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# EUDO CITIZENSHIP OBSERVATORY

## *REPORT ON CITIZENSHIP LAW: UNITED STATES OF AMERICA*

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July 2015



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European University Institute, Florence  
Robert Schuman Centre for Advanced Studies  
EUDO Citizenship Observatory

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EUDO Citizenship Observatory  
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# Citizenship Law

## United States of America

*Peter J. Spiro*

### 1 Introduction

The United States has a liberal citizenship tradition. With the important exception of racial qualifications, which were not fully eliminated from the nationality law until 1952, barriers to citizenship have been low. Since the adoption of the Fourteenth Amendment to the US Constitution in 1868, the United States has maintained a near-absolute rule of territorial birthright citizenship. Naturalisation requirements have been and continue to be satisfied by permanent residents in most cases upon satisfaction of durational residency requirements. Citizenship law has remained stable in recent decades, for the most part insulated from highly charged debates over immigration policy. Restrictionist successes with respect to immigration policy have not translated into tightened access to citizenship. The parameters of citizenship acquisition have been largely uncontested for more than a century and a half.

As a historical matter, citizenship's low profile is attributable to the country's immigration roots. Immigration to the United States was open until towards the end of the nineteenth century. Those who came to the United States were assumed to stay. The legal assimilation of immigrants was facilitated by easy access to citizenship. To speed the process, distinctions in legal rights between citizens and non-citizens were minimised. Race aside, the most heated citizenship controversies in the nineteenth and early twentieth centuries involved the expatriation of citizens who returned to their homelands. With the imposition of immigration controls, the United States moved to more of a Walzerian paradigm in which barriers to territorial entry were raised but barriers to citizenship remained low. This paradigm served American notions of equality and self-governance until porousness at the border destabilised the model. A nascent debate over the citizenship eligibility of immigration law violators may fuse the issues on the question of whether or not those whose status was to be regularised would be put on a 'path to citizenship.' That could recentre citizenship on the political landscape by linking it more visibly to immigration reform. Otherwise, although some marginal aspects of citizenship have been the subject of recent controversies, citizenship is likely to remain a low intensity issue for the foreseeable future.

## 2 Historical background

At independence from the United Kingdom, the United States inherited a common law approach to citizenship elevating the place of territorial birthright citizenship. In the face of the racial contradictions that could not be resolved at the time of the adoption of the Constitution, birthright citizenship was left uncodified until after the Civil War. By the late nineteenth century, the reach of constitutionally-based jus soli was extended to persons born in the United States except Native Americans and those resident in overseas territorial possessions, both of which communities were later extended birthright citizenship through statutory enactments. Naturalisation, meanwhile, was subject to racial qualifications through the mid-twentieth century. In the absence of an ethnic identity, naturalisation has otherwise been chiefly predicated on durational residency. The lack of an ethnic identity has also explained limitations on jus sanguinis citizenship beyond the first generation born and resident abroad. Expatriation criteria were contested in the context of immigrants who returned to their countries of origin, prompting serious bilateral diplomatic disputes with European states.

### 2.1 *The common law tradition and jus soli*

In its early decades, the United States applied the common law rule of Lord Coke's definitive opinion in the 1608 ruling in *Calvin's Case*, which had pronounced a rule of jus soli for the United Kingdom. The rule was uncontested in the United States as it applied to white inhabitants (Price 1997). The prospect of its extension to black inhabitants precluded its codification, however. Slaveholding states of the southern United States rejected the possibility of national citizenship for black inhabitants even if born free in non-slaveholding jurisdictions. Abolitionist interests in the North, meanwhile, would have refused any express disqualification of free blacks. As a result, at the time of its adoption in 1789 the Constitution of the United States was silent on the parameters for the acquisition of citizenship at birth. Addressing the question in the context of whether a black inhabitant qualified as a citizen for purposes of federal court jurisdiction, the Supreme Court held in its 1857 ruling in the *Dred Scott* case that blacks were incapable of holding national citizenship. The decision was a major contributing factor to the outbreak of the Civil War in 1861.

*Dred Scott* also supplied the primary motivation for the adoption of Fourteenth Amendment to the Constitution in 1868. Its so-called Citizenship Clause provides that 'All persons born and naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' The Fourteenth Amendment established the right of black inhabitants to birthright citizenship while incidentally confirming the common law rule with respect to white inhabitants. Less clear was its application to three other groups: the children of non-white immigrants barred from naturalisation; members of the indigenous Native American tribes; and those born in territorial possessions of the United States.

In its 1898 decision in *Wong Kim Ark*, the Supreme Court found the Citizenship Clause to extend to the children of all non-citizen immigrants, 'affirm[ing] the ancient and fundamental rule of citizenship by birth within the territory,' including the children of immigrants disqualified from naturalisation. (The case involved an individual whose Chinese immigrant parents were subject to racial bars on naturalisation.) The Court found that the amendment was meant to codify the prevailing common law rule of jus soli,

extending it to blacks without derogating from its application to other groups. The Court was not so much concerned with the children of Chinese immigrants as with the children of unnaturalised European immigrants. ‘To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries,’ observed the Court, ‘would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage who have always been considered and treated as citizens of the United States.’ The decision confirmed *jus soli* as a mechanism for incorporating immigrant populations.

The Supreme Court had meanwhile found the Fourteenth Amendment not to cover indigenous Native Americans born to tribal members on US soil in the 1884 decision in *Elk v. Wilkins*. The Court found those born to the tribes not ‘subject to the jurisdiction’ of the United States insofar as they owed direct allegiance to their tribes. Native American tribes were deemed ‘alien nations, distinct political communities. . . . The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.’ Native Americans who exited tribal jurisdiction could secure citizenship through naturalisation only. In some cases, tribes were naturalised on a collective basis. These practices evidenced an understanding, confirmed by the Court in the *Elk* decision, that birthright citizenship did not extend to tribal members.

Finally, in a series of decisions collectively known as the *Insular Cases*, the Supreme Court found territorial possessions not on a trajectory to statehood to be outside ‘the United States’ for constitutional purposes, including for purposes of the Fourteenth Amendment. Individuals born in these so-called ‘unincorporated territories’ or ‘insular possessions’ did not acquire US citizenship at birth. Most important among these territories were Spanish colonies acquired at the conclusion of the Spanish-American War in 1898 – the Philippines, Puerto Rico, and Guam – along with the US Virgin Islands, purchased from Denmark in 1916. Those born in unincorporated territories were eligible to hold US passports and entitled to the diplomatic protection of US authorities in foreign countries (Van Dyne 1904, Borchard 1915). Those born in unincorporated territories are understood to have been nationals of the United States, although it is not clear that they were ever formally designated as such. Although they were not subject to race-based immigration restrictions, residents of the territories were not guaranteed free movement in the United States. Filipinos were designated as aliens by Congress in 1934.

Congress extended birthright citizenship by statute in those territories that remained US possessions. In 1917, the Jones Act extended citizenship to those born in Puerto Rico; similar measures followed for the Virgin Islands and Guam. In 1924, the Indian Citizenship Act extended citizenship to all Native Americans born in the territorial United States. The *Insular Cases* remained applicable to the Philippines until its independence in 1946, at which point the US identity of its inhabitants (however defined) was extinguished. Today, only persons born in American Samoa are nationals but not citizens at birth. The distinction between nationality and citizenship is thus significant only at the far territorial margins.

## 2.2 *Jus sanguinis* citizenship

The first federal Congress in 1790 adopted a statute extending citizenship to the children of US citizen fathers, with the proviso that ‘the right of citizenship shall not descend to persons whose fathers have never resided within the United States.’ The *jus sanguinis* regime under US law reflected a conception of American citizenship decoupled from ethnicity or bloodline, hence the limitations on descent beyond the first generation. An 1802

reenactment restricted (through what appears to have been a quirk in legislative drafting) jus sanguinis citizenship to the children of citizen fathers as of the date of the statute (in other words, persons acquiring citizenship after 1802 could not pass citizenship to children born abroad). The cut-off was eliminated with legislation enacted in 1855.

The sex discriminatory element of the jus sanguinis regime was typical of state practice prior to the twentieth century. Patrilineal descent reflected the principle of ‘marital unity’ under which fathers determined the nationality of their wives and children. It was also aimed at reducing the incidence of dual nationality (Bredbenner 1998). Insofar as most states adopted the patrilineal orientation, fewer individuals would have dual citizenship at birth as the result of mixed nationality parentage. US law was amended in 1934 to allow descent through both citizen mothers and fathers, in part to conform US practice to the regional Montevideo Convention prohibiting sex distinctions for purposes of nationality law.

The same 1934 legislation tightened the conditions for jus sanguinis. In cases in which both parents were citizens, citizenship passed to a child born outside the United States if either parent had at any time been resident in the United States prior to the birth of the child. Children born to one citizen and one non-citizen parent outside the United States could retain citizenship only if the child maintained five years’ continuous residence immediately before turning 18 and the taking of an oath of allegiance to the United States within six months after turning 21. The 1940 Nationality Act modified the condition subsequent to require five years’ residence between the ages of 13 and 21, with exceptions for those whose US-citizen parent was employed abroad by a US-based entity. The 1952 act allowed the requirement to be satisfied with five years’ presence (as opposed to residence) prior to the age of 28, eliminating the exemption where a child’s parents were employed by US entities. The Supreme Court upheld this requirement against constitutional challenge in its 1972 decision in *Rogers v. Bellei* on the theory that jus sanguinis citizenship was extended as a matter of statutory grace and not subject to constitutional constraint.

Meanwhile, the 1940 act also made citizenship by descent contingent on ten years’ residence in the United States on the part of the citizen parent (five years of which had to be after the age of 16) prior to the birth of the child. This precluded citizenship by descent in many cases of circular migration in which persons born in the United States relocated to their parents’ homelands during childhood. The children of citizens who departed the United States as minors would in many cases be disqualified from jus sanguinis citizenship for failure to satisfy the parental residency requirement. Limitations on jus sanguinis birth citizenship have since been relaxed, as described below. But the jus sanguinis regime continues to use periods of territorial presence as a proxy for other unavailable markers of community membership.

Although facially neutral in terms of race, the jus sanguinis regime was not always applied in a race-neutral fashion. Through administrative practice, in cases of children born out of wedlock, citizenship was deemed to descend through citizen mothers but not citizen fathers. This practice, coupled with a refusal to recognise marriages in non-Christian countries, tended to exclude mixed-race progeny as US citizen men pursued commercial enterprises and participated in military operations in non-European contexts. The result partially replicated the exclusion of Asians from naturalisation (Collins 2014). The Nationality Act of 1940 codified the practice, allowing citizenship to descend to nonmarital children only through US citizen mothers. Only in 1986 was the Nationality Act amended to allow nonmarital children of citizen fathers to acquire citizenship through descent, and then

only upon the satisfaction of additional requirements not applicable to nonmarital children of citizen mothers.

### 2.3 Naturalisation

Consistent with its immigrant origins, the United States has through most of its history maintained low barriers to naturalisation. Consistent with the country's troubled engagement with race, the naturalisation regime has also been heavily inflected with racial criteria.

The US Constitution expressly allocated the naturalisation power to the federal government, giving Congress the power to 'establish a uniform rule of naturalization.' Prior to the Constitution's ratification in 1789, states had adopted variable standards for the extension of citizenship to immigrants. Some states proved lax gatekeepers of national citizenship. (Kettner 1978; Zolberg 2006). In its first session in 1790, Congress provided for the naturalisation of 'free white persons' upon two years' residence in the United States, a showing of good moral character, and the taking of an oath to support the Constitution. In 1795, the residency requirement was raised to five years. With the exception of the period from 1798-1802, during which the Alien and Sedition Acts raised the residency requirement to fourteen years, the default residency requirement (now with a number of exceptions) has remained at five years ever since. The residency requirement was conceived by the founding generation as a necessary predicate to the responsible exercise of political rights attendant to citizenship. This was accentuated by the relatively exceptional place of democracies in an eighteenth century context. In the 1795 debate, for example, one member of Congress argued against 'the rash theory, that the subjects of all Governments, Despotic, Monarchical, and Aristocratical, are, as soon as they set foot on American ground, qualified to participate in administering the sovereignty of our country' (Spiro 1999).

In the wake of the Civil War and the adoption of the Fourteenth Amendment, in 1870 Congress provided for the naturalisation of 'aliens of African nativity and to persons of African descent.' That still left everyone in between white and black ineligible for citizenship acquired after birth. East Asians were the primary target of ineligibility. As part of the infamous Chinese Exclusion Act of 1882, Chinese individuals were expressly barred from naturalisation. Japanese were also understood to be ineligible as non-white. Determination of the status of other ethnicities generated an unseemly eugenics-oriented jurisprudence of whiteness through the late nineteenth into the twentieth century. Mexicans and Middle Easterners were deemed white and naturalisation-eligible. Not so for South Asians, barred by the Supreme Court in the case of *Bhagat Singh Thind*, which defined 'white' according to 'the understanding of the common man' (Haney-Lopez 1997). The geopolitics of World War II demanded the scaling back of the racial qualifications. Chinese nationals became eligible in 1943, Filipinos and South Asians in 1946. The final racial bar – against Japanese aliens – was repealed only in 1952.

The racial exclusions ramified for other status purposes. Although non-citizens historically suffered fewer legal disabilities than in countries lacking an immigration tradition, some states of the United States discriminated particularly against 'aliens ineligible to naturalise' for such purposes as land ownership and professional licensing. Although facially neutral, these regimes had the effect of discriminating on the basis of race (the effect was particularly pronounced on the West Coast, with a large resident population of East Asian non-citizens). The naturalisation process included a two-step process as part of which aliens were required to declare their intent to naturalise as a condition to naturalisation (Motomura 2006). The declaration could be filed two years after entry, three



years before they became eligible for citizenship. So-called ‘declarant aliens’ were privileged under state and federal law. Declarant aliens were eligible to vote in many states, for instance, and could claim free land under federal homestead allowances. Since non-whites could not naturalise, they could not declare an intent to naturalise, and were thus denied these benefits. The declaration of intent was abandoned as a statutory requirement only with the repeal of the race-based naturalisation criteria in 1952.

Requirements beyond residency, good character, and whiteness were added in the early twentieth century. In 1906, applicants were required to demonstrate the capacity to speak the English language. The measure was highly contested. (The United States does not have an official language, and the naturalisation requirement is probably the most important language qualification in US law.) The language requirement was broadened in 1950 to include the capacity to read and write ‘words in ordinary usage in the English language.’ The 1950 act also added a so-called civics requirement, requiring applicants to demonstrate a knowledge of US history and governance. The requirement had its roots in the condition, dating back to 1795, that naturalisation applicants show an ‘attach[ment] to the principles of the constitution of the United States.’ Some judges had interpreted constitutional attachment to require the naturalisation applicant to show basic comprehension of the principles and mechanics of the US constitutional system, which was also sometimes interpreted to include associated historical facts. This became a prevalent practice during the so-called ‘Americanisation’ movement of the 1910s and 1920s (Pickus 2005). The civics requirement was codified not as part of a naturalisation-related measure but as a provision of the Internal Security Act of 1950, which otherwise advanced an anti-communist agenda. Under the 1906 act, two witnesses were required to testify the applicant’s good moral character.

Finally, naturalisation has also been subject to ideological qualifications. The oath to support the Constitution and the accompanying requirement of constitutional attachment presented such qualifications, albeit thin ones, excluding in theory if not often in practice those not subscribing to democratic governance systems. The requirement that naturalisation applicants renounce hereditary titles or orders of nobility (first added in 1795) also evidenced the threshold requirement of belief in democratic, anti-caste citizenship based in formal equality. More robust ideological exclusions were introduced in the twentieth century. The assassination of President William McKinley by an anarchist Polish-American prompted a provision of the 1906 Naturalization Act disqualifying those who ‘disbelieved’ or opposed organised government and anyone affiliated with any organisation teaching such principles. The 1940 Nationality Act expanded the disqualification to include those who believed in the overthrow of the US government or belonged to organisations advocating such action. The 1950 Internal Security Act expressly prohibited the naturalisation of persons supporting the ‘economic, international and governmental doctrines of communism.’ (The Act also made the advocacy of communist belief systems a ground for deportation.)

Administration of the naturalisation regime has shifted within the US federal structure. Through the beginning of the twentieth century, naturalisation was almost always secured through the state court system. (Before 1856, state and local officials were also enabled to issue passports (Robertson 2010).) All courts of common law jurisdiction were empowered to accept and act on naturalisation applications. State courts profited from naturalisation fees. The decentralised system was vulnerable to fraud, especially in urban areas in which political machines looked to naturalised citizens for electoral support. The Naturalization Act of 1906 established a unit within the US Department of Commerce and Labor charged with overseeing enforcement of naturalisation requirements. The

federalisation of naturalisation accelerated with the creation in 1933 of the Immigration and Naturalization Service in the Department of Justice and the expansion of a corps of federal examiners (Pickus 2005, Weil 2013). Naturalisation became an entirely administrative procedure pursuant to the Immigration Act of 1990.

The establishment of a federal agency supervising naturalisation enabled the keeping of statistical records. Naturalisations spiked after World War I (including a large number under a special military naturalisation procedure), in the late 1920s (the product of the Americanisation campaigns), and during World War II (among those who would otherwise count as enemy aliens from Germany and Italy).<sup>1</sup> Thereafter, the absolute number of naturalisations subsided. From a peak of 377,125 in 1944, the number fell to 61,634 in 1951 and did not reach 200,000 again until 1982. The trough tracked a decline in immigrant admissions. Naturalisation levels increased in the 1980s in the wake of greater immigration during the preceding decade.

Naturalisations spiked in the mid-1990s, reaching a record 1.4 million in 1997. This was in part the result of the massive legalisation of unauthorised migrants under 1986 legislation. Naturalisations remained high into the 2000s. Security concerns prompted by the September 11 attacks have increased the incentives to naturalise, as has the harsh deportation regime adopted by the 1996 immigration reform act. Naturalisation was increasingly perceived as a form of insurance against more vigilant and inflexible enforcement of the immigration laws. Denials of applications have increased in both absolute and percentage terms. During the 1960s, denials held steady in the 2-3% range. In recent years they have stabilised at 7-8% after reaching much higher levels at the turn of the century, with almost 400,000 petitions rejected in each of the years 1999 and 2000. It is possible that the increase in denials is attributable to a change in bureaucratic procedures. The Immigration and Naturalization Service at one time 'returned' a large number of naturalisation applications rather than issuing a denial (North 1987). Under current procedures, these may count as denied.

#### *2.4 Expatriation and Dual Citizenship*

The most heated historical controversies over US citizenship were not over how it was acquired but rather how it was lost. The parameters of involuntary expatriation were continually contested through the late twentieth century. Today it is almost impossible to forfeit citizenship against one's will, but for much of US history a range of conduct would result in expatriation.

US authorities had long fought to establish a right to expatriation to the benefit of immigrants from European states. European sovereigns followed the rule of perpetual allegiance, under which *jus soli* nationality established an indissoluble bond between the individual. The concept was central to the logic of Lord Coke's disquisition in *Calvin's Case*, but it was rooted in the natural law of feudalism and absorbed to common and civil law systems alike. Under perpetual allegiance, European states rejected the capacity to expatriate even upon permanent relocation to and naturalisation in another state.

The refusal to recognise the transfer of allegiance to the United States (reflected in the oath of naturalisation) proved a constant irritant in bilateral relations. An 1867 U.K.

<sup>1</sup> For historical figures, see Office of Immigration Statistics, Department of Homeland Security, 2012 Yearbook of Immigration Statistics, pp. 51-52, [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf)

treason trial of naturalised Irish-Americans provoked intense public anger in the United States; the defendants were tried as subjects of the British crown and denied procedural advantages extended to aliens. A common scenario involved an immigrant to the United States who returned to his country of origin for a temporary sojourn to find himself conscripted into military service. US diplomatic digests from the era are filled with dispatches from US envoys intervening with homeland authorities with respect to the status of these individuals.

In the face of US pressure, most European states relented from perpetual allegiance, whose natural law origins in any case no longer sat well with modern notions of republican governance. By the latter part of the nineteenth century, it was possible to speak of a 'right to expatriation' in the context of naturalisation in the United States. That worked a change in the nationality regimes of other states. For its own part, the United States recognised the right voluntarily to shed US citizenship.

From a US perspective, the more difficult question related to involuntary expatriation. Many naturalised Americans returned to their countries of origin on a permanent basis in a pattern of circular migration. Some attempted to invoke their US citizenship to secure diplomatic protection against homeland impositions. These entreaties did not sit well with US authorities. Diplomatic protection required an expenditure of diplomatic capital that was wasted on immigrants who had resettled back home. In his 1874 message to Congress, President Ulysses Grant deplored 'persons claiming the benefit of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims to citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere' (Spiro 1997).

This incidence of circular migration gave rise to an administrative practice under which naturalised citizens returning permanently to their countries of origin were in many cases deprived of diplomatic protection and effectively expatriated. The approach was formalised in the so-called Bancroft treaties with European and some Latin American states under which the citizenship of naturalised citizens was terminated after a certain period of residency (typically two years) in their country of origin. It was codified in 1907 legislation to the same effect. The 1907 measure also provided for the expatriation of native-born and naturalised alike upon naturalisation in or taking an oath of allegiance to another state. The law expatriated women automatically upon marriage to non-citizen men.

These mechanisms aimed to police the incidence of dual nationality. Dual citizenship as such could not be eliminated in the US context. So long as any immigrant source-states refused to recognise naturalisation by native-born subjects in other states and/or extended nationality to the children of emigrants born in the United States, the United States had no choice but to tolerate dual citizenship. However, where a US citizen activated (or re-activated) nationality in another country, US citizenship could be terminated.

This was partly a matter of reducing bilateral frictions related to the diplomatic protection of dual citizens. It was also ideological. US authorities took naturalisation to mark the complete transfer of loyalty, a political rebirth in which allegiance to homeland was erased. Dual citizenship was commonly understood to be the moral equivalent of bigamy. As George Bancroft observed, states should 'as soon tolerate a man with two wives as a man with two countries; as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it.' Theodore Roosevelt deplored the 'theory of double nationality' as a 'philosophical absurdity' (Spiro

1997). With respect to the expatriation of women who married non-citizen men, the goal of reducing dual nationality was reinforced by patriarchal conceptions of family that could not comprehend national divides within the family unit (Bredbenner 1998).

In the 1940 Nationality Act, Congress broadened the grounds for the involuntary loss of citizenship to include service in foreign armed forces and foreign government employment. The mere act of voting in a foreign political election was enough automatically to result in termination of citizenship. Expatriation resulted from any manifestation of active dual citizenship (the sole exception being the carrying of a foreign passport). Treason and military desertion were also added as grounds for expatriation.

The courts largely sustained the expatriation regime against constitutional attack through the mid-twentieth century. The 1915 decision in *Mackenzie v. Hare* set down a voluntariness principle; so long as the underlying conduct giving rise to expatriation was undertaken on a voluntary basis, the resulting termination of citizenship was lawful. Because Ethel Mackenzie voluntarily entered into a marriage with a non-citizen man, the termination of her citizenship was deemed not to have been compelled. The test held where a citizen was not aware that conduct would result in expatriation, as was the true in *Savorgnan v. United States*. Judicial deference to the expatriation regime reached its zenith in the Supreme Court's 1958 decision in *Perez v. Brownell*, which upheld the foreign voting ground for expatriation. Justice Frankfurter's opinion in the case stressed the relationship of nationality to foreign relations, a sphere in which US courts have lacked institutional self-confidence.

*Perez* also marked an inflection point. The decision drew a strong dissent from Chief Justice Earl Warren, who invoked an Arendtian theme of citizenship as the 'right to have rights.' The same day as *Perez* was decided, the Court nullified military desertion as a basis for expatriation, finding the punitive use of expatriation to constitute an unconstitutional 'cruel and unusual punishment' worse than death. *Perez* was itself reversed less than a decade later by the 1967 decision in *Afroyim v. Rusk*. The decision nullified the expatriation of a US citizen who voted in the first Knesset elections in Israel (before Israel was even a state, so the case did not directly involve dual nationality). Justice Hugo Black's opinion purported to reject the government's capacity to terminate citizenship. 'The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.'

The *Afroyim* ruling was interpreted by the Department of Justice to allow expatriation where an intent to relinquish citizenship could be inferred by conduct. More than 15,000 individuals were expatriated in the decade following *Afroyim*, most as a result of naturalising in other states, especially where an oath of allegiance included an express renunciation clause. The Court's 1978 decision in *Vance v. Terrazas* raised the bar by requiring 'specific intent' to relinquish, in other words, that the underlying conduct clearly evidenced a conscious desire to terminate one's citizenship. The State Department's administrative practice came thereafter to assume a lack of intent to relinquish citizenship except where an individual formally renounced citizenship before a consular office. By 1996, US authorities relented from stripping individuals of their citizenship against their will. Dual citizenship came to be completely tolerated under this practice.

### 3 The current citizenship regime

The 1952 codification of US citizenship law has remained remarkably stable. Partly as a result, the regime is relatively coherent, free of ambiguities and extreme statutory complexities. (This is especially true in comparison to US immigration law, which has through waves of major amendments become a statutory morass.) There are interesting aspects, mostly at the margins. As is true with all citizenship laws, current US citizenship practices highlight the parameters of an American national identity.

#### 3.1 *Jus soli*

The United States continues to maintain a near-absolute rule of *jus soli* citizenship. The children of foreign diplomats accredited to the United States are the only individuals born in US territory not extended citizenship. (It is not clear that even this minor exclusion is enforced.) The rule is rooted in the Fourteenth Amendment, the language of which has been codified in section 301(a) of the Immigration and Nationality Act (extending citizenship to persons ‘born in the United States and subject to the jurisdiction thereof’).

*Jus soli* citizenship is not contingent on parental immigration status. An estimated four million persons have been born with citizenship to parents are present in the United States in violation of the immigration laws (approximately 8% of all births annually). In the 50 states, the rule reflects the longstanding absolutist practice under the Fourteenth Amendment. Although its application to the children of unauthorised migrants has never been directly addressed by the Supreme Court, administrative agencies and other governmental actors have long interpreted the law to include all persons born on US territory. With the exception of American Samoa (noted above), those born in US territorial possessions as well as those born into Native American tribes are extended birthright citizenship by statute. Because the rule sets down a sole clear criterion, it requires no institutional machinery to administer. Proof of birth in the United States will suffice to establish entitlement to citizenship.

#### 3.2 *Jus sanguinis*

Because of the expansive adherence to and constitutional underpinnings of *jus soli*, the *jus sanguinis* regime applies only in cases of birth outside the United States. The two primary statutory mechanisms for citizenship by descent are sections 301(c) and 301(g) of the Nationality Act. Section 301(c) extends citizenship at birth those born outside the United States of parents both of whom are US citizens so long as one parent has been resident in the United States prior to the birth of the child. ‘Residence’ is defined in the statute as ‘place of general abode.’ State Department guidelines include an example of a citizen who spent summers at camp in the United States as qualifying under the standard where a touristic visit would not.<sup>2</sup> Section 301(g) governs the status of those born outside the United States to one citizen and one non-citizen parent. In that case, US citizenship descends where the citizen parent has been physically present in the United States for five years prior to the child’s birth, two years of which must have been after the age of 14. In both cases, citizenship descends automatically. Although parents will often secure a ‘Consular Report of Birth

<sup>2</sup> See U.S. Department of State Foreign Affairs Manual 7:1133.5 (2014), available at <http://www.state.gov/documents/organization/86757.pdf>.

Abroad' for purposes of facilitating recognition of entitlement to citizenship, no action is necessary to perfect the entitlement.

Special rules apply to child born abroad out of wedlock to US citizen parents under section 309. For a child born out of wedlock to a US citizen mother, citizenship descends where the mother is a citizen at the time of the child's birth and has been physically present in the United States for a continuous period of one year prior to the child's birth. The non-marital children of US citizen fathers must satisfy a more demanding set of criteria. In addition to the physical presence requirement of 301(g), the father must prove the existence of the biological relationship, undertake to financially support the child, and have the paternity formally affirmed before the child turns 18. The sex discriminatory element of *jus sanguinis* for non-marital children was upheld by the Supreme Court against constitutional attack in its 1998 decision in *Miller v. Albright*.

### 3.3 Hybrid *jus sanguinis/naturalisation*

Two contexts implicate features of birth citizenship and naturalisation. First, under section 320, children born outside the United States will acquire citizenship automatically where in the custody of a US citizen parent following a lawful admission into the United States. The provision applies where a citizen parent not satisfying the presence requirement of 301(g) subsequently relocates to the United States with a child born outside the United States. It also expressly applies to foreign adopted children. Where a US citizen adopts a non-citizen child outside the United States, the child automatically acquires citizenship upon admission to the United States. No application is necessary. The provision was adopted in 2000 after a series of cases involving the mandatory deportation for criminal activity of individuals who had come to the United States as adoptees in infancy but never naturalised. The provision can be characterised as a kind of citizenship by descent not acquired at birth. (It also operates as a kind of derivative naturalisation where a child joins a naturalised citizen in the United States.)

Section 322 provides an additional route to citizenship on the basis of descent. The provision allows for 'at option' naturalisation where parent satisfies the 301(g) residency requirement following a child's birth, even if the child continues to reside outside the United States. In other words, a child can secure citizenship after birth if her citizen parent subsequently satisfies the five-year physical presence requirement. Section 322 also extends the citizenship by descent to the grandchildren of citizens who satisfy the five-year residency requirement (two years after reaching the age of 14). In other words, the child of a citizen parent can claim citizenship even if the parent has never set foot in the United States. Although section 322 is not automatic and is styled as naturalisation, it is naturalisation as of right. Those eligible under the provision, exceptionally, are not subject to any other typically applicable naturalisation requirements, such as residency and good moral character requirements. This suggests a hybrid nature, bridging birthright citizenship and naturalisation.

### 3.4 *Naturalisation*

Considered in comparative legal perspective, the United States maintains a relatively liberal naturalisation regime. After having satisfied the durational residency requirement, most immigrants will be eligible for and able to secure citizenship at the same time that barriers to naturalisation are nontrivial. Unlike some immigrant-receiving states, however, the US government does little to encourage naturalisation, which helps explain low naturalisation rates.

Perhaps the greatest barrier to naturalisation is permanent residence status, a predicate to naturalisation in almost all cases. Durational residency requirements apply in most cases, counting time only in permanent residence status. The default period is five years, including physical presence for at least half of that period. Absences of more than six months during the period will be presumed to reset the residency clock; absences of more than a year will reset it except in exceptional circumstances involving work abroad for specified US entities. The residency period is reduced to three years where the naturalisation applicant is the spouse of a US citizen (again including physical presence for half the residency period). In both cases, the applicant is also required to have resided for at least three months in the administrative district in which the naturalisation application was filed, and must continuously reside in the United States between the filing of the naturalisation application and the granting of citizenship.

All applicants are required to demonstrate good moral character during the required residency period. Good moral character is statutorily precluded for those who have engaged in some forms of criminal activity (some of which will not only bar naturalisation but will also give rise to deportability). The good moral character requirement is imposed less searchingly than in the past, when judges had discretion to apply their own conceptions of moral fitness. Applicants are no longer required to produce character witnesses as under past administrative practice.

Naturalisation is also contingent on the taking of an oath of naturalisation. In keeping with American conception of civic faith, the naturalisation applicant pledges ‘true faith and allegiance’ not to the state or government, but rather to the Constitution and laws of the United States. The oath also requires the naturalisation applicant to ‘absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which [she has] heretofore been a subject or citizen,’ a formulation largely unchanged since the naturalisation act of 1795. The undertaking is anachronistic not only in phrasing but also in consequence, having no effect under operation of US law on the continued holding of prior citizenship. The oath requirement is now waivable where the applicant is ‘unable to understand, or to communicate an understanding of, its meaning because of a physical or developmental disability or mental impairment.’ This exception was adopted in 2000 in the wake of a series of cases respecting elderly immigrants denied public benefits as noncitizens who because of dementia were unable to secure citizenship because of the oath requirement. In most cases the oath requirement presents no barrier to naturalisation. The same goes for the makeweight if poetic requirement that naturalisation applicants be ‘well disposed to the good order and happiness of the United States’.

In many cases, under section 312 of the Nationality Act, naturalisation is contingent on passing civics and language tests. Applicants must demonstrate ‘knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States’. Naturalisation examiners ask ten questions drawn from a publicly available list of a hundred sample questions. The exercise allows for rote

memorisation. The questions are not very searching, including the names of elected officials ('What is the name of the Vice President of the United States now?'), the basic facts relating to governmental institutions ('How many justices are on the Supreme Court?'), major historical events and personages ('Who was the first President?'), and geographical facts ('What ocean is on the East Coast of the United States?'). An effort to overhaul the test in the mid-1990s resulted in only minor revisions. In its present form, the civics requirement does not constitute a robust integration mechanism.

The language component requires demonstration of 'an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language'. It does not require fluency, and the reading and writing requirements 'shall be met if the applicant can read or write simple words and phrases to the end that a reasonable test of his literacy shall be made and that no extraordinary or unreasonable conditions shall be imposed upon the applicant'. Nonetheless, failure to satisfy the English language requirement is the most significant ground for denial of naturalisation applications, and deters others from applying at all. In a recent poll, the test and the need to learn English was cited as the top reason by permanent residents as the primary reason why they had not pursued naturalisation (26%) (Gonzalez-Barrera 2013).

Older, long-term permanent residents are exempted from the language requirement: those over 50 who have been permanent residents for at least 20 years and those over 55 resident for more than 15 years. These applicants take the civics test in their native language. Those over 65 and living in the United States for at least 20 years enjoy statutorily provided 'special consideration' with respect to civics knowledge, which has been translated into a shorter list of the easiest questions from which examiners may draw. Applicants with physical or mental disabilities are excused from both the language and civics requirements.

Neither the language nor the civics requirement has been contested in recent years. This may in part be explained by the availability of the broad exemptions, eligibility for which is established by passage of time. The lack of controversy is also explained by the conventional integrationist 'melting pot' understanding of immigrants and immigration (still popularly held even if it no longer conforms with realities on the ground), with which the test requirement is consistent (Neuman 1994). Even though the tests do not require integration as administered, the trope props up the test requirement. At the same time, the test requirement obstructs some otherwise eligible applicants from securing citizenship. Notwithstanding its operation as a barrier to naturalisation in some cases, there has been no visible pressure from immigrant advocates to eliminate the civics and/or language element of the naturalisation process. Some restrictionists have pressed for more robust integration requirements (eg Huntington 2004). The current stasis may thus be explained by immigrant advocates who can accept the current regime at the same time that they see a risk to reform initiatives that could backfire on them.

The somewhat hollow nature of the knowledge-based criteria is reinforced by the lack of active government integration in the knowledge-acquisition process. Unlike Canada and some European states, the federal government does not sponsor courses for immigrants by way of either helping them prepare for the test or facilitating integration beyond the test, although it does have a modest grant program to support state and local governments and private non-profit organisations that do (\$10 million in FY 2014). Anemic federal support for integration courses may help explain the mismatch between the relatively low naturalisation rate and the relatively accessible naturalisation regime (Bloemraad 2006). The U.S. naturalisation rate in 2007 stood at 50% compared to Canada's 89%, Sweden's 82%,



and the Netherlands' 78%. The low naturalisation rate is also explained by high naturalisation fees, approaching \$700 per applicant with no reductions for family members, up from less than \$100 in 1997. Waivers are available on a narrow needs-determined basis (with qualification set at 150% of the federal poverty guideline), but requesting a fee adds another application and bureaucratic uncertainty, and many for whom the fee is burdensome will not qualify. After the language requirement, high fees are cited by permanent residents as the most important reason for not undertaking to naturalise.

An exceptional naturalisation regime applies to non-citizens serving in the US armed forces. During peacetime, non-citizens are eligible to naturalise after one year's service pursuant to section 328 of the Nationality Act. During hostilities, non-citizens are eligible to naturalise upon enlistment without any requirement of residence or physical presence in the United States under section 329. In such cases the naturalisation oath itself can be administered abroad. In July 2002, President George W. Bush designated the period following the September 11 attacks as a period involving hostilities through an executive order that remains in effect. Almost 90,000 individuals acquired citizenship through section 329 during the period 2002-2013. The vast majority were previously admitted to the United States as permanent residents. A program that uses naturalisation to attract non-citizens with critical skills (e.g. those with language skills and medical training) has allowed non-immigrants to acquire citizenship directly. The Military Accessions Vital to National Interest (MAVNI) was initiated in 2009 as a pilot program and has been since renewed, with a cap of 1,500 individuals per year. It is the only route to naturalisation that does not require permanent residence status as a qualification. Unlike some countries, the United States has no catchall discretionary basis for naturalisation for exceptional service or equivalent to the state. Historically, some non-citizens were extended citizenship through so-called 'private bills' enacted by Congress specific to the individual, but this practice is now rare.

Section 311 of the nationality act expressly prohibits discrimination on the basis of race or sex for purposes of naturalisation. There are no affinity preferences for citizenship under US law; that is, there are no direct preferences tied to country of origin or other characteristics such as ethnicity or religion. (Preferences incorporated into the immigration regime may indirectly advantage some for purposes of naturalisation, eg those fleeing Cuba.) In the post-9/11 period there have been allegations of discrimination in practice against persons of Middle Eastern descent, whose naturalisation applications have been subject in many cases to lengthy delays ostensibly caused by security checks. Naturalisation rates have been shown to vary by country of origin. According to a report of the Pew Hispanic Center, as of 2011 only 36% of eligible Mexican immigrants had secured naturalisation, significantly lower than a 68% rate among non-Mexicans (Gonzalez-Barrera 2013). According to the Department of Homeland Security, Asian immigrants naturalise on average six years after admission versus ten years for immigrants from North America (ie Mexico and Canada).

The naturalisation regime is administered by US Citizenship and Immigration Services, a component of the Department of Homeland Security. Although the courts were divested in 1990 of their historical capacities to decide naturalisation applications, they continue to exercise review of challenged denials (Morawetz 2007). In 2012, approximately 7% of all naturalisation applications were rejected by DHS.<sup>3</sup> Judicial review is also available

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<sup>3</sup> See Office of Immigration Statistics, Department of Homeland Security, 2012 Yearbook of Immigration Statistics, p. 52, [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf)

where an administrative agency rejects an individual's claim to birthright citizenship. These cases have become more common as individuals claim citizenship (typically on a *jus sanguinis* basis) as an absolute defense to deportation.

International regimes have not figured in the development of US citizenship practice, both because the US is largely compliant with thin international norms in the area and because the US maintains a dualist system under which the incorporation of international law into domestic practice has been resisted.

### *3.5 Loss of nationality and dual citizenship*

As described in the historical narrative, the formerly low threshold to termination of citizenship had been fully abandoned by the mid-1990s in the wake of constitutional determinations by the Supreme Court and the evolution of administrative practice on the part of the State Department. Under current policy, with the exception of naturalisation acquired through fraud or misrepresentation, it is impossible for the government to terminate citizenship without an individual's cooperation. The counter-terror context proves the point. Several US citizens have been implicated in terror plots against the United States, including the senior al-Qaeda official Anwar al-Awlaki. Although some suggested that al-Awlaki had expatriated himself, no such determination appears to have been seriously considered by the US government. (This should hardly be surprising, given its successful targeting of al-Awlaki with a drone strike.) Legislative proposals to make terrorist activity a ground for expatriation within the constraints of the Court's jurisprudence have failed to gain significant support. This is in contrast to the UK and Canada, where counter-terror expatriation measures have been enacted (Spiro 2014).

Consistent with the abandonment of forced expatriation, dual citizenship is completely tolerated under US law and practice. Those born with US citizenship face no risk of expatriation upon naturalisation in another country. Many native-born US citizens are acquiring additional nationalities on the basis of ancestry.<sup>4</sup> Those born with dual citizenship are not required as a matter of US law to elect at majority (though they may be under the law of the other country of citizenship). Those born elsewhere are not required to terminate their original citizenship as a condition to US naturalisation. In the face of expanded tolerance for dual citizenship among other states, a clear majority of those acquiring US citizenship will also have dual citizenship upon naturalisation. Those who naturalise from such countries as Mexico, the Philippines, and the Dominican Republic are almost all retaining their original citizenship after naturalisation. In official pronouncements, the US government takes an ambiguous stance on dual citizenship, and a perception of the status as somehow problematic may linger as reinforced by the persistent but unenforced renunciation oath. The US government does not collect statistics regarding dual citizenship. Any continuing misunderstanding respecting the acceptability of dual citizenship under US practice appears to be dissipating.

More contested than the capacity to keep US citizenship is the capacity to shed it. US citizens outside the United States are not legally disadvantaged in many respects. They have a statutorily protected right to vote in federal elections (through the district in the United

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<sup>4</sup> See Andrew Abramson, With U.S. in Slump, Dual Citizenship in E.U. Countries, Attracts Americans, Palm Beach Post, June 7, 2008. For one first-person account, see Tamara Micner, An Expat Gets Polish Citizenship—and the Right to Live in Europe, Wall Street Journal, May 29, 2015, <http://blogs.wsj.com/expat/2015/05/29/an-expat-gets-polish-citizenship-and-the-right-to-live-in-europe/>

States in which they were last resident). They are entitled to social security benefits (although some benefits are contingent on residence, such as food stamps and Medicare). External US citizens may secure consular assistance and diplomatic protection from US diplomatic authorities regardless of the length of their absence from the United States.

Uniquely among nations, the United States imposes tax obligations on externally resident citizens. Bilateral tax treaties have mitigated additional burdens of US tax liabilities as combined with tax liabilities in countries of residence. In the past, tax enforcement outside the United States was anemic. That changed with the 2010 enactment of the Foreign Account Tax Compliance Act (FATCA), which applies to individuals holding accounts in foreign financial institutions and to the institutions themselves. Although FATCA was targeted at large-scale tax offshoring and implicates both resident and non-resident US citizens, it falls heavily on external US citizens of moderate means (applying to any account exceeding \$10,000) by requiring significant additional reporting. It has also incentivised many smaller foreign banks to turn away external American customers along with their non-US citizen family members. The inconvenience and additional tax preparation burden has provoked an uproar among external Americans, largely unnoticed by the domestic US public.

FATCA has thus made it more expensive to retain citizenship after permanent relocation abroad. Many with EU and other premium citizenships are renouncing their US citizenship in record numbers.<sup>5</sup> Many more would like to but for various additional costs of renunciation. The filing fee for formal renunciation was increased in 2014 from \$450 to \$2350. Under a statute enacted in 2008, individuals must demonstrate tax compliance during the prior five years as a condition to renunciation. For those who have not been filing as required, fines can be steep. In addition, those with assets of \$2 million or more must pay capital gains taxes on appreciated assets; renunciation is treated for tax purposes as if all assets were sold on that day. Some individuals facing these liabilities have only nominal social connections to the United States, for instance, those who acquired citizenship *jus soli* and then relocated to other countries with parents early in childhood.

The FATCA controversy implicates barriers to expatriation. The issue could be resolved by scaling back FATCA and the citizenship-based tax regime to bring it more into line with the practices of other states. Or it could be mitigated by lowering barriers to expatriation in some cases. The Obama administration recently proposed to eliminate the tax hurdles to expatriation where an individual was born with dual citizenship, has not been resident in the United States since the age of 18, and has never held a US passport.<sup>6</sup> The proposal appears to acknowledge that the current regime unfairly obstructs expatriation in some circumstances.

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<sup>5</sup> See Laura Saunders, Record Number Gave Up U.S. Citizenship or Long-Term Residency in 2014, Wall Street Journal, Feb. 10, 2015. The total for 2015 was 3415, a small proportion of the estimated 6-8 million external US citizens, though this number almost surely represents an undercount for various technical reasons. For quarterly listings of individuals who have renounced their citizenship, see <https://www.federalregister.gov/quarterly-publication-of-individuals-who-have-chosen-to-expatriate>.

<sup>6</sup> See U.S. Department of the Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals (Feb. 2015), p. 282, available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf>

#### 4 Current Political Debates

Citizenship law has taken a backseat to immigration policy. There are two respects in which citizenship and immigration have been linked in current debates. First, there is a persistent but largely symbolic attempt by restrictionists to roll back *jus soli* citizenship. Second, an assumed ‘pathway to citizenship’ for unauthorized migrants regularised by prospective immigration reform may be contested.

Those who favour tougher immigration enforcement have advocated scaled-back territorial birthright citizenship for more than twenty years, beginning with revived anti-immigration sentiment in the mid-1990s. The critique focuses on the extension of birthright citizenship to the children of unauthorised immigrants. Restrictionists argue that birthright citizenship incentivises unauthorised immigration as undocumented immigrant parents look to secure US citizenship for their children. Restrictionists have also effectively developed the concept of the ‘anchor baby,’ as part of which the child born with citizenship secures legal status for the unauthorised migrant parent. Although this reflects a distorted understanding of US immigration law – children cannot petition for the permanent residence status of their parents before turning 21 – the image has become a trope of US political discourse.

Hence efforts to roll back birthright citizenship. Proposals have taken various forms. Some have been proposed as statutes conditioning the child’s citizenship on the lawful immigration status of parents. Statutory proposals are predicated on the theory that expansive birthright citizenship as now understood in administrative practice is not constitutionally required. This theory has respectable academic backing (Schuck & Smith 1985). Alternative proposals take the form of constitutional amendments. As such they would require two-thirds majority approval of both the House and the Senate along with three-quarters of the states. Some proposals would continue to extend citizenship to the children of all non-citizen parents legally present in the United States. Others restrict citizenship to the children of permanent residents and citizens only, excluding the children of legal non-immigrants.

In any case, although these proposals have been introduced in every session of Congress since 1993 they have secured little mainstream political traction. None has even been approved at the committee level, the first step on the path to enacting legislation. The task of securing a constitutional amendment would be more formidable still. With one minor exception, the US Constitution has not been amended since 1971. The political prospects for the proposals (either in statutory or constitutional form) are unlikely to improve in the foreseeable future.

The failure of immigration restrictionists to advance birthright citizenship ‘reform’ is remarkable given their success with respect to immigration enforcement and a refusal to regularise any part of the large population of unauthorised migrants present in the United States (estimated at 10-12 million). The political differential evidences a decoupling of immigration and citizenship policy. Where the former has been vigorously contested to the point of stalemate, the latter has attracted only marginal political attention. The decoupling partially explains the high level of stability in the US citizenship regime.

The decoupling is rooted in the understanding that the barriers to citizenship should be low. For all the controversy surrounding immigration levels and immigration enforcement, there has been a cultural and constitutional consensus that those who have been admitted on a permanent basis should be afforded access to citizenship. Immigration is meant to be transitional to citizenship and the assimilation it represents. Although some

permanent residents will never naturalise, denizenship is not a part of the American immigration tradition. The decoupling is ultimately rooted in American, liberal conceptions of equality. (This also explains the American aversion to guest worker programmes in light of the European experience in which those admitted on a temporary basis ended up staying on an intergenerational one.) To the extent that this consensus is articulated, it raises the spectre of caste. The broad availability of citizenship has, at least the Civil War, facilitated a self-conception of citizenship as equality's guarantee even if the practice of citizenship falls well short (Smith 1997).

The decoupling may be threatened by the current cycle of immigration politics and the proposed regularisation of the existing unauthorised population. Until recently, regularisation has been packaged as 'a path to citizenship.' That is, regularisation has been taken to be synonymous with a resolution allowing access to citizenship. The 'path to citizenship' language had achieved a kind of political neutrality, advocates of regularisation having long eschewed 'amnesty' to describe legalisation. The label avoids any implication of automaticity (the notion of "earning citizenship" is a corollary concept) also reflected an understanding that those legalised would be afforded access to citizenship. The terms of the access have been contested, for instance with respect to how long the wait time would be between legalisation and naturalisation eligibility. But all mainstream proposals in the intense, decade-long debates surrounding comprehensive immigration reform would have afforded access to citizenship on some terms. This follows the model of the last major legislative package involving a large-scale legalisation, the 1986 Immigration Reform and Control Act, which enabled the legalisation and then naturalisation of a large proportion of the then-existing undocumented population.

More recently, there has been public contemplation of legalisation that does not provide access to citizenship. Non-access could make immigration reform more palatable to restrictionists by penalising undocumented alien beneficiaries of regularisation. Legalisation short of citizenship could also be acceptable to immigrant advocates in the face of polls showing that it may be acceptable to the beneficiaries themselves. This acceptability is explained in material terms. The difference between unauthorised and legal immigrant status is much greater than the difference between legalised immigrant status and citizenship. Legal status allows the formerly unauthorised immigrant to work and travel, and largely insulates one from deportation. Citizenship adds some benefits, but they are more incremental than elemental. From an unauthorised migrant's perspective, a deal extending legal status but no path to citizenship is superior to no deal at all. The parameters of this legal status have yet to be fleshed out, but Republican Party contenders in the 2016 presidential race are making it clear that it would be something short of citizenship, so that, in other words, those who were legalized would be barred from progressing to citizenship.

Politically, then, regularisation short of citizenship could facilitate resolution of immigration controversies that have proved especially intractable. But any such deal would challenge longstanding American conceptions of citizenship. As of this writing, reform efforts have broken down in the face of extreme political polarisation. To the extent that policymakers revive regularisation without citizenship as an alternative when these negotiations resume (most likely with the election of a new president), these historical understandings may be fractured. A more focused debate on the proposition could surface popular sentiments to the institution of citizenship in unexpected ways. The contours of this debate remain contingent as would be the implications for other aspects of US citizenship practice.

## 5 Conclusion

The relative stability of the US citizenship regime does not work to mask challenging issues relating to the incorporation of migrants. In legal terms, most of these issues have been frontloaded to the immigration regime and questions relating to legal status. From the perspective of an outsider seeking to get in, lawful status is difficult and in many cases impossible to secure. Once lawful status is secured, citizenship becomes something of an afterthought. The line between lawful status and unlawful status is much more consequential than the line between lawful status and citizenship. This is especially true in juxtaposing permanent residence status and citizenship. The latter confers few additional benefits. The lack of a differential explains in part the low naturalisation rate in the United States (Schuck 1998). Instrumental motivations for acquiring citizenship on top of permanent residence are present in some cases (e.g. the capacity to vote and advantages in securing immigrant status for family members), but in many others the incremental advantage of citizenship is outweighed by the bureaucratic hassles and costs of undertaking naturalisation. Alexander Bickel's observation in 1973 that citizenship is of "minimal consequence" in the American constitutional scheme holds true today (Bickel).

The expansive application of territorial birthright citizenship may also help explain the citizenship's undervaluing. Unlike in countries lacking robust *jus soli* practices, citizenship in the United States comes as of course. At the same time that unauthorised status represents serious legal disabilities shared by a large population of long-present migrants, there is no risk of those legal disabilities persisting on an intergenerational basis. It is in this sense that US citizenship is easy to get. It has been a passive affair.

Citizenship nonetheless historically tracked the boundaries of social membership. Those who stayed either became citizens themselves through naturalisation or bestowed it on their children by birthing them on US territory. Those who stayed also became social members of the national community through proximity and norms incentivising integration. In this respect, territory was a crucial proxy for membership in the absence of any alternative metric. Expatriation practices were an important mechanism for policing citizenship boundaries by terminating the citizenship of those who exited the territory and manifested attachment to another national community (often a renewed attachment, in the case of circular migration).

Citizenship today maps out less clearly onto social community. Territory may still be important, but it is less important than it once was in the wake of material changes in communications and physical mobility. Being here means less than it once did. Integration norms have given way to multiculturalism and diaspora. Meanwhile, those who leave no longer risk forfeiting their citizenship, however acquired; citizenship is now for life. Citizenship is not only easy to get but hard to lose. This will increase the disconnect between the formal legal status of citizenship and other markers of identity. The disconnect should further harden the historically minimal consequence of citizenship in the United States. It may also highlight a new artificiality to the status, the implications of which are unclear. It could conceivably trigger a reexamination of the institution and its place in the American landscape, or it could facilitate deeper submergence.

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