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CROSSING THE BORDER THROUGH IMMIGRATION, IMPORTATION, ILLICIT AND OTHER MEANS AND THE IMPLICATIONS FOR HUMAN AND CIVIL RIGHTS

ANNA WILLIAMS SHAVERS*

Introduction

It's that fundamental belief—I am my brother's keeper, I am my sisters' keeper—that makes this country work. It's what allows us to pursue our individual dreams, yet still come together as a single American family. "E pluribus unum." Out of many, one.¹ America is enriched by diversity. It is preserved by unity.²

This symposium, "Border Patrols: The Legal, Racial, Social and Economic Implications of United States Immigration Policy," provides an opportunity for us to explore the use of borders as a means of excluding people in the United States from the full enjoyment of rights. These borders can be physical borders of the country, but they can also be borders or barriers to entry into the enjoyment of rights even after physical entry into the country. These barriers may be constructed by laws that define and limit the enjoyment of rights based upon classifications of status assigned to individuals because of their race, gender, or method of entry across the physical barriers, or these classifications may have their origin in societal treatments that are tolerated although not embodied in law. These assigned labels become identities for each of us coupled with ones that we have chosen for ourselves.³ "The citizen's point of reference is the political commu-

* Cline Williams Professor of Citizenship Law, University of Nebraska College of Law. This article is based on remarks delivered at the St. John's Symposium, "Border Patrols: The Legal, Racial, Social and Economic Implications of United States Immigration Policy" on March 16, 2012. The article was supported by a Ross McCollum research grant from the University of Nebraska College of Law and the helpful assistance and editing of the symposium organizers and editors of the St. John's Journal of Civil Rights and Economic Development.

¹ Barack Obama, Keynote Address at the Democratic National Convention (July 27, 2004), *available at* <http://www.pbs.org/newshour/vote2004/demconvention/speeches/obama.html>.

² The Bradley Project on America's Nat'l Identity, *E PLURIBUS UNUM* 5 (2008).

³ JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION*

nity, but as a man he has other memberships . . .”⁴ The assigned label and status often prevents the enjoyment of rights and participation that we expect.

E Pluribus Unum, quoted above from President Obama’s 2004 keynote address,⁵ was the national de facto motto of the United States until it was replaced by a formal motto in 1956 by an act of Congress adopting “In God We Trust.”⁶ E Pluribus Unum remains on the Great Seal of the United States. Even though its origin was focused more on the fact that the federal nature of the union signified a formation of one country out of many states,⁷ many view “E Pluribus Unum” as the lasting legacy of the country, viewing its meaning of “out of many, one” or “one from many” as the embodiment of the idea that the United States is a nation of immigrants.⁸ Although some have made the use of the phrase controversial,⁹ Presidents and courts, among others, continue to emphasize the importance of this principle, even though some attempt to minimize its importance.¹⁰ As President Clinton said in his inaugural address, the idea of “America” is “that our na-

OF JUSTICE AS EVENHANDEDNESS 15 (2000) (“people sometimes experience their identities as given, sometimes as chosen, and sometimes as a combination of the two . . .”).

⁴ MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 194 (Simon & Schuster 1982) [hereinafter OBLIGATIONS].

⁵ Barack Obama, Keynote Address at the Democratic National Convention, *supra* note 1.

⁶ 36 U.S.C. § 302 (2012).

⁷ See *Gibbons v. Ogden*, 22 U.S. 1, 14 (1824) (arguments of counsel); see generally Robert Emmett Burns, *The Death of E Pluribus Unum*, 19 DEPAUL L. REV. 651, 653 (1970).

⁸ The Continental Congress passed a resolution on July 4, 1776, authorizing a committee to devise a seal for the United States of America. The seal was adopted by Congress June 20, 1782. See BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, THE GREAT SEAL OF THE UNITED STATES (2003), available at <http://www.state.gov/documents/organization/135450.pdf>.

⁹ See, e.g., Nick Wing, *Michele Bachmann & Allies: Obama Doesn’t Say ‘God’ Enough*, HUFFINGTON POST (Dec. 8, 2013, 2:15 PM), available at http://www.huffingtonpost.com/2010/12/08/michele-bachmann-congressional-prayer-caucus_n_793147.html; Dave Niose, “E Pluribus Unum” becomes controversial, PSYCHOLOGY TODAY (Mar. 13, 2011), available at <http://www.psychologytoday.com/blog/our-humanity-naturally/201103/e-pluribus-unum-becomes-controversial> (noting that the Congressional Prayer Caucus wrote a letter to President Barack Obama, chastising him for referring to the motto E Pluribus Unum). See Letter from Congressional Prayer Caucus to President Barack Obama (Dec. 6, 2010) (on file at http://forbes.house.gov/uploadedfiles/national_motto_letter_to_president.pdf).

¹⁰ Recent Presidents have often referred to “E Pluribus Unum” as the nation’s motto. See, e.g., Proclamation No. 7526, 3 C.F.R. 7526 (2002); Proclamation No. 7500, 3 C.F.R. 7500 (2001); President Reagan, Remarks at the National Forum on Excellence in Education in Indianapolis, Indiana (December 8, 1983) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1983/120883b.htm>). See also *infra* note 11 (President Clinton). Members of Presidents’ Cabinets have also used the motto. See, e.g., *History Reminds Us What It Is To Be American* (NAT’L HIST. CLUB, Boston, Mass.), Fall 2007, at 1 (featuring Senator Lamar Alexander, Secretary of Education under George H.W. Bush, stating that “[o]ur greatest accomplishment is that we have found a way to assimilate so many disparate peoples into one united country. E pluribus unum: out of many, one. That is our unique history and what makes us truly exceptional”). Senator Lamar Alexander currently represents Tennessee in the Senate. See also Thomas Sowell, *Cultural Diversity: A World View*, Speech at the 1990 Francis Boyer Lecture AEI Annual Dinner (December 5, 1990) (transcript available at <http://www.tsowell.com/spcultur.html>) (“The very motto of the country—E Pluribus Unum—recognizes the diversity of the American people”).

tion can summon from its myriad diversity the deepest measure of unity.”¹¹ One judge acknowledged the principle in this way: “E Pluribus Unum—from many, one. It was a good idea when the country was founded, and it’s a good idea today. From many, one. That still identifies us.”¹² This concept helps us visualize a nation where its citizens are people from many different backgrounds, races, religions, and nationalities that come together as a united nation where equal rights are accorded to all its citizens. A person’s skin color or nation of origin would have no bearing on their exercise of rights. The notion of a cohesive nation is possible because of a legal structure that establishes individual rights and obligations and the limits of government power. If the shared rights and obligations derived from citizenship outweigh the differences imposed by racial, ethnic and culture backgrounds the result is the formation of a political community.¹³ The acquisition of citizenship has come to be accepted as a prerequisite for membership in the American political community.¹⁴

The national sense of this belief has been challenged in many ways since the beginning of the nation; this challenge continues today. There is not always agreement on how to reconcile the “many” and the “one.” People sometimes differ on the meaning of the phrase and whether Pluribus or Unum should be emphasized. Michael Walzer has described the American use of this phrase as symbolizing “a coexistence—. . . many-in-one.”¹⁵ This coexistence, he believes, leads to American Pluralism evidenced by the “manyness of America [being] cultural [and] its oneness [being] political.”¹⁶ Unlike many other nations, America is a political society formed by people who come together but “are free to retain” the identity they had before becoming Americans.¹⁷

In this article, I explore some of the many ways in which divisions have existed and resulted in a lack of extension of equal rights to all within the

¹¹ William J. Clinton, Inaugural Address (Jan. 20, 1993) (transcript available at <http://millercenter.org/president/speeches/detail/3434>).

¹² *Jeffers v. Tucker*, 839 F.Supp. 612, 634 (E.D. Ark. 1993) (quoting MAURICE T. CUNNINGHAM & EDMUND BEARD, *THE RE-SEGREGATION OF AMERICA: THE RACIAL POLITICS OF LEGISLATIVE REDISTRICTING* 22-23 (1993)).

¹³ See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971); *Minor v. Happersett*, 88 U.S. 162, 165 (1874).

¹⁴ I recognize that as Michael Walzer has stated, “There is no country called America. We live in the United States of America, and we have appropriated the adjective “American” even though we can claim no exclusive title to it.” Michael Walzer, *What Does It Mean to Be an “American”?*, 71 SOC. RES. 633 (2004). This book was originally published in 57 SOC. RES. (Fall 1990). I choose to use the term here recognizing as does Walzer that in North America, “Canadians and Mexicans are also Americans, but they have adjectives more obviously their own, and we have none.” *Id.* at 633.

¹⁵ Michael Walzer, *What Does It Mean to Be an “American”?*, 71 SOC. RES. 633, 636 (2004) [hereinafter “*American*”] (discussing the essence of Americanism).

¹⁶ *Id.* at 638.

¹⁷ *Id.* at 636.

borders of the United States. I also question whether it is valid to distinguish among people in the United States when deciding what rights should be extended. The three questions that I have phrased elsewhere as (1) who is a citizen, (2) what are the rights of citizens, and (3) how one becomes a citizen of the United States,¹⁸ must also be considered with a fourth question: Should the extension of rights be based upon the acquisition of citizenship? My goal here is not to provide a definite answer to these questions, nor is it to provide an exhaustive review of the exclusionary practices related to citizenship, but rather to explore and encourage: Explore our history, our existing laws, and the current debate on the extension of rights, and encourage others to join the debate.

In Part I, I explore what I view as the main basis for assessing these issues, the status of citizenship. An exploration of citizenship requires an inquiry into the methods for acquiring citizenship, the exclusion from the eligibility to acquire citizenship and the rights that we expect to be extended to citizens. Conceptualizing citizenship requires a reflection on the civil and political participation as well as the social rights and entitlements that are perceived to be incident to citizenship, but have not been extended to all citizens. I examine the history of denial or revocation of rights for certain citizens in Part II. This denial includes individuals that have been classified as citizens yet excluded from the enjoyment of rights that should be expected to be enjoyed by all citizens. Often this denial can be traced to the method of entry of the individual or the individual's family or ancestors and/or the lingering effect of the assigned status.

In Part III of the article, I examine the presence of non-citizens within the borders of the United States and the denial or extension of rights. Recently, this issue has been hotly debated. Should non-citizens be allowed to vote, attend public schools, receive public benefits, receive due process in our legal system, or have a right to be with members of their family? My brief consideration of these issues here in Parts I through III is informed by the writings of a number of scholars. I am indebted to them and recommend some of their books to you for a more robust exploration of some of these issues.¹⁹ In the final section of the article, Part IV, I attempt to resolve

¹⁸ Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 NEB. L. REV. 462, 466 (1991).

¹⁹ See generally KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICANS NEED TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007); MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOL CHILDREN* (2012); LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE*

some of these issues by applying international law principles in the determination of rights that should be granted to persons in the country. I conclude that it is valuable to maintain a distinction between citizens and noncitizens but that international treaties or principles of customary law can help us reach a solution to some of the rights issues presented here.

Citizenship

“Citizens may be marked out by birth or residence or even consent.”²⁰

Globalization, the ease of movement between countries and the accompanying immigration issues, has caused many scholars to reflect on citizenship and search for a definition. These reflections include both an exploration of the various means of acquiring citizenship as well as an examination of the rights that accompany, or should accompany the acquisition of citizenship.

Acquisition of Citizenship

The acquisition of citizenship is generally viewed as “the most desired or preferred legal status [an individual] can attain. . .”²¹ The laws of the country in which an individual claims citizenship or nationality determines if the claim is valid.²² As the Supreme Court has stated, “[I]t is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.”²³

There are two basic forms of citizenship: birthright and naturalized. In the first, a person becomes a citizen of a particular country at birth; generally, it is automatic and dependent on the operative legal rules. In the second, a person becomes a citizen of a particular country by voluntary choice. Birthright citizenship can be determined by the doctrines of *jus soli* and *jus sanguinis*. *Jus soli*, citizenship by soil, is a doctrine that confers citizenship to a person based on the place of birth. *Jus sanguinis*, citizenship by blood or descent, confers citizenship based upon the citizenship of the person’s parents at the time of birth.

Although the Constitution in its original form referred to “citizens” in

UNITED STATES (2006); and EDIBERTO ROMAN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* (2010).

²⁰ OBLIGATIONS, *supra* note 4, at 206.

²¹ EDIBERTO ROMÁN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* 4 (2010).

²² See generally Shavers, *supra* note 18, at 467-68.

²³ *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898).

numerous provisions²⁴ it did not define citizenship. The Constitution did grant the Congress the power to “establish an uniform Rule of Naturalization.”²⁵ Pursuant to this authority, the early acts of Congress set residency requirements for naturalization of citizens.²⁶ The Constitution defined neither naturalization nor citizenship until the adoption of the Fourteenth Amendment on July 28, 1868. The citizenship clause of the Fourteenth Amendment provides that: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”²⁷ The ratification of the Fourteenth Amendment included the doctrine of *jus soli* in the Constitution. The *jus sanguinis* doctrine is not explicitly recognized in the Constitution, but has been adopted in the United States through a series of congressional actions. The principal application of this doctrine has been to children born outside of the United States to United States citizens. In most instances these doctrines are not in conflict. However, questions arise when a birth occurs and the parent(s) are not in the country of their own citizenship. If a citizen of another country gives birth while physically in the United States and the country of the parent(s) citizenship has adopted *jus sanguinis* citizenship, the child may have acquired dual citizenship—*jus soli* United States citizenship and *jus sanguinis* citizenship in the country of the parent(s) citizenship.²⁸ Some countries have rejected *jus soli* citizenship.²⁹

The adoption of both *jus soli* and *jus sanguinis* citizenship in the U.S. creates complex citizenship law. Some persons are determined to be citizens based upon their birth in the U.S. or to U.S. citizens. Others have become citizens through a naturalization process provided for in a statute or treaty, and a third group are citizens based upon statutes or treaties that

²⁴ Citizens are referred to in the Constitution in general terms in, among others, these various sections: U.S. CONST. art I, § 2, cl. 2 (qualifications for Representatives); U.S. CONST. art. I, § 3, cl. 3 (qualifications for Senators); U.S. CONST. art. II, § 1, cl. 5 (qualifications for President); U.S. CONST. art. IV, § 2, cl. 1 (privileges and immunities of citizens); and U.S. CONST. art. III, § 2, cl. 1 (judicial power regarding citizens of states).

²⁵ U.S. CONST. art. I, § 8, cl. 4.

²⁶ See E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965 11 (1981).

²⁷ U.S. CONST. amend. XIV, § 1.

²⁸ Triple citizenship may occur in some cases. See note 56 *infra* and accompanying text.

²⁹ See, e.g., British Nationality Act of 1981 (effective January 1, 1983) (creating a limited *jus soli* principle). Only a child born in the UK to a parent who is a British citizen or ‘settled’ in the UK is automatically a British citizen by birth. British Nationality Act of 1981, § 1(a)(b) (1981); See generally *If You Were Born in the UK or a Qualifying Territory*, HOME OFFICE UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/britishcitizenship/othernationality/Britishcitizenship/borninukorqualifyingterritory/>; Other modern revisions have recognized *jus soli* on a limited basis. See generally Kay Hailbronner, *Germany*, 2 ACQUISITION AND LOSS OF NATIONALITY: COUNTRY ANALYSES 216 (Rainer Bauböck et al. eds., 2006); *Dual Nationality*, UNITED STATES DIPLOMATIC MISSION TO GERMANY, http://germany.usembassy.gov/acs/dual_nationality/ (last visited Oct. 1, 2013).

have conferred citizenship status. These groups may be roughly categorized as constitutional (Fourteenth Amendment) citizens, naturalized citizens³⁰ and statutory citizens,³¹ respectively. Most citizens acquire citizenship at birth, either as statutory or constitutional citizens.

Present law provides that all persons born in the United States become citizens of the United States at birth unless, as provided in the Fourteenth Amendment, they are not “subject to the jurisdiction thereof.”³² This clause has been held to exclude Indians and children of either “enemies in hostile occupation” or foreign diplomats.³³ Congress has expanded the birthright citizenship category to include Indians,³⁴ children born abroad to a U.S. citizen,³⁵ certain children born in United States possessions,³⁶ and children of unknown parentage found in the United States under the age of five.³⁷ A person may become a naturalized citizen based upon their intent and a formal application, or collectively. Collective naturalization generally results from annexation of new territories, admission to statehood, territorial cession by treaty, or statutory enactment. All persons within a specified group and meeting certain qualifications become citizens upon the occurrence of one of these triggering events.³⁸ In some situations, the individuals that are subject to this collective naturalization are not granted the right of full citi-

³⁰ The term “constitutional citizens” can be used to describe both citizenship acquired at birth when born in the United States, “subject to its jurisdiction,” as well as naturalized citizens since they are also referred to in the Fourteenth Amendment. Naturalization is defined as the conferring of nationality after birth by any means. Immigration and Nationality Act of 1952 § 101(a)(23) (1952), 8 U.S.C. § 1101(a)(23) (2012).

³¹ “Statutory citizens” is a term used to describe citizens who do not acquire citizenship through birth in the United States or a naturalization process. *See, e.g.*, PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 126 (Yale Univ. Press 1985).

³² Immigration and Nationality Act § 301(a) (1952), 8 U.S.C. § 1401(a) (2012).

³³ *See Wong Kim Ark*, 169 U.S. at 682 (exclusion of children born to foreign enemies or diplomats based upon law of England and the English colonies as exceptions to the *jus soli* principle). While recognizing that the terms “Indian”, “American Indian”, and “Native American” may not be the preferred term for some readers, I am using “Indian” as the generally recognized term with no intention of being offensive.

³⁴ Immigration and Nationality Act § 301(b), 8 U.S.C. § 1401(b) (2012).

³⁵ Immigration and Nationality Act § 301(c), (d), (e), (g), 8 U.S.C. § 1401(c), (d), (e), (g).

³⁶ Most residents of United States possessions are nationals but not citizens of the U.S. *Id.* § 308, 8 U.S.C. § 1408.

Persons who are nationals but not citizens are considered to owe allegiance to the U.S. but do not have all the rights and obligations that accrue to citizens. This group of “nationals” includes those born in Puerto Rico (§ 302, 8 U.S.C. § 1402), Canal Zone or Republic of Panama (§ 303, 8 U.S.C. § 1403), Virgin Islands (§ 306, 8 U.S.C. § 1406), Guam (§ 307, 8 U.S.C. § 1407), and those of unknown parentage (8 U.S.C. § 1401(f)) (2012).

³⁷ Immigration and Naturalization Act § 301(f), 8 U.S.C. § 1401(f) (2012).

³⁸ *See e.g.*, *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 170 (1892) (“Congress having the power to deal with the people of the Territories in view of the future States to be formed from them, there can be no doubt that in the admission of a State a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.”).

zen participation.³⁹

Citizenship and nationality law is integrally related with immigration policy. The development of immigration policies includes the necessity to develop a compatible policy for the determination of which individuals should be granted or denied citizenship. However, immigration policies are not dependent upon policies on the acquisition of citizenship policies. While many immigrants do view citizenship as the ultimate achievement in the immigration process, others do not come to the U.S. seeking immediate citizenship. However, the period of time that a person waits to file an application to become a citizen in the U.S. after becoming eligible has been decreasing over the last two decades. Persons naturalizing now wait about six years after achieving legal permanent resident status.⁴⁰

Policies regarding the acquisition and retention of citizenship presents a number of questions, such as: (1) Should all persons born in the United States acquire citizenship at the time of their birth?⁴¹ (2) Should the acts of parents affect their children's right to acquire or retain citizenship? (3) Under what circumstances should certain groups become citizens, not as individuals, but based upon their membership in a group?⁴² and (4) Should we embrace the concept of dual nationality?⁴³ If these questions are answered, the issue of accompanying rights remains and presents further questions, such as: (1) Is citizenship important? (2) Are there certain privileges or rights that can only be granted to citizens?⁴⁴ and (3) Are there situations when distinctions should be made between birthright citizens and naturalized citizens?⁴⁵

Even after the adoption of the Fourteenth Amendment, the fashioning of

³⁹ See *infra* notes 156-166 and accompanying text.

⁴⁰ See OFFICE OF IMMIGRATION STATISTICS, U.S. NATURALIZATIONS: 2011, Dep't of Homeland Security, Table 7 at 4 (2011), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_2011.pdf (median of six year); 1989 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE at xxxix (1990) (median of eight years).

⁴¹ See generally SCHUCK & SMITH, *supra* note 31 (questioning fourteenth amendment acquisition of citizenship at birth by children of illegal aliens and non-immigrants, i.e., temporary visitors).

⁴² The principle of collective naturalization is invoked by this question. See *infra* notes 156-166 and accompanying text.

⁴³ One alternative is to recognize the concept of dual nationality only for minors. Upon reaching the age of majority, the individual must affirmatively select to retain their American citizenship. See, e.g., generally *Rogers v. Bellei*, 401 U.S. 815, 832-33 (1971).

⁴⁴ This question is presented for consideration in many law school immigration texts in connection with the presence of large numbers of permanent residents who never become citizens and have been accorded the protections of the Constitution. See, e.g., T. ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 1315 (Westlaw Academic Publishing, 7th ed. 2011). See also T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMM. 9.

⁴⁵ For some purposes, birthright citizens are characterized as natural-born or non-natural-born. See *infra* notes 96-98 and accompanying text.

a coherent citizenship law has also presented challenges because of issues arising from policies relating to the citizenry that is not a part of the immigrant population—former slaves, Indians, and inhabitants of territories acquired by the United States. The acquisition of citizenship and its rights were denied to these groups as well as certain immigrants and women. Although the adoption of the Fourteenth Amendment in 1878 negated the result in the 1856 *Dred Scott* decision,⁴⁶ which had declared that a free man of the African race, whose ancestors were brought to this country and sold as slaves, is neither a “citizen” nor a person within the meaning of the Constitution of the United States. Racial restrictions continued on the acquisition of citizenship.

In 1884, the Supreme Court held in *Elk v. Wilkins* that the Fourteenth Amendment did not extend birth-right citizenship to every person born in the United States.⁴⁷ The Court relied upon the fact that subsequent to the ratification of the Fourteenth Amendment there were Indian citizens who had acquired their citizenship pursuant to treaties or statutes that provided for certain tribes to acquire citizenship. The Court concluded that citizenship was not already available to Indians under the Constitution because the Fourteenth Amendment required that all necessary conditions for birthright citizenship be met at the time of birth. At the time of birth a person had to be “subject to the jurisdiction.”⁴⁸ Since Indians were not taxed, the Court asserted, they were not subject to the jurisdiction of the United States. Thus, Indians could only become citizens through naturalization—individual or collective. The Court concluded that John Elk was not a citizen and therefore could not vote.⁴⁹ It was not until 1924 that Congress passed an Act conferring United States citizenship on all Indians born within the territorial limits of the United States.⁵⁰ The restrictive interpretation of the Fourteenth Amendment’s exclusion clause was not generally applied to immigrants.⁵¹ In *United States v. Wong Kim Ark*,⁵² the Supreme Court held that a Chinese person born in the United States was a citizen even if his parents were alien residents who because of their race could not become naturalized citizens. It was not until 1943 that Chinese became eligible for

⁴⁶ *Scott v. Sandford*, 60 U.S. 393 (1856) [*Dred Scott*]

⁴⁷ *Elk v. Wilkins*, 112 U.S. 94 (1884).

⁴⁸ *See id.* at 100. The rationale was that since Congress had conferred citizenship by statute or treaty, it could be assumed.

⁴⁹ The majority found no clear intent by Congress to apply either the Fourteenth Amendment or the 1866 Civil Rights Act to Indian citizenship questions. *Id.* at 103

⁵⁰ Act of June 2, 1924, ch. 233, 43 Stat. 253.

⁵¹ For a summary of the various positions taken in opposition to the Fourteenth Amendment and its presumed purposes and intentions, *see generally* WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1998).

⁵² 169 U.S. 649 (1898).

naturalization.⁵³

Rethinking The Acquisition of Citizenship

The U.S. has always had a presence of foreign-born or newcomers, but in the past two decades there has been a steady increase in scholarly work which focuses on the exclusion of some newcomers from rights thought to accompany citizenship. Some argue for changes in the methods for acquisition of citizenship as well as a reconsideration of whether citizenship itself should be redefined. Some scholars not only question the basis for membership but also the values attached to the formal acquisition of citizenship. This citizenship discourse starts with the most basic question—Does citizenship matter?

Our understanding of citizenship and political legitimacy is informed by the culture of the nation and the identities of those that reside here.⁵⁴ As identities change, the culture of the nation, the meaning of citizenship and the rights we expect to accompany citizenship⁵⁵ may also change. For example, as globalization facilitates the movement of people, we are more likely to have individuals who have dual or even triple claims to citizenship in various sovereign states, making membership in one nation less meaningful than envisioned in the past.⁵⁶ On the other hand, as evidenced by the reduction in the time period that immigrants who are eligible to naturalize wait before naturalization,⁵⁷ the acquisition of citizenship seems more desirable to immigrants. Another explanation is that this increase is due in part to the toughening of immigration laws that put even lawful permanent residents at risk of deportation.⁵⁸ But it can also be interpreted as a desire to be full participants in the American political and social community. Some residents can even naturalize while maintaining the rights of full participation in their county of original nationality since some countries have made it easy for naturalized citizens to maintain their original nationality.⁵⁹

Citizenship changes may manifest themselves either in the way we acquire citizenship⁶⁰ or in a reduction on the value placed upon the acquisi-

⁵³ Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, was repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600, making Chinese eligible for naturalization.

⁵⁴ See generally Carens, *supra* note 3 at chapter 7.

⁵⁵ See *infra*, Part II.

⁵⁶ See generally PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008).

⁵⁷ See *supra* discussion accompanying note 41.

⁵⁸ See *infra* discussion accompanying notes 171-175.

⁵⁹ See, e.g., Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Artículo 34, Diario Oficial de la Federación [D.O.], 20 de Marzo de 1997 (Mex.).

⁶⁰ See generally Leti Volpp, *The Culture of Citizenship*, 28 IMMIGR. & NAT'LITY L. REV. 493, 500

tion of citizenship status. In recent years, scholars have devoted significant attention to the principles on which citizenship and its accompanying rights are based. Their work includes attempts to articulate and critique the “principles of incorporating aliens and strangers, immigrants and newcomers into existing policies.”⁶¹ This work includes assessments of a new and significant debate that has developed on one of the defining issues of U.S. citizenship, the meaning and usefulness of birthright citizenship to determine who acquires citizenship and the accompanying rights.

On one side of the debate, commentators have taken an exclusionary view of the citizenship clause of the Fourteenth Amendment and have advocated for an interpretation that restricts the acquisition of citizenship at birth based upon birth in the U.S. to children born to parents who owe an allegiance to the U.S.⁶² This would exclude children born to people who are here just temporarily, whether legally or illegally, as well as people who may intend to stay here permanently but were not legally admitted or who have overstayed their temporary admission. Their argument is that “subject to the jurisdiction thereof” should not be interpreted broadly to include anyone who must comply with our laws while here, but be limited to those “owing allegiance to our country; being part of our body politic and our system of government.”⁶³ It is further argued that this view is consistent with the 1866 Civil Rights Act which excluded from automatic citizenship children whose parents’ owed allegiance to a foreign power and was codified as the citizenship clause in the Fourteenth Amendment.⁶⁴ These arguments have manifested themselves in the introduction of congressional bills and even calls for a constitutional convention to amend the Constitution.⁶⁵ Often cited as support for this limiting view of birthright

(2007) (discussing how the “good moral character” prerequisite for naturalization reflects the culture of the nation).

⁶¹ Seyla Benhabib, *Transformations of Citizenship: The Case of Contemporary Europe*, 37 *GOV'T & OPPOSITION* 439, 444 (2007) (discussing political membership in liberal democracies as domestic and international theories of justice).

⁶² See *supra* discussion accompanying notes 21-40.

⁶³ John Eastman, *The Challenge Facing America: Birthright Citizenship* (transcript of John Eastman video presentation on birthright citizenship available at <http://www.capsweb.org/about/our-tv-ads/challenge-facing-america-birthright-citizenship>).

⁶⁴ See John Feere, *Birthright Citizenship in the United States: A Global Comparison*, *BACKGROUND* (Ctr. for Immigration Studies, Washington, D.C.), Aug. 2010, at 7-9, available at <http://www.cis.org/sites/cis.org/files/articles/2010/birthright.pdf>. *Birthright Citizenship Roundtable*, 33 *Admin. & Reg. L. News* 3 (2007); *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11: Oversight Hearing on Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. of the Judiciary*, 109th Cong. 7-8 (2005) (citing *Congressional Globe*, 39th Cong., 1st Sess., 2892-97 (May 30, 1866)), available at <http://ssrn.com/abstract=905570> or <http://dx.doi.org/10.2139/ssrn.905570> (testimony of John C. Eastman, Professor of Law, Chapman University School of Law, Director, the Claremont Institute Center for Constitutional Jurisprudence).

⁶⁵ See generally Feere, *supra* note 64 at 4-5.

citizenship is the work of Professors Peter Schuck and Roger Smith in their book *Citizenship Without Consent*⁶⁶ which articulates a consensual theory of citizenship which requires both consent of the individual and the state.

On the other side of the debate are those who take an inclusive view of citizenship. This group includes not just those who argue for the status quo of the acquisition of citizenship at birth, but also those who argue that in part because our system of birthright citizenship results in the exclusion from full participation in the political and social spheres of some residents is antiquated and we should embrace residency rather than birthright as the primary basis for citizenship and its accompanying rights.⁶⁷ This view might be described as manifesting a “desire to formulate a more morally and politically robust conception of citizenship.”⁶⁸ Contemporary scholars have argued that traditional methods of viewing citizenship status and the political community are outmoded.⁶⁹ One such commentator, in his argument for including noncitizens within the full circle of membership, asserts:

[I]t is never explained why citizenship is the appropriate category for the development of a communitarian ethos. Why shouldn't we seek the formation of a sense of reciprocal obligations among all persons living and working within the territory of the United States? We know, as an empirical matter, that strong bonds between citizens and resident aliens exist. These ties, based on familial relationship, ethnicity, religion, race or location may be far more powerful than those that can be fostered among citizens who share nothing but American nationality.”⁷⁰

Linda Bosniak has developed the concept of “citizenship of aliens.”⁷¹ She embraces this terminology while recognizing that “the notion of alien citizenship will be viewed by purists as linguistically nonsensical as well as provocative.”⁷² As she states, her interests in immigration and the subordination of noncitizens drove her exploration of the acquisition of citizenship

⁶⁶ SCHUCK & SMITH, *supra* note 31, at 5 (questioning Fourteenth Amendment acquisition of citizenship at birth by children of illegal aliens and non-immigrants, i.e., temporary visitors). *See generally* Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 AM. U. L. REV. 331 (2011).

⁶⁷ *See, e.g.*, Jacqueline Stevens, Op-Ed., *Citizenship to Go*, N.Y. TIMES, May 17, 2012, at A31, available at <http://www.nytimes.com/2012/05/18/opinion/citizenship-to-go.html>; James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 Tex. Rev. L. & Pol. 161, 163-64 (2007).

⁶⁸ William Lucy, *Equality Under and Before the Law*, 61 U. TORONTO L. J. 411, 448 (2011).

⁶⁹ *See, e.g.*, Alexandra Dobrowolsky, *(In)Security and Citizenship: Security, Immigration and Shrinking Citizenship Regimes*, 8 THEORETICAL INQUIRIES IN LAW 629 (2007). Some scholars have narrowed the concept of citizenship to focus on particular rights that should be granted to noncitizens. *See, e.g.*, Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 505-07, 511 (2007). *See also* Carens, *supra* note 3, at 161-62 (arguing that citizenship has multiple dimensions: the legal, the political, and the psychological dimensions of citizenship).

⁷⁰ Aleinikoff, *Citizens*, *supra* note 44, at 30-31.

⁷¹ *See* BOSNIAK, *supra* note 19, at 2.

⁷² *Id.* at 12.

and citizenship rights:

I wondered, in particular, about the meaning of this discourse for those people living within liberal democratic societies who lack citizenship by legal definition. If citizenship is treated as the highest measure of social and political inclusion, can people designated as noncitizens as a matter of status be among the universe of the included? On first reflection, the answer is obviously no: common sense tells us that citizenship is—of course—only for citizens. Further reflection, though, greatly complicates the answer.⁷³

She asserts that there is a need for citizenship theorists to consider the effects of globalization and not “disregard . . . the larger world frame and . . . permeability of national borders.”⁷⁴ This must be accomplished notwithstanding the traditional model of “bounded solidarity” which assigns a more protected and inclusive status to insiders than extended to even resident non-national others. Roger Smith describes this task as “devising more desirable forms of (less sharply) bounded solidarities.”⁷⁵ Building upon her earlier work where she urged that any consideration of the concept of citizenship requires an exploration of citizenship in four distinct discourses: citizenship as formal legal status (which differentiates the citizen from the alien), citizenship as rights, citizenship as political activity, and citizenship as identity/solidarity,⁷⁶ she does not solve the complex puzzle for us, but as she concedes that noncitizens can only “aspire to partial citizenship at best,”⁷⁷ she provides a framework and makes a good case for reconsidering the “outsider status” of alienage in deciding whether disabilities assigned to that status are appropriate.⁷⁸

Jacqueline Stevens concludes that much of the recent controversy over birthright citizenship has arisen because of the historical, irrational link between citizenship and birthplace. In her work, she considers the historical basis for linking citizenship with birthplace and the relevant exclusions. She advocates for the use of residency to define citizenship and uses the example of the residency rules to determine citizenship in the 50 states.⁷⁹ The same principle would presumably apply to countries and support the notion of open borders. In an Op-Ed in the *New York Times*, she provocatively presents the challenge: “People should be free to move across bor-

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 6.

⁷⁵ Rogers M. Smith, *Beyond Sovereignty And Uniformity: The Challenges For Equal Citizenship In The Twenty-First Century*, 122 HARV L. REV. 907, 933 (2009).

⁷⁶ Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 479 (2000).

⁷⁷ BOSNIAK, *supra* note 19 at 15.

⁷⁸ See *infra* Part III.

⁷⁹ See Jacqueline Stevens, *Citizenship to Go*, N.Y. TIMES (May 17, 2012) <http://www.nytimes.com/2012/05/18/opinion/citizenship-to-go.html>.

ders; they should be citizens of the states where they happen to reside—period.”⁸⁰ Stevens’ comments are more fully developed in her book,⁸¹ *States Without Nations: Citizenship for Mortals*, in which she includes the need to abolish birthright citizenship as one of four proposals for change of the legal and social status quo. She argues that birthright citizenship as well as the concept of nation-states supports and promotes numerous inequalities.⁸²

The most obvious criticism of Stevens’ work is that, while the 50 states cooperate and recognize the free movement of individual within the U.S. borders, it is unlikely that this recognition will occur as a matter of world order anytime in the near future. As Seyla Benhabib recognizes, “claims of sovereign statehood over bounded territories are still the guiding normative and institutional principles in the international arena.”⁸³ Conceptualizing citizenship is driven by our domestic concerns, but must also consider how our definition of citizenship membership fits within the international definitions of rights, duties and obligations of citizenship. As Brubaker puts it, “We live in a world of nation-states.”⁸⁴

I suspect that for most Americans, the concept of “citizen aliens” or open borders would be viewed, as Peter Schuck has suggested, a further devaluation of American citizenship.⁸⁵ The relative ease of naturalizing in the U.S.⁸⁶ may indicate that for those who choose not to naturalize do not have a sufficient enough connection with the U.S. to obtain the same or nearly the same treatment as citizens. Harsh immigration laws may contribute to the reluctance of some immigrants to seek naturalization. They may fear detection of a deportable act committed by them or a family member. However, this concern can be handled by addressing immigration laws and rights of aliens rather than dispensing with the distinctions between citizens and aliens.

Stephen Legomsky has developed a formula to aid us in our attempt to conceptualize citizenship.⁸⁷ The ingredients to that formula provide an

⁸⁰ *Id.*

⁸¹ JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (2011).

⁸² *Id.* She discusses birthright citizenship, marriage, inheritance, and land rights as her four proposed areas of change.

⁸³ Benhabib, *supra* note 61, at 440.

⁸⁴ William R. Brubaker, *Membership Without Citizenship: The Economic and Social Rights of Noncitizens*, in *IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA*, (William Rogers Brubaker ed., 1989).

⁸⁵ Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 *GEO. IMMIGR. L. J.* 1, 13 (1989).

⁸⁶ Not everyone will agree that even though naturalization is more accessible than in most countries, neither the process nor the criteria used in the process make it an easy process. *See, e.g.*, Gerald Neuman, *Justifying U.S. Naturalization Policies*, 35 *VA. J. INT’L L.* 237 (1994).

⁸⁷ *See* Stephen H Legomsky, *Why Citizenship*, 35 *VA. J. INT’L L.* 279 (1994).

analysis that is helpful here—helpful to answer the question as Legomsky puts it: “What is accomplished by having a citizenship concept at all?”⁸⁸ He provides eight categories that are useful in trying to make determinations about the purpose of citizenship: (1) political participation, (2) immigration laws (that limit noncitizens in ways that do not affect citizens), (4) other rights and disabilities (such as government employment and access to benefits),⁸⁹ (5) symbolism and community, (6) allegiance, (7) sovereignty, and (8) the world order (international law rationales for citizenship or nationality). Although a thorough examination of these factors cannot be accomplished here, I agree with Legomsky that “only after identifying the reasons for having a citizenship concept can one meaningfully consider who should receive it.”⁹⁰ Further, I assert that an examination of these reasons will support the conclusion that we should continue to embrace the concept of citizenship, while assuring that residents have rights and avoiding the problems of differentiated citizenship.

Citizens Without Rights

*Equality and citizenship had been explicitly written into the Fourteenth Amendment . . . and yet our constitutional law [has] been shaped to accommodate . . . legalized subordination.*⁹¹

While there are a few instances of differentiated citizenship provided for in the Constitution,⁹² most instances of differentiated citizenship are caused by the societal borders and barriers that have excluded some citizens from full membership in the American polity and social life. The constitutional restrictions are limited, but controversial. The Supreme Court has stated “that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive.”⁹³ However, in *Rogers v. Bellei*,⁹⁴ the Supreme Court stated that statutory citizenship is an expres-

⁸⁸ *Id.* at 280.

⁸⁹ *Id.* at 287-290 (citing DAVID CARLINER, LUCAS GUTTENTAG, ARTHUR HELTON & WADE HENDERSON, *THE RIGHTS OF ALIENS AND REFUGEES—THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS* (2d ed. 1990) and A. PETER MUTHARIKA, *THE ALIEN UNDER AMERICAN LAW* (2 vols. 1980, 1981)).

⁹⁰ *Id.* at 285.

⁹¹ KARST, *supra* note 19, at 2.

⁹² *See, e.g.*, U.S. CONST. art. II, § 1, cl. 5 (stating the eligibility requirements for the presidency) and U.S. CONST. amend XII (“No person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

⁹³ *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).

⁹⁴ *Rogers v. Bellei*, 401 U.S. 815 (1971).

sion of “congressional generosity,”⁹⁵ suggesting that there is room for some distinction.⁹⁶ The distinction that has been the subject of much debate, but never decided by the Supreme Court is whether the constitutional provision that only a “natural born” citizen is eligible to be President⁹⁷ applies to statutory citizens. The Supreme Court has stated that “naturalized” citizens are ineligible for the Presidency.⁹⁸ Therefore, if statutory citizens are considered to be naturalized citizens, rather than birth-right citizens, they would not be eligible for the presidency.⁹⁹

Kenneth L. Karst’s book *Belonging to America: Equal Citizenship and the Constitution*¹⁰⁰ was published over two decades ago but provides an analysis of differentiated citizenship that remains quite relevant today. Focusing on the societal barriers to entry into full participation, he discusses our history to reveal that the Fourteenth Amendment’s equal protection guarantee has often been “an abstraction with little substantive content.”¹⁰¹

While some scholars have argued that emphasis on citizenship and a grounding of rights based upon citizenship may support arguments to exclude noncitizens,¹⁰² I believe it is helpful in securing rights for noncitizens and determining whether there are valid distinctions in rights determinations, to remind ourselves of the ways that those seemingly protected by the cloak of citizenship have been humiliated and degraded. As Rogers Smith has suggested, “we must self-consciously confront the tasks of making contextual judgments about which kinds of differentiated citizenship [or membership status] . . . are appropriate accommodations . . . and which kinds are divisive and oppressive.”¹⁰³

An American is an American

⁹⁵ *Id.* at 835.

⁹⁶ For example, it has been suggested that some naturalized citizens have suffered through denaturalization and lost their citizenship because of their political views. See generally, HARRY CARLISLE, *CITIZENS WITHOUT RIGHTS: THE STORY OF HOW THE WALTER-MCCARRAN LAW OF 1952 PENALIZES FOREIGN-BORN CITIZENS THROUGH “SECOND-CLASS” CITIZENSHIP* (1956).

⁹⁷ U.S. CONST. art. II, § 1, cl. 5.

⁹⁸ See, e.g., *Schneider*, 377 U.S. at 165-77.

⁹⁹ This uncertainty is what has led some to develop a strained interpretation of the Constitution to claim that President Barack Obama and other presidential candidates are not eligible for the presidency. See generally Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 *Geo. L.J.* 967, 980 (2010) (discussing President Obama and the birther movement); Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months And A Hundred Yards Short of Citizenship*, 107 *Mich. L. Rev. First Impressions* 1 (2008).

¹⁰⁰ See generally KARST, *supra* note 19.

¹⁰¹ *Id.*

¹⁰² See generally Bosniak, *supra* note 19, at 75 (discussing the privileges or immunities clause of the Constitution).

¹⁰³ Smith, *supra* note 75, at 934.

Is the process of becoming a citizen the same as becoming an American? As one commentator notes, “we think of American citizenship as something that should be . . . an essentially uniform status, conferring the same legal rights and duties on all those who possess it.”¹⁰⁴ We also like to think of ourselves as an Immigrant nation with a capital “I”, with a diverse mix of citizens equally participating. But, in our history, it is easy to document that at the moment of entry into citizenship, a person’s citizenship and rights obtained may be tainted by a label or status assigned to that individual, their family, or even their ancestors. The labels are numerous but can include a number of small “i” categories: the imported, illegal, illegitimate, indigenous, illicit, incarcerated, incapacitated, and islanders. Before examining the rights that arguably should be made available to all people who reside within our borders, it is worthwhile that we consider that in the U.S., disfavored groups have not only been excluded from the acquisition of citizenship, but have often been excluded from sharing equally in the social and political rights thought to accompany citizenship. Sometimes these distinctions are made between citizens on the basis of how citizenship is acquired,¹⁰⁵ but most often differentiated citizenship is based upon an arbitrary or discriminatory assignment of status.

In trying to determine which rights are important and which should be deemed available to all residents or reserved only for citizens, it is helpful to reflect upon how various groups have been excluded over time and the justifications for these exclusions. Judith N. Shklar, in her book, *American Citizenship: The Quest for Inclusion* suggests that this undertaking include an investigation of “what citizenship has meant to those women and men who have been denied all or some of its attributes, and who ardently wanted to be full citizens.”¹⁰⁶

What are all of the attributes of citizenship? What are the civil, political, and social rights and entitlements that citizens should expect? Walzer argues that there are three categories of citizens based upon their willingness and ability to fully participate in the political community: the oppressed citizen, the alienated citizen and the pluralist citizen.¹⁰⁷ Starting from early in our history, the right to “speak, print, worship, enter into contracts, hold personal property in their own name, sue and be sued, and exercise sundry other civil rights,” have been described as civil rights held by alien men and single white women during the nineteenth century, while voting, hold-

¹⁰⁴ *Id.* at 1.

¹⁰⁵ See text accompanying notes 92-101, *supra*.

¹⁰⁶ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 15 (1991).

¹⁰⁷ *OBLIGATIONS*, *supra* note 4, at 203, 226-228.

ing public office and serving on juries was reserved to white male citizens.¹⁰⁸ Ayelet Shachar includes in the “membership goods” legal status, rights, identity, security, political voice, and the practiced experience of membership in the political community.¹⁰⁹ Walzer also includes the right to receive protection from the state.¹¹⁰ As he puts it, “[t]he citizen can be regarded first and most simply as the recipient of certain benefits [including liberty and protection] that the state, and no other social or political organization, provides.” Smith further emphasizes these reasons for belonging: “Most people wish to believe that they belong to communities that can provide for their physical security and promote their economic prosperity while giving them a share of political power, and they also want to believe that those community memberships have ethical worth.”¹¹¹

Below I discuss how various groups have denied these membership goods. While the discussion here is necessarily done in a summary fashion, it is not meant to minimize the rights denials suffered by many marginalized groups.

The Imported

*The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.*¹¹²

As the Supreme Court has stated, black slaves were “imported” into the country.¹¹³ They were classified as goods and in many ways had just as many rights as other goods; goods that were classified as property and belonged to citizens. The imported, the descendants of the imported, and those having physical similarities to the imported, even if they entered as free persons, were subjected to what can be considered the most dehumanizing and degrading exclusions from citizenship and accompanying rights. Thus, I have selected as my prime example of exclusion, slaves and their descendants, but also discuss below other horrendous examples of exclu-

¹⁰⁸ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 48 (1998) (discussing rights historically held by all citizens and rights held by “first-class” citizens).

¹⁰⁹ Ayelet Shachar, *Picking Winners: Olympic Citizenship And The Global Race For Talent*, 120 *YALE L.J.* 2088, 2105-2106 (2011).

¹¹⁰ OBLIGATIONS, *supra* note 4, at 205-206.

¹¹¹ Smith, *supra* note 75, at 932.

¹¹² *University of California Regents v. Bakke*, 438 U.S. 265, 400-01 (1978) (Marshall, J.).

¹¹³ See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 271 (1901); *Dred Scott*, 60 U.S. 393; *Smith v. Turner*, 48 U.S. 283, (1849) (citing 3 Ell. Deb., 1st ed., p. 98.) (“The Eastern States, who long ago have abolished slavery, did not approve of the expression slaves. They therefore used another, which answered the same purpose . . . The word migration refers to free persons, but the word importation refers to slaves, because free persons cannot be said to be imported”); U.S. CONST. art. I, § 9, cl. 1 (providing that “the Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to Year one thousand eight hundred and eight”).

sion. As one commentator has noted, “our nation has an unsettling history of uneasy intercultural relations; slavery and segregation of blacks is the most invidious but by no means the only example of our darker side.”¹¹⁴

While most Americans agree that the period of our country when the acceptance of slavery in our country and the mistreatment of slaves was commonplace, is a shameful time that continues to have implications for our present. However, there are many who fail to see that after slavery ended, the descendants of those imported individuals were subjected to inter-generational denial of rights even after citizenship was extended to them. Many legal and societal barriers have perpetuated their exclusion in many areas of social and political life. One of the most glaring exclusions in our history has been in the area of education as I have discussed elsewhere.¹¹⁵

Shklar, in her book on exclusions,¹¹⁶ focuses mainly on the plight of black Americans and their movement from slavery to second-class citizenship. As she puts it, “[t]o be less than a full citizen is at the very least to approach the dreaded condition of a slave. To be a second-class citizen is to suffer derogation and the loss of respectable standing.”¹¹⁷ Her exploration of this status is accomplished by examining two rights presumed incident to citizenship status: the right to earn and the right to vote.¹¹⁸

Dred Scott, a former slave was denied access to federal court diversity jurisdiction because the Supreme Court held that he was not a citizen of the United States.¹¹⁹ Further the Court noted that even if he was a free black man, he was not entitled to rights that even non-citizens held.¹²⁰ The consequence of the *Dred Scott* decision is referred to by Henry Chambers and others as black persons being excluded from the first tier of “tiered citizenship”¹²¹ which was reserved for white males.¹²² In fact, early in our history, black people were placed in the lowest category of “tiered person-

¹¹⁴ Patricia Wald, “*One Nation Indivisible, With Liberty And Justice For All*: Lessons From The American Experience For New Democracies,” 59 FORDHAM L. REV. 283, 285 (1990).

¹¹⁵ See generally Anna Williams Shavers, *Katrina’s Children: Revealing the Broken Promise of Education*, 31 T. MARSHALL L. REV. 499, 499 (2006).

¹¹⁶ SHKLAR, *supra* note 106.

¹¹⁷ *Id.* at 17.

¹¹⁸ Others have noted that the right to vote without participation in politics does not accomplish full citizenship. See, e.g., OBLIGATIONS, *supra* note 4, at 210 (stating “If the citizen is a passive figure, there is no political community. [T]here is a political community in which many citizens live like aliens”); Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 STAN. L. REV. 1905, 1918 (1993).

¹¹⁹ *Dred Scott*, 60 U.S. at 393 (diversity jurisdiction required a dispute between citizens of different states and Dred Scott was not a citizen).

¹²⁰ See generally Henry L. Chambers, Jr., *Dred Scott: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 211 (2007) (discussing Chief Justice Taney’s opinion and noting that while Indians could become citizens, black persons could not).

¹²¹ *Id.*

¹²² White women were relegated to second-tier status. See *id.* at 215.

hood.”¹²³ Blacks were considered inferior to everyone else. Women were second-class citizens while blacks could not be citizens and other non-citizens were persons who could become citizens.¹²⁴ When slavery was abolished¹²⁵ and former slaves were made citizens under the Fourteenth Amendment, and the Fifteenth Amendment prohibited racial discrimination in voting, first-class citizenship appeared to be extended to blacks. However, legal and social institutions made it clear that whatever had been extended to blacks, it was not first-class citizenship. Some evidence comes from laws not directly aimed at blacks, but nevertheless emphasized their second-class status. For example, in 1892, Congress passed the Chinese Deportation Act¹²⁶ which required resident Chinese laborers to obtain a certificate of residence. If a person had not obtained a certificate, they could avoid deportation by (1) establishing in court that they had good reason for not obtaining the certificate and (2) by testimony of one credible white witness.¹²⁷ This law provided a dual layer of discrimination—discrimination against Chinese and blacks and illustrates that “[Racism] is a part of our common historical experience and . . . a part of our culture.”¹²⁸

By the time that *Plessy v. Ferguson*¹²⁹ was decided, upholding a state statute that required separate railway coaches for blacks, it was clear that blacks had been moved from the lowest category of tiered personhood to the lowest category of tiered citizenship. Even after decisions like *Brown v. Board of Education*¹³⁰ and the enactment of civil rights laws,¹³¹ there are many indicators that blacks are still not full participant citizens. Joblessness and underemployment continue to plague the black population.¹³² African Americans are incarcerated at grossly disproportionate rates throughout the

¹²³ *Id.* at 218.

¹²⁴ *Id.* (discussing Taney’s reasoning in *Dred Scott*).

¹²⁵ Although there are arguably other dates that apply, I refer here to 1865 when the Thirteenth Amendment was approved.

¹²⁶ Chinese Deportation Act of May 6, 1892, 27 Stat. 25, c. 60.

¹²⁷ See *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893). See also J. Allen Douglas, The “Priceless Possession” of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930, 43 *Duq. L. Rev.* 369, 399 n. 70 (2005) (discussing how Chinese fit within the tiered system of entitlement).

¹²⁸ See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 4 (1989) (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 330 (1987)).

¹²⁹ 163 U.S. 537 (1896). For an excellent discussion of the struggles of black persons seeking to obtain equal treatment in public transportation, see KELLEY BLAIR L. M., RIGHT TO RIDE: STREETCAR BOYCOTTS AND AFRICAN AMERICAN CITIZENSHIP IN THE ERA OF PLESSY V. FERGUSON (2010).

¹³⁰ 347 U.S. 483 (1954) (holding that segregated public schools are unconstitutional).

¹³¹ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2000)) (prohibiting discrimination in public accommodations, including employment).

¹³² See generally 2012 State of Black America available at <http://www.iamempowered.com/soba/2012/read/sobaonlineader>.

United States.¹³³ The high rate of incarceration along with felon disenfranchisement¹³⁴ further decreases participation of African Americans in the political community.

Other "i" Groups

Here, I briefly recall some of the exclusionary practices that have affected other groups based upon their status or assigned identities. These groups like African Americans may continue to experience exclusion based upon their historical barriers.

Incapacitated: Women in many ways have been classified as lacking capacity, unfit for roles in the political, business and social community. Since the beginning of the feminist movement in the United States during the middle of the nineteenth century, many have attempted to eradicate laws that presented a disadvantage to women merely because of their sex and excluded them from full participation in rights of citizenship. There was a time when a married woman could have no property of her own and, therefore, a wife could not enter a contract without her husband's signature,¹³⁵ women were excluded from service on juries,¹³⁶ and a man who engaged in conduct that would generally subject him to a charge of assault and battery was not prosecuted when the acts were committed by a husband against a wife.¹³⁷ In *Minor v. Happersett*,¹³⁸ the Court held that a native born citizen of the United States and of the State of Missouri, who was free, white, and twenty-one, was not allowed to vote because her state limited voting to male citizens. The Court reasoned that the privileges and immunities clause of the Fourteenth Amendment did not include rights of suffrage. In

¹³³ MICHELLE ALEXANDER, *THE NEW JIM CROW* 97 (2012).

¹³⁴ See *id.* at 153; Chambers, *supra* note 120, at 225 (stating the justification that felon disenfranchisement may be facially constitutional does not actually justify the practice); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 305 (2004) (discussing Mississippi's choice of crimes to which felon disenfranchisement would apply based on beliefs regarding the characteristics of crimes that black people would commit).

¹³⁵ See, e.g., *Ferguson v. Kinsland*, 93 N.C. 337 (1885) (holding that a deed signed without husband's signature was invalid and that the husband's signature was needed to give wife his protection). The traditional philosophy of William Blackstone was incorporated into American law, ultimately limiting the rights of married women. Blackstone considered that "the husband and the wife are one person in law; that is the very being or legal existence of the women is suspended during the marriage, or at least, is incorporated . . . into that of the husband . . ." 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 430 (Clarendon Press 1765-1769). See also HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 499 (W. Grp. Publ'g, 2d ed., 1987).

¹³⁶ See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Hoyt v. Florida*, 368 U.S. 57 (1961).

¹³⁷ See *Frazier v. State*, 86 S.W. 754 (Tex. Crim. App. 1905).

¹³⁸ *Happersett*, 88 U.S. 162.

Bradwell v. Illinois,¹³⁹ decided in 1872, the Supreme Court held that the privileges and immunity clause did not require that women be admitted to the Illinois bar.¹⁴⁰ In *Muller v. Oregon*,¹⁴¹ the Court upheld discriminatory economic legislation in part because states had a valid interest in protecting women because of their maternal role. The first major change was the granting of the vote to women in 1920 when the Nineteenth Amendment was ratified.¹⁴² Rules for acquisition as well as loss of citizenship reflected gender bias. From 1790 when the first naturalization act was passed by Congress,¹⁴³ until 1934,¹⁴⁴ children became citizens when their fathers were naturalized, but not upon the naturalization of their mothers. The idea that a married woman merged into her husband to create only one identity was even incorporated into citizenship law so that a woman lost her American citizenship when she married a foreigner.¹⁴⁵ One of the first women admitted to practice law lost both her license to practice law and her citizenship because of her marriage to a Dutch citizen.¹⁴⁶

Indigenous: In some ways, Indians can be referred to as the First Citizens of our country, but the *Elk* decision is evidence that the Fourteenth Amendment is interpreted as “a constitutional testimony of the separate status of Indian[s].”¹⁴⁷ The *Elk* decision echoed the views of some¹⁴⁸ but was denounced by others because it placed Indians in a separate status.¹⁴⁹ Indi-

¹³⁹ *Bradwell v. State*, 83 U.S. 130 (1872).

¹⁴⁰ See also *In re Goodell*, 39 Wis. 232 (1876) (Wisconsin denial of bar admission to Lavinia Goodell); *In re Belva A. Lockwood* (U.S. Ct. of Cl. 1874), reprinted in 21 CENTRAL L. J. 253 (1874). For a discussion of the efforts of Myra Bradwell and early admissions of other women to the practice of law, see KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 1438* (1986).

¹⁴¹ 208 U.S. 412 (1908).

¹⁴² See U.S. CONST. amend. XIX.

¹⁴³ Uniform Naturalization Act, ch. 3, 1 Stat. 103, 104 (1790) (repealed 1795).

¹⁴⁴ Although the naturalization laws had been amended to provide that minor children acquired citizenship upon the naturalization of “the parent” (see, e.g., Act of Mar. 2, 1907, ch. 2534, §5, 34 Stat. 1228, 1229), most courts construed parent to mean father unless the father was deceased (see, e.g., *In re Citizenship Status of Minor Children Where Mother Alone Becomes Citizen Through Naturalization*, 25 F.2d 210 (D. N.J. 1928)). The Act was amended in 1934 to change the word “parent” to “father or mother”. Act of May 24, 1934, ch. 344, §2, 48 Stat. 797.

¹⁴⁵ The Act of Mar. 2, 1907, ch. 2534, §3, 34 Stat. 1228, 1228-29, provided that any American woman who married a foreigner “shall take the nationality of her husband [for so long as the marriage lasted].”

¹⁴⁶ See *American Citizenship Rights of Women: Hearing Before A S. Subcomm. on Immigration*, 72nd Cong. 26 (1933); *Relative to Citizenship of American Women Married to Foreigners: Hearings Before the H. Comm. on Immigration and Naturalization*, 65th Cong. 13-14 (1918); Robert Ferrari, *The Status of a Woman Lawyer Who Marries an Alien*, 4 WOMEN L.J. 84 (1914).

¹⁴⁷ Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 239 (1984).

¹⁴⁸ See generally George F. Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21 (1881) (expressing the view that Indians were not ready for citizenship).

¹⁴⁹ *Elk v. Wilkins*, 112 U.S. 94, 122-23 (1884) (Harlan voicing his dissatisfaction with the majority’s treatment of John Elk.) (Harlan & Woods, J.J., dissenting).

ans suffered forcible removal from their land and arrest for leaving Indian Territory.¹⁵⁰ Indian families were torn apart in the off reservation placements plan which were designed to implement governmental policies of “terminating” Indian tribes and assimilating Indian children to the Euro-American value of possessive individualism.¹⁵¹ As David Wilkins notes, “while the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution accorded African Americans a measure of legal recognition of their humanity and constitutional personhood, it was not until a federal court decision in 1879 that the law began to constitutionally recognize Indians as ‘persons.’”¹⁵² In *Standing Bear v. Crook*,¹⁵³ the government’s argument that the Indian was neither a person nor a citizen under the Constitution was ultimately rejected. Indians continue to pursue complete recognition of their rights, which includes the enactment of legislation to implement the United Nations Declaration on Indigenous Peoples.¹⁵⁴ The Native People of Hawaii have also attempted to obtain legislation recognizing their rights.¹⁵⁵

Islanders: The “islanders” label refers to the fact that U.S. law provides for differentiated citizenship for some groups who have acquired citizenship through collective naturalization. While collective naturalization principles were applied to states as they joined the union and their eligible residents were collectively naturalized as U.S. citizens, acquiring the accompanying rights and obligations, when collective naturalizations were applied to residents of acquired island territories,¹⁵⁶ these residents were assigned a form of complex and confusing second-class citizenship. For example, as some commentators have noted, Puerto Ricans “are, indeed, U.S. citizens. The problem is, of course, that even though they’re citizens, they do not have the rights with which citizenship is associated; they’re, in

¹⁵⁰ See *id.*

¹⁵¹ Pauline Turner Strong, *What is an Indian Family? The Indian Child Welfare Act and the Renaissance of Tribal Sovereignty*, 46 AM. STUDS., 205-231 (Fall-Winter 2005).

¹⁵² David E Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515 (2005).

¹⁵³ United States ex rel. *Standing Bear v. Crook*, 25 F. Cas. 695, 700 (1879) (declaring that “an Indian is a ‘person’ within the meaning of the laws of the United States, and, has, therefore the right to sue out a writ of habeas corpus in a federal court”).

¹⁵⁴ See, e.g., *Native Americans Urges Government to Stop Marginalization*, Congressional Hearing, GALDU.ORG, <http://www.galdu.org/web/index.php?odas=5287&giella1=eng>.

¹⁵⁵ See, e.g., Amy Ridenour, *Native Hawaiian Act: E Pluribus Unum No Longer?* NATIONALCENTER.ORG (May 28, 2006), <http://www.nationalcenter.org/2006/05/native-hawaiian-act-e-pluribus-unum-no.html>.

¹⁵⁶ For thorough discussions of the broader constitutional law issues, see IVAN MUSICANT, *EMPIRE BY DEFAULT: THE SPANISH-AMERICAN WAR AND THE DAWN OF THE AMERICAN CENTURY* (1998) (discussing the United States expansion in Hawaii, the Philippines, Puerto Rico, Guam, the Panama Canal, and Guantanamo Bay); Juan R Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. OF PA. J. INT’L L. 283 (2007-2009).

some sense, second-hand citizens. This raises interesting questions about what “citizenship” really amounts to.”¹⁵⁷

Some residents are classified as citizens and others as nationals. Residents born and living in the territories of Guam,¹⁵⁸ the Commonwealth of the Northern Mariana Islands,¹⁵⁹ the U.S. Virgin Islands¹⁶⁰ and Puerto Rico¹⁶¹ are U.S. citizens, but they cannot vote in presidential elections.¹⁶² Their congressional representative also cannot vote in Congress. As a recently filed lawsuit illustrates, the residents were assigned various treatments of their citizenship status.¹⁶³ The plaintiffs in the lawsuit include individuals who allege that by being classified as nationals¹⁶⁴ they have been denied recognition as U.S. citizens while residing in the U.S. and serving in the military because they were born in American Samoa and consequently were the denied rights of a citizen, including the right to vote in federal and state elections. Those born in American Samoa are considered nationals, who also do not pay federal income taxes and cannot vote for president. They also have a nonvoting delegate in Congress. Nationals must follow the same procedures for naturalization as those who are permanent legal residents. In a recent decision denying a Puerto Rican citizen the right to vote in U.S. presidential elections, Judge Torruella of the First Circuit reminded us of earlier criticisms that the U.S. had racially discriminatory reasons for not granting full citizenship to island residents. He stated:

Although the unequal treatment of persons because of the color of their skin or other irrelevant reasons was then the *modus operandi* of governments, and an accepted practice of societies in general, the continued enforcement of these rules by the courts is today an outdated anachronism, to say the least.¹⁶⁵

While some residents of the territories want the Fourteenth Amendment and other constitutional provisions to apply fully to their residents so that they are “constitutional citizens” rather than “statutory citizens,” not all res-

¹⁵⁷ Joel Colón-Ríos and Martín Hevia, *The Legal Status of Puerto Rico and the Institutional Requirements of Republicanism*, 17 TEX. HISP. J.L. & POL'Y 1, 25 (2011).

¹⁵⁸ Immigration and Nationality Act §307, 8 U.S.C. 1407 (2012).

¹⁵⁹ See Presidential Proclamation No. 5564, November 3, 1986, 51 FR 40399, 3 CFR, 1986 Comp., p. 146

¹⁶⁰ Immigration and Nationality Act §306, 8 U.S.C. 1406 (2012).

¹⁶¹ Immigration and Nationality Act §302, 8 U.S.C. 1402 (2012).

¹⁶² See *Igartua-de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005), *cert. denied*, de la Rosa v. U.S., 547 U.S. 1035 (U.S. Mar 20, 2006) (NO. 05-650) (lawsuit by a Puerto Rican citizen of the United States dismissed, denying his claim that as a citizen he enjoys the right to vote in presidential elections under the ICCPR and customary international law).

¹⁶³ *Tuaua v. United States*, CIV. 12-01143 RJL, 2013 WL 3214961 (D. D.C. June 26, 2013)

¹⁶⁴ Immigration and Nationality Act §308, 8 U.S.C. 1408 (2012) (nationals but not citizens).

¹⁶⁵ *Igartua v. United States*, 626 F.3d 592, 613 (1st Cir. 2010) (J. Torruella concurring in part and dissenting in part).

idents agree that these steps should be taken.¹⁶⁶

There are of course other groups that could be included in this examination and other outrageous examples of interferences with the rights of citizens based upon their membership in an assigned status. These include the disenfranchisement of the incarcerated, the classification of children born out of wedlock as illegitimate, the internment of Japanese Americans without due process during World War II and the forcible return to Mexico of U.S. citizens during "Operation Wetback."¹⁶⁷

Noncitizens Rights

*If rights are defined as an attribute of citizenship, what then of those who lack citizenship by legal definition?*¹⁶⁸

The placement of this discussion gave me pause. In many ways the issues discussed here affect the foreign born who are citizens as well as citizens who have family members who are noncitizens. Immigrants, whether legally admitted or not are denied many of the political and social benefits that attach to citizenship. Both citizens and noncitizens can be affected by these distinctions.

An important consideration in the determination of rights and who should receive these rights is whether immigrant status should make a difference or is this a basis for differentiation that results in oppressive and divisive measures?¹⁶⁹ Is it enough to provide a liberal method of access to citizenship to obtain full participation in the political and social community? Should this access to rights be tied to residency rather than citizenship? Should immigrants be viewed as suffering the same types of unjust exclusions that citizen groups have suffered? These are difficult questions even for many liberal thinkers to tackle. As Linda Bosniak notes, "[a]lienage

¹⁶⁶ See, e.g., Fili Sagapolutele, *Am. Samoans Suing For U.S. Citizenship Told To Consult Community*, PACIFIC ISLANDS REPORT, <http://pidp.org/pireport/2012/July/07-25-10.htm>.

¹⁶⁷ See *Korematsu v. United States*, 323 U.S. 214, 217, 219 (1944) (upholding the racially-based curfew and the internment regulations); Regina Austin, "The Shame of it All" *Stigma and the Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 Colum. Human Rights L. Rev. 173 (2004); Camille M. Davidson, *Mother's Baby, father's Maybe!--Intestate Succession: When Should a Child Born Out of Wedlock Have a Right to Inherit from or Through His or Her Biological Father?*, 22 Colum. J. Gender & L. 531 (2011); Juan Ramón García, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*, *The Border: Operation Wetback* (1980), available at <http://www.pbs.org/kpbs/theborder/historytimeline20.htm>; see also Fred L. Koestler, *Handbook of Texas Online: Operation Wetback*, TEXAS STATE HISTORICAL ASSOCIATION, available at <http://www.tshaonline.org/handbook/online/articles/pq001>.

¹⁶⁸ BOSNIAK, *supra* note 19, at 78.

¹⁶⁹ See *supra* text accompanying note 109.

presents real difficulties for antisubordination theorists.”¹⁷⁰

The abrogation of noncitizen rights has occurred because of a number of factors. Most recently these have included fears driven by the 1993 terrorist bombing of the World Trade Center in New York City and the tragedy of September 11, 2001. Both of these tragedies led to amendments to the Immigration and Nationality Act in 1996 and the enactment of the USA Patriot Act in 2001, respectively.¹⁷¹ In addition, numerous immigration regulatory changes were made.¹⁷² Other fears have been based upon changes in the demographics of the country. These fears have generated numerous attempts by state and local governments to place restrictions on education, housing, and employment designed to make life more difficult for undocumented immigrants.¹⁷³ In addition, federal legislation enacted in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)¹⁷⁴ made comprehensive changes to noncitizen eligibility for public benefits.¹⁷⁵

The exclusion of rights for noncitizens led to actions such as the Immigrant Freedom Rides in the United States in 2003 and recent campaigns to obtain local voting rights for some noncitizen immigrants.¹⁷⁶ The argument for voting rights, at least with respect to resident aliens, is based upon the idea that the noncitizens should have a vote because they are regulated

¹⁷⁰ BOSNIAK, *supra* note 19, at 11.

¹⁷¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.) (establishing some of the most onerous immigration provisions that have ever been enacted); Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§411-412, 115 Stat. 272, 345-52. Other recent legislation included Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 5, 6, 18, 44, and 49 U.S.C.); the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered sections of 8 U.S.C.); and the Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (to be codified in scattered sections of 8 U.S.C.).

¹⁷² See generally, Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 Minn. L. Rev. 1369 (2007).

¹⁷³ See *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (striking down most of Arizona’s controversial Immigration Enforcement Law, SB 1070, but upholding the portion of the law that requires law enforcement officers to determine immigration status during a lawful stop); see also Nat’l Conference of State Legislators, 2012 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JAN. 1 – JUNE 30, 2012), available at <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-and-resolutions.aspx> (monitoring state immigration related legislation and maintains a website with descriptions of and numbers of proposed and enacted legislation).

¹⁷⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.).

¹⁷⁵ See Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-immigrant Provisions of the “Contract with America” Congress*, 90 KY. L.J. 1043, 1048-49, 1053 (2002) (providing thorough analysis of the effects of PRWORA).

¹⁷⁶ See BOSNIAK, *supra* note 19, at 9; See also JENNIFER GORDON, SUBURBAN SWEAT-SHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 301 (2005); see generally, Steven Greenhouse, *Riding Across America for Immigrant Workers*, N.Y. TIMES, Sept. 17, 2003, at A20; Robert F. Worth, *Push Is On to Give Legal Immigrants a Vote in the City*, N.Y. TIMES, April 8, 2004, at 1.

by the government. The principle is that anyone who is directly affected by government policy should have a say in it.¹⁷⁷

Many scholars have documented the many ways in which both immigration and generally applicable laws and policies distinguish between citizens and noncitizens in determining the extension of rights. Jennifer Chacón eloquently demonstrates the link between the underlying facts in the *Dred Scott* case which involved the brutal separation of family members and the current immigration laws which often result in the separation of family members through the deportation process.¹⁷⁸ Kevin Johnson has described the public and governmental response to the plight of immigrants in the aftermath of Hurricane Katrina and the general implications of treating immigrants “[a]s less than full-fledged members of U.S. society . . . often considered nothing more than ‘aliens’ in our midst . . . deemed unworthy of sympathy, public relief, and general concern.”¹⁷⁹ The implications of the increasing numbers of noncitizens of color and the participation of noncitizens in social and political life is explored by Enid Trucios-Haynes.¹⁸⁰ Relatedly, David Brooks notes in a recent article entitled “Relax We’ll be Fine” that increased diversity is inevitable (due to continued migration and differential fertility rates), and should be considered a source of national strength rather than a source of fear or uneasiness that some express.¹⁸¹ The lasting effect of the plenary power doctrine in immigration which was based on racially discriminatory policies, especially with regard to Asians,¹⁸² has been examined by Gabriel Chin.¹⁸³ He includes in his analysis the parallels between the African-American and Asian American legal

¹⁷⁷ See *Dred Scott*, 60 U.S. at 419-22 (restricting right to vote on the basis of race); *Happersett*, 88 U.S. at 178 (restricting right to vote on the basis of gender); see also Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-1100 (1977); SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 1-7 (2004) (arguing a more inclusive approach to political membership).

¹⁷⁸ Jennifer M. Chacon, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J. L. & POL’Y 45, 51 (2008).

¹⁷⁹ Kevin R. Johnson, *Hurricane Katrina: Lessons about Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 14-15. (2008-2009). See also BOSNIAK, *supra* note 19, at 4-5, 9-11, 15 (2006) (analyzing the ambiguous status of immigrants in U.S. society).

¹⁸⁰ Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997).

¹⁸¹ David Brooks, Op-Ed, *Relax We’ll Be Fine*, N.Y. TIMES, April 6, 2010, <http://www.nytimes.com/2010/04/06/opinion/06brooks.html>.

¹⁸² See Chinese Exclusion Act of 1882, Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943); the Gentleman’s Agreement of 1907, which restricted immigration from Japan; the California Alien Land Law of 1913, 1913 Cal. Stat., c. 113, which restricted land ownership by “aliens ineligible to citizenship.” See also *Ozawa v. United States* (1922) and *United States v. Bhagat Singh Thind* (1923), which held that a Japanese man and a Punjabi man were determined ineligible for citizenship because they were not white; and the national origin quota set by the Immigration Act of 1924, 43 Stat. 153 (repealed 1952).

¹⁸³ See, e.g., Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1.

experience. In his book *No Undocumented Child Left Behind*¹⁸⁴, Michael Olivas discusses the *Plyler v. Doe* decision¹⁸⁵ generally with respect to the effect it has had on rights for noncitizens. More specifically, he builds a case in support of the DREAM Act,¹⁸⁶ which seeks to expand the reasoning in *Plyler* to the plight that many undocumented children face when they graduate from high school.

There are some examples of actions taken to include immigrants in the political and social life of America. Most notable here are those aimed at providing avenues for undocumented to remain in the U.S. The Immigration and Nationality Act provides that a person documented or undocumented who has “served honorably” during wartime may be naturalized through an expedited naturalization process.¹⁸⁷ During peace time, immigrants can also apply for naturalization through military service without having to meet the residency requirements imposed upon most individuals seeking to naturalize.¹⁸⁸ On June 15, 2012, President Obama announced that young undocumented immigrants who were came to the U.S. before age 16, upon meeting other specified criteria, would not be subjected to deportation and would be eligible for a work permit.¹⁸⁹ This is a temporary measure until the DREAM Act can be passed. Even with these optimistic measures, there is a need to develop guiding principles to determine and provide rights to noncitizens.

Hiroshi Motomura in his book, “Americans in Waiting”, suggests that those seeking permanent immigration should be viewed as in a “transition to citizenship.”¹⁹⁰ During this limited transition period, grounds for depor-

¹⁸⁴ MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* (2012).

¹⁸⁵ *Plyler v. Doe*, 457 U.S. 202 (1982) (struck down a Texas statute that withheld from local school districts any state funds for the education of children who were not “legally admitted” into the United States and did not pay tuition). For a discussion of the facts involved and the Court’s analysis, see Michael A. Olivas, *Plyler v. Doe, The Education of Undocumented Children, and the Polity*, in *IMMIGRATION STORIES* 197, 199-210 (David A. Martin & Peter H. Schuck eds., 2005).

¹⁸⁶ Development, Relief, and Education for Alien Minors Act (DREAM Act) is bipartisan legislation that has been introduced in Congress but not passed. Under certain conditions undocumented young people would be eligible for a conditional path to citizenship. See Olivas, *supra* note 184, at Chapter 4.

¹⁸⁷ See Immigration and Nationality Act §329, 8 U.S. C. § 1440 (2013); Exec. Order No. 13269, 67 Fed. Reg. 45287, no. 130, July 8, 2002.

¹⁸⁸ Immigration and Nationality Act §328, 8 U.S. C. § 1439.

¹⁸⁹ See *Deferred Action for Childhood Arrivals*, available at DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), [http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD) (last updated Jan. 18, 2013), for frequently asked questions and general description of the Deferred Action for Childhood Arrivals program.

¹⁹⁰ See *generally*, HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007) (examining how and why a transition to citizenship view of immigrants should work in society today).

tation would be restricted and immigrants would be eligible for many of the same benefits that citizens receive, including eligibility to vote in at least local elections.¹⁹¹ The transition period would end after a specified time period and the immigrant would lose all or some of the privileges granted. Henry Chambers suggests a model for justifying a restriction of rights. It consists of two-steps: “The first step requires determining why the right at issue exists [and] [t]he second step requires comparing the basis for the restriction to the purpose of the right restricted.” He suggests that “[i]f there is little or no relationship between the right’s utilization and the restriction of the right, the restriction may be an exercise of the raw power to restrict rights rather than a justification for the restriction of the right.”¹⁹² The distinction of rights extended on the basis of residency rather than citizenship could be developed by combining the Chambers model with Legomsky’s suggested analysis. Legomsky suggests for example that we might want to place rights that have a particularly compelling need such as police or fire protection in the category that would be extended on the basis of residency.¹⁹³

International Law and the Rights of Noncitizens

“One essential component of most contemporary conceptions of democratic justice is the protection of basic human rights such as freedom of religion, freedom of thought and expression, equal treatment under the law . . .”¹⁹⁴

Perhaps we can be assisted in the task of line drawing by referring to international law principles.¹⁹⁵ As Peter Spiro has suggested, this “is not to say that international law now delivers a comprehensive regulatory regime. States will retain important discretionary powers into the future. But no function of governance will be shielded from international law as a categorical matter, membership decisions included.”¹⁹⁶ Some issues regarding the

¹⁹¹ *Id.* at 189-200.

¹⁹² Chambers, *supra* note 120, at 224.

¹⁹³ See Stephen H. Legomsky, *Why Citizenship*, 35 VA. J. INT’L L. 279, 290 (1994). See also *supra* text accompanying notes 87-90.

¹⁹⁴ Carens, *supra* note 3, at 28.

¹⁹⁵ See generally DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* (2008). See also BOSNIAK, *supra* note 19, at 25 (“[S]tandards, which encompass civil, social, and sometimes cultural rights, represent an alternative source of rights that transcends the jurisdiction of individual nation-states.”).

¹⁹⁶ See Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 746 (2011).

division between political and civil rights and who has access to these rights are addressed in international law principles and treaties, but these sources also fail to provide definitive answers. Nonetheless, an examination of international law may provide a basis to challenge immigration law and practices aimed at noncitizens that exclude them from access and protections. The Universal Declaration of Human Rights (UDHR),¹⁹⁷ the International Covenant on Civil and Political Rights (ICCPR),¹⁹⁸ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹⁹⁹ are known as the “International Bill of Rights.” One international scholar aptly describes their significance: The ICCPR and the ICESCR, which came into force in 1976, “were drafted to transform the principles of basic human rights originally formulated by the [UDHR] into binding rules of law that all states are obliged to follow.”²⁰⁰ The United States ratified the ICCPR in 1992 but made several reservations.²⁰¹ The United States has not yet ratified the ICESCR nor has it ratified or signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families that provides specific human rights protections for grants.²⁰² In particular, the ICCPR recognizes the right to enjoy “civil and political freedom” and extends these rights to all people within a country with few exceptions.²⁰³ The only specific references to rights that are limited to “citizens” relate to the political community and are found in Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs . . .

¹⁹⁷ Universal Declaration of Human Rights, G.A. res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁹⁸ See International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 at 52 (Dec. 16, 1966), 999 U.N.T.S. 171, available at UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. See also Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 at 59 (Dec. 16, 1966), 999 U.N.T.S. 302, available at <http://www1.umn.edu/humanrts/instree/b4ccprp1.htm>.

¹⁹⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [hereinafter ICESCR] (including 153 signatories).

²⁰⁰ See Shaleeta Washington, *Transcending Rhetoric: Redressing Discrimination In Education In Bulgaria and Israel Through Affirmative Action*, 23 PENN. ST. INT’L L. REV. 969, 977 (2005).

²⁰¹ See *Senate Report on Ratification of The International Covenant on Civil and Political Rights*, S. EXEC. REP. NO. 102-23 at 7-11 (1992).

²⁰² See Feminist Majority Foundation Fact Sheet, *United States Failure to Ratify Key International Conventions, Treaties and Laws*, available at http://www.feministcampus.org/fmla/printable-materials/global_project/ratify_factsheet.pdf.

²⁰³ See ICCPR, pmbl. & Arts. 3, 4.

(b) To vote and to be elected at genuine periodic elections . . . guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.²⁰⁴

On the other hand, some other sections permit discrimination based on citizenship and immigration status. In Article 2, for example, the prohibited categories for distinctions in the provision of rights includes “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” but does not include nationality as a prohibited ground.²⁰⁵ Similarly, Article 12 does not specifically mention citizenship or nationality, but it does provide that the right to freely move within a nation-state is limited to those “lawfully within the territory of a State” and that the prohibition against an arbitrary deprivation of a right to enter a country is limited to an individual’s “own country.”²⁰⁶ An alien’s right to a hearing to contest expulsion from a nation-state is limited by Article 13 to “an alien lawfully in the territory.”²⁰⁷ Even when rights are found to exist, the nation-state can deny certain rights in times of “public emergency which threatens the life of the nation.”²⁰⁸

Conclusion

In many ways, my comments here and those of others that I have cited provide more questions than answers. They do, however sound as a reminder of our past and the ways in which some exclusions from political and social life harm our country. While, it may be important to reserve some privileges to those who have made a commitment to the country as a citizen or permanent resident. We should strive to make determinations about access to rights on grounds that are not based upon arbitrary factors.

²⁰⁴ *Id.* at Art. 25.

²⁰⁵ *Id.* at Art. 2(1). While it might be argued that national and social origin encompasses nationality, international treaties usually list both categories if nationality is also a protected class. *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, arts. 1(1), (7), U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

²⁰⁶ ICCPR, at Art. 12(4). The Human Rights Committee, established under Article 28 of the ICCPR, has issued an ICCPR General Comment that allows for each country to restrict the movements of persons who are not lawfully within the territory and such lawful status is determined by domestic law. *See* U.N. Human Rights Comm., General Comment No. 27: Freedom of Movement, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999), available at <http://www.refworld.org/docid/45139c394.html>.

²⁰⁷ ICCPR, at Art. 13.

²⁰⁸ *Id.* at Art. 4(1). *See also* Bosniak, *supra* note 76, at 25 (noting that international human rights “standards, which encompass civil, social, and sometimes cultural rights, represent an alternative source of rights that transcends the jurisdiction of individual nation-states”).

