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THE (DWINDLING) RIGHTS AND OBLIGATIONS OF CITIZENSHIP

Peter J. Spiro*

Citizenship is central to modern narratives of individual well-being. As Chief Justice Earl Warren declared, “[c]itizenship is man’s basic right for it is nothing less than the right to have rights.”¹ The popular conception holds that significant rights and obligations attach peculiarly to the citizenry. In his 2012 convention acceptance speech, Barack Obama framed citizenship as “a word at the very heart of our founding,” as part of a recognition “that we have responsibilities as well as rights.”² At a more prosaic level, the website of U.S. Citizenship and Immigration Services asserts that “[c]itizenship offers many benefits and equally important responsibilities.”³

This Essay interrogates the conventional wisdom that citizenship is central to situating the legal place of individuals in society. It concludes that citizenship status has material consequence. However, citizenship is not incommensurable. Citizenship has value, but that value is bounded.

What the state extracts from you and what it owes you is contingent on citizenship status in some contexts. Within the national territory, civil rights are extended without regard to citizenship or immigration status. Permanent resident aliens are legally disadvantaged with respect to some economic incidents of the welfare state, political rights, and immigration benefits. However, formal differentials have been counterbalanced by workarounds and underenforcement. In other words, rights differentials are not as significant as they might appear. The differential is narrower in the context of obligations. With the exception of jury duty, citizenship imposes no additional societal burdens not also shouldered by noncitizen residents. Tax and military service obligations fall equally on citizens and noncitizens. All persons physically present are required to pay taxes. Mandatory military service is of historical significance only, and in any case applies equally to citizens and permanent residents alike. Americans are required to do nothing for their country that they would not be required to do as mere legal residents.

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¹ *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (emphasis omitted), *overruled by* 387 U.S. 253 (1967).

² President Barack Obama, Acceptance Speech for Renomination at the Democratic National Convention (Sept. 6, 2012).

³ See *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov> (search for “citizenship rights and responsibilities”) (last visited Mar. 15, 2013).

Outside the national territory, citizenship has greater salience on both sides of the balance sheet. Passport issuance is contingent on citizenship, as is diplomatic protection by U.S. authorities. The Supreme Court has found certain constitutional protections inapplicable to noncitizens outside of the United States, where (as a matter of doctrine) the Bill of Rights is fully portable for citizen carriers. External citizens also carry substantial tax obligations that are citizenship contingent. However, formal rights differentials have been counterbalanced by the rise of international human rights, which apply on a citizenship-blind basis.

The contemporary convergence of citizenship and noncitizenship status reflects an evolution from more significant historical differentials. Although noncitizens have always enjoyed certain equivalent constitutional protections, they were historically disadvantaged with respect to important legal capacities, including the right to own property and engage in some kinds of business. Compulsory military service was once required only of the citizen or the citizen-in-the-making. Citizenship status has grown less consequential in terms of situating an individual within society.

Part I of this Essay considers citizenship as an independent variable in the allocation of rights and obligations within the United States, with a focus on locational security, social benefits, and political rights. Part II situates the question in a global context, considering rights and obligations attaching to citizenship on an extraterritorial basis. In this context, the citizenship differential is also diminishing. The Essay concludes with brief observations on the implications of the convergence for the future of national community.

I. TERRITORIAL RIGHTS AND OBLIGATIONS

A. Rights

Few important rights hinge on citizenship status. Civil rights are enjoyed by citizens and permanent residents on a basis of near equality. Citizenship status is salient to some rights in the context of economic status, but that salience has declined as economic disabilities of alienage have diminished. Citizens alone enjoy the right to vote in national elections, although noncitizens have alternative channels of participation. Only noncitizens are subject to immigration control; citizens enjoy absolute locational security. However, the leakiness of immigration enforcement mitigates the consequence of this important formal differential.

1. Civil Rights

Outside the context of immigration proceedings, territorially present noncitizens enjoy equivalent rights to citizens. Noncitizens, including noncitizens present in violation of immigration laws, are entitled to all constitutional due process protections afforded accused citizens in the context of criminal prosecutions.⁴ The Supreme Court

⁴ *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

has extended the coverage of the Equal Protection Clause to territorially present non-citizens.⁵ In the modern era, the Court has deemed alienage a suspect classification, subject to heightened judicial scrutiny, in which respect aliens are extended a jurisprudential advantage.⁶ The courts have also found noncitizens to enjoy rights under the First, Second, and Fourth Amendments.⁷

2. Economic Status

Noncitizens were historically burdened with respect to economic pursuits. During the nineteenth and early twentieth centuries, noncitizens were subject to various discriminatory regimes sanctioned by the courts, the common law, treaty regimes, and the law of nations. Many states barred aliens from owning real property.⁸ Others that permitted land ownership restricted its transfer by inheritance.⁹ The federal government restricted homesteading to citizens or immigrants who had applied for naturalization.¹⁰ In a largely agrarian economy, these disabilities were significant.

Other economic disabilities were pervasive. Many states made aliens ineligible for the licenses required to operate a range of businesses, especially those involving natural resources (hunting and fishing licenses, for both commercial and recreational purposes) and such regulated establishments as pawnbrokers and liquor stores.¹¹ Some states prohibited noncitizen possession of firearms.¹² Every state barred aliens from the practice of law, and many jurisdictions excluded noncitizens from such other professions as medicine, accountancy, and nursing.¹³ These measures had the cumulative effect of

⁵ See *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); see also LUCY SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 13 (1995).

⁶ See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

⁷ See generally *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983) (discussing noncitizens' rights under the First and Fourth Amendments); Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1539–42 (2010) (discussing noncitizens' rights under the Second Amendment).

⁸ See, e.g., Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947); Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 176 (1999).

⁹ See, e.g., McGovney, *supra* note 8, at 22, 43–44, 59–60 (including examples of Wisconsin, Washington, and Missouri).

¹⁰ See Homestead Act of 1862, ch. 75, sec. 1, 12 Stat. 392 (repealed 1976); see also Price, *supra* note 8, at 176.

¹¹ See generally Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 566 (1953).

¹² See Gulasekaram, *supra* note 7, at 1558–59 (describing California, New York, and Pennsylvania laws that restricted firearm possession by noncitizens).

¹³ Between 1871 and 1976, for example, New York State enacted 38 laws requiring citizenship for occupations ranging from architects, private investigators, physicians, dentists, and

setting down a line between members and nonmembers for economic purposes.¹⁴ The courts upheld these and other discriminatory measures as rational measures advancing legitimate state objectives.¹⁵

Economic disadvantages attaching to alienage have for the most part been eliminated, although some disadvantages persist. The courts have nullified state restrictions relating to land ownership, inheritance, professional licenses, and gun ownership, with alienage counting as a suspect classification.¹⁶ Only with respect to a limited number of positions involving a core “governmental functions,” including police officers and public school teachers, are states constitutionally permitted to deploy citizenship eligibility qualifications.¹⁷ Most states appear not to maximally avail themselves to the exception, and those restrictions that remain on the books may be underenforced.¹⁸ Blanket civil service ineligibilities have been struck down,¹⁹ with the notable exception of eligibility for the federal civil service.²⁰ Employers are legally entitled to discriminate in favor of citizens in hiring decisions, but only where prospective workers are equally qualified.²¹ One recent study finds naturalized citizens to be economically better off than their permanent resident counterparts.²² Citizenship status appears still to count for something economically.

Nonimmigrants face greater barriers to economic advancement. They are typically employment restricted: some are ineligible to work in any or only narrow circumstances; others are limited to job positions for which they were admitted.²³ In most cases, their admission to the United States is time-limited.²⁴ Undocumented status is more clearly economically disabling. Undocumented immigrants are barred from

pharmacists to embalmers, plumbing inspectors, and blind adult vendors of newspapers. *See* Luis F.B. Plascencia et al., *The Decline of Barriers to Immigrant Economic and Political Rights in the American States: 1977–2001*, 37 INT’L MIGRATION REV. 5, 9 (2003).

¹⁴ The measures also reinforced racial criteria for naturalization. *See generally* IAN F. HANEY-LÓPEZ, *WHITE BY LAW* (1996).

¹⁵ *See, e.g.*, *Ohio ex. rel. Clark v. Deckebach*, 274 U.S. 392, 396–97 (1927) (pool halls); *Terrace v. Thompson*, 263 U.S. 197, 208 (1923) (land ownership); *Patsone v. Pennsylvania*, 232 U.S. 138, 144–45 (1914) (hunting licenses).

¹⁶ *See* *Graham v. Richardson*, 403 U.S. 365, 382 (1971); *see also* *Oyama v. California*, 332 U.S. 633, 646–47 (1948) (striking down California land law that discriminated against Japanese nationals).

¹⁷ *See, e.g.*, *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979) (public school teachers); *Foley v. Connelie*, 435 U.S. 291, 298–300 (1978) (police officers).

¹⁸ *See* Plascencia et al., *supra* note 13, at 15–17.

¹⁹ *See* *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973).

²⁰ *See* *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100–01 (1976).

²¹ 8 U.S.C. § 1324b(a)(4) (2006).

²² *See* MADELEINE SUMPTION & SARAH FLAMM, MIGRATION POLICY INST., *THE ECONOMIC VALUE OF CITIZENSHIP FOR IMMIGRANTS IN THE UNITED STATES* (2012), available at <http://www.migrationpolicy.org/pubs/citizenship-premium.pdf>.

²³ *See* 8 U.S.C. § 1101(a)(15) (2006).

²⁴ *See, e.g.*, 8 U.S.C. § 1184(g)(4) (2006) (limiting H-1B visa holders to authorized stay of no more than six years).

authorized employment, including public-sector positions.²⁵ Some states have moved to more rigorously enforce employment bars against state contractors and to better police against fraudulent work authorization documents.²⁶

The lack of permanent residence status is consequential. It is not economically effacing, however. Under some business visas, nonimmigrants are able to remain in the United States for extended stays (up to six years on the popular H-1B visa),²⁷ during which they are often able to convert to permanent residence status.²⁸ Many are in well-paying professions in which the lack of access to public benefits programs is immaterial.²⁹ Nonimmigrants who are not employment authorized (such as those on student visas) often work anyway, with little fear of effective enforcement against them.³⁰

Even undocumented status can be economically surmounted. The sizeable undocumented population demonstrates that the benefits of presence outweigh the disadvantages of undocumented status.³¹ Many undocumented aliens are able to secure work, albeit at the lower end of the labor scale.³² Banks and other businesses accept Mexican and other foreign country identity cards for dealings with individuals.³³ It is possible, as some cases have shown,³⁴ to achieve economic success as an undocumented immigrant.³⁵

²⁵ See 8 U.S.C. § 1324a(a)(1), (7) (2006) (specifically including the federal government among entities covered by employment prohibition).

²⁶ See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981, 1986 (2011) (upholding a state-mandated E-Verify program to enforce the employment bar on undocumented aliens).

²⁷ 8 U.S.C. § 1184(g)(4) (2006).

²⁸ 8 U.S.C. § 1255 (2006) (providing for adjustment of status to permanent resident).

²⁹ See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2009 ANNUAL REPORT 15 (2010), available at <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-09-characteristics.pdf> (listing salary data for H-1B visa holders).

³⁰ See Plascencia et al., *supra* note 13, at 15–17.

³¹ The number of undocumented immigrants is estimated at 11.9 million. See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., PEW RESEARCH CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009), available at <http://www.pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states>.

³² See *id.* (estimating household income of undocumented immigrants at \$36,000, compared with \$50,000 average for those born in the United States).

³³ See Rachel L. Swarns, *Old ID Card Gives New Status to Mexicans in U.S.*, N.Y. TIMES, Aug. 25, 2003, at A1.

³⁴ See, e.g., Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG., June 26, 2011, at MM22 (detailing his life as an undocumented immigrant who shared in winning a Pulitzer Prize while working as a reporter at the Washington Post). There has been recent attention drawn to undocumented immigrants enrolled in law school, and the California Supreme Court is considering a challenge to eligibility criteria for bar admissions based on legal immigration status. See Opening Brief of Applicant, *In re Sergio C. Garcia on Admission* (Cal. June 18, 2012) (No. S202512); see also Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5 (2012).

³⁵ According to the Migration Policy Institute, an estimated 11.5% of undocumented aliens hold jobs in professional or managerial occupations. See Jennifer van Hook et al., *Unauthorized*

3. Public Benefits

The salience of citizenship status to public benefits eligibility also presents a somewhat muddled narrative. During the modern period, state governments have been restrained from discriminating against aliens in most respects by Equal Protection Clause constraints except where authorized by the federal government.³⁶ Federal benefit schemes such as Social Security Disability Insurance, Medicare and Medicaid, food stamps, and welfare discriminated on the basis of citizenship status only at the margins.³⁷ (Significant federal social benefits programs date only from the mid-twentieth century, so it is difficult to establish a historical trajectory.) Federal benefits programs had placed permanent resident aliens on a par with citizens until the enactment of the major 1996 welfare reform bill.³⁸

The 1996 act rendered permanent resident aliens ineligible for a variety of federal benefits. Immigrants were made ineligible for Medicaid and Temporary Assistance for Needy Families (TANF) for five years after entry into the United States, thereafter at state option.³⁹ Aliens were excluded in most cases from Supplemental Security Income (SSI) and food stamp programs.⁴⁰

Some benefits were restored and others were covered by the states. In 1997, SSI was restored to immigrants who had entered the United States prior to the enactment of welfare reform.⁴¹ Congress followed in 1998 to restore food stamp eligibility to pre-enactment immigrants in many cases.⁴² In 2002, food stamp eligibility was extended to immigrant children regardless of their date of entry and to all immigrants after

Migrants Living in the United States: A Mid-Decade Portrait, MIGRATION INFO. SOURCE (Sept. 2005), <http://www.migrationinformation.org/Feature/display.cfm?id=329>.

³⁶ *Graham v. Richardson*, 403 U.S. 365 (1971), which first applied strict scrutiny in the context of alienage, struck down a state measure discriminating against legal permanent residents in the context of welfare benefits.

³⁷ See Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 26–27 (1997) (stressing the radical break represented by 1996 legislation discriminating against legal immigrants).

³⁸ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601 *et. seq.*) (2006).

³⁹ Personal Responsibility and Work Opportunity Reconciliation Act § 403, Pub. L. No. 104-193, 110 Stat. 2265 (1996) (codified at 8 U.S.C. § 1613 (2006)); see *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2249 (2005).

⁴⁰ See Marianne P. Bitler & Hilary W. Hoynes, *Immigrants, Welfare Reform, and the U.S. Safety Net* (Nat'l Bureau of Econ. Research, Working Paper No. 17667, 2011); see also Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 402, 110 Stat. 2264 (codified at 8 U.S.C. § 1612 (2006)).

⁴¹ See 8 U.S.C. § 1612(a)(2)(D) (2006).

⁴² Agricultural Research, Extension, and Education Reform Act of 1998 §§ 503–504, Pub. L. No. 105-185, 112 Stat. 523 (1998).

five years of U.S. residence.⁴³ All but five states opted to extend TANF eligibility to immigrants after the five-year bar.⁴⁴ As of 2009, seventeen states (including immigrant-heavy California and New York) had opted to extend TANF to immigrants during the five-year period after entry.⁴⁵ Similarly, states have been relatively generous with Medicaid eligibility. Only seven states have refused to extend Medicaid benefits to immigrants after the five-year bar.⁴⁶ One study found that immigrant Medicaid participation relative to native-born participation actually increased post-welfare reform.⁴⁷ SSI continues to represent the major unfilled gap in immigrant social benefit coverage, with only a few states “filling in” for federal ineligibility.⁴⁸

Legal permanent residents have been and continue to be eligible for Medicare.⁴⁹ They are included participants in the Patient Protection and Affordable Care Act⁵⁰ for purposes of benefits⁵¹ as well as the obligations/penalty of the so-called mandate on par with citizens, as are other noncitizens who are legally present.⁵² Legal residents are also eligible for Social Security⁵³ and other assorted federal programs, including Section 8 housing programs⁵⁴ and Legal Services Corporation assistance.⁵⁵

Nonimmigrants and undocumented immigrants are ineligible for most forms of public benefits, falling outside the social safety nets at both the state and federal levels.⁵⁶

⁴³ Farm Security Rural Investment Act of 2002, § 4401(b)–(c), Pub. L. No. 107-171, 116 Stat. 134 (2002) (codified as amended in scattered sections of 7 & 8 U.S.C.).

⁴⁴ States opting to bar immigrants after the five-year bar include Arkansas, Indiana, Mississippi, and Texas. *See* Bitler & Hoynes, *supra* note 40, at 49.

⁴⁵ *See id.*

⁴⁶ *See id.* at 50 (listing Alabama, Mississippi, North Dakota, Ohio, Texas, Virginia, and Wyoming as barring Medicaid to legal immigrants in most cases).

⁴⁷ *See id.* at 27; *see also* WENDY ZIMMERMAN & KAREN C. TUMLIN, PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 3 (1999), *available at* <http://www.urban.org/UploadedPDF/occ24.pdf> (stating that “[d]espite fears of a race to the bottom with states providing as few benefits as possible,” states have provided many benefits to immigrants at state cost).

⁴⁸ *See* Bitler & Hoynes, *supra* note 40, at 52.

⁴⁹ *See* 42 C.F.R. § 406.5 (2012).

⁵⁰ Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 21, 25, 26, 29 & 42 U.S.C.).

⁵¹ *See* 42 U.S.C. § 18001(d)(1) (2006); *see also* ALISON SISKIN, CONG. RESEARCH SERV., R41714, TREATMENT OF NONCITIZENS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 3–4 (2011).

⁵² *See* 26 U.S.C. § 5000A(d)(3) (2006); 8 U.S.C. § 1641 (2006) (defining “qualified alien” to include only permanent residents and asylees); *see also* SISKIN, *supra* note 51, at 4 (restricting most federal public benefits to “qualified aliens”).

⁵³ *See* 42 U.S.C. § 1382c(a)(1)(B)(i) (2006); 8 U.S.C. § 1612(a)(1), (a)(2)(B)(i)–(ii) (2006).

⁵⁴ *See* 24 C.F.R. § 5.506 (2012).

⁵⁵ *See* 45 C.F.R. § 1626.5 (2012).

⁵⁶ *See* 8 U.S.C. §§ 1611–1612, 1621–1622 (2006).

With the new exception of the Affordable Care Act,⁵⁷ nonimmigrants are ineligible for most public benefits.⁵⁸ Undocumented immigrants are ineligible for most public benefits.⁵⁹

However, a partial safety net protects even the undocumented. Immigration status does not bar membership in important organs of civil society, including churches and ethnic community associations, some of which may extend assistance to members without regard to immigration status.⁶⁰ A growing number of assistance centers help undocumented aliens assert their substantially equivalent rights under labor, housing, consumer, and other legal regimes.⁶¹ Undocumented immigrants are entitled to public elementary and secondary education.⁶² They benefit from the public infrastructure, including police and fire protection services. They are generally eligible for social services in kind as well as to federal aid for emergency medical care, which creates strong incentives among medical professionals to diagnose emergencies more liberally.⁶³ Some states have made undocumented residents eligible for in-state tuition rates in public institutions of higher education.⁶⁴

To be sure, nonimmigrants and undocumented immigrants face substantial legal disabilities.⁶⁵ But that still draws the line somewhere other than at the boundary of citizenship. A green card is a valuable commodity, entitling its holders to nearly equivalent economic opportunity.⁶⁶ The additional economic advantage of citizenship itself is incremental.

⁵⁷ See SISKIN, *supra* note 51, at 4.

⁵⁸ 8 U.S.C. § 1611 (2006) (deeming “non-qualified” aliens, including nonimmigrants, ineligible for public benefits).

⁵⁹ *Id.* They have also been found not to enjoy rights under the Second Amendment. See *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (upholding a conviction under federal law criminalizing possession of firearm by undocumented aliens). The Netherlands recently moved to ban the sale of marijuana to foreign visitors, a novel example of discrimination against noncitizens. See Anthony Faioloa, *Dutch Court Upholds Ban on Foreign Tourists Buying Pot*, WASH. POST, Apr. 28, 2012, at A6.

⁶⁰ See, e.g., Daniel M. Hungerman, *Are Church and State Substitutes? Evidence from the 1996 Welfare Reform*, 89 J. PUB. ECON. 2245 (2005) (finding that church provision of social services to immigrants increased in the wake of 1996 welfare reform).

⁶¹ Steven Greenhouse, *Immigrant Workers Find Support in a Growing Network of Assistance Centers*, N.Y. TIMES, Apr. 23, 2006, at 22.

⁶² See *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

⁶³ See, e.g., Dana Canedy, *Hospitals Feeling Strain from Illegal Immigrants*, N.Y. TIMES, Aug. 25, 2002, at 16.

⁶⁴ See *The Patchwork of State Policies on Undocumented Students*, CHRONICLE OF HIGHER EDUC., Sept. 1, 2011, <http://www.chronicle.com/article/The-Patchwork-of-State/128865/>.

⁶⁵ See *supra* Part I.A.3.

⁶⁶ See *supra* notes 49–55 and accompanying text.

4. Political Participation

It is sometimes assumed that if there is any realm in which citizenship makes a difference, it is that of politics.⁶⁷ Noncitizens are constitutionally ineligible for federal elective office.⁶⁸ With few exceptions, noncitizens are barred from voting.⁶⁹ From that, it is not hard to construct an account in which they lack a political voice. But this account may fetishize the ballot and fail to consider other entry points that are open to noncitizens. As the importance of individual votes diminishes and the weight of special interests—many of which noncitizens comprise a part—has increased,⁷⁰ noncitizens are able to exert political influence notwithstanding their lack of formal membership in the polity.

A limited number of jurisdictions allow legal resident aliens to vote in local elections.⁷¹ The proportion of aliens able to cast votes is small. This has effectively always been the case in the United States. Contemporary advocates assert a historical tradition of alien voting.⁷² From the mid-nineteenth century into the early twentieth, many states allowed aliens to vote even in federal elections.⁷³ There was a time when a substantial number of aliens could vote for president.⁷⁴ However, alien suffrage was typically restricted to declarant aliens, that is, aliens who had formally declared their intention to become citizens.⁷⁵ Although an anachronism today, declarant status was once an important step in the naturalization process. The taking out of “first papers” (after only three years’ residence, before the five required for naturalization itself) served as a notice of a purpose to transfer national allegiance.⁷⁶ Thus, alien suffrage involved extending the franchise to citizens-in-the-making. It was not intended to politically empower noncitizens as such.

⁶⁷ See, e.g., Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993).

⁶⁸ U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 5.

⁶⁹ See RON HAYDUK, *DEMOCRACY FOR ALL* (2006).

⁷⁰ See, e.g., John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 604–09 (2005).

⁷¹ See generally HAYDUK, *supra* note 69, at 4–5.

⁷² See *Debate Club: Should Non-Citizens Be Permitted to Vote?*, LEGAL AFF. (May 10, 2005), http://www.legalaffairs.org/webexclusive/debateclub_ncv0505.msp (advocating non-citizen voting in part based on historical experience).

⁷³ See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1098 (1977).

⁷⁴ See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

⁷⁵ See Rosberg, *supra* note 73, at 1098 (describing Wisconsin law).

⁷⁶ See HIROSHIMOTOMURA, *AMERICANS IN WAITING* 115–20 (2006) (recounting the history of alien voting by declarant aliens).

Powerful normative arguments can be deployed in favor of noncitizen voting, especially at the local level.⁷⁷ However, political voice is not a binary contingent on voting eligibility.⁷⁸ Noncitizens enjoy other channels of political influence.

Noncitizens can bring direct political influence to bear through the channel of campaign contributions. Under federal law, permanent resident aliens are permitted to make campaign contributions in federal elections.⁷⁹ Legislative attempts to eliminate noncitizen participation in campaign finance have failed.⁸⁰

As in the economic sphere, noncitizens with permanent resident status are advantaged relative to other territorially present aliens. Legal nonimmigrants are prohibited from campaign donations.⁸¹ In *Bluman v. Federal Election Commission*,⁸² a three-judge district court rejected a First Amendment challenge to the bar in the wake of the *Citizens United* decision.⁸³ Undocumented aliens may not make contributions to candidates in federal elections.⁸⁴

However, nonimmigrants can put their money to work in other forms of political expression, including contributing to campaigns relating to ballot initiatives.⁸⁵

⁷⁷ Other countries have been more generous in extending the franchise to noncitizens. Among European states, noncitizen voting in local elections is now routine. See KEES GROENENDIJK, MIGRATION POLICY INST., LOCAL VOTING RIGHTS FOR NON-NATIONALS IN EUROPE 3–4 (2008). Among member states of the European Union, on a reciprocal basis it is now required. See Consolidated Version of the Treaty on the Function of the European Union art. 20, Sept. 5, 2008, 2008 O.J. (C 115) 47. Some countries allow long-term noncitizen residents to vote in national elections, Denmark and New Zealand among them. STANLEY RENSHON, CTR. FOR IMMIGRATION STUDIES, ALLOWING NON-CITIZENS TO VOTE IN THE UNITED STATES? WHY NOT 22–23 (2008), available at http://www.cis.org/articles/2008/renshon_08.pdf. For an analysis of noncitizen voting in comparative perspective, see DAVID C. EARNEST, OLD NATIONS, NEW VOTERS: NATIONALISM, TRANSNATIONALISM, AND DEMOCRACY IN THE ERA OF GLOBAL MIGRATION (2008).

⁷⁸ But cf. Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1434 (2009) (justifying focus on voting rights to the extent that migrants could combine into voting blocs).

⁷⁹ See 2 U.S.C. § 441 (2006) (prohibiting contributions by foreign nationals, but excluding permanent residents from the bar). Permanent resident aliens are also able to make campaign donations under state law in, for example, California, New York, and Texas. See, e.g., CAL. GOV'T CODE § 85320(d) (West 2000).

⁸⁰ See Note, “Foreign” Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886 (1997).

⁸¹ See 2 U.S.C. § 441e (2006).

⁸² 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012). Although *Citizens United* does not permit noncitizen, nonpermanent residents to contribute to so-called Super PACs, some are concerned that the lack of disclosure requirements for Super PACs will make it difficult to police against such contributions. See Stephen Braun, *Foreign Donations at Risk in Super PAC Landscape*, WASH. TIMES (Feb. 10, 2012), <http://www.washingtontimes.com/news/2012/feb/10/foreign-donations-risk-super-pac-landscape/?page=all>.

⁸³ 800 F. Supp. 2d at 288.

⁸⁴ See 2 U.S.C. § 441e (2006).

⁸⁵ See, e.g., Californians for Safe Streets, Advisory Opinion No. 1989-32 (Fed. Election Comm'n July 2, 1990), available at <http://saos.nictusa.com/saos/searchao?AONUMBER=>

Noncitizens can also belong to and work for political parties. There is no apparent bar on temporary foreign visitors volunteering for campaigns.⁸⁶ Noncitizens are free to exercise other forms of political speech.⁸⁷ Undocumented aliens have engaged in high-visibility political activism in recent years on the issue of immigration reform, notwithstanding risk of exposure to deportation.⁸⁸

Indirect levers are also available to all noncitizens in advancing political interests. Undocumented aliens count for purposes of congressional apportionment.⁸⁹ Noncitizens are eligible for membership in most civil society entities, an important channel of political influence.⁹⁰ Unions have advocated noncitizen agendas in recent years, especially on immigration issues,⁹¹ as have religious organizations.⁹² Immigrants who belong to minority ethnic and racial communities are likely to have interests advanced by advocacy groups.⁹³ They also might have relatives who are citizens and can vote.

1989-32 (press “search” button) (distinguishing “candidate-related elections” from “issue-related ballot initiatives”).

⁸⁶ See, e.g., Sean Quinn, *On the Road: Big Stone Gap, Virginia*, FIFETHIRTYEIGHT (Oct. 25, 2008, 12:38 AM), <http://www.fivethirtyeight.com/2008/10/on-road-big-stone-gap-virginia.html> (recounting a German citizen volunteering for the Obama campaign); see also Juliana Barbassa, *Unable to Vote, Noncitizen Immigrants Volunteer*, USA TODAY (Oct. 30, 2008), http://usatoday30.usatoday.com/news/politics/2008-10-30-2806448683_x.htm; Barry Newman, *Lots of Noncitizens Feel Right at Home in U.S. Political Races*, WALL ST. J., Oct. 31, 1997, at A1 (describing the experience of one “Democrat on Arrival”).

⁸⁷ See *Bridges v. Wixon*, 326 U.S. 135, 147–48 (1945); see also SYDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 359 (1995) (finding little difference in political activity by noncitizens other than voting).

⁸⁸ See generally RALLYING FOR IMMIGRANT RIGHTS (Kim Voss & Irene Bloemraad eds., 2011).

⁸⁹ See Complaint at 1–2, *Louisiana v. Bryson*, 132 S. Ct. 1781 (2012) (No. 2201400R6), available at <http://www.ag.state.la.us/shared/ViewDoc.aspx?Type=3&Doc=312> (challenging census practice and seeking original jurisdiction of Supreme Court to consider the question); see also Leonard Steinhorn, *Without Voting, Noncitizens Could Swing the Election for Obama*, WASH. POST, Oct. 5, 2012, http://articles.washingtonpost.com/2012-10-05/opinions/35500687_1_electoral-college-votes-noncitizens-battleground-states.

⁹⁰ See, e.g., Randy Shaw, *Building the Labor-Clergy-Immigrant Alliance*, in RALLYING FOR IMMIGRANT RIGHTS, *supra* note 88, at 82.

⁹¹ See, e.g., Marc Thiessen, *Are Foreign and Illegal Workers Funding Democrats’ Attack Ads?*, WASH. POST, Oct. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/18/AR2010101802645.html> (lamenting probability of undocumented immigrant political participation through union intermediaries).

⁹² See, e.g., Daniel Gonzalez, *LDS Members Conflicted on Church’s Illegal Migrant Growth*, USA TODAY, Apr. 3, 2009, http://usatoday30.usatoday.com/news/religion/2009-04-03-mormon-immigrants_N.htm; Jay Reeves, *Ala. Churches Leading Opponents of Immigration Law*, ASSOCIATED PRESS, July 10, 2011; see also Jen Smyers, *Seeking God’s Law in Immigration Policies*, THE CHRISTIAN CITIZEN 8 (Apr. 3, 2012), available at http://abhms.org/resources/christian_citizen/docs/CC2012_1.pdf (chronicling the role of the Church and the challenge of immigration reform).

⁹³ For example, the League of United Latin American Citizens, which has been active on immigration issues. See, e.g., Press Release, League of Latin American Citizens, LULAC

Both legal and undocumented noncitizens benefit from these levers. The result is a kind of virtual representation.

Finally, noncitizens enjoy powerful advocates in the form of their homeland governments. Under traditional international law, foreign governments had the right to exercise diplomatic protection on behalf of their citizens against mistreatment at the hands of another state.⁹⁴ This practice is broadening. Foreign governments are interceding in the United States to assist with representation in the criminal law context (especially where the death penalty is implicated).⁹⁵ They are also working to advance social interests. Mexico has been aggressive in this respect. With more than fifty consulates in the United States, Mexican government officials are working to advance the interests of Mexican nationals on a range of issues, from school benefits to healthcare to labor rights at all levels of government.⁹⁶ This advocacy will work to equalize the position of noncitizens relative to citizens.

5. Locational Security

With respect to immigration control, citizenship status is consequential. Citizenship affords security of location. The immigration regime also advantages citizens relative to permanent resident aliens with respect to the admission of family members.

However, this citizenship differential is less meaningful than it appears. Most permanent resident aliens are locationally secure. Congress has never provided for the deportation of aliens on the basis of nationality or status alone. Even in wartime, although so-called enemy aliens have been in some cases subject to internment, there has never been a mass deportation of aliens for reasons unrelated to individual conduct.⁹⁷

Launches “Latinos for Immigration Reform” (Dec. 13, 2012), *available at* http://lulac.org/news/pr/LULAC_launches_latinos_for_immigration_reform/.

⁹⁴ See, e.g., Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT’L L. 37, 52 (2007).

⁹⁵ See, e.g., Hugh Southey, *Why Is the UK Involved in a Texas Death Case?*, DALL. MORNING NEWS (Aug. 31, 2009, 1:59 PM), <http://deathpenaltyblog.dallasnews.com/2009/08/why-is-the-uk-involved-in-a-te.html/>.

⁹⁶ See, e.g., RICARDO GAMBETTA, NAT’L LEAGUE CITIES, POSITIVE CROSSROADS: MEXICAN CONSULAR ASSISTANCE AND IMMIGRANT INTEGRATION, (2012), *available at* <http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Immigrant%20Integration/positive-crossroads-mexican-consular-assistance-cpb-mar12.pdf>; Anna Gorman, *Mexican Consulate in L.A. Takes a Wide-Ranging Role in Guiding Immigrants to Social Services*, L.A. TIMES, July 23, 2009, at A5 (stating that “the Mexican consulate in Los Angeles has become an almost de facto public agency”); Heather Mac Donald, *Mexico’s Undiplomatic Diplomats*, CITY J. (2005), http://www.city-journal.org/html/15_4_mexico.html.

⁹⁷ The Alien Enemy Act of 1798, ch. 66, 1 Stat. 577 (current version at 50 U.S.C. § 21 (2006)) allows the President to order the internment of aliens whose association with an American enemy presents a danger to the national security. See generally J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992). The President has only

So long as they are not implicated in criminal activity, permanent resident aliens are entitled to remain in the United States.⁹⁸

Beyond the deportation regime, the immigration-related disabilities of permanent residence status are minimal. There are technical restrictions on a resident alien's right to exit and re-enter the United States.⁹⁹ Prolonged absence may result in abandonment of residency status.¹⁰⁰ In practice, however, the presence requirement is under-enforced so long as an alien maintains a U.S. address, is absent for no longer than two years at a stretch, and complies with federal tax requirements. Permanent residents use the same lines as citizens upon inspection at U.S. airports.¹⁰¹

The Immigration and Nationality Act¹⁰² privileges citizens with respect to securing the entry of some family members. Where citizens can petition for the admission of parents, siblings, and married adult children, permanent resident aliens cannot.¹⁰³ Spouses and children of noncitizen residents are subject to annual quotas that in recent years have resulted in lengthy delays.¹⁰⁴ Visas for equivalent relatives of citizens are not capped.¹⁰⁵

Noncitizens without permanent residence status are more significantly disadvantaged in the immigration context. Locational status is not legally secure for nonimmigrants. With few exceptions, nonimmigrant admissions are temporary. Barring adjustment of status, nonimmigrants will be required to depart the United States.¹⁰⁶ Noncitizens who are out of status are subject to removal.¹⁰⁷ As a legal matter, the drawbacks of conditional or illegal presence are clear. As a practical matter, they may be manageable. Many who enter the United States legally as nonimmigrants subsequently acquire equities rendering them eligible for permanent resident status. In the

ordered such internment of aliens who were citizens of a country with which the United States was at war. *Id.* at 1413–15.

⁹⁸ See 8 U.S.C. § 1227 (2006) (setting forth grounds for deportation); see also Schuck, *supra* note 37, at 15 (“[A]ctual risk of removal for non-criminal LPRs living in the United States has been vanishingly small.”).

⁹⁹ See 8 C.F.R. § 211.1(a) (2012) (setting forth documentary requirements for noncitizen admission).

¹⁰⁰ See 8 C.F.R. § 211.1(a)(2) (2012) (deeming permanent residence status unexpired upon return from temporary absence of less than one year); see also *Lateef v. Holder*, 683 F.3d 275, 280 (6th Cir. 2012) (setting out grounds for abandonment of permanent residence status).

¹⁰¹ See *Alaka v. Elwood*, 225 F. Supp. 2d 547, 551 (E.D. Pa. 2002) (describing configuration of airport immigration checkpoints).

¹⁰² Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.)

¹⁰³ See 8 U.S.C. § 1153(a) (2006).

¹⁰⁴ See *Visa Bulletin*, U.S. DEP'T ST., http://travel.state.gov/visa/bulletin/bulletin_1360.html# (last visited Mar. 15, 2013) (setting forth “preference cut-off dates” for visa availability).

¹⁰⁵ See 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (codifying no cap for children, parents, or spouses of U.S. citizens).

¹⁰⁶ See *id.* § 1101(a)(15) (listing the classes of nonimmigrant visas); *id.* § 1255 (codifying process of status adjustment from nonimmigrant to person admitted for permanent residence).

¹⁰⁷ See *id.* § 1227(a)(1)(c).

meantime, their presence is secure so long as they comply with the terms of the non-immigrant admission.

For noncitizens present in violation of the immigration law, the inefficiency of immigration enforcement reduces the risk of apprehension. As of 2010, almost two-thirds of the undocumented population is estimated to have been present for ten years or more.¹⁰⁸ Nationally, there are fewer than 8,000 investigations officers tasked with the identification and removal of deportable aliens,¹⁰⁹ approximately one agent for every 1,500 undocumented aliens present in the United States. Many of those agents are focused on cases involving criminal aliens and with the logistics of removing aliens subject to final removal orders.¹¹⁰ Less than seven percent of investigative work hours are directed at the interior apprehension of aliens who entered without inspection or who are otherwise out of status.¹¹¹ The Obama Administration recently adopted a major new policy under which it will, on a categorical basis, not pursue the deportation of undocumented aliens who arrived in the United States before the age of 16.¹¹² The locational security of unauthorized immigrants is compromised; at best, it results in a kind of locational limbo. But given the inefficiency and contestedness of immigration law enforcement it is less compromised than formal analytics would suggest.

Even with respect to immigration rights and locational security, the differentials among citizens, permanent resident aliens, and other aliens are better situated along a scale than in a binary system. Were one to draw a line, it would not fall along the citizen /noncitizen divide but would rather distinguish citizens and legal aliens, on the one hand, and those out of status or with no basis for securing it, on the other. Citizenship absolutely immunizes its holders from removal.¹¹³ But relative to permanent resident status, it is more a kind of insurance policy, paying off for only a small number who as permanent residents might be exposed to deportation for engaging in criminal activity.

¹⁰⁸ See Paul Taylor et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW HISPANIC CTR., PEW RESEARCH CTR. (Dec. 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/>.

¹⁰⁹ See *Department of Homeland Security Appropriations for 2012: Hearing Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 112th Cong. 16 (2011) (statement of John Morton, Ass't Sec'y of Immigration & Customs Enforcement), available at <http://www.ice.gov/doclib/news/library/speeches/031111morton.pdf>.

¹¹⁰ See ALISON SISKIN, CONGR. RESEARCH SERV., RL 33351, IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES (2006), available at <http://www.fas.org/sgp/crs/misc/RL33351.pdf>.

¹¹¹ See *id.* at 59.

¹¹² See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Services & John Morton, Dir., U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; see also Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1.

¹¹³ See 8 U.S.C. § 1231 (2006) (codifying detention and removal for aliens).

Citizenship status continues to accrue substantial benefits for some holders. For others, there will be little advantage. The franchise is the only right accruing to all who acquire citizenship status. The legal capacity to vote has dignitary value, but in the range of other channels of political influence (all of which are available to legal permanent residents) it ranks low. Although noncitizens have long enjoyed equal civil rights, the lack of citizenship historically represented a significant obstacle to economic advancement.¹¹⁴ That is less true today.

B. Obligations

If the citizenship differential is limited in the context of rights, it is negligible in the context of obligations. Most obligations to the state, including taxes and military service, are based on residence rather than citizenship status. Jury duty is the only obligation extracted from citizens only. As with rights, the trajectory points to the declining salience of citizenship status.

Citizenship status previously played a key formal role in defining the class of men subject to mandatory military service.¹¹⁵ Since the founding, noncitizens have been eligible to serve in the U.S. armed forces.¹¹⁶ Declarant aliens were subject to conscription during the Civil War and World War I.¹¹⁷ However, other noncitizens were eligible for exemption from conscription.¹¹⁸

Congress repealed the exemption possibility for aliens in 1951.¹¹⁹ Except as provided by treaty, permanent resident aliens and citizens have since been treated as equivalent for military service requirements. During the Korean and Vietnam conflicts, resident aliens were subject to the draft.¹²⁰ Today, they are subject to selective service registration requirements.¹²¹ Only nonimmigrant aliens are exempted from compulsory military service.¹²² In any case, military conscription appears increasingly improbable. In the wake of the September 11th attacks, efforts to revive the draft have failed.¹²³

¹¹⁴ See *supra* Part I.A.2.

¹¹⁵ See Charles E. Roh, Jr. & Frank K. Upham, Comment, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972).

¹¹⁶ See ANITA U. HATTIANGADI ET. AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 19, CNA (2005), available at <http://www.cna.org/sites/default/files/research/D0011092.A2.pdf> ("Non-citizens have served in the U.S. military for much of our country's history, including the War of 1812, the Civil War, and both World Wars.").

¹¹⁷ *Id.*

¹¹⁸ Exemption from conscription resulted in permanent disbarment from naturalization, pursuant to provisions that continue (superfluously) in force as part of the Immigration and Nationality Act. See 8 U.S.C. §§ 1425, 1426(a) (2006).

¹¹⁹ Act of June 19, 1951, ch. 144, Pub. L. No. 82-51, 65 Stat. 75 (codified as amended in scattered sections of 50 U.S.C. app.).

¹²⁰ Roh & Upham, *supra* note 115, at 504.

¹²¹ See 50 U.S.C. app. § 454 (2006).

¹²² *Id.* § 454(a).

¹²³ See PEW RESEARCH CTR., WAR AND SACRIFICE IN THE POST-9/11 ERA (2011),

The formal abandonment of a citizenship criterion for conscription decouples a major traditional burden of citizenship from the status.¹²⁴

Tax obligations also attach on the basis of territorial presence. Territorially resident noncitizens, regardless of status, have always been obligated to pay income taxes.¹²⁵ Noncitizens who are present in the United States for more than 183 days during a calendar year must file tax returns.¹²⁶ Except in the case of diplomats and employees of international organizations, territorially present noncitizens are also subject to social security taxes, state and local taxes, and sales taxes.¹²⁷ Noncitizens are entitled to foreign tax credits for tax payments made to nations with whom the United States has bilateral tax treaties, but so are citizens.¹²⁸ The sole major citizenship differential in the tax context relates to the estate tax. Noncitizens are ineligible for the spousal exemption upon the death of a spouse, which in the case of high-net-worth individuals could result in increased and accelerated estate tax liabilities.¹²⁹ In this respect, tax obligations fall more heavily on noncitizens than citizens (in other words, citizenship reduces the level of obligation).

Jury duty is the only differential obligation working from a citizenship criterion. Federal and state courts exclude noncitizens from jury pools.¹³⁰ With some state-level exceptions for declarant aliens, that has historically been the case.¹³¹ The exclusion may be indefensible, especially insofar as the right to trial by peers is implicated. But

available at <http://www.pewsocialtrends.org/2011/10/05/war-and-sacrifice-in-the-post-911-era/> (showing lack of public support for the draft).

¹²⁴ One could abandon one's residency status with the aim of avoiding conscription. This option would increasingly be available to the many citizens who hold alternate nationality, who could renounce U.S. citizenship if faced with the draft. See Note, *Aliens—Renunciation of Nationality Leaves Individual Stateless and Excludable as Any Alien*, 46 TUL. L. REV. 984 (1972) (describing case of Thomas Glenn Jolley, who renounced his American citizenship to avoid the draft).

¹²⁵ See, e.g., U.S. DEP'T OF TREASURY, PUBLICATION 519: U.S. TAX GUIDE FOR ALIENS (Feb. 7, 2012), <http://www.irs.gov/pub/irs-pdf/p519.pdf>.

¹²⁶ 26 U.S.C. § 871(a)(12) (2006). If an alien cannot show a "tax home" in a foreign country, she may be liable to file on the basis of presence of more than 183 days spread over a three-year period. *Id.*

¹²⁷ See, e.g., 26 U.S.C. § 3121(b)(11), (15) (2006) (defining "employee" without regard to citizenship status); *id.* § 3101 (outlining federal insurance contributions for "employees"); see also, e.g., N.M. CODER. § 3.3.7.2 (LexisNexis 2013); 34 TEX. ADMIN. CODE § 3.225(a) (2013).

¹²⁸ See U.S. DEP'T OF TREASURY, PUBLICATION 901: U.S. TAX TREATIES (Apr. 30, 2012), available at <http://www.irs.gov/pub/irs-pdf/p901.pdf>. For a list of countries with whom the United States has tax treaties, see INTERNAL REVENUE SERVICE, UNITED STATES INCOME TAX TREATIES A TO Z (2012), <http://www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z>.

¹²⁹ See 26 U.S.C. § 2056(d) (2006).

¹³⁰ See Amy R. Motomura, Note, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503, 1504 & n.1 (2012).

¹³¹ See generally *id.*

in any case, it does not create a significant gap between citizens and noncitizens for purposes of obligations to the state.

The thinness of citizenship-dependent obligations lowers the cost of naturalization for permanent resident aliens. On the benefits side, citizenship has in recent years retained some appeal as a defensive investment against the possibility of deportation and the deprivation of federal public benefits. That may have contributed to the spike in naturalization applications through the mid-1990s.¹³² But as anti-immigrant sentiments subside, the long-term value added in citizenship may not balance out \$700 in naturalization costs.¹³³

II. RIGHTS AND OBLIGATIONS BEYOND BORDERS

The discussion thus far has focused on rights and obligations as they apply within the territorial United States. Some rights and obligations have been determined on the basis of citizenship status regardless of location. Citizenship appears more consequential in an extraterritorial frame. However, when contextualized by other sources of rights and obligations, the differential is mitigated.

A. Rights

At one time, the most important benefit of U.S. citizenship took the form of diplomatic protection, under which citizens were entitled to use the U.S. government as a shield against mistreatment by foreign governments.¹³⁴ Outside the territorial United States, this right presented a valuable commodity.¹³⁵ The institution of diplomatic protection, as delimited by international law, predicated the dictum that all rights are national rights.¹³⁶ Sovereigns were unconstrained in the treatment of their own nationals and stateless individuals but were circumscribed in their treatment of the nationals of other states. In the nineteenth and early twentieth centuries, a U.S. passport permitted an individual to invoke the government's protection in the international context.¹³⁷ With a short-lived, limited exception for a small number of declarant resident aliens, these rights were available to citizens alone.¹³⁸

¹³² See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 52 (2012), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

¹³³ See U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., Current Naturalization Fees, Form M-479 (Nov. 23, 2010) (listing naturalization fees of \$680 per applicant).

¹³⁴ See Edwin Borchard's magisterial treatise, which uses diplomatic protection as a vehicle for addressing international law generally. See EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915).

¹³⁵ *Id.* at 25–26.

¹³⁶ See HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 275–76 (2d ed. 1968).

¹³⁷ See generally CRAIG ROBERTSON, THE PASSPORT IN AMERICA (2010).

¹³⁸ See 3 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW § 502 (1906) (describing practice under which declarant aliens were eligible for passports).

The citizenship criterion remains in place today for passport eligibility.¹³⁹ The U.S. government will intercede more vigorously for its own citizens than for others. But the value of diplomatic protection has declined in the face of international human rights. Previously, diplomatic protection was an individual's only recourse for constraining other sovereigns.¹⁴⁰ Today, personhood, rather than citizenship status, presents a substantial restraint against mistreatment by governmental authorities. Moreover, U.S. authorities are increasingly willing to intercede on behalf of permanent resident aliens in some cases.¹⁴¹

Relatedly, consular assistance abroad remains available exclusively to citizens.¹⁴² Citizens are enabled, for example, to turn to U.S. consular representatives abroad when detained by foreign authorities.¹⁴³ However, budgetary pressures have diminished such consular efforts on behalf of U.S. citizens.¹⁴⁴ U.S. citizens abroad have also turned to U.S. authorities for evacuation from dangerous conflict situations.¹⁴⁵ But these evacuation operations have also been pared down.¹⁴⁶ Many U.S. citizens in these situations have been better served by crisis insurance policies subscribed to by employers or universities.¹⁴⁷ In other words, the U.S. government is the protector of last, rather than first, resort.¹⁴⁸ A U.S. passport still provides value to its holder abroad. As a correlate

¹³⁹ See 22 C.F.R. § 51.2(a) (2012) ("A passport may be issued only to a U.S. national.").

¹⁴⁰ See BORCHARD, *supra* note 134.

¹⁴¹ For example, with respect to China. See, e.g., Craig S. Smith, *Two Chinese Residents of U.S. Sentenced to Prison by Beijing*, N.Y. TIMES, July 25, 2001, at A1. European states have undertaken diplomatic efforts on behalf of noncitizen residents detained at Guantánamo Bay. See, e.g., C.R.G. Murray, *The Ripple Effect: Guantánamo Bay in the United Kingdom's Courts*, 1 PACE INT'L L. REV. ONLINE COMPANION 15 (2010), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1009&context=pilronline>.

¹⁴² See 22 C.F.R. § 71 (2012) (detailing protection of Americans abroad). On the distinction between diplomatic protection and consular assistance, see Annemarieke Künzli, *Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance*, 66 HEIDELBERG J. INT'L L. 321 (2006).

¹⁴³ See 22 C.F.R. § 71.1 (2012).

¹⁴⁴ See, e.g., Mary Jordan, *Unknown and Alone in Mexico*, WASH. POST, Aug. 9, 2003, at A1 (reporting consular inattention to Americans in Mexican prisons).

¹⁴⁵ See Exec. Order No. 12656, sec. 1301(f), 3 C.F.R. 585 (1988) (giving lead responsibility to Department of State for protection and evacuation of U.S. citizens and nationals abroad and safeguarding their property abroad).

¹⁴⁶ See Lee Hudson Teslik, *The Easy Way Out*, DAILY BEAST (July 25, 2006), <http://www.thedailybeast.com/newsweek/2006/07/25/the-easy-way-out.html> (observing that private entities more efficiently evacuate U.S. citizens than the government).

¹⁴⁷ *Id.* (comparing evacuations from the conflict situation in Lebanon in 2006 undertaken by private firms against those undertaken by U.S. government).

¹⁴⁸ It seems increasingly plausible to situate assistance to citizens in the context of an emerging "responsibility to protect" regardless of citizenship status. See U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009). Under this doctrine (which does not yet represent hard international law), governments have an obligation to protect persons in other countries against humanitarian disasters where they have the

to locational security, U.S. citizens outside the United States have an absolute right of reentry.¹⁴⁹ But in other respects the value has degraded.

Citizens abroad have also enjoyed formal protection against mistreatment by the U.S. government, rights not always extended to noncitizens. Citizens are entitled to constitutional protections against U.S. government action regardless of their location where nonresident noncitizens are entitled to few. In *Reid v. Covert*,¹⁵⁰ the Supreme Court in effect established the portability of the Bill of Rights for citizens.¹⁵¹ In *United States v. Verdugo-Urquidez*,¹⁵² by contrast, the Court held that nonresident noncitizens do not enjoy a Fourth Amendment right against unreasonable searches and seizures undertaken abroad by American law enforcement authorities.¹⁵³ The doctrine pointed to a putative binary in which citizens are extended all rights, noncitizens none.¹⁵⁴

However, the formal differential may be mitigated through the application of other sources of protection. *Verdugo-Urquidez* bracketed the applicability of constitutional rights to permanent resident aliens temporarily outside the United States.¹⁵⁵ Even with respect to others (noncitizen, nonpermanent residents), U.S. law enforcement will exploit the nonapplicability of rights only where it can be confident that they are in fact dealing with nonresident noncitizens. Many other countries constrain law enforcement along the lines of the Fourth Amendment.¹⁵⁶ In most cases, U.S. authorities will have to play by these rules when participating in enforcement operations in those countries.¹⁵⁷ Protection against arbitrary investigative activity is an emerging entitlement under

capacity to do so. *Id.* For present purposes, that would mean that a noncitizen nonresident would enjoy a right to assistance from the U.S. government notwithstanding the absence of any preexisting connection.

¹⁴⁹ *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (acknowledging that citizens have an absolute right to reenter the United States). This right has been compromised in practice where U.S. citizens seeking to return from abroad have found themselves on “no fly” lists barring air travel. *See, e.g.*, Scott Shane, *An American Abroad May Remain So Until He’s Off the No-Fly List*, N.Y. TIMES, June 16, 2010, at A6 (reporting on a 26-year-old Muslim-American man, who is on the “no-fly list,” preventing him from returning from Yemen to Virginia).

¹⁵⁰ 354 U.S. 1 (1957).

¹⁵¹ *Id.* (holding that a Sixth Amendment right to trial by jury applies in U.S. prosecution of a servicemember’s spouse abroad); *see also* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 cmt. b. (1987).

¹⁵² 494 U.S. 259 (1990).

¹⁵³ *Id.*

¹⁵⁴ *See, e.g.*, KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?* (2009) (describing membership theory of extraterritorial constitutional application); Eric A. Posner, Boumediene and the Uncertain March of Judicial Cosmopolitanism, 2007–2008 CATO SUP. CT. REV. 23, 25–26 (“People in the American political community are entitled to certain rights that are denied to those outside it.”).

¹⁵⁵ *See Verdugo-Urquidez*, 494 U.S. at 261.

¹⁵⁶ *See generally* HUMAN RIGHTS IN CRIMINAL PROCEDURE (John A. Andrews ed., 1982).

¹⁵⁷ *See* Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT’L L. 329 (1994).

international law.¹⁵⁸ Nonresident noncitizens who do not enjoy Fourth Amendment coverage may get the same protection from other bodies of law, ones that constrain U.S. enforcement activities on foreign soil. Meanwhile, the courts have found other constitutional rights, including the Fifth Amendment, to extend to noncitizens outside of the United States.¹⁵⁹

Similarly, citizenship represents added value, of an incremental nature, in the context of post-9/11 extraterritorial enforcement against terrorism. The United States has undertaken the targeted killing of U.S. citizens located abroad who are suspected of al-Qaeda membership and not subject to apprehension.¹⁶⁰ Citizenship has afforded no judicial process to those individuals, although it does appear to trigger higher levels of intra-executive branch scrutiny.¹⁶¹ Justice Kennedy's opinion in *Boumediene v. Bush*¹⁶² included citizenship status as a factor in considering extraterritorial application of habeas corpus, but the noncitizen detainee petitioner in that case was extended the writ nonetheless.¹⁶³ Citizens are insulated from detention at Guantánamo and from prosecution before military commissions.¹⁶⁴ In that respect, citizenship affords protection to its holders relative to noncitizens. However, both Guantánamo and the military commissions may represent legacy practices to be wound down rather than ramped up. They are being put to work only with respect to individuals already in the system.¹⁶⁵ If so, this differential may lose salience. Yaser Hamdi may be the only individual clearly to benefit from his citizenship in this context.¹⁶⁶

¹⁵⁸ See International Covenant on Civil and Political Rights, art. 17, Dec. 19, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171.

¹⁵⁹ See, e.g., *United States v. Bin Laden*, 92 F. Supp. 2d 225, 241 (S.D.N.Y. 2000) (finding the Fifth Amendment to apply in interrogation undertaken outside the United States).

¹⁶⁰ See, e.g., David Cole, *Killing Our Citizens Without Trial*, N.Y. REV. BOOKS (Nov. 24, 2011), available at <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/>.

¹⁶¹ See Charlie Savage, *Top U.S. Security Official Says 'Rigorous Standards' Used for Drone Strikes*, N.Y. TIMES, May 1, 2012, at A8.

¹⁶² *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding enemy combatants detained at Guantánamo Bay have a habeas corpus privilege).

¹⁶³ *Id.* at 2253.

¹⁶⁴ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600 (codified at 10 U.S.C. § 948c (2006)). In the case of citizen Jose Padilla, the Bush Administration claimed a power to hold suspected terrorist citizens apprehended in the United States in military detention, although it evaded a test of his detention in the Supreme Court by shifting him to prosecution through ordinary federal criminal processes on terrorist conspiracy charges. See Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. TIMES, Jan. 5, 2006, at A22.

¹⁶⁵ See Charlie Savage, *At Guantánamo, Trial for 9/11 Defendants, and for a Revamped Tribunal*, N.Y. TIMES, May 5, 2012, at A13.

¹⁶⁶ Hamdi was detained at Guantánamo prior to the discovery of his citizenship status, at which point he was relocated to a military brig in the United States. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). The U.S. government nonetheless sought to detain him there without

Public benefits, meanwhile, remain keyed to territorial presence in a way that does not favor nonresident citizens over nonresident noncitizens. As a general matter, U.S. citizens resident outside the United States are ineligible for such benefits as Medicare,¹⁶⁷ SSI,¹⁶⁸ food stamps,¹⁶⁹ and TANF.¹⁷⁰ On the other hand, benefits on an individualized pay-in basis, such as Social Security, are not always contingent on continued residence and are not citizenship contingent.¹⁷¹

Finally, even political rights can be plotted in scalar terms. Citizens resident abroad, including those holding multiple nationalities, are guaranteed the right to vote in federal elections.¹⁷² External citizen voting was centered by the 2000 presidential election.¹⁷³ As described above, permanent resident aliens do not enjoy the franchise but are permitted to give money.¹⁷⁴ Although they must maintain legal residence in the United States by way of retaining permanent residence status, the status is consistent with maintaining significant links to other states, including citizenship and property ownership.¹⁷⁵ Nonresident noncitizens can neither vote¹⁷⁶ nor give money.¹⁷⁷ But that

process. *Id.* at 510–11. That effort that was rebuffed by the Supreme Court, which required the extension of some process to him as a citizen detainee. *Id.* at 533 (“We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”). Hamdi was thereafter released to Saudi Arabia, in part on the condition that he renounce his U.S. citizenship. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

¹⁶⁷ 42 U.S.C. § 1395o(2) (2006).

¹⁶⁸ *See id.* § 1382(f).

¹⁶⁹ 7 C.F.R. § 273.3(a) (2012) (requiring that an applicant reside in participating state).

¹⁷⁰ *See, e.g.*, 40 TEX. ADMIN. CODE § 372.251 (2013) (requiring Texas residence for TANF eligibility).

¹⁷¹ *See* DAWN NUSCHLER & ALISON SISKIN, CONGRESSIONAL RESEARCH SERV., RL32004, SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION (2005), available at <http://fpc.state.gov/documents/organization/46681.pdf>.

¹⁷² *See* Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-1 (2006).

¹⁷³ *See* David Barstow & Don Van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at 1.

¹⁷⁴ *See supra* Part I.A.4.

¹⁷⁵ An LPR can lose permanent residence status by a prolonged absence from the United States. *See supra* note 100.

¹⁷⁶ *See* 18 U.S.C. § 611(a) (2006) (stating that aliens cannot vote in federal elections). For an argument that the franchise should be extended universally for purposes of U.S. presidential elections, see Frances Stead Sellers, *A World Wishing to Cast a Vote*, WASH. POST, Nov. 21, 2004, at B1.

¹⁷⁷ *See* Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL’Y REV. 503, 503–04 (1997). Foreign campaign contributions are permitted in some other major democracies. *See Campaign Finance: Comparative Summary*, L. LIBR. CONGRESS (July 25, 2012), <http://www.loc.gov/law/help>

does not translate into a lack of political influence. Foreign citizens can retain lobbying firms to make their case to legislative and other officials.¹⁷⁸ Through organizational membership, both corporate and NGO, they can indirectly affect U.S. decisionmaking.

B. Obligations

With respect to extraterritorial obligations, there are two respects in which citizenship makes a difference. First, some laws apply extraterritorially to citizens, the so-called nationality basis for jurisdiction under international law.¹⁷⁹ For example, citizens are subject to criminal prosecution for certain activities relating to sex tourism outside the United States.¹⁸⁰ However, the number of these statutes is small, and most cover extreme conduct.¹⁸¹ Although the citizen located outside the United States has the formal obligation to comply with these statutes, the burden is insignificant.¹⁸²

Much more significant are tax obligations that follow U.S. citizens to residence beyond the territorial United States. U.S. citizens abroad must file federal income tax returns.¹⁸³ In past years, this requirement has been nontrivial but not onerous. In most cases, U.S. citizens have been able to credit tax payments made in their country of residence against U.S. federal income tax obligations, with the result that tax due is reduced or eliminated.¹⁸⁴ For high-net-worth individuals, the estate tax presented a major potential liability contingent on citizenship status.¹⁸⁵ In most cases, however, tax filing requirements appear not to have provoked major resistance among U.S. citizens outside the United States.

/campaign-finance/comparative-summary.php (noting legality in some circumstances of campaign contributions by foreigners in Australia, Germany, and France); *see also* Chaim Levinson, *More Than Half of Contributions to Israeli Politicians Come from Foreign Donors*, HAARETZ (Oct. 12, 2012), <http://www.haaretz.com/news/elections/more-than-half-of-contributions-to-israeli-politicians-come-from-foreign-donors.premium-1.469542>.

¹⁷⁸ *See* 22 U.S.C. §§ 611–621 (2006) (regulating lobbying on behalf of foreign governments); *see also* Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 1 (2012) (describing various cross-national influences on U.S. elections).

¹⁷⁹ *See* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 182 (2010).

¹⁸⁰ *See, e.g.*, 18 U.S.C. § 2423(b) (2006) (proscribing citizens from traveling “in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person”).

¹⁸¹ *See* Meyer, *supra* note 179, at 182–83 (listing laws applying extraterritorially to U.S. persons only, involving, for instance, the use of chemical or biological weapons).

¹⁸² *See id.*

¹⁸³ 26 U.S.C. § 61 (2006).

¹⁸⁴ Citizens abroad may exclude their foreign earned income from their gross income. *See* 26 U.S.C. § 911(a)(1) (2006).

¹⁸⁵ *See* ROBERT C. LAWRENCE III, INTERNATIONAL TAX AND ESTATE PLANNING 82–84 (1983).

The adoption of the Foreign Account Tax Compliance Act (FATCA)¹⁸⁶ has increased the burden substantially.¹⁸⁷ The law does not change the effective tax rate paid by U.S. citizens abroad.¹⁸⁸ However, it imposes additional filing requirements for foreign account holders.¹⁸⁹ It also imposes additional requirements for financial institutions hosting accounts owned by U.S. citizens.¹⁹⁰ The measures were aimed at offshore accounts held by persons resident in the United States, but by their terms also apply to U.S. citizens residing abroad.¹⁹¹ The IRS appears poised to pursue underreported income by nonresident citizens.¹⁹² FATCA has provoked a backlash among U.S. citizens abroad.¹⁹³ The new approach to extraterritorial tax collection represents a significant obligation not imposed on noncitizen, nonpermanent residents outside the United States, which is a high citizenship differential.

It is not clear that the FATCA regime is sustainable. The United States is the only country in the world (other than Eritrea) that imposes taxes on external citizens.¹⁹⁴ The regime is opposed not just by individual taxpayers but also by powerful financial institutions.¹⁹⁵ Other governments are negotiating FATCA enforcement regimes with U.S. authorities,¹⁹⁶ but some have balked,¹⁹⁷ and the bilateral infrastructure remains fragile. Many U.S. citizens outside of the United States will evade enforcement.¹⁹⁸

¹⁸⁶ This Act was part of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501, 124 Stat. 71 (2010). See Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 722 n.201 (2012).

¹⁸⁷ See Morse, *supra* note 186, at 700–01.

¹⁸⁸ See U.S. DEP'T OF TREASURY, *supra* note 125.

¹⁸⁹ *Id.*

¹⁹⁰ See Morse, *supra* note 186, at 700–01.

¹⁹¹ See U.S. DEP'T OF TREASURY, INSTRUCTIONS FOR FORM 8938 (Jan. 9, 2013), available at <http://www.irs.gov/pub/irs-pdf/i8938.pdf>.

¹⁹² See David Jolly, *Law Adds to Tax Burden for Americans Overseas*, N.Y. TIMES, Apr. 16, 2012, at B9.

¹⁹³ See, e.g., Brian Knowlton, *Many Americans Abroad Surprised By Tax Code's Nasty Bite*, N.Y. TIMES, May 10, 2012, <http://www.nytimes.com/2012/05/11/us/11iht-expats11.html?pagewanted=all>.

¹⁹⁴ John D. McKinnon, *Tax History: Why U.S. Pursues Citizens Overseas*, WALL ST. J. BLOG (May 18, 2012, 4:39 PM), <http://blogs.wsj.com/washwire/2012/05/18/tax-history-why-u-s-pursues-citizens-overseas/>.

¹⁹⁵ See, e.g., John D. McKinnon, *Tax Rule Provokes Foreign Banks' Ire*, WALL ST. J., May 12, 2012, at A2.

¹⁹⁶ See U.S. Dep't of Treasury, Press Release, Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden (July 26, 2012), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx>.

¹⁹⁷ See, e.g., David Jolly & David Knowlton, *Law to Find Tax Evaders Denounced*, N.Y. TIMES, Dec. 27, 2011, at B1 (stating that the law may be financially burdensome on foreign countries).

¹⁹⁸ The complicated law may also result in accidental non-compliance. See *id.*

The United States has no inventory of citizens located outside of the United States; in many cases, the IRS will have difficulty identifying covered individuals.

Even if FATCA survives, it may supply evidence that U.S. citizenship cannot bear the weight of differential obligations. Pre-FATCA, the cost of retaining U.S. citizenship was low. Now that FATCA has raised the price, an increasing number of individuals located outside the United States are renouncing their U.S. citizenship.¹⁹⁹ This is the mirror image of the cost-benefit rationale noted above with respect to naturalization. The calculation highlights the minimal advantages of external citizenship. If the maintenance of citizenship outside the United States implicated high differential benefits, high differential obligations could be imposed without provoking individual exit.

CONCLUSION: REVERSING CONVERGENCE?

This Essay has described the converging position of citizens and noncitizens with respect to rights and obligations. A trope of public discourse, “the rights and obligations of citizenship”²⁰⁰ has become a largely empty proposition. The diminishing differential between citizens and noncitizens suggests that citizenship is a less robust form of association. If citizenship does not meaningfully coincide with actual community, it is unlikely to be determinative of rights and duties.

Nor are strategies for revaluing citizenship likely to work. Linda Bosniak powerfully proposes the normative concept of “the citizenship of aliens,” in which citizenship’s equality norm is reborn through territorial rather than status definition.²⁰¹ The boundaries of citizenship are in effect redrawn to include not just formal citizens but others also territorially present. The redrawing is accomplished not through the extension of citizenship status itself (as other liberal theorists have proposed),²⁰² but through the extension of rights and elimination of obligations attaching to the status. This framing would sanctify the legal grouping of resident aliens with citizens, as so much of the law already does.

The “citizenship of aliens” is unlikely to reinscribe citizenship solidarities. The paradox of the juxtaposition cancels out any expressive value in the status; citizenship status loses its place as a focal point. This difficulty is compounded insofar as the concept encompasses undocumented immigrants. Territorial delimitation of community, moreover, no longer works especially well in an era of circular and return migration.²⁰³

¹⁹⁹ See Brian Knowlton, *More American Expatriates Give up Citizenship*, N.Y. TIMES, Apr. 25, 2010, <http://www.nytimes.com/2010/04/26/us/26expat.html>.

²⁰⁰ PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 81 (2008).

²⁰¹ See Linda S. Bosniak, *The Citizenship of Aliens*, 56 SOC. TEXT 29 (1998); see also T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 151–81 (2002).

²⁰² See RUTH RUBIO-MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE (2000) (proposing that citizenship automatically be extended to immigrants upon ten years of residence).

²⁰³ This challenges Ayelet Shachar’s similar conception of *jus nexi* basis for citizenship, in which territorial presence and the social connection putatively associated with it becomes

Presence does not correlate with community (nor does absence preclude it). Hence the sort of bleeding over boundaries as well as citizenship status described above.

More directly, the differential in rights and obligations could be restored with the object of restoring citizenship itself. Making citizenship legally more consequential, it might be supposed, would intensify citizenship solidarities. The more citizenship gets you and the more it asks of you, the more meaningful it will be. This is the premise of political invocations of the status; citizenship is important precisely because it requires mutual sacrifice at the same time that it extends special benefits to its holders.

But this strategy reverses the causation. Citizenship is able to sustain a meaningful differential (among citizens relative to the rest of the world) in line with social solidarities on the ground. The consequentiality of citizenship status more reflects those solidarities than manufactures them. At the margins, the rights/obligations differential might enhance the sense of community felt among members on a club model. But community is unlikely to be shored up through citizenship law.

the basis for allocating citizenship status. *See* AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY* 164–65 (2009).