CITIZENS' RIGHTS AND HUMAN RIGHTS

*Stephen H. Legomsky**

Given the burgeoning literature on the devaluation of national citizenship and the effects of globalization, the sources and beneficiaries of individual legal rights assume increased importance. This Article seeks to distinguish those legal rights that states should confine to their own citizens from those that flow from residence, immigration status, territorial presence, or simply personhood. Section I examines the very reasons for states to distribute citizenship in the first place. These reasons relate to participatory democracy, immigration privileges, other rights and disabilities, personal emotional fulfillment, building community, continuity over time, sovereignty, and the world order. It finds unconvincing those reasons that rest on the municipal interests of states but, given the present world order, finds those reasons that are rooted in international relations more compelling. Building on those conclusions, Section II considers a second normative question: What are the key variables that should determine whether a given legal right should be confined to citizens rather than made more generally available to all persons or at least selected classes of noncitizens? Section III then illustrates how one country—the United States—parcels out legal rights and examines whether its decisions comport with the demands of international human rights law.

INTRODUCTION

While the role of citizenship is fast diminishing,[1] the threats to that venerable institution are not existential. Citizenship remains secure, stubbornly defying the forces of globalization. Sovereign states continue to reserve many important legal rights exclusively for their own citizens. At the same time, states willingly recognize certain other legal rights as extending to all human beings within, and in some instances even outside, their territorial boundaries. Still other legal rights occupy a vast and diverse middle ground populated by a mix of citizens and selected classes of noncitizens.

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[1] *See infra* Part III(C).

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It is timely, therefore, to ask a fundamental question: When should national citizenship[2] be a prerequisite for legal rights, and when should personhood be enough? In particular, what constraints flow from national constitutions, other sources of municipal law, or international human rights law? And by what overarching principles *should* a sovereign state make those judgments?

The decision to whom to accord a given legal right is more a continuum than a dichotomy. One could construct what David Martin, speaking only in the specific context of procedural due process, has called "circles of membership." Under his conception, the greatest procedural rights would be reserved for citizens, next for lawfully admitted permanent resident noncitizens, and least for other noncitizens who are physically outside the country and seeking admission.[3] Ultimately, however, Martin finds the citizen-versus-resident distinctions more substantive than procedural. (He would also place clandestine entrants in the third category.)[4] Martin's hierarchy thus reflects one's formal political ties to the national community. That model is not inevitable. An alternative hierarchy of legal rights might reflect one's community ties and other components of personal stakes, as Alex Aleinikoff has suggested.[5]

A further complication is that the hierarchy is multivariate. Independent variables that might be thought relevant to the recognition of legal rights include not only citizens versus noncitizens, but also many subdivisions within the realm of noncitizens. The latter might include whether the person is physically present in the state or outside it;[6] whether, if within the territory of the state, the person's immigration status is lawful or unlawful; whether, if the status is lawful, it entails permanent residence, a brief sojourn, or something in between; whether the person is a refugee; whether the person's family is settled in the country; and whether the person's occupation or other activities evidence strong community ties.

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[2] The terms "citizen" and "national" have multiple meanings. International law generally uses the word "nationals" to refer to the same people that the municipal laws of several states call "citizens"—i.e., individuals who owe permanent allegiance to the particular state. *See, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE 237 (3d ed. 2009). In some states, however, the domestic law distinguishes citizens from noncitizen nationals. *See, e.g.*, 8 U.S.C. § 1101(a)(22); Carlos Narvaez-Hasfura, Immigration in Mexico and America: Constitutional Reciprocity Within a Plenary Power (1995) (unpublished JSD dissertation, Washington University).

[3] David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 UNIV. PITT. L. REV. 165, 208-19 (1983).

[4] *Id.* at 231.

[5] T. Alexander Aleinikoff, *Aliens, Due Process, and "Community Ties": A Response to David Martin*, 44 UNIV. PITT. L. REV. 237, 244-45 (1983).

[6] *See generally* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

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The multiplicity of these variables is consequential. *All else equal*, noncitizens who possess some sort of lawful immigration status command broader legal rights than those who do not. But that does not necessarily mean that a noncitizen who obtains a lawful transit visa, and who spends two hours at an airport to change planes, should have broader rights than a person who has resided unlawfully in that same country for 15 years. Some might so argue, but a positive answer is hardly obvious. That is because, *all else equal*, permanent resident noncitizens should possess broader legal rights than those noncitizens who are only temporary visitors. There are multiple factors that frequently conflict. Is lawful versus unlawful more important than long-term permanent versus short-term temporary? Different observers might give different answers, ranging from "yes" to "it is a matter of degree" to "it depends on still other variables" to "no." I therefore suggest that no pure linear hierarchy of favored groups can be constructed for this purpose.

Nonetheless, one can distinguish laws that make citizenship a *necessary* condition for a legal right from those that do not require citizenship at all. To make the present discussion manageable, that distinction will be the focus of this article. The questions, in other words, will be for which legal rights national citizenship is, and for which legal rights it ought to be, a *sine qua non*.

Underlying everything that follows are four basic propositions about present world practice:

1. Subject to some fairly narrow treaty constraints, every state decides who its own citizens are.[7]
2. Citizenship criteria vary from state to state.[8]
3. Typically, the rules of a given state establish several alternative paths to citizenship.[9] These are traditionally categorized under two headings - citizenship at the moment of birth and citizenship later in life (naturalization). The former, in turn, often encompasses either *jus soli* (citizenship by virtue of birth in the state's territory) or *jus sanguinis* (birth to one or more parents who possess the

[7] *See, e.g.*, Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 L.N.T.S. 101; Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, June 5, 1963, E.T.S. No. 043; European Convention on Nationality, Nov. 6 1997, E.T.S. No. 166 .

[8] *See* U.S. Office of Personnel Management Investigations Service, Citizenship Laws of the World, IS-1 (Mar. 2001), *available at* www.opm.gov/extra/investigate/IS-01.pdf (last visited Apr. 22, 2010).

[9] *Id.*

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state's citizenship). In most states, the citizenship criteria are an amalgam that combines modified versions of these alternative paths.

4. While most of the world's people possess one citizenship each, the combination of propositions 1, 2, and 3 has resulted in multiple citizenships for many individuals and statelessness for many others.

The law of noncitizens' rights reflects the tension among several possible competing bases for the recognition of legally protected interests – citizenship, residence, immigration status, physical presence and so forth. When should a nation accord rights to all human beings who possess specified attributes, and when should it superimpose citizenship as a qualifying condition? To address this question, I start with two themes that I tried to articulate many years ago and that seem especially relevant here.

First, I have long agonized over the question of how laws can morally condition valuable rights and privileges on such fortuities as place of birth and the identity of one's parents, when society so routinely condemns discrimination on the basis of such other accidents of birth as race and gender.[10] I have also suggested that this state of affairs is not the inadvertent side effect of laws meant to serve other purposes. Rather, the laws of practically every country specifically define citizenship by reference to one's place of birth and the identities of one's parents and then, in turn, assign legal consequences to citizenship. This is *de jure* discrimination, not just de facto.[11] Ayelet Shachar has now written an entire book thoughtfully examining this problem and offering some constructive solutions.[12]

Second, anterior to the question of who should *receive* citizenship is the question of why we even need a citizenship concept at all. I once posed this question: "Cities, counties, and sewer districts get along fine without 'citizens.' Why do countries need them?."[13] I sought to answer that question in a later article, "Why Citizenship?";[14] the first section of this Article borrows liberally from that article.

Section I, then, explores the functions of citizenship. Section II tackles the next logical question: Given citizenship, and given almost any politically imaginable method for parceling out the various national citizenships among the world's people, which rights should be reserved for citizens and which rights should flow more generally

[10] STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 126 (1st ed. 1992).
[11] *Id.*
[12] AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009).
[13] LEGOMSKY, IMMIGRATION LAW AND POLICY, *supra* note 10, at 1027.
[14] *See generally* Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279 (1994).

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to all humans (or to at least some noncitizens)? I do not attempt a comprehensive formula for answering that question; I settle for trying to identify the key variables. To examine how one country handles these issues, Section III compares selected rights that the United States conditions on national citizenship to the guarantees supplied by international human rights law.

I. WHY CITIZENSHIP?

One fundamental question has received surprisingly scant attention: Exactly why have we created, and why do we preserve, this institution we call citizenship? What, exactly, does any state gain by classifying all human beings as citizens or noncitizens and then assigning a different bundle of rights and obligations to each of the two resulting groups? Only after identifying the underlying justifications for a citizenship regime can one convincingly assign legal consequences to citizenship.

A. PARTICIPATORY DEMOCRACY

Scholarly writings have long associated citizenship with political participation.[15] At least two strands of this linkage sometimes emerge. According to one theory, citizenship supplies a useful criterion for identifying those who may vote, hold elected office, and otherwise share the governance of the liberal polity. Under another theory, participation in the democracy is a carrot that can be held out to entice noncitizens to acquire citizenship when they are eligible for it.

As rationales for a citizenship concept, these theories get us nowhere. Making citizenship a requirement for voting makes it no easier to decide who should be allowed to vote; it simply accentuates the importance, and the difficulty, of deciding who should receive citizenship. Furthermore, the use of voting rights to encourage naturalization begs the question of why naturalization should be encouraged, an inquiry that in turn hinges on what citizenship accomplishes in the first place.

[15] *See, e.g.*, Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 240-41 (1994); Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGRATION L.J. 1 (1997); Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGRATION L.J. 1 (1989) [hereinafter Schuck, *Membership in the Liberal Polity*].

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B. Immigration Privileges

Citizenship plays an important role in a state's immigration policies. Citizens are free from immigration controls and exempt from removal.[16] In contrast, the admission of a noncitizen and the security of his or her stay are subject to a state's immigration restrictions. Thus, citizenship has been the traditional criterion for distinguishing those who may come and go as they please from those whose entry is restricted.

Again, however, a state could have immigration restrictions without having citizens. It would need to decide, in ways consistent with its fundamental municipal law and any applicable principles of international law, which classes of individuals ought to be admitted on a "no other questions asked" basis and which classes of individuals should be required to satisfy prescribed admission criteria.

Using citizenship as the measuring stick is superficially convenient, but only after the more difficult task of deciding who receives citizenship has already been completed.

C. Other Rights and Disabilities

Even beyond political participation and immigration, various domestic laws attach legal consequences to citizenship. Discussed later in this Article,[17] these laws relate to eligibility for certain professional licenses, government employment, government assistance, voting, protection of labor laws and nondiscrimination laws, free public education, land ownership, jury service and access to courts.[18] Citizenship might be regarded as a convenient proxy for drawing these difficult lines.

But, the contribution of citizenship to this policymaking process is illusory. Using citizenship as a separation device merely shifts the battleground. Instead of asking who should be allowed to own land, or to serve on juries, or to receive welfare assistance, or to work for the government, we must now ask who should receive citizenship. Nor is the problem merely that the hard decisions are not avoided. If anything, they are exacerbated. Under the present regime, when rules for the acquisition and loss of citizenship are debated, one must somehow decide what human qualities most closely

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[16] In the United States, see, e.g., 8 U.S.C. § 1182(a) (only "aliens" may be denied admission), 1227(a) (only "aliens" may be found deportable and "removed").

[17] *See infra* Part IV(C).

[18] *See* Stephen H. Legomsky & Cristina M. Rodríguez, Immigration and Refugee Law and Policy 1374-77 (5th ed. 2009).

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correspond with the whole disparate range of usages to which the citizenship criterion will eventually be put.

D. PERSONAL EMOTIONAL FULFILLMENT

Most human beings feel some need for communion. Citizenship might be seen as serving that need. It is a way to formalize one's attachment to the nation-state and to one's fellow citizens. Membership in a selective club can also foster feelings of identity, pride, and belonging. If citizenship is procured through naturalization rather than through birth, then additional emotional rewards include a sense of achievement and, as with marriage, an opportunity for public proclamation of one's perpetual love and commitment.

I do not discount these feelings. But they do not explain why citizenship has to define one's *legal* rights and obligations. Is tangible gain a prerequisite to drawing identity from group membership, or experiencing pride in the group, or feeling a sense of belonging? As for the additional benefit, applicable in naturalization cases, of having an opportunity to proclaim one's devotion publicly, again the acquisition of new legal rights seems superfluous. Once the individual has passed the necessary tests, any solemn public ritual in which the applicant takes a formal oath of naturalization equally serves the public proclamation function.

E. BUILDING COMMUNITY

Much of the communitarian literature emphasizes the role of citizenship in uniting the community.[19] While related to the preceding discussion of personal emotional fulfillment, the communitarian theory focuses on the collective benefits for the nation. The notion is that, in a universe of centrifugal forces, citizenship is the glue that holds us together.

There is, of course, any number of other bonding agents. Many people identify closely with their families, friendship groups, neighborhoods, community organizations, places of worship, places of employment, professional associations or trade unions, schools, or local communities. Still, one might argue that none of

[19] *See, e.g.*, Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1504-06 (1986); Michael Walzer, *The Distribution of Membership*, *in* BOUNDARIES—NATIONAL AUTONOMY AND ITS LIMITS 1-35 (Peter G. Brown & Henry Shue eds., 1981).

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these groupings does what citizenship does— unite people under a broader national umbrella.

Whether citizenship in fact contributes to a shared identity is not at all clear. If a state were to abolish citizenship, would the former citizens feel less bound to one another? Or would their identities more likely be rooted in their upbringing, homes, neighborhoods, educational and cultural experiences, and national history? It is hard to say.

One frequently recurring theme emphasizes sacrifice—a willingness to put collective interests ahead of personal ones—as an essential building block of community.[20] As an argument for citizenship, however, this position actually requires two premises: Community requires sacrifice and sacrifice requires citizenship. The first premise might seem self-evident, but the second does not. As the later portions of this Section illustrate, citizens today enjoy *more,* not *fewer,* legal benefits than noncitizens. Far from representing sacrifice, citizenship entails substantial material gain. Perhaps those who emphasize sacrifice believe implicitly that citizens will voluntarily sacrifice more for the collective good than will noncitizens. But that premise seems sufficiently counterintuitive that some empirical support would be expected before it is made the basis for policy prescription. More likely, I submit, is that a person's inclination to sacrifice for others depends on one's personal values, character, and relationships to those others.

A related theme is that cultural integration builds community and that citizenship in turn correlates to cultural integration. Again, however, the latter premise is hardly self-evident. One might seek naturalization, for example, for any number of reasons. The reason might be that one feels "integrated," but it might also be that the person will benefit materially. The only concession that this argument requires is that the process of naturalization typically entails study of the host country's language, history, and government.[21] Admittedly, that study process fosters integrative goals. At any rate, that latter rationale has no applicability to individuals who acquired citizenship at the moment of birth. They might well be expected to integrate the most easily, but if so, it will be because of their life experiences, not because they have the title "citizen."

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[20] *See, e.g.,* Schauer, *supra* note 19; Schuck, *Membership in the Liberal Polity*, *supra* note 15, at 14.

[21] In the United States, see, e.g., 8 U.S.C. § 1423.

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F. CONTINUITY OVER TIME

During the panel discussion that accompanied the presentation of this paper, Dean Aleinikoff suggested that I had omitted a critical function of citizenship—the continuity that it provides over the course of time. Although he did not elaborate, I believe continuity might be considered at two different levels—the individual and the collective. At the individual level, the notion might be that one's citizenship can continue for life. A citizen who leaves his or her country at an early age, for example, might remain overseas for decades but still retain citizenship and, with it, the right of return. But the same result can be achieved without a citizenship concept. A country can, and should be allowed to, decide on policy grounds how lengthy an absence will be considered an abandonment of one's residence rights. If it wishes to preserve them for life, it can do so with or without a citizenship concept.

Perhaps, however, the notion is that citizenship supplies collective continuity, a mechanism for linking past citizens to present citizens to future citizens. But this function too seems unnecessary and not even particularly helpful. The supposed link is purely a matter of definition; the generations share this common bond only because the citizenship laws say so and invent a common name for them to share. Perhaps citizenship offers a nice metaphor for linkage, but to the extent symbolism is important, residence would seem to fit the bill just as well. It is not apparent why past generations would feel any more connected by being awarded the legal abstraction we call citizenship than by sharing whatever physical bonds flow from having lived in the same country.

G. ALLEGIANCE

International law has long recognized the link between an individual's duty of allegiance to a state and the state's reciprocal power of protection.[22] Resident noncitizens do not owe permanent allegiance to the state of residence.[23] The United States Supreme Court in *Harisiades v. Shaughnessy*[24] relied partly on the interaction of

[22] *See, e.g.*, KELSEN, *supra* note 2, at 237 (observing that citizens owe allegiance to the state and that, in return, the state has the power, though not the obligation, to provide protection. *Cf.* Glanville L. Williams, *The Correlation of Allegiance and Protection*, 10 CAMBRIDGE L.J. 54 (1948) (making similar suggestions about English domestic law).

[23] EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 11 (1915).

[24] Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952).

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these two principles to justify lessened constitutional protection for lawfully admitted permanent resident noncitizens.

But several limitations are critical. First, the Court's (accurate) statement that noncitizens do not bear permanent allegiance to the state is true only as a formal legal matter, not as a statement of empirical fact. The law *defines* nationality, and derivatively citizenship, as a barometer of allegiance. This maxim, therefore, does not help us answer the normative question of whether citizens deserve greater protection than resident noncitizens. There might indeed be reason to treat permanent resident noncitizens less favorably than citizens if, as a class, the former in fact are seen as feeling less allegiance to the United States than citizens feel. As to that, however, one need only note that under the laws of both the United States and Israel, for example, resident noncitizens are subject to military conscription,[25] an unlikely policy decision if the governments indeed consider them per se disloyal.

In any case, there seems little reason to assume that those who have consciously chosen to leave their original homes and migrate permanently to a new land will harbor less allegiance than those whose citizenship was purely ascriptive. Finally, even as a matter of law, noncitizens owe at least a temporary allegiance to the host state. As a result, they are subject to all applicable criminal and civil laws.[26]

H. SOVEREIGNTY

To some, citizenship serves an essential, or at least useful, democratic function. It has been said to define "The People" who constitute the sovereign.[27] Yet this function too seems wholly definitional. Even if one assumes that democratic sovereignty must comprise a defined set of individual members, "members" are not synonymous with "citizens" except by definitional *fiat*. No law of nature requires such an equation. It would be just as rational to define the members of a polity as all human beings who reside permanently within the territory of that polity.[28] Without the legal construct that we call citizenship, perhaps that is precisely what the nations of the world would have done.

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[25] *See generally* Charles E. Roh & Frank K. Upham, *The Status of Aliens under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972).

[26] BORCHARD, *supra* note 23, at 11.

[27] T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 14 (1990).

[28] That is in fact the position taken by Aleinikoff, *id.*

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If the preceding justifications for citizenship seem unconvincing, there are stronger arguments for the use of citizenship classifications in the international sphere. In transnational affairs, citizenship—or nationality as it is more commonly called in this context, assumes great legal significance. Two of the most important effects of nationality involve travel and security. States typically issue passports,[29] and afford diplomatic protection,[30] to their own nationals.

If the world order were being reconstituted from above, a regime without nationality would be easy to theorize. There could, of course, be a world federation without sovereign states. And even in a world that has sovereign states but not citizens, the states could choose to allow designated individuals freedom of travel into and within their territories. World bodies responsible for passport issuance and protection of travelers could also be constructed. Or, international law could be reconfigured to allow states to perform these functions for their own residents (rather than for their own "citizens"). Citizenship, in other words, would not be essential.

In this Article, however, I take the prevailing world order as a given. I assume, in other words, that sovereign states exist; that in each state certain individuals receive the title "citizen"; that each state generally decides who its own citizens are; and that international law recognizes those decisions as legitimate.

Given such a world order, nationality has immense practical importance. Any state that unilaterally abolished nationality would disadvantage the great majority of its inhabitants. People do travel across national boundaries, states do restrict immigration, and governments do violate international human rights. Stateless persons have problems in obtaining passports and therefore in traveling overseas. They also have no state to protect them from maltreatment by foreign governments.

The preceding discussion suggests that citizenship actually accomplishes very little at the municipal level. States use the legal abstraction that we call citizenship as a proxy for a range of disparate and otherwise unrelated legal rights. They could as easily, and more effectively, define the beneficiaries of those rights simply by referring to the relevant underlying characteristics: place of residence, age, family status, etc. Citizenship might well nourish personal needs for communion and collective needs for civic sacrifice, but there is no reason that citizenship must have *legal* significance

[29] LUKE T. LEE, CONSULAR LAW AND PRACTICE 200-03 (2d ed. 1991) (observing that passport is prima facie evidence of nationality).

[30] RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 8-17 (1984).

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to achieve these ends. In contrast, absent cataclysmic changes to the present world order, citizenship (or nationality) serves critical international functions.

II. CITIZENSHIP AND PERSONHOOD AS PREDICATES FOR RIGHTS

From a policy standpoint, the considerations in the preceding section suggest that citizenship serves few important internal functions in representative democracies. Residence seems a more finely tuned mechanism for identifying the beneficiaries of particular legal rights under municipal law.[31] But, both domestic laws and international law[32] clearly permit governments to treat citizens more favorably than noncitizens. In this Article, therefore, the operative assumption is that such distinctions are not per se unacceptable.

There remains, however, the crucial question of degree: How much legal significance should citizenship distinctions have in municipal law? At one end of the spectrum would be those who believe the law should never distinguish citizens from noncitizens at all. This view would be functionally equivalent to abolishing citizenship entirely and instead defining all legal rights by reference to other characteristics. At the other end of this spectrum would be those who believe that noncitizens or certain subclasses of noncitizens deserve literally *no* legal rights. Such a view would be tantamount to positing that both international law and municipal law should leave states, international bodies, and even the private sector free to treat noncitizens any way they wish. The late United States Chief Justice Earl Warren, himself no enemy of civil liberties, came dangerously and probably unwittingly close to embracing this position when he described citizenship as "the right to have rights."[33]

Today, neither extreme can claim many serious subscribers. Morally sound arguments for abolishing citizenship or for opening borders can certainly be constructed. Citizenship, after all, is usually an accident of birth, and laws that explicitly define rights by reference to accidents of birth are at least suspect.[34] But the

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[31] Again, I credit Alex Aleinikoff for elaborating this thesis. *See* Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, *supra* note 27.

[32] In the United States, this has been evident at least since Chae Chan Ping v. United States, 130 U.S. 581 (1889). At the same time, modern international law withholds carte blanche; there are limitations on what sovereign states may do even to noncitizens. Some of those limitations are noted at various points of this section.

[33] Perez v. Brownell, 356 U.S. 44, 64 (1958).

[34] For arguments along these lines, see, e.g., Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POLITICS 251 (1987); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY

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practical political problems with that view are self-evident. Among other things, the abolition of all citizenship distinctions would logically require either open borders or, at the other extreme, allowing states to exclude and deport their own citizens. Few today embrace either consequence.

At the other end of the ideological spectrum, perhaps some would earnestly contend that noncitizens should have literally no rights—that they could legally be rounded up and tortured or subjected to genocide, or that public assistance should be denied even in life-or-death emergencies. Both shared moral notions and settled norms of constitutional and international human rights law preclude that option.

The vast majority of observers, therefore, can be assumed to fall somewhere between the two end points of this spectrum. I suggest that, for any given observer, the degree of legal significance that citizenship ought to command should depend on at least three distinct variables: the right, the state, and the era.

A. THE RIGHTS SPECTRUM

Differentials between the treatment of citizens and the treatment of noncitizens run a wide gamut. The acceptability of these differentials depends, of course, on the particular rights in question. By way of illustration, perhaps the most widely accepted differentials relate to immigration control. The virtually uniform state practice of subjecting specified classes of noncitizens to both admission restrictions and expulsion contrasts with the nearly equally uniform state practice of exempting noncitizens from both. As noted earlier, few people today question this differential. Nor do most people today balk at restricting the vote in national elections to citizens of the state.

Other rights differentials, in contrast, are more obviously unacceptable. As noted earlier, few (hopefully) would view citizenship as a prerequisite to protection from torture, genocide, or other grave violations of international law. Similarly, the prohibition on the refoulement of refugees[35] obviously is not limited to (and normally doesn't even arise with respect to) citizens of the host state.

AMERICA NEEDS TO ELIMINATE ITS BORDERS AND RETHINK IMMIGRATION LAW (2007); SATVINDER SINGH JUSS, INTERNATIONAL MIGRATION AND GLOBAL JUSTICE (2006); Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212 (1971); SHACHAR, *supra* note 12; R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOYOLA L.A. L. REV. 1265 (1994).

[35] United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 1989 U.N.T.S. 137, accepted by U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, signed at Geneva, as modified by United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

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Certain norms of customary international law also protect noncitizens.[36] Under United States municipal law, most constitutional constraints extend to noncitizens (as discussed below), and even the statutory authority to remove noncitizens is restricted to certain enumerated grounds.[37]

B. THE COUNTRY SPECTRUM

The differentials between citizens' and noncitizens' rights should also vary with the ethos of the host state, which can be a matter of the state's history, its self-image, or its external image. The more vital the role of immigration in the settlement of the state's territory and the composition of its population, and the keener the state is to maintain either the reality or the appearance of an immigrant heritage, the smaller one would expect the differential between citizens' rights and noncitizens' rights to be.

Some countries, of course, have a special immigration ethos. Elsewhere I have discussed the competing metaphors of the melting pot and the patchwork quilt and have suggested that in the United States an intermediate metaphor—a bowl of granola—comes closest to capturing both historical and contemporary reality.[38]

Under any of these variants, the fact that immigration has played, and continues to play, a central role in shaping a national identity and national norms militates toward minimizing (not necessarily eliminating) differentials between the rights of citizens and noncitizens.

C. THE TIME SPECTRUM

The national ethos described above changes over the course of time, in response to both internal and external stimuli. Some changes are sudden, others gradual. Some changes are enduring, others more fleeting. I would propose, however, that a combination of forces augurs a general diminution in the practical importance of citizenship and that this diminution is likely to be long-term.

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[36] See, e.g., the contrasting views on temporary safe haven expressed in Kay Hailbronner, *Non-Refoulement and the "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857 (1986) and Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551 (1986).

[37] 8 U.S.C. § 1182(a) (inadmissibility), 1227(a) (deportability).

[38] Stephen H. Legomsky, *The John C. Paulus Lecture: Immigrants, Minorities, and Pluralism: What Kind of Society Do We Really Want?*, 6 WILLAMETTE J. INT'L L. & DISPUTE RESOLUTION 153 (1998).

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One such force is the changing conception of national sovereignty in world affairs. Much of that transformation, in turn, has been the product of the world community's increased recognition of fundamental human rights that transcend national boundaries and national citizenships. No longer can a despot fend off accusations of human rights violations simply by uttering the words "[t]his is an internal matter." While the protection of international human rights is tragically inchoate, most would acknowledge that classical notions of sovereignty have had to give way. The international law of human rights extends to abuses that do not cross international boundaries, and it extends to abuses against one's fellow citizens. The pertinent characteristic is personhood, not citizenship. As this body of law continues to gain worldwide acceptance, both national sovereignty and national citizenship lose some of their importance.

For similar reasons, the world community has focused increased attention on refugees. As international law develops protections for refugees,[39] domestic legal regimes are likely to do the same. For unique historical reasons, Germany has constitutionalized the right of asylum.[40] In other nations, asylum is more typically a matter of statutory or other sub constitutional stature. But even in the latter case, the treatment of refugees can be constitutionally constrained. Again, those constraints transcend the refugees' citizenship.

Another force that I believe continues to diminish the significance of citizenship on both the national and world planes is the trend toward independence and Balkanization. In the space of less than two decades, the world has witnessed the breakup of the Soviet Union into fifteen republics and the further secession movement in Chechnya, the splintering of Yugoslavia into six pieces and the further independence of Kosovo from Serbia, the division of Czechoslovakia into two states, and independence movements in Québec, Chiapas, Chechnya, and the southern Thai provinces. Many other centrifugal forces make additional dissolutions likely.

Ironically, these events have occurred at the same time that reduced trade barriers and other cooperative arrangements have made our world more interconnected. The European Union slowly but surely takes on more and more of the attributes traditionally associated with sovereignty. The African Union has replaced the more

[39] The principal refugee agreement is the United Nations Convention Relating to the Status of Refugees as modified by the 1967 U.N. Protocol Relating to the Status of Refugees (*see supra* note 35).

[40] *See* Grundgesetz für die Bundesrepublik Deutschland (Basic Law) art. 16a.

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loosely configured Organization of African Unity. And we all like to speak generically of the global village in which we live.

So as one state splits into two or more, and as other states form regional or other alliances, we are seeing an odd merger of cosmopolitan and parochial impulses. For present purposes, it probably does not matter which of these patterns is more dominant. The important point is that *both* phenomena highlight the increasingly transitory nature of the bond between the individual and the state.

Yet another force that I believe likely to weaken the significance of citizenship is the scale of international migration. The combination of economic disparities, armed conflict, and systemic violations of human rights have created incentives for migration, at the same time that advances in both transportation and communication technology have made large-scale migration possible. These migrations have transformed both the sending states and the receiving states. They have weakened the links between the migrants and the states of which they are citizens, and they have strengthened the ties between the migrants and the receiving states of which they are not citizens. Again, citizenship becomes less important while residence and physical presence become more so. Eventually, many of the migrants naturalize. In many instances they must renounce their old citizenships. In this way, citizenship becomes still more transitory.

Finally, for a number of reasons catalogued by others (including international migration), dual citizenship has become far more common, and far more tolerated, than in former times.[41] Whether dual citizenship dilutes one's allegiance to either state is a hotly disputed question. At the very least, however, it is a further reminder that citizenship is often a fleeting attribute. Arguably it suggests also that citizenship is becoming less central to one's legal and personal identity.

III. ONE COUNTRY'S ATTEMPT TO RECONCILE CITIZENSHIP WITH PERSONHOOD: THE UNITED STATES

A. DOES THE U.S. CONSTITUTION EVEN APPLY TO NONCITIZENS?

The United States Constitution creates various rights and uses different linguistic devices to describe the beneficiaries of those rights. A few provisions refer specifically to "citizens." For example, the President and all members of Congress,

[41] *See*, e.g., TOMAS HAMMAR, DEMOCRACY AND THE NATION STATE ch. 5-7 (1990); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1413 (1997).

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must be citizens.[42] The Constitution does not say that only citizens may vote, but several provisions set out particular grounds on which "citizens" cannot be denied the vote, such as race, gender, failure to pay a tax, and age (if over 18).[43] No analogous constitutional provisions apply to noncitizens. Section 1 of the Fourteenth Amendment prohibits the states from abridging the "privileges and immunities" of "citizens," but it does not spell out what those privileges and immunities are.

Other constitutional rights, in striking contrast, explicitly belong to every "person." The Fifth Amendment, which constrains the actions of the federal government, grants every "person" the right not to be tried for an infamous crime without an indictment or presentment from a grand jury, the right not to be subjected to double jeopardy, the privilege against self-incrimination, and the right not to be deprived of life, liberty, or property without due process of law. Under section 1 of the Fourteenth Amendment, none of the individual states shall "deprive any *person* of life, liberty, or property without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."[44] In the light of this explicit language, the Supreme Court has held that even noncitizens whose presence is unlawful are within the ambit of the equal protection clause.[45] In much the same vein, the Sixth Amendment provides that in all criminal cases the "accused" is entitled to specified rights, including the right to a speedy and public trial, the right to a jury trial, the right to notice of the charges, the right to confront and subpoena witnesses, and the right to counsel. The use of the word "accused" rather than "citizen" makes clear that noncitizen criminal defendants are among the beneficiaries.[46] The courts have even extended certain of these rights to noncitizens overseas.[47]

Other provisions are less clear. The Second Amendment refers to "the right of the people" to keep and bear arms. The Fourth Amendment similarly recognizes "the right of the people" to be free of unreasonable searches and seizures. Does "the people" include noncitizens, or at least some noncitizens? In *United States v. Verdugo-*

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[42] U.S. CONST. art. I, § 2, cl. 2 (Representatives); art. I, § 3, cl. 3 (Senators); art. II, § 1, cl. 5 (President).

[43] *See*, respectively, U.S. CONST. amends. XIV, XIX, XXIV, XXVI.

[44] *See* U.S. CONST. amend. XIV, § 1 (emphasis added S.L.). Although the Fourteenth Amendment directly restricts only the states, the Fifth Amendment due process clause has been interpreted to impose an analogous equal protection obligation on the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[45] Plyler v. Doe, 457 U.S. 202 (1982); *see* discussion *infra* IV(D)(8).

[46] *See* Wong Wing v. United States, 163 U.S. 228, 241 (1896).

[47] *See, e.g.*, Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); United States v. Tiede, 86 F.R.D. 227 (U.S. Court for Berlin, 1979).

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Urquidez,[48] the Supreme Court held the Fourth Amendment inapplicable to searches and seizures by United States officials of the overseas property of noncitizens residing abroad. But, there is no real doubt that noncitizen criminal defendants may invoke the Fourth Amendment in connection with searches and seizures that take place in the United States.

Still other provisions do not mention the beneficiaries of the rights at all. One approach is simply to say what the government shall not do. Thus, under the First Amendment, "Congress shall make no law" concerning the establishment of religion or preventing the free exercise of religion, or abridging the freedoms of speech, press, assembly, or petition. Some provisions achieve the same end by phrasing the prohibitions in the passive voice. The Fifth Amendment prohibits the taking of private property for public use without just compensation. Under the Seventh Amendment, "the right of trial by jury shall be preserved" in most civil cases. The Eighth Amendment uses the passive voice to prohibit excessive bail, excessive fines, and cruel and unusual punishment. Under article I, section 9, clause 2 of the Constitution, the writ of habeas corpus "shall not be suspended." This protection clearly applies to noncitizens and in fact was historically the usual vehicle by which noncitizens obtained judicial review of deportation orders.[49]

Thus, some constitutional rights seem clearly applicable to all persons, others seem clearly confined to citizens, and still others seem unclear as to their reach. Even with respect to those provisions that apply to noncitizens, however, there remain questions as to the content of the protection. As the following discussion will show, the scope of the constitutional right can very much depend on whether the beneficiary is a citizen or a noncitizen.

B. Immigration and the Plenary Power of Congress

In the United States, the judicial decisions that delimit the constitutional rights of noncitizens are *sui generis*. The starting point in understanding this unusual jurisprudence is that the courts have either explicitly or implicitly distinguished "immigration" laws from other laws regulating noncitizens. This subsection deals only with the former; the next subsection deals with the latter. One must also understand that

[48] United States v. Verdugo-Urquidez, 494 U.S. 259, 264-275 (1990); *see generally* Neuman, *Whose Constitution?*, *supra* note 6.

[49] *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1389-90 (1953).

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the Supreme Court has consistently construed the Constitution to entrust immigration (as distinguished from other regulations of noncitizens) exclusively to the federal government—not to the states.[50] When Congress exercises this exclusively federal power, the role of the courts in reviewing for constitutionality is unusually minimal. That is because the Supreme Court has held the congressional power to be "plenary." By this it means that, when the subject matter is immigration, either the Constitution places unusually few limitations on Congress or the courts have unusually little leeway to define those constraints. Thus, the Court has upheld immigration statutes that discriminated explicitly on the basis of race, or that restricted political speech or freedom of association without any showing of imminent harm, or that prescribed retroactive deportations.[51]

One leading case, a persistent relic of the Cold War, is illustrative. In *Shaughnessy v. United States ex rel. Mezei*,[52] a permanent resident noncitizen who had lived lawfully in the United States for 25 years traveled to Eastern Europe to visit his ailing mother. For 19 months the Hungarian government would not allow him to leave. When Hungary finally relented, the U.S. government issued Mezei a visa and he set sail for the United States. Upon arrival he was excluded, with no notice of the charges and without a hearing, under a special regulation that permitted the Attorney General to dispense with these procedural rights to protect national security. Because no other country would accept him, Mezei was imprisoned on Ellis Island indefinitely. He argued that before a returning resident could be excluded, and certainly before he could be detained indefinitely, due process required reasonable notice of the charges and an opportunity to be heard. The Supreme Court disagreed. It said "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[53]

In a set of three writings I have previously attempted a comprehensive treatment of the plenary power doctrine. These writings examine its historical development, identify and critique the stated and unstated rationales for it, discuss the strategies lower courts have sometimes used to circumvent it, and offer predictions about its

[50] This theme dates back at least to the Passenger Cases: Smith v. Turner; Norris v. Boston, 48 U.S. 283 (1849).

[51] *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, SUPREME CT. REV. (1984) 255 [hereinafter Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*].

[52] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

[53] *Id.* at 212, *citing* Knauff v. Shaughnessy, 338 U. S. 544; Nishimura Ekiu v. United States, 142 U. S. 651, 142 U. S. 660 (1892).

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future.[54] Here I merely summarize the themes that have recurred in this century-long line of Supreme Court cases and refer the reader to these other writings for the details and the criticisms of the Supreme Court's rationales.

The themes are varied.[55] The Court has depicted the constitutionality of an immigration statute as a political question, unsuitable for judicial resolution, on the assumption that every regulation of immigration reflects sensitive policy judgments about foreign affairs. Courts have also described noncitizens as mere guests, to whom hospitality may be terminated at the pleasure of the host, in contrast to citizens, who are conceived as full members of the national club. In addition, the Court has contrasted the clear allegiance owed by citizens with the ambiguity of the allegiance owed by noncitizen residents. Moreover, the Court has described the congressional power to regulate immigration as inherent in the very notion of a sovereign state and therefore insulated from judicial constraint. Finally, in the case of the exclusion of noncitizens arriving at United States shores, the Court has held the Constitution inapplicable because arriving passengers are deemed by law to be outside United States territory, where the Constitution is said not to be in force.

C. OTHER REGULATION OF NONCITIZENS

Outside the field of immigration, both the federal and state governments have regulated the treatment of noncitizens since the founding of the republic. Most of the case law focuses on the constitutionality of the government's differential treatment of citizens and lawfully admitted permanent resident noncitizens.

Generally, *congressional* action that discriminates against noncitizens—even those who are lawful permanent resident noncitizens—has been upheld, in large part because the Supreme Court has recognized a plenary congressional power to regulate immigration and has conflated the exercise of that power with other regulations of noncitizens.[56] At least at the Supreme Court level, there are no true counterexamples.[57]

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[54] STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY — LAW AND POLITICS IN BRITAIN AND AMERICA ch. 3 (1987); Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 51; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

[55] Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 51, at 260-77.

[56] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976); Flemming v. Nestor, 363 U.S. 603 (1960).

[57] *But cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), in which the Court struck down a Civil Service Commission regulation (not a statute) that disqualified all noncitizens from the competitive Civil Service. The Court held the Commission's action to be *ultra vires* the statute.

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State laws that draw citizenship distinctions, however, have been treated very differently. When those state laws are characterized as attempts to regulate "immigration," they have been struck down on federal preemption grounds.[58] The greatest challenge has been to draw a principled line between invalid state attempts to regulate immigration and valid state attempts to regulate noncitizens in other spheres.[59]

State action that treats citizens more favorably than noncitizens raises equal protection issues even when the subject matter is not immigration. State action that discriminates against lawful permanent resident noncitizens has been held "suspect," a characterization that triggers strict judicial scrutiny and usually invalidation.[60] In *Plyler v. Doe*,[61] the Court went a step further, striking down a state statute that had disqualified undocumented noncitizen children (not lawful permanent residents) from public elementary and secondary schools.

The treatment of state "alienage" classifications as suspect is subject to an important exception when the state is found to be discharging a "political function." Voting is the paradigm example and is discussed more specifically below.[62] But the political function exception has mushroomed to encompass far more than voting and other elements of political life. The Supreme Court has upheld state action that prohibits noncitizens from becoming state troopers,[63] public school teachers,[64] or probation officers.[65] The Court's rationale has been that a state may reserve important sovereign functions for those who constitute the political community, even if the particular

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[58] *See, e.g.*, Toll v. Moreno, 458 U.S. 1 (1982); Plyler v. Doe, 457 U.S. 202 (1982). *But see* DeCanas v. Bica, 424 U.S. 351 (1976) (approving state penalties on employers of undocumented noncitizens).

[59] On this point, see Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

[60] Supreme Court decisions striking down state attempts to disqualify noncitizens from government employment, professional licenses, or welfare benefits include Bernal v. Fainter, 467 U.S. 216 (1984) (notary public); Nyquist v. Mauclet, 432 U.S. 1 (1977) (educational assistance funds); Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (engineers); In re Griffiths, 413 U.S. 717 (1973) (lawyers); Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil service employment); Graham v. Richardson, 403 U.S. 365 (1971) (welfare benefits).

[61] Plyler v. Doe, 457 U.S. 202 (1982), discussed *infra* Part IV(D)(8).

[62] *See infra* Part IV(D)(6).

[63] Foley v. Connelie, 435 U.S. 291 (1978).

[64] Ambach v. Norwick, 441 U.S. 68 (1979).

[65] Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

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functions involve no policymaking. In such cases, the state need only show "some rational relationship between the interest sought to be protected and the limiting classification."[66]

D. SOME ILLUSTRATIONS: DIFFERENTIAL TREATMENT, CONSTITUTIONAL LIMITS, AND INTERNATIONAL HUMAN RIGHTS LAW

The discussion that follows highlights some of the more significant ways in which United States law treats citizens differently from noncitizens. When relevant, the limitations imposed by either municipal constitutional law or international human rights law are also considered. These examples are merely illustrative; more comprehensive treatments appear elsewhere.[67]

1. APPLICABILITY OF IMMIGRATION RESTRICTIONS

As noted earlier, United States citizens are free to enter, and remain in, the United States as they please; noncitizens, in contrast, are subject to elaborate admission requirements and can be removed.[68] The Supreme Court placed its constitutional imprimatur on this principle long ago.[69]

Article 13.2 of the Universal Declaration of Human Rights[70] (UDHR) gives everyone the right "to return to his country" but does not say whether "his" country means country of citizenship or, more broadly for example, country of permanent residence in the case of an immigrant or, more broadly still, country of ethnic/historic affiliation. At any rate, the corresponding provision of the International Covenant on Civil and Political Rights (ICCPR), Article 12.4, is more limited. It prohibits only "arbitrary" deprivations of a person's "right to enter his own country."[71] The implication is that the right of even a citizen to return to his or her country might not be absolute. The most direct pronouncement relevant to the United States is Article

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[66] *Foley v. Connelie, supra* note 63, at 296.

[67] *See, e.g.*, DAVID CARLINER ET AL., THE RIGHTS OF ALIENS AND REFUGEES (2d ed. 1990); DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL ch. 13 (5th ed. 2005).

[68] *See* 8 U.S.C. §§ 1182(a), 1227(a).

[69] Chae Chan Ping v. United States, 130 U.S. 581 (1889) (noncitizens may be excluded); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (noncitizens may be deported).

[70] G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter UDHR].

[71] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

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22.5 of the American Convention on Human Rights (ACHR).[72] It provides: "No one can be expelled from the territory of a state of which he is a national or be deprived of the right to enter it."

2. FAMILY UNIFICATION

The United States immigration laws give explicit admission preferences to those noncitizens who wish to reunite with certain United States citizen family members. Analogous preferences extend to the noncitizen family members of lawful permanent resident noncitizens, but the qualifying relationships are narrower and the waiting periods generally longer.[73] Here it is sufficient to mention a few of the more significant sub issues and the possible constitutional and international human rights law implications.

One difficulty is that a series of reforms enacted in 1996 magnified the financial barriers to the reunification of otherwise eligible families.[74] In addition, for certain family members of United States citizens, the waiting periods are extremely long, especially if the applicants are natives of heavily subscribed states. As of July 2009, for example, the unmarried adult sons and daughters of citizens wait almost seven years (almost 16 years if from the Philippines). For the married adult sons and daughters of citizens, the waits are slightly longer. And for the brothers and sisters of United States citizens, the waiting periods are 23 years for Filipinos, approximately 11 years for others.[75] All these waiting periods flow from the "quotas"—the annual numerical ceilings on the admission of designated subcategories of immigrants. In contrast are "immediate relatives," defined as the spouses of citizens, parents of adult citizens, and unmarried, under-age-21 children of citizens; this group is subject to no numerical maximum and therefore no statutory waiting period.[76] Even for immediate relatives, however, the administrative processing time has lengthened immensely.

A different problem is that life is yet more difficult for the nuclear family members of lawful permanent resident noncitizens. First, there is no provision at all for the admission of their parents or siblings. Second, as of July 2009, the annual quotas

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[72] American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36 at 1, OEA/Ser.L.V/II.23 doc. rev. 2 [hereinafter ACHR].

[73] 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE chs. 36-38 (Matthew Bender ed., 2009); LEGOMSKY & RODRÍGUEZ, *supra* note 18, at 251-304.

[74] LEGOMSKY & RODRÍGUEZ, *supra* note 18, at 457-61.

[75] U.S. Department of State, Visa Bulletin (July 2009).

[76] 8 U.S.C. § 1151(b)(2)(A)(i).

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subject even their spouses and their young children to waiting periods of four and one-half years (seven years if from Mexico)—an unconscionably long time to separate newlywed husbands from wives and newborn children from parents.[77]

One last problem worth noting here is the removal of those noncitizens who have United States citizen children. Discretionary relief is sometimes possible if the parents have been physically present ten years or more and other stringent conditions are met.[78] This relief is uncertain even then, however, and entirely unavailable when the parents have lived in the United States for a shorter time. The children, being United States citizens, have the right to remain in the U.S, But their parents must leave.

The issue is not an easy one. The government points out that the parents may bring the children back with them to the country of origin, and in any case, the government does not want to create an incentive for a person to enter the United States illegally, bear children here, and thus establish a shield to removal. Noncitizen parents have occasionally challenged their removal orders on the ground that they result in unconstitutional de facto removal of their citizen children, but the courts have uniformly rejected those challenges.[79]

Do these various impediments to family unification comport with United States international human rights obligations? Article 16.3 of the UDHR, Article 23.1 of the ICCPR, and Article 17.1 of the ACHR[80] are identically worded. They provide: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state." Whether this very general formulation prohibits any of the specific United States measures outlined above is difficult to say. One could argue that to separate lawfully admitted permanent residents from their spouses or children for such prolonged periods violates at least the spirit of these provisions.

The United States has not ratified the Convention on the Rights of the Child.[81] If it does, interesting issues might arise under Articles 9 and 10. Under Article 10.1, states

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[77] U.S. Department of State, Visa Bulletin (Apr. 2009). This waiting period applies only to spousal relationships formed, and children born, *after* the principal immigrant's admission for permanent residence. Preexisting spouses and children may usually accompany or follow the principal immigrant to the United States. 8 U.S.C. § 1153(d).

[78] This remedy is called "cancellation of removal." *See* 8 U.S.C. § 1229b(b).

[79] *See, e.g.*, Newton v. INS, 736 F.2d 336, 342-43 (6th. Cir. June 7, 1984); Acosta v. Gaffney, 558 F.2d 1153, 1157-58 (3rd. Cir. July 6 1977).

[80] At this writing, the United States has not ratified the ACHR. Nonetheless the United States is arguably bound by its provisions, either on the theory that the Convention is an authoritative interpretation of the OAS Charter (to which the United States is clearly bound) or on the theory that particular Convention provisions are customary international law. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 343 (1999).

[81] Convention on the Rights of the Child, art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3.

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parties must deal with parent/child reunification applications "in a positive, humane and expeditious manner." Imposing a four-and-one-half-year waiting period arguably would not satisfy this requirement. The government might well respond that it is the parent, not the government, who is creating the separation.

Article 9.1 requires states parties to "ensure that a child shall not be separated from his or her parents against their will, except when ... separation is necessary for the best interests of the child." It gives examples of such an exception—"abuse or neglect of the child by the parents" or parental separation. One might argue that this provision prohibits unconscionably prolonged separation periods.

The same provision arguably applies to de facto removal as well. In such cases the separation is decreed not because of the best interests of the child, but because of the government's interest in removing the parents—and typically against the child's best interests. Does that fact bring de facto removal within the Article 9.1 prohibition? Article 9.4 sheds indirect light on this question and provides that, when the separation occurs because of removal, the government of the sending state must furnish information about the whereabouts of the separated family members. The clear implication is that Article 9 does not necessarily bar the removal itself.

3. ASYLUM AND NONREFOULEMENT

This is obviously too large a subject[82] for an article on citizenship, but asylum and nonrefoulement are worth noting briefly, for two reasons. First, since all refugees are noncitizens, refugee policy is a specific example of the rights differential between citizens and noncitizens. The former are free to enter the country and remain as they wish, while the latter must prove eligibility under one of the statutorily prescribed admission categories. Second, United States refugee policy raises additional potential issues concerning national compliance with international legal obligations.

By way of example, the Supreme Court in *Sale v. Haitian Centers Council,*[83] despite seemingly clear language to the contrary, held that neither United States statutory law nor Article 33 of the United Nations Convention Relating to the Status

[82] Excellent general sources on refugee law include DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES (3d ed., 1999); GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (3d ed. 2007); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2005); DAVID A. MARTIN ET AL., FORCED MIGRATION—LAW AND POLICY (2007); KAREN MUSALO ET AL., 4 REFUGEE LAW AND POLICY—A COMPARATIVE AND INTERNATIONAL APPROACH (3d ed. 2007).

[83] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).

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of Refugees (1951 U.N. Refugee Convention)[84] applies on the High Seas. As a result, United States officials were permitted to interdict Haitian vessels on the High Seas and return the passengers to Haiti without considering any of the passengers' asylum claims. For reasons detailed elsewhere,[85] the UNHCR Executive Committee severely reprimanded the Court, calling its decision "a very unfortunate example" and "a setback to modern international refugee law."[86] The Inter-American Commission on Human Rights responded in similar terms, finding the decision incompatible with both the 1951 U.N. Refugee Convention and the American Declaration of the Rights and Duties of Man.[87]

The Supreme Court has imposed needlessly restrictive readings on other Convention and statutory language as well. The Court in *INS v. Stevic,*[88] interpreting the nonrefoulement requirement that the person's "life or freedom be threatened," held that the applicant must prove persecution is "more likely than not." And in *INS v. Elias-Zacarias*,[89] the Court made political opinion claims extraordinarily difficult to sustain. It required the victim to prove that the persecutor cares what the victim's actual political opinions (as distinguished from the physical manifestations of the victim's opinions) are. Nor is it enough, the Court held, to prove that the persecutor's actions were calculated to promote his or her own political objectives.

Finally, the relevant United States statutory provision establishes several exceptions to the prohibition on the refoulement of refugees. The United States statutory list of exceptions is considerably broader than the corresponding list in the 1951 U.N. Refugee Convention.[90]

4. THE CONVENTION AGAINST TORTURE

Analogous observations can be made about the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[91]

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[84] *See supra* note 35.

[85] *See* Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. REFUGEE L. 677, 686-92 (2006).

[86] *U.N. High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993).

[87] HENKIN ET AL., *supra* note 80, at 426.

[88] INS v. Stevic, 467 U.S. 407, 424 (1984).

[89] INS v. Elias-Zacarias, 502 U.S. 478 (1992).

[90] Compare 8 U.S.C. § 1251(b)(3)(B) with United Nations Convention Relating to the Status of Refugees, as modified by the 1967 U.N. Protocol Relating to the Status of Refugees, *supra* note 35, art. 33.2.

[91] G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (Dec. 10, 1984).

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(CAT), which the United States Senate ratified in 1990.[92] In addition to specifying reservations, the Senate's ratification resolution added a long list of understandings and declarations, some of which are difficult to reconcile with the obligations imposed by the Convention. Particularly troublesome is the high standard of proof that U.S. law imposes on noncitizens who seek to avoid nonrefoulement—a standard at least arguably contrary to the language of CAT.[93]

5. FREEDOMS OF SPEECH, PRESS, AND ASSEMBLY

Noncitizens in the United States theoretically enjoy the First Amendment freedoms of speech, press, and assembly, but they exercise those freedoms at their peril. For most of the twentieth century, advocacy of various unpopular views and membership in certain unpopular organizations have been bases for both denying admission to noncitizens and removing those already resident. The Supreme Court has consistently upheld the constitutionality of these restrictions.[94]

In 1990, Congress considerably relaxed the expression-related exclusion grounds and eliminated the corresponding deportation grounds.[95] Still, past or present membership in the Communist Party remains a bar to the admission of immigrants, albeit with broad exceptions.[96] Such membership, as well as other expression-related events, also remains barriers to naturalization.[97] And in 1999, the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee* announced in dictum that deportable noncitizens in removal proceedings have no right to assert first amendment claims that they have been selectively prosecuted because of their political associations.[98]

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[92] 101st Cong., 2d Sess., 136 Cong. Rec. S17491-92 (27 Oct. 1990). The implementing legislation is the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G, § 2242, 112 Stat. 2681 (Oct. 21, 1998).

[93] *See* LEGOMSKY & RODRÍGUEZ, *supra* note 18, at 1107, *item* 7; for additional examples, see *id.* at 1095-114; Kristen B. Rosati, *Article 3 of the United Nations Convention Against Torture: A Powerful Tool to Prevent Removal Just Became More Powerful*, 4 BENDER'S IMMIGRATION BULLETIN 137 (Feb. 15, 1999).

[94] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Harisiades v. Shaugnessy, 342 U.S. 580 (1952); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

[95] Immigration Act of 1990, Pub. L. 101-649, §§ 601, 602, 104 Stat. 4978 (Nov. 29, 1990).

[96] 8 U.S.C. § 1182(a)(3)(D).

[97] *Id.* at § 1424.

[98] Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 488-89 n.10 (1999).

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Do these policies comport with international human rights obligations? Free expression is generally guaranteed by Article 19 of the UDHR, Article 19 of the ICCPR, and Article 13.1 of the ACHR. The freedoms of peaceable assembly and association are similarly guaranteed by Article 20.1 of the UDHR, Articles 21 and 22 of the ICCPR, and Articles 15 and 16 of the ACHR. But none of these freedoms is absolute.[99] All of them permit exceptions to protect the public order, and none of these provisos specifies the level of probability or the degree of potential harm that those exceptions contemplate. Thus, it is not clear whether the United States prohibitions on Communist Party advocacy or membership are in keeping with the obligations reflected in the relevant human rights conventions.

6. VOTING

In nineteenth century America, many states allowed lawful permanent resident noncitizens to vote; today, however, all fifty states limit the vote to United States citizens in national and statewide elections.[100] The constitutionality of that limitation has been upheld,[101] and there are no apparent conflicts with international human rights law. There are also, as Justice Rehnquist has pointed out, several places in which the constitutional text expressly makes citizenship a requirement for designated political office.[102]

7. PUBLIC ASSISTANCE

Until 1996, the general pattern in the United States was that lawful permanent resident noncitizens were eligible for both federal and state welfare programs on essentially the same terms as citizens. Other noncitizens—both those who were present lawfully as temporary visitors and those who had no legal immigration status at all—were ineligible for most welfare benefits.[103]

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[99] *See, e.g.,* ICCPR, *supra* note 71, art. 19 (3); ACHR, *supra* note 72, art. 30; UDHR, *supra* note 71, art. 29(3).

[100] WEISSBRODT & DANIELSON, *supra* note 67, at 520.

[101] Skafte v. Rorex, 191 Col. 399, 553 P.2d 830 (1976), appeal dism'd, 430 U.S. 961 (1977). *But see* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?,* 75 MICH. L. REV. 1092 (1977) (arguing for allowing resident noncitizens to vote).

[102] *See supra* Part III(A).

[103] *See* WEISSBRODT & DANIELSON, *supra* note 67, at 529-30.

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In 1996, however, Congress enacted two major statutes that together cut back sharply on noncitizens' eligibility for public assistance—a welfare reform law and an immigration reform law.[104] Under the revised laws, even lawful permanent resident noncitizens are now ineligible for the major federal assistance programs unless they have worked in the United States, and have not received welfare, for a minimum time period—usually ten years.[105] Exceptions include admitted refugees during their first seven years, certain military veterans, and certain grandparented recipients.[106] Eligibility for state public assistance programs is decided by the individual states, subject to various federal statutory parameters.[107] Other noncitizens are more broadly ineligible for public assistance, with some exceptions for emergency medical treatment, short-term emergency disaster relief, immunizations, and certain other vital needs.[108]

The policy arguments for and against restricting noncitizens' eligibility for welfare have been marshaled elsewhere.[109] Here I simply note that the Supreme Court has upheld the constitutionality of federal welfare legislation that treats lawful permanent resident noncitizens less favorably than citizens,[110] but has struck down analogous state legislation.[111]

On this subject, international human rights law is once again indeterminate. The UDHR comes close to requiring public assistance for lawful permanent residents. Article 25.1 is the most directly in point: "*Everyone* has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services ... " (emphasis added S.L.). The United States has not ratified the International Covenant on Economic, Social and Cultural Rights[112] (ICESCR) but Articles 9, 11.1, and 12 confirm the UDHR and furnish some additional detail on this issue. The Convention on the

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[104] *See*, respectively, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PRWORA, Pub. L. 104-193, 110 Stat. 2105 (Aug. 22, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, Div. C (30 Sept. 1996).

[105] 8 U.S.C. §§ 1612(a)(1), 1612(a)(2)(B).

[106] *Id.* at §§ 1612(a)(2)(A,C), 1612(a)(2)(D,E,F,H).

[107] *Id.* at §§ 1612(b), 1622.

[108] *Id.* at § 1621.

[109] *See id.* at § 1601 (Congress's stated rationales); Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 U.C.L.A. L. REV. 1453, 1462-70 (1995).

[110] Mathews v. Diaz, 426 U.S. 67 (1976).

[111] Graham v. Richardson, 403 U.S. 365 (1971).

[112] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (Jan. 3, 1976).

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Rights of the Child,[113] which the United States also has not ratified, is, with regard to children, even more explicit on the state's obligation to meet certain material needs. Article 24 recognizes "the right of the child" (with no qualifying language concerning citizenship) to "the highest attainable standard of health" and to "the provision of adequate nutritious foods." Article 26 gives "every child" the right to social security. Article 27 recognizes "the right of every child to [an adequate] standard of living." And Article 2.1 eliminates all doubt about the class of beneficiaries by requiring the states parties to "respect and ensure the rights set forth in the present Convention to *each child within their jurisdiction* . . ." (emphasis added S.L.). Articles 11 and 16 of the American Declaration of the Rights and Duties of Man[114] are to similar effect, guaranteeing every "person" the rights to health and social security.

8. PUBLIC EDUCATION

The cost of educating undocumented immigrant children has been of concern to many high-immigration regions of the United States in recent years. In 1982, the Supreme Court in *Plyler v. Doe* struck down a Texas statute that denied a free public education to undocumented children while providing it to United States citizen children and other lawfully resident children.[115] The Court cast its decision in equal protection terms, but the overriding themes were the moral innocence of the affected children and the fundamental importance of education to their long-term futures.

Despite *Plyler*, the voters of California in 1994 passed an initiative called Proposition 187.[116] The most famous provision of this initiative prohibited California public schools from enrolling any undocumented children. It also required school officials to investigate the immigration statuses of all their students and their students' parents and, if they suspect a person lacks lawful status, to expel the child from school, advise the child and/or the parents to leave the United States, and report their findings to the federal government. Relying on *Plyler,* a federal district court invalidated this provision.[117]

[113] Convention on the Rights of the Child, *supra* note 81.

[114] O.A.S. Res. XXX, adopted by Ninth International Conference of American States, Bogota (1948), Novena Conferencia Internacional Americana, 6 Actas y Documentos 297-302 (1953).

[115] Plyler v. Doe, 457 U.S. 202 (1982).

[116] For the full text, see League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 787-91 (C.D. Cal. 1995).

[117] LULAC v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997), affirmed in unpublished mediated settlement (9th Cir., July 29, 1999).

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A mediated appellate court settlement effectively affirmed the district court decision.[118]

There is ample commentary on the wisdom, political significance, and constitutionality of Proposition 187.[119] The international human rights implications are also worth investigating. Article 26.1 of the UDHR is explicit. It says: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory." Article 13.1 of ICESCR (to which the United States, as noted earlier, is not a party) similarly recognizes "the right of everyone to education." Article 13.2 gets more specific: "(a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms ... shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education." Similar language appears in Article 28 of the Convention on the Rights of the Child (to which the United States also is not a party.) And the American Declaration of the Rights and Duties of Man, in Article 12, affirms the right of "every person" to education. It adds: "Every person has the right to receive, free, at least a primary education."

Significantly, none of these provisions is confined to citizens or even to persons with lawful immigration status. Words like "everyone" and "every person" are more general. Nonetheless, if pressed, the United States might make either of two arguments. First, it might point out, the only one of the cited instruments that is actually a treaty is the Convention on the Rights of the Child, which the U.S. has not ratified. Secondly, it might argue, even if the quoted language were otherwise binding on it, the United States would not be in violation because the person is free to leave California and obtain an education elsewhere. The children might well respond that, as long as they continue to reside within the jurisdiction, a state party cannot meet its obligations by insisting that children exercise their rights somewhere else.

CONCLUSION

Deciding which legal rights should be the exclusive province of citizens, which ones should attach by virtue of personhood, and which ones are in between is a tricky business. One preliminary question is why citizenship should *ever* define one's legal

[118] *See* Patrick J. McDonnell, *Davis Won't Appeal Proposition 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999.

[119] *See, e.g.*, the collection of symposium articles in 42 U.C.L.A. L. REV. (1995).

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rights. Given the present world order, the view here is that citizenship distinctions are appropriate in the international context. There are fewer suitable occasions to hinge municipal legal rights on citizenship.

On the assumption that citizenship distinctions are not per se undesirable or legally impermissible, the question is *which* differentials between citizens' rights and noncitizens' rights are acceptable. I have suggested that the outcome should depend on the nature of the particular right, the ethos of the particular state and the era in which the decision is made. The historical ethos of the United States as a nation of immigrants, combined with the steadily diminishing centrality of citizenship in the modern era, suggest that in contemporary America relatively few legal rights should be conditioned on citizenship.

The United States Constitution is both ambivalent and ambiguous on this score. Some provisions—especially those that relate to political participation — explicitly reserve certain rights solely for citizens. Those that safeguard other fundamental human rights tend to apply fairly clearly to all persons. Some other provisions are unclear.

As for those constitutional rights that extend to noncitizens, the question then becomes one of content. The Supreme Court has consistently recognized a plenary congressional power to treat noncitizens less favorably than citizens, both in immigration and in other contexts. In contrast, for reasons related to federalism, state legislation that distinguishes citizens from noncitizens has been generally disfavored unless it promotes the state's (broadly defined) political functions.

The final section of this Article highlights eight subject areas in which United States law distinguishes the legal rights of citizens and noncitizens. As the discussion illustrates, some such distinctions raise constitutional concerns, some raise issues of international human rights law, some raise both, and some raise neither. I offer these examples simply to illustrate some of the common contexts in which governments must decide whether to award legal rights on the basis of citizenship, personhood, or something in between. In most of the cited examples, I do not claim that the United States has violated either municipal constitutional law or international human rights law; I am generally content merely to call attention to some of the instances of differential treatment and raise the question of their compatibility with shared values, constitutional limitations, and international law.

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