

## CITIZENSHIP, IN THE IMMIGRATION CONTEXT

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### ABSTRACT

*Recently, many international law scholars have begun to argue that the modern world is experiencing a “decline of citizenship” and that citizenship is no longer an important normative category. This Article argues that, on the contrary, citizenship remains an important category and one that implicates considerations of justice. I articulate and defend a “civic” notion of citizenship that is based explicitly on political values rather than on shared demographic features such as nationality, race, or culture. I use this premise to argue that a just citizenship policy requires some form of the jus soli (citizenship based on location of birth) and the jus sanguinis (citizenship based on “blood” or descent) approaches to citizenship acquisition. I show why arguments against a “civic” notion of citizenship made by Peter Schuck, Rogers Smith, Peter Spiro, Linda Bosniak, and Ayelet Shachar, among others, are mistaken. This justice-based approach to citizenship also has significant implications for naturalization law and policy. I argue, first, that this approach requires open and easy naturalization, and I show why the use of naturalization policy to foster national identification is wrong. Second, I demonstrate that if naturalization is easy and open, then some rules limiting certain social benefits and privileges to citizens may be compatible with justice, thereby providing a foundation for future discussions of alienage law.*

### I. INTRODUCTION

Citizenship policy is intrinsically tied to immigration policy. Therefore, it is impossible to create a just immigration policy without exploring the limits placed on citizenship policy by considerations of

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justice. The primary question I ask in this Article is how citizenship may be distributed. I consider how the good of full membership may be distributed and made available, paying particular interest to how new members may join a society and to the sorts of limits that existing members may place on joining their society.<sup>1</sup> A related question is what makes an individual a member of one society rather than another. This question becomes increasingly important as we move away from racially or ethnically defined accounts of citizenship—an approach that I argue we should adopt.<sup>2</sup>

Traditionally, citizenship has been distributed in three main ways: by descent (*jus sanguinis*),<sup>3</sup> by birth within a territory (*jus soli*),<sup>4</sup> and by naturalization.<sup>5</sup> The vast majority of citizens in all states gain citizenship through one or both of the first two methods.<sup>6</sup> These citizens are usually thought of as “natural” citizens, and so we might think that an inquiry focused on immigration need not say anything deep about such cases. But, as I show, these rules have significant import for the question of citizenship in the immigration context,<sup>7</sup> and so we must work to determine which, or which mix, of the principles is correct—if any. I also examine the specifics of naturalization policy in some detail, seeking to establish the requirements for and boundaries of such a policy in a just state.<sup>8</sup> Answering these questions will take up the bulk of this Article.

For purposes of this Article, I assume that states have significant, though not unlimited, discretion to set their own immigration policies.<sup>9</sup> Given this assumption, I discuss the question of citizenship only

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1. See *infra* Parts III, IV.

2. See *infra* Part II.B.

3. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 15 (5th ed. 2003) (translating *jus sanguinis* as “right of blood” and defining the term as “the conferral of nationality based on descent, irrespective of the place of birth”); see *infra* Part III.A.

4. ALEINIKOFF ET AL., *supra* note 3, at 15 (translating *jus soli* as “right of land or ground” and defining the term as the “conferral of nationality based on birth within the national territory”); see *infra* Part III.B.

5. Rogers Brubaker, *Citizenship as Social Closure*, in IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, *supra* note 3, at 2, 8 (defining naturalization as the process by which “[p]ersons to whom the citizenship of a state is not ascribed at birth may be able to acquire it later in life”); see *infra* Part IV.A.

6. Brubaker, *supra* note 5, at 7–8 (noting that “[t]he vast majority of persons acquire their citizenship” by ascription). As this Article makes apparent, I have doubts about whether “ascription” is necessary for defining such action.

7. See *infra* Part III.A–B.

8. See *infra* Part IV.A.

9. Cf. Joseph Heath, *Immigration, Multiculturalism and the Social Contract*, 10 CAN. J.L. & JURISPRUDENCE 343, 350 (1997) (noting that “[i]t is widely accepted that states are . . . not under any obligation to accept as members those who seek to enter through migration”);

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as it is most relevant to the problem of immigration. In limiting my inquiry to issues directly relevant to immigration, I hope to make a sizeable problem somewhat more manageable. Except where directly relevant to immigration, I ignore those questions about citizenship that are at the heart of the debates between liberals and republicans (in the political philosophy, not the political party sense)—such as the question of what it means to be a good citizen<sup>10</sup> and the many important questions related to multiculturalism.<sup>11</sup> I do not claim to give anything resembling a full theory of citizenship. I will assume much that would have to be argued for more fully in a work focused exclusively on citizenship or more generally on global justice.

In this Article, I work primarily in a form of ideal theory,<sup>12</sup> at least insofar as I focus on an idealized case in which we have a world of states, each liberal<sup>13</sup> or at least decent,<sup>14</sup> that are not below some acceptable minimum level of wealth. I will make exceptions to this rule clear. I take this ideal case as my focus because it allows me to ignore considerations relating to refugees and other groups that suffer extreme deprivation. These are special cases (though sadly common ones) that are best dealt with separately. Using this idealized account allows us to settle on a model that we can use to think about just citizenship policies.

Because I am concerned with an ideal model, I do not devote significant time to detailed criticism of, and proposals for, reform of

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Stephen R. Perty, *Immigration, Justice, and Culture*, in JUSTICE IN IMMIGRATION 94, 94 (Warren F. Schwartz ed., 1995) (arguing that “liberal states have extensive but not unlimited obligations to admit outsiders”).

10. Compare, e.g., EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (2004) (arguing in favor of a liberal notion of civic education and “good citizenship”), and STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2003) (same), with PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) (arguing in favor of a “civic republican” notion of citizenship).

11. See generally, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994).

12. For a comprehensive discussion of “ideal theory,” see generally JOHN RAWLS, A THEORY OF JUSTICE 7–8 (1971) [hereinafter RAWLS, THEORY OF JUSTICE]. My use of “ideal theory” is somewhat less stringent than that used by John Rawls. In my analysis, more facts about the actual world must be considered.

13. JOHN RAWLS, THE LAW OF PEOPLES 23 (1999) [hereinafter RAWLS, LAW OF PEOPLES] (“Liberal peoples have three basic features: a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by . . . ‘common sympathies’; and finally, a moral nature.” (footnote omitted)).

14. *Id.* at 59–60 (defining “decent peoples” as “nonliberal societ[ies]” whose “basic institutions meet certain specified conditions of political right and justice and lead its people to honor a reasonable and just law”).

the citizenship laws of any particular state. Instead, my account explores the idealization of certain aspects of membership in a just state. While I use examples of laws from several actual states to help explicate principles and to provide concrete examples, the goal of this Article is not to critique specific laws but to provide an ideal model. The model created in this Article is one to which a liberal state should aspire. Accordingly, the model goes beyond the bare minimum requirements that any liberal or decent state must meet if it is not to be an outlaw state<sup>15</sup> and instead sketches the standards that a state must meet for its citizenship policy to be truly just.

I assume (but do not argue) that there are lesser standards, the satisfaction of which would qualify a state as a member in good standing in the international community, at least as to its citizenship policy; in other words, states that meet these lesser standards would not be considered outlaw states. To the extent that states meet these lesser standards, they should not be pressured to change their citizenship policies, even if those policies are not fully just.<sup>16</sup> My focus, however, is not on these more minimal standards; instead, I focus on the more demanding standards to which liberal societies, out of a desire to be fully just, rightly hold themselves. Most, if not all, states are not and have not been fully just, so issues relating to membership in actual states involve many remedial questions that I cannot hope to adequately deal with in this Article. I do not attempt, for example, to provide answers to such hard questions as what is required in nonideal conditions or why one society should move toward the ideal if others do not do the same. I aim to provide a clear picture of the ideal toward which we should move. This is a difficult enough problem for this Article.

My argument is situated within the context of modest cosmopolitanism. Modest cosmopolitanism holds that despite our duties of justice to all people, there will remain individual states, and citizens

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15. *Id.* at 90 (defining “outlaw states” as those states that “refuse to comply with a reasonable Law of Peoples” and noting that such “regimes think a sufficient reason to engage in war is that war advances, or might advance, the regime’s rational (not reasonable) interests”).

16. *See id.* at 59–62 (explaining the importance of tolerating nonliberal peoples and outlining reasons why we should not “insist[ ] on liberal principles for all societies,” despite concerns that “the social world of liberal and decent peoples is not one that, by liberal principles, is fully just”); Jon Mandle, *Tolerating Injustice*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 219, 219–33 (Gillian Brock & Harry Brighouse eds., 2005) (asking “[w]hy should a society committed to liberal principles of justice and willing to enforce them domestically refrain from doing so internationally?” and concluding that, in fact, “the toleration of decent societies does not involve any compromise of liberal principles of justice, but rather results from that very commitment [to justice]”).

within those states have more, stronger, and different duties to co-members than to nonmembers.<sup>17</sup> Those who reject modest cosmopolitanism will find more cause to disagree with my analysis than those who accept it, but because I believe this view is the best, or at least the most plausible, I apply it throughout this Article. I hope that even those who reject modest cosmopolitanism can see the value in exploring what such an approach requires of citizenship policy.

## II. THE IMPORTANCE AND ROLE OF CITIZENSHIP

Before discussing how we should structure citizenship policies, I must say something about why citizenship is a good worth discussing. Although the goodness and importance of citizenship is, to some degree, assumed by modest cosmopolitanism (since it accepts that there may be greater duties among members than those owed to nonmembers),<sup>18</sup> this view also makes the importance of citizenship less clear in some ways (since significant, albeit smaller, duties are owed to nonmembers as well). There are at least two distinct questions to consider here—questions that are not often clearly distinguished by those working in the area. First, we might ask what role, if any, citizenship plays in a theory of justice that is compatible with modest cosmopolitanism. Second, we might ask what good citizenship is to individual persons; in other words, why is citizenship important as a matter of morality and personal development?

These two ways of thinking about the importance of citizenship roughly correspond to the distinction between the right and the good.<sup>19</sup> Communitarians have traditionally defined the right in terms of the good<sup>20</sup> while liberals have taken a different approach—giving priority to the right, which sets limits to permissible conceptions of the good.<sup>21</sup> I address issues related to both approaches in this Article,

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17. See generally, e.g., JON MANDLE, *GLOBAL JUSTICE* 88 (2006) (describing a sense of “justice [that] requires that everyone respect the basic human rights of all people” as “a form of cosmopolitanism”); SAMUEL SCHEFFLER, *Conceptions of Cosmopolitanism*, in *BOUNDARIES AND ALLEGIANCES* 111, 111–30 (2001) (outlining “two different strands in recent thinking about cosmopolitanism”—“[c]osmopolitanism about justice and cosmopolitanism about culture”).

18. See *supra* note 17 and accompanying text.

19. The distinction between the right and the good is found in the works of Immanuel Kant, John Rawls, and others. Under this distinction, moral principles, including principles of justice (or principles of “right”), have priority over and constrain the rational pursuit of goods and values. For further discussion on this point, see JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 140–45 (2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*].

20. See generally, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998).

21. According to Samuel Freeman:

though I assume the priority of the right to the good. My discussion provides indirect support for the priority of the right by drawing a compelling, or at least plausible, picture of the role and nature of citizenship in a just society and in a community of states.

We can express the role of citizenship in a liberal society that gives priority to the right over the good in the following schematic form.<sup>22</sup> We begin from the idea that social cooperation is necessary for the development of fully human capacities and for the achievement of nearly any conception of the good life.<sup>23</sup> The next step is to recognize that, at least in the world we live in and in any world we are likely to find in the conceivable future, social cooperation presupposes political cooperation.<sup>24</sup> Political cooperation, however, must be grounded in some kind of theory of citizenship because citizenship ultimately instructs us about the groups of people to whom we owe our duties and against whom we can invoke our rights.<sup>25</sup> At the heart of such a theory of citizenship is the idea of “equal citizenship,” which is the core of any plausible liberal theory of political cooperation.<sup>26</sup>

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Once specified, the one rational good enables us completely to define right and justice in maximizing terms, as those courses of conduct that ultimately are most conducive to causing this independently specifiable state of affairs to obtain. This simplifies moral and political deliberation: all conflicts between prevailing norms and disparate ends are resolvable by ascertaining which combination of ends and courses of action promote the greater overall balance of good. And this in turn provides a rational morality, one that defines for all choices a uniquely rational thing to do.

SAMUEL FREEMAN, *Utilitarianism, Deontology, and the Priority of the Right*, in JUSTICE AND THE SOCIAL CONTRACT 45, 62–73 (2006); see also RAWLS, JUSTICE AS FAIRNESS, *supra* note 19, at 141 (“In justice as fairness, then, the general meaning of the priority of right is that admissible ideas of the good must fit within its framework as a political conception.”); JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 230–32 (2000) [hereinafter RAWLS, LECTURES] (describing Kant’s approach to the priority of right).

22. Each of the following points is given more detail later in this Article as I discuss various challenges to the idea of citizenship and the ways it may be acquired in a just state. The account provided here is no more than a sketch and relies on what is said later and the referenced works for sufficient support. In this sketch, I draw heavily on ideas developed by Rawls, especially in his *Political Liberalism*. See generally JOHN RAWLS, POLITICAL LIBERALISM 15–35 (1991) [hereinafter RAWLS, POLITICAL LIBERALISM]. It seems to me, however, that these general ideas do not depend on Rawls’s particular view, but are found in most versions of liberalism and represent strong themes in social contract thinking, especially as developed by Jean-Jacques Rousseau and Immanuel Kant.

23. See *infra* Part II.B.

24. See *infra* Part II.B.

25. This may seem like question-begging against a more cosmopolitan view, but I do not think it is so. As stated, the possibility that we have the same rights and duties in relation to all people is left open. I do not think that this is a plausible view, but it will be closed off by considerations drawn from broader political philosophy and by what I say later in this Article, not by the definition of citizenship given here.

26. See *infra* Part II.B.

While much more could be said about these matters, the intuitive idea described here will guide us throughout our investigation.

A. *The “Decline” of Citizenship?*

Despite what may be implied from the preceding sketch, many scholars contend that citizenship is, for various reasons, of much less importance today than it was in the past.<sup>27</sup> The claim that citizenship is no longer of great importance, or that it has been “devalued” (to use Peter Schuck’s term),<sup>28</sup> is an increasingly common one. This claim, put forward by what Seyla Benhabib calls the “decline-of-citizenship theorists,”<sup>29</sup> is presented as a descriptive and a normative claim. My focus is on the normative claim that, with the spread of international human rights, the importance of citizenship has decreased in that it no longer plays an important role in our political thought.<sup>30</sup> Since many of the developments that lead the “decline-of-citizenship

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27. See generally, e.g., DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* (1996); PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); Richard Falk, *The Decline of Citizenship in an Era of Globalization*, 4 *CITIZENSHIP STUD.* 5 (2000).

28. See generally PETER H. SCHUCK, *The Devaluation of American Citizenship*, in *CITIZENS, STRANGERS, AND IN-BETWEENS* 163, 163–75 (2000) (discussing how “the equality, due process, and consent principles have evolved in ways that devalue citizenship”). Schuck’s “equality principle” refers to the “strong presumption that government must treat alike all individuals who are similarly situated.” *Id.* at 163. The “‘due process principle’ requires the government to deal fairly with all individuals over whom it exercises coercive power.” *Id.* The “‘consent principle’ emphasizes that political membership must be grounded in a continuing consensual relationship between the state and its citizens.” *Id.*

29. SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 115–16 (2004) (stating that “the decline-of-citizenship school” “consider[s] the waning of the nation-state, whether under the impact of economic globalization, the rise of international human rights norms, or the spread of attitudes of cosmopolitan detachment, as resulting in the devaluation of citizenship as an institution and practice”). It should be noted that Benhabib uses this term to cover a very wide range of views about citizenship and political philosophy more generally, including those who consider the supposed “decline” of citizenship a positive and those who consider it a negative. See *id.* at 115. The common point among these theorists is the belief that citizenship as traditionally understood is decreasing in importance in our globalizing world.

30. For an example of this argument, see JACOBSON, *supra* note 27, at 1–3. Of course, even the strongest proponents of such views recognize that human rights are not universally accepted and that even states that officially accept them often violate them. Cf., e.g., *id.* at 101 (noting “[t]he lag and ambivalence in the adoption of international human rights instruments in the United States”). The point is, however, that the movement toward the acceptance and protection of human rights is taken to be a progressive trend that will eventually be universal. Whether this is a plausible claim need not be addressed in this Article.

theorists” to disparage citizenship are essential to a liberalism that embraces modest cosmopolitanism, I must take this challenge seriously.<sup>31</sup>

As David Jacobson notes, “Determining who may become a member and a citizen is the state’s way of shaping and defining the national community.”<sup>32</sup> Traditionally, membership in a national community was very important. As Hannah Arendt explains, citizenship conferred, or at least secured, the “right to have rights.”<sup>33</sup> Without this right, some groups faced great physical danger, as was the case for those rendered stateless after the First and Second World Wars.<sup>34</sup> Other groups faced discrimination associated with the exclusion from citizenship, as was the case of Asians in the United States before changes were made to the naturalization law in the 1940s.<sup>35</sup>

With the rise of universal human rights on the international level, the value of citizenship seems to have greatly decreased,<sup>36</sup> so that some scholars now claim that residence, rather than citizenship, is of the most normative importance.<sup>37</sup> Given this development, we may

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31. While these concerns about the supposed “decline” of citizenship are common, they are not necessarily new. In addition, they are also not necessarily tied to globalization in its modern form. Such worries were noted, for example, by Bernard Bosanquet at the end of the nineteenth century in his articles discussing the duties of citizenship. In those articles, Bosanquet provides a quite modern-sounding discussion of whether citizenship still means anything in the face of the modern world. See B. Bosanquet, *The Duties of Citizenship*, in ASPECTS OF THE SOCIAL PROBLEM 1, 1–13 (Bernard Bosanquet ed., London, Macmillan & Co. 1895); B. Bosanquet, *The Duties of Citizenship—Continued*, in ASPECTS OF THE SOCIAL PROBLEM, *supra*, at 14, 14–27.

32. JACOBSON, *supra* note 27, at 5.

33. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296–98 (1951). For an excellent discussion and evaluation of Arendt’s argument, see BENHABIB, *supra* note 29, at 49–69.

34. Cf., e.g., David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of Occupation*, 47 VA. J. INT’L L. 295, 323–26, 336 & n.233 (2007) (describing the plight of “stateless Jews in Europe during” the Second World War).

35. While the “Chinese Exclusion Act” and similar laws were in place, Asians were not allowed to naturalize in the United States. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). The Chinese Exclusion Act was repealed in 1943, but even then, naturalization for Asians (mostly for women married to U.S. citizen men) remained limited. Full naturalization rights were not granted to Asians until passage of the Immigration and Nationality Act of 1952 (commonly called the “McCarren-Walter Act”), which removed restrictions on naturalization by “nonwhites.” See Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

36. See JACOBSON, *supra* note 27, at 1–3 (outlining the “ongoing paradigmatic shift from state sovereignty to international human rights” and arguing that “[w]hat we are witnessing today is the transforming of the state and international institutions, of their function and of their very *raison*, and human rights provide both the vehicle and object of this revolution”).

37. *Id.* at vii (arguing that “as the United States and Western European countries extended social, economic, and civic rights to growing foreign resident populations,” “the ‘value’ of citizenship as a status . . . became more attenuated,” so that, over time, “resi-

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think that “the distinction between citizen[s] and non-citizen[s] is not very significant,”<sup>38</sup> at least in liberal countries that respect human rights.

In Western Europe, much of this change has come through the implementation of human rights laws at the state level in an explicitly transnational form.<sup>39</sup> In the United States, the change has come primarily through the Supreme Court’s interpretation of the Due Process and Equal Protection Clauses of the U.S. Constitution,<sup>40</sup> with the high-water mark coming in *Plyler v. Doe*,<sup>41</sup> in which the Court held that states must provide primary education to undocumented aliens.<sup>42</sup> While these changes have been seen as admirable by most, not all agree with this favorable view. Some scholars argue that such changes “devalue” citizenship, undermine solidarity among citizens, and discourage immigrants from naturalizing.<sup>43</sup> Schuck, for instance, argues that the “devaluing” of American citizenship has undermined the “consensual” foundation of membership in liberal societies.<sup>44</sup> Schuck

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dence became the critical issue in determining access to a basket of rights and privileges, not citizenship”); *see also* SPIRO, *supra* note 27, at 16 (“But the human rights argument may not be one about citizenship so much as it is about legal residency status.”).

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38. JACOBSON, *supra* note 27, at 38; *see also* SPIRO, *supra* note 27, at 81 (“But in fact, citizenship makes very little difference. . . . Leaving aside the context of immigration law, resident aliens have essentially equivalent rights.”). I find Peter Spiro’s argument to be a significant exaggeration, even beyond the point that the “context of immigration law” is not a small issue to leave aside. The important point, however, is that Spiro argues that the rise of human rights has led to a decrease in the importance of citizenship.

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39. For example, parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention of Human Rights, must guarantee certain rights to “everyone” within their territories regardless of their citizenship. Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”); *see also* JACOBSON, *supra* note 27, at 38–41 (providing examples of constitutional and statutory schemes in several European states that guarantee aliens certain rights and arguing that “the disappearing distinction between citizen and alien” results in “devalued” citizenship).

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40. U.S. CONST. amend. XIV, § 1.

41. 457 U.S. 202 (1982).

42. *Id.* at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”).

43. *See, e.g.*, SCHUCK, *supra* note 28, at 163–64.

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44. *Id.* at 168. According to Schuck:

The consent principle . . . holds that political membership should not be ascribed to an individual on the basis of the contingent circumstances of his or her birth. Instead, it must reflect the individual’s free choice to join the polity, as well as the polity’s concurrence in that choice.

believes that it is important, if liberalism is to continue, to “re-value” American citizenship, and therefore he has applauded changes in immigration laws since the mid-1990s that allow states and the federal government to withhold benefits from noncitizens.<sup>45</sup> So far, such plans have not had complete success in federal courts, though some important changes were made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>46</sup> which limited immigrant access to public benefits.<sup>47</sup> Further, the last few years have seen increases in the aggressive enforcement of immigration laws<sup>48</sup> and the passage of local laws aimed against immigrants (especially, but not only, illegal or undocumented immigrants).<sup>49</sup>

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Two striking facts suggest that many aliens do not consent to citizenship: a large number of aliens who are eligible to naturalize fail to do so, and most of those who do naturalize do not apply until well after they become eligible.

*Id.* (footnote omitted). See generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (arguing that membership in a liberal society is based on actual consent and that extending rights to noncitizens, especially illegal aliens, undermines this consent condition). In a recent editorial in the *New York Times*, Schuck restated his position, arguing that citizenship is, or should be, based on “mutual consent.” See Peter H. Schuck, Op-Ed., *Birthright of a Nation*, N.Y. TIMES, Aug. 14, 2010, at A19. Although it is somewhat outside my main area of interest, it is worth noting that the historical claims made by Schuck in this editorial (and elsewhere) about the intent of the drafters of the Fourteenth Amendment are open to considerable doubt. Mark Shawhan offers an excellent discussion of this point. See generally, e.g., Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States’ Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519 (2001); Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship*, 119 YALE L.J. 1351 (2010); Mark Shawhan, “By Virtue of Being Born Here”: Birthright Citizenship and the Civil Rights Act of 1866 (Oct. 31, 2010) (unpublished manuscript) (on file with author and the Maryland Law Review), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1675876](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675876).

45. See generally PETER H. SCHUCK, *The Reevaluation of American Citizenship*, in *CITIZENS, STRANGERS, AND IN-BETWEENS*, *supra* note 28, at 176, 176–206.

46. Pub. L. No. 104-193, §§ 402(b), 412, 110 Stat. 2105, 2264–65, 2269–70 (1996) (codified at 8 U.S.C. §§ 1612(b), 1622 (2006)).

47. Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 357 (2002) (noting that “Congress enacted sweeping new restrictions on alien access to public benefits in 1996, [which] imposed . . . restrictions directly on various federal programs [and] authorized the states to restrict alien access to state benefits and to certain designated federal benefits, including Medicaid and welfare”).

48. See generally, e.g., Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 561–76 (2009) (describing the “increasingly aggressive tactics” used by the Bureau of Immigration and Customs Enforcement (“ICE”) “to enforce U.S. immigration law” and particularly focusing on “its practice of raiding the homes of immigrants”).

49. See, e.g., Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 6–13 (2007) (outlining immigration regulation ordinances enacted by “several states and municipalities” in 2006 and 2007 in response to “local perceptions that the federal

It is easy to overstate the similarities between citizens and noncitizens,<sup>50</sup> especially for someone who has never had the experience of living in a state as a noncitizen. This is especially true if we include temporary residents and, in particular, illegal or undocumented immigrants. In the United States, the rights of such individuals differ greatly from citizens and legal permanent residents.<sup>51</sup> But, if we focus on legal permanent residents, it is clear that the rise of human rights has made a significant difference in their situation, making them significantly more like citizens than previously was the case.<sup>52</sup> To the extent that this is true, the “decline of citizenship theorists” are correct. What, then, if anything, can we say is important or distinctive about citizenship?

### B. *The Importance of Citizenship*

Two distinct considerations are important. First, certain rights and benefits that should be made available to all citizens in a just society may justifiably be kept from legal permanent residents.<sup>53</sup> Some of these disabilities are only temporary, and most benefits must eventually be made available to any long-term resident, citizen or not. But, a just state may withhold some benefits from noncitizens indefinitely.<sup>54</sup> The most obvious of these restrictions is the right to full political participation, though at least some social benefits also fall into this category. I argue this not to deny Jacobson’s point that citizenship has become less important with the rise of human rights, but to note that respect for human rights does not entail full liberal rights.<sup>55</sup> As a result, a just society may reserve certain rights to its citizens.

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government [had] failed to enact [sufficiently] comprehensive [immigration] legislation”).

50. See, e.g., Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 211 (1998) (“The rigid bifurcation of citizens and noncitizens seems fictional in its failure to accurately recognize similarities between the groups . . .”).

51. See, e.g., D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 819–20 (noting that “undocumented immigrants” are “exclude[d]” from voting and “from many federal welfare benefits”).

52. Cf., e.g., *Mojica v. Reno*, 970 F. Supp. 130, 143 (E.D.N.Y. 1997) (stating that it is necessary “when deciding the meaning of the important new statutes dealing with legal permanent resident aliens to put these provisions in” the appropriate context, which includes acknowledging “the international role of [the United States] as a global leader in the defense of human rights”).

53. See *infra* Part IV.B. We may be able to restrict even more benefits from temporary residents, though I do not discuss this possibility to any great degree in this Article.

54. See *infra* Part IV.B.

55. See, e.g., MANDLE, *supra* note 17, at 44–45 (acknowledging that human rights “must be respected by all, and are owed to all human beings” but stating that, in the context of “a

Second, citizenship also retains its importance in defining the basis of social solidarity. This question involves understanding why a person should be a member of one community rather than another, as well as why people should feel motivated to engage in social cooperation. I show that, when joined with a general theory of justice, an answer to the first question can set up an answer to the second.

In normal circumstances, a state may not use morally irrelevant criteria such as racial and ethnic membership to determine immigration admission any more than it could use those criteria to make any other decision.<sup>56</sup> I expand on this theory to show that a just citizenship policy may not depend on or make reference to ethnic, racial, or national features. But, if such features are ruled out, we may question whether there is any sufficient basis for the sort of social solidarity necessary to establish and to encourage trust and reciprocity. If citizenship criteria are created based on a notion of the right and not on some substantial conception of the good, such as shared culture or nationality, societies might not develop the internal support necessary for stability. I contend, however, that shared membership in a polity—citizenship—that is just can itself provide the basis for this trust, and that a “thick” notion of membership is not necessary to ground citizenship.<sup>57</sup>

This is an old idea that finds expression, somewhat differently, in the political thoughts of Immanuel Kant and Jean-Jacques Rousseau, who argue that freedom is best developed within a republican state

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theory of global justice,” human rights “are more limited in content and are given a different defense than would be appropriate in other contexts and for other purposes”); Erin Kelly, *Human Rights as Foreign Policy Imperatives*, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY* 177, 177–92 (Deen K. Chatterjee ed., 2004) (stating that “[h]uman rights must be conceived of narrowly if they are to play the role spelled out for them by [her] principle of International Responsibility for Human Rights” and noting that this narrow conception of human rights does not “include the full liberal right to freedom of expression” or “the right to democratic political participation,” among others).

56. See Perry, *supra* note 9, at 114. According to Stephen Perry:

Restrictions on immigration that are intended to preserve cultural stability should therefore generally do so not by favoring certain cultures or discriminating against others, but rather by limiting the overall number of immigrants so as to ensure that cultural change within the state is not too rapid and present social forms are not simply overwhelmed.

*Id.* We might distinguish affirmative discrimination in favor of a particular ethnic or religious group when done for essentially remedial reasons or to rectify past injustice. I do not deal with this significant issue in this Article.

57. For a discussion of the “thin/thick” narrative distinction, see generally MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1994); for a contrast between the “thin” notion of the good found in Rawls and Kant with “thick” ethical notions, see BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

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that is able to form a league of like-minded states.<sup>58</sup> The idea also finds a natural home in the political liberalism of John Rawls and Charles Larmore.<sup>59</sup> In yet a different form, the same idea is put forward by Michael Walzer in his call for an American citizenship that is deeply and essentially pluralistic<sup>60</sup> but focused on developing a civic virtue that can be shared by all members.<sup>61</sup> It is also put forward by Jürgen Habermas and Jan-Werner Müller in their defenses of “constitutional patriotism.”<sup>62</sup> I will not adjudicate between these competing conceptions of what we might call a civic notion of citizenship.<sup>63</sup> In-

58. See IMMANUEL KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE 80–81 (E.B. Ashton trans., Univ. Pa. Press 1974) (1793); IMMANUEL KANT, PERPETUAL PEACE (M. Campbell Smith trans., 1903) (1795) [hereinafter KANT, PERPETUAL PEACE], reprinted in THE PORTABLE ENLIGHTENMENT READER 552, 552–59 (Isaac Kramnick ed., 1995); JEAN-JACQUES ROUSSEAU, *On The Social Contract*, in BASIC POLITICAL WRITINGS 141, 148 (Donald A. Cress ed. & trans., 1987) (1754) (“At once, in place of the individual person of each contracting party, this act of association produces a moral and collective body composed of as many members as there are voices in the assembly, which receives from this same act its unity, its common *self*, its life and its will.”); see also Pauline Kleingeld, *Kant's Theory of Peace*, in THE CAMBRIDGE COMPANION TO KANT AND MODERN PHILOSOPHY 477, 477 (Paul Guyer ed., 2006) (“Kant argues . . . that true peace is possible only when states are organized internally according to ‘republican’ principles, when they are organized externally into a voluntary league that promotes peace, and when they respect the human rights not only of their own citizens but also of foreigners.”). This line of thought has recently been developed with great skill and relevance to the present discussion by Anna Stilz. See generally ANNA STILZ, LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE 105–09 (2009) (discussing the views that Kant and Rousseau might have on the question of “global distributive justice” and the relationship of individuals to the state).

59. See generally CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 40–68 (1987) (developing the idea of “political liberalism”); RAWLS, LAW OF PEOPLES, *supra* note 13 (same); RAWLS, POLITICAL LIBERALISM, *supra* note 22 (same). R  
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60. See generally MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 53–77 (1992).

61. See generally *id.* at 81–101 (discussing civility and civic virtue in America).

62. See generally, e.g., JÜRGEN HABERMAS, *Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West*, in THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE HISTORIANS' DEBATE 249, 249–67 (Shierry Weber Nichol森 ed. & trans., 1989); JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM (2007); Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in MULTICULTURALISM, *supra* note 11, at 107, 107–49 [hereinafter Habermas, *Struggles for Recognition*]. As Müller states, “‘Constitutional patriotism’ . . . designates the idea that political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution.” MÜLLER, *supra*, at 1. R

63. Müller distinguishes between what he calls “civic nationalism” and his own favored view, “constitutional patriotism,” on the ground that “civic nationalism” aims for a “homogeneity” of beliefs, even if not of ethnic background, and “more or less directly imperils values such as inclusiveness, individuality, and diversity.” MÜLLER, *supra* note 62, at 78–79. We might think that France, with its official policy of secularism, would be an example of this. The civic notion of citizenship I develop in this Article, however, is closer to Müller’s “constitutional patriotism” than his “civic nationalism” because it does not require a substantive conception of the good. Since Müller’s view is an explicit form of political liberalism, as developed independently by Rawls and Habermas, this is unsurprising. Confusion R

stead, I only note a few points that are common among the various accounts. In doing so, I illustrate how a civic notion of citizenship can ground the social solidarity required by a just state without resorting to exclusive ethnic, national, or racial characteristics and without depending on members believing in mythical stories of national unity or origin or being subjected to bad faith on a massive scale.<sup>64</sup> If successful, I will have gone a long way toward showing the value of citizenship, even after the advent of universal human rights.

A civic notion of citizenship may be theorized in several ways. Michael Walzer characterizes it as “[c]itizenship . . . separated from every sort of particularism: the state is nationally, ethnically, racially, and religiously neutral.”<sup>65</sup> The private organizations that make up “civil society” are “the ground of democratic politics,” since it is in such groups that we learn the virtues of cooperation and reciprocity.<sup>66</sup> But, such a state is also one in which the exercise of political rights helps us to develop our attachment to the state.<sup>67</sup> This approach to citizenship is explicitly based around political values. The relationship among and between citizens in a just liberal state is one of “civic friendship,” a desire to seek “fair standards of social cooperation”; it does not require citizens to abandon their various moral beliefs or

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is almost impossible to avoid in this area given the variety of terminology used by various writers, but I stick, for better or for worse, with a “civic notion of citizenship.”

64. For a discussion of the role of bad faith in formulating national solidarity, see generally Simon Keller, *Patriotism as Bad Faith*, 115 *ETHICS* 563 (2005). Rogers Smith has argued at great length that various “stories of peoplehood” are necessary elements in any stable society. See ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* 5 (2003) (discussing “the fundamental and pervasive role that stories of peoplehood play in political life”). In Smith’s account, these stories almost always involve large-scale falsehoods, mythical beginnings, and half-truths. See *id.* at 44–45 (noting that these stories contain “a certain account of the past and present that is usually selectively stylized if not mythical”). The depressing idea that false beliefs are necessary for social cooperation is defended by Smith through historical analysis and speculative claims about human psychology. What results is a deeply elitist, undemocratic, and anti-Enlightenment view in which certain select groups (including, it seems, political theorists) see the stories for the falsehoods that they are but use them to keep the rabble happy enough to pay taxes and get along. I find this inadequate as a historical description and implausible as a normative ideal. Indeed, the tendency to slide between speculative descriptive claims and normative conclusions is a constant flaw in Smith’s book. Because I argue that people in a democratic society are mature enough to base their cooperation on true claims, I reject Smith’s view.

65. WALZER, *supra* note 60, at 9.

66. *Id.* at 18 (noting that “American citizens acquire political competence within secondary and often parochial associations”).

67. See *id.* at 18–19 (arguing that “it is the exercise of political rights that gives them value in the eyes of the citizens” and that “participatory politics . . . enhances the citizen’s commitment to the larger community”).

ethnic or cultural backgrounds.<sup>68</sup> These “fair standards for social cooperation” focus not on the moral values or cultural background of citizens, since these may be quite diverse, but on the process of law-making and the use of state power.<sup>69</sup> In this way, the civic notion of citizenship helps make the good of citizenship possible.

In a pluralistic society, citizens do not expect general agreement on the good<sup>70</sup> but can agree on the political arrangements that allow each individual to pursue his own various conceptions of the good.<sup>71</sup> It is these political arrangements to which we owe allegiance as citizens. Importantly, these ideas are not merely abstract—they necessarily involve the notion of being part of a particular system of social cooperation, of taking part in a political system.<sup>72</sup> We need not go as far as Aristotle and state that we are essentially political animals,<sup>73</sup> but we can affirm Rousseau’s contention that in society we become more than brutes and animals.<sup>74</sup> Political cooperation is a part of social cooperation and a necessary feature of it; without political cooperation, we would not have the stability necessary for social cooperation.<sup>75</sup> So, a civic notion of citizenship is rooted in the idea of social cooperation,

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68. See Amy Gutmann, *Rawls on the Relationship Between Liberalism and Democracy*, in *THE CAMBRIDGE COMPANION TO RAWLS* 168, 185–86 (Samuel Freeman ed., 2003).

69. See Habermas, *Struggles for Recognition*, *supra* note 62, at 134–35.

70. See LARMORE, *supra* note 59, at 124 (noting that “there is no general agreement about ideals of the person” in “pluralistic societies”).

71. According to Rawls:

[R]easonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own. This is because, given the fact of reasonable pluralism, a public and shared basis of justification that applies to comprehensive doctrines is lacking in the public culture of a democratic society.

See RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at 60–61.

72. By “taking part in a political system,” I do not necessarily mean taking part in political activity, though that may be an especially powerful way to take part. Rather, I have in mind the more day-to-day activities involved with availing one’s self of a system of social cooperation made possible by the rule of law, public standards, and regulations, and so on.

73. ARISTOTLE, *The Politics*, in *THE POLITICS AND CONSTITUTION OF ATHENS* 9, 13 (Stephen Everson ed., B. Jowett trans., Cambridge Univ. Press 2d ed. 1996) (“And he who by nature and not by mere accident is without a state, is either a bad man or above humanity . . .”).

74. SAMUEL FREEMAN, *Reason and Agreement in Social Contract Views*, in *JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY* 17, 22 (2007) (“Rousseau maintains, contrary to Hobbes, that as an isolated being, man is a ‘stupid and shortsighted animal,’ tranquil by nature, and driven only by sensation and instinct.” (footnote omitted)); see also STILZ, *supra* note 58, at 113–36 (discussing Rousseau’s models of freedom and culture).

75. This is, of course, one of the lessons we learn from Thomas Hobbes, although we need not think that his account of political cooperation follows from the more basic point. See generally THOMAS HOBBS, *LEVIATHAN* 106–08 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1668).

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which in turn includes the idea of political cooperation. But, if we accept the argument made by Kant and others (as we should) that political cooperation that respects individual autonomy requires a number of distinct republics,<sup>76</sup> then a civic notion of citizenship entails membership in one (or more) distinct state(s). That is to say, citizenship remains an important feature in our moral world, even when we accept universal human rights.<sup>77</sup>

### C. *Potential Objections to a Civic Notion of Citizenship*

There are several potential objections to this account. I consider four such objections.

#### 1. *Thinness*

First, and most briefly, we might worry that a civic notion of citizenship is too thin to ground social cooperation.<sup>78</sup> This worry may be based on the idea that we need “thicker” narratives to ground cooperation or in the claim that diversity, which is an inevitable outcome of a “thin” notion of identity, leads to a lack of trust and social solidarity.<sup>79</sup> Both claims are mistaken.

The notion that we need “thicker” narratives to ground cooperation is often associated with communitarian thought.<sup>80</sup> In light of this

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76. KANT, PERPETUAL PEACE, *supra* note 58; *see also* Kleingeld, *supra* note 58, 485–88 (arguing that Kant’s position is that “the only way to leave the state of nature among states is by starting with a league of states, while [a] federation [of states] remains the ultimate ideal”).

77. Although I will not argue the point here, my view is that human rights depend on social cooperation and therefore political cooperation, for their very foundation and certainly for their best degree of efficacy. Political cooperation, in turn, includes the idea of citizenship.

78. *See supra* note 57.

79. Recent work by Robert Putnam purports to show that diversity leads to decreased trust among citizens, though I am somewhat skeptical of his claims. *See generally* Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 138 (2007) (arguing that “[i]n the short to medium run . . . immigration and ethnic diversity challenge social solidarity and inhibit social capital”). Stephen Macedo, in a recent unpublished paper, argues that Putnam’s work gives liberals who support a welfare state good reason to restrict immigration. *See* Stephen Macedo, *When and Why Should Liberal Democracies Restrict Immigration?* (2008) (unpublished paper) (manuscript at 3) (on file with author and the Maryland Law Review) (“A political community’s special and urgent obligations to its least well off members may take priority over the claims of some even poorer people abroad. If particular patterns of immigration worsen domestic economic disparities and undermine commitments to social justice, these are reasons . . . for revising immigration policies.”).

80. *See generally, e.g.*, DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 141–42 (2008) [hereinafter MILLER, NATIONAL RESPONSIBILITY] (describing “communitarian intuition[ ]” as the notion that “we have identities that connect us to larger groups of people, and we often feel vicarious pride or shame in what they do”); DAVID MILLER, ON

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theoretical background, it is ironic that a strong answer to this concern is found in Walzer's work. In *What It Means to Be an American*, Walzer explains that a civic notion of solidarity and citizenship may be constructed out of purely political values and by building on the various groups that make up civil society.<sup>81</sup> Citizens retain their membership in various groups while supporting the political society that makes civil society stable. To use Rawls's terms, a just society is a "social union of social unions"<sup>82</sup> that makes possible the particular associations that make our lives meaningful and secure. Because citizens can affirm membership in society on these grounds, this approach is not too thin to attract and to maintain loyalty.<sup>83</sup>

The second aspect of the objection is the claim that a civic notion of citizenship will lead to diversity, but that this diversity undermines the trust needed to develop a just system of reciprocity.<sup>84</sup> Many recent scholars have made this claim, often building on the work of Robert Putnam, among others.<sup>85</sup> This claim is, however, overblown for several reasons. To start, it takes contingent and time-bound facts as necessary and therefore fails to afford enough weight to our ability and duty to change them. So, even if trust is lowered when we see groups as the "other," a group that is currently "other" may not always be seen as such. The integration of Irish, Jewish, Italian, and Eastern Euro-

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NATIONALITY 72 (1995) ("It is because we have prior obligations of nationality . . . that the practice of citizenship properly includes redistributive elements of the kind that we commonly find in contemporary states."); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61–63 (1983) (describing concerns about the development of "communities of character" and arguing that "[t]he determination of aliens and guests by an exclusive band of citizens . . . is not communal freedom but oppression").

81. See, e.g., WALZER, *supra* note 60, at 18 ("Civil society is for us the ground of democratic politics, and this is ground that must be tended by the state."): R

82. RAWLS, THEORY OF JUSTICE, *supra* note 12, at 527. R

83. How Walzer's account in *What It Means to Be an American*, *supra* note 60, fits with his account in *Spheres of Justice*, *supra* note 80, in which he suggests that solidarity requires a notion of community stronger than a merely civic notion, is a difficult question, which, to my knowledge, Walzer has not specifically addressed. It might be that the account in *What it Means to Be an American* should be taken as an account of American citizenship and not as an example of a more general account of liberal principles of citizenship and membership. This account would mesh with the relativism found in *Spheres of Justice* and other works by Walzer. See generally, e.g., MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987). It might also be that Walzer's relativism has softened over time. R

84. See *supra* note 79 and accompanying text. R

85. See, e.g., David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 LAW & SOC. INQUIRY 295, 303 (2008) (concluding that "ethnically diverse societies should be more likely to have capital punishment" because "[e]thnic diversity . . . reduces social participation and trust"); Jonathan Haidt et al., *Hive Psychology, Happiness, and Public Policy*, 37 J. LEGAL STUD. S133, S151 (2008) ("We . . . believe that the unquestioning celebration of diversity should give way to more careful scrutiny and to a full cost-benefit analysis."): R

pean groups into mainstream “white” society in the United States shows how this is possible. In fact, there is reason to believe that it is a civic notion of citizenship that helped make this possible, especially when we consider the more successful integration of immigrants and minorities in Canada and the United States as compared to states such as Germany and France.<sup>86</sup>

Next, the claim that diversity undermines trust is not universally true, and it is particularly false in Canada, a society that has a largely civic notion of citizenship.<sup>87</sup> Importantly, Canada’s evolution into a social democracy came only after the country repealed its explicitly racist immigration laws and evolved into a significantly more diverse society.<sup>88</sup> This example puts to rest the claim that there is a necessary conflict between a civic notion of citizenship and the degree of trust needed for social solidarity.<sup>89</sup> Indeed, as Müller points out, a more plausible interpretation is that the development of the welfare state in various societies has grown, not out of a notion of “communal trust,” but through the active political struggle of various segments of society seeking respect and recognition as equals worthy of fair treatment.<sup>90</sup> This political struggle is centered around constitutional essentials and

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86. See, e.g., Eddie Bruce-Jones, *Race, Space, and the Nation-State: Racial Recognition and the Prospects for Substantive Equality Under Anti-Discrimination Law in France and Germany*, 39 COLUM. HUM. RTS. L. REV. 423, 433 (2008) (“In both France and Germany, people of color are commonly referred to as immigrants and foreigners (*immigres* and *Auslander*, respectively), regardless of nationality, or German or French cultural integration. This appellation creates a discursive framework under which integration of non-white people as German or French is a crude fantasy.” (footnotes omitted)).

87. Ayelet Shachar, *The Worth of Citizenship in an Unequal World*, 8 THEORETICAL INQUIRIES L. 367, 372 (2007) (describing Canada as an “archetype[ ] of the civic model”).

88. Canada first put restrictions on “Chinese” (meaning essentially all East-Asian) immigration in 1885 in the form of an immigration tax. JAMES P. LYNCH & RITA J. SIMON, IMMIGRATION THE WORLD OVER: STATUTES, POLICIES, AND PRACTICES 55 (2003); see also David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000, 1027 n.92 (2008) (describing the Canadian immigration tax as “very onerous and explicitly racist”). The 1923 Immigration Act barred nearly all Asian immigration, although it was amended in 1931 to allow the Asian spouses of Canadian citizens to immigrate into Canada. LYNCH & SIMON, *supra*, at 55–56. In 1946, a new immigration policy was put in place that continued restrictions on “Asiatic immigration,” which applied to nearly everyone in the Eastern Hemisphere and prohibited immigration by all blacks unless they were of a preferred class. *Id.* at 57. Absolute racial discrimination was removed only in 1962, though preferential treatment was still given to “European” immigration. *Id.* It was not until the passage of the Immigration Act of 1976 that full equality on the basis of race was established in Canada. See *id.* at 57–58.

89. Why was Canada able to become more diverse and more just at the same time? The simple answer is better leadership. A more optimistic answer is that greater diversity can itself lead to more liberal values. See generally, e.g., Will Kymlicka & Keith Banting, *Immigration, Multiculturalism, and the Welfare State*, 20 ETHICS & INT’L AFF. 281 (2006).

90. MÜLLER, *supra* note 62, at 73–74.

political values rather than ethnic or even cultural values,<sup>91</sup> and is therefore in line with the civic notion of citizenship.

## 2. *Nonexclusivity*

The next set of criticisms comes from Peter Spiro's recent book *Beyond Citizenship*.<sup>92</sup> His criticisms relate to the fear that a civic notion of citizenship cannot do the work needed because it is not exclusive in the same way as an ethnic or nationalistic notion of citizenship. Spiro's first criticism is that a civic notion of citizenship cannot work because it fails to sufficiently differentiate among states.<sup>93</sup> Liberal political values can and are held by people all over the world.<sup>94</sup> Spiro argues that if adherence to liberal values is necessary for a civic notion of citizenship, then there is no good reason to justify a state's decision to exclude noncitizens or to differentiate between citizens and noncitizens.<sup>95</sup> As Spiro states:

To the extent that America has been defined by its adherence to a distinctive governance system, it loses that identity insofar as the system becomes universal. If individual Americans used to be identified by their faith in that system, they also lose that identity insofar as others claim similar faith. *Once everyone is an American, no one is an American.* Identity and community boundaries are ultimately about difference. Once the difference disappears, the identity disappears with it. If indeed we have become a civic nation, we are on the way to being a nation no more.<sup>96</sup>

Spiro's concern operates in two ways. First, if American citizenship is based on civic ideals,<sup>97</sup> then what justifies excluding an outsider who shares those ideals, as many do today?<sup>98</sup> Second, if our loyalty is to a set of ideals that are shared by many countries, it is unclear why anyone would choose loyalty to one state over another.<sup>99</sup> The connection between a citizen and the state, Spiro claims, is therefore too arbi-

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91. *Id.* at 73 (“[W]elfare states have come about as a result of political struggles for participation and justice.” (emphasis omitted)).

92. *See generally* SPIRO, *supra* note 27.

93. *See id.* at 52.

94. *See id.*

95. *See id.* at 47.

96. *Id.* at 52.

97. *Id.* at 46–47 (noting that America is “above all, a ‘civic’ nation”).

98. *See id.* at 116.

99. *Cf. id.* at 52 (arguing that if “democracy alone emerges as a legitimate system of government,” the American identity, “defined by its adherence to a distinctive governance system,” may well disappear).

trary to ground normative considerations, especially ones of great importance.<sup>100</sup>

This line of criticism misses the point and the importance of the civic notion of citizenship and ignores the nature of social and political cooperation discussed above.<sup>101</sup> While it is true that liberal ideals are an essential part of the civic notion of citizenship, they are essential only insofar as they regulate a scheme of cooperation.<sup>102</sup> So, acceptance of and adherence to such ideals in the abstract is only one part of cooperation. Actual participation in the life of a society is another essential aspect, one that nonmembers do not enjoy, at least to the same degree. As Joseph Raz notes: “Meaning comes through a common history, and through work. They make the object of one’s attachment unique.”<sup>103</sup> So, the point that liberal ideals are held by nonmembers and citizens alike does not, by itself, show that the civic notion is insufficient because it fails to consider the significance of work, a common history, and the experience of actually living together.<sup>104</sup>

Consider a comparison. A family should be formed around a certain notion of love. But, not everyone who has this sort of love can enter or be part of any particular family. Moreover, the fact that different families profess to serve the ends of love and family harmony does not make it irrational to love one’s own family and seek its good

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100. *Id.*

101. *See supra* text accompanying notes 81–83.

102. Michael Blake suggests that living under a shared coercive order is the relevant moral notion for determining political obligations, while Andrea Sangiovanni suggests that sharing in a system of reciprocity is the salient point. *See generally* Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257 (2001); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3 (2007). In my opinion, these approaches are complementary rather than competitive and both support the point at issue.

103. JOSEPH RAZ, *VALUE, RESPECT, AND ATTACHMENT* 20 (2001).

104. In conversation, Peter Spiro has suggested to me that he believes that this common history is no longer significant because social cooperation is no longer limited to distinct states. It is true, of course, that social cooperation is not limited to interactions within states. This fact does not, however, support Spiro’s contention for two reasons. First, significant cross-border social interaction is not a recent phenomenon; in fact, it has existed at many times, in large scale, throughout history. *See supra* note 31 (discussing concerns about the decline of citizenship considered, and answered, by Bernard Bosanquet in the nineteenth century). *See generally* SASKIA SASSEN, *GUESTS AND ALIENS* (1999) (extensively detailing the history of migration and showing that large-scale migration has been a regular pattern for hundreds of years). If such interactions are not new, this cannot be a new challenge to the notion of citizenship. Second, even social cooperation and interaction that take place across borders depend heavily on political cooperation at the state level for stability; this dependence gives those who take part in social cooperation reason to support and identify with the states that make such cooperation possible.

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rather than another's. Similarly, all corporations are primarily concerned with making a profit. That does not mean, however, that anyone who wishes to maximize profits may join any corporation or that members of any one corporation have as much reason to maximize the profits of any other corporation as they do their own. Thus, facts of interaction and participation (and history) play an important normative role in individuating group duties and obligations.

### 3. *Arbitrariness*

Even if we accept my arguments against Spiro's account, we might still think that citizenship determinations cannot be morally important because they are "arbitrary" in some sense. This view is mistaken. Even if it is correct to say that one's nation of citizenship is "arbitrary," it is not necessarily true that citizenship is arbitrary from a moral point of view. Citizenship is based on, and a necessary feature of, social cooperation<sup>105</sup>—something that can only be done within particular groups. Even if any group would do, once one is a part of a particular group, moral obligations are formed to that group. Again, a comparison may illustrate the point. Perhaps it is morally arbitrary that a woman is the mother of one child rather than another. But, because she is the mother of that particular child, she has particular obligations to him. Similarly, if certain morally arbitrary facts about my history were different, then I would have different friends. Regardless, I have the same moral obligations to my actual friends and do not have such obligations to other potential friends, even if those friends would have served just as well. So, even if certain facts about us are in some ways arbitrary, they are not precluded from having significant moral importance in their actual implementation. Having a particular history specifies our duties and makes them concrete, even if this history is not in itself morally important. In light of these illustrations, Spiro's objections to the civic notion of citizenship seem moot.<sup>106</sup>

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105. See Tommie Shelby, *Race and Social Justice: Rawlsian Considerations*, 72 *FORDHAM L. REV.* 1697, 1703 (2004) (defining "citizenship" as "participat[ion] in a fair system of social cooperation over a complete life" (citing RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at 18–22, 299–302)).

106. I do not present friendship or the family as analogous to citizenship in a state. There are, of course, deep and important differences. The examples of friendship and the family serve as counterexamples to the general claim that a relationship cannot be morally important or give rise to moral claims if it depends on morally arbitrary accidents of history. Therefore, those who argue that the "arbitrary" nature of citizenship determinations means that citizenship cannot be morally important must argue that something is special about the case of citizenship that makes this claim correct in that context. As far as I can see, no such argument has been made, and as there are arguments against the general

#### 4. *Cosmopolitanism*

The final challenge to the civic notion of citizenship is a related one that we might call the cosmopolitan challenge. This challenge is succinctly stated by Linda Bosniak who claims that we should give up and move beyond the idea of citizenship because any “national solidarity” project must “categorically privilege” insiders in a way that is incompatible with equal respect for all people.<sup>107</sup> Instead, Bosniak argues, we should “maintain[ ] solidarity with the powerless” all over the world regardless of their citizenship.<sup>108</sup>

It is hard to see why these contentions should be seen as in contrast to the civic notion of citizenship developed in this Article. Equal respect for all people is a feature of the modest cosmopolitanism in which this project is situated.<sup>109</sup> But, equal respect for all people does not require, nor could any plausible moral or political theory require, that we actually treat all people the same way or seek to promote the legitimate ends of all people to the same degree. To think otherwise is to confuse the essential idea of equal respect with the fundamentally different idea, drawn from utilitarianism, of equal consideration.<sup>110</sup> Only the first approach is essential to a civic notion of citizenship, and a strict attempt at the second approach is not plausible.<sup>111</sup> Actually attempting to give equal consideration to the ends of all people would make nearly all forms of human life impossible. Such a project would make impossible not only commercial life (although this is an obvious example) but also family life and friend-

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claim, found in this Article and in the works cited previously by Kant, Rawls, Rousseau, and others, I take the “arbitrary nature” argument to be a failure.

107. Linda S. Bosniak, *A National Solidarity?: A Response to David Hollinger*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 101, 104 (Noah M. J. Pickus ed., 1998).

108. *Id.* (stating that she is “most of all committed to a political and cultural position that repudiates any overarching, authoritative form of solidarity, and that ensures the space for disparate visions of solidarities and citizenship identities—including, but not subordinated to, national solidarities and national citizenship identities”).

109. See, e.g., MANDLE, *supra* note 17, at 88 (noting that cosmopolitanism encompasses the notion that “justice requires that everyone respect the basic human rights of all people”).

110. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272 (1977) (“Government must treat those whom it governs with *concern*, that is, as human beings who are capable of suffering and frustration, and with *respect*, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.” (emphasis added)).

111. For an argument demonstrating that even utilitarians ought to accept “special” partial duties, see Robert E. Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 ETHICS 663, 664–66 (1988).

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ship.<sup>112</sup> So, partiality must be acceptable, at least in some cases. What is important, and what is implied by modest cosmopolitanism, is that we have a duty to make sure that the basic rights of all people are met, at least insofar as we are able to do so. This is, in my opinion, the most plausible way to understand Bosniak's notion of "solidarity with the powerless."<sup>113</sup> Understood this way, the idea is not at all incompatible with the civic notion of citizenship, which respects our duties toward noncitizens and does not disrespect groups of people by categorically excluding them from citizenship in ways that ethnic or nationalistic notions of citizenship exclude them.<sup>114</sup>

Further, if we believe that the best way to realize universal human rights is with a system or federation of liberal or at least decent states,<sup>115</sup> then we are justified in believing that the civic notion of citizenship, as an essential component of the internal organization of just liberal states, is not an obstacle to properly conceived cosmopolitan values but rather a precondition for them. Properly interpreted, then, the cosmopolitan challenge presents no valid objection to the civic notion of citizenship.

#### D. Summary

In this Part, I provided a brief sketch of the civic notion of citizenship and defended it against four common criticisms. This notion of citizenship is inherently political and rejects the idea that citizenship is, or should be, based on a common culture, ethnicity, or nationality.<sup>116</sup> The notion's role in making possible the social cooperation necessary for the development of our human capabilities shows that this is the correct account of citizenship.<sup>117</sup> In turn, this notion of citizenship provides space for citizens to pursue their various conceptions of the good and thereby provides an answer to the question

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112. See SAMUEL SCHEFFLER, *Families, Nations, and Strangers*, in BOUNDARIES AND ALLEGIANCES, *supra* note 17, at 48, 48–65 (discussing the nature of various responsibilities, including the responsibility owed "to our families and friends, to the people in our neighbourhoods and communities, to the members of other groups with which we are affiliated, and, of course, to those vast numbers of people who are strangers to us, and with whom our only significant social bond, if it can be called that, is that we are all members of the human race" and arguing that "the conflicting tendencies on the political level toward integration and differentiation are mirrored within our moral thought by conflicting views about the boundaries of our responsibilities").

113. Bosniak, *supra* note 107, at 104.

114. I discuss this point further later in the Article. See, e.g., text accompanying notes 133–34.

115. See *supra* text accompanying note 58.

116. See *supra* Part II.A.

117. See *supra* Part II.B.

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about the role of citizenship in the moral development of individuals.<sup>118</sup>

### III. WAYS OF GAINING CITIZENSHIP

Having sketched the appropriate nature of citizenship for a liberal state and shown why citizenship is important, even if we accept universal human rights, I turn to more specific issues of citizenship policy. In the following Sections, I discuss the ways of gaining citizenship, debate which mixture of them should be used in a just state, and outline some of the limits that considerations of justice place on the citizenship policy of a liberal state.<sup>119</sup> Citizenship is gained in three main ways: by descent or “blood” (*jus sanguinis*),<sup>120</sup> by location of birth (*jus soli*),<sup>121</sup> or by naturalization.<sup>122</sup> I argue that a liberal state must combine elements of all three approaches. Each approach, however, presents its own specific problems and so each must be looked at carefully in turn.

#### A. *Jus Sanguinis*

The rule of *jus sanguinis* is a good place to start a discussion of citizenship policy for two reasons. First, all states incorporate at least some form of this rule into their citizenship policies.<sup>123</sup> Second, the large majority of individuals gain access to citizenship by this method.<sup>124</sup> This basic rule can vary in strength. Not all versions of *jus sanguinis* are compatible with liberal principles of justice. Some are compatible, but not required, while others are required. Before discussing these points further, it is worth pausing to discuss various ways the approach may be implemented and to consider the meaning of “stronger” and “weaker” versions.

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118. See *supra* Part II.C.

119. See *infra* Parts III.A–B, IV.A.

120. See *infra* Part III.A.

121. See *infra* Part III.B.

122. See *infra* Part IV.A.

123. SPIRO, *supra* note 27, at 10–11.

124. Jordan Collins, *Same Laws, Different Century: The Bureau of Industry & Security's Role in Global Trade & National Security*, 15 CURRENTS: INT'L TRADE L.J. 108, 116 (2006) (noting that “141 countries including Iran, North Korea, China, Russia, and Afghanistan[ ] confer citizenship *exclusively* by *jus sanguinis*, requiring more than just birth within a countries' [sic] borders to confer citizenship” (emphasis added)). We might worry about “double counting” since, in many countries, a child born to a citizen would, in most cases, gain citizenship either by the *jus sanguinis* rule or the *jus soli* rule. But, it is proper to count the *jus sanguinis* rule as the more basic rule in such cases because it applies regardless of place of birth in most cases, while the same is not true of the *jus soli* rule.



### 1. “Strong” Jus Sanguinis

The strongest version of *jus sanguinis* equates citizenship with ethnic membership, so that citizenship “flows with the blood,” so to speak.<sup>125</sup> Such an approach grants citizenship to all (and perhaps, though not necessarily, only) members of a defined ethnic group, regardless of any territorial considerations.<sup>126</sup> Something like this approach is found in Germany, Japan, and, to a somewhat lesser degree, in other states.<sup>127</sup> In its most extreme version, this approach is usually coupled with rejection of the principle of *jus soli*<sup>128</sup> and with very restrictive or nonexistent naturalization rules,<sup>129</sup> although this is not strictly necessary.

In this very strong form, *jus sanguinis* is likely incompatible with liberal principles in two ways. First, if descent is the only way to gain citizenship, as has essentially been the case in Japan<sup>130</sup> and to a somewhat lesser degree in pre-1999 Germany,<sup>131</sup> then some people who

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125. See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 17, 18 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) (noting that “many academic and popular observers . . . attribute a *jus sanguinis* regime to the ethnic character of its framer’s conception of nationhood”).

126. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 24 n.41 (2006) (noting that a *jus sanguinis* theory of citizenship does not “presume[ ] residence in [a] territorial state”).

127. See LYNCH & SIMON, *supra* note 88, at 225 (noting that “Japan is not and Germany was not [until recently] an immigrant nation”). These countries, until recent times, offered citizenship with only small formalities to members of their self-defined ethnic groups, even when these persons never lived in the relevant country, and often even if no relative had lived in the relevant country for several generations. Japan and Germany, in particular, also greatly restricted access to citizenship to nonethnic Japanese or Germans respectively. *Id.* at 195 (Japan); *id.* at 176–77 (Germany). *But see id.* at 186 (stating that “Germany passed a major immigrant act [in 1999] that cut the links between blood ties and nationality that had been in effect since 1913”). At present, Japan’s citizenship laws most closely resemble the “strong” version presented here. *See id.* at 189 (“Of all the major industrial nations in the world, Japan has worked the hardest at maintaining a homogeneous, distinctive culture in which foreign influences and foreigners have been barely visible.”); *id.* at 225 (describing “Japanese immigration policy” as “absolute in its exclusion of foreigners for the purpose of permanent settlement”).

128. See, e.g., Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 102 (2010) (noting that “many former British and Portuguese colonies rejected the *jus soli* tradition and switched to an often strongly ethnically tinged version of *jus sanguinis*” during the decolonization process).

129. See, e.g., Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U. J. INT’L L. & POL. 35, 58 (1990) (noting that Germany’s “*jus sanguinis* principle of citizenship” was coupled with “a highly restrictive naturalization policy”).

130. LYNCH & SIMON, *supra* note 88, at 195–96.

131. *Id.* at 176–77.

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deserve citizenship in a particular state will be denied it.<sup>132</sup> If justice requires that some people are able to acquire citizenship by location of birth or by naturalization, then any approach to citizenship that takes descent to be a necessary (not just sufficient) condition for gaining citizenship will be unjust.

The strong form of *jus sanguinis* (which equates citizenship with ethnic membership) is also potentially incompatible with liberal principles of justice for a second reason: Such an approach is likely incompatible with the liberal conception of citizenship sketched above.<sup>133</sup> In this view, de facto membership in a certain political community is essential to citizenship. But, if citizenship is distributed on the basis of ethnic membership, then it is both overinclusive and underinclusive. It is underinclusive because it excludes some who are, or would be, fully contributing members of a political community for morally irrelevant reasons beyond their control. It is also overinclusive. Strong *jus sanguinis* extends citizenship, or at least the right to access to citizenship as a matter of right, to some who are not, and who need not be, members of the political community in question. Any citizenship policy that distributes citizenship along ethnic lines will grant these rights to some individuals who are not members of the political community.<sup>134</sup>

At first, it might not be obvious that a strong *jus sanguinis* approach is incompatible with liberal principles, at least if it is not the only way to gain citizenship. (In cases in which ethnic membership is the *only* way to gain citizenship, however, this point will apply to an even greater degree.) Such an approach is problematic, even when it is only a sufficient and not a necessary requirement, for it favors some groups over others for the benefits of citizenship; particularly problematic is that this bias is not based on cooperation and reciprocity<sup>135</sup> but on morally irrelevant grounds. The distribution of valuable benefits to some groups but not to others on the basis of morally irrelevant grounds undermines the mutual respect necessary for domestic and international cooperation. Like more general approaches to immigration that restrict benefits to certain ethnic groups, this approach signals to those outside of the privileged group that they are not wor-

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132. I spell out why people should be granted citizenship in a particular state by ways other than descent when I discuss other ways of gaining citizenship. See *infra* Part III.B.

133. See *supra* Part II.B.

134. An example is pre-1999 German citizenship law that made access to citizenship a matter of right for "ethnic Germans" regardless of their need or their actual connection to the German political community. See *infra* note 137 and accompanying text.

135. See generally Sangiovanni, *supra* note 102 (discussing the importance of sharing in a system based on reciprocity).

thy of equal concern and respect. This directly results from basing citizenship on ethnicity because, unlike other grounds for admission to citizenship, the strong conception of *jus sanguinis* is based on something people cannot change.

The principle may be muted in special, essentially remedial, cases. For example, a state may be justified in giving special access to citizenship to members of certain ethnic groups to make up for past injustices or to help protect against ongoing ethnic-based harms. The easy access that Jewish people have to citizenship in Israel might be justified on these grounds,<sup>136</sup> as might the grant of citizenship to ethnic Germans expelled from Eastern European countries after the end of the Second World War,<sup>137</sup> and, somewhat more doubtfully, as might the easy access to citizenship given by Ireland to those of Irish descent.<sup>138</sup> Such policies, however, are truly remedial; that is, they should be limited in duration to the time necessary to fulfill the special purpose and should not be the sole way, or essentially the sole way, to gain access to citizenship.

## 2. *A More Limited Jus Sanguinis*

Despite my criticisms of the strong version of *jus sanguinis*, a more limited version of the principle plays an important role in a just liberal citizenship policy. The most basic statement of the position is that children should inherit the citizenship of their parents. There are

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136. See Ofrif Liviatan, *Judicial Activism and Religion-Based Tensions in India and Israel*, 26 ARIZ. J. INT'L & COMP. L. 583, 605 (2009) (noting that "the unique legal construction of the Law of Return [of] 1950 and the Nationality Law [of] 1952" has "provid[ed] for the exclusive right of Jews to immigrate to Israel and automatically acquire Israeli citizenship").

137. See Karen Y. Crabbs, *Resurgence of Nazism in Germany—An Attitude Problem*, 8 FLA. J. INT'L L. 33, 38 (1993) (noting that "'people of German ethnic origin' (i.e., children born in Germany with two native German parents or native Germans who were forced to flee the country after World War II)" are "entitle[d] . . . to citizenship" in Germany).

138. David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1218 n.31 (1999) (stating that "the Irish Nationality and Citizenship Act of 1956 set[s] out the legal basis of acquisition of citizenship . . . and on the basis of descent"); see also Thomas M. Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT'L L. 41, 45 (1997) (noting that "Americans of Irish descent . . . have been known to recover their ancestral citizenship in order to use the shorter 'European Union' line at continental passport control stations, or to give their children the opportunity in the future to work in Paris"). The Irish case, in my opinion, is the least plausible since the harm (namely, colonial oppression by the British) was long gone, most of those who benefited from the law had perfectly decent places to live, and there was no serious risk of future harm. Importantly, these remedial rights do not, at least by themselves, imply a right to limit citizenship to the group seeking assistance. So, even if the German and Israeli programs of giving special benefit were just, the correlated refusal to give fair access to citizenship to nongroup members would, at least, require a distinct justification, which seems to be lacking.

potential limitations to this principle, but first, I explain why this version of the principle is important. First, children should inherit the citizenship of their parents because otherwise some individuals born in a state in which their parents do not have citizenship and in a situation in which birth in the state does not confer citizenship would be stateless.<sup>139</sup> All states have a duty to prevent statelessness.<sup>140</sup> One way to fulfill this duty is to ensure that children inherit the citizenship of their parents, thereby assuring that all children have access to citizenship in at least one state.<sup>141</sup>

Second, and more fundamentally, children should inherit the citizenship of their parents because it is essential to orderly family life. If children do not inherit the citizenship of their parents, then in some cases, the right of parents and children to live together will be in jeopardy.<sup>142</sup> We might see this as the most immediate embodiment of the right to form a family that is provided and protected by the practice of family based immigration.<sup>143</sup> In the case of natural born children,

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139. See Lisa Napoli, *The Legal Recognition of the National Identity of Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 189 (1998) (noting that “a person born in a country whose nationality law is [*ius sanguinis*] of parents from a country whose law of nationality is *ius soli* will . . . be stateless”).

140. See generally, e.g., Convention on the Reduction of Statelessness art. 1, Aug. 30, 1961, 989 U.N.T.S. 175 (requiring contracting states to grant nationality to any “person born in its territory who would otherwise be stateless”). Of course, only states that are party to this convention are legally bound by it, but I contend that *all* states have a moral duty to prevent statelessness as a condition on their right to limit access to citizenship in other ways.

141. A real-life example of this policy is the so-called “guest workers” policy in Germany. Children (and grandchildren, eventually) born to first generation “guest-workers” did not have access to citizenship in Germany and would have been stateless were they not given Turkish (or other) citizenship by their parents. For a discussion on the history of “guest workers” in Germany and the current law governing migrant workers in Germany, see generally Christoph Gyo, *Migrant Workers in Germany*, 31 COMP. LAB. L. & POL’Y J. 47 (2009). This example might make us think that this phenomenon is only a problem for nonideal theory. To a degree, it is, since this sort of situation would not arise, at least not in large numbers, if all states were just (in the sense that they followed the theory outlined in this Article). Similarly, we might think that the bad acts of some cannot create positive duties for others. This is not simply nonideal theory because each state must ask what is required of it in the situation in which it is likely to find itself, and liberal states may not, without committing further injustice, insist that all states meet the requirements of liberal principles of justice. So, even if such a rule has little practical effect in an ideal world, it remains plausible that it is a general requirement of justice.

142. See generally, e.g., United Nations Convention on the Rights of the Child art. 9, Nov. 20, 1989, 1577 U.N.T.S. 3 (requiring contracting parties to “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities . . . determine . . . that such separation is necessary for the best interests of the child”).

143. For the U.S. law on family based immigration, see Immigration and Nationality Act (INA), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2006). For a discussion of family based immigration, see Matthew Lister, *Immigration, Association, and the Family*, 29 L. & PHIL. 717 (2010).

however, the right to *membership* applies immediately without an application process.<sup>144</sup>

The general rule that children should inherit their parents' citizenship may be qualified in some ways but not in others. To start with my second claim, states may not restrict the right to citizenship only to mothers or fathers. Both sorts of limits have some historical precedent.<sup>145</sup> But, such restrictions are illegitimate (for reasons that hardly need to be spelled out) when categorical or imposed so as to make acquisition of citizenship very difficult.

To prevent its reach from becoming indefinite, the rule that a child should inherit his parents' citizenship may be qualified. Many

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144. See, e.g., SPIRO, *supra* note 27, at 9 (noting that “there’s no application process” for natural-born American citizens). Note, however, that the converse rule does not hold. That is, parents need not be automatically granted access to any citizenship to which their children have a right. Cases like this arise when citizenship is granted, as I argue it should be, on the basis of a version of the *jus soli* principle. But, granting parents immediate access to any citizenship held by children to their parents would provide perverse incentives for noncitizens to have children in a particular country. It is for this reason that most countries have a rule similar to the American rule, which does not allow U.S. citizen children to file a petition for their parents for permanent resident status for their parents until they have reached twenty-one years of age. See 8 U.S.C. § 1151(b)(2)(A)(i) (“[T]he term ‘immediate relatives’ means the children, spouses, and parents of a U.S. citizen, except that, in the case of parents, such citizens shall be at least 21 years of age.”). In my article, *Immigration, Association, and the Family*, I argue that a just immigration policy requires a family based immigration provision, at least for immediate family members. See generally Lister, *supra* note 143; see also Matthew Lister, *A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples*, 37 U. MEM. L. REV. 745, 763–72 (2007) (positing “that Rawlsians should accept, and even require, the granting of family-based immigration benefits”).

145. For example, until 1934, citizenship in the United States was transferred by *jus sanguinis* only via U.S. citizen fathers and not mothers, so that a child born outside the United States to a U.S. citizen father and noncitizen mother became a U.S. citizen while U.S. citizen mothers who had a child abroad with a noncitizen father could not transfer their citizenship to their children. In a case that allowed the 1934 immigration amendment to apply retroactively, the Court of Appeals for the Ninth Circuit held that the old rule violated modern standards of equal protection. See *Wauchope v. U.S. Dep’t of State*, 985 F.2d 1407, 1418 (9th Cir. 1993) (stating that the old law constituted “impermissible gender-based discrimination” and requiring the district court to redress that discrimination “by extending to citizen mothers the same rights as those possessed by citizen fathers”). The Ninth Circuit’s decision was later codified at 8 U.S.C. § 1401(h). Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 101, 108 Stat. 4305, 4306 (codified as amended at 8 U.S.C. § 1401(h)). Discrimination against fathers, however, persists in U.S. law. While citizenship now flows automatically to the child of a U.S. citizen mother born abroad even if the child is born out of wedlock, a U.S. citizen father who has a child out of wedlock with a noncitizen abroad must take several steps before the child’s eighteenth birthday to ensure that his citizenship flows to his child. See 8 U.S.C. § 1409(a); see also *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (upholding Section 1409). For a useful discussion on “gender equality” in the context of nationality, see Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES*, *supra* note 125, at 89, 89–118.

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states currently have such rules. An example is a rule that denies citizenship to the child of a citizen born outside of the country of his citizenship who has not availed himself of the protection of his country of citizenship by a certain age (or a combination of age and time after the birth of the child in question).<sup>146</sup> This result is unproblematic, at least when it does not result in statelessness, as the justifications for granting *jus sanguinis* citizenship discussed above no longer hold true; the child in question has citizenship in the country of his birth and has access to the state that provides the cultural context for his parents. Further, states may legitimately worry that extending *jus sanguinis* beyond the first foreign-born generation would dilute the value of citizenship by extending citizenship to people who have no social ties to, and who do not engage in social cooperation with, the state in question.<sup>147</sup>

Such a rule is also connected to the limits placed on the strong form of *jus sanguinis* that I argued against above. In fact, these limitations help explain why we place restrictions on the strong form of *jus sanguinis*. As we might expect from the discussion of the strong principle, the exact limits that a state may or should set on a weaker *jus sanguinis* principle are not the sorts of limits that derive from philosophical considerations. Rather, the proper extent of the *jus sanguinis* principle for any particular state will depend heavily on the history of the state and its people, as well as on their culture and other historical considerations.<sup>148</sup> In these ways, states may negotiate the features of *jus sanguinis* citizenship without falling into the false and pernicious view that equates citizenship with ethnicity.

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146. So, if Parent X, a citizen of S, has a child, Y, outside of S, and Y never lives in or avails himself of the protection of S, Y's child Z, also born outside of S, would not inherit citizenship in S through Y. The United States has a rule somewhat like the one discussed. See 8 U.S.C. § 1401(g).

147. See, e.g., Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 253 (1999) (stating that Israel limits "acquisition of citizenship [*jus sanguinis*] outside the state . . . to one generation only"); see also Sasha Baglay, Book Review, 47 OSGOODE HALL L.J. 151, 155 (2009) (reviewing AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009)) (recognizing that "[*jus sanguinis*] allows the conferral of citizenship on persons who reside abroad and potentially have little meaningful connection to the country of their citizenship").

148. Cf., e.g., Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 648 (noting that American "*jus sanguinis* embodies a number of policy considerations, including the continuity of families, re-enforcement of a family's political stake in the future of the United States, and ensuring a family's cultural socialization in the United States").

B. *Jus Soli*

Citizenship is also commonly acquired by *jus soli*, or location of birth. The large majority of states have some version of this rule,<sup>149</sup> with Japan as perhaps the most notable exception. (For many years, Germany did not have such a rule, but the country changed its citizenship law in 1999 to institute a limited form of *jus soli*.<sup>150</sup>) Some version of this rule is required by considerations of justice in liberal states, but the rule need not be quite as strong as the version employed in the United States. (Considerations of administrative efficiency, however, might well push weaker rules toward more categorical applications.)

During this discussion, I argue against the claim recently argued most strongly by Peter Schuck and Rogers Smith that the *jus soli* rule, at least in any moderately strong form, violates a basic liberal principle of justice—the idea that membership in a society should be determined by the consent of the society’s members.<sup>151</sup> I show that, at least in the sense considered by Schuck and Smith, consent is not a relevant liberal principle; so, although *jus soli* makes membership dependent on something other than the consent of current members, that fact is not detrimental to the perspective of liberal principles of justice.

1. “Strong” and “Weak” *Jus Soli*

Before discussing these issues further, it is worth taking a moment to clarify the different ways in which the principle of *jus soli* may work. One of the strongest versions of *jus soli* is found in the United States and traces its origins to the Fourteenth Amendment of the Constitution, under which anyone born on U.S. territory automatically gains U.S. citizenship regardless of the status of his parents and whether any significant time after birth is spent in the country.<sup>152</sup> The

149. See SPIRO, *supra* note 27, at 10–11.

150. LYNCH & SIMON, *supra* note 88, at 171.

151. See SCHUCK & SMITH, *supra* note 44, at 7, 116–40 (arguing that “the United States should” adopt a “consensual membership approach”); see also PETER H. SCHUCK, *Consensual Citizenship*, in CITIZENS, STRANGERS, AND IN-BETWEENS, *supra* note 28, at 207–16 (outlining flaws in the ascriptive view of citizenship and arguing in favor of a consent-based approach to citizenship). Smith has softened his views somewhat over time. See generally, e.g., ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 243–85 (1997).

152. The Fourteenth Amendment states in relevant part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV. This general rule was affirmed in *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). Exceptions to the rule are very narrow—children born to foreign sovereigns or accredited diplomats, chil-

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rule applies without any consideration of conditionality (of the sort to be discussed later in this Section) and regardless of any other citizenship to which the person may be entitled.<sup>153</sup> This is obviously a very strong version of the rule, perhaps stronger than what is required by principles of justice, but it aids administrative efficiency, especially when birth records are well kept (as they are in most places in the United States).<sup>154</sup>

Much weaker versions of *jus soli*, however, are conceivable and actually implemented by many states. The weakest version that might still be recognizable as *jus soli*, which limits citizenship rights to individuals born in a state to parents admitted for permanent residence, makes the grant of citizenship conditional on continued presence in the state of birth for many years after the birth and requires a renunciation of any other potential citizenship—usually that of his parents—at the age of eighteen. Germany’s revised citizenship laws contain many of these features, though not all of them.<sup>155</sup> Exactly which combination of features is required by a fully just system is not likely to be answered without detailed knowledge of the social, political, and economic features of the state or states in question.<sup>156</sup>

A form of the *jus soli* principle somewhat stronger than the weakest version presented above<sup>157</sup> is necessary for justice, at least for the near future. It is possible that, in a world made up of fully liberal states, in which something like Rawls’s “Law of Peoples” is met<sup>158</sup> and in which barriers to movement are very low, the weakest version might well suffice. Since such a world is not likely in the near future and is

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dren born on foreign public vessels (mostly warships, not commercial ships) while in U.S. territorial waters, and children born to “alien enemies in hostile occupation of a portion of U.S. territory.” ALEINIKOFF ET AL., *supra* note 3, at 18. Each of these exceptions is not “subject to the jurisdiction” of the United States. *See, e.g., id.* at 18 n.6 (quoting U.S. CONST. amend. XIV). R

153. *Cf.* ALEINIKOFF ET AL., *supra* note 3, at 32 (describing the *jus soli* rule in the United States as “broad”). R

154. *See* Christine J. Hsieh, Note, *American Born Legal Permanent Residents? A Constitutional Amendment Proposal*, 12 GEO. IMMIGR. L.J. 511, 527 (1998) (acknowledging “claims that disposing of the status quo *jus soli* system [in the United States] would create an administrative nightmare”). This point is perhaps too strong, but the worry is significant.

155. *See* LYNCH & SIMON, *supra* note 88, at 176–77. R

156. This is partly (though not entirely) the case because considerations of administrative efficiency, in some circumstances, may give rise to considerations of justice in others. For example, if many people would risk being made stateless by a particular rule, that rule would be unacceptable, but if statelessness was not a concern, such a rule might be within the bounds of justice.

157. *See supra* text accompanying notes 155–56. R

158. That is, that the world is just. *See generally* RAWLS, LAW OF PEOPLES, *supra* note 13. R



arguably more than liberal peoples can reasonably hope for, I do not spend any more time on the possibility.

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. An example, developed below, may help clarify the case.

This proposal has several practical and theoretical advantages over the current U.S. rule. Conceptually, the proposed rule is superior because it recognizes that there is nothing special about the place of birth.<sup>159</sup> Mere birth in a particular place, if not accompanied by anything else, is surely not enough to establish the sort of ties that citizenship is meant to build and to protect.<sup>160</sup> Tourists provide perhaps the clearest examples. If a tourist gives birth in a particular country but then almost immediately returns to her home state with her child, and if the child never returns for any significant period of time to his state of birth, then it is not clear why that child ought to have the rights (and duties) of citizenship. Imagine, similarly, a French businessman who is transferred to the United States from France for a short period and brings his pregnant wife. Suppose the wife gives birth in the United States and then the whole family returns to France within a few months and never returns to the United States.<sup>161</sup> Under current law, the child of the businessman would be entitled to U.S. citizenship while, under my proposed rule, he would

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159. See SPIRO, *supra* note 27, at 9 (noting that “*accident* of birth is the cornerstone of U.S. citizenship law” (emphasis added)).

160. *Id.* at 10 (“The fact of birthplace [has] become[ ] a happenstance, and persons sharing birthplace in the United States may in fact share little else. A citizenship based on birthplace neither creates nor evidences any necessary bonds among its holders.”).

161. Or, to take a frivolous but real example, Brad Pitt and Angelina Jolie chose, for apparently idiosyncratic reasons, to birth their first natural child in Namibia. Neither Pitt, Jolie, or the child has any other significant connection to Namibia nor are any of them likely to have Namibian culture as a significant part of their life stories. In such a case, it seems preposterous to suggest that the child deserves Namibian citizenship as a matter of justice.

not be. Certainly, it seems hard to see why this child should be granted citizenship in the United States as a matter of justice.<sup>162</sup>

The above discussion, of course, leaves unanswered how long a child must stay in the country of birth before we accept that he has “availed” himself of the benefits of membership and that it would be unjust to refuse him citizenship.<sup>163</sup> Any cutoff date is bound to be at least somewhat arbitrary. Further, in a modern society, there is reason to think that any attempt to implement a fully individualized system, in which each instance is judged in its own terms, is less likely to be just than a bright-line rule.<sup>164</sup> But, the issue is of significant enough importance that we should err on the side of caution in establishing a rule. This is especially true since potential harm to the state caused by setting the bar too low is significantly less than the harm faced by an individual who is wrongly denied citizenship. My intuition is that a bar of one year is likely to do as good of a job as any. So, any child born in a country, who remains in the country of his birth until the age of one, should be given the right to citizenship in the country of his birth. This cutoff protects almost everyone who needs protection<sup>165</sup> but also rules out obvious cases in which persons lack enough ties to the country of birth to justify providing them with the duties and benefits of citizenship.<sup>166</sup> Other lines may also be just. I do not

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162. See, e.g., SPIRO, *supra* note 27, at 10 (“Increased global mobility and the sustainability of distant ties are rendering place of birth an attenuated marker of life trajectory. A child born in America may well leave America in childhood, or she may grow up with a primary attachment to some other community.”).

163. See *generally id.* at 19–21 (describing a “group of happenstance Americans,” who enjoy American citizenship “through the accident of birthplace” but lack any “ultimate community affiliation” with the United States).

164. Larmore explains that:

[S]ystem can prove more desirable than sensitivity for a very important reason. Whenever the government acts according to publicly known statutes and laws that allow little room for conflicting directives, this gives its actions a predictability that can be invaluable for those who must make decisions in other areas of society, or in other branches of government.

See LARMORE, *supra* note 59, at 40–42 (emphasis omitted).

165. See, e.g., *supra* notes 34–35, 139 and accompanying text (providing historical examples of problems associated with statelessness).

166. See *supra* note 160 and accompanying text (noting that birthplace alone rarely confers such ties).

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claim to have shown that this line is the most plausible,<sup>167</sup> but it does seem to be acceptable and administrable.<sup>168</sup>

This is not the only rule that is compatible with justice. A state might choose to adopt the more generous U.S. rule and, in most cases, doing so will not be incompatible with justice.<sup>169</sup> Doing “more” than justice requires is always acceptable, as long as it does not cause other injustices elsewhere in the system. My theory only establishes a plausible floor for what justice requires. States may have good reasons, both moral and administrative, to go above that floor, while in some particularly difficult or otherwise unusual circumstances, less may be required. But, if we can establish a plausible minimum for what justice requires, then we have accomplished something important. That several states fall below my proposed floor (those states that do not provide for *jus soli* citizenship *at all* being the clearest examples) helps make this point clear.

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167. In conversation, Peter Spiro tells me that he favors a ten-year period of residence like the one found under current British law. See Hsieh, *supra* note 154, at 522 (describing the British Nationality Act of 1981, which provides that “‘children born in the United Kingdom who are not British citizens by birth, may now acquire British citizenship by registration after ten years of continuous stay from birth there’”). While I do not think that such a law is obviously unjust, I do think it is likely to be more difficult to administer; there is also significantly more opportunity for unjust denials of citizenship. These factors weigh in favor of a shorter period, though they do not, of course, decisively speak in favor of the one-year rule I propose. R

168. As noted, the single greatest advantage of the cutoff being birth is administrative efficiency. See *supra* note 154 and accompanying text. If the rule I propose proves to be extremely difficult to administer—perhaps because there are a large number of disputed cases in which it is not clear if the person in question left his country of birth before the age of one and did not return, and in which competent evidence did not decide the matter—then justice might call for the use of birth as the rule. Deciding such issues, however, is outside the scope of this Article. R

169. Cases in which the American rule might be incompatible with justice are more imaginative than actual. Suppose state *X*, as a matter of justly decided policy, chooses to limit its population growth, but uses the American rule of *jus soli* and allows for short-term visits, as liberal states should. (Because there is no plausible reason to rule out short-term visits in most cases and because doing so would likely be offensive to other states and detrimental to current citizens, liberal states have a strong presupposition in favor of allowing short-term visits by foreigners.) Suppose a neighboring state, *Y*, has high population growth and encourages its citizens to give birth in state *X* when possible so as to provide an “escape valve” if the population in state *Y* is too high, since citizens born in *X* could leave overcrowded *Y* for *X*. In such a case, the American rule would allow *Y* to perpetrate an injustice on *X* by undermining *X*’s ability to engage in self-determination. Cases like this are likely to be rare, though, if they exist at all. For a very good discussion of the importance of self-determination and how it might be undermined by outside actions, including immigration, see MILLER, NATIONAL RESPONSIBILITY, *supra* note 80, at 71–74. R

## 2. Responding to the Consent Challenge

A more detailed argument for my position is best made in the course of defending it against a set of related challenges to the *jus soli* principle in general. Although these challenges are quite old,<sup>170</sup> they remain common. These theories hold that membership in a liberal society must be based on the consent of all members to be legitimate.<sup>171</sup> In these accounts, consent is necessary and sufficient for membership.<sup>172</sup> Those proposing such a position claim that any strong form of *jus soli* violates the consent principle because it requires granting membership to some individuals without the consent of current members.<sup>173</sup> This argument is made most clear by the example of children of illegal immigrants,<sup>174</sup> but the logic of the position is not limited to such cases. Rather, the consent principle implies that a state may set rules for admission to citizenship in almost any way so long as all current members consent.<sup>175</sup>

The consent principle purports to trace its origins back to John Locke's version of social contract theory.<sup>176</sup> Since much of the argu-

170. See generally SCHUCK & SMITH, *supra* note 44, at 10–11 (describing the historical “antecedents” of “[t]he principle of consent”).

171. SCHUCK, *supra* note 151, at 207 (explaining that “[t]he principle of consent” “holds that political membership can result only from free individual choices”).

172. See *id.* (“[T]he circumstances of one’s origins may of course influence one’s preferences for political affiliation, but they are not determinative.”).

173. See generally SCHUCK & SMITH, *supra* note 44, at 30–31 (noting that many scholars argue that “consent to membership must . . . be mutual, granted by the representatives of the existing citizenry as well as by the prospective citizen”).

174. *Id.* at 94 (“If mutual consent is the irreducible condition of membership in the American polity, it is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens.”); see also SCHUCK, *supra* note 151, at 208 (noting that “ascription significantly constrains governmental control over membership and can compel the state to provide protection to those, most notably illegal aliens, whose entrance into the country it has actively endeavored to prevent”).

175. Liberals (as opposed to at least some forms of libertarians) will insist that other principles of justice limit what members may consent to, so that, for example, a state may not offer citizenship to the children of current noncitizens on the condition that the noncitizens work as slaves. See generally PETER H. SCHUCK, *The Transformation of Immigration Law, in* CITIZENS, STRANGERS, AND IN-BETWEENS, *supra* note 28, at 19, 24 (“Liberalism . . . does not merely affirm the primacy of individual consent as the bedrock of political and juridical relationships. It also locates fundamental legal rights in individuals by reason of their universal humanity and without regard to contingencies of their status or condition.”). Libertarians who think that freedom of contract is a basic right would reject even this sort of limit. This is one of the ways in which libertarianism differs from liberalism. See Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105, 131–32 (2002). One of the issues raised here is whether some form of the *jus soli* principle is, as I contend, one of the principles of justice with which any other agreement between citizens and noncitizens must be compatible.

176. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348–51 (Peter Laslett ed., Cambridge Univ. Press 1964) (1690). For a contemporary Lockean approach that insists

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ment in this Article is set in contractarian<sup>177</sup> terms, it is especially important that I show what is wrong with the consent position. Locke did not discuss this particular issue in his *Second Treatise*, giving only a sketchy account of joining consent (as opposed to legitimating consent).<sup>178</sup> As a result, I do not give significant time to his account, in particular, but focus instead on variants more directly on point.

The consent principle that I criticize here is common in the United States, despite our long tradition of *jus soli* citizenship. At the Constitutional Convention, Governor Morris, one of the “founding fathers,” stated that “every [s]ociety from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted.”<sup>179</sup> The position is also set out strongly by Charles Kesler, who claims that self-government presupposes a distinct “national ‘self’”<sup>180</sup> and that, in turn, “[a] people [that is, the ‘national self’] is defined . . . by the unanimous consent of each member.”<sup>181</sup> Therefore, Kesler contends, a state or nation (the two coincide on his account) is rightly analogized, as Governor Morris argued, to a club that may set whatever membership rules it wishes.<sup>182</sup> Further, Kesler contends that most U.S. citizens actually view their citizenship through the lens of consent.<sup>183</sup>

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that legitimacy requires actual consent, see generally the works of A. John Simmons, including, *THE LOCKEAN THEORY OF RIGHTS* (1992) and *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* (1993). Simmons’s account, however, is primarily an account of legitimacy and not membership, and he does not significantly discuss immigration.

177. “Contractarianism” (or “contractualism”—the technical difference between the two does not need to be discussed here) is a family of views in moral and political philosophy that seeks to use the idea of an agreement, often put in terms of a “social” contract, to illustrate and explain important ideas about morality, legitimacy, or justice. Although early versions of contractarianism can be traced as far back as Plato’s *Republic*, the modern versions of the view derive from Hobbes, Locke, and Rousseau. In this Article, I most closely follow the version developed by Rawls, although I believe that accepting most of my arguments does not require accepting Rawls’s entire framework. For a discussion of Rawls’s relationship to the contractarian tradition, see SAMUEL FREEMAN, *RAWLS* 14–21 (2007).

178. Locke discusses the “origins” of political society in the *Second Treatise*, but his account does not describe the situation of someone seeking to join an existing society. See LOCKE, *supra* note 176, at 285, 349–51. Locke discusses how consent legitimates the power of government, but he has very little to say about an “outsider” joining an existing government. See *id.* at 364–67.

179. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 237–38 (Max Farrand ed., Yale Univ. Press rev. ed. 1966).

180. Charles R. Kesler, *The Promise of American Citizenship*, in *IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY*, *supra* note 107, at 3, 22.

181. *Id.* at 15.

182. *Id.*

183. *Id.* at 16.

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Kesler's last point is questionable since it is unlikely that many people conceive of anything that can properly be called a "theory of citizenship." Regardless, the view that *jus soli* is incompatible with liberalism has many other supporters. Elizabeth Cohen, for example, argues that *jus soli*, in any form, is incompatible with liberalism for two reasons. First, it "ascrib[es] citizenship to persons" in a way that "is almost entirely arbitrary."<sup>184</sup> Second, it "deprives both the community and the individual [gaining citizenship] of the opportunity to come to reasoned conclusions about membership."<sup>185</sup> I deal with Cohen's first concern more explicitly later<sup>186</sup> (although my quick discussion above gives some reason to think her claim is false).

For now, I wish to focus on the second issue—Cohen's claim that consent is a necessary feature of citizenship. Peter Schuck and Rogers Smith have defended this view at great length. I focus on Schuck's version of the argument, although he presents his view as an argument developed with Smith. According to Schuck's account, which he explicitly relates back to Locke,<sup>187</sup> mutual and actual consent between members (and any would-be members) is essential to any properly liberal view of justice and citizenship; it is also characteristic of U.S. practice.<sup>188</sup> Though both claims seem wrong, I focus only on the first claim to any great deal.

Actual consent may be either express or tacit.<sup>189</sup> It is clear that express consent to membership—an actual and explicit agreement among all citizens that they will be citizens and will extend citizenship rights to each other—does not and probably could not exist on any large scale.<sup>190</sup> So, if actual consent is to play a normative role in this

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184. Elizabeth F. Cohen, *Carved from the Inside Out: Immigration and America's Public Philosophy of Citizenship*, in *DEBATING IMMIGRATION* 32, 41 (Carol M. Swain ed., 2007).

185. *Id.*

186. See *infra* text accompanying note 208.

187. SCHUCK, *supra* note 151, at 209.

188. *Id.* at 210, 212.

189. For a discussion of tacit consent, see generally A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 75–100 (1979).

190. *Id.* at 79 (noting that "[t]he paucity of express consentors is painfully apparent"). Schuck and Smith argue that express consent to the American system was given by the people through their Representatives in Congress. See generally SCHUCK & SMITH, *supra* note 44, at 74–89 (outlining the legislative history surrounding the enactment of the Citizenship Clause). This is implausible, even for those alive at the time of the passage of the Fourteenth Amendment; most of the Representatives in Congress were elected without any indication that the Fourteenth Amendment would be passed. Further, general features of representative government weigh against such a conclusion. It might make sense to suggest that the governed consent to whatever their Representatives enact, but if this is the case, individuals will rarely actually consent to any individual piece of legislation—either because their favored candidate did not win the election or because their Representative is

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discourse, it must be as tacit consent.<sup>191</sup> But, there are reasons why tacit consent cannot play this role. Arguments made by David Hume more than two hundred years ago remain decisive: Actual consent is neither necessary nor sufficient to establish political obligations or to provide justification for the sort of consent that might ground citizenship.<sup>192</sup> The circumstances in which people find themselves—born into a society, usually raised in it, and commonly without a concrete right to go to any other particular country—Hume argued, are such that “consent” is not a meaningful factor.<sup>193</sup> It cannot, therefore, be the ground for our relationships of state membership.<sup>194</sup> Thus, the weakness of Schuck’s argument is already apparent from conclusions over two hundred years old. It is worth, however, looking at some of the details of Schuck’s view to explore more fully why it is incorrect and to consider how a more modern contractarian view can avoid these drawbacks.

Schuck, like many others, is particularly worried about illegal aliens.<sup>195</sup> The presence of illegal aliens threatens to devalue citizenship, he claims.<sup>196</sup> Despite what Schuck sometimes seems to imply, the consent view of citizenship does not have anything to say about illegal aliens as such.<sup>197</sup> Whether immigrants of any sort, illegal or not, gain citizenship is a question of naturalization policy,<sup>198</sup> and consent theory, as presented by and of interest to Schuck, is not a theory of naturalization but an attack on the *jus soli* principle.<sup>199</sup> The issue, then, is not with illegal immigrants but with the *children* of illegal immigrants born in the United States. It is these people who Smith,

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in opposition to the measure. Actual consent to “the system” would be just another fiction. Furthermore, even if these difficulties could be resolved, Schuck and Smith’s account is completely opaque as to why consent is binding on future generations, none of whom consented in any meaningful way to what was done by Representatives acting long before they were born. This approach is therefore hopeless.

191. Cf. SIMMONS, *supra* note 189, at 79 (“[T]he real battleground for consent theory is generally admitted to be the notion of tacit consent.”). R

192. See generally, e.g., DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 465, 465–87 (Eugene F. Miller ed., Liberty Fund, Inc. 1985) (1741).

193. *Id.* at 475.

194. See *id.*

195. See SCHUCK, *supra* note 151, at 212. R

196. See, e.g., text accompanying note 45. R

197. See, e.g., SCHUCK, *supra* note 151, at 214 (claiming that *jus soli* principles “reward lawbreaking”). The only possible “lawbreaker” here is the illegal alien parent. The illegal alien parent, however, is not a possible focus of an argument about *jus soli* citizenship and consent. R

198. See *supra* note 5 (defining naturalization). R

199. See, e.g., SCHUCK & SMITH, *supra* note 44, at 22 (explaining that early consensual theories were motivated by a desire “to challenge absolutist views” and to reevaluate “how the circumstances of birth defined one’s political membership”). R

Schuck, Cohen, and others would exclude from citizenship.<sup>200</sup> Schuck’s view gains its (limited) plausibility by constantly (and illicitly) shifting between considerations of illegal immigrants and their children, which allows Schuck to claim that the *jus soli* principle allows “outsiders [to] possess the power to transform themselves into insiders without the nation’s consent.”<sup>201</sup> The only obvious outsiders here are the noncitizen parents of children born in a state, and a *jus soli* rule does not, at least on its own, say anything about whether they are eligible for citizenship, or even immigrant status, at all.<sup>202</sup>

What about the children of illegal immigrants? Are they not “outsiders” who, by the *jus soli* principle, force insiders to treat them as fellow insiders without their consent? This is a dubious and confused view. First, the children of illegal aliens are, from a moral perspective, just like any other child born in a particular state—all just find themselves there.<sup>203</sup> The status of the parents is simply irrelevant to the

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200. See *supra* note 174. See generally SCHUCK & SMITH, *supra* note 44, at 91 (“Perhaps most important, the inclusiveness of the birthright citizenship rule . . . has the effect today of removing a legal disability that would otherwise afflict many children of illegal aliens.”).

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201. SCHUCK, *supra* note 45, at 178.

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202. Recall that in the United States, the noncitizen parents of a U.S. citizen are only eligible to gain immigrant status from this relationship after the citizen child reaches the age of twenty-one. See *supra* note 144. The parent must then wait at least five more additional years to naturalize. INA, 8 U.S.C. § 1427(a)(1) (2006). Considerations of justice do not strictly require this rule, and it may be statutorily changed. Schuck’s constant shifting between discussions of the children of illegal immigrants and their parents (the illegal immigrants themselves) is one of the most frustrating, almost dishonest, aspects of his book. For example, he claims that we should not interpret the Citizenship Clause of the Fourteenth Amendment to establish a *jus soli* principle because so doing would “reward lawbreaking.” SCHUCK, *supra* note 151, at 214. But, again, the people who are granted citizenship by such a *jus soli* principle are the children born here, and they are not, in any plausible sense, “lawbreakers.” This must be clear to Schuck. I can only assume that he shifts between discussing the parents and the children because it is necessary to gain rhetorical force for his position, which rests on otherwise faulty foundations.

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203. See HUME, *supra* note 192, at 476 (“Did one generation of men go off the stage at once, and another succeed, as is the case with silk-worms and butterflies, the new race, if they had sense enough to choose their government . . . , might voluntarily, and by general consent, establish their own form of civil polity, without any regard to the laws or precedents, which prevailed among their ancestors. But as human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary, in order to preserve stability in government, that the new brood should conform themselves to the established constitution . . . .”); RAWLS, POLITICAL LIBERALISM, *supra* note 22, at 41 (“We have no prior identity before being in society: it is not as if we came from somewhere but rather we find ourselves growing up in this society in this social position, with its attendant advantages and disadvantages, as our good or ill fortune would have it.”); RAWLS, THEORY OF JUSTICE, *supra* note 12, at 12 (“No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects.”). Each of these descriptions fits the children of illegal immigrants born into a society just as much as they fit the children of citizens.

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moral status of the child. To hold otherwise is not to take a consent view but to take the very view that proponents of the consent view oppose—an ascriptive view that assigns status to a child based on morally irrelevant grounds.<sup>204</sup> It is the supposed “consent” view, however, that threatens to make citizenship a caste-like structure while the *jus soli* principle prevents this from occurring, despite what Schuck, Smith, Cohen, and others have argued.

We see this more fully when we look at the more plausible contractarian view presented by Rawls. Here, the idea of actual consent is replaced by a new idea—hypothetical consent in the original position.<sup>205</sup> Parties in the original position do not know their place in society or that of their parents.<sup>206</sup> They also (notoriously) take themselves to be born into a society and develop rules based on that assumption.<sup>207</sup> I contend, however, that when people in the original position develop rules for citizenship (assumedly in the constitutional and legislative stages), they will adopt a rule of *jus soli*; no other rule guarantees that all who enter a society by birth have equal rights. Once again, we see that, far from being in conflict with liberal principles, a rule of *jus soli* is necessary to protect and to ensure such principles.

The next step is to show how Cohen’s first argument—that the *jus soli* principle ascribes membership on morally irrelevant grounds<sup>208</sup>—is mistaken. Consider again the necessary features of the *jus soli* principle I have advanced. Under this principle, citizenship must, at least, be granted to anyone who is born in a state and who

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204. SCHUCK, *supra* note 151, at 207 (“In its purest form, the principle of ascription holds that one’s political membership is entirely and irrevocably determined by some objective circumstance—in this case, birth within a particular sovereign’s allegiance or jurisdiction.” (emphasis omitted)); *see also* Cohen, *supra* note 184, at 44 (arguing that the reason “we have such a well-articulated public understanding of citizenship that fails to answer basic questions about borders” is “that the jurisprudence out of which American citizenship was established was one that did not take up questions of immigration,” but instead “adopt[ed] ascriptive *jus soli* in a confined manner that does not apply universally”). Bernadette Meyler, working from a historical perspective rather than a philosophical one, also argues that the logic of Schuck and Smith’s approach leads them to an essentially ascriptive account of citizenship, despite their stated opposition to this. *See* Meyler, *supra* note 44, at 558–59.

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205. For a summary of Rawls’s “original position,” *see* RAWLS, *POLITICAL LIBERALISM*, *supra* note 22, at 304–10.

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206. *See id.* at 305 (noting that the original position’s “‘veil of ignorance’ means that the parties do not know the social position, or the conception of the good (its particular aims and attachments), or the realized abilities and psychological propensities, and much else, of the persons they represent”).

207. *See id.* at 40–41 (stating that because “entry into” a democratic society “is only by birth,” “[w]e have no prior identity before being in society”).

208. *See supra* text accompanying note 184.

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lives in the state long enough to have “availed” himself of the protection and of the goods that the state provides. This includes childhood socialization. Having been born into and raised in a society is the primary method by which one gains a culture; access to a culture, especially access to the culture in which one is born and raised, is arguably an extremely important good.<sup>209</sup> It is only a *jus soli* principle, at least of the weak sort I have defended here, that ensures the right to this good. Therefore, once again the *jus soli* rule does not distribute goods in a way that is morally irrelevant, but in a way that is necessary to *prevent* a morally irrelevant distribution of goods.

Finally, it is important to see that a *jus soli* rule need not have the negative “ascriptive” aspects attributed to it by Schuck, Cohen, Smith, and others. Such a contention confuses historical fact with conceptual necessity. Schuck, Cohen, and Smith all note that the *jus soli* principle developed out of the rule in *Calvin’s Case*, which was decided by Sir Edward Coke.<sup>210</sup> This rule held that citizenship was determined by birth and was not changeable; it could not be alienated.<sup>211</sup> Although this inalienability was historically a part of *jus soli*, it is no longer a necessary part of the rule and to think otherwise is to engage in a massive non sequitur. In fact, many modern societies manage to mix *jus soli* rules with the rights to emigrate and to alienate one’s citizenship.<sup>212</sup> The fact that the *jus soli* principle was once paired with an illiberal ascriptive notion of citizenship—one tied up with (British) imperialism<sup>213</sup>—is interesting historically but carries no significant normative force. It is difficult to see, then, how Cohen’s argument is

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209. Although states and “societies” do not perfectly overlap, the overlap is significant, and the political structure of the state is, to some degree, necessary for societies to persist over time. For discussion of this point and others made in this Section, see generally KYMLICKA, *supra* note 11, at 82–93 (1995). I do not, however, endorse all aspects of Kymlicka’s account, and I especially take issue with his association of societies with “nations” and his rejection of a civic notion of citizenship. R

210. *Calvin v. Smith (Calvin’s Case)*, 77 Eng. Rep. 377 (K.B. 1608). For particularly useful descriptions of *Calvin’s Case*, see Cohen, *supra* note 184, at 40–45, and Meyler, *supra* note 44, at 550. R  
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211. SMITH, *supra* note 151, at 45 (“As God’s will and natural law were perfect, eternal, and immutable, one’s natural subjectship was unalterable by anyone short of God Himself.”). This is what Cohen has in mind when she states that *jus soli* limits both sides in a would-be membership negotiation; it is also what she means when she claims that *jus soli* was one of the principles vigorously opposed by the colonists before and during the American Revolution. See Cohen, *supra* note 184 (arguing that citizenship based on *jus soli* “deprives both the community and the individual of the opportunity to come to reasoned conclusions about membership”). R

212. In the Expatriation Act of 1868, for example, the United States declared that “the right of expatriation is a natural and inherent right of all people.” Act of July 27, 1868, ch. 249, 15 Stat. 223, 223.

213. Cohen, *supra* note 184, at 40–45. R

persuasive. In light of these considerations, we have no good reason to reject a sensible *jus soli* rule, and we have significant reason to incorporate such a rule as part of our citizenship policy.

### 3. *Contra Shachar*

Before discussing naturalization, I wish to address one other challenge to the *jus soli* and *jus sanguinis* principles. Ayelet Shachar has recently challenged systems of “birthright” citizenship, a category that seems, on her account, to include aspects of both the *jus soli* and *jus sanguinis* approaches, on the ground that they perpetuate inequality and are acceptable only if we think that persistent inequalities of wealth and opportunity are justified on ascriptive grounds.<sup>214</sup> Additionally, Shachar worries that the very idea of citizenship may be unjust because it implies that those “inside” a state are able to make choices that affect those “outside” a state without the outsiders having a say in the matter.<sup>215</sup>

Shachar’s worries must be taken seriously by anyone committed to modest cosmopolitanism. It is far from clear, however, that a radical reformation of the very idea of citizenship, as called for by Shachar,<sup>216</sup> is the right approach. First, recall that citizenship, in this Article, is not “ascriptive” in any objectionable sense. It is not tied to ethnic membership, nor is it immutable, since the obligations that it imposes may, at least in some circumstances, be shed. Next, recall that our general modest cosmopolitan view places limits on the sorts of inequalities that are acceptable between states.<sup>217</sup> While this view does not call for the same degree of equality between states as within them, it does hold that certain inequalities are unjust. These unjust inequalities cannot be justified on the basis of the system of citizenship outlined in this Article—they cannot be justified at all. As Sarah Song puts it, “The question of the acceptability of a state’s membership rule has to be separated from the normative grounds for global redistribution.”<sup>218</sup> This shows only that the acceptability of a state’s

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214. See Ayelet Shachar, *Against Birthright Privilege: Redefining Citizenship as Property*, in IDENTITIES, AFFILIATIONS, AND ALLEGIANCES 257, 261 (Seyla Benhabib et al. eds., 2007).

215. *Id.* at 264.

216. *Id.* at 261. For a full account of Shachar’s thoughts on how citizenship should be reformed, see generally SHACHAR, *supra* note 147. Because the details of her reform project are not directly relevant for the issue I am concerned with here, I do not discuss them.

217. See MANDLE, *supra* note 17, at 102–24 (developing a modest cosmopolitan account of distributive duties between states).

218. Sarah Song, *Rethinking Citizenship Through Alienage and Birthright Privilege*, ISSUES IN LEGAL SCHOLARSHIP (forthcoming 2010) (manuscript at 12) (on file with the Maryland Law Review).

membership rule is independent of the notion of “birthright” citizenship, at least when properly conceived and put within a modest cosmopolitan framework. The attempt to derive redistribution through discussion of birthright citizenship turns out to be a needless shuffle.

Shachar’s other concern has a similar solution. It is true that the very notion of citizenship implies that “insiders” (citizens) are able to make decisions that affect “outsiders” (noncitizens) who have no, or limited, say in the matter.<sup>219</sup> But, this is not necessarily unjust. Any type of association, and every type of decision making, even by an individual person, has this result. For example, decisions made within a family will affect nonfamily members, and many decisions I make as an autonomous individual will affect others who had no right to a say in my decision. This shows that the mere fact that some who had no right to a say in a decision are affected by that decision cannot then make a system that allows such decision making problematic. Rather, we must look at cases where those affected are *unjustly* affected. Here, again, there is nothing special about citizenship. No practice of citizenship makes it acceptable to unjustly affect outsiders. On my account, what determines which effects are unjust is not the theory of citizenship per se but the modest cosmopolitan view in which the theory is embedded. Shachar accepts this argument, conceding that ideas of “world citizenship” and open borders are not plausible alternatives.<sup>220</sup> Her worries, it seems, are worries about the types of international duties we have, rather than worries about “birthright citizenship” as such. I suspect that Shachar would want international duties to be stronger than those called for by modest cosmopolitanism; *this*—and not as to citizenship—is where our accounts differ.

#### IV. NATURALIZATION AND ALIENAGE LAW

Last, I discuss naturalization policy and alienage law, or the area of law that relates to the rights and duties of noncitizens.<sup>221</sup> States may impose only fairly modest limits on naturalization, these limits must be neutral among different conceptions of the good, and they must be enforced in a regular, uniform way. Moreover, despite the above requirements, states have a modest amount of room in which to

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219. See Shachar, *supra* note 214, at 264.

220. *Id.* at 269–70.

221. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1581 (2008) (“Alienage law . . . define[s] the rights and obligations of noncitizens within the United States.”). I largely ignore the question of what rules should apply to nonimmigrant foreigners, including guest workers. This is a difficult and important question, but one I avoid for the sake of space. I hope to return to it in the future.

treat citizens and noncitizens differently without violating the demands of justice. In sum, while naturalization should be open and easy, states may use alienage law to treat noncitizens differently from citizens in many substantial areas.

A. *Naturalization*

While states vary in their requirements for naturalization, all states have requirements of some sort.<sup>222</sup> These requirements serve two main purposes: They ensure a commitment to the country of immigration,<sup>223</sup> and they ensure assimilation into the culture of the country.<sup>224</sup> Obviously, the two functions may be linked. Some will find the link to be necessary,<sup>225</sup> arguing that an immigrant cannot be sufficiently committed to the state of immigration without being highly assimilated to that state's culture. When such a view is joined with an approach that ties culture to ethnicity, naturalization is difficult or even impossible. The limiting case in this direction is Japan. Nonethnic Japanese are essentially barred from naturalization and even ethnic Japanese who are foreign-born must be judged by a review panel with significant discretion prior to naturalization.<sup>226</sup> Before the reform of its immigration laws in 1999, Germany also had a very strong ethnic element, although it did allow individuals judged by a review panel to be sufficiently "Germanized" (depending on various factors) to naturalize after a residency period of ten to fifteen years.<sup>227</sup> The panel held significant discretion in determining whether the applicant was sufficiently "Germanized."<sup>228</sup>

Such systems are deeply problematic from a liberal perspective. Restrictions on naturalization aimed at cultural preservation are incompatible with liberal principles of justice for several reasons. Most

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222. SPIRO, *supra* note 27, at 33.

223. *See, e.g., id.* at 33, 37–40 (noting that American naturalization policy includes "[d]urationally residency requirements" and describing those requirements).

224. *Cf. id.* at 38 ("One could assume that presence in the United States would (on average) impart to an individual the distinctive qualities of American life in all its elements, cultural, historical, social, and political. Better than any test of specific knowledge, one could be expected to absorb, through the contacts of everyday life, what it [means] to be American.").

225. Noah Pickus seems to take such a view. *See, e.g.,* Noah M.J. Pickus, *To Make Natural: Creating Citizens for the Twenty-First Century*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY, *supra* note 107, at 107, 107–39. Pickus calls his position "constitutional citizenship." *Id.* at 110 (internal quotation marks omitted). Pickus's view is quite different, as will be clear, from the "constitutional patriotism" or the "civic notion of citizenship" I argued for above. *See* Part II.B.

226. LYNCH & SIMON, *supra* note 88, at 195–96.

227. *See id.* at 176–77.

228. *See id.*

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fundamental, such rules place restrictions on full citizenship that outsiders either cannot meet or that are unreasonable to expect them to meet.<sup>229</sup> These rules cannot form the basis of a scheme of reasonable and rational cooperation. If a system of rules is to form the basis for cooperation, then those who cooperate must be able to meet the system's standards without giving up fundamental rights. If we assume that justice requires all states to accept some degree of immigration—at least some form of family based immigration and perhaps some refugees<sup>230</sup>—then there must be some degree of cooperation between insiders and outsiders regarding access to full membership. The exact terms that set the limits on cooperation remain to be spelled out, but it is elementary that terms that one side cannot meet, or cannot be expected to meet, cannot be terms of cooperation.

Further, it is clearly unacceptable to impose such requirements on natural-born citizens. A society may not, if it hopes to comply with liberal principles of justice, require that its members have a certain culture (let alone a certain ethnicity) to be afforded full rights. To require otherwise is inevitably to use repressive force against citizens in a manner that is incompatible with liberalism. As Rawls points out, a plurality of conceptions of the good is a permanent feature of life in a society that rejects oppressive uses of state power to impose a political conception of the good.<sup>231</sup> Now, it is not the case that a state may only require of immigrants seeking to naturalize what it may require of its own citizens, a point I spell out more fully below. The comparison is apt, however, because the conditions considered here are ones that a would-be citizen could not change or should not be expected to change out of fundamental fairness to his personality.<sup>232</sup> This is in contrast with the other requirements that I consider below, all of which an applicant could meet without having to change fundamental aspects of his personality.

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229. For a discussion of the American requirements for naturalization, see SPIRO, *supra* note 27, at 34–42.

230. See *supra* Part III.A.2.

231. RAWLS, POLITICAL LIBERALISM, *supra* note 22, at 36–37; see also Burton Dreben, *On Rawls and Political Liberalism*, in THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 68, at 316, 320–21 (“Rawls holds that not only can you not expect citizens to agree on the same comprehensive moral doctrine, but also you can not expect citizens to agree on the same liberal political conception; that would be unreasonable.”).

232. I intentionally draw a parallel with the “social group” ground for an asylum claim here. That this same characterization fits with a basis for granting asylum shows that such conditions cannot be reasonable because they cannot be part of a system of cooperation. For the U.S. rule in this area, see *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). For further discussion on social cooperation and reasonableness, see generally RAWLS, POLITICAL LIBERALISM, *supra* note 22, at 48–58.

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The type of diversity about views of the good life discussed here is seen by some scholars as a threat to citizenship; some argue that citizenship is meaningful only if it is based on membership in an exclusive encompassing group of the sort only a shared culture could provide.<sup>233</sup> From a liberal perspective, this is almost exactly the opposite of correct. While we might accept that the state is the largest pervasive group to which a citizen belongs,<sup>234</sup> it is, as Michael Walzer points out, only when there are other groups within the state to which a citizen might give allegiance that citizenship can be a moral choice.<sup>235</sup> This moral choice is something that liberals ought to value.

What about naturalization requirements less strenuous than those described above? Noah Pickus, among others, argues that the naturalization process should promote a form of civic nationalism,<sup>236</sup> although Pickus’s civic nationalism is tied to what he takes to be particular American values.<sup>237</sup> Unlike the exclusionary models rejected above, Pickus claims that such policies are necessary to ensure the inclusion of would-be immigrants.<sup>238</sup> Pickus rejects Linda Bosniak’s claim that “national solidarity” programs “categorically privilege” in-

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233. See, e.g., SPIRO, *supra* note 27, at 31 (“To the extent that citizenship as a legal status no longer reflects distinctive communal bonds, the less meaning will attach to the category.”); cf. David Miller, *Immigrants, Nations, and Citizenship*, 16 J. POL. PHIL. 371, 375 (2008) (“The legitimacy of the modern state derives in part from its role as protector and promoter of the national culture of its people—if there was no distinct culture to protect, there would be no reason for the state to exist as an independent entity.”).

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234. See MICHAEL WALZER, *The Problem of Citizenship*, in OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 203, 218 (1970) (“A citizen, we might say, is a man whose largest or most inclusive group is the state.”). Peter Spiro objects to this characterization on the ground that there are many groups to which people belong that are transnational in character. SPIRO, *supra* note 27, at 125–26. Again, the existence of this type of group is not a new phenomenon, so this is not a new problem for citizenship. And, especially today, these transnational societies are, to a large degree, parasitic on cooperation at the domestic level and are therefore less fundamental from the perspective important for this work.

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235. WALZER, *supra* note 234, at 227.

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236. Civic nationalism is, in this case, distinct from what I have called a “civic notion of citizenship” in that civic nationalism still calls for a homogeneity of political and, to some degree, moral beliefs. An example might be the French policy of official state “secularism.” For a discussion of the difference between Pickus’s “civic nationalism” and something much more like what I have called a “civic notion of citizenship,” see MÜLLER, *supra* note 62, at 78–80.

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237. It is doubtful that the values Pickus focuses on are “particularly American,” at least any more. See SPIRO, *supra* note 27, at 46–50 (explaining that although “American democracy presented an anomaly in the global political landscape” at “the time of the first naturalization measure,” its “distinctiveness” may no longer be as striking).

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238. Pickus, *supra* note 225, at 133. According to Pickus:

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[A] single complex sense of constitutional identity is necessary to integrate our allegiances to the multiple communities to which we belong. We need citizens who feel an emotional attachment to the polity, who are committed to its basic

siders and are therefore unjust.<sup>239</sup> Pickus argues, instead, that such programs are a requirement of justice, since a shared national identity is necessary for the legitimacy of the state and thus for justice.<sup>240</sup> The goal of the naturalization process, Pickus claims, should be to “foster[ ] immigrants’ identification” with the country of naturalization.<sup>241</sup> If this is not done, Pickus worries, immigration threatens to destabilize national identity and thereby delegitimize the state.<sup>242</sup>

The state may, Pickus argues, legitimately promote the adoption of a national identity through the immigration and naturalization process and may seek to bring about a “transformation of consciousness” in the would-be citizen.<sup>243</sup> To do this, the state may impose substantial naturalization requirements.<sup>244</sup> As Pickus himself acknowledges, however, it is hard to know to what such claims (about “transforming consciousness”) might amount.<sup>245</sup> We could replace our largely empty (though in some ways still problematic) civics and language requirements with mandatory civics classes or even community service. It is not at all clear, however, that this would even tend toward, let alone guarantee, the “transformation of consciousness” that Pickus desires.<sup>246</sup> Further, it has long been a basic liberal principle that while the law may compel outward behavior, it cannot legitimately seek to peer behind external action and judge the content of our hearts.<sup>247</sup> So, it seems that we are left with a choice between formal, but perhaps

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values, who share certain qualities and attitudes, and who are willing to interrogate those values and deliberate over the meaning of their shared identity.

*Id.*

239. See Bosniak, *see supra* note 107.

240. Pickus, *supra* note 225, at 109.

241. *Id.* at 124.

242. *Id.* at 113.

243. *Id.* at 127–29.

244. See, e.g., *id.* at 130 (“Not all barriers [to naturalization] are harmful. . . . A naturalization process that treats citizenship as a valued and substantive status gives applicants a reason to prize their new standing. Moreover, naturalization requirements can provide immigrants with valuable educational opportunities that foster their development as full members of the polity.”).

245. Cf. *id.* (noting that “[a] more serious naturalization process need not mean fewer successful applicants”).

246. *Id.* at 127–29.

247. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 23–24 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797); see also Wolfgang Kersting, *Politics, Freedom, and Order: Kant’s Political Philosophy*, in THE CAMBRIDGE COMPANION TO KANT AND MODERN PHILOSOPHY 342, 345 (Paul Guyer ed., 1992) (“Kant’s concept of right concerns only the external sphere of the freedom of action. Only the effects of actions on the freedom of action of others are of interest to it.”). This does not mean that we cannot have, say, a school system designed to promote a feeling of civic loyalty. Properly understood, such a program is necessary. But, it does mean that any tests designed toward judging the hearts of immigrants must be rejected.



empty, rules and an illiberal process in which we give officials discretion to judge the hearts of others, seeking to discern their worthiness, in a way that is arbitrary and capricious. In light of this problem, and given the strong reasons liberals have for preferring rules that can be uniformly enforced, we have strong reason to reject Pickus's view.<sup>248</sup>

Additionally, the sort of scheme suggested by Pickus may be unnecessary to achieve the legitimate aspects of his goals. If we want new immigrants to gain our civic ideals, to value those parts of our society that we think make it particularly valuable, and to cherish the society as their own, then we should welcome them to participate in civil society as equals and on their own terms rather than require them to participate as part of the naturalization process. After all, as Walzer points out, this is how natural-born citizens come to (or fail to) adopt these ideals.<sup>249</sup>

Pickus's claim that extending rights to noncitizens might keep them from broader political participation<sup>250</sup> is also mistaken. Allowing as much participation in public life as possible (perhaps including the right to take part in the local political process, as is allowed in several European countries for noncitizens regardless of nationality and is required by the European Union for E.U. nationals<sup>251</sup>) is instead likely to do much more to foster a sense of civic belonging than would the "more substantial" naturalization requirements favored by Pickus. Walzer, who notes that native-born citizens primarily develop their sense of virtue through these means,<sup>252</sup> and Saskia Sassen, who notes that civil society activities such as "immigrant associations and cultural activities" do not, as Pickus fears, lead to a balkanized society but assist "integration," also make this same point.<sup>253</sup>

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248. For a particularly egregious example of the abuse that can result when discretion is given to officials to judge "assimilation" when making naturalization decisions, see Katrin Bennhold, *A Veil Closes France's Door to Citizenship*, N.Y. TIMES, July 19, 2008, at A1.

249. WALZER, *supra* note 60, at 18.

250. Pickus, *supra* note 225, at 116, 118.

251. This right is guaranteed by the Treaty on the European Union of 1993 (commonly called The "Maastricht Treaty"). See generally Treaty on European Union of 1993 art. 8b, Feb. 7, 1992, 31 I.L.M. 247. Noncitizen voting in state and even federal elections existed throughout the nineteenth century in the United States, as well, and existed in some forms as late as 1928. Ronald Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the US*, 26 NEW POL. SCI. 499, 505 (2004). For an argument that full voting rights should be extended to noncitizens (a position stronger than the one I argue for here and one that I do not accept), see Jennifer Gordon, *Let Them Vote*, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 43, 43-51 (Joshua Cohen & Joel Rogers eds., 1999).

252. WALZER, *supra* note 60, at 18-19.

253. SASSEN, *supra* note 104, at 145.

If we reject Pickus's call for substantial (though not ethnic) requirements for naturalization, what are we left with? Joseph Carens helpfully distinguishes between requirements that can be legitimately enforced by law, norms that should not be legally enforced but may be encouraged through societal sanctions, and aspirations—our hopes as to what immigrants will become.<sup>254</sup> The majority of what Pickus calls for, Carens claims, is most properly thought of as aspirational.<sup>255</sup> For the reasons discussed above, I agree with Carens. The remaining question, then, is which burdens are requirements that should have the force of law and which burdens are norms that are properly subject to societal pressure.

Carens takes a strong view, arguing that the only fully justifiable and legally enforceable requirement is a term of residence not longer than five years.<sup>256</sup> Any other requirements should only be formal, such as filling out an application form and paying a modest fee.<sup>257</sup> The justification for this strong view, Carens claims, is that living in a society is what makes someone a member of it, and full membership should not be kept from de facto members.<sup>258</sup> We may legitimately expect immigrants to learn the language and culture of the state, but these expectations, Carens claims, are better thought of as norms to be encouraged by social pressure than as regulations to be enforced by law.<sup>259</sup>

Carens's strong view is perhaps not as far from current practice in the United States as we might think, since the English language exam, for example, requires far less than true fluency to pass<sup>260</sup> and the "civics" exam is, at best, an exercise in rote memorization, requiring correct answers to only six out of ten questions selected from a preset list of one hundred possible questions.<sup>261</sup> In addition, waivers exist for individuals who are not able to meet even these fairly lax require-

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254. Joseph H. Carens, *Why Naturalization Should Be Easy: A Response to Noah Pickus*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY, *supra* note 107, at 141, 142.

255. *Id.* at 142 (arguing that "most of the things people advocate when they talk about strengthening or improving the naturalization process" are aspirational).

256. *Id.* at 142–43.

257. *See, e.g., id.* at 144 (arguing against "tests of civic and historical knowledge" and "competence in English" as "requirement[s] for naturalization").

258. *Id.* at 143.

259. *Id.* at 145–46.

260. *See, e.g.,* ANITA BIASE, YOUR U.S. CITIZENSHIP GUIDE: WHAT YOU NEED TO KNOW TO PASS YOUR U.S. CITIZENSHIP TEST 142 (2009) ("An applicant for U.S. citizenship does not necessarily need to be fluent in English, but he or she must have the ability to read, write, speak, and understand the basics of the English language.").

261. For a list of potential exam questions, see U.S. CITIZENSHIP & IMMIGRATION SERVS., CIVICS (HISTORY AND GOVERNMENT) QUESTIONS FOR THE NATURALIZATION TEST (rev. 2009), available at <http://www.uscis.gov/files/nativedocuments/100q.pdf>.

ments.<sup>262</sup> These waivers, though nominally based on health- or age-related inability to study,<sup>263</sup> are given quite liberally in practice and are rarely challenged.<sup>264</sup>

Since the language and civics requirements are clearly less significant impediments in current U.S. practice than we might have thought, should we agree with Carens that liberal states should officially remove these requirements? While I think removal is perhaps the best overall policy, it is not, strictly speaking, a demand of justice. What is ruled out by my argument is the use of language and civics requirements to enforce cultural homogeneity. As Carens rightly notes, it is of no use, and may in fact be positively harmful, to “legalize” loyalty, patriotism, or identity,<sup>265</sup> and language and civics exams should not be used as backdoor methods for so doing. Additionally, it would be unreasonable to expect adult immigrants, most of who work full time in or out of the home, to gain full fluency or deep knowledge of civics if resources are not made easily available to them. A system that requires passing a fair and reasonable exam or completing a certain number of language and civics classes provided at public expense and at various times and locations to gain citizenship, at least if waivers are available to those who need them, however, would not be an undue burden or a violation of the bounds of justice. After all, natural-born citizens are also expected, and even required, to attend compulsory education, which includes courses that aim to teach at least minimal language and civic knowledge. If this is not unjust, then the language and civics requirements I suggest here are not unjust. That said, such requirements also do not seem to be required by considerations of justice and may prove to be difficult and expensive to administer and ineffective in achieving their goals. If so, states may be well advised to follow Carens’s advice and limit formal requirements to a

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262. See generally *Exceptions & Accommodations*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow “Citizenship Through Naturalization” hyperlink; then follow “Exceptions & Accommodations” hyperlink) (last updated July 14, 2010) (providing information about exceptions to the various naturalization requirements).

263. *Id.*

264. In my experience working with immigrants at a public interest law firm, I saw that waivers were regularly sought on quite thin health grounds, to say the least. The idea that waivers are liberally given and rarely challenged is a sort of “open secret” in the immigration bar.

265. Carens, *supra* note 254, at 146.

period of residency,<sup>266</sup> perhaps with a good standing requirement included.<sup>267</sup>

The final requirement that I discuss is the common naturalization requirement that immigrants renounce allegiance to other states. This requirement is related to the question of whether dual citizenship should be allowed.<sup>268</sup> The practice of dual citizenship had been, for many years, disfavored by nearly all countries.<sup>269</sup> The naturalization oath taken in the United States seems to officially require renouncing prior citizenship before naturalization.<sup>270</sup> As recently as 1963, an international convention was held to discuss the goal of reducing dual citizenship.<sup>271</sup>

More recently, however, the context has changed. While some states do not allow dual citizenship, many officially do, and some even

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266. See *supra* text accompanying notes 256–57. If the point of having naturalization requirements is to foster identification with the country of naturalization and if a period of residence is a proxy for this identification and a way to try to ensure that it takes place, then in some cases, in which there is an independent reason to think these goals are met in a shorter period of time and such a rule can be applied in a regular way, a much shorter period of residence may be appropriate. Examples include the shorter period of residence required for naturalization in the United States when the immigrant gains his immigrant status by marriage to a citizen, or the shorter residence period required for noncitizens serving in the military. See INA, 8 U.S.C. §§ 1430(a), 1439 (2006). My thanks to Kristin Madison for helpful discussion on this point.

267. While it seems reasonable to require a period of good standing—a period without arrest for any significant crime (perhaps one equal in length to the residency requirement)—for naturalization, I do not give a more detailed analysis of exactly how such a system should work, if waivers should be available, and if those who commit certain crimes should be permanently barred from naturalization, assuming they are not deported. All of these questions require more detailed knowledge about specific features of the states in question than can be hoped for from a work of philosophy.

268. This is only part of the question, however, since some people gain dual citizenship at birth, either because they are born to parents of mixed citizenship and inherit the citizenship of both states by law or because they gain one citizenship from their parents and another from the location of birth. For some time, most states required those who claimed more than one citizenship at birth to renounce one upon reaching adulthood. This is still the practice in Germany, though it is now less common in other states. See LYNCH & SIMON, *supra* note 88, at 176–77. I do not devote significant space to this way of gaining dual citizenship because much of what I say above applies in this case as well.

269. For a discussion of what he calls “plural citizenship,” see SPIRO, *supra* note 27, at 59–67. President Theodore Roosevelt once stated that the “theory” of dual citizenship was “a self-evident absurdity.” *Id.* at 61 (internal quotation marks omitted). Similarly, Henry Cabot Lodge proclaimed that he could “not assent for a moment to the proposition that such a thing as dual citizenship is possible.” *Id.* (internal quotation marks omitted).

270. The relevant portion of the U.S. naturalization oath reads, “I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen[ ] . . . .” 8 C.F.R. § 337.1(a) (2010).

271. Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, *opened for signature* May 6, 1963, 634 U.N.T.S. 221.

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encourage it.<sup>272</sup> The United States has never taken practical steps to make the oath of renunciation effective, and today dual citizenship is tacitly accepted by the government.<sup>273</sup> The Supreme Court has made it extremely difficult to strip natural-born citizens of their citizenship, even when they naturalize abroad.<sup>274</sup> These changes are attributable to increased levels of peace and respect for human rights around the world, among other things. In the past, one objection to dual citizenship was that it created obligations for states to protect their citizens against other states that also claimed dominion over the individuals in question.<sup>275</sup> This was viewed as a threat to state sovereignty, understood as the right of states to conduct their internal affairs as they saw fit.<sup>276</sup> As the acceptance of universal human rights has spread, however, this conception of sovereignty has waned.<sup>277</sup> This, in turn, has made dual citizenship seem less problematic.

In addition, we might think that dual citizenship should be limited since it allows for dangerous “dual loyalties,”<sup>278</sup> under which

272. Peter H. Schuck, *Plural Citizenships*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY, *supra* note 107, at 149, 154–55.

273. SPIRO, *supra* note 27, at 69, 72; Schuck, *supra* note 272, at 162.

274. SPIRO, *supra* note 27, at 68–69; Schuck, *supra* note 272, at 161–62. The foundational case on point is *Afroyim v. Rusk*, 387 U.S. 253 (1967). *Afroyim* is the first in a line of cases in which the Supreme Court held that only explicit renunciation by an individual, with the intent that it be effective, could remove citizenship from a natural-born citizen. The Court stated:

We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

*Id.* at 268. Somewhat lower standards apply for naturalized citizens, who may be stripped of their citizenship when, for example, it is shown that citizenship was “procured by concealment of a material fact or by willful misrepresentation.” INA, 8 U.S.C. § 1451(b) (2006). The Supreme Court has interpreted this standard in a fairly broad way. *See generally*, e.g., *Kungys v. United States*, 485 U.S. 759 (1988).

275. SPIRO, *supra* note 27, at 63.

276. *See id.* at 70–71 (noting, for example, that in the past “dual Italian and American” citizenship “might [have] . . . provoke[d] controversy between Italy and the United States, as the latter sought to intervene on the individual’s behalf against the former’s mistreatment”).

277. *See id.* at 71 (noting that, under the new human rights regime, “[i]f Italy treats a person inconsistent with human rights norms, it has violated international law, and all states have standing to complain of that violation, even if the individual is merely an Italian”); *see also* Kelly, *supra* note 55, at 188 (arguing that human rights “generate moral obligations—for non-engagement, aid, or intervention—to be represented within foreign policy as priorities, insofar as a society is in a favorable position to be able to implement the policy or has incurred a special debt”).

278. Michael Jones-Correa, *Why Immigrants Want Dual Citizenship (and We Should Too): A Response to Peter Schuck*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY, *supra* note 107, at 193, 193.

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some citizens might seek to promote interests other than those of the state in question. This worry is less pressing today when the interests of states are more in line than they were when trade and empire were primary areas of competition.<sup>279</sup> With the end of (at least open) support for empire, the end of the Cold War, and the move to managed free trade in the confines of a cooperative body such as the World Trade Organization, these concerns have taken on less practical importance.

This concern is grounded in an illiberal attitude—the idea that “the state” might have interests other than those of its members. If we reject this idea and do not falsely assume that interests must be zero-sum, then this objection loses much of its force. It is not clear why the fact that some citizens have concerns for what happens in another state should be any more problematic than the fact that some citizens have interests in other groups, some of which (churches or corporations, for example) also extend beyond the borders of the state. This objection, then, provides no categorical reason for rejecting dual citizenship.

There are also positive reasons for granting dual citizenship. Rather than fostering conflict, dual citizenship may further ties of cooperation, friendship, and understanding between states. This belief may lay behind the shift toward allowing (even encouraging) dual citizenship in recent years.<sup>280</sup> Additionally, there is some evidence that allowing dual citizenship, rather than preventing assimilation, actually helps encourage it by removing psychological and sometimes legal barriers to full membership in the new society.<sup>281</sup> When immigrants do not feel as if they must break all ties to their country of origin, it is easier for them to become full members of their new societies.<sup>282</sup> When legal impediments to becoming full members, such as laws found in many countries that prevent noncitizens from holding land, are no longer present, the costs of assimilation become lower and the process more attractive.<sup>283</sup>

There are few, if any, compelling reasons to deny dual citizenship and some good, if not fully obligatory, reasons to allow it. But, do principles of justice *require* states to allow dual citizenship? This is less clear, as the arguments presented here do not completely settle the

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279. *See id.*

280. Schuck, *supra* note 272, at 154 (noting that “the road to dual citizenship seems easier to travel today than it was in the past” and exploring reasons for that development).

281. Jones-Correa, *supra* note 278, at 194–96.

282. *Id.* at 196.

283. *Id.*

case. A compelling case against dual citizenship may be found in certain times and in certain historical circumstances, even if not in our present situation. Until such an argument can be articulated, however, the presumption should be in favor of greater liberty, including the liberty to have multiple citizenships.<sup>284</sup>

### B. *Alienage Law*

Last, I touch on alienage law, or the law that determines legal status within a state on the basis of whether the person in question is a citizen or not.<sup>285</sup> More specifically, I explore whether distinctions as to social and political rights and benefits based on alienage status, when applied to permanent residence, are acceptable.<sup>286</sup>

Owen Fiss argues that principles inherent in the Constitution and liberal theories of justice require us to treat all people within reach of the state in the same way, at least with respect to social rights and benefits.<sup>287</sup> This implies that alienage law should not allow for differences in status between citizens and noncitizens. Fiss extends his argument not only to legal permanent residents but to anyone present in the territory of a state, including those without the legal right to be present.<sup>288</sup> This extension is extremely implausible, but I limit my discussion to the more easily defensible claim that liberal principles of justice require us to treat legal permanent residents in exactly, or

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284. Peter Spiro, discussing the strong prudential reasons for allowing plural citizenship, pushes further than I do in asserting that dual citizenship should be seen as an important human right. *See generally* Peter Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111 (2010). His strongest argument is that rejecting plural citizenship interferes with the associative rights of individuals. This argument is not conclusive. If states are seen as associations (as Spiro's argument requires), then they must have some degree of discretion in setting their membership. Limits on this discretion are set by principles of justice. But, the mere fact that someone wishes to associate with a state, by itself, is not a consideration of justice. It is a reason to allow plural citizenship, but other interests, such as the interests of a society in self-determination, must also be considered. In my opinion, so long as the individuals in question are not rendered stateless, there is no fundamental right at stake. Thus, while Spiro's argument gives further weight to the presumption in favor of allowing plural citizenship, it does not establish such a presumption as a human right that all states must respect to be just.

285. *See supra* note 221 (defining alienage law).

286. This question is independent of whether such distinctions are desirable as a matter of sound public policy. I expect that often they will not be, although I confine myself here to the narrower question of whether such distinctions are always unjust. Once again, I focus on the case of permanent residents and leave the difficult case of guest-workers aside.

287. *See generally* Owen Fiss, *The Immigrant as Pariah*, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS, *supra* note 251, at 3, 3–21. Fiss seems willing to allow differences in political rights, though his reasons for so doing are not completely clear. *See id.* at 4–5.

288. *See id.* at 16–17.

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nearly exactly, the same way as citizens, at least with regards to social and economic rights.<sup>289</sup> The primary ground for this requirement, Fiss argues, is the rejection by liberals of the idea of social caste.<sup>290</sup> To restrict benefits from legal permanent residents, Fiss claims, is to subject them to principles of subordination that liberals must reject.<sup>291</sup>

Fiss bases his argument on principles implicit in the Supreme Court's landmark decision in *Plyler v. Doe*,<sup>292</sup> which held that the State of Texas could not refuse to provide primary education to children on the basis of alienage classification.<sup>293</sup> In *Plyler*, the Court sought to prevent the creation and "perpetuation of a subclass" unable to take part in society that would result if noncitizen children were refused access to education.<sup>294</sup> Fiss wishes to generalize this claim and to argue that social disability based on any sort of alienage classification is unacceptable insofar as it tends to perpetuate caste-like social structures.<sup>295</sup> Nearly any social disability for noncitizens implemented at any point prior to naturalization, Fiss contends, would tend to do this.<sup>296</sup>

This claim is not borne out. Access to citizenship must be fairly easy. It must be open to all who want it and who will undertake fairly limited, largely formal steps to achieve it. In such a case, the formation of a perpetual underclass is not a worry that arises out of the restriction of certain social benefits to those of a certain alienage classification. As Alexander Aleinikoff notes, since legal aliens can, at least after some time, remove themselves from the disadvantaged class by naturalizing, it is misleading to say that such disability puts caste-like social structures in place.<sup>297</sup> At most, Fiss's worries might apply to those who are not eligible for naturalization, such as illegal immigrants; but, to imply, as Fiss does, that such aliens should be eligible for all public benefits is essentially to argue that mere presence is

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289. *Id.* at 19–21.

290. *Id.* at 7.

291. *Id.* at 15.

292. 457 U.S. 202 (1982).

293. *Id.* at 230.

294. *Id.* at 223 ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."); *id.* at 234 (Blackmun, J., concurring) ("In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.").

295. Fiss, *supra* note 287, at 7.

296. *See id.* at 15–16.

297. T. Alexander Aleinikoff, *First Class, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS*, *supra* note 251, at 30, 31.



enough to establish all ties of community. This, as Iris Marion Young points out, cannot be right because it would amount to having no control over access to social benefits at all.<sup>298</sup>

Fiss's proposal has other perverse outcomes as well. If states are not able to limit access to benefits to immigrants before naturalization, then many states may respond with tighter immigration controls. The likely tradeoff is not between immigration at a set level, with or without restrictions on benefits before naturalization, but between higher and lower levels of immigration. Since immigration, even without benefits, is more attractive to the would-be immigrant than his current situation (based on his choice to immigrate at all), then the system that replaces immigration without access to full benefits for one of lower immigration makes everyone worse off. It is hard to see how such a system could be favored by liberals, especially when easy access to naturalization makes the perpetuation of an ongoing subordinate caste impossible.

We might still have worries about this approach, though. Consider what Hiroshi Motomura calls a "contract approach" to alienage classification.<sup>299</sup> Motomura's "contract approach" holds that any deprivation of rights or benefits is acceptable so long as it is bargained for as a condition of entry.<sup>300</sup> This seems like what I described above, but as Motomura points out, in an unrestrained form, such an approach will lead to a caste system.<sup>301</sup> Aliens who would not otherwise be admitted might, for example, agree to never be eligible for naturalization in exchange for admission, and therefore would never gain full membership and full access to benefits.

If there were no limits on what could be bargained for, this would be a serious problem. Such a system would be a libertarian system (rather than liberal) that gives unrestricted freedom of contract a

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298. Iris M. Young, *Beyond Borders, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS*, *supra* note 251, at 58, 59–60.

299. Hiroshi Motomura, *Alienage Classifications in a Nation of Immigrants: Three Models of "Permanent" Residence*, in *IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY*, *supra* note 107, at 199, 200 [hereinafter Motomura, *Alienage Classifications*]. Motomura has extended his analysis in a recent book. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006). The point at issue, however, seems to be unaffected.

300. Motomura, *Alienage Classifications*, *supra* note 299, at 200.

301. See *id.* at 202 (noting that an "alternative consequence of eliminating permanent residence as a distinct category may be two categories of citizenship, one fuller than the other").

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place of pride.<sup>302</sup> Liberal theories rightly reject such unrestricted freedom of contract.<sup>303</sup> Just as the types of contracts we make in our normal dealings are restricted by constitutional law (no slave contracts, for example)<sup>304</sup> and by the doctrines of estoppel and unconscionability,<sup>305</sup> so the sorts of detriments that could be “bargained” for in immigration and alienage classifications will be restricted by basic human rights, which require that at least minimal rights and liberal principles of justice be met. These limitations on the contract model show how some benefit restrictions may be compatible with liberal principles of justice, at least in some cases.

The above arguments do not, however, imply that restrictions on access to benefits must be implemented or that so doing is even a good idea. At least in wealthy countries, such as the United States, Canada, and Western Europe, we might think these kinds of restrictions are mean and needless and serve no legitimate purpose. Whether this is true is likely to be a complex empirical matter, but it is at least a real possibility. Similarly, it seems at least *prima facie* plausible that providing full benefits to immigrants prior to naturalization will provide them with the necessary resources to integrate into society more fully and will allow them to feel the bonds of community that encourage them to do so.<sup>306</sup> These are, however, largely questions of public policy and institutional design that fall outside of this Article.

It is worth noting that the above argument assumes that the noncitizen in question has a “home” state to which he could return if he found the situation in the state to which he immigrated undesirable. Obviously, this condition does not apply to refugees, the stateless, and those in need of temporary protected status, since they cannot safely return to their home countries. Because such people do not have the option of returning home, they are in a different situation than normal immigrants. This, it seems, speaks strongly in favor of granting a larger basket of social benefits to refugees and similarly

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302. On how libertarian approaches that place unrestricted freedom of contract at the center and allow for the alienage of any right differ from liberal systems, see Freeman, *supra* note 175, at 131–35.

303. For a discussion of this point, see FREEMAN, *supra* note 177, at 51.

304. See U.S. CONST. amend. XIII.

305. See Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Businesses*, 66 U. COLO. L. REV. 881, 910 (1995) (noting that the contract doctrines of unconscionability and estoppel allow courts “to inject general notions of equity and fairness into our contracting system”).

306. See Motomura, *Allienage Classifications*, *supra* note 299, at 216 (positing a “transition model” of naturalization, which involves “[a]n essential . . . period . . . of socioeconomic integration”).

situated individuals, though I do not address whether the full range of social benefits open to citizens is required.<sup>307</sup>

## V. CONCLUSION

I argued in this Article that citizenship remains important, even in a world that respects human rights.<sup>308</sup> I showed what the limits of citizenship are, how citizenship can be restricted, and when citizenship must be made available.<sup>309</sup> I showed that a liberal program for citizenship should include aspects of both the *jus soli* and the *jus sanguinis* approaches and explained that such rules are not “arbitrary” in a morally problematic way.<sup>310</sup> I clarified that access to citizenship for immigrants via naturalization must be fairly easy and that restrictions, when allowed, must be formal in nature.<sup>311</sup> Finally, I showed that liberal principles can accommodate some restrictions based on alienage, but that there may be prudential reasons for limiting those restrictions.<sup>312</sup> While difficult questions of nonideal theory remain, I hope to have provided at least a rough guideline for states seeking to craft a just citizenship policy in the immigration context.

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307. In the United States, refugees and asylees in the first five years of residence are eligible for certain welfare benefits to which regular immigrants are not. Thomas J. Espenshade et al., *Implications of the 1996 Welfare and Immigration Reform Acts for U.S. Immigration*, 23 *POPULATION & DEV. REV.* 769, 771–72 (1997). There are, however, restrictions on how long and to what degree these benefits are available even to refugees. *See id.* at 771–73 (outlining several examples of comparatively increased, but nevertheless restricted, eligibility).

308. *See supra* Part II.A–B.

309. *See supra* Part II.C.

310. *See supra* Part III.

311. *See supra* Part IV.A.

312. *See supra* Part IV.B.