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MAPPING CITIZENSHIP: STATUS, MEMBERSHIP, AND THE PATH IN BETWEEN

D. Carolina Núñez*

Abstract

The concept of citizenship poses an interesting asymmetry: though all citizens receive the same rights and obligations on equal terms, citizenship is not distributed to individuals on equal terms. In the United States, some are citizens by virtue of birth within the national territory or birth to citizen parents. Others must undergo the process of naturalization. Different citizenship rules appear to solve for different variables, and it is not clear whether and how those variables relate to one another.

This Article begins unraveling the paradox. It argues that the apparent paradox results from a failure to understand the relationship between citizenship's formal and substantive dimensions. The Article reconceptualizes citizenship by decoupling substantive and formal citizenship. Formal citizenship is not a static condition that is or even ought to be synonymous with more abstract notions of membership and belonging. Rather, formal citizenship is a path that leads toward substantive citizenship, and formal citizenship rules serve as entrances to that path. Mapping and understanding the way that formal citizenship can relate to substantive citizenship can inform contemporary debates about citizenship, immigration, and membership.

This Article offers a typology of the ways in which formal citizenship can relate to substantive citizenship. Citizenship rules can play a "descriptive" role by conferring citizenship on individuals who have already achieved some measure of substantive citizenship. But citizenship can also encourage an individual's development of the qualities that make someone a desirable member of the polity. That is, citizenship rules may be "prescriptive" in that they distribute citizenship to individuals who are not yet fully substantive citizens. Citizenship rules may also be "predictive" in nature: they bestow citizenship on individuals who are likely to become substantive citizens and help facilitate that development. Other citizenship rules operate to claim individuals without regard to notions of membership and belonging; these may be fairly described as "conscriptive" citizenship rules. To illustrate the value of the proposed framework, this Article uses it to recast two contemporary debates that touch on citizenship: challenges to territorial birthright citizenship and the creation of a "path to citizenship" for DREAMers.

I. INTRODUCTION

The concept of citizenship poses an interesting asymmetry: though all citizens receive the same rights and obligations on equal terms, citizenship is not distributed to individuals on equal terms. In the United States, some are citizens by virtue of circumstance—birth within the national territory¹ or birth to citizen parents.² Others must prove their fitness for citizenship through the process of naturalization.³ All citizens, however, receive the same rights on the same terms,⁴ regardless of their path to citizenship.⁵ As I will explain in this Article, the existence of these varying rules, though at first puzzling, is a useful feature of U.S. citizenship law. This feature operates to better integrate immigrant communities, helps marginalized individuals gain the tools to develop a shared sense of identity with fellow citizens, and avoids the dangers of a tiered society where subsets of residents remain ineligible for

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¹ U.S. CONST. amend. XIV, § 1.

² See Immigration & Nationality Act §§ 301, 309, 8 U.S.C. §§ 1401, 1409 (2012) [hereinafter I.N.A.].

³ See I.N.A. § 316, 8 U.S.C. § 1427.

⁴ Of course, I do not mean to say that all citizens actually experience equal citizenship, but rather that the law—in the abstract—treats all citizens equally. Several scholars of critical race theory, feminist legal theory, and other fields have discussed the lived realities and second-class citizenship of many different types of citizens. Kevin Johnson, for example, has traced the lived second-class status of people of color in a world of facially neutral laws. See, e.g., Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 629 (1995) [hereinafter Johnson, *An Essay on Immigration Politics*] (analyzing California's Proposition 187 and its impact on immigration politics); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1259 (1997) [hereinafter Johnson, "Melting Pot" or "Ring of Fire"?] (discussing the assimilation difficulties of Mexican Americans). Katherine Bartlett has highlighted how females can experience actual gender discrimination caused by facially neutral laws. See Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 6 (1994). Alexander Aleinikoff has also proposed that even ensuring that laws are "colorblind" is not enough to remedy the second-class experience of minority citizens. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991).

⁵ For a brief discussion of two exceptions to the principle of equal citizenship, see the text accompanying *infra* notes 69–70.

citizenship until they have proven to the satisfaction of the majority their worthiness for citizenship.

But to fully explore how the coexistence of separate citizenship rules that impose different requirements on individuals can advance integration and shared identity, I first acknowledge the puzzle that varying citizenship rules creates. After all, in light of well-accepted notions of distributive justice, rights would be afforded based on indicators related to the right being distributed.⁶ In an ideal world, we would expect citizenship rules to identify individuals who are desirable members of the polity—however that might be defined—in a substantive way.⁷ But it is not clear how the various paths to U.S. citizenship qualify an individual for the same package of rights and benefits.⁸ A two-day-old infant born in Ohio to French immigrants and a forty-five-year-old school teacher from Vietnam who completes the naturalization process are both citizens of the United States under the law. A five-year-old child born and living in Argentina a year after her parents—both of them U.S. citizens—moved there to work is also a citizen. Though the naturalized schoolteacher was required to demonstrate basic English proficiency and knowledge of U.S. history and civics,⁹ the Ohio-born infant cannot speak at all, and the Argentina-born child may speak Spanish rather than English. Neither knows anything of history and civics. In fact, there is no guarantee that the children will ever be able to meet the same requirements that the Vietnamese schoolteacher met in order to be naturalized.¹⁰ Yet all three individuals, each of whom qualified for citizenship under very different rules, are entitled to the same citizenship—and its corresponding rights—at the moment of birth or naturalization. It is not clear that any of the individuals would qualify for citizenship under any rule of citizenship except the one under which he or she acquired citizenship. Once again, this is not to say that

⁶ See *infra* Part II.

⁷ Several scholars have made arguments, both generally and with respect to particular citizenship rules, based on just such an assumption. See, e.g., Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 237–38 (1994); Ayelet Shachar, *The Worth of Citizenship in an Unequal World*, 8 THEORETICAL INQUIRIES LAW 367, 373 (2007) (criticizing birthright citizenship rules for failing to limit the distribution of citizenship to individuals who identify with the state's political ideals of freedom and liberty or some other substantive characteristic); see also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 50 (1983) (asserting that membership in a community, including citizenship, depends on a “sense of relatedness and mutuality”); Mark Tushnet, *Creedal Citizenship*, 9 ISSUES LEGAL SCHOLARSHIP 1, 1 (2011) (suggesting that citizenship ought to relate to adherence to substantive values: “By creedal citizenship I mean something fairly modest, though important: a set of beliefs, not necessarily religious in content, but in which the adherent has some significant degree of emotional as well as cognitive investment.”).

⁸ See Neuman, *supra* note 7, at 247–48 (“In a coherent system of citizenship law, one might expect continuities between the approaches to citizenship expressed in these other parts of citizenship law and the approaches expressed in naturalization policy. On the other hand, it might be too much to expect U.S. citizenship law to display coherence.”).

⁹ See I.N.A. § 312, 8 U.S.C. § 1423.

¹⁰ See PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 117 (1985).

any one of these hypothetical individuals is a less legitimate citizen than the others. In fact, this Article concludes otherwise. Rather, these hypotheticals merely highlight what appears to be a puzzling distribution of citizenship that calls into question the very rationale for the concept of citizenship.¹¹ Why do citizenship rules appear to solve for different variables if citizenship provides the same rights and benefits to all citizens? Unraveling this paradox helps highlight how each rule works in conjunction with the others in a way that maximizes the potential for individuals' development of meaningful membership in the United States.

Though scholars have not explicitly discussed the paradoxical distribution of equal citizenship on unequal terms,¹² I argue it lies at the heart of many contemporary inquiries into citizenship law. Commentators, however, have analyzed citizenship through very focused lenses that allow detailed discussion of some aspects of citizenship law,¹³ but provide little context or even recognition of the underlying paradox. For example, some scholars have explored the citizenship of children:¹⁴ Do children exercise a different kind of citizenship than do adults?¹⁵ Why do children have citizenship at all? While such scholarship centers on children's citizenship, it implicitly raises more general questions about whether citizenship rules adequately distribute citizenship to individuals who are fit for the

¹¹ Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 285 (1994) (arguing that all commentary on citizenship builds on this "fundamental question: What is accomplished by having a citizenship concept at all? Why, in other words, should the law affirmatively classify all earthlings as citizens or noncitizens and create rights, duties, and disabilities that hinge on that distinction?").

¹² A few, however, have at least recognized the existence of this question. See, e.g., Neuman, *supra* note 7, at 247–48.

¹³ Jennifer Gordon & R.A. Lenhardt describe the tendency of scholars to focus on particular facets of citizenship as "balkanization." Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2494 (2007).

¹⁴ See Jacqueline Bhabha, *The Citizenship Deficit: On Being a Citizen Child*, 46 DEV. 53, 53 (2003); Ruth Lister, *Why Citizenship: Where, When and How Children*, 8 THEORETICAL INQUIRIES LAW 693, 693 (2007); Jeremy Roche, *Children: Rights, Participation and Citizenship*, 6 CHILDHOOD 475, 475 (1999).

¹⁵ See, e.g., DAVID CUTLER & ROGER FROST, TAKING THE INITIATIVE: PROMOTING YOUNG PEOPLE'S INVOLVEMENT IN PUBLIC DECISION MAKING IN THE UK 8 (2001) (discussing the concept of children as "citizens in waiting"); Madeleine Arnot & Jo-Anne Dillabough, *Introduction*, in CHALLENGING DEMOCRACY: INTERNATIONAL PERSPECTIVES ON GENDER, EDUCATION AND CITIZENSHIP 1, 12 (Madeleine Arnot & Jo-Anne Dillabough eds., 2000) (describing children as "learner citizens"); Ruth Lister et al., *Young People and Citizenship*, in YOUTH POLICY AND SOCIAL INCLUSION: CRITICAL DEBATES WITH YOUNG PEOPLE 33, 33 (Monica Barry ed., 2005) (proposing that children are "citizens in the making"); Michael Wyness et al., *Childhood, Politics and Ambiguity: Towards an Agenda for Children's Political Inclusion*, 38 SOC. 81, 82 (2004) (suggesting that children are "apprentice citizens"). But see Elizabeth F. Cohen, *Neither Seen nor Heard: Children's Citizenship in Contemporary Democracies*, 9 CITIZENSHIP STUD. 221, 236 (2005) ("Liberal democracies owe children a more carefully defined and judiciously governed political status that acknowledges their needs alongside their weaknesses and vulnerabilities.").

exercise of citizenship. More broadly, it highlights the reality that not all citizens are identically qualified or prepared to exercise citizenship rights and obligations despite being citizens.

Likewise, many critiques of birthright citizenship arise from the paradox of equal citizenship distributed on unequal terms. Why does the U.S. border dictate citizenship at birth? How are individuals born inside the border more deserving than those born outside?¹⁶ What about individuals who are born inside the United States as a result of a parent's unauthorized crossing of the border?¹⁷ At bottom, these questions challenge territorial birthright citizenship's ability to identify individuals who are fit for the same citizenship that other citizens have.

Commentators have also focused on particular aspects of citizenship, including citizenship as rights,¹⁸ citizenship as participation,¹⁹ citizenship as work,²⁰ citizenship as standing,²¹ and citizenship as identity.²² But few have discussed the relationships among these different facets, perhaps because these concepts do not always coincide. After all, an individual may experience citizenship as rights, but fail to experience citizenship as participation. Why are rights distributed to individuals who do not or cannot participate? Why not distribute rights to those who do participate? These questions cannot be answered with reference to a single facet of citizenship.

My purpose here is to widen the lens. My interest is not in the effect of a single citizenship rule, in a single facet of citizenship, or in a particular group's lack of access to citizenship or citizenship rights, though my analysis sheds light on those issues. Rather, my interest lies in the very existence of multiple, disparate rules that purport to grant the very same citizenship and what it says about citizenship generally and in the United States. Here, I take a high-altitude view of the citizenship landscape to create a conceptual map. Rather than focus on a single rule or aspect of

¹⁶ See, e.g., AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 4–5 (2009) (challenging the view that citizenship should be based on the location of one's birth).

¹⁷ See, e.g., SCHUCK & SMITH, *supra* note 10, at 118 (suggesting that U.S. citizenship is not guaranteed to children of “illegal aliens and ‘nonimmigrant’ aliens”).

¹⁸ See, e.g., T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* 47, 85 (1950) (discussing the “rapidly developing concept of the rights of citizenship on the structure of social inequality”).

¹⁹ See, e.g., Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 *ETHICS* 352, 353 (1994) (describing one meaning of citizenship as “‘citizenship-as-desirable-activity,’ where the extent and quality of one's citizenship is a function of one's participation in that community”).

²⁰ See, e.g., Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. REV.* 1161, 1191 (2008) (arguing that “work functions as an important pathway to citizenship as a form of belonging”).

²¹ See, e.g., JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 2 (1991) (“[C]itizenship in America has never been just a matter of agency and empowerment, but also of social standing as well.”).

²² See, e.g., Kymlicka & Norman, *supra* note 19, at 353 (calling for “‘a theory of citizenship’ that focuses on the identity . . . of individual citizens”).

citizenship—a single peak or valley in the landscape—I explore the relationship between citizenship rules and the substance of citizenship itself—the broader geography of the landscape. This is not to say that individual rules and aspects of citizenship are not worthwhile units of analysis. They are. But a more holistic understanding of citizenship can give greater context and nuance to the details of citizenship.²³ Here, I examine the coexistence of seemingly dissonant citizenship rules to help illuminate the nature of citizenship and its relationship to notions of membership and belonging.

In this Article, I advance existing commentary on citizenship in two ways. First, I reconceptualize citizenship by disentangling “formal citizenship,” the government-issued legal status, from more abstract notions of membership and belonging, which I call “substantive citizenship.” I argue that, though formal citizenship and substantive citizenship are inextricably tied, they are not synonymous and need not be.²⁴ Second, I offer a typology that explains how formal citizenship and substantive citizenship relate to each other. This, in turn, allows formal citizenship to emerge as a dynamic trajectory (rather than a static condition) that can promote, facilitate, and preserve an individual’s development of substantive citizenship. In that sense, formal citizenship can be a culmination of an individual’s development of substantive citizenship or a catalyst of that development.

To achieve these purposes, my Article proceeds in four parts. In Part II, below, I begin by discussing the concept of membership and argue that legal rights and benefits can be thought of as the privileges of certain types of membership. This preliminary discussion of membership contextualizes Part III’s description of citizenship, generally, and U.S. citizenship law. There, I argue that citizenship in the United States appears, at first glance, to be distributed in a paradoxical fashion and against well-accepted norms of distributive justice.

In Part IV, I argue that the apparent paradox of equal citizenship distributed on unequal terms stems from an inadequate understanding of citizenship. I argue that formal citizenship—the legal status—must be understood as separate and distinct from substantive citizenship—a more abstract sense of membership and belonging. Further, I introduce a typology that categorizes the various ways that formal citizenship can relate to substantive citizenship. In particular, I highlight the transformative power of formal citizenship. By conferring citizenship to an individual, the state provides rights, privileges, and benefits that, in turn, help the individual develop substantive citizenship.

²³ Jennifer Gordon and R.A. Lenhardt have described the balkanization of citizenship scholarship: “Because ‘citizenship’ is used to mean so many things, explorations of citizenship in different fields may run on parallel tracks, never intersecting, even though each set of analyses might benefit greatly from interaction with others.” Gordon & Lenhardt, *supra* note 13, at 2494. In this Article, I help overcome this “balkanization,” not by directly connecting any particular tracks of scholarship, but by constructing a large-scale framework that accommodates and undergirds many tracks.

²⁴ Using terms from citizenship theory, I might recharacterize this: the thin conception of citizenship—the formal legal label—is not synonymous with a thick conception of citizenship as a more substantive view of citizenship as activity or identity.

Part V illustrates the value of this typology by translating several important contemporary debates about citizenship into the framework proposed in this Article. While the typology advanced in this Article has application outside of the United States—in fact, I use examples from outside the United States to help illustrate the typology—I limit myself to U.S.-specific examples in this Part. First, I highlight how an understanding of the various ways in which formal citizenship relates to substantive citizenship can inform and give substance to current and historical debates about the distribution of citizenship, including those surrounding the DREAM Act and proposals to withhold citizenship from the U.S.-born children of undocumented immigrants. In Part VI, I offer some brief conclusions and questions for the future.

II. MEMBERSHIP

Basic notions of membership are a rich and driving force of individual and group identity, the distribution of rights, and the imposition of burdens and responsibilities.²⁵ By membership, I mean the abstract—but intuitive—notion of belonging.²⁶ On the most basic level, we are members of families, communities, cultures, and churches. More mundane examples include membership in fitness clubs, farming co-ops, and book clubs. In all these cases, membership suggests a sense of belonging that often shapes individuals' identity.

In addition, membership secures privileges that are unavailable to nonmembers. That is what ultimately makes membership desirable. Membership in a fitness club, for example, guarantees use of the club's health and fitness equipment. Farming co-op members may have access to fresh produce each week, and book club members enjoy camaraderie and stimulating discussion of books. But these benefits are not free; membership also entails obligation. Whether it is by paying dues, working on the co-op farm, or hosting book-club gatherings, members undertake some obligation.

In all of the examples mentioned above, the membership entity must make decisions about who may be a member and who remains a nonmember. A fitness club may limit membership to individuals who show a willingness and ability to pay for one year of membership. This helps the fitness club ensure that it can continue to offer membership benefits to all its members for the coming year. A farming co-op may select individuals with farming experience or who own farming equipment. This helps the co-op maximize the possibility that it will produce fresh produce for all its members. A sports team may select individuals who demonstrate skill in the sport. This allows the team the best chance to engage in competitive matches—one of the very benefits of membership.

²⁵ PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 151 (2008) (“All communities set terms for membership.”).

²⁶ Elsewhere, I have written extensively about notions of membership and belonging. My discussion here tracks and echoes these prior writings. See, e.g., D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 824 (2010).

These examples highlight an intuitive idea: membership entities logically select members based on the substance of the “club” at issue. This might take one of many forms: a membership entity might make membership decisions based on individuals’ ability to bear the responsibilities of membership, a common interest with other members, or a common goal. It would seem absurd and unjust for the fitness club to offer membership based on musical ability, the farming co-op to select members based on applicants’ fashion preferences, or for the book club to base its decisions on shoe size.

The concept of membership extends beyond the types of examples mentioned above. Indeed, legal rights can be thought of as benefits of membership. Whenever a state distributes a good—or, in legal parlance, a right—the state sorts members from nonmembers. When a state issues a driver’s license, for example, it essentially admits that person as a “member” of an abstract driving “club.” We would expect the state to select its drivers based on criteria that relate to the responsibilities the driver will undertake and the benefits that the driver will enjoy. It comes as no surprise, then, that a state limits membership in this “club” to individuals who can properly see roadside signs and understand and obey traffic laws. Such an individual is likely to help keep the roads safe, a benefit that all license holders enjoy. We would instinctively reject a rule that issued driver’s licenses to individuals based on wealth, cooking abilities, or hobbies.

These principles of membership coincide with Michael Walzer’s theory of distributive justice—that every social good should be distributed to individuals based on criteria that relate to the very social good being distributed.²⁷ In this state of complex equality, the distribution of a good is “just or unjust relative to the social meanings of the goods at stake.”²⁸ A distribution of a good based on criteria that are relevant to a different social good would constitute an unjust distribution. “Every social good or set of goods constitutes, as it were, a distributive sphere within which only certain criteria and arrangements are appropriate.”²⁹ Each good is distributed in its own “sphere of justice.”³⁰

III. CITIZENSHIP AND MEMBERSHIP

The state’s distribution of citizenship is a paradigmatic exercise in sorting members from nonmembers. Members acquire access to a suite of rights and privileges³¹ that are exclusively reserved for citizens—the benefits of membership

²⁷ See WALZER, *supra* note 7, at 20 (“No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x.”); see also BERNARD WILLIAMS, PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956–1972, at 248 (1973) (“[O]ne might hope for a society in which there existed both a fair, rational, and appropriate distribution of these goods . . .”).

²⁸ WALZER, *supra* note 7, at 9.

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ In this Article, I often refer to citizenship rights, privileges, and benefits. I use these to refer generically to the state-guaranteed advantages of citizenship. Others have undertaken

in the “club.” In a Walzerian world, citizenship would be distributed to individuals who somehow demonstrate qualities or characteristics that relate to the substance of citizenship. This might take the form of distributing citizenship to individuals who demonstrate the ability to take on the obligations and responsibilities of citizenship. Or citizenship might be distributed to individuals who share a common quality or characteristic. Ultimately, the criteria would depend on the substantive meaning of citizenship in that state.

Even without defining the substantive meaning of citizenship in the United States, its rules are puzzling. The coexistence of separate rules providing citizenship based on entirely different criteria seems to pose a problem for the principles of membership advocated here and elsewhere. What is it about birth within the U.S. territory (*jus soli*), birth to U.S. citizen parents (*jus sanguinis*), or the fulfillment of a list of language, morality, civics, and other requirements (naturalization) that qualify individuals for the very same citizenship? The three approaches to citizenship appear to produce results that are at odds with each other. Each rule may produce citizens that could not have qualified and would never qualify under either of the remaining rules. Yet the law behaves as though citizens are identically qualified in that it offers each individual an identical package of rights and obligations.

In this Part, I explore this puzzle in detail. Here, I discuss the concept of citizenship, both abstractly and with reference to U.S. law, to more fully explore the dissonance in U.S. citizenship law and offer some preliminary possibilities that explain this dissonance. This sets the stage for Part IV, which offers a reconceptualization of citizenship that helps explain and even legitimize that dissonance.

A. Citizenship in Multiple Dimensions

Perhaps because of its close association with abstract notions of belonging, the term “citizenship” can refer to many different concepts.³² Commentators have, for instance, discussed citizenship as social standing,³³ citizenship as participation,³⁴

a more nuanced categorization of types of citizenship rights, but such distinctions are not necessary in the analysis here. See Thomas Janoski & Brian Gran, *Political Citizenship: Foundations of Rights*, in HANDBOOK OF CITIZENSHIP STUDIES 13, 16 (Engin F. Isin & Bryan S. Turner eds., 2002) (describing Hohfeld’s theory of rights to distinguish between citizenship liberties, claims, powers, and immunities).

³² Gordon & Lenhardt, *supra* note 13, at 2494 (“Because citizenship has so many dimensions, it is important to be precise about which dimensions are under discussion at any given moment.”).

³³ SHKLAR, *supra* note 21, at 2.

³⁴ *Id.* at 3.

citizenship as rights,³⁵ citizenship as identity,³⁶ and citizenship as status,³⁷ among other things. These various dimensions of citizenship might be grouped into two broad categories: formal and substantive citizenship.³⁸

1. *Formal Citizenship*

By formal citizenship, I refer to the dimensions of citizenship controlled by the state and administered through the law. The state exerts exclusive control over only two dimensions of citizenship. First, the state has exclusive control over the distribution of the formal, legal status of nationality.³⁹ This is not to say that the state completely ignores the contributions that citizens can or will make, citizens' sense of identity, the social standing that citizenship brings, or any other facets of citizenship. In fact, as I will argue in Part IV, citizenship rules can help promote and incentivize other dimensions of citizenship. But the state cannot distribute any type of citizenship other than legal nationality, and individuals cannot exert power over the distribution of legal nationality. Second, the state has exclusive control over the legal rights that its citizens enjoy.⁴⁰ Again, this power may allow the state to influence other dimensions of citizenship, but the state does not have the power to unilaterally determine or create those other dimensions of citizenship. Rather, they are subject to a variety of forces ranging from individual choice to happenstance.

These state-centric dimensions of citizenship—the bestowal of citizenship in conjunction with the state's attachment of rights to that citizenship—make up formal citizenship.⁴¹ As discussed below, there is broad consensus on the normative qualities of the formal legal concept of citizenship. On the most basic level, formal citizenship should do at least two things: (a) guarantee a set of rights to its holders and (b) provide those rights equally to all citizens.

³⁵ See Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 452–53, 455–56 (2000) (distinguishing between citizenship as rights, legal status, political activity, and identity/solidarity).

³⁶ *See id.*

³⁷ *Id.*

³⁸ The distinction between formal citizenship and substantive citizenship overlaps but does not coincide with several other categorizations of citizenship. ENGIN F. ISIN & PATRICIA K. WOOD, *CITIZENSHIP & IDENTITY* 4–5 (1999) (dividing citizenship into “a set of practices (cultural, symbolic and economic) and a bundle of rights and duties (civil, political, and social)”).

³⁹ SHKLAR, *supra* note 21, at 3–4.

⁴⁰ Janoski & Gran, *supra* note 31, at 13 (“[C]itizenship rights are legislated by governmental decision-making bodies, promulgated by executive orders, or enacted and later enforced by legal decisions.”).

⁴¹ Rogers M. Smith, *Modern Citizenship*, in *HANDBOOK OF CITIZENSHIP STUDIES*, *supra* note 31, at 105, 105 (describing the modern conception of citizenship as bestowing nationality on individuals and guaranteeing basic rights).

(a) Rights

Formal citizenship's most recognizable feature and most widely recognized dimension is its guarantee of legal rights.⁴² Citizenship rights are featured in numerous commentaries on citizenship. T.H. Marshall, whose seminal work on citizenship became the starting point for subsequent citizenship scholarship, famously categorized citizenship rights into civil, social, and political.⁴³ While typologies vary, the normative model remains the same: citizenship has substance only if it secures rights.

In the United States, citizenship guarantees individuals the full suite of rights and benefits provided by the state. While many of these rights are also available to certain noncitizens, some are reserved exclusively for citizens.⁴⁴ Citizens, for instance, enjoy the exclusive right to vote,⁴⁵ the right to remain within the national territory indefinitely, the ability to enter and leave the United States on a preferred basis,⁴⁶ protection when the citizen is abroad,⁴⁷ access to welfare benefits on a preferred basis,⁴⁸ the ability to petition the government for the admission of

⁴² T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 12–13 (1990) (“[M]ost Americans would probably recognize the possession of political rights as the most significant difference between aliens and citizens.”); Janoski & Gran, *supra* note 31, at 13. (“Citizenship is grounded in the guarantee of legal and political protections from raw coercive power . . .”).

⁴³ Marshall defined civil citizenship as “the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice.” MARSHALL, *supra* note 18, at 10. He defined political citizenship and the right to participate in the political processes and social citizenship as “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civili[z]ed being according to the standards prevailing in the society.” *Id.* at 11. Some of these are not necessarily accurately described as the rights of formal citizenship in the U.S. because those rights are not exclusive to citizens in the U.S.

⁴⁴ For an argument that U.S. citizenship rights are only minimal, see SPIRO, *supra* note 25, at 81 (“[C]itizenship makes very little difference. What the state extracts from you and what it owes you are minimally contingent on citizenship status. Citizens are privileged in only a few dwindling contexts.”); see also Peter H. Schuck, *Liberal Citizenship*, in HANDBOOK OF CITIZENSHIP STUDIES, *supra* note 31, at 131, 139 (“[A]lmost all of the rights of US citizens are also enjoyed by legal resident aliens.”).

⁴⁵ For an account of the historical U.S. practice of allowing noncitizens to vote, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 33–40 (2000) (discussing history of noncitizen voting in United States).

⁴⁶ T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 119, 119 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000) (“Other benefits accompany citizenship, such as eligibility for a passport, the right to not be deported, and the ability to seek protection by their home government when traveling in a foreign country.”).

⁴⁷ *Id.*

⁴⁸ *Id.*

noncitizen relatives,⁴⁹ and more. It is the guarantee of rights unavailable to others—its very exclusivity—that helps make citizenship desirable and socially consequential.⁵⁰

Before moving on to the second universal feature of citizenship, it is worth noting that the state also has exclusive control over the imposition of citizenship responsibilities and obligations.⁵¹ Public rhetoric often talks of “the rights and obligations of citizenship.” This is the corollary to the state’s exclusive power to secure rights. However, modern citizenship systems impose relatively few burdens. Among those, some states subject citizens to compulsory voting requirements,⁵² mandatory military service,⁵³ and burdensome extraterritorial taxation,⁵⁴ but U.S. citizenship carries relatively few legal obligations.⁵⁵ Though there is a sociocultural expectation that good citizens will vote, voting is not required in the United States, and voter turnout is often disappointing.⁵⁶ While jury duty, on the other hand, is

⁴⁹ I.N.A. § 201(a), 8 U.S.C. § 1151 (2012) (stating that while legal permanent residents have the right to petition for noncitizen spouses and unmarried children, citizens may also petition for their noncitizen parents, married children (and their spouses and children under twenty-one), and siblings (and their spouses and children under twenty-one)).

⁵⁰ Justice Byron White justified the exclusion of aliens from access to certain rights on this basis: “The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition.” *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).

⁵¹ See generally CHRISTOPHER HEATH WELLMAN, *LIBERAL RIGHTS AND RESPONSIBILITIES: ESSAYS ON CITIZENSHIP AND SOVEREIGNTY 1* (Oxford Press 2014).

⁵² For an examination of Australia’s compulsory voting system, see M. Mackerras & I. McAllister, *Compulsory Voting, Party Stability and Electoral Advantage in Australia*, 18 *ELECTORAL STUD.* 217, 223–24 (1999). For an analysis of Brazil’s compulsory voting requirement, see Timothy J. Power & J. Timmons Roberts, *Compulsory Voting, Invalid Ballots, and Abstention in Brazil*, 48 *POL. RES. Q.* 795, 797–98 (1995).

⁵³ Israel, Brazil, and Finland require compulsory military service. See *The World Factbook*, CENT. INTELLIGENCE AGENCY, www.cia.gov/library/publications/the-world-factbook/fields/2024.html [<https://perma.cc/5EXA-JM9S>] (last visited May 1, 2016); see also Kari Laitinen, *National or International? Contending Discourses on Finnish Conscription*, in *THE CHANGING FACE OF EUROPEAN CONSCRIPTION* 41, 41 (Pertti Joenniemi ed., 2006) (discussing how Finnish conscription contains stronger mythical elements compared with other Nordic countries); Hanne Eggen Røislien, *Religion and Military Conscription: The Case of the Israel Defense Forces (IDF)*, 39 *ARMED FORCES & SOC’Y* 213, 216–18 (2012) (discussing how the Israel Defense Force operates as a conscript army and drafts its individual members).

⁵⁴ China has worldwide taxation requirements for citizens, which it plans to enforce more strictly in the future. See Keith Bradsher, *China Wants Taxes Paid by Citizens Living Afar*, N.Y. TIMES (Jan. 7, 2015) (on file with the Utah Law Review), <http://www.nytimes.com/2015/01/08/business/international/china-starts-enforcing-tax-law-for-citizens-working-abroad.html>.

⁵⁵ Schuck, *supra* note 44, at 131.

⁵⁶ See Editorial, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES (Nov. 11, 2014) (on file with the Utah Law Review), <http://www.nytimes.com/2014/11/12/opinion/the-worst-voter-turnout-in-72-years.html>.

mandatory, the law provides ample opportunities for avoiding it.⁵⁷ The United States does require male citizens to register for selective service in the military, but this requirement is not tied exclusively to citizenship.⁵⁸ Beyond male citizens, the requirement extends to all permanently residing males, including legal permanent residents and undocumented immigrants, who meet specified criteria.⁵⁹ U.S. citizenship, then, is not particularly burdensome. This rights-heavy model is typical in modern states.

(b) *Equality*

Beyond guaranteeing rights, however, citizenship should guarantee them on an equal basis.⁶⁰ As Rogers Brubaker explained, citizens exercise their rights in a “region of legal equality”⁶¹ such that all citizens are entitled to the same rights and subject to the same obligations on the same terms.⁶² Regardless of race, social class, education, wealth, and beliefs, a citizen is a citizen and must be treated as such under the law.⁶³ This holds generally true in the United States: formally, citizens have equal access to rights. More precisely, citizens are entitled to rights on the same terms. This principle is embedded in the U.S. Constitution and is a hallmark of the U.S. civic ideal. Among other things, citizens may vote, remain in the United States,

⁵⁷ For a historical account of the details and failure of compulsory jury service in the United States, see Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2673–75 (1996).

⁵⁸ See SELECTIVE SERV. SYS., SELECTIVE SERVICE—WHO MUST REGISTER, <https://www.sss.gov/portals/0/PDFs/WhoMustRegisterChart.pdf> [<https://perma.cc/K6KB-RLMU>] (last visited May 1, 2016).

⁵⁹ See *id.*

⁶⁰ Rogers Brubaker identified six membership norms of citizenship. William Rogers Brubaker, *Immigration, Citizenship, and the Nation-State in France and Germany: A Comparative Historical Analysis*, 5 INT’L SOC. 379, 380 (1990). Under his model, citizenship “should be egalitarian, sacred, national, democratic, unique and socially consequential.” *Id.*; see also MARSHALL, *supra* note 18, at 28–29 (“All who possess the status [of citizenship] are equal with respect to the rights and duties with which the status is endowed.”).

⁶¹ ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 21 (1992); Kymlicka & Norman, *supra* note 19, at 370 (“On the orthodox view, citizenship is, by definition, a matter of treating people as individuals with equal rights under the law. This is what distinguishes democratic citizenship from feudal and other premodern views that determined people’s political status by their religious, ethnic, or class membership.”); see also MARSHALL, *supra* note 18, at 8–10 (discussing the effects of class distinctions on citizenship and citizens’ participation in society).

⁶² See Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 565, 568 (2006) (“Equality among the citizenry is not only a deeply rooted component of citizenship literature but is also a basis for the citizenship ideal.” (citation omitted)).

⁶³ This principle is sometimes described not as equality of citizenship but as protection of minorities. That is, equality is preserved specifically by “protecting ‘the few’ who have little power . . . who need shelter from the tyranny of ‘the many’ and/or elites.” Janoski & Gran, *supra* note 31, at 13.

and access welfare benefits on the same terms without regard to race, culture, religion, or social class.

This is not to say that all U.S. citizens have unencumbered access to all the same rights. Scholars have documented the myriad ways in which U.S. citizens who are members of minority groups experience, as a matter of practical reality, limited citizenship rights.⁶⁴ The resulting second-class citizenship is very real and poses a significant problem to the liberal democratic ideal. But the creation of second-class citizenship cannot be explicitly embedded into the structure of the state's distribution of citizenship rights under well-accepted normative models of citizenship. Indeed, in the United States, second-class citizenship is not a feature of citizenship, but largely a by-product of inappropriate and often illegal practices and cultural biases. For purposes of this Article, I am interested in the state's express guarantees of rights rather than de facto experienced rights.

In a few instances, U.S. law does make express distinctions among citizens that result in some citizens having fewer rights. Equal protection jurisprudence exists precisely to delineate between constitutional and unconstitutional ways in which the government may distinguish between individuals.⁶⁵ The Supreme Court has found some distinctions between classes of citizens constitutional. For example, the Court has declined to strike down provisions that make convicted felons ineligible to vote in elections.⁶⁶ This might appear to be inconsistent with the "region of legal equality" of the universally accepted normative model for citizenship. After all, one class of citizens—convicted felons—has restricted access to one of the rights attached to citizenship. Indeed, several scholars have criticized this aspect of current U.S. voting laws.⁶⁷ But this restriction could also be characterized as a feature of an equal citizenship regime in that all citizens are subject to this prohibition *on the same*

⁶⁴ See, e.g., Aleinikoff, *supra* note 4, at 1113–15; Bartlett, *supra* note 4, at 1; Johnson, *An Essay on Immigration Politics*, *supra* note 4, at 629–30.

⁶⁵ For an interesting article exploring the meaning of "similarly situated" in Equal Protection jurisprudence, see Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 581 (2011); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) ("There is hardly a law on the books that does not affect some people differently from others."); *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) ("The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.").

⁶⁶ See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding felon disenfranchisement laws).

⁶⁷ See Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 405 (2012) (demonstrating the factors that inhibit convicted felons' access to voting rights, including "[c]lass and race-based stigma, collateral consequences, onerous re-enfranchisement requirements, and burgeoning carceral debt"); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1048–52 (questioning the liberal and republican justifications for disenfranchisement of convicted felons).

terms.⁶⁸ Importantly for this Article, these prohibitions do not apply differently to citizens depending on the method they acquired citizenship.

In fact, I am aware of only a few rights or benefits of U.S. citizenship that are legally restricted based on the method of acquiring citizenship.⁶⁹ Two important ones come to mind.⁷⁰ First, the U.S. Constitution expressly limits eligibility for the presidency to “natural born citizens.”⁷¹ Commentators have not always agreed on

⁶⁸ This is not to say that I support disenfranchisement of convicted citizens. In fact, I would argue that denials of citizenship rights to convicted citizens only serves to alienate and further exclude them in a way that impedes their development of the substantive citizenship described in this Article. That is, felon disenfranchisement laws arguably do not adequately account for the prescriptive role of formal citizenship described in Part IV.

⁶⁹ Arguably, naturalized and birthright citizens could be described as having unequal access to rights by virtue of the differing evidence requirements each will produce to prove citizenship status as a prerequisite to exercising citizenship rights. Individuals who are citizens by virtue of birth in U.S. territory may show a birth certificate to prove citizenship while others may need to produce a certificate of citizenship or a passport as proof of citizenship. See Fatma Marouf, *The Hunt for Noncitizen Voters*, 65 STAN. L. REV. ONLINE 66, 66 (2012). Here I also note that there are several examples of states discriminating against certain U.S.-born citizens. Some states, for example, have denied or continue to deny in-state resident college tuition rates to U.S. citizens who are the children of undocumented immigrants. See Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 109 (2008) (documenting state efforts to deny in-state resident college tuition rates to the children of undocumented immigrants, including those born in the U.S.). Texas has prevented U.S.-born children access to their birth certificates by imposing burdensome identification requirements—ones that undocumented immigrants have difficulty meeting—for a parent wishing to obtain the certificate. See Manny Fernandez, *Immigrants Fight Texas’ Birth Certificate Rules*, N.Y. TIMES (Sept. 17, 2015) (on file with the Utah Law Review), <http://www.nytimes.com/2015/09/18/us/illegal-immigrant-birth-certificates.html>. At first, this might look like a distinction that is based on a method of acquiring citizenship. After all, states are discriminating against individuals who obtained citizenship by birth in the U.S. after their parents entered or remained in the United States without authorization. However, these distinctions do not distinguish among *jus soli*, *jus sanguinis*, and/or naturalization. They discriminate based on parents’ immigration status. These distinctions are reprehensible and face strong legal challenges, but they do not represent discrimination based on a method of acquiring citizenship.

⁷⁰ Other than the two mentioned in the text, I have encountered only one other circumstance in which the method of acquiring citizenship creates differing legal rights or benefits. The tax code normally requires a U.S. citizen residing abroad to pay certain taxes upon renouncing U.S. citizenship. However, an individual who was born both a U.S. citizen and the citizen of another country—a birthright dual citizen—may avoid this exit tax. The effect of this distinction is to require all naturalized U.S. citizens to pay the exit tax upon expatriation, but require only some birthright citizens to pay that exit tax. See 26 U.S.C. § 877A (g)(1)(B)(i) (2015).

⁷¹ U.S. CONST. art. II, § 1, cl. 5; see *Schneider v. Rusk*, 377 U.S. 163, 165 (1964) (“We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the ‘natural born’ citizen is eligible to be President.”); *Knauer v.*

exactly who is included in this term, but there is broad consensus on who it excludes.⁷² Naturalized citizens are not natural born citizens and therefore cannot be elected to the presidency.⁷³ Second, naturalized citizens may lose citizenship on slightly different terms than their birthright citizen counterparts. The U.S. government may revoke a naturalized citizen's citizenship that was obtained through fraud or some other illegal act.⁷⁴ In essence, such denaturalization rules call into question the validity of naturalization and the legitimacy of the acquired citizenship.

2. Substantive Citizenship

Citizenship means more than just the state's guarantee of equal rights. The word "citizen" conjures notions of belonging, inclusion, and shared identity,⁷⁵ and scholars have described a more substantive—or "thick"—conception of citizenship.⁷⁶ In addition to its formal dimensions, citizenship has a "membership

United States, 328 U.S. 654, 658 (1946); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944); *Luria v. United States*, 231 U.S. 9, 22 (1913); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 *YALE L.J.* 881, 881 (1988) ("Despite its apparent simplicity, the natural-born citizen clause of the Constitution has never been completely understood. . . . It is . . . clear that persons born abroad of alien parents, who later become citizens by naturalization, do not [qualify]." (citations omitted)); see also Sarah Helene Duggin & Mary Beth Collins, 'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It, 85 *B.U. L. REV.* 53, 54–55 (2005) (discussing the ambiguity of the "natural born citizen" clause); Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 *GONZ. L. REV.* 349, 349 (2001) (analyzing the history and disagreements over the meaning of the "natural born citizen" provision).

⁷² See *supra* note 71 and accompanying text; see also Duggin & Collins, *supra* note 71, at 56 n.11 (indicating that "individuals born outside the United States who have no claim to United States citizenship other than *post-birth* naturalization . . . are barred from serving as President or Vice President."); Lohman, *supra* note 71, at 360 (stating that under English common law "any child born to an alien enemy father engaged in hostile occupation of British territory was not a natural-born British subject . . . [and] any child born to an alien father who was an ambassador or diplomat of a foreign state was also excluded." (citation omitted)).

⁷³ See *Schneider*, 377 U.S. at 165.

⁷⁴ See Immigration and Nationality Act § 340(a), (e), (j), 8 U.S.C. § 1451 (2012).

⁷⁵ D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 *BYU L. REV.* 1517, 1518, 1523.

⁷⁶ See, e.g., Diemut Bubeck, *Thin, Thick and Feminist Conception of Citizenship*, *CONTEMPORARY POL. STUD.* 461, 461–62 (1995) (defining thick citizenship as active engagement in the community and political life); Charles Tilly, *Citizenship, Identity and Social History*, in *CITIZENSHIP, IDENTITY AND SOCIAL HISTORY* 1, 8 (1996) ("Citizenship can then range from thin to thick: *thin* where it entails few transactions, rights and obligations; *thick* where it occupies a significant share of all transactions, rights and obligations sustained by state agents and people living under their jurisdiction."); Effie MacLachlan, The Graduate Sch. & Univ. Ctr. of the City of N.Y., Address at the ECSA Sixth Biennial International

facet”: “the sense of belonging and participation in the national community.”⁷⁷ This could take a number of forms, depending on a community’s understanding of membership in the national community.⁷⁸ It is in this “thick” conception of citizenship that a sense of shared identity, loyalty, responsibility, and contribution come into play.⁷⁹ When we talk about citizens, we often contemplate this “substantive citizenship” in addition to the more formal citizenship described above.

Substantive citizenship escapes precise description, both because it is an abstract concept and because it is country specific. States may have various ways of conceptualizing substantive citizenship. In some states, it might be strongly tied to cultural identity and language.⁸⁰ In other states, it might be linked to political ideals or religion.⁸¹ In the U.S., it may be a basic sense of shared political identity. It is important to note that this Article does not undertake a detailed description or normative model of substantive citizenship in the United States or in any other state. Such inquiries may be found elsewhere.⁸² This Article’s purpose is to create a

Conference: Who Cares?: Gender and Citizenship in the European Union 3 (June 2–5, 1999), http://aei.pitt.edu/2324/1/002596_1.PDF [<https://perma.cc/86WG-7V3T>] (arguing that thick citizenship indicates active political and community engagement and the extent of transactions, rights, and obligations).

⁷⁷ Román, *supra* note 62, at 572; *see* Kymlicka & Norman, *supra* note 19, at 369 (“Citizenship is not just a certain status, defined by a set of rights and responsibilities. It is also an identity, an expression of one’s membership in a political community.”); *see also* DEREK HEATER, *CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION* 187 (3d ed. 2004) (“Citizenship is more than a label. He who has no sense of a civic bond with his fellows or of some responsibility for civic welfare is not a true citizen whatever his legal status. Identity and virtue invest the concept of citizenship with power.”).

⁷⁸ *See* HEATER, *supra* note 77, at 187 (“The interests which unite a group are often cultural—a sense of tradition, ethnicity or way of life.”); WALZER, *supra* note 7, at 52 (arguing that current members have a right to decide the criteria for admission to membership).

⁷⁹ Kymlicka & Norman, *supra* note 19, at 353; William Safran, *Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community*, 18 INT’L POL. SCI. REV. 313, 313 (1997) (“In a more general sense, [citizenship] also refers to a person’s moral quality as exemplified by his or her behavior . . .”).

⁸⁰ JAMES P. LYNCH & RITA J. SIMON, *IMMIGRATION THE WORLD OVER: STATUTES, POLICIES, AND PRACTICES* 213–15 (2003).

⁸¹ Some commentators, for example, have characterized U.S. citizenship (or, more specifically for purposes of this paper, substantive citizenship) with reference to political ideals. *See, e.g.*, Safran, *supra* note 79, at 318 (“‘Americanness’ was defined in terms of a commitment to democracy, equality, and other values, as anchored in the U.S. Constitution . . .”).

⁸² *See, e.g.*, WALZER, *supra* note 7, at 52 (discussing the meaning of membership in political communities and the differences between immigration and naturalization); Bosniak, *supra* note 35, at 449 (questioning whether citizenship as a concept can only ever be national); Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2449 (2007) (discussing the concept of national citizenship in the alienage setting); Matthew Lister,

framework that applies to many different conceptions of substantive citizenship and many different types of citizenship rules. Here, I analyze the ways in which formal citizenship may relate to substantive citizenship, whatever its content and contours, particularly in a system of coexisting citizenship rules.

Regardless of the precise contours of the state's substantive citizenship, the assumption is that citizens share or ought to share some fundamental quality or identity that affects

how they view potentially competing forms of national, regional, ethnic, or religious identities; their ability to tolerate and work together with others who are different from themselves; their desire to participate in the political process in order to promote the public good and hold political authorities accountable; their willingness to show self-restraint and exercise personal responsibility in their economic demands and in personal choices which affect their health and environment.⁸³

In sum, substantive citizenship is a sense of belonging and shared identity that binds individual members of the state together. Whether that sense of belonging is based solely on a shared commitment to a democratic ideal, a strong sense of shared history, or an attachment to a shared territory, substantive citizenship ideally gives shape to the collective citizenry.

B. U.S. Citizenship Law: Unequal Paths to Equal Rights?

Though citizens exercise equal rights and—at least ideally—share a sense of belonging and membership, they do not obtain citizenship in the same way. To the contrary, states employ a variety of rules to distinguish citizens from noncitizens. In fact, multiple paths to citizenship, each with very different requirements, may coexist within a single state. In virtually all states, birthright citizenship rules have naturalization counterparts. Such is the case in the United States. Some are citizens by virtue of birth within U.S. territory⁸⁴ or birth to U.S. citizen parents,⁸⁵ and others become citizens after fulfilling naturalization requirements.⁸⁶ Though all these paths rely on different criteria, they confer the very same citizenship and the very same rights on those who satisfy their criteria.

Citizenship, in the Immigration Context, 70 MD. L. REV. 175, 175 (2010) (investigating what substantive citizenship means in the context of children).

⁸³ Kymlicka & Norman, *supra* note 19, at 352–53.

⁸⁴ U.S. CONST. amend. XIV, § 1.

⁸⁵ See I.N.A. §§ 301, 309, 8 U.S.C. §§ 1401, 1409 (2012).

⁸⁶ See I.N.A. § 316, 8 U.S.C. § 1423.

I. U.S. Citizenship Law: A Triad

U.S. citizenship law provides three main avenues for the acquisition of citizenship: birthright citizenship based on birth in the United States, naturalization, and birthright citizenship based on birth to a U.S. citizen parent.

(a) Territorial Birthright Citizenship

The Fourteenth Amendment provides that “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States”⁸⁷ Some commentators have suggested that the requirement that an individual be “subject to the jurisdiction” of the United States at birth imposes additional requirements besides mere birth within the territory.⁸⁸ But these arguments have not gained traction; the Fourteenth Amendment’s citizenship clause has been interpreted to require the bestowal of citizenship on every individual born within United States territory.⁸⁹ The rule is strictly territorial in nature. Thus under even a single rule, the U.S. version of *jus soli*—territorial birthright citizenship—a wide spectrum of individuals become citizens of the United States.

(b) Naturalization

The Constitution also contemplates a path to citizenship after birth, and Article I specifically assigns the power to regulate naturalization to Congress.⁹⁰ The Immigration and Nationality Act details the requirements.⁹¹ Broadly speaking,⁹² an individual may apply for naturalization by showing that he has resided in the United States for five years, has been physically present in the United States for two and a half years, is of good moral character, is attached to the principles of the Constitution, has basic proficiency in the English language, and has a basic

⁸⁷ U.S. CONST. amend. XIV, § 1.

⁸⁸ See, e.g., SCHUCK & SMITH, *supra* note 10, at 116–19.

⁸⁹ Supreme Court dicta supports this view. *United States v. Wong Kim Ark*, 169 U.S. 649, 699, 705 (1898) (holding that a child born in the United States to Chinese nationals, who were ineligible to naturalize, was a U.S. citizen under the Fourteenth Amendment). Two universally accepted exceptions to the Fourteenth Amendment’s territorial birthright citizenship clause exist—neither the children of enemy aliens nor the children of diplomats are U.S. citizens despite being born on U.S. soil. See Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 AM. U. L. REV. 331, 338 n.30 (2010).

⁹⁰ U.S. CONST. art. I, § 8, cl. 4.

⁹¹ See I.N.A. § 316, 8 U.S.C. § 1423.

⁹² Some of the requirements of naturalization vary in certain instances. For example, spouses of U.S. citizens have a shorter residency requirement than others, and long-term residents may apply for naturalization without fulfilling the language, history, and civics requirement after reaching a certain age. See I.N.A. § 316, 8 U.S.C. §§ 1422–23, 1430.

understanding of U.S. history and civics.⁹³ If approved, the process culminates in a citizenship ceremony where the applicant takes an oath of allegiance to the United States.⁹⁴

(c) Birthright Citizenship Based on Parent's Citizenship

Rules granting citizenship to infants born outside of the United States to U.S. citizen parents form the third leg of the U.S. citizenship law triad. These rules allow for children to essentially inherit the citizenship of their parents. Though these rules can broadly be characterized as *jus sanguinis*, they do not rely entirely on the citizenship of the parent. Current citizenship rules provide for U.S. citizenship to foreign-born children of U.S. citizens only where the U.S. citizen parent has resided in or been physically present in the United States prior to the birth of the child.⁹⁵ The length of residence or physical presence required varies depending on whether the child is born in wedlock and on whether the U.S. citizen parent is the child's mother or father. A child born out of wedlock to a U.S. citizen mother, for example, is a U.S. citizen if the mother was physically present in the United States for at least one year prior to the birth of the child.⁹⁶ A child born to a married U.S. citizen father and noncitizen mother is a U.S. citizen only if the father has been physically present in the United States for at least five years, two of which were after the age of fifteen.⁹⁷ A child born to two U.S. citizen parents is a U.S. citizen if at least one of the parents had a residence of any length in the U.S. prior to the birth of the child.⁹⁸

⁹³ See I.N.A. § 316, 8 U.S.C. §§ 1422–23, 1427.

⁹⁴ See I.N.A. § 337, 8 U.S.C. § 1448 (requiring a naturalization applicant to take a public oath of allegiance).

⁹⁵ See I.N.A. § 301, 8 U.S.C. § 1401.

⁹⁶ See I.N.A. § 301, 8 U.S.C. § 1401.

⁹⁷ See I.N.A. § 301, 8 U.S.C. § 1401. An unwed U.S. citizen father must also satisfy a series of requirements that are inapplicable to mothers wishing to pass on citizenship to their children. Unwed fathers must establish a blood relationship with the child; agree, in writing, to financially support the child until age eighteen; and establish parentage in court, either through legitimation, a written and sworn acknowledgment of paternity, or court adjudication. I.N.A. § 309, 8 U.S.C. § 1409. The U.S. Supreme Court has upheld the constitutionality of the more burdensome requirements for fathers wishing to pass on U.S. citizenship to their children born out of wedlock, citing a legitimate interest in a “demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.” *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 64–65 (2001).

⁹⁸ U.S. law also provides a mechanism for noncitizen children to automatically become U.S. citizens under certain conditions. Noncitizen children who reside in the United States as legal permanent residents with at least one U.S. citizen parent automatically become U.S. citizens. See I.N.A. § 320, 8 U.S.C. § 1431. Noncitizen children who are temporarily admitted to the United States may apply for a certificate of citizenship if a U.S. citizen parent or grandparent has met certain U.S. residency requirements. See I.N.A. § 322, 8 U.S.C. § 1433. These rules affect children in many different situations. Under these rules, a child may

2. *The Citizenship Paradox*

“Laws of citizenship and immigration do more than regulate the entry and the status of non-citizens; they reveal much about how a nation conceives of itself.”⁹⁹ What, then, do U.S. citizenship rules tell us about how the United States conceives of itself? The variety of paths to citizenship results in a wide spectrum of citizens. Consider the following examples:

A is a two-day-old infant born in Ohio. Her parents are French immigrants living lawfully and permanently in the United States. Because A was born in the United States, she is a U.S. citizen.

B is a Vietnamese schoolteacher. When he became eligible for naturalization a few years ago, he applied. As part of the naturalization process, B had to demonstrate basic English proficiency, knowledge of U.S. history and civics, and five years of residence in the United States, among other things. Because he successfully completed the naturalization process, B acquired U.S. citizenship.

C is a five-year-old child living in Argentina. She was born in Argentina a year after her parents—both of them U.S. citizens—moved there to work at the foreign branch of a U.S.-based company. Because C’s parents are U.S. citizens who had a residence in the United States prior to C’s birth, C acquired U.S. citizenship at birth.

While the existence of multiple methods of acquiring the same right is interesting in and of itself, it is not unique. Other areas of law employ a similar structure. Individuals may acquire the “bundle of rights” associated with real property ownership, for instance, by formal transfer of title or through adverse

automatically become a U.S. citizen upon a parent’s naturalization. In addition, an adopted child who entered as a legal permanent resident automatically becomes a citizen upon establishing a residence in the United States with an adoptive U.S. citizen parent. These rules draw from U.S. *jus soli* and *jus sanguinis* rules in that they look to parentage and territorial presence in the United States. However, they confer citizenship after birth and therefore act much like categorical naturalization rules. Because these mechanisms depend on or mirror one of the three main forms of citizenship acquisition discussed in this Article, I do not discuss them separately.

⁹⁹ Daniel Kanstroom, *Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 YALE J. INT’L L. 155, 158 (1993) (citation omitted).

possession.¹⁰⁰ In many legal regimes, including a handful of U.S. states,¹⁰¹ the law recognizes a couple as married if an individual authorized by the state marries them through a process outlined by the law or if they openly cohabit for a certain number of years as spouses.¹⁰²

While many might object to some of these alternative methods of acquiring property rights and/or marriage rights, it is reasonably easy to articulate a common theme that runs through each system of disparate rules. Property law, the argument might go, ought to incentivize and protect individuals' improvement of land in a way that maximizes its utility.¹⁰³ By recognizing the ownership of an individual who paid money or other consideration for land, the law protects and coincides with that individual's vested interest in maximizing the benefit of that land.¹⁰⁴ Likewise, an individual who has been in possession of the land has a vested interest in its utility

¹⁰⁰ See 3 AM. JUR. 2D *Adverse Possession* § 1 (2013) (explaining that individuals may acquire the bundle of rights through adverse possession); 72 AM. JUR. 2D *Statute of Frauds* § 60 (2012) (explaining that individuals may acquire the bundle of rights through the statute of frauds).

¹⁰¹ Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and the District of Columbia still recognized common-law marriage as of 2012. COLO. REV. STAT. § 14-2-104 (2015); KAN. STAT. ANN. § 23-2502 (Supp. 2014); S.C. CODE ANN. § 20-1-100 (2006); TEX. FAM. CODE ANN. § 2.401 (West 2006); *Creel v. Creel*, 763 So. 2d 943, 946 (Ala. 2000); *Johnson v. Young*, 372 A.2d 992, 994 (D.C. 1977); *In re Marriage of Martin*, 681 N.W.2d 612, 617 (Iowa 2004); *In re Estate of Ober*, 62 P.3d 1114, 1115 (Mont. 2003); *In re Estate of Stinchcomb*, 674 P.2d 26, 28–29 (Okla. 1983) (per curiam); *DeMelo v. Zompa*, 844 A.2d 174, 177–78 (R.I. 2004) (per curiam). New Hampshire recognizes common-law marriage only at death. N.H. REV. STAT. ANN. § 457:39 (2006). Utah recognized common-law marriage by statute in 1987 in an effort to combat welfare fraud. UTAH CODE ANN. § 30-1-4.5 (West 2013).

¹⁰² See, e.g., UTAH CODE ANN. § 30-1-4.5 (stating that couples are legally and validly married if a court or administrative agency establishes a marriage based on ceremony or cohabitation).

¹⁰³ See Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 584–85 (2010) (describing various normative rationales for adverse possession as consistent with an overall goal of efficiency and fairness); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840–42 (1994) (describing and ultimately critiquing the “development model” of adverse possession: “Under the development model, adverse possession functions to facilitate the economic exploitation of land.”); see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 156 (1988) (noting that adverse possession tends to redistribute property to higher-valued uses); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 70 (3d ed. 1986) (explaining that a property has more utility if the adverse possessor keeps the property); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 61–62 (1987) (arguing that in the context of boundary disputes, particularly in urban areas, the adverse possessor places a higher value on the disputed land than does the record owner).

¹⁰⁴ Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 847–49 (2009).

and therefore is likely to improve it to maximize utility.¹⁰⁵ Similar reasoning might be applied in the context of marriage. If marriage helps further individual family members' economic and social well-being,¹⁰⁶ then that purpose can be achieved by allowing individuals to claim legal protections afforded by marriage in a formal legal ceremony or by bestowing those rights on individuals already living such an arrangement.

Citizenship rules operate in much the same way, but their commonality is much harder to discern than that of property acquisition and marriage rules. The hypothetical U.S. citizens above help illustrate this point. Two things are worth noting about them. First, it is difficult to identify a commonality among these individuals that would suggest they are equally qualified for citizenship. Though B, the Vietnamese schoolteacher, was required to demonstrate basic English proficiency and knowledge of U.S. history and civics, A, the Ohio-born baby, cannot speak at all and knows nothing of history and civics. In fact, there is no guarantee that A would ever be able to meet the same requirements that B met in order to be naturalized. The only thing that A and B seem to share, aside from their citizenship, is their residence in the United States. But they do not share this with C, who lives in Argentina. And there is no guarantee that C will ever set foot in the United States. All three individuals, however, are entitled to the same citizenship despite qualifying under different rules.

A second observation worth noting is that none of these hypotheticals is particularly controversial in the political realm. Few legislators or politicians would raise objections to any of these individuals acquiring citizenship or call into question the legitimacy of their citizenship. This is important. It helps illustrate the paradoxical nature of the rules. I have crafted these hypotheticals such that the individuals are sufficiently different to show that U.S. citizenship rules make citizens of very different individuals. But these hypothetical individuals are unlikely to trigger a visceral reaction against their citizenship. How can each of these individuals be legitimately entitled to citizenship despite their very different qualifications?¹⁰⁷

¹⁰⁵ For an argument that the uncertainty of adverse possession prior to actual settlement of title results in less efficiency and social utility, see generally Brown & Williams, *supra* note 103, at 583–88 (stating that adverse possession should be abrogated as a way of divesting owners of title because adverse possession is not the most fair and efficient outcome). For an argument that the utilitarian underpinnings of the adverse possession doctrine are not consistent with the modern need to protect the environment, see generally Sprankling, *supra* note 103, at 817 (exploring the relationship between adverse possession and environmental preservation).

¹⁰⁶ See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1637–38 (2007); Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 781–82 (2002).

¹⁰⁷ There are a number of other hypotheticals I could raise to illustrate the point that U.S. law distributes citizenship to a broad spectrum of individuals. In fact, the asymmetry between disparate citizenship rules becomes more pronounced if we consider other examples more likely to elicit controversy. Consider the following:

If we assume that U.S. citizenship rules do or should conform to intuitive principles of membership and Walzerian notions of distributive justice,¹⁰⁸ then the rules by which a state confers citizenship should somehow correspond to the essence of citizenship. More specifically, if citizenship confers the same rights and obligations on all citizens equally, we would expect citizenship rules to identify individuals who are equally desirable for citizenship. But the relationship between citizenship rules and the rights and obligations attached to citizenship is not obvious. Neither is the relationship between citizenship rules and the more substantive notion of belonging inherent in substantive citizenship obvious. What kinds of individuals are good candidates for citizenship, and do the state's citizenship rules adequately identify them? Do the requirements of naturalization guarantee an individual's sense of shared identity with other citizens? How does birth within national territory qualify infants for the same citizenship that naturalized citizens receive?

1. D is a thirty-five-year-old software engineer who was born in the United States while her mother, an Italian citizen, was on vacation in Florida. Six weeks later, D traveled to Italy with her mother. D has never returned to the United States. Because D was born in the United States, he is a U.S. citizen.

2. E is a child living in Afghanistan. He was born in Afghanistan to an unwed U.S. citizen mother. E's mother has never been in the United States except for a year she spent studying English there. Because E's mother is a U.S. citizen who spent at least one year in the United States, E is a U.S. citizen. This remains the case even if E's mother acquired citizenship in the same way E did.

3. F is a wealthy business owner. For the last five years, F has been spending half the year in his native Sweden and half the year in his vacation home in Maine. To eliminate the need for renewing permanent visas and to gain advantage under Swedish and U.S. tax laws, F naturalized. As a result, F is a U.S. citizen. F continues to split his time between the United States and Sweden.

These hypotheticals certainly highlight the variety of individuals that U.S. citizenship rules designate citizens. But they do not highlight the paradox of equal citizenship on unequal terms because they raise questions of legitimacy from some groups. That is, from some viewpoints, the paradox would simply be a result of bad rules that need to be fixed. I prefer to focus on hypotheticals that do not trigger calls for change in order to make some sense out of the current system. However, I believe that what we learn from these less controversial examples will help give structure to discussions about the more controversial examples.

¹⁰⁸ Interestingly, Walzer argues that all individuals within a state's territory must have access to citizenship. For Walzer, rules of immigration serve as the sorting mechanisms for political membership. Thus, the notion of political membership is tied, in the first instance, to immigration regulation: "The members of a political community have a collective right to shape the resident population—a right subject always to . . . the meaning of membership to the current members and the principle of mutual aid." WALZER, *supra* note 7, at 52. "Immigration, then, is both a matter of political choice and moral constraint. Naturalization, by contrast, is entirely constrained: every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship." *Id.* at 62.

3. *The Citizenship Paradox and Modern Citizenship Scholarship*

I believe that much academic commentary on citizenship results from the tensions inherent in the notion of unequal citizenship rules leading to equal citizenship. The literature on child citizenship, for example, attempts to reconcile children's formal citizenship—usually acquired under birthright citizenship rules—with their temporarily diminished capacities.¹⁰⁹ Many of the rights exclusive to citizenship are inaccessible to children. Children are legally ineligible to vote, serve on juries, or run for public office. Few argue that these rights should be available to children,¹¹⁰ and some have argued that children cannot be accurately described as citizens at all.¹¹¹ But some have affirmed children's citizenship and criticized the assumption that children are “citizens in the making”¹¹² rather than full citizens.¹¹³ These commentators call for expanded rights for children. Some, for example, have explored children's diminished citizenship rights in the immigration arena. While adult citizens may initiate the immigration process for relatives, child citizens may not.¹¹⁴ More concerning for these commentators is the de facto deportation of citizen children.¹¹⁵ Broadly speaking, the scholarship on citizen children highlights the reality that not all citizens are identically qualified to exercise citizenship rights and obligations despite being citizens.

Likewise, critiques of birthright citizenship are inherently rooted in the paradox of equal citizenship (and the resulting rights of citizenship) distributed on unequal

¹⁰⁹ TOM COCKBURN, *RETHINKING CHILDREN'S CITIZENSHIP 1* (2013) (“Perhaps, ‘children’s citizenship’ is a misnomer, as children are in some respects ‘not citizens’: they have not ‘come of age’ and consequently do not have many of the privileges (such as full voting rights) or the obligations (such as full financial responsibility) that adults hold.”).

¹¹⁰ Roche, *supra* note 14, at 487 (“Save for the ‘child liberationists’, no one is arguing that children are identical to adults or that they should enjoy exactly the same bundle of civil and political rights as adults.” (citation omitted)); *see also* Cohen, *supra* note 15, at 221 (arguing for a reconceptualization of children's citizenship to more adequately reflect their diminished capacities and protect important rights). *But see* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).

¹¹¹ John Locke, for example, argued that a government based on consent could not bestow citizenship on children. Children, he claimed, are not born into the compact. Under this view, children may not develop a national identity until adulthood. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 300–01 (Division of Gryphon ed., The Legal Classics Library 1994) (1690).

¹¹² *See* Lister, *supra* note 14, at 696 (quoting MARSHALL, *supra* note 18, at 25).

¹¹³ Bhabha, *supra* note 14, at 56 (“There seems to be an assumption that children's disabilities as citizens are self-evidently justified, a consequence of the fact that they are citizens in the making, ‘future’ rather than actual citizens.”).

¹¹⁴ *Id.* (describing children's diminished ability to petition for noncitizen relatives).

¹¹⁵ *Id.* at 54 (describing circumstances under which citizen children are constructively deported from the state due to a parent's deportability).

terms. Some commentators, for instance, have claimed that citizenship based on birth within the state's territory makes an arbitrary and unjust distinction between individuals who are equally desirable as members of the polity, but were born on different sides of the border.¹¹⁶ Some question whether birth within the national territory, by itself, is sufficiently related to the rights and responsibilities of citizenship to justify the bestowal of citizenship. Thus, under these arguments, birthright citizenship based on birth within U.S. territory is, at worst, a tool of exclusion that disenfranchises underprivileged groups¹¹⁷ or, at best, a relic of history that rewards the lucky and incentivizes unauthorized immigration.¹¹⁸ Scholars have proposed solutions that range from requiring individuals born in the United States to confirm citizenship as adults through a process resembling naturalization¹¹⁹ to limiting birthright citizenship to those born to U.S. citizen parents.¹²⁰ Underlying these solutions is a desire to mitigate the effect of a single citizenship rule that appears to sometimes result in citizenship for an individual who is not similar enough to those who obtain citizenship through other citizenship rules.

Even broader, more abstract, discussions of citizenship tend to focus on particular facets of citizenship. Scholars, for instance, have explored citizenship as

¹¹⁶ See generally Shachar, *supra* note 7, at 369 (arguing that birthright citizenship is an unjust system of inherited property insufficiently tied to a principled notion of political membership); Angela Kim, Recent Development, *Development in the Legislative Branch: The Growing Movement to Redefine Birthright Citizenship and the Fourteenth Amendment*, 25 GEO. IMMIGR. L.J. 757, 757 (2011) (discussing the Fourteenth Amendment's establishment of birthright citizenship); William M. Stevens, Comment, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 389 (2008) (suggesting that the birthright citizenship clause be modified to apply to only children of citizens or permanent residents).

¹¹⁷ See SHKLAR, *supra* note 21, at 3.

¹¹⁸ SCHUCK & SMITH, *supra* note 10, at 9–10; Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 497 (1999); Stevens, *supra* note 116, at 349.

¹¹⁹ See SCHUCK & SMITH, *supra* note 10, at 117; see also Joy Pepi Wiesenfeld, Note, *The Conditional Nature of Derivative Citizenship*, 8 U.C. DAVIS L. REV. 345, 357–58 (1975) (recommending the requirement of an oath of allegiance to the United States upon the age of majority for children wishing to keep citizenship inherited from U.S. citizen parents).

¹²⁰ See, e.g., Kim, *supra* note 116, at 757; Stevens, *supra* note 116, at 383–84; see also Birthright Citizenship Act of 2013, H.R. 140, 113th Cong. § 2 (2013) (proposing to amend section 301 of the Immigration and Nationality Act to clarify who qualifies for birthright citizenship); Birthright Citizenship Act of 2011, S. 723, 112th Cong. § 2 (2011) (same); Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. § 2 (2009) (same); H.R. 126, 111th Cong. § 2 (2009) (proposing to amend section 301 of the Immigration and Nationality Act by limiting birthright citizenship to persons with a legal resident mother); Citizenship Reform Act of 2007, H.R. 133, 110th Cong. §§ 2, 3 (2007) (proposing to amend section 301 of the Immigration and Nationality Act by “denying citizenship at birth for children of non-citizen, non-permanent resident aliens”).

rights,¹²¹ citizenship as participation,¹²² citizenship as work,¹²³ citizenship as standing,¹²⁴ and citizenship as identity.¹²⁵ Each of these illuminates an important

¹²¹ MARSHALL, *supra* note 18, at 8–9; T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1484–88 (1986); Bosniak, *supra* note 35, at 463–70 (addressing citizenship as rights and stating that “[i]n twentieth-century social theory, the notion of citizenship has been most closely associated with the enjoyment of certain important rights and entitlements”).

¹²² See Bosniak, *supra* note 35, at 470–79 (addressing citizenship as political activity and stating that “[a]s political theorists use the term, ‘citizenship’ most commonly denotes active engagement in the life of the political community”); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 9 (1977) (arguing that, to the ancient Greeks, “[t]o be a citizen is not merely to be a consumer of rights, but to be responsible to other members of the community”); Kymlicka & Norman, *supra* note 19, at 353 (describing one meaning of citizenship as “citizenship-as-desirable-activity, where the extent and quality of one’s citizenship is a function of one’s participation in that community”); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 965–69 (2005) (exploring the link between citizenship and political participation).

¹²³ See, e.g., Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT’L L. & COM. REG. 497, 501 (2002); James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103, 105 (1996) (stating that supporters of ‘workfare’ reforms believe that ‘workfare’ aid recipients “will attain equal social citizenship by performing the primary obligation of citizenship: work.”); Gordon & Lenhardt, *supra* note 20, at 1161. See generally LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP*, at ix (1986) (suggesting that the pervasiveness of welfare problems can be solved through citizen work requirements).

¹²⁴ See, e.g., SHKLAR, *supra* note 21, at 2; Sofya Aptekar, *Citizenship Status and Patterns of Inequality in the United States and Canada*, 95 SOC. SCI. Q. 343, 356–57 (2013) (“Persistent and large inequalities in citizenship leave the already disadvantaged unskilled immigrants without access to rights, representation, security, or job and educational opportunities.”); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 412–16 (2004); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1574 (2012) (arguing that the current enforcement of this naturalization requirement “force[s] legal resident immigrants with criminal histories to permanently live in the shadows of full citizenship, never able to possess the . . . respect that citizenship can bring.”); Michael T. Light et al., *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOC. REV. 825, 825 (2014) (“[C]itizenship status is a salient predictor of sentencing outcomes [in criminal prosecutions]—more powerful than race or ethnicity.”); Eileen Diaz McConnell, *Hurdles or Walls? Nativity, Citizenship, Legal Status and Latino Homeownership in Los Angeles*, 53 SOC. SCI. RES. 19, 21 (2015) (“Many studies report that citizen immigrants have higher homeownership rates than non-citizen immigrants.”); Scott E. Wolfe et al., *Unraveling the Effect of Offender Citizenship Status on Federal Sentencing Outcomes*, 40 SOC. SCI. RES. 349, 349 (2010) (“[B]oth legal and illegal aliens have a higher probability of incarceration than similarly-situated US citizens.”).

¹²⁵ See RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* 3 (2d ed. 2003) (“The notion of citizenship identity derives from the most basic meaning of citizenship: membership of a community”); Bosniak, *supra* note 35, at 479–88 (addressing

dimension of membership in the polity, but treats each without sufficient reference to the others and therefore fails to account for the relationships among them, especially the relationship between substantive and formal dimensions. This is perhaps due, at least in part, to the difficulty of explaining why formal citizenship rules do not always coincide with many of these facets of citizenship. Citizenship rules, after all, do not necessarily distribute formal citizenship to individuals who base their identity on that citizenship or who participate in the polity, and noncitizens may be just as likely to identify with a state or participate in the polity as their citizen counterparts.

While some citizenship inquiries have seemingly orbited around the paradox without touching down on it,¹²⁶ no one has offered an explanation or resolution of that paradox.

4. *Addressing the Citizenship Paradox*

Broadly speaking, there are two alternative ways of addressing the apparent paradox of equal citizenship distributed on unequal terms. First, one might simply attribute the existence of dissonant citizenship rules to meaningless accidents of history. Under this view, one might conclude that existing U.S. citizenship rules are arbitrary and unjust. Second, one might instead view the existence of disparate citizenship rules as somehow meaningful in itself. Under this view, one might distill some insight about citizenship from an analysis of the system as a whole.

In this Article I take the second approach. Part IV below proposes a framework for understanding citizenship that resolves the apparent paradox described in this Part. In that sense, this Article advances the notion that there is a legitimate rationale for the apparent paradoxical distribution of citizenship and that individual citizenship rules are integral pieces of a cohesive system. Individual citizenship rules

citizenship as identity/solidarity and discussing “citizenship’s psychological dimension, that part of citizenship that describes the affective ties of identification and solidarity that we maintain with groups of other people in the world.” (citation omitted)); Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT’L L. 330, 345 (2006); Kymlicka & Norman, *supra* note 19, at 353; Seymore, *supra* note 122, at 958–64 (exploring naturalized citizenship as identity); Nora Graham, Note, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593, 618 (2004-05) (discussing the consequences of losing citizenship when “the [Supreme] Court considers citizenship to be the equivalent to a person’s social and political identity” (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

¹²⁶ Noah M.J. Pickus, *To Make Natural: Creating Citizens for the Twenty-First Century*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 107, 123 (Noah M.J. Pickus ed., 1998) (evaluating U.S. naturalization law’s capacity to create a common national identity and asking: “Why, simply because they were born in the United States, should legal residents be entitled to the rights of citizenship, especially participation in governance? In particular, why should alienated residents, citizens who know little and care less about the polity, be entitled to citizenship, while committed and knowledgeable aliens are denied it?”).

have admittedly arisen at different times and for different reasons in a way that might seem to weigh against studying them together as a whole. However, those individual rules have enjoyed significant longevity—the U.S., for example, has included some version of *jus soli*, *jus sanguinis*, and naturalization since its founding. As a result, citizenship rules have had ample time to yield to a public sense of a just distribution of citizenship. Citizenship rules, in other words, provide some evidence of what U.S. citizens, through their representatives, have believed to be an appropriate and just way to distribute citizenship.

In any event, even if citizenship rules do not reflect any coherent understanding of citizenship or just distribution—if they are truly accidents of history—the discussion that follows in Part IV can be read as a framework for discussing the potential functions of citizenship and evaluating the current U.S. citizenship system. That is to say, the discussion in Part IV need not depend on the assumption that citizenship rules have developed, in the first instance, around the framework proposed below.

IV. THE CITIZENSHIP MAP

The apparent paradox created by varying citizenship rules results from an incomplete understanding of citizenship. Discussions about citizenship build on two related but flawed premises. First, some scholars have failed to sufficiently distinguish between substantive and formal citizenship and have assumed that formal citizenship does or should coincide with substantive citizenship.¹²⁷ At first glance, this seems like a reasonable position. In the complete absence of substantive citizenship, formal citizenship becomes a meaningless entitlement to shared rights despite a lack of shared identity or sense of membership. However, the reality is that many citizenship rules, in the United States and elsewhere, do not require a concurrence of formal and substantive citizenship.

U.S. citizenship law diverges significantly from coinciding formal and substantive citizenship. U.S. citizenship law does not ensure that formal citizens are also substantive citizens (i.e., individuals who have developed substantive citizenship). After all, it is untenable to say that the Ohio-born and Argentina-born children of my hypotheticals above exhibit some quality—like loyalty or a sense of shared culture—with other citizens from the moment of birth. It is also unlikely that naturalization ensures that naturalized citizens have acquired all the requisite fundamental qualities of substantive citizenship. This is especially the case in states that, like the United States, impose a relatively small burden on naturalization applicants. But I do not believe this is a failure of U.S. citizenship law. Rather, it is a potential strength. Citizenship rules should not exclusively aim to make formal citizens of those that are already substantive citizens. A rigid coupling of formal and substantive citizenship fails to account for the transformative power of citizenship. Formal citizenship can facilitate and promote substantive citizenship, as I will explain below in section IV.B.

¹²⁷ See *supra* note 77 and accompanying text.

The second flawed premise of many citizenship discussions relates to and depends on the first. Because scholars often focus on the rights of citizenship—citizenship as the final rung on an ascending ladder of rights¹²⁸—citizenship sometimes appears to be a static condition or the culmination of substantive citizenship. Public rhetoric often echoes this notion. Politicians speak of a “path to citizenship”¹²⁹ in a way that suggests citizenship is a final destination. This has intuitive appeal. After all, citizens enjoy the full package of rights and benefits offered by the state; there is no category of persons with more rights and benefits.¹³⁰

¹²⁸ See, e.g., Bosniak, *supra* note 35, at 450–51 (“Virtually everyone in the debates treats citizenship as embodying the highest normative value. The term rings unmistakably with the promise of personal engagement, community well-being, and democratic fulfillment.” (citation omitted)); Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 122 (2013) (“[T]he DREAMers have also had to contend with the fact that there is no existing path to help them realize their goal of matching their identity as Americans to a legal status as U.S. citizens. The absolute lack of a path to regularize their immigration status means that, for DREAMers, there is no possibility (yet) for transitioning to the ultimate, full membership of citizenship”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 398 (2006) (“Immigration law defines membership in this society explicitly, by establishing a ladder of accession to permanent residence and then formal U.S. citizenship, and a set of criteria to determine whether an individual meets the requirements for these various levels of membership.”).

¹²⁹ See, e.g., Josh Hicks, *Sen. Ted Cruz Calls Path to Citizenship ‘Profoundly Unfair,’* WASH. POST (July 21, 2013), <http://www.washingtonpost.com/news/post-politics/wp/2013/07/21/sen-ted-cruz-calls-path-to-citizenship-profoundly-unfair/> [<https://perma.cc/RTR6-5KY3>] (quoting Senator Ted Cruz as saying, “I think a path to citizenship for those who are here illegally is profoundly unfair to the millions of legal immigrants who followed the rules”); Annie Karni, *Bill Clinton: Path to Citizenship Is Just Common Sense*, POLITICO (May 12, 2015, 1:01 PM), <http://www.politico.com/story/2015/05/bill-clinton-immigration-citizenship-path-117856.html> [<https://perma.cc/3RN8-H5C6>] (quoting former President Bill Clinton as saying, “I think the only thing that makes sense is a path to citizenship and adequate support for children”); Seth McLaughlin, *Jeb Bush’s Immigration Evolution: Earned Legal Status but No Path to Citizenship*, WASH. TIMES (July 8, 2015), <http://www.washingtontimes.com/news/2015/jul/8/jeb-bush-no-illegal-immigrant-path-to-citizenship-/?page=all> [<https://perma.cc/K6N4-5UYP>] (quoting former Secretary of State Hillary Rodham Clinton as saying, “[Jeb Bush] doesn’t believe in a path to citizenship. If he did at one time, he no longer does”); Charlie Spiering, *Chris Christie: No ‘Special Way’ for Illegal Immigrants to Get U.S. Citizenship*, BREITBART (July 20, 2015), <http://www.breitbart.com/big-government/2015/07/20/chris-christie-no-special-way-for-illegal-immigrants-to-get-u-s-citizenship/> [<https://perma.cc/KB5K-DLKP>] (quoting New Jersey Governor Chris Christie as saying, “I think, you know, Secretary Clinton talks about [a] path to citizenship for people who are here illegally—she’s just pandering”); *Earned Citizenship*, WHITE HOUSE (Jan. 29, 2013), <http://www.whitehouse.gov/issues/immigration/earned-citizenship> [<https://perma.cc/5ZQK-S35D>] (quoting President Barack Obama as saying that “[w]e’ve got to lay out a path [to citizenship for individuals who are here illegally]”).

¹³⁰ Lowell W. Barrington, *The Making of Citizenship Policy in the Baltic States*, 13 GEO. IMMIGR. L.J. 159, 161 (1999) (“[C]itizenship is . . . the highest form of official

Moreover, immigration rules can be viewed as a transitional mechanism that leads individuals to the ultimate goal of citizenship.¹³¹ Here, I propose that formal citizenship continues the transition. A static view of citizenship ignores the reality that formal citizenship does not necessarily equate with substantive citizenship. Formal citizens have varying levels of substantive citizenship at the time they acquire citizenship, formal citizens can develop substantive citizenship after obtaining formal citizenship, and formal citizenship can affect individuals' substantive citizenship in a variety of ways.

A. *The Citizenship Trajectory*

Formal citizenship is best understood not as a static condition that equates with substantive citizenship but rather as a trajectory that leads toward that ideal. In other words, formal citizenship may lead to, facilitate, and preserve a more substantive citizenship. Formal citizenship might be visualized as a one-way highway with multiple entrances that leads toward substantive citizenship. In this analogy, substantive citizenship is the destination, formal citizenship is the path of travel, and citizenship rules provide access.¹³²

This imagery aptly illustrates four important points. First, in the same way that a single highway can have multiple entrance ramps, the citizenship path has multiple entry points. Though individuals on the citizenship path may travel in the same direction—toward substantive citizenship—they have accessed the trajectory via different citizenship rules. Some have entered the path through birth in the territory, others by naturalization, and still others through birth to citizen parents abroad.

membership in the state granted to the general public, . . . and it implies a certain equality among members.”); Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 689 (1995) (“While most rights and privileges are enjoyed by both citizens and non-citizens within the boundaries of the United States, certain privileges are available only to citizens.” (citation omitted)).

¹³¹ HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 189 (2006) (arguing that the U.S. has drifted away from the concept of using immigration law as a way to facilitate integration and move immigrants toward substantive citizenship, and that the U.S. would benefit from returning to immigration laws based on this concept of “immigration as transition”).

¹³² Like any analogy, this one is imperfect. One problem is that the highway analogy suggests that some individuals are closer to substantive citizenship than others based entirely on how they initially access the trajectory and that formal citizenship becomes useless once an individual has reached that destination. A perhaps more accurate, though certainly less helpful, analogy might be an asymptotic highway—one that infinitely approaches a destination without ever reaching it. In that case, substantive citizenship might be analogized to the direction of travel, rather than any specific final destination. Such a modified analogy preserves the value of formal citizenship and dispels the notion that an individual may be closer to a defined destination depending on the particular citizenship rule through which she accessed the highway.

Regardless of how individuals access the citizenship path, they are all subject to the same rules and enjoy the same benefits.

Second, the citizenship path offers a set of rights and protections not available to noncitizens, much as a highway offers speedier travel, increased safety, and a set of rules that order travel on the highway so that travelers may reach their destinations sooner and more efficiently than those on ordinary roads. The rights and benefits of formal citizenship protect individuals in their development and maintenance of substantive citizenship. U.S. citizens, for example, may vote in federal elections and apply for federal means-tested welfare benefits. These rights allow citizens meaningful ways to further develop and maintain substantive citizenship. Noncitizens do not have access to these benefits.

Third, just as individuals may travel toward a destination without traveling on the highway, individuals may develop substantive citizenship outside the protections of formal citizenship. This might be visualized as individuals traveling on parallel roads toward the same destination as those on the citizenship path. That is, the citizenship map includes many other roads and paths. Of course, individuals who are not on the highway lack the benefits and protections the highway offers—they may travel more slowly and encounter more obstructions, for example. The case of naturalization is illustrative. Many immigrants never naturalize. Some choose not to, some are not eligible, and others simply do not know how. This does not necessarily prevent them from developing substantive citizenship; in fact, individuals may develop the very same substantive citizenship that their formal citizen counterparts develop.

Fourth, just as some individuals move toward a destination without entering the highway, others fail to move toward a destination despite being on the highway. The mere fact of being on a highway does not guarantee that travelers will effectively and speedily travel toward the destination or that travelers will move toward any destination at all. There may be travelers stalled on the side of the highway or even moving against the flow of traffic. Such individuals make travel on the highway less efficient and even dangerous for all travelers. The same holds true on the citizenship trajectory. Some individuals gain access to citizenship, but do not develop substantive citizenship. Some may even affirmatively avoid developing substantive citizenship.

Finally, every state's "citizenship map" will be different. The framework I provide here is meant to apply to many different states, regardless of their individual "citizenship map," but because states have different conceptions of substantive citizenship, the path to substantive citizenship may be different for each state. In the same way that one may observe that rivers generally run downhill and toward an ocean without knowing the precise direction of the river or the precise location of the ocean, formal citizenship leads (or at least ought to lead) to substantive citizenship, whatever its contours. Formal citizenship rules, described below, provide access to that path.

B. *A Typology of Citizenship Rules*

Citizenship rules provide diverse means for accessing that trajectory—distinct entrances onto the highway. But not all citizenship rules are located at the same point along the citizenship path, nor do they provide access in exactly the same way. As discussed below, formal citizenship rules can play one or more of several different roles in relation to the citizenship highway. Citizenship rules may be descriptive, predictive, conscriptive, and/or prescriptive in nature. Ultimately, each type of rule advances the ideal of a formal citizenry composed of substantive citizens without requiring all formal citizens to be substantive citizens. This, in turn, takes into account the potential transformative power of formal citizenship.

1. *Descriptive Citizenship Rules*

A state may confer formal citizenship on an individual who displays substantive citizenship. I label such citizenship rules “descriptive” because the formal status is meant to describe or affirm the individual’s substantive citizenship. The acquisition of citizenship certifies that the individual is fit for the obligations of citizenship and deserves the benefits of citizenship. The development of some level of substantive citizenship, then, is the precursor and qualifier for bestowal of formal citizenship.

Naturalization rules may play such a descriptive role.¹³³ Indeed, scholarship on naturalization sometimes treats naturalization law as a measure of the meaning of substantive citizenship in a state.¹³⁴ The assumption is that a state does not bestow citizenship on an individual if that individual has not shown sufficient substantive citizenship or somehow proves to be a desirable citizen.¹³⁵ In the United States, naturalization candidates must prove basic English proficiency, threshold knowledge of U.S. history and civics, good moral character and attachment to the Constitution, as well as meeting residency and physical presence requirements.¹³⁶ One might think of an individual’s fulfillment of these requirements as evidence that

¹³³ See Neuman, *supra* note 7, at 241 (describing a “thick communitarian” model of naturalization in which citizenship reflects the identity of its members: “The community offers naturalization to those individuals who meet its criteria of identity or are making satisfactory progress toward that goal.”).

¹³⁴ See, e.g., SPIRO, *supra* note 25, at 33 (explaining that “rules relating to naturalization open a window on the meaning of national identity” and suggesting that “the nation’s aspirations are reflected in its naturalization regime”).

¹³⁵ This view of naturalization as a descriptive citizenship rule coincides with the bilateral liberalism that Gerald Neuman describes. See Neuman, *supra* note 7, at 239–40. In bilateral liberalism, the state’s evaluation of who is a desirable citizen interacts with the individual’s need and desire to be a citizen. *Id.* Gerald Neuman argues that although the “rhetoric of U.S. naturalization law fits the model of bilateral liberalism,” U.S. naturalization criteria more accurately fit into his conception of unilateral liberalism, which focuses on the individual’s need and desire to be a citizen rather than the state’s interest in determining what kinds of individuals should be citizens. *Id.* at 240. This unilateral liberalism complements the ideas of prescriptive citizenship below.

¹³⁶ See I.N.A. § 316, 8 U.S.C. § 1423 (2012).

the individual has demonstrated his substantive citizenship in the United States and is ready for the obligations, rights, and symbolic approval associated with citizenship.¹³⁷ While U.S. naturalization rules indeed have a descriptive flavor,¹³⁸ I believe (and argue later in this Article) that they are perhaps more accurately characterized as prescriptive in nature.

German naturalization rules, however, provide a more striking example of descriptive citizenship rules. Historically, Germany's naturalization rules employed citizenship as the state's certification that the citizen had achieved ethnocultural assimilation¹³⁹—that is, Germany's version of substantive citizenship has historically been tied to ethnicity and culture.¹⁴⁰ Until 2000, for example, Germany granted birthright citizenship solely on the principle of *jus sanguinis*, primarily because of the “traditional, romantic-biological, and monocultural ideology of a German *Volk*,”¹⁴¹ membership in which, it was argued, an individual is powerless to obtain or relinquish.¹⁴² Even if foreigners met this level of assimilation, naturalization depended on a favorable exercise of discretion, granted only where there was a public interest in the individual obtaining citizenship.¹⁴³ A candidate had

¹³⁷ See Lister, *supra* note 82, at 219 (arguing that naturalization requirements “ensure a commitment to the country of immigration” and “ensure assimilation into the culture of the country”).

¹³⁸ See, e.g., Lister, *supra* note 82, at 220–30. Matthew Lister rejects Pickus' call for more difficult naturalization requirements in order to compel assimilation to the “national identity,” and accepts Carens' view that the United States should require only a period of residency for naturalization, not English language proficiency or civics knowledge, suggesting that the current naturalization requirements are not enforced rigorously enough to be prescriptive. *Id.* (citing Joseph H. Carens, *Why Naturalization Should Be Easy: A Response to Noah Pickus*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY, *supra* note 126, at 141, 141–46); Pickus, *supra* note 126, at 127–29.

¹³⁹ BRETT KLOPP, GERMAN MULTICULTURALISM: IMMIGRANT INTEGRATION AND THE TRANSFORMATION OF CITIZENSHIP 40 (2002) (“German debates about exclusive citizenship versus multiculturalism are set significantly apart from similar debates elsewhere due to Germany's historical legacy and its mythology of the prepolitical, natural *Volk*, which to this day colors German naturalization law . . .”).

¹⁴⁰ Hartnell, *supra* note 125, at 373 (“Germany is typically viewed as exemplifying the primordialist or organicist view that belonging presupposes ethno-cultural homogeneity.”).

¹⁴¹ German naturalization was limited to individuals who were integrated in the German way of life (*Einordnung*) and displayed a voluntary and lasting affiliation (*Hinwendung*) with the state. Dilek Çinar, *From Aliens to Citizens: A Comparative Analysis of Rules of Transition* 9 (Institut für Höhere Studien, Paper No. 17, 1994), https://www.ihs.ac.at/publications/pol/pw_17.pdf [<https://perma.cc/KS9M-9ME2>]; see also KLOPP, *supra* note 139, at 43–44 (cataloguing German citizenship developments, including the passage of Germany's 1913 citizenship law and subsequent amendments).

¹⁴² KLOPP, *supra* note 139, at 40–41. Until the 1970s, it was even difficult for a foreign spouse to gain citizenship independent of the German spouse. See *id.* at 43.

¹⁴³ Çinar, *supra* note 141, at 9. Ethnic Germans from Central and Eastern European States (*Aussiedler*) have “an unconditional right to German citizenship if they can prove their ethnic German origins.” *Id.* Generally, spouses of German citizens, long-term residents, and

to prove that she had become thoroughly and deeply German. As a result, until reforms in the 1990s, second- and third-generation foreigners acquired citizenship only after a complicated and lengthy process subject to the state's sole discretion—a right or entitlement to naturalization did not exist until 2000.¹⁴⁴ For Germany, the purpose of “naturalization is not to foster an individual's integration into German society, but rather to affirm or even consecrate integration after it has occurred.”¹⁴⁵ More recent reforms have loosened the requirements of naturalization, but naturalization in Germany remains complicated and burdensome.¹⁴⁶

Popular rhetoric surrounding citizenship and immigration often paints an image of formal citizenship serving a descriptive role. Popular terms in the citizenship and immigration debate include “path to citizenship” and “earned citizenship,” suggesting that the purpose of formal citizenship is to certify an individual's fitness

young foreigners who meet all the requirements receive favorable exercises of discretion. *Id.* at 10; KLOPP, *supra* note 139, at 43.

¹⁴⁴ LYNCH & SIMON, *supra* note 80, at 177; *see also* Ciro Avitabile et al., *The Effect of Birthright Citizenship on Parental Integration Outcomes*, 56 J.L. & ECON. 777, 782–83 (2013) (“The changes [in 1990 and 1993] introduced limited discretion of officials to deny naturalization and provided foreigners with the legal right to claim naturalization. . . . The law approved in 1999 introduced further changes to the naturalization criteria: it lowered the minimum residency requirement to 8 years (without age restriction) and refined the legal entitlement to naturalization with additional requirements such as swearing loyalty to the German constitution, being able to support oneself and one's family without social security or unemployment benefits, a clean criminal record, and adequate command of the German language. Moreover, applicants had to renounce their former citizenship, to which they were legally entitled only if they are 18 or older.”). For an overview of the evolution of German naturalization law, see Marc Morjé Howard, *The Causes and Consequences of Germany's New Citizenship Law*, 17 GERMAN POL. 41, 41–43 (2008).

¹⁴⁵ MOTOMURA, *supra* note 131, at 145–46 (describing German naturalization as historically meaning that “the applicant becomes German in a profound way, through something of a change of identity”); *see* Kay Hailbronner, *Citizenship and Nationhood in Germany*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 67, 79 (William Rogers Brubaker ed., 1989).

¹⁴⁶ Simon Green, *Much Ado About Not-Very-Much? Assessing Ten Years of German Citizenship Reform*, 16 CITIZENSHIP STUD. 173 (2012) (analyzing recent amendments to Germany's citizenship policy and analyzing their relationship to declining naturalizations); *see also* *Naturalization/Receiving German Citizenship*, INTEGRATION IN BONN, <http://www.integration-in-bonn.de/en/permission-of-residence/naturalization-receiving-german-citizenship.html> [<https://perma.cc/S8KD-FBVM>] (last visited May 8, 2016) (summarizing the requirements of qualifying for citizenship at birth in Germany); Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, as amended, BUNDESGESETZBLATT, Teil I [BGBL. I] (Ger.), https://www.gesetze-im-internet.de/englisch_rustag/nationality_act.pdf [<https://perma.cc/B8EB-4AYP>] (providing an English translation of Germany's Nationality Act, which lists the requirements for acquiring German citizenship). Japan has also employed very restrictive citizenship rules that involve stringent ethnic and cultural components. Nonethnic Japanese individuals are all but barred from naturalizing. *See* LYNCH & SIMON, *supra* note 80, at 189–96.

for inclusion in the polity.¹⁴⁷ But citizenship rules do more than merely evaluate and certify fitness for citizenship.

2. Predictive Citizenship Rules

Citizenship rules may also play a predictive role. A state may grant formal citizenship to individuals who are likely to become substantive citizens. The bestowal of formal citizenship *now* protects and facilitates the likelihood substantive membership *later*. *Jus soli* provides an intuitive illustration.¹⁴⁸ An infant born within the state is not a substantive citizen at the time she becomes a citizen. She has no quality—no sense of loyalty, shared identity, or shared culture, for example—that would suggest she is a substantive citizen. Nonetheless, presence within the state at birth may suggest that the child is likely to grow up within the state boundaries, associate with other individuals within the state boundaries, attend school within the

¹⁴⁷ For example, President Barack Obama has spoken of earned citizenship in his public speeches. While President Obama's immigration policy objectives are not necessarily accurately or fully described in his statements regarding earned citizenship, the choice to discuss immigration in these terms evidences the tenor of public rhetoric:

We have to deal with the 11 million individuals who are here illegally. We all agree that these men and women should have to earn their way to citizenship. But for comprehensive immigration reform to work, it must be clear from the outset that there is a pathway to citizenship. We've got to lay out a path—a process that includes passing a background check, paying taxes, paying a penalty, learning English, and then going to the back of the line, behind all the folks who are trying to come here legally. That's only fair.

Earned Citizenship, *supra* note 129. Jeb Bush, a former candidate for the 2016 Republican presidential nomination, has made remarkably similar comments, referring to “legal status” instead of “citizenship,” however:

My suggestion is earned legal status. Not earned citizenship, but earned legal status. You don't create a system where people cut in line in front of those who have been patiently waiting. But you get a provisional work permit, you work, you pay taxes, you pay a fine, you learn English, you don't commit crimes, and you earn—over an extended period of time—legal status.

Editorial, *Jeb's Smart Stand As Bush Breaks with GOP Obstruction*, N.Y. DAILY NEWS (Apr. 19, 2015, 4:05 AM) (on file with the Utah Law Review), <http://www.nydailynews.com/opinion/editorial-jeb-smart-stands-article-1.2189539>; Andrew Kaczynski, *Spokesman: Jeb Bush Supports “Legal Status,” But Could Support Pathway to Citizenship “(Depending) on the Details,”* BUZZFEED NEWS (May 3, 2015, 2:43 PM), <http://www.buzzfeed.com/andrewkaczynski/jeb-bush-could-support-a-pathway-to-citizenship-for-undocume#.yo8L86Qzmg> [<https://perma.cc/2TRQ-2Y2A>].

¹⁴⁸ SPIRO, *supra* note 25, at 9–10 (arguing that birthright citizenship based on birth in the territory “ma[kes] sense in a world in which the fact of birth in U.S. territory was likely to coincide with actual subsequent assimilation into the American community.”).

state, and therefore develop a sense of identity that is tied to the state.¹⁴⁹ Granting formal citizenship protects this likelihood by ensuring that the individual has access to rights and benefits that, in turn, help him develop substantive citizenship. Arguably, the U.S. version of *jus sanguinis* similarly distributes citizenship to individuals who are likely to develop substantive citizenship. Individuals who are born abroad to U.S. citizens may be likely to develop an affinity for the United States. This is particularly so where the citizen parents have spent significant time in the United States, as U.S. law requires for *jus sanguinis* to apply.¹⁵⁰

Naturalization can also be thought of as a predictive citizenship rule. An individual who meets the qualifications for naturalization, the argument might go, is likely to continue developing the qualities of substantive citizenship if allowed to. In the United States, it may be that someone who is willing to study for the naturalization interview, willing to learn sufficient English, and who appears at a ceremony that confers citizenship is likely to continue learning about her new country and increasingly identify with that country over time.

This is not to say that naturalization or birthright citizenship rules necessarily and consistently do a good job of playing this predictive role.¹⁵¹ Rather, I am offering a set of terms that we might use to evaluate and describe citizenship rules. The predictive value of birth within the territory, and therefore the predictive role of territorial birthright citizenship rules, may depend on a variety of factors. The size of the state, proximity of the state to other states, the economic opportunities of the state relative to surrounding states, the ease of travel into and out of the state, etc., all bear on the predictive value of birth within the state. For example, where travel into and out of the state is difficult, there is a stronger likelihood that those born within the state will remain within the state and therefore forge the ties described above. Birth within a small state surrounded by multiple states that have stronger economies may not be predictive of a strong tie with the first state.

3. *Conscriptive Citizenship Rules*

Conscriptive citizenship rules distribute formal citizenship without regard for the individual's current or future substantive citizenship. A conscriptive citizenship rule is one that obligates an individual to the state for the state's benefit despite the

¹⁴⁹ *Id.* at 17 (“Persons born in the United States, regardless of parentage, in many cases could be expected to make their lives in the country, to become members of the national community as a matter of fact.”).

¹⁵⁰ For example, a child born abroad to one U.S. citizen and one noncitizen in wedlock is a U.S. citizen only if the U.S. citizen parent has spent five years in the United States prior to the birth of the child. I.N.A. § 301, 8 U.S.C. § 1401(g) (2012). Even where both parents are U.S. citizens, a child born in wedlock will be a citizen only if one of the parents has had a residence in the United States prior to the child's birth. I.N.A. § 301, 8 U.S.C. § 1401. For rules applying to children born out of wedlock, see I.N.A. §§ 301, 309, 8 U.S.C. §§ 1401(g), 1409).

¹⁵¹ See Neuman, *supra* note 7, at 249 (arguing that *jus soli* “operates too randomly to be understood as preserving any particular national identity”).

individual's own (and potentially contrary) sense of substantive citizenship. Conscriptive citizenship rules differ from the other types of citizenship rules discussed in this Article in that instead of seeking to preserve, promote, or predict a sense of substantive citizenship, conscriptive citizenship rules operate in spite of and without reference to substantive citizenship.

This abstract definition is admittedly hard to illustrate—how does one evaluate whether a citizenship rule operates contrary to individuals' current or future substantive citizenship? One must look beyond the rule itself and to the rights, benefits, and obligations offered to citizens. There are several factors that might help identify a conscriptive citizenship rule or a state that employs a conscriptive citizenship system. Citizenship that is distributed to individuals without a possibility of the citizen renouncing that citizenship is likely conscriptive. Under such a citizenship rule, the individual has no recourse should she determine that she is not and does not want to become a substantive citizen of the state. But other markers are relevant. A lack of reciprocal obligations between citizens and sovereign suggests the existence of conscriptive citizenship. For example, a state that offers few if any rights or protections to its citizens might be said to impose conscriptive citizenship. Likewise, a state that unilaterally imposes significant and unwelcome obligations on its citizens may also be fairly described as employing conscriptive citizenship.

The conscriptive category of citizenship rules is perhaps most relevant in a historical context. Some states have historically limited their citizens' or subjects' ability to renounce citizenship and have provided very limited rights to those citizens. China¹⁵² and the former Soviet Union¹⁵³ arguably employed conscriptive

¹⁵² See Nationality Law of the People's Republic of China, art. 1 (Sept. 10, 1980), <http://www.china-embassy.org/eng/ywzn/lsw/vpna/faq/t710012.htm> [<https://perma.cc/3ZMP-5LJ2>].

¹⁵³ See Union of Soviet Socialist Republics: Law on Citizenship, July 1, 1979, 20 I.L.M. 1207, art. 11 ("A child, both of whose parents at the time of its birth were citizens of the USSR, is a citizen of the USSR, irrespective of whether being born on the territory of the USSR or outside of the USSR."). Eric Lohr describes Bolshevik citizenship policies in the early twentieth century as follows:

Despite its attempts to attract immigrants and return migrants in 1920, in November of the same year the regime took a hard line on émigrés who did not return immediately. Decrees of November 3 and 19, 1920, ordered the confiscation of all land, housing, and personal possessions of individuals who had left the territory of the [Russian Soviet Federative Socialist Republic]. This amounted to a powerful policy against the return of émigrés and refugees, and it established the basic Bolshevik approach to its diaspora: return immediately or never.

From 1926 to 1930, nearly all aspects of the citizenship boundary became more firm and restrictive. Immigration, emigration, naturalization, and denaturalization all became much more difficult. There were several motives for the restrictive turn—xenophobia, security-mania, ideological zeal, and an all-

citizenship rules in the past. Both prevented their citizens from traveling abroad, except in controlled circumstances;¹⁵⁴ voluntarily renouncing citizenship;¹⁵⁵ naturalizing in another state;¹⁵⁶ and exercising any meaningful political rights.¹⁵⁷

consuming desire to prevent the loss of hard currency, precious metals, and other valuables through illicit export.

ERIC LOHR, *RUSSIAN CITIZENSHIP: FROM EMPIRE TO SOVIET UNION* 147, 171 (2012) (ebook) (citation omitted).

¹⁵⁴ LOHR, *supra* note 153, at 175 (“[In the 1930s, e]migration was almost completely banned for Soviet citizens, and for the first time in Russian history this ban was actually enforced. The border was sealed as never before.”); Michael L. Waddle, *Physical Environment and Population, in CHINA: A COUNTRY STUDY* 59, 83 (Robert L. Worden et al. eds., 4th ed. 1988) (“Through most of China’s history, strict controls prevented large numbers of people from leaving the country. In modern times, however, periodically some have been allowed to leave for various reasons.”); Thomas M. Magstadt, *Emigration and Citizenship: Implications for Soviet-American Relations* (Cato Policy Analysis, Paper No. 70, 1980), <http://www.cato.org/pubs/pas/pa070.html> [<https://perma.cc/9GFK-U465>].

¹⁵⁵ Union of Soviet Socialist Republics: Law on Citizenship, art. 17 (“Renunciation of citizenship of the USSR is sanctioned by the Presidium of the Supreme Soviet of the USSR. A sanction to renounce citizenship of the USSR *may not be granted* if the person applying for renunciation has unfulfilled commitments to the state or property commitments involving the essential interests of citizens or state, cooperative and other public organi[z]ations. Renunciation of citizenship of the USSR *is not permitted* if the person applying for renunciation is called to account as a defendant or there is against him a sentence of a court of law, which has taken legal effect and is to be enforced, or if renunciation of citizenship of the USSR by the person *runs counter to the interests of state security of the USSR.*” (emphases added)).

¹⁵⁶ Nationality Law of the People’s Republic of China, art. 3 (“The People’s Republic of China does not recognize dual nationality for any Chinese national.”); *id.* art. 9 (“Any Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality.”); Union of Soviet Socialist Republics: Law on Citizenship, art. 8 (“No person, being a USSR citizen, shall be recogni[z]ed as having a foreign nationality.”); LOHR, *supra* note 153, at 176 (“In case after case regarding people who had the chance to opt for other citizenships but had not done so by the established deadline, the government upheld their ascribed status as Soviet citizens (even if they had no documents and had not undergone any formal ceremony, and even if another state claimed them to be eligible for their citizenship). Only after a lengthy and by no means automatic appeals process could these individuals be released from Soviet citizenship and allowed to leave the country.”).

¹⁵⁷ LOHR, *supra* note 153, at 151 (“The great denaturalization of Russians abroad fits into the broader context of the Soviet approach to domestic citizenship, which included a peculiar variant of partial denaturalization that involved deprivation of the rights of citizenship while retaining the obligations and status of citizen.”); *Freedom in the World Country Ratings: 1972–2014*, FREEDOM HOUSE, <https://freedomhouse.org/sites/default/files/Individual%20Country%20Ratings%20and%20Status%2C%201973-2015%20%28FINAL%29.xls> [<https://perma.cc/ALL8-C2CZ>] (last visited May 9, 2016) (giving the Soviet Union and communist China consistently low political rights and civil liberties scores).

In many ways, the concept of conscriptive citizenship lines up with many commentators' understanding of "ascriptive citizenship."¹⁵⁸ I decline to use that term here, however, for two reasons. First, the term "ascriptive citizenship" suffers from ambiguity in the citizenship literature. Second, some commentators have used the term "ascriptive citizenship" to challenge territorial birthright citizenship rules. While my use of "conscriptive citizenship" aligns well with those commentators' general descriptions of "ascriptive citizenship," I disagree that *jus soli* constitutes an ascriptive—or (in my framework) conscriptive—citizenship rule.

The term "ascriptive citizenship" is well established in legal commentaries on citizenship, thanks in large part to Peter Schuck and Rogers Smith's detailed treatment of the concept in *Citizenship Without Consent: Illegal Aliens in the American Polity*.¹⁵⁹ The term, however, suffers from ambiguity. Some use the term "ascriptive" to refer to citizenship rules that automatically distribute citizenship to individuals based on some objectively identifiable criteria.¹⁶⁰ Under this conception of ascriptive citizenship, all birthright citizenship rules are ascriptive because they work automatically at birth based on the circumstances of birth. Often, however, the term "ascriptive" carries a connotation of unfairness and arbitrariness.¹⁶¹ Two varieties of this more negative version of "ascriptive citizenship" exist. Some discussions of a negative version of ascriptive citizenship focus on unfairness to the state: by automatically conferring citizenship on individuals, the state loses its ability to consent to each citizen's inclusion in the polity.¹⁶² Others focus on the unfairness

¹⁵⁸ In fact, it is only because "ascriptive citizenship" occupies such an important place in citizenship scholarship that I include conscriptive citizenship at all. Because conscriptive citizenship describes so few citizenship rules, it is not as helpful as the other categories I have created. But it is important to contextualize those categories in the literature about ascriptive citizenship, which I distinguish from conscriptive citizenship, particularly because many commentators have described territorial birthright citizenship, a topic featured in Part V of this Article, in their discussions of ascriptive citizenship.

¹⁵⁹ SCHUCK & SMITH, *supra* note 10, at 15.

¹⁶⁰ See, e.g., RUTH RUBIO-MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 8 (2000) (proposing a system of European citizenship in which "permanent residents could be 'automatically' granted citizenship—that is, citizenship could be ascribed to all residents after a certain number of years, even to those who would not choose to opt for naturalization under a voluntary naturalization approach"); see also Jo Shaw, *E.U. Citizenship and Political Rights in an Evolving European Union*, 75 FORDHAM L. REV. 2549, 2563 (2007) (recognizing that there is "nothing like a system of automatic or ascriptive citizenship acquisition for resident non-nationals . . . in the E.U. Member States").

¹⁶¹ Matthew Lister has highlighted the unwarranted connotation the term has developed. Lister, *supra* note 82, at 216 ("[I]t is important to see that a *jus soli* rule need not have the negative 'ascriptive' aspects attributed to it by Shuck, Cohen, Smith, and others. Such a contention confuses historical fact with conceptual necessity."); see SCHUCK & SMITH, *supra* note 10, at 9–22.

¹⁶² See, e.g., SCHUCK & SMITH, *supra* note 10, at 20–21; Elizabeth F. Cohen, *Carved from the Inside Out: Immigration and America's Public Philosophy on Citizenship*, in DEBATING IMMIGRATION 32, 41 (Carol M. Swain ed., 2007) (arguing that *jus soli* is a form

to citizens: the automatic bestowal of citizenship on an individual imposes citizenship on the individual without her consent.¹⁶³

This more negative understanding of ascriptive citizenship has roots in modern academic debates about the U.S. practice of distributing citizenship to the U.S.-born children of undocumented immigrants. Elizabeth Cohen, Peter Schuck, Rogers Smith, and others have used the term to argue that *jus soli* is an illegitimate basis for distributing citizenship in the United States.¹⁶⁴ They argue that the distribution of citizenship based on birth within state territory—*jus soli*—is rooted in antiquated notions of citizenship and therefore foreign to the consensualist underpinnings of the U.S. Constitution.¹⁶⁵ For Schuck and Smith, the most problematic aspect is the lack of consent on the part of the citizen, though they also refer to the state's lack of consent.¹⁶⁶ Elizabeth Cohen's primary objection to birthright territorial citizenship is the state's lack of consent.¹⁶⁷ Others have persuasively challenged these arguments

of ascriptive citizenship that “deprives both the community and the individual [gaining citizenship] of the opportunity to come to reasoned conclusions about membership”).

¹⁶³ See SCHUCK & SMITH, *supra* note 10, at 20–21; Cohen, *supra* note 162, at 41.

¹⁶⁴ See SCHUCK & SMITH, *supra* note 10, at 116–17; Cohen, *supra* note 162, at 40–45.

¹⁶⁵ SCHUCK & SMITH, *supra* note 10, 116–18; Cohen, *supra* note 162, at 40–45; Stevens, *supra* note 116, at 340–45.

¹⁶⁶ Schuck and Smith trace the history of ascriptive citizenship to medieval notions of “natural” allegiance. SCHUCK & SMITH, *supra* note 10, at 15. An infant born within the sovereign's territory, whose birth there resulted from divine will, owed a “debt of allegiance due in return for protection received.” *Id.* at 15–16. The subject “owed complete obedience and service; the sovereign owed physical protection and just governance.” *Id.* at 17. This relationship was irrevocable and perpetual. *Id.* In practice, however, irrevocability was more binding on the subject. See *id.* The sovereign's failure to protect the subject did not release the subject from his obligation of allegiance, but the subject's failure to render allegiance was grounds for banishment or worse. See *id.* In order to keep individuals from freely absolving themselves of their debt of fealty, ascriptive citizenship includes not only a nonconsensual entry strategy to citizenship (birth) but also a nonexistent or severely limited exit strategy to citizenship. See *id.* Thus, based on Schuck and Smith's historical account, the hallmark of ascriptive citizenship is lack of consent on the part of the citizen and an inability to terminate her relationship with the state.

Schuck and Smith argue that *jus soli* is a form of ascriptive citizenship because it (1) imposes citizenship on individuals who have not consented to citizenship and to whom the state has not consented (2) based on the accidental circumstance of birth within the territory. See *id.* at 13–17. Such a system, the argument goes, runs counter to the consensualist notions of citizenship that underlie the U.S. Constitution. See *id.* at 116–17. *Jus sanguinis*—citizenship based on birth to a citizen parent—they argue, is a more appropriate and consent-based form of citizenship. See *id.* Schuck and Smith propose a reinterpretation of the Fourteenth Amendment that does not require the distribution of citizenship to the children of undocumented immigrants. See *id.*

¹⁶⁷ Cohen argues that the commonly understood foundations of *jus soli* do not actually support its modern application. Cohen, *supra* note 162, at 44–45. She emphasizes the circumstances surrounding *Calvin's Case*—which is commonly cited as the origin of American *jus soli*. *Id.* at 40–45. In *Calvin's Case*, she argues, “it was borders rather than people doing the migrating” in that it “resolved the political status of people who had been

against birthright citizenship, and I do not undertake a direct response to these arguments here.¹⁶⁸ I do, however, comment on territorial birthright citizenship in Part V of this paper using the framework developed in this Part. Because my arguments about *jus soli* are at odds with those of Schuck, Smith, and Cohen, I choose to use a new term, “conscriptive citizenship,” to refer to the types of citizenship rules that they might label “ascriptive.”

4. Prescriptive Citizenship

Significantly neglected in contemporary public rhetoric about immigration and citizenship is the prescriptive role of citizenship. Formal citizenship can prescribe substantive citizenship: that is, formal citizenship can provide an individual the rights, benefits, and opportunities that will nudge the individual toward the development of substantive citizenship.¹⁶⁹ In effect, formal citizenship can be a mechanism for integrating and incorporating otherwise marginalized individuals and groups into mainstream society. Formal citizenship can remove many of the obstacles and challenges to integration and development of substantive membership that such marginalized individuals and groups face.

The concept of prescriptive citizenship can be slightly harder to define and distinguish from the other categories described in this Article. At first blush, prescriptive citizenship might sound like conscriptive citizenship in that the state uses a formal citizenship rule to achieve its own purpose. However, there are important differences. In conscriptive citizenship, the state assigns formal citizenship for the state’s own benefit without regard for the individual’s substantive citizenship. In prescriptive citizenship, the state desires to integrate the individual receiving citizenship and paves the path for the individual’s development of

born in Scotland after the ascent of a Scot, King James, to the British throne.” *Id.* at 41. But modern citizenship rules are more related to the dynamics of immigration across sovereign borders. *Id.* As such, modern rules must take into account more fundamental questions of “Who do we want to be?” *Id.* at 45.

¹⁶⁸ I agree with commentators who have argued that the conclusions of Shuck and Smith, as well as others who subscribe to their understanding of ascriptive citizenship, are undermined by their own argument. See, e.g., Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among ‘We the People,’* 76 OR. L. REV. 233, 238–42 (1997). After all, their preferred citizenship rule, *jus sanguinis*, is subject to the very same critique they use to challenge *jus soli*. *Jus sanguinis* imposes citizenship on an infant that has not consented to citizenship based on something entirely outside of the child’s control. SCHUCK & SMITH, *supra* note 10, at 117–18. Consent plays no real role. Moreover, Schuck and Smith fail to account for the fact that most states’ versions of *jus soli* allow a citizen to terminate citizenship at will. The right to subsequently reject citizenship might fairly be characterized to represent consent to that citizenship. The absence of irrevocability in most modern applications of *jus soli* weighs against labeling *jus soli* as categorically ascriptive in nature.

¹⁶⁹ See MOTOMURA, *supra* note 131, at 189; Safran, *supra* note 79, at 314 (identifying the bestowal of citizenship as a historical means to integrate immigrants into the political community).

substantive citizenship.¹⁷⁰ The goal of prescriptive citizenship is that the individual's substantive citizenship will align with the individual's formal citizenship. The goals of conscriptive citizenship are unrelated to the individual's substantive membership. A state that employs prescriptive citizenship rules offers protections, rights, and benefits to individuals in order to foster the development of substantive citizenship. A state that employs conscriptive citizenship rules may disproportionately impose burdens without corresponding protections.

Prescriptive citizenship can also seem to overlap with predictive citizenship. After all, if a prescriptive citizenship rule is effective, it will consistently and predictably produce the desired result—individual citizens' development of substantive citizenship. One can predict the individual's development of substantive citizenship by virtue of the conferral of formal citizenship. This is indeed the ideal result of a prescriptive citizenship rule, but the rationales for prescriptive and predictive citizenship rules are different. A state employs a prescriptive citizenship rule in order to catalyze the development of substantive citizenship in individuals who otherwise might not have developed substantive citizenship. A state employs a predictive citizenship rule to merely sanction what it already expects will happen. In both instances, the effect is the same—formal citizenship protects and fosters the development of substantive citizenship—but the rationale is different. This difference in rationale is important because it affects the ultimate contours of a citizenship rule. If the state focuses on predictive citizenship, it may enact formal citizenship rules that confer citizenship on individuals it views as mainstream members of society. If the state focuses on prescriptive citizenship, it may extend citizenship to marginalized individuals who could use the protections of formal citizenship in developing substantive citizenship and ultimately integrating into mainstream society.

The concept of prescriptive citizenship recognizes the transformative power of formal citizenship—formal citizenship can help individuals move toward substantive citizenship. Hiroshi Motomura's concept of "immigration as transition" leads naturally to the notion of prescriptive citizenship. In *Americans in Waiting*, Motomura proposes treating new immigrants like citizens to give "lawful immigrants the best chance to belong in America, in a broad sense that goes beyond

¹⁷⁰ The precise mechanisms by which formal citizenship can help an individual develop substantive citizenship (and the effectiveness of that relationship) depend entirely on the state's understanding of substantive citizenship, the particular rules by which it grants formal citizenship, and the rights and benefits associated with citizenship. Again, I do not undertake an examination of the contours of substantive citizenship in the United States or anywhere else, and I make no normative judgments about particular views of substantive citizenship in this Article. Rather, I propose that formal citizenship can affect substantive citizenship in a variety of ways, depending on the content of that substantive citizenship. The state may have various reasons for prescribing membership. The state may recognize that, absent a grant of formal citizenship, certain classes of individuals may become an underclass. The state may also wish to facilitate the development of substantive citizenship in individuals who have expressed an independent desire to do so. Other reasons may exist.

formal citizenship to include integration into American society.”¹⁷¹ In essence, Motomura advocates extending many rights¹⁷² currently available only to citizens to new immigrants to foster “a fuller sense of belonging through family, education, and economic opportunity.”¹⁷³ As Motomura recognizes, however, this transition does not end with the acquisition of formal citizenship through naturalization. To the contrary, naturalization is itself part of the integration process: it “is neither a start nor an end point, but an important milestone along the way.”¹⁷⁴

U.S. citizenship acquired through naturalization indeed provides the most intuitive case of prescriptive citizenship. Though naturalization imposes requirements on candidates, they are less burdensome than in many other states.¹⁷⁵ Naturalization requirements do not restrict formal citizenship to only those individuals whose identities are inextricably tied to the state or who have fully integrated into society. That is, naturalization requirements do not necessarily ensure that those who naturalize are substantive citizens. But this is not a failing of naturalization. Rather, naturalization can be seen as a tool of transition for the individual applicant; naturalization fosters greater commitment to and membership in society.¹⁷⁶ In fact, the process itself—the study of U.S. history and civics, the

¹⁷¹ MOTOMURA, *supra* note 131, at 189.

¹⁷² *Id.* at 190–97 (advocating for immigrant welfare benefits, voting rights, the right to serve in public office or public employment, and protection against deportation).

¹⁷³ *Id.* at 162.

¹⁷⁴ *Id.* at 164.

¹⁷⁵ *See id.* at 145–47 (comparing the approaches of German immigration law, which “consecrates” integration that has already occurred, with American immigration law); *see also* RAINER BAUBÖCK ET AL., EUROPEAN UNIV. INST., ACCESS TO CITIZENSHIP AND ITS IMPACT ON IMMIGRANT INTEGRATION: EUROPEAN SUMMARY AND STANDARDS 2–21 (2013), http://eudo-citizenship.eu/images/acit/acit_report_eu%20level%20summary.pdf [<https://perma.cc/RN98-B7P2>] (providing a statistical analysis comparing the naturalization requirements within Europe); BRONWEN MANBY, OPEN SOC’Y FOUNDS., CITIZENSHIP LAW IN AFRICA: A COMPARATIVE STUDY 64–72 (2d ed. 2010), <http://www.unhcr.org/4cbc60ce6.pdf> [<https://perma.cc/VG36-9GXW>] (charting the difficulty of obtaining citizenship in many African nations).

¹⁷⁶ *See* MOTOMURA, *supra* note 131, at 189–200. Compare this view of naturalization to that of Noah Pickus, who argues that current naturalization procedures do not adequately “generate[] a sense of mutual commitment among all Americans, naturalized and native-born alike.” Pickus, *supra* note 126, at 108. He suggests that U.S. naturalization should be more substantive and symbolic. *Id.* at 126. To put his arguments in terms of the framework provided in this Article, Pickus takes a particular view of substantive citizenship in the United States and argues that naturalization should be descriptive with respect to that view of substantive citizenship. *Id.* Joseph Carens, on the other hand, proposes that a minimum residency requirement is the only defensible requirement for naturalization. Carens, *supra* note 138, at 142. His approach takes a more prescriptive view of naturalization in that he distinguishes between the requirements of naturalization and the aspirations for naturalized citizens. *Id.* at 142–46 (“What about loyalty, patriotism, and identity? Can’t we expect immigrants to become attached to America? . . . [A]s a normative matter, we should not try to impose such an expectation, much less make it a legal requirement. This is the sort of thing we can try to encourage and foster, but it’s not the sort of thing we should try to command.”).

efforts to become sufficiently proficient in English, the citizenship ceremony—promotes substantive citizenship even if only alerting new citizens to concepts, processes, and history that are widely believed to be important and fundamental to substantive citizenship in the United States.¹⁷⁷

Perhaps less obvious is how formal citizenship can play a prescriptive role even outside the realm of naturalization. *Jus soli* plays a prescriptive role in U.S. citizenship law, both on an individual level and on a group basis. For an individual, birthright citizenship secures the full suite of rights and benefits available in the state. This arguably maximizes the individual's opportunity to develop substantive citizenship and a sense of belonging in the community that, in turn, prepares the individual for assuming the obligations of citizenship.¹⁷⁸ Citizenship shapes an individual's sense of identity, loyalty, sense of place, and sense of belonging.¹⁷⁹ This is particularly important for first-generation U.S. citizens, but remains true for children descended from a long line of citizens.

The prescriptive role of *jus soli* also plays out in the aggregate: the distribution of formal citizenship to individual children born in the United States fosters the integration of whole communities over time. The conferral of citizenship on a single

Carens, however, does not adequately account for the capacity to foster substantive citizenship inherent in formal citizenship itself.

¹⁷⁷ MOTOMURA, *supra* note 131, at 156–57 (urging the use of the “civics and history requirements to educate rather than purely to test”).

¹⁷⁸ GERISON LANSDOWN, UNICEF, *THE EVOLVING CAPACITIES OF THE CHILD* 17 (2005), <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> [<https://perma.cc/7V6W-4Z7U>] (asserting that individuals, including children, “build competence and confidence through direct experience: Participation leads to greater levels of confidence, which in turn enhances the quality of participation”).

¹⁷⁹ See, e.g., Bhabha, *supra* note 14, at 58 (“As the child develops, so the balance between ascriptive status and consensual identification shifts—the child changes from a repository of protective concerns, a recipient of enabling inputs to an active participant”); Caroline B. Brettell, *Political Belonging and Cultural Belonging: Immigration Status, Citizenship, and Identity Among Four Immigrant Populations in a Southwestern City*, 50 AM. BEHAV. SCIENTIST 70, 70 (2006); Kelly Campbell et al., *Exploring the Latino Paradox: How Economic and Citizenship Status Impact Health*, 34 HISP. J. BEHAV. SCI. 187, 188 (2012); Ariana Mangual Figueroa, “I Have Papers So I Can Go Anywhere!”: *Everyday Talk About Citizenship in a Mixed-Status Mexican Family*, 11 J. LANGUAGE, IDENTITY, & EDUC. 291, 291 (2012) (“The findings show that siblings communicate two key understandings during everyday conversations: first, the relevance of migratory status to their day-to-day lives and second, their family’s shared conventions for talking about citizenship in the home. As children and youth demonstrate the social norms for talking about citizenship, they also express their understanding of the ways that being a United States or Mexican citizen shapes their future opportunities.”); Roger Geertz Gonzalez, *Same and Different: Latino College Students’ Perceptions of Themselves and Others on Campus*, 12 J. HISP. HIGHER EDUC. 3, 17 (2013) (“[M]ost Latino college students point to a political power hierarchy between the three groups based on country of origin: Puerto Ricans who are natural born citizens, Cuban Americans who can stay and become U.S. citizens based on the wet foot/dry foot policy, and Mexicans who have a harder time acquiring citizenship when they enter the United States.”).

individual can foster the development of substantive citizenship in that individual's parents, children, and grandchildren.¹⁸⁰ As the individual with formal citizenship enjoys the advantages of formal citizenship, she becomes an usher in her family's navigation of culture, language, government, politics, and more.¹⁸¹ In that sense, the development of substantive citizenship "can be a multigenerational process."¹⁸² The Supreme Court's decision in *Wong Kim Ark*¹⁸³ triggered just such an aggregate effect. There, the U.S.-born child of Chinese immigrants claimed that he was a U.S. citizen by virtue of the Fourteenth Amendment.¹⁸⁴ Though the United States did not provide for the naturalization of any Chinese immigrants and did not allow Chinese immigration at the time, the Court found that the claimant fell within the Fourteenth Amendment's citizenship clause.¹⁸⁵ As a result, the operation of the Fourteenth Amendment played an important role in placing Chinese communities on a trajectory toward substantive citizenship in American society.¹⁸⁶ I contextualize the prescriptive role of *jus soli* in the larger debate about birthright citizenship in more detail in Part V.

V. NAVIGATING MODERN IMMIGRATION AND CITIZENSHIP DEBATES

A more nuanced understanding of the roles that formal citizenship can play with respect to substantive citizenship alleviates the apparent paradox created by multiple paths to formal citizenship. Citizenship is much more than a stamp of approval indicating an individual's fitness for membership in the community, though it can sometimes play just such a descriptive role. Citizenship is not a destination, but rather a path to integration and belonging—substantive citizenship. The fact that individuals who become citizens through naturalization, *jus soli*, and

¹⁸⁰ See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 180–81 (2014) (describing the way in which the conferral of legal residence and citizenship status on children helps children "serve as cultural brokers between their parents and mainstream society" despite their parents' language barriers and immigration status).

¹⁸¹ *See id.*

¹⁸² *See* MOTOMURA, *supra* note 131, at 146–47 ("*Jus soli* reflects transition for families, by assuring first-generation immigrant parents that their children born in the United States will be citizens. Historically, this was especially important for Asian immigrants, who were barred from naturalization, but whose U.S.-born children became citizens under the U.S. Supreme Court's 1898 decision in *Wong Kim Ark*. More fundamentally, *jus soli* recognizes that transition can be a multigenerational process."); *see also* MOTOMURA, *supra* note 180, at 168–69 (discussing the relationship between local integration and national citizenship as "mutually reinforcing"). In addition, the Fourteenth Amendment plays a more fundamental anti-caste function that is most apparent in the citizenship rights associated with African Americans. *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2 (2011); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669–70 (2009).

¹⁸³ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

¹⁸⁴ *Id.* at 649.

¹⁸⁵ *Id.* at 702–05.

¹⁸⁶ *See* MOTOMURA, *supra* note 131, at 146–47.

jus sanguinis are not equally qualified at the moment of citizenship is not a failing of citizenship law but an important feature that accounts for formal citizenship's ability to preserve and facilitate substantive citizenship.

Under the framework proposed here, political and academic debates regarding citizenship and immigration can best be understood as arising from (1) disagreement about which role formal citizenship should play with respect to substantive citizenship or (2) whether a formal citizenship rule has or will successfully affect substantive citizenship in the desired or expected way. Should birthright citizenship be predictive in nature? Is it adequately fulfilling this role? What role should naturalization play? Is it descriptive? If so, do naturalization requirements adequately measure an individual's substantive citizenship?

This dynamic is evident in many areas, but here I briefly discuss how my framework helps spotlight the underlying tensions in two examples: (A) the recurring proposals to exclude the children of undocumented immigrants from access to territorial birthright citizenship and (B) the debate surrounding the proposal and ultimate failure of the DREAM Act provide useful discussion platforms.

A. *Jus Soli and the U.S.-born Children of Undocumented Immigrants*

U.S. law has historically operated (and continues to operate) on the premise that the Fourteenth Amendment's guarantee of citizenship to all individuals "born . . . in the United States, and subject to the jurisdiction thereof"¹⁸⁷ included all but the children of diplomats and "Indians not taxed."¹⁸⁸ In its landmark decision of *Wong Kim Ark*, the Supreme Court held as much in concluding that the U.S.-born son of Chinese immigrants (who themselves were legally barred from naturalizing on account of their race) was a U.S. citizen.¹⁸⁹ The publication, however, of Schuck and Smith's *Citizenship Without Consent*, which argued that the children of undocumented immigrants are outside of the Fourteenth Amendment's guarantee,¹⁹⁰ sparked a long-term debate about the meaning of the Fourteenth Amendment's citizenship clause. Several scholars have challenged Schuck and Smith's conclusion that the Fourteenth Amendment does not mandate the distribution of citizenship to the U.S.-born children of undocumented immigrants,¹⁹¹ but others have adopted

¹⁸⁷ U.S. CONST. amend. XIV, § 1.

¹⁸⁸ See Epps, *supra* note 89, at 352 (describing the two classes not subject to "the full and complete jurisdiction" of the United States: children of diplomats and Indians not taxed).

¹⁸⁹ *Wong Kim Ark*, 169 U.S. at 705.

¹⁹⁰ SCHUCK & SMITH, *supra* note 10, at 114–15.

¹⁹¹ See, e.g., Epps, *supra* note 89, at 334–35; Gotanda, *supra* note 168, at 237–38; Allen R. Kamp, *The Birthright Citizenship Controversy: A Study of Conservative Substance and Rhetoric*, 18 TEX. HISP. J.L. & POL'Y 49, 59 (2012); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 501 (2008); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278, 279 (1985) (reviewing SCHUCK & SMITH, *supra* note 10); Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 486 (1987) (reviewing SCHUCK & SMITH, *supra* note 10);

their views.¹⁹² Legislators periodically attempt to limit the Fourteenth Amendment's citizenship clause's application,¹⁹³ but all have failed. A recent surge in debate about the birthright citizenship based on birth in U.S. territory¹⁹⁴ suggests that this will be a recurring topic of public interest.

The existing debate can be better understood within the citizenship framework proposed in this Article. Many critics of territorial birthright citizenship argue that the United States cannot financially support a citizenry that is increasing through birthright citizenship.¹⁹⁵ Because there are simply not enough jobs or tax dollars to go around, the state must make distinctions among individuals born in the United States. Others are more specific; they argue that the children of undocumented immigrants are not and are unlikely to become like other U.S.-born children despite being born in the same country.¹⁹⁶ The children of undocumented immigrants, the

David S. Schwartz, *The Amoralism of Consent*, 74 CAL. L. REV. 2143, 2143 (1986) (reviewing SCHUCK & SMITH, *supra* note 10); Janet Wong, Book Review, 21 HARV. C.R.-C.L. L. REV. 746, 748 (1986) (reviewing SCHUCK & SMITH, *supra* note 10). These articles argue against Schuck and Smith's position that a person born of illegal immigrants should not be a citizen within Fourteenth Amendment protection.

¹⁹² See, e.g., Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 3 (2009); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 227 (2008); Wood, *supra* note 118, at 494–95; Stevens, *supra* note 116, at 344–45. These articles advocate for a change in American birthright citizenship similar to the Schuck and Smith position.

¹⁹³ See, e.g., Birthright Citizenship Act of 2013, H.R. 140, 113th Cong. § 2 (2013); Birthright Citizenship Act of 2011, S. 723, 112th Cong. § 2 (2011); Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. § 2 (2009); H.R. 126, 111th Cong. § 2 (2009); Citizenship Reform Act of 2007, H.R. 133, 110th Cong. §§ 2, 3 (2007). These bills have varied, but they generally reinterpret the Fourteenth Amendment's citizenship clause to require citizenship only for children born to U.S. citizens, legal permanent residents, or aliens serving in the armed forces. Other proposals to deny birthright citizenship to the children of undocumented immigrants, however, concede that the Fourteenth Amendment may indeed provide for birthright citizenship to all children born in the United States and, therefore, they call for an amendment to the Constitution. See S.J. Res. 2, 112th Cong. (2011).

¹⁹⁴ For example, 2016 Republican presidential candidate Donald Trump has expressed doubts that the U.S. Constitution requires the bestowal of citizenship to the children of undocumented immigrants. Nick Gass, *Trump to O'Reilly: The 14th Amendment Is Unconstitutional*, POLITICO (Aug. 19, 2015, 6:38 AM), <http://www.politico.com/story/2015/08/donald-trump-bill-oreilly-interview-121515.html?ml=po> [<https://perma.cc/3CHJ-6Y27>].

¹⁹⁵ Ian Tuttle, *The Very Real Economic Costs of Birthright Citizenship*, NAT'L REV. (Aug. 21, 2015, 6:40 PM), <http://www.nationalreview.com/article/422921/birthright-citizenship-economic-costs-incentives> [<https://perma.cc/DW4P-ZYXM>].

¹⁹⁶ See, e.g., Wood, *supra* note 118, at 495–96 (“[B]ecause the parents are illegal, and hence to some degree fearful of apprehension and deportation, their children are less likely to participate in the wider community, to learn English, and otherwise to assimilate fully. As a result, U.S.-born children of illegal aliens seem less likely to become fully Americanized than the children of citizens or legal immigrants. To the extent they are not fully Americanized before they reach voting age, their votes are less likely to be based on traditional American values and concerns, and therefore more likely to favor policies

argument goes, will not speak English, will not have sufficiently strong ties and loyalty to the United States, will not engage in the U.S. political culture, or will otherwise fail to ever become attached to the United States in a meaningful way.¹⁹⁷ Essentially, these arguments presume that the purpose of birthright citizenship is to identify individuals who are already like other citizens or who will become like other citizens—that territorial birthright citizenship is predictive or descriptive in nature. Under these arguments, territorial birthright citizenship is failing in its descriptive or predictive role.

Generally, opponents respond to these arguments in kind. The U.S.-born children of undocumented immigrants, they argue, are very much like their counterparts with documented parents.¹⁹⁸ They will go to school in the United States, they will learn English, they will have more ties to the United States than to any other country, they will be as informed about political debates as any other child born in the United States, and they will consider themselves American.¹⁹⁹ These supporters of current U.S. citizenship practice conclude that birthright citizenship succeeds in its descriptive and predictive role.²⁰⁰

Arguments on both sides are flawed and incomplete. First, it is nonsensical to think of birthright citizenship as having any descriptive role. Infants born in the United States cannot be said to be substantive citizens from the moment of citizenship—birth. Infants have no real ties, no loyalty, no sense of shared identity, no understanding of the surrounding culture, or any other factor that could legitimately measure substantive citizenship in the United States. All infants are indistinguishable with respect to substantive citizenship. Any discussions about

opposed by most Americans. Less rapid or complete Americanization also frequently results in greater ethnic tensions and other problems associated with the growing multiculturalism in our country.” (citation omitted)).

¹⁹⁷ See *id.*

¹⁹⁸ See, e.g., Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1136–37 (2012); D. Carolina Núñez, *Beyond Blood and Borders: Finding Meaning in Birthright Citizenship*, 78 BROOK. L. REV. 835, 875–80 (2013).

¹⁹⁹ The debate surrounding the DREAM Act illustrates these assertions as well. President Barack Obama has described undocumented immigrant children brought to the United States at a young age: “These are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper.” Press Release, Office of the Press Sec’y, White House, Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/57DB-62PD>]; see also Jose Antonio Vargas, *Shadow Americans*, TIME, June 25, 2012, at 34, 36–43 (discussing personal experiences with immigrant misperceptions). If these DREAMers, brought to the country at a young age, have acquired substantive citizenship even without formal citizenship, it is illogical to think that similarly situated children born in the United States would not develop substantive citizenship, particularly with the protections that formal citizenship provides.

²⁰⁰ See Núñez, *supra* note 198, at 878.

whether the children of undocumented immigrants—or infants generally—somehow “deserve” birthright citizenship are fatally flawed.

To the extent that arguments focus on the predictive role of territorial birthright citizenship, those arguments are incomplete. Certainly, birthright citizenship has a predictive role. It is not a stretch to argue that the distribution of citizenship to individuals born in the United States identifies individuals who are likely to become like the rest of the citizenry in some substantive way. After all, they are likely to reside in the U.S., attend public school, and engage in activities that incorporate them into their surrounding communities. Thus, the arguments about whether the children of undocumented immigrants will become like other citizens are inherently arguments about whether birthright territorial citizenship as currently understood in the United States adequately predicts substantive citizenship. While I agree with those who argue that the children of undocumented immigrants are very much like their counterparts born to parents who are citizens or documented immigrants,²⁰¹ these arguments fail to account for a potentially more important role that territorial birthright citizenship plays.

As proposed in Part IV above, territorial birthright citizenship has a strong prescriptive component, and the failure to account for the transformative role of formal citizenship renders the current debates on birthright citizenship incomplete. The distribution of citizenship to individuals at birth can place those individuals on a path toward substantive citizenship. As citizens exercise their citizenship rights, they develop the characteristics of substantive citizenship, including shared identity, loyalty, civic-mindedness, or any other trait that is important to substantive citizenship in the United States. In fact, that is arguably precisely what the Fourteenth Amendment accomplished for the Americans who had previously been excluded from citizenship by slavery.²⁰²

²⁰¹ *Id.* at 875–80.

²⁰² *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 702–05 (1898) (holding an American-born child of Chinese immigrants had citizen rights under the Fourteenth Amendment); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1857) (denying U.S. citizen rights to a slave), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; Henry L. Chambers, Jr., *Slavery, Free Blacks and Citizenship*, 43 RUTGERS L.J. 487, 505 (2013) (“The Fourteenth Amendment . . . granted citizenship to all native-born black Americans, making African American citizenship a part of the Constitution.”); Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 ST. LOUIS U. PUB. L. REV. 329, 354 (2013) (noting that U.S. citizenship concerns for former slaves after the Civil War culminated in the Thirteenth, Fourteenth, and Fifteenth Amendments); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2071 (2008) (explaining that the Fifth and Fourteenth Amendments helped with the integration of immigrants); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2528 (2007) (“For the freed slaves, . . . access to territorial birthright citizenship has been a measure of progress against racial inequality and subordination. [They] have recognized that citizenship is the most elemental condition for racial equality because only citizenship guarantees the right to be territorially present and the right to vote; in other words, it is the individual’s foundational protection from state authority. The Fourteenth Amendment aimed precisely to accomplish

The question, then, ought to be not only whether a territorial birthright citizenship rule accurately predicts who will become a substantive citizen, but also whether a territorial birthright citizenship rule properly identifies individuals that the United States wants to place on the path to substantive citizenship.²⁰³ Reframing the question in this way helps ground the varying scenarios that have raised questions about the legitimacy of current U.S. territorial birthright citizenship practice in appropriate language.

For example, some who challenge the current application of U.S. territorial birthright citizenship point to evidence of noncitizen women entering the United States as tourists to give birth and thereby secure U.S. citizenship for their children. In a spirited critique of U.S. *jus soli* as currently applied, John McCaslin of the *Washington Times* referenced a “huge and growing industry in Asia that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American. Obviously, this was not the intent of the 14th Amendment; it makes a mockery of citizenship.”²⁰⁴ Judge Richard Posner later quoted McCaslin in his own vigorous objection to the current U.S. citizenship practice.²⁰⁵ There are legitimate questions about whether extending birthright citizenship to the children of tourists temporarily in the United States adequately and effectively serves a predictive or prescriptive function. Are the children of tourists likely to develop substantive U.S. citizenship? Are the children of tourists part of a class of individuals we ought to place on the citizenship path to encourage their development of substantive citizenship?

Whatever the answer to those questions,²⁰⁶ there is no reason to extrapolate those answers to the children of undocumented immigrants. Even if formal

that basic condition, to nullify *Dred Scott*'s exclusion of black people from citizenship.”); Núñez, *supra* note 198, at 872–74 (discussing the grant of citizenship to American Indians after the Fourteenth Amendment); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) (quoting one senator’s explanation of the purpose of the Fourteenth Amendment at the time of passing as an attempt to “abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another” (alterations in original) (citation omitted)).

²⁰³ Reframing the question in this way helps sift through the varying scenarios that have raised questions about the birthright citizenship rule.

²⁰⁴ *Inside the Beltway*, WASH. TIMES (Aug. 27, 2002), <http://www.washingtontimes.com/news/2002/aug/27/20020827-041504-7305r/> [<https://perma.cc/3SVZ-4NYY>] (quoting Craig Nelson, director of Friends of Immigration Law Enforcement).

²⁰⁵ See *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring).

²⁰⁶ My initial instincts with respect to the children of tourists is that, even assuming such children are not the appropriate subjects of prescriptive citizenship rules and are unlikely to independently become substantive citizens in the way anticipated by predictive citizenship rules, devising a rule that excludes them while including others who are indeed likely to become substantive citizens or who ought to be nudged toward substantive citizenship comes at too great an administrative cost. Matthew Lister, however, is open to a potential citizenship rule that excludes the children of tourists:

citizenship fails to carry out any of the potential roles it could play with respect to the substantive citizenship of U.S.-born children of tourists, that has no bearing on whether formal citizenship fulfills an important role with respect to the substantive citizenship of the U.S.-born children of undocumented immigrants.

I do not undertake a full analysis of the question of whether birthright citizenship for the children of undocumented immigrants accurately and adequately predicts or prescribes substantive citizenship—my purpose is merely to show how the framework proposed in this Article helps illuminate current citizenship and immigration debates—but I suggest that the children of undocumented immigrants are precisely the individuals that ought to be nudged toward substantive citizenship. These children are likely to remain in the United States. It would be a tragedy to create an underclass of sub-citizens, possibly stateless individuals, who walk on an unprotected, parallel path toward substantive citizenship or wander aimlessly on the citizenship map without access to the formal citizenship path.²⁰⁷

The version of the *jus soli* principle that I argue is required by liberal principles of justice, at least in any world in which we are likely to achieve in the near future, requires that citizenship be granted to anyone born in a state who spends any significant amount of time in the state—who “avails” himself of the good provided by the state—before the age of maturity. This applies, with only a few special exceptions, to anyone born in a particular state regardless of the legal status of his parents. This approach would be weaker, however, than the current U.S. rule because someone merely born in a state, who leaves at a very young age and who is entitled to citizenship in another country (to prevent statelessness), does not “avail” himself of the benefits of the society of his birth and therefore is not entitled to citizenship.

Lister, *supra* note 82, at 207.

²⁰⁷ Not only does the conferral of birthright citizenship on the U.S.-born children of undocumented immigrants foster those individuals’ development of substantive citizenship, it helps integrate families and communities. As Hiroshi Motomura has described,

[Birthright citizenship] is part of the integration of immigrants into American society. Children in immigrant families are typically much more likely than their parents to become integrated linguistically, socially, and in other dimensions. This is true regardless of a child’s legal status, but is even more true for children who have lawful immigration status or citizenship, which allows them to serve more effectively as cultural brokers between their parents and mainstream society outside immigrant enclaves. Their brokering role often starts with translating between their parents and teachers, not only from English but also from the culture of the school system and American society generally. In this way, a significant implication of both birthright citizenship and the DREAM act is allowing children to help not just themselves integrate, but their families, too.

Motomura, *supra* note 198, at 1136–37; *see also* MOTOMURA, *supra* note 180, at 180–81 (“By conferring lawful status on some family members, both birthright citizenship and the DREAM Act foster the integration of all family members, including those without lawful immigration status.”).

B. The DREAM Act and a “Path to Citizenship”

While the U.S.-born children of undocumented immigrants have access to the formal citizenship path under current U.S. law, individuals who were born without U.S. citizenship but grow up in the United States as undocumented immigrants find themselves in a more politically fraught controversy. The ultimately failed Development, Relief, and Education for Alien Minors Act of 2010²⁰⁸ (“the DREAM Act” or “the Act”) sought to provide undocumented immigrants who arrived in the United States as children (“DREAMers”) a path to citizenship in the United States.²⁰⁹ The Act provided a three-step system that ultimately led to naturalization for eligible noncitizens.²¹⁰ Noncitizens under the age of thirty-five who had arrived in the United States before age sixteen and had graduated from a U.S. high school were eligible for a temporary conditional status if they were accepted into a U.S. institution of higher education.²¹¹ They later could adjust their status to that of lawful permanent residents after ten years and after completing two years in a bachelor’s degree program or serving two years in the Armed Forces.²¹² Finally, after three years as legal permanent residents, DREAMers would be eligible to naturalize.²¹³ The DREAM Act, in effect, provided beneficiaries with a formal status and an avenue for obtaining citizenship. The Act, in my analogy, would place beneficiaries on an entrance onramp for the highway. The result for DREAMers would be significant. They would enjoy many opportunities that were inaccessible to them as undocumented immigrants. Legal status would open doors to education,²¹⁴ employment,²¹⁵ travel outside of the United States without fear of being unable to

²⁰⁸ S. 3992, 111th Cong. (2010).

²⁰⁹ *Id.* § 4; see Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 623, 626–31 (2011); Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 85–90 (2013).

²¹⁰ See Barron, *supra* note 209, at 626–30 (conceptually dividing the DREAM Act, S. 3992 §§ 5, 6, as follows: the first step is conditional nonimmigrant status (§ 5); the second is permanent residence (§ 6); and the third is naturalization (§ 6(k))).

²¹¹ S. 3992 § 4(a)(1)(A)–(F); Barron, *supra* note 209, at 627.

²¹² S. 3992 § 6(a), (c)–(d)(1)(D); Barron, *supra* note 209, at 629.

²¹³ S. 3992 § 6(k); Barron, *supra* note 209, at 631.

²¹⁴ For discussions of the challenges that undocumented immigrants face in access to education and related legal developments, see Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 437–52 (2004); Olivas, *supra* note 69, at 108–14; Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1759–69 (2009) [hereinafter Olivas, *The Political Economy*].

²¹⁵ Besides allowing formal access to work opportunities, work authorization also removes the fear that many undocumented workers have in enforcing employment rights. See Núñez, *supra* note 26, at 869–71 (discussing the difficulty of fully enforcing many employment and workplace rights as an undocumented worker); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 540–47 (2012).

return, and more. Once they became citizens, they would have the right to vote and participate in the political process.

Though the DREAM Act would not have immediately conferred citizenship on its recipients, the framework proposed in this Article is a useful tool for understanding the discussion surrounding the Act because public rhetoric addressed the DREAM Act in terms of a “path to citizenship.”²¹⁶ In fact, the public rhetoric surrounding the DREAM Act in many ways mirrored the public rhetoric related to territorial birthright citizenship.

Proponents of the DREAM Act largely framed the issue as an economic one and a moral one. Allowing U.S.-educated children to go to college and work would stimulate the economy, many argued.²¹⁷ Some also championed the Act as the “right thing to do.”²¹⁸ It would be unfair, proponents argued, to punish individuals who made no choice to immigrate to the United States without authorization.²¹⁹ Opponents were reluctant to support the Act because, among other things, they believed it incentivized unauthorized immigration, insufficiently disincentivized fraud, allowed beneficiaries to petition for immigration benefits for their undocumented immigrant relatives, and extended eligibility to too many.²²⁰ The DREAM Act failed by a narrow margin of votes, disappointing many on both sides of the political spectrum.²²¹

²³⁰ See, e.g., Editorial, *A Path to College*, L.A. TIMES (Nov. 17, 2010), <http://articles.latimes.com/2010/nov/17/opinion/la-ed-tuition-20101117> [<https://perma.cc/BV67-6RSD>].

²¹⁷ *Id.* (“Economically, it makes sense to encourage these students to go to college; if they become successful professionals, business owners and taxpayers in California, they will contribute to the state’s coffers.”). For an analysis of the advocacy used during the height of debates about the DREAM Act, see Olivares, *supra* note 209, at 97–98 (“Rather than continue to engage in the same debates about the righteousness of helping the DREAMers, advocates and legislators must change course and highlight the potential gains to the country (not just the DREAMers) in passing the DREAM Act.” (citation omitted)).

²¹⁸ See Press Release, Office of the Press Sec’y, *supra* note 199 (“[S]end me the DREAM Act . . . and I will sign it right away. . . . I will not give up on this issue, not only because it’s the right thing to do for our economy[,] . . . not just because it’s the right thing to do for our security, but because it’s the right thing to do, period.”); see also Editorial, *supra* note 217 (“Morally, it also makes sense; it would be unfair to penalize children who arrived in this country as minors and had no choice in the decision to come, and who themselves committed no crime.”); Editorial, *Dream Time*, N.Y. TIMES (Sept. 19, 2010) (on file with the Utah Law Review), <http://www.nytimes.com/2010/09/20/opinion/20mon2.html> (“Those who might qualify . . . are blameless for their illegal status and helpless to make it right.”).

²¹⁹ Editorial, *supra* note 217.

²²⁰ See Barron, *supra* note 209, at 623–25 (analyzing the arguments of proponents and opponents to the DREAM Act and categorizing the types of arguments used on both sides).

²²¹ For a comprehensive history of the genesis of the DREAM Act and the bipartisan support it initially had, see Olivas, *The Political Economy*, *supra* note 214, at 1759–1802. The Act’s bipartisan support may be attributed, in part, to its relatively narrow focus. That is, while comprehensive immigration reform would likely provide many issues over which individuals could disagree, the relatively narrow DREAM Act excluded many such issues.

But this had not been the first and was not the last attempt to address the status of undocumented immigrants in the United States. Prior proposals and subsequent efforts to resurrect the DREAM Act failed without much fanfare. But it is the alternative versions proposed by opponents of the 2010 DREAM Act that highlight the core of the disagreement between supporters and opponents. Senator Marco Rubio, for example, proposed a diluted version of the Act in which eligible noncitizens would obtain legal status in the United States but would be ineligible for citizenship.²²² “You can legalize someone’s status,” he said, “without placing them on a path toward citizenship.”²²³ Mitt Romney, on the other hand, favored granting a form of residency to undocumented immigrants in exchange for military service: “I’m delighted with the idea that people who come to this country and wish to serve in the military can be given a path to become permanent residents of this country”²²⁴

The alternative proposals suggest that the true opposition to the DREAM Act was based on an understanding of formal citizenship as a purely descriptive status. In proposing alternatives that did not lead to citizenship at all and that imposed more specific criteria for access to formal citizenship, opponents essentially disagreed with proponents of the original DREAM Act about whether its would-be beneficiaries had sufficiently developed substantive citizenship. In other words, many commentators treated the DREAM Act’s provision for access to formal citizenship as a descriptive citizenship rule. Disagreements centered around the question of how much substantive citizenship warranted access to formal citizenship. Did the DREAMers have enough substantive citizenship to ultimately become citizens? How should DREAMers prove their substantive citizenship? Military service? High school graduation? College education?

Imagining the DREAM Act as a process that ends in formal citizenship once those individuals have proven their substantive citizenship is certainly one valuable way to explore the issue. It is easy to visualize the DREAMers as individuals who are on paths parallel to the formal citizenship path, approaching substantive citizenship, but unprotected by the rights and benefits that the formal citizenship path provides. They grow up in the United States, attend school in the United States, enroll in college, and likely develop all of the same qualities of substantive citizenship that their documented and citizen counterparts do. And DREAMers do

See id. at 1789–1802 (arguing that the DREAM Act would be a perfect test case for determining to what extent piecemeal immigration legislation could be more successful than a comprehensive immigration solution).

²²² Editorial, *A Dream Act Without the Dream*, N.Y. TIMES (Mar. 27, 2012) (on file with the Utah Law Review), <http://www.nytimes.com/2012/03/28/opinion/a-dream-act-without-the-dream.html>.

²²³ *Id.* For other legislation proposing a path to legal status without a route to citizenship for DREAMers, see STARS Act, H.R. 5869, 112th Cong. (2012).

²²⁴ James Oliphant, *Mitt Romney Says He Would Veto DREAM Act*, L.A. TIMES (Jan. 1, 2012), <http://articles.latimes.com/2012/jan/01/health/la-pn-mitt-romney-says-he-would-veto-dream-act-20120101> [<https://perma.cc/62JQ-RNVS>].

this in spite of the obstacles that their undocumented status poses. In some sense, their development of substantive citizenship merits the grant of formal citizenship.

But these arguments are incomplete. Formal citizenship can be more than descriptive of an individual's substantive citizenship. Formal citizenship can also be predictive and prescriptive. Instead of discussing formal citizenship as a final destination that lies at the end of a "path to citizenship," commentators must also discuss the citizenship path itself. What might formal citizenship do to foster substantive citizenship in DREAMers? How much faster might DREAMers develop substantive citizenship as formal citizens rather than blazing a difficult trail? Formal citizenship may be much more than a reward for the DREAMers' development of substantive citizenship; formal citizenship may also be a driving force in their development of substantive citizenship. With formal citizenship, DREAMers would be included in significant opportunities for substantive citizenship building. For example, they would have increased access to educational opportunities that would, in turn, help them contribute to their communities. DREAM Act beneficiaries might develop increased loyalty to a country that affirmatively claims them as the country's own. Beneficiaries might find the prospect of political participation an incentive for increased engagement in political debate. Again, the purpose of this Article is not to answer the question of whether and to what extent formal citizenship might foster substantive citizenship in DREAM Act beneficiaries, but rather to offer a framework for recasting and renewing important debates that touch on immigration and citizenship issues.

VI. CONCLUSION

Formal citizenship and substantive citizenship are related but not synonymous. Though all formal citizenship rules place individuals on what I have described as the citizenship trajectory, they do so in different ways and at different points on the trajectory toward substantive citizenship. This view of citizenship helps explain the coexistence of multiple, varying citizenship rules leading to equal citizenship and reveals the often overlooked prescriptive role of citizenship. Moreover, it provides a framework and language for future discussions of formal citizenship's relationship to substantive citizenship. Analyzing citizenship rules under this framework reveals dynamics that are worth exploring.

Here, I have translated the debates surrounding territorial birthright citizenship for the U.S.-born children of undocumented immigrants and the DREAM Act into the language of my framework. This helps illuminate the perceived role that formal citizenship plays for commentators on both sides of these issues and highlights the failure of many commentators to account for the other roles that formal citizenship plays. In addition to discussing a path to citizenship, we must discuss the citizenship path itself. That is, rather than treating formal citizenship as a reward for developing a more substantive sense of membership and belonging, or substantive citizenship, we must recognize formal citizenship as a mechanism for fostering that very substantive citizenship. But the framework proposed in this Article has value in many other debates and arenas of inquiry. How might proposals to reinstate felon-

voting rights, for example, fit into this framework? Do the rights of citizen children adequately protect and facilitate their development of substantive citizenship? How did the distribution of citizenship to American Indians in the United States fit into this framework? Ultimately, recognition of the multidimensional relationship between formal citizenship and substantive citizenship facilitates clearer and more productive discussion of citizenship.