual's legal membership in a state. Those who hold the status of being a citizen of the related state enjoy certain rights and privileges that are not afforded on a coterminous basis to non-citizens. Because citizenship affords its holders with various public goods that can be denied to non-members, citizenship has a discriminatory aspect. When a state denies citizenship to an individual, it has affirmatively decided that doing so meets some institutional interest (e.g., national security, prevention of creating a charge on the public, etc.). Indeed, a core part of a state's sovereignty, particularly in a democratic society, is the right to self-determination—the ability to set the boundaries of who is a member of the in-group versus the out-group. However, there is a critical linkage between citizenship and human rights that is ever present. When a state excludes certain people from holding the status of being a citizen, the state makes a pronouncement about who it does not want to protect—to whom it does not want to provide civil rights. And, as Isin and Turner note, citizenship is a crucially important concept for human rights in effective democratic societies.[131]

In this analysis, the legal principle of *jus soli*, or birthright citizenship, was analyzed in the context of three democratic societies—the United States, the Dominican Republic, and Chile. Specifically, this research investigated the critical difference between the operation of the principle of *jus soli* in the constitutions of the United States, the Dominican Republic, and Chile and how these three countries' highest courts have interpreted the language that qualifies this principle. The U.S. Constitution provides for birthright citizenship to anyone born in the United States if "subject to the jurisdiction thereof." The U.S. Supreme Court has interpreted this clause (most notably in the case *U.S. v. Wong Kim Ark*) in a manner

128. *See, e.g.*, *Rios-Pineda*, 471 U.S. at 446 (stating that the child of illegal immigrant parents is deemed a citizen by virtue of his birth within the United States).

129. Decree No. 5142 (Chile).

130. *See* OPEN SOC'Y FOUNDS., DOMINICANS, *supra* note 60, at 7-8.

131. Isin & Turner, *supra* note 8, at 5 (2007) ("Citizenship is essential for cultivating civic virtues and democratic values.").

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that allows for a relatively expansive legal inclusion of racial and ethnic immigrant minorities into U.S. citizenship. Further, under the U.S. constitutional construct, individuals who are born on U.S. soil, even to parents who are unlawfully present in the country, are U.S. citizens.

The Dominican constitution, on the other hand, provides for birthright citizenship to any person except those born to individuals that are "in transit" in the Dominican Republic. Unlike in the United States, the Supreme Court of Justice of the Dominican Republic deferred to the national legislature for promulgation of a definition of who is deemed to be "in transit." Under Dominican immigration law, those individuals who are deemed to be "in transit" include the notable category of "temporary foreign workers," and "undocumented migrant workers"—most of whom are Black Haitians. From this legislative definition, the Dominican supreme court has upheld the national Congress' pronouncement that undocumented immigrants are "in transit" within the meaning of the language that qualifies the *jus soli* principle in the Dominican constitution. Consequently, the operation of *jus soli* as a legal criterion for membership into Dominican citizenship is to narrowly construe its meaning in order to evade inclusion of Black Haitians.

In the country of Chile, the construct of citizenship does allow children born within the Chilean territory who cannot claim Chilean citizenship at birth to "opt for" citizenship at the age of twenty-one. In practice, however, the "opt for" allowance still does not make it possible for a child of non-Chilean parents who is born in Chile to enjoy the rights and privileges of a Chilean citizen *during* childhood. The application of Chile's constitutional construct of citizenship is vulnerable to being profoundly misused to reflect racial and ethnic bias in its operation and to create de facto discriminatory effects on racial and ethnic immigrant minorities.

As Patrick J. Glen eloquently noted in a study similar to this one, the problem of undocumented aliens migrating across national boundaries "will not dissipate in the near future, regardless of which compromise comes out of executive and Congressional dialogue on the issue."[132] The challenge faced by governing institutions is to operationalize the basic and enduring constitutional principles in an impartial manner and without invoking nationalistic, ethnocentric, and racial biases. Undoubtedly, the constitutional constructs of citizenship in the United States, Dominican Republic, and Chile will continue to function under the tremendous weight of each society's racial, ethnic, and socio-economic biases. The existence of limiting clauses in each country's constitution and the ability of bureaucrats to interject discretion in the application of these limiting clauses (more so in the Dominican Republic and Chile than the United States) greatly increases the need for national and international judicial bodies to stand ready to confer and protect the accurate granting of citizenship to all persons who are due such status. However, the power of such judicial institutions to safeguard access to citizenship and nationality may be weakened in light of the ebb and flow of popular opinion and political propaganda aimed at satiating public demands for restricting

132. Patrick J. Glen, Wong Kim Ark *and* Sentencia que Declara Constitucional la Ley General de Migración 285-04 *in Comparative Perspective: Constitutional Interpretation,* Jus Soli *Principles, and Political Morality*, 39 U. MIAMI INTER-AM. L. REV. 67, 108 (2007).

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immigrant access to citizenship. Ultimately, the citizenship standing of the most discrete and insular of society—racial and ethnic immigrant minorities—hinges on the agendas of such leaders and their willingness to protect the rights of immigrants.

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