Brooklyn Law Review

Volume 78 | Issue 3 Article 2

2013

Beyond Blood and Borders: Finding Meaning in Birthright Citizenship

D. Carolina Nunez

Beyond Blood and Borders:

FINDING MEANING IN BIRTHRIGHT CITIZENSHIP

D. Carolina Núñez[†]

INTRODUCTION

Several decades ago, Alexander Bickel asserted that citizenship in the United States was (and ought to be) nothing more than a theoretical distinction with little practical value. "[W]e live under a Constitution to which the concept of citizenship matters very little indeed,"[1] he wrote. Under Bickel's view of the Constitution, the government protected the rights of persons, rather than the rights of citizens: "It remains true that the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen."[2] For Bickel and others, the Constitution, which in its pre-amendment form maintained silence on the definition of citizenship and scarcely even mentioned the term, limited very few rights to citizens.[3]

[†] Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. I am grateful for the insights and comments offered on prior drafts by RonNell Andersen Jones, Kif Augustine-Adams, Shima Baradaran, Teneille Brown, Wendy Gerwick Couture, Brigham Daniels, Lisa Grow Sun, Sarah Haan, Christopher Lasch, Michelle McKinley, Kim Pearson, Addie Rolnick, Jeff Schwartz, and Jane Yakowitz Bambauer. Many thanks to my research assistants, Garrett Beeston, Josh Bishop, Melanie Grant, and Megan Flager for their excellent work.

[1] Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 387 (1973).

[2] *Id.* at 370. In contrast to Bickel's approval of citizenship's relative lack of importance in his perception of the Constitution, several scholars lament what they see as the devaluation of citizenship in the United States. *See, e.g.*, PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 6-7 (2008); Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship,* 3 GEO. IMMIGR. L.J. 1, 1-2 (1989).

[3] Bickel, *supra* note 1, at 369. As noted by Bickel, prior to the Reconstruction amendments, the Constitution's treatment of citizenship was essentially limited to a bestowal of the naturalization power to Congress, U.S. CONST. art. I, § 8, the requirement that the offices of President, *id.* art. II, § 1, Congressman, *id.* art. I, § 2, and Senator, *id.* art. I, § 3, be filled by citizens, and the citizen's guarantee against a

Bickel's conclusions about the importance of citizenship have not carried over into the popular or political estimation of citizenship. It turns out that citizenship—as well as the type and strength of an individual's claim to citizenship—matters a great deal, at least in public rhetoric.[4] Being a citizen in the United States connotes belonging to and engaging in its society.[5] Citizens are wanted insiders, while noncitizens are tolerated outsiders at best and uninvited pariahs at worst. In many settings, public rhetoric contemplates only "citizens" and "illegal aliens."[6] In this binary conception of membership, the "citizen" is a desirable, integral part of our national polity, while an "illegal alien" is an uninvited intruder. The "citizen" contributes and participates, while the "illegal alien" consumes and depletes.[7]

---

state's abridgement of privileges or immunities, *id.* art. IV, § 2. Bickel, *supra* note 1, at 369. As a result of the Constitution's guarantees of rights to "persons" and "people," aliens, regardless of immigration status, have enjoyed a variety of constitutional rights while in the United States. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 229-30 (1982) (holding that undocumented children are entitled to the same public education that their documented and citizen counterparts are entitled to); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (extending the reasoning of *Yick Wo* to the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that aliens within the United States are entitled to the protection of the Fourteenth Amendment).

[4] Quite illustrative of the increasing interest in an individual's claim to citizenship is the public scrutiny of Barack Obama's birth certificate in relation to the requirement that the President be a natural born citizen of the United States. *See* Dan Pfeiffer, *President Obama's Long Form Birth Certificate*, WHITE HOUSE BLOG (Apr. 27, 2011, 8:57 AM), http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate. This is not to suggest that the public inappropriately demanded U.S. citizenship of the president; the Constitution clearly requires as much. U.S. CONST. art. 2, § 1, cl. 4. Rather, the unusual and intense focus on the details of the president's birth certificate combined with opponents' expressed suspicions of the president's loyalty and legitimacy illustrate the strong connection between citizenship and membership. Nothing less than citizenship could quell the perception of "otherness" that injected itself into public debate about the president. *See* Editorial, *A Certificate of Embarrassment: The president is Finally Forced to React to a Preposterous Political Claim About His Birth*, N.Y. TIMES, Apr. 28, 2011, A24, *available at* http://www.nytimes.com/2011/04/28/opinion/28thu1.html (characterizing the challenges to the president's citizenship as "a proxy for those who never accepted the president's legitimacy, for a toxic mix of reasons involving ideology, deep political anger and, most insidious of all, race").

[5] Justice Warren characterized citizenship as "nothing less than the right to have rights." *See* Perez v. Brownell, 356 U.S. 44, 63 (1958) (Warren, C.J., dissenting), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253, 267 (1967).

[6] *See, e.g.*, M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1557 (2008) (exploring the use of the word "citizen" in judicial opinions and commentary on the Fourth Amendment as coterminous with person or people and arguing that such usage exacerbates bias against immigrants).

[7] This binary conception of membership even carries over into court opinion discussions of fundamental constitutional rights, with opinions often characterizing rights that are not explicitly linked to the concept of citizenship as rights of "citizens." *See, e.g.*, *id.* at 1576-77.

As the rhetorical gap between citizenship and alienage widens, the rules by which the United States awards birthright citizenship have come under scrutiny, especially as they relate to unauthorized immigration.[8] The Fourteenth Amendment, which provides that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States,"[9] has historically served as a broadly inclusive guarantee of citizenship for virtually all children born within U.S. territory.[10] This bestowal of citizenship based on birth within U.S. territory is a form of *jus soli*—that is, the right of the soil or land. Scholars and politicians, however, have increasingly advocated withholding *jus soli* citizenship from the children of undocumented immigrants.[11] The current, inclusive understanding

---

[8] Marc Lacey, *On Immigration, Birthright Fight in U.S. Is Looming*, N.Y. TIMES, Jan. 5, 2011, at A1, *available at* http://www.nytimes.com/2011/01/05/us/politics/05babies.html; Ed Hornick, *Is the Next Immigration Fight Over "Anchor Babies"?*, CNN ONLINE (Apr. 28, 2011), http://www.cnn.com/2011/POLITICS/04/28/anchor.baby/index.html.

[9] U.S. CONST. amend. XIV, § 1.

[10] Some widely accepted exceptions to this broad inclusivity have been the children of foreign diplomats, prisoners of war, and prior to 1924, American Indians living under the tribal rule, *see* Elk v. Wilkins, 112 U.S. 94 (1884), all of whom have been interpreted as being insufficiently "subject to the jurisdiction" of the United States. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 171 (1996). In one sense, these classes of persons may be said to be outside the territory of the United States by a legal fiction derived from the immunities these classes derive from treaty or international law. *See id.*

[11] These proposals and academic arguments take two forms. Some have argued that the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," does not obligate the United States to confer citizenship on the children of undocumented immigrants because they are not "subject to the jurisdiction" of the United States. U.S. CONST. amend. XIV, § 1. Thus, proponents of this view have proposed bills to statutorily define "subject to the jurisdiction thereof" as including only the children of legal permanent residents and citizens. *See, e.g.*, PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 116 (1985). Many bills operate on the assumption that the Fourteenth Amendment does not require birthright citizenship to the U.S.-born children of most aliens. *E.g.*, Birthright Citizenship Act of 2011, S. 723, 112th Cong. § 2(b) (2011); A Bill To Amend the Immigration and Nationality Act To Limit Citizenship at Birth, Merely by Virtue of Birth in the United States, to Persons with Citizen or Legal Resident Mothers, H.R. 126, 111th Cong. § 1(a) (2009); Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. § 2(b) (2009); Citizenship Reform Act of 2007, H.R. 133, 110th Cong. § 3(a) (2007). These legislative efforts have varied in their details but generally provide that the phrase "subject to the jurisdiction thereof" language of the Fourteenth Amendment is fulfilled only if the child is born to a U.S. citizen mother or permanent legal resident mother, a U.S. citizen father or permanent legal resident father who meets additional criteria, or to an alien serving in the armed forces. *See id.* Other proponents of denying birthright citizenship to the children of undocumented immigrants, however, concede that the Fourteenth Amendment may indeed provide for birthright citizenship to all children born in the United States (with some aforementioned exceptions, *see supra* text accompanying note 10) and therefore call for an amendment to the Constitution to exclude anyone not born to a U.S. citizen, legal

of birthright citizenship, proponents have argued, incentivizes and even rewards unauthorized immigration.[12] Indeed, because U.S. citizens over twenty-one years of age may begin the immigration process for their alien parents,[13] aliens could potentially immigrate without authorization, have a child, and then wait for their "anchor babies" to come of age and secure legal residency.[14] The proposed remedy is to deny the U.S.-born children of undocumented immigrants citizenship in the United States based on their parents' lack of U.S. citizenship or status as a legal permanent resident. Such a conception of citizenship derives from *jus sanguinis*—the inheritance of citizenship through blood (rather than through place of birth).

Though unsuccessful thus far, these proposals have spurred vigorous debate on the original meaning and purpose of the Fourteenth Amendment. More broadly, and more relevant to this article, however, they offer insight into the popular conception of "membership" in the national community and the mechanisms by which we select those members.[15] *Membership* is an intuitive term—much of our ordering of the universe depends on the notion of membership. We are members of fitness clubs, farming cooperatives, and political parties, among many other things, and our membership in these institutions guarantees certain benefits. Members of fitness clubs enjoy the right to use fitness club equipment. Members of farming cooperatives have the privilege of consuming the vegetables harvested by the cooperative. Members also bear burdens and obligations. Fitness club members pay dues and may be expected to act in accordance with club rules, while farming cooperatives may expect members to help raise crops, allow crops to be raised on their own property, or buy a "share" of the venture.

---

permanent resident, or alien actively serving in the U.S. military. *See* Joint Resolution Proposing an Amendment to the Constitution of United States Relating to United States Citizenship, S.J. Res. 2, 112th Cong. (2011).

[12] *See* Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. TIMES, Mar. 29, 2011, at A1, *available at* http://www.nytimes.com/2011/03/29/us/29babies.html.

[13] *See* Immigration and Nationality Act, sec. 1, § 201(b), 79 Stat. 911, 911 (1965) (codified as amended at 8 U.S.C. § 1151(b)).

[14] *See* Lacey, *supra* note 8. For many, this concern also extends to temporary, though legal, visitors to the United States. Medina, *supra* note 12.

[15] Michael Walzer's seminal book, *Spheres of Justice*, analyzes justice in various spheres, including the spheres of education, free time, kinship and love, and what he refers to as "membership," which here I have labeled citizenship or national polity. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xi-xv, 3, 31 (1983).

Every organization, whether formal or not, has a mechanism for selecting its members. Ideally, the mechanism sorts those who are well-suited for membership in the organization from those who are not. One way of doing that would be to rely on a very individualized analysis of potential members to determine whether each candidate will fulfill his membership obligations, remain loyal to the organization, etc. This, however, would be very time consuming in the case of a large organization, whose representatives must make hundreds or even thousands of membership decisions. Instead, individuals responsible for making decisions about membership frequently refer to factors that are more easily and quickly measured. For example, a college might use an applicant's high school grades and aptitude test scores to determine whether the applicant is likely to succeed in college. Although this is not a perfect indicator of the candidate's likely success, it is a useful proxy.

Legal rights are privileges for the members of a more abstract "club." The decision of whether and to what extent an individual enjoys legal rights is ultimately a determination of that person's membership. The right to citizenship is no different. Citizenship and its attendant benefits, as I explain in this article, are the privileges of membership in the national polity. Who gets citizenship and—perhaps more importantly—who does not get citizenship shapes the meaning of citizenship itself. Thus, the rules and proxies by which citizenship is distributed warrant close analysis.

The calls for a move away from a territorial conception of citizenship toward a status-based conception of citizenship evidence a shift in the way legislators, scholars, courts, and others understand membership and belonging. More abstractly, the proposed shift from a territorial to a status-based approach to citizenship implies an ongoing inquiry into the adequacy of various proxies for membership. After all, there is nothing magical about a child's geographic location at birth or the status of the child's parents. In fact, they are, in the most genuine sense, mere accidents of birth. Rather, we look to these proxies to help us assess something more substantive but less measurable: whether an individual "belongs."

My purpose in this article is to analyze birthright citizenship and proposals to deny citizenship to the U.S.-born children of undocumented immigrants in the context of the changing meaning of membership. While scholars have vigorously debated the intent of the drafters of the Fourteenth Amendment, none has examined *jus soli* and *jus sanguinis* as

proxies for more substantive indicators of membership. Neither have scholars evaluated those proxies' effectiveness in approximating the qualities for which they serve as proxies.

In this article, I argue that the move from a territorial conception of citizenship toward a status-based conception of citizenship parallels a broader trend in which courts and legislators are decreasingly distributing rights and privileges on the basis of territorial presence. I argue, however, that the distribution of citizenship based on status (or more accurately, parents' status) fails to account for the substantive indicators of membership and belonging for which territorial presence at birth stands proxy. Although I concede that birthright citizenship, as a whole, must be distributed based on proxies—after all, it is impossible to evaluate an individual's substantive eligibility and desirability for citizenship at the moment of birth—I argue that territorial presence, though imperfect, is a more accurate indicator of membership than parents' status. As I explain in this article, rather than measure an individual's substantive indicators of membership, a status-based approach further removes the membership inquiry from the substantive basis of membership in the national polity. Moreover, a status-based approach threatens to create a cast of modern-day "illegitimate" children—children who, on account of their parents' status, remain outside the law of their birthplace despite their de facto membership in the community.

To reach these conclusions, I begin with a discussion of membership in Part I. I discuss several competing approaches to membership employed in U.S. law, including a territorial, status-based, and "post-territorial" approach.[16] I draw attention to the territorial and status-based approaches' reliance on proxies—namely, geographic location and status—to determine membership and compare them to the post-territorial approach's more direct reliance on the individual's actual ties to the surrounding community and submission to the state's imposition of obligations and duties. I then briefly explore the trajectory of courts' distribution of membership rights to aliens in the United States outside the context of citizenship to illustrate territoriality's generally waning hold on U.S. treatment of aliens in favor of the post-territorial approach.

---

[16] For a detailed discussion of this emerging post-territorial approach, see D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 818-27, 830-32 (2010).

In Part II, I examine citizenship law in the context of the territorial and status-based approaches to citizenship. I analyze the historical trajectory of membership approaches in U.S. citizenship law, highlighting the strong role that the territorial approach has played and continues to play. I discuss court opinions that make individual determinations of U.S. citizenship, as well as the legislative history and circumstances surrounding categorical grants or rejections of citizenship. Acknowledging courts' and legislatures' use of territorial presence as a proxy for substantive indicators of membership, I distill the substantive factors for which territorial presence has served as a proxy in order to evaluate, in Part III, whether the territorial model continues to effectively approximate those factors today.

Part III discusses the citizenship of children of undocumented immigrants through the lens of the substantive factors identified in Part II. I assert that these substantive indicators of membership are generally better approximated by looking toward a child's country of birth rather than the status of the child's parents, especially in the context of undocumented immigrants living in the United States. I acknowledge that the use of a territorial model in the birthright citizenship sphere defies the movement away from the territorial model described in Part I. I argue, however, that in the birthright citizenship sphere, where only the territorial or status-based models are available for use, the territorial model best fulfills the mandates of the post-territorial model. In essence, I propose that—perhaps counterintuitively—the territorial model operates much like the post-territorial model in the context of birthright citizenship.

I. MEMBERSHIP

Perhaps more than any other legal construct, citizenship captures the essence of membership. But membership encompasses much more than citizenship. In fact, decisions about membership inhere in most forms of social and legal ordering. Membership is a powerful concept that shapes individuals' identity, underlies the conferral of benefits, and influences the imposition of obligations.[17]

Much of our identity is tied to the concept of membership. We are members of families, political parties, professions, cultures, churches, and many other groups. Often,

[17] Portions of Part II track and summarize my prior discussions of membership. For a more detailed discussion, see Núñez, *supra* note 16, at 819-26, 830-31.

when we introduce ourselves to others, we identify ourselves as belonging to something. In different settings, we highlight different memberships. An individual might be a lawyer at a cocktail party, a city council member at a political convention, a grandmother at a wedding, and a member of the Navajo tribe at a meeting of the National Congress of American Indians. Membership matters on a very personal level—it facilitates and signals fundamental aspects of identity.

Beyond shaping an individual's sense of identity and belonging, the concept of membership has a very concrete effect on the rights, privileges, and benefits that individuals receive. Ultimately, decisions about who receives goods (tangible and abstract) are decisions about membership. Members have privileges that nonmembers lack. Fitness club members enjoy access to fitness equipment, farming co-op members enjoy fresh produce, and sports team members enjoy camaraderie and competition. It is this access to membership privileges that makes membership particularly appealing.

Membership, however, denotes more than benefits and privileges; perhaps equally as important, membership also implies an obligation. Fitness club members pay dues, farming co-op members donate time and effort to raising crops, and sports team members physically contribute to the team's efforts. Because membership benefits are reserved exclusively for the members of their respective groups, individuals are willing to undertake membership obligations.

Every club has a mechanism for selecting its members. In some cases, membership may depend on an individual's similarity to other members of the club. For example, a shared language or set of customs might be enough to secure membership in a cultural club, while shared beliefs may secure membership in a religious organization. Often, membership depends on the likelihood of an individual undertaking and fulfilling her membership obligations once she becomes a member. This, however, can be difficult to predict. A credit card company, for example, expects its cardholders—or members—to repay the company for purchases they make with their credit card. Because an individual's actual future performance is impossible to measure ex ante, member selection often requires reference to factors that are more easily measured and that indicate the individual's likelihood of fulfilling her future obligations as a member. The credit card company will review the candidate's financial history to determine whether she will, in the future, pay her bills. This is not a direct measure of whether the

candidate will actually pay her bills. Rather, the candidate's past payment history is a proxy—and usually a very accurate proxy—for her ability to make future payments.

Legal rights and privileges are also benefits of membership in particular, although more abstract, clubs. Employees have access to workers' compensation benefits, adult citizens have voting privileges, and sixteen-year-olds may obtain driver's licenses. As with the more pedestrian examples of membership discussed above, the act of including someone also entails an inherent act of exclusion. The unemployed do not enjoy workers' compensation benefits, noncitizens may not vote,[18] and young children cannot drive. The process of sorting members from nonmembers presupposes the existence of nonmembers. Exclusion is a byproduct of inclusion.

Sorting members from nonmembers in the context of legal benefits and rights can be especially challenging. Not only is it difficult to define the club—or sphere of membership—to which a legal privilege attaches, but it is nearly impossible to measure whether an individual in fact displays whatever characteristics or qualities are important to that sphere of membership. For example, what qualities do we hope licensed drivers will possess? Most would answer, among other things, that all drivers should be law-abiding, possess good judgment, be vigilant, and have the ability to remain focused. Since it is impossible to know ex ante whether an individual will exemplify those qualities while driving, the question becomes what proxies will best approximate these qualities. Potential proxies might include age, driving test score, or parental certification of time spent driving under supervision, but none will provide a perfect metric. These same questions arise in every sphere of membership. What, exactly, should qualify an individual as a member of the club that distributes the legal right in question? Who is a member? Or, perhaps more importantly, who is not? Should each individual be evaluated separately to determine whether he should be admitted into the club at issue? Is there a good way to measure an individual's fitness for membership?

When it comes to aliens' access to rights and benefits, several approaches to membership have evolved in the United

---

[18] For an account of changing access to the voting franchise, see Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345 (2003) ("The history of right to vote [sic] in America is one of expansion and contraction, of punctuated equilibria, rather than gradual evolution.").

States. These membership models provide a sorting mechanism—a way of determining who is and who is not a member—for the distribution of membership rights. Two proxy-based membership models have historically played a significant role in the distribution of rights. A territorial approach to membership distributes rights and privileges based on an individual's geographic location, while a status-based approach looks to an individual's legal status (in this case, immigration status). A third, less proxy-focused membership model seems to be developing. Some courts are using what I have elsewhere called a "post-territorial approach"[19]—that is, an approach that looks to the underlying rationales of territoriality—to distribute rights among individuals. All of these membership paradigms are in tension with each other and arise in various areas of U.S. law. It is against this background that the current debate about citizenship for the children of undocumented immigrants has unfolded.

A. The Territorial Model: The Meaning of Place

1. Membership and Borders

The territorial model of membership draws the line between members and nonmembers along the state's borders.[20] Individuals on the inside of the border belong, and those on the outside do not.[21] Strict territoriality ignores an individual's

---

[19] *See supra* note 17.

[20] *See* NEUMAN, *supra* note 10, at 6-8 (dividing approaches to the distribution of constitutional rights into membership approaches, mutuality approaches, universality, and "global due process"); Linda S. Bosniak, *Being Here*: *Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 390-92 (2007) [hereinafter Bosniak, *Being Here*] (comparing the territorial and status-based models of membership); *see also* WALZER, *supra* note 15, at 41-42; Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1031 (1988) [hereinafter Bosniak, *Exclusion and Membership*].

[21] Though this model appears simple in writing, it can be difficult to apply in practice. It is not always clear where a state's territory begins and ends. Guantanamo Bay, for example, is not a part of the United States, but it is, for many important purposes, controlled by the United States. The Supreme Court ultimately held that Guantanamo Bay was sufficiently under U.S. control to extend habeas rights to enemy combatants being held there. *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Courts have also held that individuals who are unquestionably inside U.S. borders are outside its borders for purposes of the distribution of certain rights and privileges. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), an alien had arrived from abroad at Ellis Island in 1950 but was denied admission to the United States on security grounds and detained at Ellis Island for almost two years without a hearing. *Id.* at 208-09. When the claimant argued that his detention was a violation of due process, the Supreme Court treated

community ties, sense of identity, legal status, and ethnicity. Simple in theory and predictable in its result, territoriality merely asks whether an individual is present within the state's territory.[22] *Jus soli* provides a good example of strict territoriality and is particularly relevant to this article. Under *jus soli*, individuals born within a state's territory are citizens of the state at birth.[23] Mere presence within a state's territory at the moment of birth guarantees this right. In the United States, the current application of the Fourteenth Amendment's Citizenship Clause conforms to this territorial pattern. In fact, much of U.S. law employs a territorial approach to the distribution of rights.[24] For example, a territorial approach governs undocumented children's rights to public education in the United States.[25] Under *Plyler v. Doe*,[26] presence within the United States entitles undocumented children to the same free public education that their U.S.-citizen counterparts enjoy.[27] In both the *jus soli* and public education examples, an individual's parentage, immigration status, loyalty to the state, sense of identity, likelihood of remaining within the state's boundaries, and ability and willingness to contribute to the state are irrelevant to the inquiry. The only relevant inquiry is whether the individual is physically present on U.S. soil at the time the membership right at issue is distributed.

2. Territorial Presence as a Proxy

Territoriality's apparent disregard for these and other factors has raised questions about its rationale. Is mere presence within a state's territory a good enough reason to count a particular individual as a member entitled to full membership rights? Clearly, physical presence within a state's territory—standing alone, and viewed in the abstract—means very little. Rather, being within a territory represents something more meaningful—that is, physical presence within

him as if he had not yet set foot in the United States: "In sum, harborage at Ellis Island is not an entry into the United States." *Id.* at 213.

[22] *See* Bosniak, *Being Here*, *supra* note 20, at 394.

[23] U.S. CONST. amend. XIV, § 1.

[24] *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978 (2002) ("[R]elatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation.").

[25] *See* Plyler v. Doe, 457 U.S. 202 (1982).

[26] *Id.*

[27] *Id.*

a territory is a proxy for substantive traits and characteristics that are desirable in a member. Commentators have offered several possible indicators of membership for which territorial presence serves as a proxy. Close analysis, however, reveals that territorial presence is not a consistently effective measure for these possible indicators of membership, especially in an increasingly globalized world of cross-border communication and transactions.

a. Mutuality of Obligation

Territorial presence within a state's boundaries might serve as a proxy for an individual's acceptance of jurisdiction over her.[28] The notion is that an individual, by being present within a state's borders, acknowledges the state's exclusive right to impose obligations upon her.[29] This idea stems from Westphalian sovereignty, in which a nation-state exerts complete and exclusive jurisdiction over individuals within its territory.[30] This territorial jurisdiction superseded the medieval practice of overlapping fealty owed to feudal lords and ecclesiastical leaders. In a Westphalian system, an individual owes duties to the state rather than to individuals who might be geographically distant.[31] Thus, an individual's location is the ultimate determinant of her obligations.[32]

This territorial sense of jurisdiction requires a territorial notion of membership, or so the argument goes, because a nation-state must provide corresponding membership rights and benefits to the individuals on whom it imposes obligations. That is, the state owes individuals within its territory full membership rights as a matter of mutuality of obligation

---

[28] *See* NEUMAN, *supra* note 10, at 108-09 (describing a conception of the U.S. Constitution based on mutuality of obligation); Bosniak, *Being Here*, *supra* note 20, at 408.

[29] *See* NEUMAN, *supra* note 10, at 108-09.

[30] Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508-11 (2005) (tracing territoriality back to the Peace of Westphalia).

[31] For a piece challenging the conventional view that the Peace of Westphalia single-handedly established a territorial world order, see Stéphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181 (2004).

[32] *See* M.S. Janis, *Sovereignty and International Law: Hobbes and Grotius*, *in* ESSAYS IN HONOUR OF WANG TIEYA 391, 393 (Ronald St. John Macdonald ed., 1994) ("The treaties of Westphalia enthroned and sanctified sovereigns, gave them powers domestically and independence externally."). In addition to the Westphalian international norms that constrain a state's ability to act outside of its borders, practical considerations play an important role. Logistics and cultural and social limitations all constrain the exercise of power beyond the state's borders. *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 269 (2009).

because those individuals are subject to all of the duties imposed by the state.

Although the mutuality-of-obligation rationale for territoriality is sound in a formalistic sense, it does not account for the modern reality that states sometimes impose obligations on individuals outside their borders.[33] The Foreign Corrupt Practices Act (FCPA),[34] for example, prohibits U.S. nationals living outside U.S. territory from engaging in certain practices. Despite being geographically outside the United States, individuals subject to the FCPA are nonetheless subject to U.S. law.[35] Strict territoriality also fails to account for the practice of offering selective immunity to individuals within state territory.[36] Foreign diplomats are exempt from some of the obligations the state imposes on other individuals within its boundaries. In that sense, diplomats do not accept the host state's full jurisdiction over them by virtue of their mere presence.[37] In each of these scenarios, territorial jurisdiction does not accurately describe the source of individuals' obligations. As a result of these incompatible situations, territoriality is an inconsistent proxy for mutuality of obligation.

b. Community Ties

Others have argued that territorial presence is a proxy for ties between an individual and the surrounding community.[38] They argue that an individual is most likely to develop ties to the institutions and individuals physically near her.[39] These

---

[33] Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1200-01 (1996).

[34] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), d(1), (g)-(h), 78dd-1 to -3, 78ff (2006)).

[35] *Id.*

[36] *See id.* §§ 78dd-2 & 78dd-3; Raustiala, *supra* note 30, at 2510 (describing the principle of sanctuary, where a location is "plainly within a prince's territorial realm yet into which secular law could not reach," as an example of lapses in territorial sovereignty). *See generally* Neuman, *supra* note 33.

[37] *See* Raustiala, *supra* note 30, at 2510.

[38] Joseph H. Carens, *On Belonging: What We Owe People Who Stay*, 30 BOS. REV., Summer 2005, at 3, 16, *available at* http://bostonreview.net/BR30.3/carens.php ("Whatever their legal status, individuals who live in a society over an extended period of time become members of that society, as their lives intertwine with the lives of others there. These human bonds provide the basic contours of the rights that a state must guarantee; they cannot be regarded as a matter of political discretion."); *see also* Bosniak, *Being Here*, *supra* note 20, at 404. *See generally* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 11 (2006) (describing an affiliations-focused approach to immigration based on "the ties [immigrants] have formed in this country").

[39] Carens, *supra* note 38.

ties, in turn, foster commitment and loyalty to the surrounding community, and they increase the likelihood the individual will contribute to that community. Likewise, the surrounding community forms ties with the individual such that the surrounding community depends on the individual's membership.

This rationale for territoriality is intuitive, but it can seem outdated in a modern world. After all, electronic communication and ease of travel reduce the need for interaction between individuals living in geographic proximity and allow individuals to form strong ties across state boundaries.[40] In addition, the community ties rationale does not parallel territoriality's binary world of members and nonmembers.[41] Even assuming that territorial presence results in affiliations between the individual and the surrounding community, strict territoriality does not account for the varying depth and type of ties any one individual might have to the community. In a membership system truly based on community ties, individuals with more numerous and significant connections to the surrounding community would presumably possess a stronger claim to membership rights than those who have fewer and weaker ties.

Although territorial presence seems to intuitively correlate with community ties such that territorial presence would be an effective proxy for those ties, there are many situations, as described above, in which that would not be the case.

c. Community Preservation

Territoriality might also help preserve the character of the surrounding community.[42] This rationale is also based on the idea that territorial presence serves as a proxy for ties between the individual and the surrounding community. It is not, however, the individual's fitness for membership that is at issue under this rationale but rather the preservation of the community's egalitarian character.[43] Scholars argue that excluding

---

[40] For a critique of the relationship between proximity or "place" on the one hand and identity and responsibility on the other, see Doreen Massey, *Geographies of Responsibility*, 86B GEOGRAFISKA ANNALER 5 (2004), *available at* http://oro.open.ac.uk/7224/1/geographies_of_responsibility_sept03.pdf.

[41] *See* Bosniak, *Being Here*, *supra* note 20, at 405-06.

[42] The community preservation rationale has also been called the anti-caste or anti-subjugation rationale. *See id.* at 392-95; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (2d ed. 1988).

[43] *See* Bosniak, *Being Here*, *supra* note 20, at 392-95.

individuals within the community from membership would create a subclass of nonmembers that would degrade the community's character.[44] It is important to note, however, that this rationale for territoriality is not one about fairness to individuals. Instead, it is about the nature of the community. In fact, under the community preservation rationale, unequal treatment of individuals would not be justified, even by consent of the affected individuals, because the community would nonetheless suffer from the creation of a subclass.[45]

This argument in favor of territoriality is perhaps the most appealing of the three discussed here. It suggests that, even when territorial presence may not reflect mutuality of obligation or community ties, inclusion may nevertheless be warranted because exclusion might bring unwanted changes to a society.

B. Membership Based on Status

Rights may also be distributed based on an individual's status with respect to the polity.[46] Under this approach, citizens enjoy all the rights and privileges offered by the polity, while those without any legal status enjoy fewer rights and privileges.[47] In the United States, voting rights follow this pattern: only citizens may vote, while others may not.[48] The U.S. welfare system also conforms to the status-based approach.[49] Citizens have access to many benefits that legal permanent residents do not enjoy, while legal permanent residents enjoy more benefits than do tourists and other temporary visa holders.[50]

---

[44] Owen Fiss has linked the Fourteenth Amendment to principles of community preservation. The Amendment, he argues, is "a statement about how society wishes to organize itself, and prohibits subjugation, even voluntary subjugation, because such a practice would disfigure society." Owen Fiss, *The Immigrant as Pariah*, 23 BOS. REV., Oct./Nov. 1998, at 5, *available at* http://bostonreview.net/BR23.5/Fiss.html; *see also* Thomas Jefferson, *Drafts of the Kentucky Resolutions of 1798*, *in* 7 THE WRITINGS OF THOMAS JEFFERSON: 1795–1801, at 303 (Paul Leicester Ford ed., 1896) ("[T]he friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow . . . .").

[45] *See* WALZER, *supra* note 14, at 62.

[46] *See* NEUMAN, *supra* note 10, at 6-7; Bosniak, *Being Here*, *supra* note 20, at 390.

[47] Bosniak, *Being Here*, *supra* note 20, at 390.

[48] For a description of a historical territorial-based approach to voting rights, see Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 21 IMMIGR. & NAT'LITY L. REV. 477, 479 (2000).

[49] *See* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 528-31 (6th ed. 2008).

[50] *See id.*

The status-based approach to membership is also a proxy-based approach. An individual's status as a citizen, standing alone, means very little. Rather, status is a measure for something more meaningful. Status might represent the polity's consent to that individual's participation in the community or the individual's willingness to abide by legal norms.[51] Status might also serve as a proxy for loyalty, community ties, or sense of obligation to the state.

Unfortunately, status does not always provide an accurate approximation of some of these factors. Like territoriality, the status-based approach to membership relies on an imperfect proxy. For example, a citizen is not necessarily more loyal than a legal permanent resident. Likewise, a legal permanent resident does not necessarily have more ties to the surrounding community than does a long-time undocumented resident. Thus, status is not a consistently effective proxy for these and other more substantive indicators of membership.

C. Post-Territoriality

As an alternative to proxy-based systems of rights distribution, courts and legislatures have also distributed rights under a more principled, functional approach.[52] Rather than referring to a proxy like territorial presence or status, courts and legislatures can instead directly measure an individual's ties to the surrounding community, sense of obligation to the United States, and other fundamental indicators of membership.[53] I call this a post-territorial approach because it values the rationales underlying the territorial model while divorcing itself from a rigid adherence to territorial presence. Post-territoriality is a developing, potential successor to territoriality.[54]

The Supreme Court's opinion in *Boumediene v. Bush* serves as a useful example of the post-territorial approach.[55] There, the Court held that Guantanamo Bay detainees had the right to petition for a writ of habeas corpus under the Constitution.[56] Specifically rejecting the argument that the detainees' location outside U.S. territory excluded them from

---

[51] *See* Bosniak, *Being Here*, *supra* note 20, at 390.
[52] *See* Núñez, *supra* note 16, at 842-47.
[53] *See id.*
[54] *Id.* at 848.
[55] 553 U.S. 723 (2008).
[56] *See id.* at 770.

petitioning for a writ of habeas corpus, the Court analyzed several factors before arriving at its conclusion.[57] The Court focused on the actual power the United States exerted over the detainees and the corresponding obligations the United States must afford.[58] In other words, the Court looked directly to mutuality of obligation, rather than to a proxy for mutuality of obligation, in order to determine the detainees' membership for purposes of habeas corpus review.

Cancellation of removal, the process by which an alien facing removal from the United States may instead obtain permission to remain as a permanent resident, provides an example of a legislative use of the post-territorial approach.[59] Under relevant law, an undocumented immigrant is eligible for cancellation if, among other requirements, she has been present in the United States for ten years, has been of good moral character, and can show that removal would result in exceptional and extremely unusual hardship to a qualifying relative in the United States.[60] Rather than simply ask whether the individual has the requisite status to remain in the United States, the Immigration and Nationality Act focuses on more direct measures of an individual's membership, including ties to the surrounding community and the extent to which the community depends on the individual.[61]

D. Aliens and Membership

For a U.S. citizen living in the United States, the difference between the status-based approach and the territory-

---

[57] *See id.* at 752 ("[N]o law other than the laws of the United States applies at the naval station" even though Cuba retains technical sovereignty over Guantanamo.); *see also* Neuman, *supra* note 32, at 259 (exploring *Boumediene*'s functional approach to the extraterritorial application of the Constitution).

[58] *See Boumediene*, 553 U.S. at 769, 771 (contrasting *de jure* sovereignty with practical sovereignty and finding that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States" because the detainees at issue "are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government").

[59] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240A, 110 Stat. 3009-594 (codified as amended at 8 U.S.C. § 1229b (2006)) (providing a mechanism by which removable aliens may remain in the United States as legal permanent residents).

[60] *See id*. § 240A(b).

[61] The cancellation of removal statute admittedly uses proxies—length of stay in United States, *see id.* § 240A(b)(1)(A), and hardship to U.S. relatives, *see id.* § 240A(b)(1)(D), for example—to measure membership. The cancellation statute, however, is fairly characterized as post-territorial in nature because it rejects proxies that are no longer useful in favor of a more textured analysis of the individual's membership.

based approach is merely theoretical. After all, whether it is because of her citizenship or her presence within the United States, the individual receives membership benefits. A U.S. citizen in the United States is entitled, for example, to the protections of the Fourth Amendment, either because she is present in the United States or because she is a U.S. citizen. But for an alien, the decision of which membership paradigm governs has a very palpable effect on the rights the alien enjoys. For example, an undocumented immigrant in the United States might find that her presence within the United States is simply not enough to secure Fourth Amendment rights and that her status precludes her from those rights.[62] Similarly, for individuals living outside the United States, the membership model applied matters. Indeed, citizenship might secure a right for an individual despite her absence from U.S. territory.

Thus, the applicability of U.S. law to aliens within the United States and to individuals outside of the United States provides two perfect fields in which to study the evolving trajectory of membership models in the United States. An examination of that trajectory reveals a trend away from strict territoriality. As presence within the United States becomes less accurate in reflecting an individual's ties to the United States, courts and legislatures are looking to other indicators of membership. In some instances, legal status now secures a certain right or privilege. In other instances, courts and legislatures have attempted to directly measure an individual's community ties and sense of obligation to the United States. That is, in some areas of law, the status-based approach is now competing with the post-territorial approach to displace the more traditional territorial model. As a result, presence within the United States no longer guarantees certain membership rights, and presence outside the United States does not necessarily foreclose an individual from receiving membership rights.

The tension between competing membership paradigms arises in a variety of spheres. In the labor and employment context, for example, a status-based approach to worker rights has slowly begun to displace the territorial model.[63] The result is a fractured system in which some courts tether rights to

---

[62] *See, e.g.*, United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003).

[63] *See generally* Núñez, *supra* note 17, at 849 (arguing that under a post-territorial approach, undocumented immigrants are members of the employment sphere entitled to all the rights and remedies available to documented workers).

lawful immigration status or citizenship while others tie them to territorial presence.[64] This disconnect is apparent in Title VII discrimination cases,[65] state employment law and tort claims,[66] and workers' compensation claims.[67]

State legislatures have adopted different membership models in their treatment of undocumented college students, as well. Some states offer in-state tuition prices to all students who are residents of the state, regardless of their immigration status,[68] while other states require in-state undocumented

---

[64] For example, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that an undocumented worker could not recover backpay, wages that would have been earned but for an illegal termination, under the National Labor Relations Act (NLRA). *Id.* at 159-60. The decision opened the door for significant encroachment of a status-based approach into the labor and employment law sphere. *See supra* notes 58-61 and accompanying text.

[65] *See, e.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896-97 (S.D. Tex. 2003). *But see* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1074-75 (9th Cir. 2004) (suggesting that *Hoffman* is not applicable to Title VII claims).

[66] *See, e.g.*, Garcia-Lopez v. Bellsouth Telecomm., No. 1:08CV1397-LG-RHW, 2010 WL 1873042, at *6 (S.D. Miss. May 7, 2010) (holding that an undocumented immigrant's lost wage and earning capacity claims are barred); Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317, 1334-35 (M.D. Fla. 2003) (holding that the estate of an undocumented worker injured in a work-related accident could not recover lost U.S. wages against the forklift manufacturer); Crespo v. Evergo Corp., 841 A.2d 471, 473 (N.J. Super. Ct. App. Div. 2004) (holding that a claimant's lack of authorization to work precluded both economic and non-economic damages for her illegal termination); *see also* Hernandez-Cortez v. Hernandez, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780, at *16-17 (D. Kan. Nov. 4, 2003) (suggesting that an undocumented worker may be able to recover lost wages, but only at the prevailing wage in the individual's country of origin); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1002 (N.H. 2005). *But see* Madeira v. Affordable Hous. Found., 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (holding that undocumented status does not prevent a worker from recovering compensatory damages for state employment law violations).

[67] *See, e.g.*, Xinic v. Quick, 69 Va. Cir. 295 (Va. Cir. Ct. 2005). *But see* Pontes v. New Eng. Power Co., No. 0300160A, 2004 WL 2075458, at *3 (Mass. Super. Ct. Aug. 19, 2004) (holding status is not relevant in worker's compensation claim); Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) (limiting award of lost wages to compensate only for time period during which employer did not know of employee's undocumented status); Cherokee Indus. v. Alvarez, 84 P.3d 798 (Okla. Ct. App. 2003) (suggesting that undocumented status may render alien ineligible for specific remedy of vocation rehabilitation or medical treatment by a specific doctor).

[68] Thirteen states have enacted such laws: California, *see* CAL. EDUC. CODE § 68130.5 (West 2002); Connecticut, *see* CONN. GEN. STAT. § 10a-29 (2011); Illinois, *see* 110 ILL. COMP. STAT. ANN. 305/7e-5 (2009); Kansas, *see* KAN. STAT. ANN. § 76-731a (West 2004); Maryland, *see* MD. CODE ANN. § 15-106.8 (West 2012); Nebraska, *see* NEB. REV. STAT. ANN. § 85-502 (West 2006); New Mexico, *see* N.M. STAT. ANN. § 21-1-1 (2005); New York, *see* N.Y. EDUC. LAW § 355(h)(8) (McKinney 2012); Texas, *see* TEX. EDUC. CODE ANN. § 54.052 (West 2001); Utah, *see* UTAH CODE ANN. § 53B-8-106 (West 2002); Washington, *see* WASH. REV. CODE ANN. § 28B.15.012 (West 2003); Oklahoma (overturned in 2011), *see* OKLA. STAT. ANN. tit. 70, § 3242 (West 2007), *invalidated by* Thomas v. Henry, 260 P.3d 1251 (Okla. 2011); and Wisconsin (repealed in 2011), *see* WIS. STAT. § 36.27, *repealed in part by* 2011 Wis. Legis. Serv. 32 § 994L (June 26, 2011). The Rhode Island Board of Regents has adopted policies allowing undocumented students to pay in-state tuition at state schools, though no legislative act requires it. *See* S. 5.0, R.I. Board of Governors for Higher Education,

students to pay the higher, out-of-state tuition prices.[69] States have also differed on whether undocumented status should foreclose students from enrolling in post-secondary state schools at all.[70]

Another area in which the territorial model competes with a status-based model lies in the debate over whether to allow undocumented immigrants to apply for driver's licenses. A majority of states have now passed laws that require proof of legal residency or citizenship in order to obtain a driver's license.[71] A handful of states, however, continue to allow all state residents, regardless of their immigration status, to apply for some form of driver's license.[72]

These examples highlight the waning importance of territorial presence. Being here, alone, is not enough. From the examples discussed above, it appears that a status-based approach is quickly overtaking the previously dominant territorial approach. The tension, however, between the territorial model's broad inclusivity of individuals within the borders and the status-based model's categorical exclusion of undocumented immigrants has led to a post-territorial approach in the sphere of constitutional law. Although territorial presence once guaranteed protection under the Constitution, with little explanation, recent Supreme Court precedent suggests that something more substantive than territorial presence triggers constitutional coverage.

For much of U.S. history, territorial presence weighed heavily in the distribution of membership rights. Commentators

---

Sept. 26, 2011, *available at* http://www.ribge.org/residency1for2012.pdf; *see also Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/
educ/undocumented-student-tuition-state-action.aspx (last visited Jan. 18, 2013).

[69] At least four states legislatures specifically foreclose undocumented immigrants from in-state tuition prices: Arizona, *see* ARIZ. REV. STAT. ANN. § 15-1803 (2006); Colorado, *see* COL. REV. STAT. ANN. § 24-76.5-103 (2011); Georgia, *see* GA. CODE ANN. § 20-3-66 (2008); and Indiana, *see* IND. CODE ANN. § 21-14-11 (West 2011). South Carolina, Indiana, and Alabama also prohibit undocumented students from enrolling in state postsecondary schools. *See Undocumented Student Tuition*, *supra* note 68.

[70] South Carolina, *see* S.C. CODE ANN. § 59-101-430 (2008); and Alabama, *see* ALA. CODE § 31-13-8 (2011); 2011 Ala. Acts 535 § 8, also prohibit undocumented students from enrolling in state postsecondary schools.

[71] *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-3153(D) (2011); MICH. COMP. LAWS ANN. § 257.307 (2012); NEV. REV. STAT. § 483.290 (West 2011).

[72] Washington, New Mexico, and Utah allow undocumented immigrants to apply for some form of a driver's license. *See* N.M. STAT. ANN. § 66-5-9 (West 2011); UTAH CODE ANN. § 53-3-205(8) (West 2002); WASH. REV. CODE ANN. §§ 46.20.021, 46.20.091 (West 2003).

attribute this inclusive tradition to *Yick Wo*,[73] where the Supreme Court held that the protections of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[74] Indeed, this reasoning found favor in subsequent cases exploring the Constitution's application to aliens.[75]

Of course, the necessary corollary to a rule that distributes rights based exclusively on presence inside the borders is the denial of rights to individuals on the outside. Indeed, being outside the United States has, for much of U.S. history, foreclosed protection under many constitutional provisions.[76] The Constitution, as it turned out for those outside the border, could "have no operation in another country."[77]

More recently, this territorial approach to membership has undergone a transformation toward post-territoriality. Perhaps because territorial presence is not as accurate as it once was in predicting community ties or an individual's sense of obligation to the surrounding community and polity, courts and legislatures have begun to look past territorial presence to more substantive factors. The Supreme Court's opinion in *United States v. Verdugo-Urquidez*,[78] for example, suggested that the Constitution only protects aliens who have "developed

---

[73] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[74] *Id.* at 369.

[75] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 222-23, 230 (1982) (holding that the Equal Protection clause of the Fourteenth Amendment requires states to provide public education to undocumented children); Wong Wing v. United States, 163 U.S. 228, 234-35 (1896) (extending the reasoning of *Yick Wo* to the Fifth and Sixth Amendments).

[76] *See, e.g.*, *In re* Ross, 140 U.S. 453 (1891) (holding that a sailor, whom the court treated as a constructive U.S. citizen, employed on a U.S. merchant ship was not protected by the Sixth Amendment's guarantee of a trial by jury). The *Insular Cases*, which centered on whether the Constitution applied to U.S. territorial possessions such as the Philippines and Puerto Rico, also provide good examples of the exclusionary side of territoriality. *See* Dorr v. United States, 195 U.S. 138, 139 (1904); Hawaii v. Mankichi, 190 U.S. 197, 198 (1903); Armstrong v. United States, 182 U.S. 243, 244 (1901); Downes v. Bidwell, 182 U.S. 244, 247-48 (1901); De Lima v. Bidwell, 182 U.S. 1, 2 (1901); Dooley v. United States, 182 U.S. 222, 222 (1901).

[77] *In re Ross*, 140 U.S. at 464.

[78] 494 U.S. 259 (1990). Justices Kennedy, White, O'Connor, and Scalia joined Justice Rehnquist's opinion, but Justice Kennedy also submitted his own concurrence, which diverged from the reasoning of the Court. As a result, courts and commentators have questioned the precedential value of what amounts to a plurality opinion. *See* Lamont v. Woods, 948 F.2d 825, 835 & n.7 (2d Cir. 1991); Randall K. Miller, *The Limits of U.S. International Law Enforcement After* Verdugo-Urquidez*: Resurrecting* Rochin, 58 U. PITT. L. REV. 867, 867 n.3 (1997); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 972 (1991).

substantial connections with this country."[79] Territorial presence, alone, was insufficient.[80] The Court has also departed from strict territoriality in cases focusing on individuals outside the border—that is, absence from U.S. territory does not necessarily foreclose an individual from constitutional protection. For example, in *Reid v. Covert*,[81] the Court held that U.S. citizens living abroad and convicted of murder by a U.S. military court were entitled to the right to a trial by jury after indictment by a grand jury.[82] In *Reid*, the Court rejected the strict territorial approach of earlier cases in favor of a status-based approach that focused on the individuals' U.S. citizenship.[83] More recently, in *Boumediene v. Bush*,[84] the Court held that enemy combatants held at Guantanamo Bay were entitled to the writ of habeas corpus and the protections of the Suspension Clause.[85] Enemy combatants were deemed "members" for purposes of habeas corpus review, not because of status or presence within U.S. territory, but because of a more substantive concern with, among other things, providing protections to those on whom the government imposes obligations.[86] In evaluating substantive indicators of membership rather than categorically granting or denying rights based on territorial presence, Supreme Court opinions show a trend toward post-territoriality.

The trend away from territoriality and toward post-territoriality suggests an increased focus on the substance of membership. Though this trend represents an encouraging move away from proxy-based systems of membership that are both overinclusive and underinclusive,[87] the trend toward post-territoriality has not yet been developed in the sphere of citizenship law. And those who call for the abandonment of a

---

[79] *Verdugo-Urquidez*, 494 U.S. at 271.

[80] *Id.* at 271-72 ("[T]his sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country.").

[81] 354 U.S. 1 (1957).

[82] *Id.* at 32-33.

[83] *See id.* at 5-6 ("[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the . . . Bill of Rights . . . should not be stripped away just because he happens to be in another land.").

[84] 128 S. Ct. 2229 (2008).

[85] *See id.* at 2277.

[86] *See* D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85 (2011) (arguing that *Boumediene* was decided under a post-territorial paradigm that focuses on the underlying rationales of territoriality).

[87] *See generally* Núñez, *supra* note 17.

territorial conception of birthright citizenship have not advocated for a system of distributing citizenship that employs more accurate measures of membership. Rather, they seek to replace territorial presence with a different proxy: parents' immigration status. In the remainder of this article, I argue that, when it comes to birthright citizenship, where inaccurate proxies are unavoidable, territorial presence is the more accurate indicator of membership and best fulfills the post-territorial objective of accurate and fair inclusion.

II. CITIZENSHIP AND TERRITORY

Citizenship in the United States is intimately related to territory. Virtually all U.S. citizenship rules require a connection to U.S. territory. Birthright citizenship under the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,"[88] is one of the most territorial conceptions of citizenship in the industrialized world. Even birthright citizenship rules for the foreign-born children of U.S. citizens incorporate a strong territorial component. In order to pass U.S. citizenship to their children born abroad, U.S. citizen parents must have lived or been physically present in the United States before the birth of the child.[89] Thus, even U.S. birthright citizenship based on blood or inheritance—known as *jus sanguinis*—is strongly territorial in nature. Naturalization laws also require a territorial connection to the United States, with most immigrants being required to have a continuous residence in the United States for the five years prior to naturalization.[90] Beyond the residency requirement, naturalization rules also require an intending citizen to have been physically present in the United States for at least two and a half years before naturalization.[91]

---

[88] U.S. CONST. amend. XIV, § 1.

[89] *See, e.g.*, 8 U.S.C. § 1401(c) (2006) (Two U.S. citizens may pass U.S. citizenship to children born abroad if one of the parents "had a residence in the United States" before the birth); *id.* § 1401(g) (A child born abroad to one U.S. citizen and one alien is a U.S. citizen only if, before the birth, the U.S. citizen parent "was physically present in the United States" for at least five years, two of which were after the parent was 14 years old); *id.* § 1409(c) (A child born out of wedlock to a U.S. citizen mother is a U.S. citizen only if the mother has been "physically present in the United States . . . for a continuous period of one year.").

[90] *See id.* § 1427(a). Those who immigrate as the spouse of a U.S. citizen may naturalize after three years of residency in the United States. *See id.* § 1430(a).

[91] *See id.*

Citizenship's relationship to territory has not, as it has in other aspects of U.S. law, given way to post-territoriality. Rather, it seems that exactly the opposite has occurred. U.S. citizenship began and evolved in the post-territorial climate of the American Revolution, where boundaries—both territorial and political—were shifting so profoundly that it was difficult to tether citizenship to them. As boundaries solidified, so too did citizenship rules.

Below, I explore several junctures in U.S. history in which courts and legislatures asked the fundamental question—who should be a citizen? I attempt to distill the substantive factors that motivated the answers to this question in order to evaluate, in Part III, the merits of using territorial presence at birth as a proxy for membership today.

A. The Birth of American Citizenship

The earliest U.S. citizens were those who became such after the British colonies in America declared independence in 1776. With no clear rule demarcating the boundaries of citizenship, courts struggled to identify whether and when these individuals became U.S. citizens.[92] What made a former British subject a citizen? When did British subjects become citizens? As courts sorted between citizens and noncitizens in the wake of the Revolution, they did not conform to rigid rules. Instead, more interestingly, courts looked to underlying rationales for the concept of membership. And in the course of that evaluation, an individual's sense of allegiance to the United States and community ties, as indicated by territorial presence, played an important role.

1. Post-Revolution Citizenship Cases

Two Supreme Court cases, *Inglis v. Trustees of Sailor's Snug Harbour*[93] and *Shanks v. Dupont*,[94] specifically dealt with the effects of revolution and U.S. independence on individual citizenship. In both cases, the Court focused on U.S. inhabitants' "right of election"—that is, the right of selecting one's citizenship

---

[92] I use "U.S. citizen" here to refer both to citizens of the individual states and of the United States as a whole. Citizens of individual states, after all, were citizens of the United States.

[93] Inglis v. Tr. of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99 (1830).

[94] Shanks v. Dupont, 28 U.S. (3 Pet.) 242 (1830).

in the wake of a revolution.[95] An individual exercised her right of election, not through a formal declaration, but rather through allegiance to a country as apparent from her actions. The Court's decisions in *Inglis* and *Shanks* thus highlight some of the methods by which courts measured an individual's allegiance and consequent citizenship.

In each case, the Court's analysis followed a similar pattern, although the application to each case's details carried some nuance. First, the Supreme Court addressed the individual's citizenship at birth under a simple *jus soli* rule.[96] Second, the Court determined whether the individual, during and after the Revolution, had made an election to become a U.S. citizen.[97] If the individual was not of age at the time of the Revolution, the Court assigned to the child whatever election the child's parent had made on the child's behalf.[98] In both of these steps, territory played an important role; the location of an individual's birth and later residence weighed heavily in the determination of citizenship.

a. John Inglis

In *Inglis*,[99] the U.S. Supreme Court determined that John Inglis was not a U.S. citizen and therefore could not

---

[95] *Inglis*, 28 U.S. at 121-22; *Shanks*, 28 U.S. at 255-56. *See* Respublica v. Samuel Chapman, 1 U.S. (1 Dall.) 53, 53 (1781) (describing the right of election as available to individuals where one government "withdraw[s] from an old government, and erect[s] a distinct one").

[96] *See Inglis*, 28 U.S. at 120-21; *Shanks*, 28 U.S. at 245.

[97] *See Inglis*, 28 U.S. at 121-22; *Shanks*, 28 U.S. at 255-56.

[98] In *Birthright Citizenship and the Civic Minimum*, Professor Mayton suggests that the Court's willingness to tie a child's citizenship to his or her parent's citizenship evidences the Fourteenth Amendment's citizenship clause original meaning: as a *jus sanguinis* rule. William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008). While this article does not purport to identify the original understanding of the Fourteenth Amendment, it is worth noting that the Court in post-Revolution citizenship cases does not purport to apply a *jus sanguinis* citizenship rule. Rather, the Court specifically holds that birthright citizenship is governed by the rule of *jus soli*. It is the child's later *election*, which exists only during times of revolution or other political schism, that may be tied to the parent. That is, where the child did not have the capacity to legally make an election, the Court held that the parent's election would serve as the child's election as well. This is an important distinction in light of the factors the Court considered to determine the parent's election. In every case, the parent's choice of residence was determinative. In each case, the child lived with his or her parent. That is, the parent's residence was also the child's. A strict *jus sanguinis* rule relies on the parent's citizenship, which is cast before a child is born and can be in a country to which a child has no physical connection.

[99] *Inglis*, 28 U.S. at 99.

inherit real property located in the United States.[100] Inglis was born in New York sometime before 1779.[101] In 1783, Inglis left the United States with his father, an English royalist, for England.[102] Inglis remained in England for two years and then took up residence in Nova Scotia, of which he became the bishop under the Church of England.[103]

The Court recognized at the outset that the issue of citizenship was not just a matter of long-established citizenship rules:

> This question as here presented, does not call upon the court for an opinion upon the broad doctrine of allegiance and the right of expatriation, under a settled and unchanged state of society and government. But to decide what are the rights of the individuals composing that society, and living under the protection of that government, when a revolution occurs; a dismemberment takes place; new governments are formed; and new relations between the government and the people are established.[104]

First, the court began with the "universally admitted" proposition that an individual born on American territory subject to British rule was born a British subject.[105] In essence, the Court began with *jus soli*—that birth on British-governed territory would result in British citizenship. Unfortunately, the date of Inglis's birth in New York was unclear. Since New York had been alternately occupied by British and American forces during the years when Inglis could have been born, the Court could not ascertain whether New York was a British colony at the time of Inglis's birth.[106]

In any event, *jus soli* was insufficient to resolve the issue of Inglis's ultimate citizenship because, even if the British had governed the colonies at the time of Inglis's birth, a new government controlled that same territory at the time of Inglis's ability to inherit property. A new dimension of *jus soli* had to be explored—namely, whether *jus soli* ties an individual

---

[100] *Id.* at 126-27. Because the date of John Inglis's birth, which would have revealed Inglis's citizenship at birth (depending on who controlled the territory in which Inglis was born), and Inglis's age at the time when he could have made an election (which would dictate whether Inglis could make his own election or merely follow his father's election), were uncertain, the Court reached this conclusion by evaluating the outcome based on several different hypothetical birth dates. *See id.* at 126.

[101] *Id.* at 102-03.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 120.

[105] *Id.* at 120-21.

[106] *Id.* at 120.

to the territory of birth regardless of who exercises sovereignty over that territory, or whether *jus soli* ties an individual to the government that exercised sovereignty over that territory at the time of birth.

The Court found that Inglis's citizenship was not tied to either. Rather, Inglis had a "right of election." Inglis's nationality was not a mere function of formal legal rules, but rather the result of his allegiance, as demonstrated by his actions.[107] Thus, the Court considered whether Inglis had, at some point after birth, become (or, if he had been born while his home was ruled by American forces, remained) an American citizen:

> The settled doctrine of this country is, that a person born here, who left the country before the declaration of independence, and never returned here, became thereby an alien, and incapable of taking lands subsequently by descent in this country. The right to inherit depends upon the existing state of allegiance at the time of descent cast.[108]

The Court finally concluded that, regardless of whether the British controlled New York at the time of Inglis's birth, Inglis had ultimately become a British subject by leaving New York for England and never returning.[109] The Court also suggested that Inglis may have been a British subject, rather than an American citizen, *before* leaving the United States.[110]

---

[107] *Id.* at 123. In his concurrence, Justice Story summed up this pragmatic, post-territorial approach:

> Under the peculiar circumstances of the revolution, the general, I do not say the universal, principle adopted, was to consider all persons, whether natives or inhabitants, upon the occurrence of the revolution, entitled to make their choice, either to remain subjects of the British crown, or to become members of the United States. . . . [E]ach case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party.

See id. at 159-60 (Story, J., concurring).

[108] *Id.* at 121 (majority opinion).

[109] *Id.* at 126-27. The Court analyzed Inglis's "election" by considering three hypothetical dates of birth: birth prior to the Declaration of Independence, birth after the Declaration of Independence but prior to the later British occupation of New York, and birth during the British occupation of New York. *Id.* at 126. If born prior to the Declaration of Independence, Inglis was born a British subject and by leaving the United States, he elected to remain a British subject. *Id.* If born after the Declaration of Independence but prior to the subsequent British occupation, then Inglis would be too young to make his own election and would be assigned his father's election to be a British subject. *Id.* If born during the British occupation of New York, Inglis was born a British subject and elected to remain a British subject by leaving the United States. *Id.* In any event, the Court noted, by ultimately leaving the United States and remaining in Britain, Inglis had elected to abandon any U.S. citizenship he had. *Id.* at 127.

[110] *Id.* at 126 ("[H]is infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right

Inglis was likely too young to make an election during his time in the United States, and Inglis's father, who was a royalist, would have elected British nationality for Inglis.[111]

b. Ann Shanks

An individual's decision to remain in the colonies or leave them proved equally important in *Shanks*.[112] There, the parties contested the citizenship of Ann Shanks both at the time of her father's death and at the time of the treaty with Great Britain of 1794, which controlled whether her children could inherit land in South Carolina.[113]

Shanks was born in South Carolina.[114] Her father, Thomas Scott, supported the American cause.[115] In 1781, Shanks married a British officer and later left South Carolina for England with her husband in 1782.[116] After Shanks's marriage but before her departure to England, Shanks's father died.[117] After raising five children in England, Shanks died in 1801.

Justice Story, writing for the Court, concluded that Shanks was a citizen of South Carolina at the time of her father's death,[118] but she was not a U.S. citizen at the time of the treaty.[119] The Court focused on Shanks's "election" and "allegiance," as evidenced by her voluntary residence in one country or another.

With respect to Shanks's citizenship on the date of her father's death, the Court viewed Shanks's residence in South Carolina as an important indicator of Shanks's U.S. citizenship. Noting that Ann's father "adhered to the American cause," the Court reasoned,

> There is no dispute that . . . Ann, at the time of the revolution, and afterwards, remained in South Carolina until December 1782. Whether she was of age during this time does not appear. If she was,

---

of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject.").

[111] *Id.*

[112] Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246-47 (1830).

[113] *Id.* at 243.

[114] *Id.* at 244.

[115] *Id.* at 245.

[116] *Id.* at 244.

[117] *Id.*

[118] *Id.* at 245.

[119] *Id.* at 246-47.

> then her birth and residence might be deemed to constitute her by election a citizen of South Carolina.[120]

That Shanks remained in the state of her birth when she came of age was a strong indicator of Shanks's allegiance to that state. If she was not of age, then the evidence—that Shanks's father was an American supporter—suggested that her father had nonetheless elected American citizenship for Ann.[121]

According to the Court, the fact that Shanks had married a British subject before her father's death could not change her

---

[120] *Id.* at 245.

[121] *Id.* at 247. Justice Story explained, "If she was not of age, then she might well be deemed under the circumstances of this case to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his national character, as a citizen of that country." *Id.* at 245. Justice Story's statement appears to be directly at odds with Justice Thompson's analysis in *Inglis*, decided in the same term as *Shanks*. In *Inglis*, Justice Thompson had begun with the "universally admitted" proposition that "all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects." Inglis v. Tr. of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 120 (1830). Indeed, Justice Story, just a few paragraphs before referring to Ann's father's citizenship, had confirmed *Inglis* to be the Court's complete statement of the relevant law. *Shanks*, 28 U.S. at 245 ("After the elaborate opinions expressed in the case of Inglis vs. The Trustees of the Sailor's Snug Harbour . . . upon the question of alienage, growing out of the American Revolution; it is unnecessary to do more in delivering the opinion of the court in the present case, than to state, in a brief manner, the grounds on which our decision is founded.").

While some have suggested that Justice Story's assignment of American citizenship to Shanks despite her birth in a British colony is an endorsement of *jus sanguinis*, *see, e.g.*, Mayton, *supra* note 98, at 222, an analysis of the specific facts in the case suggest otherwise. The Court could not have meant to endorse a conventional *jus sanguinis* rule of citizenship. If it had, then Ann could not possibly be a U.S. citizen. After all, her father was born in South Carolina prior to the Revolution and his parents were, in the best case scenario, born in the British colonies, and, in the worst case scenario, born in Britain or elsewhere. Were *jus sangunis* or *jus soli* controlling, Ann's father would be a British subject (or a citizen or subject of whatever state his parents belonged to). But in *Shanks*, the Court found that Shanks would have been a U.S. citizen. This result was entirely a product of the doctrine of election, by which Shanks had a choice of nationality. If, however, Ann was not competent to make a choice because of age, then the Court would have to look to the father. Other than the place of his birth (in a British colony), the only information the Court mentioned about Shanks's father was his political loyalty and his residence in South Carolina: "[H]er father adhered to the American cause." *Shanks*, 28 U.S. at 245. It seems then, that in holding that Anne would have the citizenship of her father, the Court was not holding that Ann inherited her father's *original citizenship*, but instead Shanks inherited her father's *election* after the Declaration of Independence. This is very different from *jus sanguinis*, which ascribes citizenship on individuals through blood lines. Shanks's "election" was a choice that she was entitled to make if competent to make the decision and that her father was entitled to make if she was not competent.

citizenship.[122] Shanks's association or legal ties to an individual did not involuntarily strip her of her elected citizenship.[123]

On the question of Shanks's citizenship after the date of her father's death, the Court concluded that Shanks had ultimately become a British subject.[124] Once again, voluntary residence in a country was determinative. That is, although Shanks's marriage to a British officer did not dissolve her U.S. citizenship, her later decision to move to Britain did: "[H]er subsequent removal with her husband operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown."[125] Shanks's decision to permanently leave the United States was an important—if not controlling—indicator of her election to relinquish U.S. citizenship.

c. Asa Kilham and Henry Gardner

The importance of an individual's physical attachment to territory heavily influenced the outcomes in several early state court cases, as well.[126] In 1806, the Massachusetts Supreme Court held that the claimant, Asa Kilham, who had been denied the opportunity to vote on the ground that he was an alien, was a citizen entitled to vote.[127] Kilham was born in Massachusetts in 1754,[128] but in 1775, he departed to Newfoundland.[129] Nevertheless, he had always expressed loyalty to the American cause.[130] In fact, he had refused to fight against the Americans during his return voyage to the United

---

[122] *Shanks*, 28 U.S. at 246.

[123] Of course, the Court's dismissal of these arguments is also notable for its implications on gender and citizenship. For a discussion of the historical effect of a woman's marriage on her citizenship, see Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

[124] *Shanks*, 28 U.S. at 247.

[125] *Id.* at 246-47. The Court also found that, even if Ann's move to Britain was not sufficient to dissolve her American Citizenship, it was, nonetheless, enough to establish her election to be a British subject. *Id.* at 249.

[126] *See* Kilham v. Ward, 2 Mass. (1 Tyng) 236 (1806); Gardner v. Ward, 2 Mass. (1 Tyng) 244 (1805); Palmer v. Downer, 2 Mass. (1 Tyng) 179 (1801) (holding that a Massachusetts native who left the U.S. after the commencement of the Revolution and remained in British-ruled territory until his death became an alien); Moore v. Wilson's Admin'rs, 18 Tenn. (10 Yer.) 406, 408-09 (1837) ("Besides, the complainant has resided since 1780 within the United States, and has been twice married to American citizens, and she therefore is not an alien.").

[127] *See Kilham*, 2 Mass. at 262 (opinion of Parker, J.).

[128] *Id.* at 236 (reporter's commentary).

[129] *Id.*

[130] *Id.*

States at great personal expense.[131] In 1780, Kilham arrived in Massachusetts, where he joined the militia, attended town meetings, and engaged in a trade.[132] The court affirmed his citizenship. "[H]e did not lose his rights as a citizen of the United States," the court found. "His absence from his country was temporary, and was for the purpose of getting a livelihood."[133]

Less than a year before, the Massachusetts court also heard the case of *Gardner v. Ward*, in which the claimant's vote had been disallowed for the same reason as Kilham's.[134] There, the court held that Gardner was a citizen despite a long absence from the United States.[135] Because Gardner returned to Salem, "there having his domicile," and joined in the American cause, "he was, of course, a citizen of the United States."[136]

2. Understanding the Meaning of Territory

At first glance, these early post-Revolution cases appear to have been decided entirely on the basis of territorial presence and therefore seem to offer little insight into why the courts thought territorial presence was a useful metric for sorting citizens from noncitizens. But the courts' decisions did not evaluate the individual's history of arrivals and departures from the United States in a vacuum. The courts also took note of the individual's (and his or her family's) expressions of loyalty to the United States. In *Inglis*, for example, the fact that the claimant's father was a royalist weighed against a finding of U.S. citizenship.[137] In contrast, the Court found that Ann Shanks's father supported "the American cause," which weighed in favor of finding U.S. citizenship on the date of her

---

[131] *Id.* at 236-37. As a result of his refusal, the officers of the ship confiscated his property. *Id.*

[132] *Id.* at 237.

[133] *Id.* at 262 (opinion of Parker, J.).

[134] *Id.* at 262; Gardner v. Ward, 2 Mass. (1 Tyng) 244, 244 (1805) (reporter's commentary).

[135] *Gardner*, 2 Mass. at 247-48 (opinion of Sewall, J.).

[136] *Id.* at 150 (emphasis omitted).

[137] *See* Inglis v. Trustees of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 124 (1830) (noting that the claimant's father was "as much a royalist" and "that no man could be more so"); *see also Kilham*, 2 Mass. at 236-37 (noting the claimant's frequent expressions of "his attachment to his native country" and refusal to fight against Americans); *Gardner*, 2 Mass. at 236 n.1 (commenting that the claimant had, during his absence from the United States, loaned money to American prisoners).

father's death.[138] In addition, the courts considered where the individual raised his or her family, with the *Shanks* Court specifically observing that Ann Shanks's children had all been born in England.[139] This fact was an indication of her election to eventually relinquish U.S. citizenship. The claimant's integration into the community also played a role in the courts' determinations. In *Kilham*, the court noted the claimant's work as a carpenter, his voting history, and the fact that he was believed by his neighbors to have been temporarily outside the United States for legitimate purposes.[140]

Not surprisingly, these facts correspond to the rationales of territoriality identified above in Part I.A.[141] An individual's loyalty and willingness to support the American cause are one side of the mutuality of obligation equation. As an individual takes on obligations to a state, the state is obliged to provide corresponding protections. Moreover, an individual's willing integration into a community evidences community ties that ought to be recognized by continued inclusion in that community. The facts that the courts considered in these post-Revolution citizenship cases, combined with their correlation with mutuality of obligation and community ties, suggests that territorial presence served as a proxy for these more substantive indicators of membership.

B. The Fourteenth Amendment

The question of who should be a citizen resurfaced during the adoption of the Fourteenth Amendment.[142] Although this article does not purport to explore in detail the original

---

[138] *See* Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 245 (1830) (stating that Shanks's father "adhered to the American cause" and therefore would have passed on that character to Ann if she were not of age at the time of the Revolution).

[139] *See id.* at 244 (observing that Shanks had left five children, all born in England, at her death).

[140] *See Kilham*, 2 Mass. at 237 (observing that the claimant had joined the local militia in Massachusetts, worked in his trade there, had voted at town meetings, and appeared to his neighbors to be genuine in his explanation for having been outside of the United States for some time); *see also Gardner*, 2 Mass. at 236 n.1 (taking account of the claimant's continued connection with the United States during his absence through an agent, his transaction of business in Massachusetts upon return, and the community's consideration of him as a citizen).

[141] *See supra* text accompanying notes 22-44.

[142] *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2893 (1866) (remarks of Sen. Reverdy Johnson) ("Who is a citizen of the United States is an open question.").

intent of the drafters of the Fourteenth Amendment,[143] an examination of the Amendment's legislative history illustrates the tenacity of territoriality within the concept of American citizenship and highlights some of the substantive factors for which territorial presence served as proxy.

The originally proposed Fourteenth Amendment did not include any citizenship language.[144] It was not until after House adoption that Senator Jacob Howard of Michigan proposed a citizenship clause during the Senate debate of the Amendment: "[A]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[145] Two concerns with the proposed language arose: First, the language would make citizens of the children of Chinese immigrants and "Gypsies."[146] Second, the language would make citizens of Native Americans living in U.S. territory.[147] The discussion that surrounded these two issues once again highlighted the underlying rationales for a territorial approach to citizenship—a desire to recognize mutuality of obligation, account for community ties, and avoid the creation of a caste system.

1. Children of Gypsies and Chinese as Citizens

Senator Cowan of Pennsylvania, an objector to the Amendment, assured that Gypsies were a threat to his state. He described Pennsylvania's struggle with

> a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own—an *imperium in imperio*; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen . . . . They wander in gangs in my state. . . . If the mere fact of being born in the country confers that right, then they will have it; and I think it will be mischievous.[148]

---

[143] For analyses of the Fourteenth Amendment's original meaning, see Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 2010 AM. U. L. REV. 331 (2010); Mayton, *supra* note 98.

[144] *See* Epps, *supra* note 143, at 353.

[145] CONG. GLOBE, 39TH CONG., 1ST SESS. 2890 (1866) (remarks of Sen. Jacob Howard).

[146] *Id.* at 2890-91 (remarks of Sen. Edgar Cowan).

[147] *Id.* at 2894 (remarks of Sen. Lyman Trumbull).

[148] *Id.* at 2890-91 (remarks of Sen. Edgar Cowan).

In essence, Senator Cowan described a group of people whom he perceived to be unwilling to subject themselves to U.S. sovereignty and therefore undeserving of citizenship. Though his remarks were undoubtedly colored by racial stereotypes, which he frequently articulated,[149] his objection squarely raised questions of mutuality of obligation.

The Chinese, argued Senator Cowan, were unfit for citizenship on account of being of "a different race, of different religion, of different manners, of different traditions, different tastes and sympathies."[150] Senator Cowan expressed concern for the State of California, believing the Chinese "may pour in their millions upon our Pacific coast in a very short time."[151] "[I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to be immigrated out of house and home by Chinese? I should think not."[152]

Senator John Conness of California, a proponent of the Amendment, agreed that the Fourteenth Amendment, as drafted, would indeed make citizens of the U.S.-born children

---

[149] *See, e.g.*, *id.* at 2891 (suggesting that citizenship should be open to people of the same "blood and lineage, people of the same religion, people of the same beliefs and traditions," and referring to the white race as "the strongest").

[150] *Id*.

[151] *Id.* Interestingly, in these comments, Senator Cowan raised some of the same arguments that current proponents of a restrictive reading (or repeal) of the Fourteenth Amendment's citizenship clause have raised: that a territorial conception of birthright citizenship would allow people to immigrate in alarming numbers, that immigration would be hard to control, and that U.S. culture would be detrimentally affected. *See* Julia Preston, *Citizenship From Birth Is Challenged on the Right*, N.Y. TIMES, Aug. 6, 2010, at A8, *available at* http://www.nytimes.com/2010/08/07/us/politics/07fourteenth.html (quoting Senator Graham, a proponent of proposals to deny citizenship to the children of undocumented immigrants: "We can't just have people swimming cross the river having children here—that's chaos."); Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 5, 2011, at A1, *available at* http://www.nytimes.com/2011/01/05/us/politics/05babies.html (quoting Representative Duncan Hunter: "We're just saying it takes more than walking across the border to become an American citizen. It's what's in our souls."); Sandhya Somashekhar, *GOP Push to Revise 14th Amendment Not Gaining Steam*, WASH. POST, Aug. 8, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/07/AR2010080702605.html (discussing the sentiment that territorial birthright citizenship fuels increasing undocumented immigration). The parallel is even more striking in the rhetoric used outside mainstream media. *See, e.g.*, Joe Guzzardi, *Ending Birthright Citizenship Should be a Top Priority for Congress*, GOPUSA.com (Jan. 14, 2013, 6:33 AM), http://www.gopusa.com/commentary/2013/01/14/guzzardi-ending-birthright-citizenship-should-be-a-top-priority-for-congress/ ("Many of these children will grow up without traditional American values, struggle to learn English, perform indifferently in school and only marginally contribute to society. Eventually, the U.S. could lose control over its demographic future.").

[152] *Id.* at 2890-91.

of Chinese immigrants and Gypsies.[153] In response to Senator Cowan, he retorted,

> I beg the honorable Senator from Pennsylvania, though it may be very good capital in an electioneering campaign to declaim against the Chinese, not to give himself any trouble about the Chinese, but to confine himself entirely to the injurious effects of this provision upon the encouragement of a Gypsy invasion of Pennsylvania. I had never heard myself of the invasion of Pennsylvania by Gypsies . . . .
>
> . . . I have lived in the United States for now many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life.[154]

Senator Conness explained that, although the Chinese "are not regarded as pleasant neighbors,"[155] they are

> docile, industrious people . . . . They are found employed as servants in a great many families and in the kitchens of hotels; they are found as farm hands in the fields; and latterly they are employed by thousands . . . in building the Pacific railroad. They are there found to be very valuable laborers, patient and effective.[156]

Senator Conness's remarks encapsulate the community ties rationale for territoriality. Chinese residents were an integral part of the community, at least with respect to the economy, and therefore were not to be excluded as nonmembers.

Later, Senator Conness summed up why the U.S.-born children of Chinese immigrants should be regarded as citizens of the United States, entitled to all the rights and privileges afforded to citizens. He described the plight of the Chinese, who had been the subject of numerous anti-Chinese laws in California, including a prohibition on Chinese individuals testifying in court:

> The Chinese were robbed with impunity, for if a white man was not present no one could testify against the offender. They were robbed and plundered and murdered, and no matter how many of them were present and saw the perpetration of those acts, punishment could not follow, for they were not allowed to testify.[157]

Here, Senator Conness raised a community preservation argument: he maintained that the Chinese should be afforded birthright citizenship because they would become a subclass of

---

[153] *Id.* at 2892 (remarks of Sen. John Conness).
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

the American population if they were not eligible for citizenship. Citizenship for everyone born within the territory would create a just, egalitarian society.

After the Fourteenth Amendment's passage, the Supreme Court relied on a mutuality of obligation rationale in reaffirming the inclusion of Chinese children born in the United States within the ambit of the Fourteenth Amendment's citizenship clause. In *United States v. Wong Kim Ark*,[158] the Supreme Court explained that a child born in the United States to alien parents was nonetheless a U.S. citizen because that child was born subject to U.S. power and therefore must be extended the corresponding protections of citizenship. "By this circumstance of his birth," the Court reasoned, "he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship.'"[159]

2. American Indians as Noncitizens

The question of American Indian citizenship received more attention than the question of Chinese and Gypsy citizenship in the debates preceding the adoption of the Fourteenth Amendment. Although there was apparent agreement that American Indians living under tribal rule should not be U.S. citizens, there was less certainty about how best to achieve that result. Senator James R. Dolittle of Wisconsin proposed that the Fourteenth Amendment include an exception from citizenship for "Indians not taxed," who, under identical language in the 1787 Constitution, were not counted for purposes of Congressional representation or tax apportionment.[160] Senator Lyman Trumbull of Illinois, who had sponsored the Civil Rights Act of 1866, took the floor to explain that the phrase was not necessary. Indians were not within the jurisdiction of the United States, he argued, because they were not subject to U.S. law:

> Can you sue a Navajoe Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not

---

[158] 169 U.S. 649 (1898).

[159] *Id.* at 663 (quoting Gardner v. Ward, 2 Mass. (1 Tyng) 244, 244 n.1 (1805)).

[160] *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2894 (1866) (remarks of Sen. James Dolittle).

> subject to our jurisdiction. If they were, we would not make treaties with them. . . . Do we pass a law to control them? Are they subject to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty?
>
> . . . .
>
> . . . We cannot make a treaty with ourselves; it would be absurd.[161]

For Trumbull, American Indians were effectively outside of U.S. territory. In fact, when asked whether American Indians were outside of U.S. jurisdiction merely as a "matter of pleasure on the part of the Government," Senator Trumbull compared Indian territory to a foreign country. The United States could impose U.S. law on Indian tribes only to the extent it could "extend the laws of the United States over Mexico and govern her."[162] But American Indians who had left their lands posed a different question: "If they are there and within the jurisdiction of Colorado, and subject to the laws of Colorado,

---

[161] *See id.* at 2893 (remarks of Sen. Lyman Trumbull). It was in this dialogue that Senator Trumbull defined "subject to the jurisdiction thereof" as "not owing allegiance to anybody else," *id.* at 1866, which commentators have since wielded in defense of a restrictive interpretation of the Fourteenth Amendment's citizenship clause. *See, e.g.*, Mayton, *supra* note 98, at 244-46. Trumbull, however, was speaking only of Indian populations, whom he viewed as quasi-separate polities:

> We have had in this country and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them.

CONG. GLOBE, 39TH CONG., 1ST SESS. 2894 (1866) (remarks of Sen. Lyman Trumbull). Senator Howard, also shared that sentiment:

> They have a national independence. They have an absolute right to the occupancy of the soil upon which they reside . . . . We have always recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains.

Id. at 2895 (remarks of Sen. Jacob Howard).

[162] *Id.* at 2894. Senator Fessenden nonetheless maintained that Congress could enforce its laws in Mexico. *Id.* (remarks of Sen. William Fessenden). Senator Trumbull supposed that Congress could do so only if it had the physical power to enforce those laws, though it would be a "breach of good faith" to do so to Mexico and a breach of treaties to do so to American Indians. *Id.* (remarks of Sen. Lyman Trumbull). The acknowledgement that having power to enforce laws is one component of "jurisdiction" finds support in Justice Kennedy's opinion in *Boumediene*, in which the Court's functional approach considered the ability to enforce law as a component of de facto sovereignty over a territory. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).

they ought to be citizens; and that is all that is proposed."[163] Ultimately, Senator Trumbull's reasoning—which corresponds squarely to the mutuality of obligation rationale for territoriality—prevailed, and the "Indians not taxed" language was not adopted.[164]

The Supreme Court interpreted the Fourteenth Amendment just as Senator Trumbull had proposed—as excluding American Indians. In *Elk v. Wilkins*, the Court held that American Indians were not citizens at birth because they were born members of an independent political community and owed allegiance to individual tribes.[165] Justice Gray, writing for the majority, referred to Indian tribes as "alien nations, distinct political communities" whose members "were not part of the people of the United States" at the time of the drafting of the Fourteenth Amendment and who the United States could not impose obligations on.[166] Indian tribes, in some respects, were not part of U.S. territory, and their members thus were not "subject to the jurisdiction" of the United States, as required by the Fourteenth Amendment's citizenship clause.[167]

C. Indian Citizenship After the Fourteenth Amendment

Although American Indians were outside the reach of the Fourteenth Amendment, they were the subjects of a series of federal legislative acts that granted American Indians citizenship in a piecemeal fashion. Many American Indians gained citizenship through the Dawes Act.[168] The Dawes Act allowed the federal government to divide tribal land and grant it to individual tribe members.[169] With the individual grant of land, the government essentially dissolved tribal sovereignty over that land, effectively incorporating it into U.S. territory.

---

[163] CONG. GLOBE, 39TH CONG., 1ST SESS. 2893 (1866) (remarks of Sen. Lyman Trumbull).

[164] U.S. CONST. amend. XIV, § 1.

[165] *See* Elk v. Wilkins, 112 U.S. 94 (1884).

[166] *Id.* at 99-100.

[167] *Id.* at 109-10. Justices Harlan and Woods dissented on the grounds that the claimant was a U.S. citizen because he had severed relations with his tribe and had "surrendered himself to the jurisdiction of the United States" by "becoming . . . a *bona fide* resident of the State of Nebraska." *Id.* at 120-21 (Harlan & Woods, JJ., dissenting). The majority, however, noted that it was birthright citizenship that was at stake and that the individual's condition at birth was what mattered. *Id.* at 102-03 (majority opinion).

[168] Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331 (2006)).

[169] *See id.*

In return for the subjection to U.S. law, the Dawes Act made citizens of any American Indian granted land under its provisions.[170] During the Senate debates, important themes regarding territoriality resurfaced. The Senators expressed concern over notions of mutuality of obligation, community ties, and community preservation.

First, proponents were interested in subjecting American Indians to U.S. law and allowing them to protect their individual grants of land through access to courts. Senator Maxey, who strongly supported granting citizenship with each allotment, argued that granting citizenship was an important protection that must accompany the grant: "[Citizenship] gives the Indian holding land in severalty a place in the United States courts to vindicate his right to his land and protect himself in the enjoyment of his land."[171] Without citizenship, American Indian land owners would be at the mercy of U.S. law without access to the protections of citizenship.

Second, proponents of the Dawes Act felt that an allotment of land would bring American Indians into the "civilized life." Though racially charged, this discussion amounted to an evaluation of the likelihood that an allotment of land would result in an individual's integration within the surrounding community.[172]

Finally, proponents of the Dawes Act were concerned with the negative effects of denying citizenship to American Indians who were living among citizens. Such a distinction between American Indians and white citizens would lead to the subjugation of the American Indians. Senator Chace observed,

> I confess that I am at a loss to understand how gentlemen reconcile to themselves and to their own sense of right and justice that anomalous condition that the people of the United States have occupied so long toward the Indian tribes. How with our system of laws, based as it is upon the Declaration of Independence, which announces "that all men are created equal," that they are endowed "with certain inalienable rights, . . ." this people can go on generation

---

[170] *See id.*

[171] 17 CONG. REC. 1627, 1633 (1886) (remarks of Sen. Samuel Maxey).

[172] *See, e.g.*, *id.* at 1632 (remarks of Sen. Henry Dawes) ("[The Act] is to make citizens of the United States of those Indians and those only who have . . . adopted the habits of civilized life."); *id.* ("[W]e do it in order to encourage any Indian who has started upon the life of a civilized man and is making the effort to be one of the body-politic in which he lives.").

> after generation holding in subjection this handful of a race of men . . . .[173]

Senator Maxey joined in Senator Chace's concerns and added that a system that denied citizenship to American Indians while at the same time granting citizenship to similarly situated white individuals would be detrimental to everyone.[174] He compared the potential grant of citizenship to American Indians to the grant of citizenship to prior slaves:

> The policy of the United States Government when they liberated the slaves was first to make them citizens . . . . [A]nd why? Because they were not isolated, they were not dissociated, they were not separated from the white citizens of this country; but they were mixed among them, they were our neighbors. As long as we and our descendants . . . shall live in this country, just that long will the colored man and his descendants live in this country, and their fortunes, their destinies will run side by side with ours.
>
> . . . [T]he better educated the colored man is the more he respects himself, the better citizen he makes, and the better it will be for both colored and white.[175]

It was not until 1924 that Congress passed a broad grant of citizenship to Native Americans born "within the territorial limits of the United States."[176]

The examples of judicial and legislative grants of citizenship discussed in this section demonstrate the importance of mutuality of obligation, community ties, and community preservation in the citizenship inquiry. These examples show that an individual's presence within U.S. territory has played an important role in determining whether those factors would be well served by a grant of citizenship. Having isolated the factors that historically played important roles in the concept of citizenship, one question remains: How can we best account for those factors today? Does a territorial conception of birthright citizenship effectively account for them? Would a status-based approach be more effective today? In Part III, I use the factors—the substantive indicators of membership distilled in this part—to evaluate the efficacy of the territorial and status-based membership models in the specific context of birthright citizenship.

---

[173] *Id.* at 1633-34.

[174] *Id.* at 1634 (remarks of Sen. Maxey).

[175] *Id.*

[176] Act of June 2, 1924, ch. 233, 43 Stat. 253, 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)).

III. FINDING MEANING IN CITIZENSHIP: MEMBERSHIP BY PROXY

It is interesting that, in the realm of birthright citizenship, U.S. law has adhered to a very territorial membership model despite the broader trend toward the more nuanced, substantive measure of membership offered by post-territoriality. Certainly, presence in the United States at birth does not necessarily ensure that the individual bears whatever characteristics or qualities are desirable in a citizen. Territoriality remains, however, the primary model that describes the U.S. approach to birthright citizenship.

Of course, the failure of post-territoriality to filter into birthright citizenship rules makes intuitive sense. Undertaking a substantive evaluation of the community ties, loyalty, and sense of obligation of every individual born with some claim to U.S. citizenship would be impractical. In fact, it would be impossible, since very little beyond a person's physical and genetic qualities and physical location can be discerned about a person at birth. As a result, territory has persisted as a proxy for more substantive indicators of membership.

The only possible alternative to the territorial model, in light of the limited information known about a child at birth, evaluates the qualities or status of the parents. Because a substantive evaluation of all parents giving birth to children in the United States is impractical, distribution of citizenship based on parents' citizenship is the only viable alternative to territoriality in the birthright citizenship context. In this part, I argue that territoriality is the appropriate model to apply to children of undocumented immigrants. For these children, territorial presence at birth remains an effective proxy for more substantive indicators of membership.

The underlying principles I identified earlier in this article have persisted through various historical iterations of the question of who should be a citizen. That is, courts and legislatures have consistently focused on mutuality of obligation, community ties, and the need to preserve an egalitarian polity by avoiding the creation of a caste system. I propose that the same questions should be asked about the children of undocumented immigrants in order to evaluate whether a territorial conception of birthright citizenship remains an effective mechanism for distributing citizenship rights. Are these individuals subject to the obligations and burdens of U.S. law in a way that suggests they should be

offered corresponding protections? Do the children of undocumented immigrants have significant ties to their surrounding communities? Would a denial of citizenship to the children of undocumented immigrants alter the nature of the national community?

A. Mutuality of Obligation

With respect to mutuality of obligation, the answer is easy. From birth, the children of undocumented immigrants are very much subject to the obligations and burdens of U.S. law merely by their presence within the territory. Indeed, even their parents, who have no legal status in the United States, are likewise subject to those obligations. For example, residents, whether authorized or unauthorized, must register for selective service in the armed forces.[177] Residents must also pay taxes, including state sales tax, income tax,[178] and social security tax.[179] Residents must obtain marriage licenses to marry, driver's licenses to drive, and business licenses to conduct business.

Opponents of birthright citizenship based on birth within U.S. territory might argue that undocumented immigrants do not, in fact, comply with these obligations. Frequently, for example, commentators raise undocumented immigrants' alleged failure to pay taxes as an important

---

[177] *See* 50 U.S.C. App. § 453 (2011); *see also Fast Facts: Who Must Register*, SELECTIVE SERVICE SYS., http://www.sss.gov/FSwho.htm (last updated Apr. 11, 2013). Unlike individuals present in the United States as students or tourists, who do not have to register, immigrants who have taken up residency in the United States before turning twenty-six must register. *See id.*

[178] In fact, though U.S. law distinguishes between resident and nonresident aliens by allowing nonresident aliens to pay taxes only on their U.S. source income at a rate negotiated by treaty with the alien's home country, *see* 26 U.S.C. §§ 871, 894 (2011); *see also Alien Taxation—Certain Essential Concepts*, I.R.S., http://www.irs.gov/Individuals/International-Taxpayers/Alien-Taxation---Certain-Essential-Concepts (last updated Aug. 2, 2012), most undocumented immigrants are considered resident aliens by virtue of their long-term presence in the United States. *See* 26 U.S.C. § 7701(b)(1)(A)(ii). They therefore must pay income tax under the same rules that govern citizens living in the United States. *See id.*; *see also* IRS, *Determining Alien Tax Status*, http://www.irs.gov/Individuals/International-Taxpayers/Determining-Alien-Tax-Status (last updated Aug. 18, 2012); *Substantial Presence Test*, I.R.S., http://www.irs.gov/Individuals/International-Taxpayers/Substantial-Presence-Test (last updated Aug. 18, 2012).

[179] Only non-resident aliens can be exempt from social security. Anyone employed in the United States must pay social security tax. *See Aliens Employed in the U.S.—Social Security Taxes*, I.R.S., http://www.irs.gov/Individuals/International-Taxpayers/Aliens-Employed-in-the-U.S.-%E2%80%93-Social-Security-Taxes (last updated Aug. 2, 2012).

consideration in any debate about immigration or citizenship. This, these commentators might argue, should weigh against U.S.-born children of undocumented immigrants gaining citizenship at birth, since their parents have demonstrated a deliberate decision not to subject themselves to U.S. law. In some sense, the argument is one about an "election" of the type discussed in post-Revolution cases[180]—undocumented immigrants elect alien status for their children by failing to pay taxes. This argument, however, fails on several grounds. First, there is much evidence that undocumented immigrants do pay taxes.[181] Second, an individual who does not pay taxes remains subject to U.S. law and penalties, including fines and imprisonment, which exist to enforce those laws. Third, the failure to pay taxes cannot seriously be considered a rejection of U.S. citizenship on behalf of the child when so many other indicators suggest that the parents have elected membership in the United States for their children. Those same parents have borne their children in the United States, raised them in the United States, sent them to U.S. schools,[182] and supported them by working in the United States.[183]

Another argument against considering an individual's subjection to U.S. law as a factor in citizenship determinations is that, under the logic of the mutuality of obligation rationale, virtually all residents, including undocumented immigrants, should immediately be granted citizenship. But this argument fails to consider that, first, this article discusses *birthright* citizenship. Assuming the desirability of birthright citizenship rules, I argue that a territorial conception of birthright citizenship most accurately measures, at birth, the substantive qualities that underlie American notions of citizenship. As a result, I only analyze these factors with respect to individuals

---

[180] *See supra* notes 177-79 and accompanying text.

[181] *See, e.g.*, John Lantigua, *Illegal Immigrants Pay Social Security Tax, Won't Benefit*, SEATTLE TIMES (Dec. 28, 2011, 10:00 PM), http://seattletimes.com/html/nationworld/2017113852_immigtaxes29.html.

[182] *Cf.* Plyler v. Doe, 457 U.S. 202, 229-30 (1982) (holding that undocumented children are entitled to the same free public education that their documented counterparts and citizens are entitled to).

[183] Of approximately 12 million undocumented immigrants, 7.2 million are in the labor force, accounting for about 4.9% of the U.S. workforce. Broken down by gender, 94% of undocumented immigrant men and 54% of undocumented immigrant women work in the United States. *See* JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (2006), *available at* http://www.pewhispanic.org/files/reports/61.pdf.

born in the United States.[184] Second, I do not propose that citizenship be granted to the children of undocumented immigrants based solely on their being subject to U.S. law at birth. As I argue below, their likelihood of developing ties to the surrounding community, as well as the risk that denying them citizenship will harm the national community, weighs in favor of granting birthright citizenship.

B. Community Ties

At birth, children have no meaningful community ties. They have no social ties or economic ties.[185] Their first relationships are formed with the people who care for and feed them—their family. For the children of undocumented immigrants, however, birth in the United States is predictive of their development of community ties in the same way that—or perhaps even more than—it does for the children of authorized residents and citizens. Like the children of U.S. citizens in the United States, the children of undocumented parents are required and entitled to attend school.[186] And like the children of U.S. citizens, the children of undocumented parents are likely to remain in the United States.[187] Of course, some might

---

[184] Immigrants, documented and undocumented, are instead subject to naturalization rules. *See generally* 8 U.S.C. §§ 1421 *et seq*. I would argue that the same principles, including mutuality of obligation, should guide the formulation of naturalization rules.

[185] As a result, many commentators have treated children as prospective citizens rather than actual citizens at birth. *See, e.g.*, DAVID CUTLER & ROGER FROST, TAKING THE INITIATIVE: PROMOTING YOUNG PEOPLE'S INVOLVEMENT IN PUBLIC DECISION-MAKING IN THE UK 8 (2001); Madeleine Arnot & Jo-Anne Dillabough, *Introduction*, *in* CHALLENGING DEMOCRACY: INTERNATIONAL PERSPECTIVES ON GENDER, EDUCATION AND CITIZENSHIP 1, 12 (Madeleine Arnot & Jo-Anne Dillabough eds., 2000); Michael Wyness et al., *Childhood, Politics and Ambiguity: Towards an Agenda for Children's Political Inclusions*, 38 SOCIOLOGY 81, 82 (2004); *see also* Ruth Lister, *Why Citizenship: Where, When and How Children?*, 8 THEORETICAL INQUIRIES IN LAW 693 (2007).

[186] *See Issues & Research*: *Compulsory Education: Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), http://www.ncsl.org/issues-research/educ/compulsory-education-overview.aspx (discussing state compulsory education laws). The requirement and obligation would exist regardless of citizenship. *See* Plyler v. Doe, 457 U.S. 202 (1982) (holding that all children, including undocumented children, must be offered the same free public education under the Fourteenth Amendment).

[187] Several studies show that geographic mobility is directly correlated with education levels and income. *See, e.g.*, PEW RESEARCH CTR., AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE'S HOME?, *available at* http://www.pewsocialtrends.org/files/2011/04/American-Mobility-Report-updated-12-29-08.pdf (last updated Dec. 29, 2008). This would suggest that undocumented immigrants, who generally have little education and a low income, *see* JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iv (Apr. 14, 2009), *available at*

argue that if those same children were denied citizenship—that is, if they had no status in the United States—they would be less likely to remain in the United States. Research shows, however, that undocumented immigrants tend to remain in the United States for long periods of time.[188] Moreover, because the Department of Homeland Security currently focuses on the deportation of "criminal aliens,"[189] unauthorized immigrant children would be unlikely to face deportation. Of course, the longer U.S.-born children remain, the more likely they are to develop greater ties to individuals and institutions in the United States.

C. Community Preservation

Finally, a strong argument exists that the denial of birthright citizenship to children of undocumented immigrants would inject an effective caste system, colored by issues of race and culture, into U.S. law and society. Many commentators have suggested that this concern alone weighs in favor of an

---

http://www.pewhispanic.org/files/reports/107.pdf (finding that "[a]dult unauthorized immigrants are disproportionately likely to be poorly educated" and that the "median household income for unauthorized immigrants was $36,000, well below the $50,000 median household income for U.S.-born residents"), would be less likely to move their families (whether it included citizen or alien children) out of the United States. This is especially so given the current bars to admissibility that are triggered by long unauthorized stays in the United States. Unauthorized presence for a continuous period of one year or more renders that individual, should she leave the country, ineligible to return to the United States for ten years. *See* INA § 212(a)(9)(B)(i)(II).

[188] PAUL TAYLOR ET AL., UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 3 (Dec. 1, 2011), *available at* http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf. The Pew Hispanic Center reports that approximately 63% of undocumented immigrants have lived in the United States for at least ten years, and 35% have been in the United States for at least fifteen years. *See id.* Only 15% of the undocumented immigrant population has been in the United States for less than five years. *See id.* Nearly half of all undocumented immigrants are parents of minor children. *See id.* By comparison, only 38% of authorized immigrant adults and 29% of U.S.-born adults are parents of minor children. *See id.* at 5. Of the current undocumented immigrant population in the United States, an estimated 1.2 million are under the age of eighteen and 1.29 million are between the ages of eighteen and twenty-four. *See* MICHAEL HOEFER ET AL., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, at 5 (Feb. 2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

[189] *See* Memorandum from John Morton, Director, U.S. Immigr.& Customs Enforcement, to Field Office Directors, Special Agents in Charge, and Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (providing factors to consider in the enforcement of immigration law); *see also Plyler*, 457 U.S. at 226 ("[T]here is no assurance that a child subject to deportation will ever be deported . . . . In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported . . . .").

expansive interpretation of the Fourteenth Amendment.[190] I propose that, normatively, a territorial model is the most just system for distributing membership rights in the citizenship sphere. Individuals who live and work alongside each other should receive rights on the same terms to avoid the possibility that one group will become subject to the tyranny of another. Current proposals to deny citizenship to the children of undocumented immigrants[191] would distribute membership rights on different terms to individuals who are effectively identical in all substantive respects.

These proposals are *not* proposals to replace *jus soli* with *jus sanguinis*, although they are often labeled as such. A true *jus sanguinis* law of citizenship would offer citizenship only to the children of citizens, and it would deny citizenship to the children of aliens. Proposals to deny citizenship to the children of undocumented immigrants, however, also grant citizenship to the children of aliens who are legally in the United States. Children of legal resident aliens would thus be treated the same as children of citizens based on a territorial conception of citizenship: they would be subject to *jus soli*. The children of undocumented immigrants, however, would be excluded from this territorial notion of citizenship based on their parents' immigration status. In essence, such proposals do not deny birthright citizenship based on a parent's citizenship but rather on a parent's violation of immigration law. Such punishment for a parent's crime has no place in American law and would result in a class of U.S. residents who live, study, and work among citizens but are, nonetheless, subcitizens. The creation of this class would represent a significant departure from the egalitarian system of opportunity that is the hallmark of the U.S. legal system.

---

[190] *See, e.g.*, Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 448, 466-72 (2008); Cristina M. Rodriguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1365-68 (2009).

[191] *See* Birthright Citizenship Act of 2011, S. 723, 112th Cong. § 2 (2011); Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. § 2 (2009); A Bill to Amend the Immigration and Nationality Act to Limit Citizenship at Birth, Merely by Virtue of Birth in the United States, to Persons with Citizen or Legal Resident Mothers, H.R. 126, 111th Cong. § 1 (2009); Citizenship Reform Act of 2007, H.R. 133, 110th Cong. § 3(a) (2007).

CONCLUSION

Although the Constitution makes little, if any, distinction between citizens and noncitizens, citizenship carries a great deal of meaning in the United States. For citizens, it confirms a sense of belonging, protection, and community. For noncitizens, it is the finish line that marks acceptance. Children of undocumented immigrants who are born in the United States are Americans by all substantive measures. They are raised and schooled here, and they are subject to our laws. They are at home in the United States.[192] Proposals to deny citizenship to these children threaten to put their citizenship at odds with their identity as Americans. Perhaps more importantly, denying citizenship to children of undocumented immigrants threatens to put our sense of what it means to be a just, egalitarian community at odds with what it means to be an American citizen.

As legislators consider citizenship, and as they reconsider the Fourteenth Amendment's strong territorial flavor based on claims that too much has changed since the Amendment's adoption, it is important to explore the historical rationales for grants of citizenship. Territoriality is worth abandoning only if its underlying rationales no longer apply. The rationales of territoriality still apply today in the context of citizenship for the children of undocumented immigrants.

---

[192] According to a Pew Research Center study, 60% of foreign-born adults in the U.S. consider the U.S. their "home," while 26% of U.S.-born adults who have lived in more than one place say they consider their state of birth to be home. *See* AMERICAN MOBILITY, *supra* note 187.