

CONSTITUTIONAL CITIZENSHIP THROUGH THE PRISM OF ALIENAGE

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Notwithstanding Alexander Bickel's declaration a generation ago that the concept of citizenship is of little significance in American constitutional law,¹ the idea of citizenship has enjoyed a huge resurgence of interest in constitutional law scholarship in recent years. Much of the literature concerned with citizenship today deploys the concept in the mode of normative political theory, with scholars embracing the concept as an aspirational ideal for our national political life. Citizenship is portrayed in this literature as embodying the highest political values: democracy, egalitarianism, pluralism, civic virtue, community--and sometimes, all of these at once.

Constitutional theorists' decidedly romantic preoccupation with citizenship in recent years echoes the work of theorists in neighboring disciplines, for whom the concept of citizenship has likewise become a central normative benchmark.² Yet the work of many constitutional scholars goes beyond normative theory per se; for many, increasingly, have sought to attach the commitments they ascribe to the idea of citizenship to constitutional text. Many, in particular, have urged that the

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¹Alexander M. Bickel, *Citizenship In the American Constitution*, 15 *Arizona L. Rev.* 369 (1973).

²As one commentator has recently noted, the ideal of citizenship has become a "big tent" under which a wide range of initiatives...can find shelter. Indeed, public and policy intellectuals have reclaimed it as a legitimating sign under which to pursue new, diverse and conflicting projects of political transformation and cultural renewal." David Scobey, "The Specter of Citizenship," 5 *Citizenship Studies* 11, 21 (2001). For additional reviews of the broad-ranging literature on citizenship in political and social thought, see Will Kymlicka and Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory," 104 *Ethics* 352 (1994); Linda Bosniak, "Citizenship

concept of constitutional citizenship should be read to encompass and ground our most basic individual rights. There is today a burgeoning movement in constitutional theory to recast our constitutional rights framework in the language and structures of citizenship.

In their efforts to reorient constitutional rights discourse around the idea of citizenship, scholars have pursued a variety of textual strategies. Some invoke the privileges or immunities clause of the Fourteenth Amendment, urging interpretive restoration of this long-dormant provision to Fourteenth Amendment jurisprudence.³ Others have seized on the Amendment's citizenship clause: Despite its usual interpretation as a definitional provision,⁴ these commentators argue that the clause should be understood to guarantee basic substantive rights as well.⁵ Still others have located the idea of constitutional citizenship in the equal protection clause. In this reading, the provision's core animating principle is the principle of "equal citizenship."⁶

The citizenship turn in constitutional theory has important merits. Among other things, reincorporating fourteenth amendment citizenship into our rights discourse might, as some scholars have

Denationalized," 7 *Indiana J. Glob. L. St.* 447 (2000).

³The literature is vast and growing. See sources cited in note [], *infra*.

The Supreme Court's 1999 decision in *Saenz v. Roe*, 119 S. Ct. 1518 (1999) dramatically intensified the interest in the privileges or immunities clause and has fueled a debate over the question whether privileges or immunities is likely to enjoy a full-scale renaissance. See e.g., Laurence H. Tribe, "Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future Or Reveal the Structure of the Present?" 113 *Harv. L. Rev.* 110 (1999); Tim Lempert, "The Promise and Perils of 'Privileges or Immunities,'" 23 *Harv. J. La. & Pub. Policy* 295 (1999); F.H. Buckley, *A Liberal Nationalism*, 48 *UCLA Law Rev.* 221 (2000).

⁴This is the classic reading. See e.g., *Slaughter-House Cases*, (J. Field, dissenting): (The first clause of this [the Fourteenth] Amendment determines who are citizens of the United States, and how their citizenship is created....); T. Alexander Aleinikoff, *A Rereading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 *U. Ill. L. Rev.* 961, 964 (The Fourteenth Amendment "provided, for the first time, a constitutional definition of citizenship");

⁵See especially, Charles Black, *Structure and Relationship in Constitutional Law* (1969), 33-66. For additional citations to a fast-growing body of scholarship advancing such an "aggressive reading" of the clause, Christopher Eisgruber, "Political Unity and the Powers of Government," 41 *UCLA L. Rev.* 1297, 1336 n. 117 (1994), see note [], *infra*, and accompanying text.

⁶See especially the work of Kenneth Karst. Against the suggestion that the Equal Protection clause is not the appropriate textual home for the principle of equal citizenship, Karst argued in 1977 that the Equal Protection Clause "shows every sign of being able to bear the full meaning of the equal citizenship principle." Karst, *Forward*, *supra* note [], at 43.

argued, provide the foundation for a more coherent rights jurisprudence. Those seeking a revival of the privileges or immunities clause, in particular, regard the effective disabling of the clause in the *Slaughter-House* case,⁷ and the subsequent development of individual rights jurisprudence under the aegis of the due process and equal protection clauses, as having produced deep irrationalities in the doctrine.⁸ It might well be true that the revitalization of the privileges or immunities clause would help to rationalize and perhaps even to deepen the various doctrines of substantive, fundamental rights.⁹

It is also true that the idea of “citizenship as an organizing value possesses substantial normative resonance and power.¹⁰ The concept of citizenship is particularly valuable in its evocation of a mutual and engaged relationship between the political community and its members. This is a relationship that some traditional rights theory has, arguably, sometimes obscured or ignored to its detriment.

Despite its potential benefits, however, this turn to the idea of citizenship as foundation for

⁷*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). As one commentator described the case, the Court held that the privileges or immunities clause of Section 1 of the Fourteenth Amendment “protected only what was already otherwise protected in the Constitution.” Lino A. Graglia, *Do We Have An Unwritten Constitution? The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J. of Law and Public Policy 83 (1987).

⁸ See sources cited in note [], *infra*.

⁹ Some progressives have suggested that a revival of the privileges or immunities clause could serve the interests of the marginalized and excluded. E.g., Angela Harris, “Beyond Equality: Power and the Possibility of Freedom In the Republic of Choice,” 85 Cornell L. Rev. 1181, 1183 (2000) (the Privileges or Immunities Clause was about freedom: specifically, the freedom of six million or so people of African descent....[It was] an exercise in considering the relevance of [the already-existing literature on natural rights] to the project of emancipation. “ This project she describes, lamentingly, as the road not taken.”)

Note, however, that proponents of a revitalization of privileges or immunities have included supporters of limited government, judicial restraint and laissez-faire constitutionalism. See e.g., Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J. L. and Publ. Policy 63 (1989). See also Kurland, *supra* note [], at 414 (describing support of “privileges or immunities as a means to establish a constitutional doctrine of laissez-faire with regard to industrial and commercial activities.”)

¹⁰Bosniak, “Citizenship Denationalized,” *supra* note [], at 450-453; 489-491; Linda Gordon and Nancy Fraser, “Civil Citizenship Against Social Citizenship? On the Ideology of Contract vs. Charity,” in *The Condition of Citizenship* 90 (Bart Van Steenberg ed., 1994) (describing citizenship as “a weighty, monumental, humanist work@ which has no pejorative uses.@).

constitutional rights is not without its costs.¹² Perhaps the principal one has to do with its effects on the status of aliens. If rights are defined as an attribute of citizenship, what then of those who lack citizenship by legal definition? Those formally lacking in citizenship would seem to fall, at least arguably, outside the scope of this normative discourse. Bickel himself warned thirty years ago that aliens would suffer under a citizenship-centered constitutional regime,¹³ and this concern remains pressing today. Notwithstanding the common criticism that the idea of rights grounded in the status of personhood is excessively “thin,”¹⁴ I believe that we can be justifiably proud of a constitutional system which treats non-citizens as entitled to a substantial measure of community recognition and protection.¹⁵ Whether such recognition and protection would withstand adoption of a rights regime organized around the idea of constitutional citizenship remains an open question.

Nevertheless, these implications for the status of aliens represented by the turn to citizenship are most often ignored by constitutional scholars. Even among progressive scholars, who by definition are concerned with the marginalized and excluded, the subject is rarely on the radar screen. Progressive constitutional scholars have recently urged the recognition of the citizenship of gays and

¹² One of these, as I have suggested above, is that the concept is so utterly flexible and protean in meaning that its usefulness in analytic discussion is sometimes compromised. I have addressed the multiple meanings of citizenship in an earlier paper. See Linda Bosniak, “Citizenship Denationalized,” 7 *Indiana J. Global L. St.* 447 (2000).

¹³Bickel, *supra*.

¹⁴Kylmlicka and Norman, *supra* note [], at [].

¹⁵For discussion of the development and significance of the American jurisprudence of personhood and its impact on noncitizens, see e.g., Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under U.S. Law*, 1988 *Wis. L. Rev.* 955; Linda Bosniak, “Membership, Equality and the Difference That Alienage Makes,” 69 *N.Y.U. Law Rev.* 1047 (1994); See also Aleinikoff, Scaperlanda, Motomura.

The Supreme Court forcefully reiterated its longstanding position that aliens enjoy fundamental rights as territorially-present persons in the recent decision *Zadvydas v. INS*, in which Justice Breyer wrote for the majority that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.” *Zadvydas v. Davis*, 533 U.S. (2001).

lesbians¹⁶ and of the economically marginalized,¹⁷ along with racial minorities, women and others, without, in most cases, acknowledging the potential doctrinal and rhetorical costs to noncitizens involved in doing so.¹⁸

Among those scholars who *have* addressed the question, the conventional view is that the grounding of constitutional rights in the idea of citizenship runs the risk of excluding aliens. Laurence Tribe, for instance, has recently noted that a revival of the privileges of immunities clause may ultimately result in the denial to aliens of the constitutional protection they now enjoy under substantive due process. “There may be no convincing escape,” he writes, “from the conclusion that the Privileges and Immunities Clause, while providing a sounder basis than the Due Process Clause for the protection of substantive rights, protects only a limited group of persons: United States citizens.”¹⁹ Similarly, John Ely wrote a generation ago that in light of the express terms of the privileges or immunities clause, most commentators see themselves as “stuck with the conclusion that only citizens are protected.”²⁰

For some commentators, such an outcome is not particularly troubling. Their view is that citizenship is a constitutional value too long ignored in this country, and that once revived, citizenship rights belong, quite naturally and rightfully, to those who possess citizenship status. For

¹⁶William Eskridge, “The Relationship Between Obligations and Rights of Citizens,” 69 *Fordham L. Rev.* 1721 (2000). See also Mark Strasser, “The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel,” 52 *Rutgers L. Rev.* 553 (2000) (urging the privileges or immunities clause be interpreted to protect the right of same-sex couples to wed). [Kendall Thomas]

¹⁷William E. Forbath, *Class, Caste and Equal Citizenship*, 98 *Michigan Law Review* 1, 7-9 (2000); Kenneth Karst, “The Coming Crisis of Work,” *Cornell Law Review* (1997).

¹⁸Linda Bosniak, “Universal Citizenship and the Problem of Alienage,” 94 *Northwestern University Law Rev.* 963 (2000).

¹⁹Laurence Tribe, *American Constitutional Law*, Volume 1 (3rd ed., Foundation Press, 2000), at 1324-1325.

those of us concerned with the condition and well-being of noncitizens, however, their exclusion from this potential new domain of rights is indeed worrisome. Charles Black, for example, noted in the course of outlining his structural argument for grounding constitutional rights in the Citizenship Clause that he used the word ‘citizen’ hesitatingly because “inference of rights from citizenship” might be regarded as excluding or otherwise disadvantaging aliens.²¹ I myself in earlier work have questioned the turn to citizenship as a basis for rights for precisely the same reason: I argued that grounding rights in the concept of citizenship is problematic because doing so would likely rebound against those individuals who lack citizenship status by legal definition.²²

The question whether the exclusion of aliens from the domain of basic rights is a good or bad thing is, of course, a longstanding one. But that question is not my concern here, at least not directly. Rather, the focus of the present paper is the basic factual premise which underlies this dispute in the first instance: namely, that a return to citizenship as rights necessarily entails an exclusion of, or disadvantage to, noncitizens. I want to argue here that the premise that citizenship rights must be confined to status citizens is less secure than we tend to assume.

My initial impetus for the argument derives, in part, from reading constitutional theory of the 1970's and 1980's on the subjects of citizenship and alienage. While citizenship was not the fashionable concept it has since become, some scholars at the time argued that a reorientation of constitutional rights-

²⁰John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 25 (Harvard, 1980).

²¹Charles L. Black, Jr., *Structure and Relationship In Constitutional Law* (Louisiana, 1969), at 52-53.

See also Kurland, *supra* note [], at 415 (“It is possible that for some the [privileges or immunities] clause was deemed inhospitable because by its language it confined its protection to citizens, while the equal protection clause and the due process clause afford sanctuary for all persons, including corporations, which the Supreme court had specifically held to be outside the ambit of the privileges or immunities clause.”);

²² See Linda Bosniak, “The Citizenship of Aliens,” *Social Text*; Linda Bosniak, “Universal Citizenship and the Problem of Alienage,” 94 *Northwestern L. Rev.* 963 (2000). Gerald Neuman expressed similar concerns in response to Judith Shklar’s work on rights and American citizenship. See Gerald Neuman, [], [] *Michigan L. Rev.* [] (199[]), reviewing Judith N. Shklar, *American Citizenship: The Quest For Inclusion* (Cambridge: Harvard University Press, 1991).

talk around the concept of citizenship would serve as an antidote to the peculiarities of substantive due process doctrine and, in the view of some, as a response to the chronic legal marginalization and subordination of African Americans in American life. Thus, Charles Black, Phillip Bobbit, John Ely, Kenneth Karst, Philip Kurland and others each defended a return to citizenship as a basis for rights in constitutional law (though by way of several different doctrinal routes). In so doing, each of these scholars recognized the potential cost of doing so to noncitizens. Yet each sought to mitigate this effect by means of one of two main arguments. First, some argued, restoration of citizenship does not necessarily entail the elimination of rights grounded in personhood, but can serve instead to supplement them.²³ This is, effectively, an argument that constitutional rights doctrine can hereinafter proceed on a double track, with the law of personhood not displaced, but augmented, by the law of citizenship. Philip Kurland, for example, wrote of the possible revival of the privileges or immunities clause: *“There the clause is, an empty and unused vessel which affords the Court full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses.”*²⁴ And indeed, he and others have argued, the precedents on alienage discrimination under the Equal Protection Clause could presumably be invoked to diminish most differences in the treatment of aliens that might result from reliance on citizenship-related provisions as a source of rights.²⁵

²³In his dissent in *Saenz*, J. Thomas argues that before reinvoking the privileges or immunities clause as the basis for constitutional decision, the Court must, among other things, “consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.” 119 S. Ct. at 1538.

²⁴Kurland, at 420.

²⁵See e.g., Kurland, *supra* note [] at 419 (“The equal protection clause has already required that classifications be rationalized so that differences in treatment between aliens and citizens would have to be particularly justified.”). Tribe makes a similar argument: Grounding new rights in the privileges or immunities or citizenship clauses would seem, he acknowledges, to leave aliens behind. Yet “by prohibiting discrimination in legal rights among all *persons*--citizens and aliens alike--[the Equal Protection Clause could], in effect ...secure the ‘privileges or immunities of citizens of the United States’ to all *persons* within a jurisdiction of a particular state.” Tribe, *supra* note [], at 1325. Under this approach, the Equal Protection clause would be used to piggyback onto the Privileges or Immunities Clause to accomplish for aliens indirectly what cannot (by dint of text) be done directly.

In the end, however, Tribe concludes that Equal Protection would not require perfectly identical treatment of citizens and aliens: “With respect to entitlement to at least some of the privileges or immunities of national citizenship, aliens and citizens may simply not be similarly situated,” he writes. *Id.*

Of course, this supplementarity strategy raises various questions about exactly how rights would be divided up under a citizenship-centered rights regime: which rights would remain personhood rights and which would end up

A second mitigating argument found in the literature²⁶ though it has been in most cases more a suggestion than an elaborated argument--is that a return to constitutional citizenship as the basis for individual rights is not, in fact, inherently exclusionary toward aliens. The suggestion is, rather, that aliens can be incorporated into the turn to constitutional citizenship turn along with everybody else. Ely proposes a textual argument to this effect: Instead of concluding that "the privileges or immunities of citizens" are available only to citizens, he maintains that "one may plausibly read the privileges or immunities clause [to provide] that there is a set of entitlements, 'the privileges and immunities of citizens of the United States,' which states are not to deny to anyone, including aliens. In other words, the reference to citizens may define the class of rights rather than limit the class of beneficiaries."²⁷ Similarly, though in a broader vein, Phillip Bobbit suggests that reconceptualizing constitutional rights as flowing from a structural principle of citizenship (such as that proposed by Charles Black) need not be read as inherently exclusionary toward aliens. Bobbit specifically rejects the view that there exists an "antinomy between citizen and alien."²⁸ He instead proposes that "for constitutional purposes, the alien be analogized to the citizen, with only such exceptions voting and office-holding as the Constitution itself provides."²⁹

Crucially, neither Ely nor Bobbit maintain that aliens can escape marginalization under a revived citizenship regime by *becoming* citizens via naturalization. Rather, their argument is that aliens, while they are aliens--*qua* aliens can be said to enjoy citizenship, or should not be precluded from enjoying citizenship, in at least some respects.

as rights of citizenship? If this approach left most of the rights enjoyed by aliens intact, it would seem to do little toward rationalizing our existing due process- and equal protection-based fundamental rights doctrine--the pursuit of which has been a prime motivator for citizenship revivalists in the first place.

²⁶The Fourteenth Amendment provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

²⁷Ely, *supra* note [], at 25.

²⁹ Bobbit, at 89. See also Note, "Membership Has Its Privileges and Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship," 102 Harv. L. Rev. 1925, 1931, 1931 and n. 43 (1989) (Understanding citizenship "as a binding relationship between the individual and the political community under which the polity is obligated to guard and respect certain fundamental rights of the individualdoes not necessarily exclude aliens from the protection of these same fundamental rights. Aliens have generally been extended the same individual

It is this second effort to ameliorate constitutional citizenship's alienage problem that interests me in this paper. The notion that a return to constitutional citizenship as the central foundation for rights need not leave aliens behind is quite fascinating. It leads to the apparently paradoxical idea that aliens can enjoy, or partake in, some aspects of citizenship. It points to the prospect, in other words, of "alien citizenship" under our constitution.

At first glance, the notion of "alien citizenship"³⁰ may seem impossible--baldly contradictory by its terms.³¹ Yet it has not seemed so to all observers. And the fact that this idea has *not* seemed impossible--including to several of constitutional law scholarship's most eminent commentators-- is itself quite striking. These scholars' conviction that a (re)turn to citizenship as a basis for constitutional rights need not imply the exclusion of aliens--and indeed might well bring them along--raises intriguing and important questions about the nature of our understandings of constitutional citizenship in broader terms.

In Part II of this article, I address the following question: In order for us to hold that grounding rights in constitutional citizenship would not necessarily entail a loss of rights to aliens--in order to assume that rights based in citizenship might well extend to aliens--what sort of conception of citizenship must we maintain? The answer, it seems to me, is that our conception of citizenship must be a divided one. It must be a conception that approaches citizenship status and citizenship rights as analytically distinct facets of citizenship which are not always in alignment. Such a conception, I will argue, is already common to us by way of the idea of "second-class citizenship." The second-class citizen is one who is a formal subject of

guarantees as those enjoyed by persons who have achieved the legal status of citizenship.")

³⁰See Karst, 1977, at 25 (describing alien rights cases of the 1970's as "promot[ing] the principle of equal citizenship.")

³¹For earlier articulations of the notion of the "citizenship of aliens," see Bosniak, "The Citizenship of Aliens," *Social Text* 56, Vol. 16, No. 3 (Fall 1998), at 29-35; Bosniak, "Universal Citizenship and the Problem of Aliens," *supra*. See also Rut Rubio Marin, "National Limits to Democratic Citizenship," 11 *Ratio Juris* 51, 54-55 (1998) (urging recognition of the "democratic citizenship" of resident aliens); Virginie Guardiron, "Citizenship Rights For Noncitizens: France, Germany and the Netherlands," in *Challenge To the Nation-State* (Christian Joppke, ed. Oxford, 1998)(describing civil, social and political rights enjoyed by aliens as "citizenship rights.")

The concept of "alien citizenship" may resemble the sort of Zen Buddhist Koan Charles Black refers to in describing the apparently paradoxical notion of "substantive due process." In a more postmodern vein, we might characterize "alien citizenship" as a "performative contradiction." See Bosniak, "Universal Citizenship and the Problem of Aliens," quoting Judith Butler [].

citizenship—a status citizen—but who is nevertheless denied full enjoyment of citizenship’s substance, including rights associated with citizenship. The construct of alien citizenship is precisely the converse: it presupposes that those lacking the formal status of citizenship nevertheless enjoy rights commonly associated with citizenship.

To an important extent, this characterization seems to conform to our current constitutional practice: status noncitizens in the United States today enjoy a substantial range of rights of a kind which many commentators have sought to characterize in the language of citizenship. Yet assuming we do want to characterize rights as a kind of citizenship,³² the question remains whether the idea of alien citizenship is normatively defensible, and whether it is even coherent when considered in light of citizenship’s own substantive values and commitments. On the normative question, I argue that in light of our constitutional tradition’s commitment to rights for persons, alien citizenship cannot be described as morally unjust in the way that second-class citizenship is.

I also contend in Part III, however, that the idea of citizenship as rights is itself beset by normative tensions which make the notion of alien citizenship fundamentally unstable. For while the idea of constitutional citizenship—equal citizenship—is characterized by a powerful commitment to universality, and as such, supports a regime of rights based on personhood, constitutional citizenship also embodies an exclusive, nationalist political vision. These two commitments are usually seen as relevant to different spheres: citizenship’s ethic of universality is presumed to pertain to relations among members of the community, while its nationalism is regarded as relevant to the community’s borders. Yet the category of alienage brings these two commitments into tension with one another. Although the lives of aliens are significantly shaped by reference to citizenship’s universalist commitments, citizenship’s nationalism also

³² Citizenship has long been associated with the enjoyment of rights. In social theory, the approach is most closely linked with the work of T.H. Marshall. See T.H. Marshall, *Citizenship and Social Class* (1949). But citizenship-as-rights represents only one among several understandings of citizenship that we conventionally maintain. Scholars have distinguished among several understandings or “dimensions” of citizenship, though their formulations vary. Virtually all distinguish between rights-based and republican conceptions, and others stress cultural and legal understandings as well. An important essay is Kymlicka and Norman, *supra*. For further discussion

fundamentally structures their status and experience.

I therefore conclude that the suggestion by Ely, Bobbit and other scholars that aliens can be the subjects of citizenship, and that reviving constitutional citizenship need not result in a diminution of rights for aliens, is quite plausible, but only to a point. Aliens may enjoy substantive citizenship as constitutional persons, but they remain national outsiders in important respects as well. In the end, alien citizenship is necessarily a partial or incomplete citizenship.

While in Part III I enter the fray to some extent over the proper place of noncitizens in the constitutional order, this essay is fundamentally conceptual in nature. My principle concern is to show that our understandings of constitutional citizenship are segmented and divided in nature. They are divided analytically as between citizenship as status and citizenship as rights, and they are divided normatively: the constitutional ideal of equal citizenship contains both universalist and nationalist commitments.

My emphasis here on citizenship as a divided construct bears affinity with other recent work on the nature and history of citizenship in the United States. Constitutional historians, for example, have pointed out that the rights that comprise the enjoyment of citizenship in this country have never been cut from a single cloth, but entail a range of entirely distinguishable sorts of entitlements and protections.³³ This work, which focuses on the distinctions between civil, political, social and (more recently) economic conceptions and practices of citizenship, is useful not merely because it allows us to think about the enjoyment of, and the exclusion from, citizenship in more complex terms than we are usually accustomed to doing, but also because it raises the possibility that citizenship is not an all-or-nothing affair but a construct which is internally complex and segmented. Nancy Cott's work makes this kind of approach especially clear. In an article on the history of women's citizenship in the United States, she shows that while white women in

on the multiple understandings of citizenship, see Bosniak, *Citizenship Denationalized*, *supra*.

³³ In the nineteenth century, political thought distinguished between natural rights, civil rights, political rights and social rights, see Nancy Cott, "Marriage and Women's Citizenship in the United States, 1830-1934," *American Historical Review* (December 1998), at 1448-1449; Earl Maltz, "Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment," 24 *Houston L. Rev.* 221 (1987); Jeffrey Rosen, "Translating the Privileges or Immunities Clause," 66 *George Washington L. Rev.* 1241 (1998), and citizenship was associated with only the first two of these. Political rights became integral to our conception of citizenship only over the course of the twentieth century. A number of scholars have recently urged expansion of the class of rights associated with citizenship still further by advocating recognition of what some have termed "economic citizenship."

nineteenth century America enjoyed “nominal” or “minimal” citizenship, they were nevertheless denied many of the rights we now consider fundamental to citizenship in its fullest sense. In the course of the study, she observes that “citizenship can be delivered in different degrees of permanence or strength. ...Citizenship is not a definitive either/or proposition--you are or you are not--but a compromisable one.”

Cott’s notion of divisible, compromisable citizenship is highly relevant here. The status of aliens underlines the fragmented quality of citizenship as we conventionally understand it. This is a fragmentation that produces diverse sorts of partial citizenship identities, including the anomalous identity of the alien citizen. What is distinctive about the case of alienage is that it introduces into the mix an aspect of citizenship that most constitutional theorists who focus on rights tend to ignore: citizenship as formal national membership status. It is the uneasy relationship between citizenship rights and citizenship status, as well as between the universalist and particularist commitments embodied in the idea of citizenship as rights itself, that I address in the current paper.

II. CITIZENSHIP’S SUBJECTS AND CITIZENSHIP’S SUBSTANCE

Interpreters of the Constitution have long been uncertain about precisely what the Fourteenth Amendment has to say about citizenship. Everyone, of course, acknowledges that passage of the Amendment radically altered American constitutional understandings of citizenship. We recognize, first of all, that the amendment made citizenship a matter of national law and national concern. Whereas prior to its passage, the meaning and regulation of citizenship were understood to be matters reserved to the states, the new amendment signaled the “repudiation of state sovereignty”³⁴ and a fundamental realignment of the relationship between the state and federal governments.

Everyone, furthermore, recognizes that the amendment’s Citizenship Clause served to reverse the Supreme Court decision in *Dred Scott* which held that persons of African descent did not and

³⁴Christopher Eisgruber, “The Fourteenth Amendment’s Constitution,” 69 S. Cal. L.Rev. 47, 71 (1995)

could not possess citizenship.³⁵ In so doing, the Amendment provided “a definition of citizenship in which race played no part.”³⁶ Most commentators read the Fourteenth Amendment as defining the criteria for citizenship in more general terms as well:³⁷ the Amendment tells us “who are citizens of the United States,”³⁸ thereby designating the class of formal members of the nation.³⁹

Yet while most commentators agree on these fundamentals, there looms beyond them a host of uncertainties about the Fourteenth Amendment’s vision of, and mandate concerning, citizenship. In recent years, divisions around these questions have mostly found expression in two broad debates.

The first debate is a debate over the question of citizenship’s substantive meaning and scope. While scholars increasingly concur that constitutional citizenship has been wrongfully neglected, if not repressed, for too long, the literature is replete with heated exchanges over precisely what effect the return to citizenship would or will have on constitutional jurisprudence-- on the constitutional jurisprudence of rights, especially. Scholars have debated, among other things, whether the privileges or immunities clause or the citizenship clause or both should be read to incorporate the federal Bill of Rights or a much narrower set of rights;⁴⁰ whether the protections of citizenship are confined to antidiscrimination guarantees or

(The clause’s “declaration of citizenship decisively repudiates state sovereignty.”)

³⁵Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

³⁶Bickel, *supra* note [], at 374.

³⁷See *Slaughterhouse Cases* (Miller, J.), (describing first sentence of first Clause of the 14th Amendment as providing “a definition of citizenship.”)

³⁸Mark Tushnet, “Away From the Cts,” at 191. See also Eisgruber, *The Fourteenth Amendment’s Constitution*, 69 S. Cal. L. Rev. 47, 77 (1995) (the Amendment “articulat[es] citizen identity.”)

³⁹The citizenship clause declares as citizens all persons born or naturalized in the United States. Congress possesses naturalization power under Article I, Sec. 8, pursuant to which it may define the criteria for accession to citizenship after birth. It is therefore the Citizenship clause together with the naturalization decisions Congress may make pursuant to the naturalization power that defines the class of citizens.

While there have been disputes over the years about the precise contours of the class of Fourteenth Amendment citizens--the most recent concerning the status of U.S.-born children of undocumented immigrants--on the whole, the Amendment’s definition of the citizenship class is uncontroversial.

⁴⁰For the pro-incorporation position, see e.g., Akhil Amar, “The Bill of Rights and the Fourteenth

embody protection of those fundamental rights now guaranteed under substantive due process theory--and perhaps other unenumerated rights as well;⁴¹ and finally, whether the enjoyment of citizenship necessarily entails social and economic as well as political and civil rights for society's members.⁴²

The second major debate on the subject is a debate over the significance of citizenship in our constitutional system. Alexander Bickel famously launched the modern version of this debate by

Amendment," 101 Yale L. J. 1193 (1992); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); Kevin Christopher Newsom, "Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases," 109 Yale L. J. 643 (2000) (arguing that "the Framers' purpose of incorporating Bill of Rights freedoms through the Privileges or Immunities clause may be accomplished without disturbing the Slaughter-House precedent."). For arguments urging a narrower, nonincorporationist interpretation of the Privileges and Immunities Clause, see Raoul Berger, *Government By Judiciary* (1977), at [22, 31-32, 38]; Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1949).

⁴¹For arguments on behalf of an anti-discrimination reading of the Privileges or Immunities clause, see e.g., John Harrison, "Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1388 (1992) (providing an "equality-based reading" of the Privileges or Immunities clause, holding that "the main point of the clause is to require that every state give the same privileges and immunities of state citizenships...to all of its citizens." Graglia, "Do We Have An Unwritten Constitution," supra note [] (arguing that the privileges or immunities clause, like the due process and equal protection clauses, was meant to ensure the protection of civil rights for blacks.); Raoul Berger, *Government By Judiciary*, supra note [], chapter 2. For opposing views, see Ely, supra, at 24 ("it is no small problem for the [anti-discrimination] reading of the Privileges or Immunities Clause that it would render the Equal Protection Clause superfluous....[The Clause] seems to announce rather plainly that there is a set of entitlements that no state is to take away."); Michael Kent Curtis, "Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment," 38 B.C. L. Rev. 1 (1996) (reading the privileges or immunities clause to prohibit states from abridging a body of preexisting national rights); Note, "Membership Has Its Privileges And Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship," 102 Harv. L. Rev. 1925, 1937 (1989) (suggesting a reading of "citizenship" as providing certain "nontextual guarantees" to members of the political community); Richard Aynes, "On Misreading John Bingham and the Fourteenth Amendment," 103 Yale L. J. 57, 104 (1993).

⁴²The debate is, in part, historical. Some scholars have argued the rights the framers sought to guarantee by way of the privileges or immunities clause were only civil, and not social or political rights. See e.g., Earl Maltz, "Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence," 28 Arizona State L. J. 1135, 1190 (1996); Jeffrey Rosen, "Translating the Privileges or Immunities Clause," 66 George Washington L. Rev. 1241, 1245 (1998) (describing the framers' "broader purpose...to extend civil rights (or privileges or immunities of citizenship), but not political or social rights, to all citizens, black and white, on equal terms.") See also Daniel J. Levin, "Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and An Interpretive Truce," 35 Harv. C.R.-C.L. Law Rev. 569 (2000) (arguing that the normative content of the "privileges or immunities of citizens of the United States" is embedded in conceptions of structural participation of self-government rather than in more general notions of personal liberty.)

In contrast to these readings, a number of scholars have argued recently that the rights of citizenship should be understood, on historical and normative grounds, to entail economic rights. See e.g., William E. Forbath, "Why Is This Rights Talk Different From All Other Rights Talk? Demoting The Court and Reimagining the Constitution," 46 Stan. L. Rev. 1771 (1994). Kenneth L. Karst, "The Coming Crisis of Work in Constitutional Perspective," 82 Cornell

espousing the view that possession of citizenship status has been, and should remain, fundamentally insignificant in the American constitutional order.⁴³ Many scholars have since attempted in a variety of ways to contest this view; some dispute the historical account,⁴⁴ and others have urged that the status of citizenship has, in any event, wrongly been “devalued” and deserves constitutional prominence and honor.⁴⁵ Others, however, continue to characterize the constitution as centrally

L. Rev. 523 (1997); Ackerman and Alsott, “Your Stake In America,” 41 Arizona L. Rev. 249 (1999).

⁴³Bickel, supra note [].

⁴⁴See e.g., Earl M. Maltz, A Citizenship and the Constitution: A History and Critique of the Supreme Court’s Alienage Jurisprudence,” supra (“The text, structure and history of the Constitution reflect a keen appreciation of the importance of the political relationships inherent in both state and national citizenship, as well as the potential relevance of those relationships to the allocation of a wide variety of rights and benefits.”)

⁴⁵See especially Peter Schuck, The Devaluation of American Citizenship, 3 Georgetown Imm. L. J. 1, 1-2 (1989) (“[T]he distinctive meaning of American citizenship...has been transformed in recent decades by a public philosophy that...[has] reduced almost to the vanishing point the marginal value of citizenship as compared to resident alien status. Not only do aliens need or want it less; many of those who *do* want it for their children need expend remarkably little in order to get it.”). See also Eskridge, “The Relationship Between Obligations and Rights of Citizenship,” supra note [];

Justice Rehnquist has penned what is probably the most pointed judicial articulation of this position:

committed to the rights of persons, and to normatively defend such a commitment.

On the face of it, these two debates are intimately related. At the most obvious level, it will only be worthwhile to engage in protracted debates about the meaning of citizenship to the extent that we regard citizenship as legally and politically significant. Yet they are also distinguishable in ways that are conceptually important. For one thing, the precise object of their concern--the “citizenship” which they address--is not identical in each case. Those engaged in the debate over the meaning of citizenship treat citizenship as an ensemble of rights (and sometimes, responsibilities) enjoyed by community members whose nature and scope require specification. Those involved in the “significance of citizenship” debate, in contrast, approach citizenship as a formal legal status and ask what that status means, and what it ought to mean, in our constitutional system. The two debates also have radically different starting points with respect to the class of persons deemed to constitute citizenship’s subjects. Those engaged in the “meaning of citizenship” debate presume at the outset that everyone in the community enjoys the formal status of citizenship, and instead focus on the nature and distribution of the substantive rights to which these citizens are entitled. In contrast, those addressing “the significance of citizenship” begin by assuming that *not* everyone is a formal citizen, and then go on to examine the implications of possessing, or not possessing, citizenship

[T]he Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity.... In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence.

Sugarman v. Dougall, 413 U.S. 634 (1973) (Rehnquist, J., dissenting).

status.

These differences in base-line and focus set the debates apart from one another in conceptual terms. But the distinctions are not merely conceptual: As it happens, something of a professional divide has developed between those engaged in the two citizenship debates as well. Whereas the “meaning of citizenship” debate is central fare in mainstream constitutional theory concerning both rights and democratic self-governance, the “significance of citizenship” issue has been of special interest to immigration scholars and those concerned with the status of aliens. Only rarely do scholars involved in one of these debates cross the line to engage with the other.

This seems to me to be an unfortunate divide. For while the two debates do indeed address different sorts of questions, these are questions which inevitably bear very closely on one another. It comes down to this: we cannot think productively about constitutional citizenship in substantive terms without addressing the question of citizenship’s formal subjects as well. We cannot address constitutional citizenship conceived as rights without being likewise mindful of the allocation and effect of national citizenship status--or so I will argue.

But the question remains as to precisely *how* rights and status bear on one another. What exactly is the nature of the relationship between citizenship’s subjects and citizenship’s substance, between the “who” and the “what” of constitutional citizenship? This relationship has been extremely complex and uncertain in constitutional thought. For one thing, it is not always clear on the face of it which of these aspects of citizenship commentators are addressing in any given context. The two are often conflated, and they can often be hard to distinguish in any event.⁴⁷ At the same time, because constitutional law and commentary on citizenship often treats substance and subjects

⁴⁷E.g., Rogers Smith, *Civic Ideals* (1998) (describing laws pertaining to acquisition and loss of citizenship

as distinct legal concerns which employ distinct analytic and even normative vocabularies, the relationship between them is rarely directly considered.

One of the most productive ways, it seems to me, to address the difficult interplay between citizenship's substance and citizenship's subjects in constitutional law is to examine it in relation to the constitutional status of aliens. At first glance, alienage might seem to be a subject wholly encompassed within the second, "significance of citizenship" debate, for inquiring about the legal and social difference that citizenship status makes necessarily entails an inquiry about the difference that alienage makes as well.⁴⁸ But alienage, as it happens, is also significantly implicated by the "meaning of citizenship" debate. This is because imbuing the idea of citizenship with greater constitutional meaning--characterizing increasing numbers of rights and responsibilities in the idiom of citizenship--presents the possibility that aliens will be excluded from the scope of many of the Constitution's protections altogether.

While this risk is most often ignored in the literature, we have seen that some constitutional commentators have recognized it as a real possibility, and have expressed concern that linking rights to citizenship will cut against enjoyment of rights by those persons lacking citizenship by legal definition.⁴⁹ A few other commentators, in contrast, have sought to argue that exclusion of aliens is not a strictly necessary outcome of the revival of constitutional citizenship. They have done so by positing, as Philip Bobbitt writes, that there is no "necessary antinomy between citizen and alien,"⁵⁰

status and laws pertaining to general rights of residents as "citizenship laws.") *Id.*, at 2.

⁴⁸Cf. Bosniak, "Membership, Equality and the Difference That Alienage Makes," 69 *N.Y.U. Law Rev.* 1047 (1994).

⁴⁹See text accompanying notes [], *supra*.

⁵⁰Bobbitt, at 89.

and by suggesting that aliens might themselves enjoy some aspects of constitutional citizenship.⁵¹

What is significant about such a proposal is that it implicitly relies upon a conception of citizenship in which citizenship's subjects and citizenship's substance are not necessarily coextensive but are relatively autonomous the one from the other. This is a conception in which a person need not *be* a citizen in order to *enjoy* citizenship. It is the soundness and the implications of this premise with which I am concerned here.

A. Citizenship Minimalism and Its Critics

The Fourteenth Amendment tells us who the nation's citizens are. But beyond designating the class of national citizens, what more about citizenship does the Fourteenth Amendment have to say? One reading, which has long dominated our jurisprudence and constitutional thought, is that it says very little else. In this minimalist reading,⁵² the effect of the Amendment's Citizenship Clause is almost entirely definitional.⁵³ The clause designates a class of national citizens who owe allegiance to the polity and are in turn guaranteed its protection in the international sphere.⁵⁴ And while the Amendment contains the Privileges or Immunities Clause as well, the longtime interpretation of this clause by the Supreme Court has regarded it as guaranteeing very little by way of substance to those defined as 14th amendment citizens. As is well-known, in a 1873 decision not yet overruled, a

⁵¹See text accompanying notes [], supra.

⁵²Bickel, *The Morality of Consent* 51 (1975) (describing the "traditional minimal content of the concept of citizenship.")

⁵³See sources cited in note [], supra. This characterization seems questionable: Describing the clause as "defining citizenship" suggests that it provides a definition of what citizenship substantively entails. As Douglas Smith has written, the clause is better viewed as "defin[ing] the conditions sufficient for attaining the status of >citizen." Smith, *Citizenship and the Fourteenth Amendment*, supra note [], at 692-693.

majority of the Court held that the privileges or immunities guaranteed in the Amendment's first clause guaranteed virtually nothing beyond a set of minimal rights already guaranteed or implicit elsewhere in the Constitution.⁵⁵ Until fairly recently, most scholars have taken largely for granted both the *Slaughter-House* Court's evisceration of the clause and the development of the jurisprudence of individual rights under the aegis of personhood by way of the equal protection and due process clauses.⁵⁶

On this traditional account, then, the Fourteenth Amendment does no more than specify who is a citizen, and offer an exceptionally thin conception of what citizenship is. Citizenship, in this understanding, is "membership of a nation,"⁵⁷ and not a great deal more.⁵⁸ As Bickel put it: "While

⁵⁴Minor v. Happersett, 88 U.S. 162, 166 (1875).

⁵⁵The Supreme Court's recent decision in *Saenz v. Roe*, 526 U.S. 489 (1999), has been characterized by some scholars as representing a major step toward an unravelling of the *Slaughter-House*. See authorities cited in note [], supra.. Determining whether this reading of the *Saenz* is overly optimistic will have to await the further decisions from the Court.

⁵⁶For arguments that *Slaughterhouse* badly distorted constitutional rights doctrine by, in effect, forcing the equal protection and due process clauses to bear the weight for which they were, and are, ill-equipped, see e.g., Tribe, supra note [], at 1317 (noting that for many constitutional scholars, "the problems [associated with] the textual gymnastics arguably necessary to find protection of *substantive* rights in a provision whose words seem most apparently concerned with process--have become insuperable."); Kurland, supra note [], at 406 ("only the privileges or immunities clause speaks to matters of substance; certainly the language of due process and equal protection does not."); John Hart Ely, *Democracy and Distrust* (1980) 18-22 (arguing that substantive due process is "a contradiction in terms--sort of like `green pastel redness,'" and urging new attention to the privileges or immunities clause as a source of substantive rights).

For a contrary view on the effect of the *Slaughter-House* Cases, see Walter Dellinger, "Remarks on Jeffrey Rosen's Paper," 66 *George Washington L. Rev.* 1293 (1998) ("Although *Slaughter-House* was wrong, I have never agreed with the many scholars who believe that its fundamental error was that it eliminated the correct clause for the national protection of individual rights (the Privileges and Immunities Clause) thereby "forcing" later interpreters to rely upon the wrong clause (the Liberty/Due Process Clause....Having the Due Process clause do the work intended for the Privileges and Immunities Clause may be awkward, but it is not a constitutional tragedy."); Jeffrey Rosen, "Translating the Privileges or Immunities Clause," 66 *George Washington L. Rev.* 1241, 1242-1243 (1998) (arguing that "the new conventional wisdom about the virtues of resurrecting the Privileges or Immunities Clause is wrong....Overruling *Slaughter-House* would solve so few of the problems in modern Fourteenth Amendment jurisprudence that it's not clear that a textualist revival would be worth the trouble.")

⁵⁷Minor v. Happersett, 88 U.S. at 165-166.

⁵⁸As the Court in *Slaughter-House* described the reach of the privileges or immunities clause, it imparts

we now have a definition of citizenship in the Constitution, we ...set very little store by it.⁵⁹

Against this minimalist reading, contemporary scholars urging the revival of the idea of constitutional citizenship have protested that the 14th Amendment has much more to say about citizenship than this account acknowledges. Specifically, they argue that beyond defining the class of citizenship's subjects, the idea of citizenship carries with it substantive rights which are far more elaborate and robust than the minimalist reading allows. Some would locate these in the citizenship clause itself: they argue that implicit in the constitutional definition of citizenship's subjects is a commitment to provide fundamental rights to citizens.⁶⁰ Others maintain the Framers entrusted

only rights of national citizenship, which confer upon the individual the right to "come to the seat of government to assert any claim he may have upon the government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its function, to free access to its seaports...to the subtreasuries, land offices and courts of justice in the several States... and to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of the federal government." 83 U.S. at [] (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867)).

⁵⁹Bickel, "Citizenship in the American Constitution," at 378.

⁶⁰See e.g., Charles L. Black, *Structure and Relationship in Constitutional Law* (1969), 33-66; Rebecca E. Zietlow, "Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism," 62 U. Pitt. L. Rev. 281 (2000); Jennifer Hendricks, "Women and the Promise of Equal Citizenship," 8 Tex. J. Women & L. 51 (1998); Arthur Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers L. Rev. 387, 395 ("the national citizenship bestowed upon the Negro by the first sentence of the Fourteenth Amendment contained as an essential attribute of this new status the right to be free from the stigma of inferiority implicit in the institution of slavery, the right to be free from discrimination by reason of race in the exercise of rights or privileges generally available to white citizens."); Douglas G. Smith, "Citizenship and the Fourteenth Amendment," 34 San Diego L. Rev. 681, 690 (1997) (arguing that "[t]he Citizenship clause of Section 1 may be interpreted to represent a guarantee binding upon both the state and federal governments of certain fundamental rights inherent in the concept of citizenship as understood at the time of the ratification of the Amendment."); Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War*, 61 NYU L. Rev. 863, 912-913 (1986) ("Understood within the context of the Declaration of Independence, natural rights theory, and nationalist constitutionalism, the citizenship clause of the Fourteenth Amendment delegated the constitutional authority to secure affirmatively the fundamental rights of American citizens."); Christopher Eisgruber, "Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence," 43 Duke L. J. 1, 45 (1993) (suggesting Congress' power under Section 5 of the 14th Amendment to enforce the Citizenship clause could be read to grant congress authority to ensure "the benefits government ought to provide to a free people--such as liberty, security and justice.") See also William Eskridge, *A Tribute To Kenneth Karst*, supra note [], at 1219 (urging that the due process and equal protection clauses "be read as guarantees fulfilling the promise of citizenship made in the first sentence of the Fourteenth Amendment.").

See also Tribe, supra note [], (describing the citizenship clause as "an underutilized constitutional provision if ever there was one.")

citizenship's substance to the privileges and immunities clause,⁶¹ while others still read a commitment to substantive citizenship values in the equal protection clause by way of the principle of equal citizenship.⁶² Some would confine the rights of citizenship to civil and/or political rights, while others insist that constitutional citizenship entails commitments to economic and social equality as well.⁶³

In each case, though, revivalists want to press beyond the minimalist reading of 14th Amendment citizenship in two respects: First, they maintain that the Fourteenth Amendment should be read not merely to designate citizenship's subjects but also to provide substantive guarantees associated with citizenship. Second, they contend that these guarantees are thicker and more meaningful than the traditional minimalist account allows.

As to why constitutional citizenship should be understood more thickly and substantively, scholars' rationales have varied. Some analysts regard the minimalist account as simply mistaken as an historical matter; in their view, citizenship minimalism ignores the intent of the Framers and the original meaning of the Fourteenth Amendment.⁶⁴ Others contend that, beyond history and text, citizenship minimalism obscures the meaning of our Constitution in a deeper sense. Whether

⁶¹As John Ely writes, "It was probably the clause from which the framers of the Fourteenth Amendment expected most." Ely, *Democracy and Distrust*, supra, at 22.

⁶²Karst, "Foreward: Equal Citizenship Under the Fourteenth Amendment," 91 Harv. L. Rev. 1, 4 (1977) (describing citizenship principle as giving "substantive content [to] the equal protection clause.")

⁶³For arguments that the Fourteenth Amendment's protection of citizenship rights pertained only to civil rights, see Maltz, supra; John Harris, supra. [political rights] For arguments that citizenship has to be understood to include economic and social rights, see Forbath and Karst (economic rights); Balkin (social rights).

⁶⁴There is by now a substantial literature on the historical origins and political context of the Fourteenth Amendment, and many scholars have concluded that the framers affirmatively intended to imbue the concept of citizenship with real constitutional effect E.g., Ely, supra; Maltz, Harrison,

animated by an anti-caste vision of the constitution or by principles of republican self-government,⁶⁵ the ideal of citizenship is understood to represent a core source of rights and responsibilities in our constitutional nomos.

I am sympathetic to the view espoused by critics of citizenship minimalism that the idea of constitutional citizenship possesses a meaning that goes beyond providing for the sheer delineation of national status. Notice, however, that to the extent we adopt a more robust reading of constitutional citizenship, we are presuming a dual conception of Fourteenth Amendment citizenship, under which the Amendment's provisions work *both* to designate the class of persons entitled to citizenship *and* to set out a substantive vision of citizenship rights. This conception may represent a more complete accounting of citizenship's meaning under the Constitution, but it introduces complexities as well. Specifically, it opens up a variety of analytical and normative questions concerning the nature of the relationship between status citizenship and rights citizenship in the first instance.

⁶⁵ Some characterize the constitution as embodying an anti-caste ethic; in this view, the Fourteenth Amendment should be read as a response to the subordination of African Americans --and by implication, to other oppressed groups as well. The concept of equal citizenship--understood as full and meaningful membership for all--figures centrally in this narrative. E.g., Karst, "Foreword," 91 Harv. L. Rev. at 17 (The framers "chose to cast the amendment in general terms, declining to use the language of specific rights and particular groups that they had used in the 1866 Act. It was this choice that gave the principle of equal citizenship its capacity to grow into a protection of other groups and other rights."); Jack Balkin, "The Constitution of Status," Yale L. Rev. (1998). Others regard the Constitution as embodying commitments to democratic self-government and republican virtue. See e.g., McClain and Fleming, *supra*; Macedo, *supra*, Sunstein.

B. “Mere Status” and “Equal Citizenship:” The Second-Class Citizenship Critique

In discussions of citizenship in political and social theory, it is common for scholars to distinguish between “thin” and “thick” versions of citizenship. Thin citizenship is citizenship-as-status, “mere status,” in the disparaging phrase of some commentators.⁶⁶ This thin version of citizenship is contrasted with more robust, substantive conceptions. Such conceptions vary in kind: some scholars focus on citizenship as the meaningful enjoyment of rights; others, in a more civic republican vein, approach citizenship as a kind of democratic engagement and self-governance. In either case, however, a hierarchy is posited: to possess the legal status of citizenship is to enjoy citizenship only in the most formal and “nominal sense.” The true and full enjoyment of citizenship requires much more.⁶⁷

In the constitutional literature, some accounts of the relationship between citizenship status and citizenship rights employ a similar hierarchical framework, with rights the superior, and status the inferior, term. The work of Kenneth Karst is especially illustrative: Karst describes the Fourteenth Amendment as containing two conceptions of citizenship: a “narrow” conception, pursuant to which citizenship constitutes legal status, and a “broader conception,” which embodies,

⁶⁶See e.g., Chantal Mouffe, “Democratic Citizenship and the Political Community,” in *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (Chantal Mouffe, ed., 1992) at 227 (“liberalism...reduced citizenship to a mere legal status”); Sanford Levinson, “National Loyalty, Communalism, and the Professional Identity of Lawyers,” 7 *Yale J. L. & Hum.* 49-53-54 (1995) (distinguishing between the concept of ‘good citizens’ and ‘mere citizens.’)

⁶⁷For a useful, and elaborate, characterization of ‘thin’ and ‘thick’ conceptions of citizenship, see Rainer Baubock, *Differentiating Citizenship*, in *Inclusion/Exclusion* (Alison Woodward, ed., Routledge, forthcoming). In contrast to the account here, however, Baubock characterizes as “thin” not merely conceptions of citizenship-as-status but also conceptions of citizenship-as-rights which do not entail corresponding obligations or cultural commitments. *Id.*, at [5-7]. He propounds a conception of thick citizenship that is far more communitarian and nationalistic than mine.

in his argument, the principle of “equal citizenship.”⁶⁸ For Karst, citizenship status is a “simple idea,”⁶⁹ a “constitutional trifle,”⁷⁰ -- whereas the broader conception of equal citizenship entails “the dignity of full membership in the society,”⁷¹ and constitutes for this reason, the fundamental normative value of our national life.⁷²

There are good reasons for approaching citizenship in this hierarchical fashion. Doing so represents a response to the history of discrimination in this country and elsewhere, pursuant to which the formal citizenship status of subordinated groups has been recognized while these groups have, at the same time, remained excluded and marginalized in many significant respects. Scholars’ normative prioritization of rights citizenship over status citizenship can be read, in other words, as part of a critique of legal arrangements whereby individuals possess formal citizenship status but experience de facto exclusion and powerlessness. Such a critique is often articulated as the critique of “second-class citizenship.”

“Second-class citizenship” is a concept which has been normatively powerful in American political and legal discourse. In rhetorical terms, it has been quite effective in conveying the idea that

⁶⁸Karst describes the principle of equal citizenship not merely as a constitutional mandate but as “an ideal, a cluster of value premises.” 91 Harv. L. Rev. at 5.

⁶⁹Id., at 5, quoting Bickel, *The Morality of Consent* 54 (1975).

⁷⁰Karst, 91 Harv. L. Rev. at 5. See also Karst, *Belonging to America*, supra note [], at 10 (“I agree that the bare legal status of citizenship is a ‘constitutional trifle.’”)

⁷¹Id., “Equal Citizenship,” at 5; see also *Belonging to America*, at 10 (“real membership in the community is more than a legal status.”)

⁷²For other articulations of this antimony, see e.g., Black, *Structure and Relationship*, supra, at 53 (the Citizenship Clause does not simply bestow an “honorific label;” it also mandates, more substantively, “incorporation and participation in society.”); Note, “Membership Has Its Privileges and Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship,” 102 Harv. L. Rev. 1925, 1946 (1989) (“Although the title of >citizen= has been reduced to a mere legal status, the belief that `citizenship means something= remains a powerful emotional and symbolic legacy in our political traditions.”)

the extension of the formal status of citizenship, alone, can mask real oppression and thereby represents a largely empty husk.⁷³ Much of the history of citizenship in this country can be, and has been, recounted in these terms.⁷⁴ After the passage of the Fourteenth Amendment, African Americans possessed formal citizenship but remained subordinated in virtually every sphere. Likewise, for many years women were recognized as possessing the nominal status of citizenship, and yet were denied the franchise and other fundamental incidents of membership. Sometimes, the denial of rights to citizens was overtly defended: the citizenship of some groups was simply deemed to be less complete than that of others. Increasingly, however, rights that we now regard as integral to citizenship were denied to status citizens through court decisions maintaining that these rights fell outside the core substantive requirements of citizenship. The classic example is the decision in the 1875 case of *Minor v. Happersett*, in which the Supreme Court concluded that voting was not a “privilege or immunity of citizenship.”⁷⁵

The critique of second-class citizenship is thus a critique of citizenship formalism, whereby nominal membership serves to mask the continued exclusion and social domination of historically marginalized groups. It is a critique of citizenship minimalism as well: it rejects the notion that the class of citizens can be defined as pure status holders without being acknowledged and empowered as active community participants, and it demands recognition and effectuation of rights and protections that make

⁷³Civil Rights Cases (Harlan, J., dissenting); Kinoy, *supra*, note [], at 403

⁷⁴See e.g., Kenneth Karst, “Why Equality Matters,” 17 *Georgia L. Rev.* 245, 288 (1983)(quoting Robert Wiebe, *The Segmented Society An Introduction To the Meaning of America* (1975), at 95 (formal citizenship never guaranteed full societal membership; “[a]ctual membership was determined by additional tests of religion, perhaps, or race or language or behavior, tests that varied considerably among segments and over time.”)).

⁷⁵*Minor v. Happersett*, 88 U.S 162 (1875).

Proponents of “economic citizenship” today would argue that Congress and the courts have wrongfully excluded economic rights from the scope of substantive citizenship as well. For citations of recent work advocating a recognition of economic citizenship, see note [], *supra*.

community membership meaningful.⁷⁶⁷⁷

While this is an indispensable form of political and legal criticism, the second-class citizenship critique also suffers from certain limitations. One problem is that its focus on the denial of rights to status citizens often renders the critique insensitive to the history of systematic denial of citizenship status itself to members of subordinated groups in this country. Important recent scholarship on Asian and other non-white exclusion from naturalization eligibility, and on the history of married women's nationality laws which, among other things, denationalized American women who married foreigners, makes the point vividly.⁷⁸ So too does the growing literature on the exclusion of Puerto Ricans from constitutional citizenship status. Possession of the "mere status" of citizenship does not appear so trivial a matter when approached in the context of these struggles.⁷⁹ This account, furthermore, obscures the ways

⁷⁶While most invocations of the idea of "second class citizenship" counterpose the possession of formal citizenship status with the denial of substantive rights, the term has sometimes been used to describe imposition of lesser forms of citizenship status itself. See e.g., *Schneider v. Rusk*, 377 U.S. 163, 169 (1964) (a statute which deprived naturalized citizens of their citizenship status if they resided abroad for three years in their place of original nationality or birth creates "a second-class citizenship.") See also *Knauer v. U.S.*, 328 U.S. 654 (1946) ("Citizenship obtained through naturalization is not a second-class citizenship."); *Rogers v. Bellei*, 401 U.S. 815 (1970).

⁷⁷Members of the Supreme Court has often used the concept of "second hand citizenship" in an offhand and unexamined way to refer to a condition of exclusion or stigma or less favorable treatment experienced by a subject group (most often African Americans and other racial minorities; sometimes veterans, juveniles or others). In one case, however, there is a brief exchange among the Justices about the concept: J. Black, dissenting in *Rogers v. Bellei*, argues that "[u]nder the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause and would instead be relegated to the permanent status of second-class citizenship, subject to revocation at the will of Congress." 401 U.S. 815, 839 (1970). The majority, in response, describes the characterization that the holding imposes second-class citizenship as a "cliche [that is] is too handy and too easy, and, like most cliches, can be misleading.." *Id.*, at 835.

Perhaps in part because second-class citizenship is an inherently critical term, it is far more often invoked in dissenting than in majority opinions.

⁷⁸See Ian Haney Lopez, *White By Law: The Legal Construction of Race* (NYU, 1996); John Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," 109 *Yale L. J.* 817 (2000); Nancy Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, *American Historical Review*, December 1998; Leti Volpp, "Dependent Citizens and Marital Expatriates," (manuscript in preparation).

⁷⁹In a recent essay, Karst recognizes this point. See Kenneth Karst, "Citizenship, Law and the American Nation," 7 *Indiana J. Global L. Studies* 595, 596 (2000) (While Alexander Bickel considered the status of citizenship "a trifling matter....to an African-American living under Jim Crow, or to many a resident alien today, the status was and is a prize to strive for...The formal status of citizenship can seem trifling only when you are able to take it for granted.")

in which a *lack* of the status of citizenship itself—in the form of alienage--sometimes serves as a basis for caste-like treatment and discrimination.⁸⁰

But beyond this insensitivity to the continuing significance and intractability of citizenship status questions, there lies another, more conceptual, difficulty with the second-class citizenship critique. I have said that commentators often treat citizenship status and citizenship rights as elements in a hierarchy, with status the lesser of the two values. Yet the hierarchy posited is usually not one of otherwise independent variables. Instead, the possession of citizenship status is often regarded as logically prior to--as a necessary but insufficient condition for--the enjoyment of citizenship rights. In this account, citizenship status is assumed to be an embryonic form of citizenship, an indispensable antecedent to citizenship in its more substantive mode.

But conceiving of the relationship between status and rights this way can be misleading. Citizenship status is not, in fact, always an antecedent to citizenship rights. While citizenship status is a condition precedent for the enjoyment of some rights, there are many rights that many citizenship revivalists would want to characterize as rights of citizenship--expressive and associational rights, for instance, or procedural rights in the criminal context, or the right to attend public schools with other children-- for which citizenship status is not a prerequisite at all. Such rights have been regarded, instead, as attaching to persons--territorially-present persons, often through the constitutional values of equal protection and due process.

And indeed, there is one particular right--that of voting--that today is very closely associated with citizenship both in popular understandings and in political theory,⁸¹ and that in recent decades

⁸⁰See generally, Bosniak, "Universal Citizenship and the Problem of Alienage," *supra*.

⁸¹Voting has not always been regarded as a necessary incident of citizenship. See e.g., *Minor v. Happersett*, 21 Wall. 178; *Pope v. Williams*, 193 U.S. 621 (1904) ("Citizenship and suffrage are by no means inseparable: the

has been confined to people who possess citizenship status, which nevertheless was not limited to status citizens historically. As a number of scholars have chronicled in recent years, aliens possessed the right to vote in many states through the late nineteenth century, and even today, they vote in a handful of local elections.⁸²

The point is that citizenship status does not always serve as the ground floor in the larger edifice of constitutional citizenship. Instead we find that just as citizenship status hasn't always entailed citizenship rights, the possession of rights doesn't always require prior possession of citizenship status. Rights and status, in short, are relatively autonomous.⁸³

C. Alienage and the Citizenship Revival

This relative autonomy as between citizenship status and citizenship rights goes a long way to explaining the suggestion of those constitutional scholars who have considered the alienage question that, notwithstanding potential deleterious effects on aliens, the revival of constitutional citizenship ultimately need not undercut alien's rights. Aliens can enjoy much in the way of rights-citizenship, even if, by

latter is not one of the universal, fundamental, inalienable rights with which men are endowed by their Creator.") See also Cott, *supra* note [].

⁸²Jamin B. Raskin, "Legal Alien, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," 141 U. Pa. L. Rev. 1391 (1993); Gerald M. Rosberg, "Aliens and Equal Protection: Why Not the Right to Vote?" 75 Mich. L. Rev. 1092 (1977); Gerald Neuman, *Strangers to the Constitution* 63-71, 139-149 (1996).

⁸³The concept of "relative autonomy" has often been used to describe the nature of a relationship between social domains or phenomena in empirical terms; it is meant to convey the idea that two domains (or phenomena) are neither entirely reducible to one other, nor entirely independent. The term has its origins in Marxist thought (Althusser, culture and ideology in capitalism), and was a key concept of Critical Legal Studies' accounts of law's relationship to other social fields. See e.g., Robert W. Gordon, *Critical Legal Histories*, 36 Stanford L. Rev. 57, 101(1984). Today legal scholars of many stripes rely on the idea to acknowledge both "the obvious influences running, in both directions, between law and other social spheres," and, at the same time, the fact that law must be treated "in its own terms, not the terms of some other field or discipline." Hugh Baxter, *Autopoiesis and the 'Relative Autonomy' of Law*, 19 Cardozo L. Rev. 1987, 1990 (1998).

My use of the term here is meant to convey not an empirical but a logical or conceptual relationship: My argument is simply that rights citizenship does not depend entirely on status-citizenship, nor does enjoyment of status citizenship entail, necessarily, enjoyment of citizenship rights. These dimensions of citizenship, in other words, are not mutually collapsible one into the other; they are closely related and partly overlapping, but substantially independent as well.

definition, they lack status-citizenship. Citizenship, in other words, is a divided condition.

It is this conception of a divided citizenship that enabled Charles Black to write that “filling with content the concept of citizenship need not result in neglect of the rights of aliens among us.”⁸⁴ Rather, Black wrote, the grounding of rights in citizenship should result in the further protection of aliens”—lawfully resident aliens, he qualifies—“for their position is in many respects and for many purposes soundly to be analogized to that of citizens.”⁸⁵ Likewise, it is this sort of disjuncture between status and rights that John Ely invoked when he suggested that the Privileges and Immunities clause need not be read to protect citizens only; instead, he maintains, it can plausibly be read to mean that “there is a set of entitlements, the privileges and immunities of citizens of the United States, which states are not to deny to *anyone*—aliens included. The phrase “privileges or immunities of citizens,” he writes, “define the class of rights rather than limit the class of beneficiaries.”⁸⁷

And it is with this conception of the relative autonomy of citizenship’s subjects and substance implicitly in mind that Philip Bobbit could criticize the assumption “that ‘alien’ and ‘citizen’ are opposites, sharing no characteristics, defined as negations of one another.”⁸⁸ Bobbit would

⁸⁴Black, *The Unfinished Business of the Warren Court*, 46 *Washington L. Rev.* 3, 10 (1970).

⁸⁵*Id.*, at 10, n. 38.

⁸⁶Ely, *supra* note [], at 25 (emphasis added). Ely recognizes that on its face, the clause’s language appears to “limit its protection to United States citizens.” In response he writes: “I certainly agree that we should defer to clear constitutional language: for one thing it is the best possible evidence of purpose. But when the usual reading is out of accord with what we are quite certain was the purpose, we owe it to the framers and ourselves at least to take a second look at the language....Since everyone seems to agree that [the non-exclusionary construction] would better reflect what we know of the purpose, and since it is one the language will bear comfortably, it is hard to imagine why it shouldn’t be followed.” *Id.*

⁸⁷*Id.*

⁸⁸Bobbit, *supra* note [], at 89.

presumably concur that alien and citizen are, to some degree, opposing categories in the domain of formal citizenship status; indeed, our immigration law defines the category alien precisely as “any person not a citizen” of the United States.⁸⁹ But with regard to substantive citizenship--understood here as rights--the relationship, he suggests, is far more subtle and complex.⁹⁰

Kenneth Karst’s discussion of the alienage question in his early work is a notable example of constitutional theory employing a divided conception of citizenship. Karst is a longtime proponent of revitalizing the normative ideal of citizenship as a basis for constitutional rights, though unlike many other scholars, he has argued that the principle of equal citizenship is best housed not in the Citizenship Clause or the Privileges or Immunities Clause but in the Equal Protection Clause. He acknowledges that this may seem counterintuitive; after all, he writes, it is the former clauses that expressly address the subject of citizenship. But he endorses the Equal Protection Clause as a textual foundation for equal citizenship for several reasons.

First, Karst writes, there is the value of, and safety in, precedent: “We already have a store of well-developed equal protection doctrine embodying the principle of equal citizenship...It seems sensible to leave the principle where it took root.”⁹¹ Moreover, he contends (contrary to the weight of more recent opinion on the matter), the Equal Protection Clause “shows every sign of being able to bear the full meaning of the equal citizenship principle.”⁹² There is, in other words,

⁸⁹ See 8 U.S.C. @ 1101(a)(3) (1994) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

⁹⁰ Bobbit writes that the relationship between citizen and alien is not necessarily an “antimony:” it is, rather, “a chiaroscuric relationship,” one “which may be found in Aristotle but is not a relationship established anywhere in the Constitution.” *Id.*, at 88.

⁹¹ Karst, *Equal Citizenship*, at 43-44.

⁹² *Id.*, at 43.

no intrinsic reason of doctrinal integrity or coherence to depart from our recent interpretive practice. But for Karst, the most important reason for sticking with Equal Protection is that the Clause extends its protection “not only to ‘citizens’ but to every `person.’” This is for him a signal virtue. It is a virtue because it means the clause is maximally inclusive, as the equal citizenship principle ought to be. It is a virtue, in particular, precisely because the Equal Protection Clause does not confine its protections to citizens-- and, Karst maintains, “it is important to extend most of the content of the equal citizenship principle to aliens.”⁹³

Now this is a very striking position: Karst urges retention of the Equal Protection clause as the textual site of the equal citizenship principle precisely because the Equal Protection clause does not limit its protective scope to citizens. Karst himself acknowledges the apparent paradox: on introducing the argument, he requests of his readers “the suspension of incredulity.”⁹⁴ He goes on to explain his view that, “for most purposes, aliens are entitled to be regarded as respected participants in our national society, even though they lack citizenship in the narrow sense. The broader principle of equal citizenship extends its core values to noncitizens, because for most purposes they are members of our society.”⁹⁵

Karst thus employs his preference for substantive over formal citizenship to urge inclusion of formal noncitizens within citizenship’s substantive scope. Aliens’ lack of the “narrow” citizenship

⁹³Id., at 44-45.

⁹⁴Id., at 44.

⁹⁵Id., at 45. Karst suggests that noncitizens may rightly be denied political (though not other) rights because “we are a political community and many aliens are members of other political communities, and it may be permissible for a state to restrict political participation.” Id. Of course, many citizens--increasing numbers of them--are members of other political communities as well, yet we do not disenfranchise them on this basis. For a useful recent overview of the subject of dual nationality in fact and in law, see e.g., Peter Spiro, Dual Nationality And the Meaning of Citizenship, 46 Emory L. Rev. [] (1997).

of status does not require them to be denied the “broader” citizenship of membership, for status citizenship, in his formulation, is not a precondition for equal citizenship.

What each of these scholars shares in common is the conviction that locating the idea of citizenship at the center of the constitutional discourse of rights need not entail the wholesale exclusion of aliens. This conviction presupposes that citizenship is not monolithic whole, but rather a compound and ultimately severable concept: Citizenship’s subjects and its substance--its beneficiaries and its rights, in Ely’s terms-- are treated as discontinuous. Just as being a citizen does not guarantee (although it should, all agree) any particular citizenship substance, enjoying citizenship does not require being a citizen in any formal sense.⁹⁶ In this understanding, citizenship status and citizenship rights are simply nonconvergent.

D. The Prevailing View: Citizenship For Citizens

The reading these scholars give to the status of alienage under an enhanced citizenship rights regime in constitutional law is not, to be sure, the prevailing understanding. Most scholars seem to take it for granted that the enjoyment of citizenship rights requires possession of citizenship status. This is made clear in many contemporary discussions of the revival of the constitutional concept of citizenship as a basis for rights. Scholars most often read the Privileges or Immunities Clause, for example, as ensuring citizenship rights only for people who possess citizenship status. The rights possessed by virtue of the Privileges or Immunities Clause of the Fourteenth Amendment “are held by those with the status of citizens of the United States,” Michael Kent Curtis has

⁹⁶One way of expressing this divide in textual terms might be to say that while aliens are clearly not “Fourteenth Amendment first-sentence citizen[s],” *Rogers v. Bellei*, 401 U.S. 815 (1971), they are in many respects, Fourteenth Amendment, second-sentence citizens.

written.⁹⁷ This is, he says, “a simple and direct reading” of the textual language.⁹⁸ Likewise Akhil Amar specifically rejects Ely’s bifurcated reading of the clause, maintaining that the clause is best read as “defining the rights *of* Americans *as* Americans.”⁹⁹

The assumption that citizenship is the preserve of citizens has also been voiced by some scholars who have criticized the citizenship revival in constitutional and political discourse. Scholars have argued, on that basis, that a revitalization of citizenship will almost certainly work to the detriment of aliens. In my own work, I have warned of such a consequence, contending that as a rhetorical and practical matter, treating “citizenship” as the measure of full political and social inclusion may implicitly work to exclude persons who lack citizenship by legal definition.¹⁰⁰ Once again, the operant assumption here is that the status and substance of citizenship necessarily converge. If rights are conceived as a kind of citizenship, in this view, then aliens will be unjustly

⁹⁷ Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. Law Rev. 1071, 1147-48 (2000). See also [].

On interpreting the closely analogous privileges and immunities clause of Article IV, Justice O’Connor observed, “The word “Citizens” suggests that the Clause also excludes aliens. Any prohibition of discrimination aimed at aliens... must derive from other constitutional provisions.” *Zobel v. Williams*, 457 U.S. 55, 73, n. 3 (1982) (O’Connor, concurring).

⁹⁸Michael Kent Curtis, *Two Textual Adventures: Thoughts on the Reading of Jeffrey Rosen’s Paper*, 66 *George Washington L. Rev.* 1269, 1272 (1998).

⁹⁹Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale, 1998), at 364, n. 42. See also Michael J. Perry, *Brown, Bolling and Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 *S. Ill. U. L. J.* 53, [], n. 44 (1995) for similarly skeptical discussion of Ely’s reading.

See also T. Alexander Aleinikoff, *ACitizenship Talk: A Revisionist Narrative*, 69 *Ford. L. Rev.* 1689, n. 32 (2001) (assuming that Anon-citizens ...cannot claim the protection of the privileges and immunities clause.); Daniel Levin, *Reading the Privileges or Immunities Clause*, supra note [], at 586 (“The 1866 [Civil Rights] Act envisioned a different set of beneficiaries than the Amendment did. The Amendment returned to the language of citizenship...[whereas] the civil rights enumerated in the 1866 Act inured to the inhabitants of every race.”); Karst, *Equal Citizenship Under the Fourteenth Amendment*, supra note [], at 42 (“the privileges and immunities clause is addressed explicitly to the rights of citizens.”)

¹⁰⁰Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 *Northwestern U. L. Rev.* 963 (2000); Linda Bosniak, *The Citizenship of Aliens*, *Social Text* 56 (1998), 29-36.

disadvantaged.

On its face, the notion that citizenship is the exclusive preserve of citizens is hardly a surprising proposition. Among other things, it seems natural to treat variants of the same root word as closely-related attributes. Common sense understandings tend to regard the term “citizenship” as the state of being a citizen,¹⁰¹ and “citizen” as the identity of one who enjoys citizenship. This reciprocal, mutually-referential sort of definition is reflected in much of the theoretical scholarship about citizenship. In political and legal theory, citizenship’s subjects are often defined entirely derivatively, by reference to their possession of substantive citizenship, and citizenship’s substance is likewise defined in relation to what the subjects of citizenship possess or enjoy or do. Civic republicans, for example, approach citizenship as a state of purposeful engagement in the life of the political community; for them, active self-governance is citizenship’s substance. And in this tradition, when a person exercises or enjoys or enacts such citizenship, she becomes “a citizen” by definition. Conversely, a citizen in the republican sense is understood to be a person who is actively engaged in the process of the political community’s process of self-government; and when a person is a citizen, she or he is, by definition, practicing “citizenship.”¹⁰²

In the prevailing view then, a subject of citizenship is simply one who enjoys citizenship in substantive terms, and substantive citizenship is simply what citizens have or do. Substance and subjects are not independent attributes of citizenship: they are merely different ways of expressing the same citizenship-related condition.

¹⁰¹E.g., The American Heritage Dictionary of the English Language 245 (1969) defines “citizenship” as “the status of a citizen, with its attendant duties, rights and privileges.”

¹⁰²As one theorist has written, “Within civil republicanism, citizenship is an activity or a practice and not simply a status, so that not to engage in the practice is, in important senses, not to be a citizen.” Adrian Oldfield, “Citizenship and Community: Civic Republicanism and the Modern World,” in *The Citizenship Debates: A Reader*

Yet as we have seen, this is not the only understanding scholars maintain of the relationship between the subjects and the substance of citizenship. Indeed, in American constitutional discourse, the relationship between these attributes of citizenship is often regarded as distinctly fractured. The second-class citizenship critique, first of all, specifically recognizes that the subjects and substance of citizenship do not always converge: people not infrequently possess citizenship status without enjoying the much in the way of what we consider to be the substance of citizenship.

The status of aliens presents another possibility of disjuncture between citizenship's subjects and its substance. Immigration commentators have often noted that today, lawful permanent resident aliens "live lives largely indistinguishable from those of most U.S. citizens...exercising most constitutional rights on the same terms as native-born and naturalized citizens."¹⁰³ To the extent the exercise of such rights is characterized as the enjoyment of "citizenship"--and describing rights in the language of citizenship is increasingly common--we will face the prospect of what we can only call "alien citizenship"--or more to the point, "noncitizen citizenship." While apparently paradoxical, such neologisms make clear that the American conception of constitutional citizenship is partially split, with the "who" and the "what" of citizenship not always neatly lined up.

E. Is Citizenship For Aliens Unjust?

Most constitutional scholars today criticize this lack of alignment when it takes the form of second-class citizenship. Most assume, in other words, that if a person possesses the status of citizenship, she ought to fully possess the substance of citizenship as well. As we have seen, this is

((Gershon Shafir, ed., Minnesota, 1998), at 79.

¹⁰³T. Alexander Aleinikoff, *Between Principles and Politics: The Direction of U.S. Citizenship Policy* (Carnegie Endowment For International Peace, Washington D.C., 1998). See also Peter Schuck, *The Devaluation of Citizenship*, *supra*.

a critically important staple of progressive constitutional thought. To grant membership in formal terms while denying protections and privileges enjoyed by other members is simply unjust exclusion. To use the fact of a person's nominal membership as a smokescreen for their de facto exclusion is rank hypocrisy. This seems clear.

But does the converse argument hold as well? Is bifurcated citizenship in the other direction--the enjoyment of citizenship rights without the possession of citizenship status--likewise objectionable?

One response to this question would be that such a divide is indeed objectionable, and that citizenship status should be a prerequisite for citizenship rights. The strongest versions of this argument rely on a heavy dose of symbolic nationalism; they espouse the claim that formal citizenship is an essential status for marking who belongs to "we the people." In this perspective, citizenship status is significant precisely because it separates members from outsiders. Anti-immigrant activists and commentators defend views of this sort,¹⁰⁴ but constitutional analysts have as well. Jeffrey Rosen, for instance, has argued that the Supreme Court should "resurrect[] the distinction between citizens and aliens...[and thereby] resurrect the meaning of citizenship itself as something more than a pale and disembodied legalism."¹⁰⁵

Such views have also been expressed by more progressive scholars. William Eskridge, for instance, has recently defended the "proposition that the `privileges or immunities of citizens of

¹⁰⁴E.g., Brimelow, Geyer, etc.

¹⁰⁵Jeffrey Rosen, *America In Thick and Thin*, *The New Republic*, January 5 and 12, 1998 (reviewing Rogers M. Smith *Civic Ideals: Conflicting Views of Citizenship in U.S. History* (Yale, 1997)). See also Frederick Schauer, *Community, Citizenship, and the Search For National Identity*, 84 *Mich. L. Rev.* 1504, 1515 (1986) (arguing that citizenship status serves as the principal mechanism for social cohesion and common identity in the United States, and arguing that citizenship status must therefore count for something in order to serve this "community-bonding function."); Peter Schuck, *The Devaluation of Citizenship*, *supra* note [].

the United States' are those entailing obligations as well as rights that set apart the full membership in the political community from the outsider, or alien."¹⁰⁶ This is not merely an interpretive statement about the meaning of the privileges or immunities clause: it is an affirmative claim, as well, about the proper relationship between citizenship rights and citizenship status^B a claim that important citizenship rights are properly confined to those possessing the status.

Despite the somewhat inflammatory phrasing, Eskridge's is not entirely an outlying view. Many people assume that citizenship status "has to count for something"¹⁰⁷--that it must be consequential;¹⁰⁸ and they assume that its consequentiality resides, in part, in assured and exclusive access to certain rights (and responsibilities). Indeed, the notion that citizenship status ought to be a prerequisite for the enjoyment of at least some citizenship rights is presupposed by anyone who supports continued denial to aliens of the right to vote -- a commonly accepted feature of even the most liberal and egalitarian democratic states today.¹⁰⁹ The citizen voting rule represents a rather weak version of the principle that citizenship status should be necessary for citizenship rights in that it confines itself to only one right rather than many. Nevertheless, the principle is widely accepted in this context.

On the other hand, it is striking to note the degree to which the "citizenship for citizens"

¹⁰⁶William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 *Fordham L. Rev.* 1721, 1726 (2000). Eskridge goes on to write that the Court's jurisprudence ought to read the equal protection clause differently, in some respects, for citizens than for noncitizens. *Id.*, at 1727.

¹⁰⁷See *The Slaughter-House Cases*, 83 U.S. at 114 (Bradley, J., dissenting) ("In this free country...citizenship means something.")

¹⁰⁸Rogers Brubaker, "Introduction," in *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America, 1989), at (citizenship in its ideal form will be "consequential," among other things, meaning that it "should entail important privileges.")

¹⁰⁹But see text accompanying notes [], *supra*, for discussion of alien voting as an historical matter.

principle does not much characterize the state of the law in this country, at least beyond the franchise. As many scholars have noted, most aliens--including undocumented aliens--are afforded a broad range of constitutional (as well as statutory) rights which in some respects render them indistinguishable from citizens.¹¹⁰ This is a function of our constitutional system's guarantee of rights to "persons" rather than "citizens" in most cases--a state of affairs that has been forcefully defended by many scholars over the years. Their basic argument is that "personhood" embodies a powerful ideal of universality, one which represents a core commitment of our constitutional system.¹¹¹

Precisely because of this universalist commitment, most of those who defend the personhood model would not regard the extension of citizenship rights to those without citizenship status as morally reprehensible; indeed, they regard it as entirely necessary. From their perspective, the two sorts of citizenship misalignment discussed here--rights without status and status without rights--cannot be regarded as moral equivalents. As a supporter of personhood-based conceptions of rights,¹¹² I believe they are clearly right about this. So long as citizenship status is made available

¹¹⁰See text accompanying note [], supra; see also Peter H. Schuck, Citizenship (Update 1), Encyclopedia of the American Constitution (Leonard W. Levy and Kenneth L. Karst, eds., 2nd Edition. 2000), at 366 ("As a result of steady expansion of the equal protection and due process principles, legal resident aliens today enjoy almost all the significant rights and obligations that citizens enjoy...")

¹¹¹It is this assumption that has rendered the post 9/11 establishment of military tribunals for accused noncitizen terrorists highly controversial. By design, these tribunals provide an adjudicative process stripped of important due process guarantees for the accused. These procedures would, in ordinary circumstances, be deemed to violate basic precepts of constitutional law, at least as to those aliens within the United States. See *Wong Wing v. United States*, 163 U.S. 228, 239 (1896) (all persons within the territory of the United States are entitled to the protections guaranteed by the fifth and sixth amendments). Times of declared national emergency are not ordinary times, however, and few commentators expect that the courts will soon invalidate the order establishing the tribunals.

¹¹²See e.g., Linda Bosniak, Exclusion and Membership: The Dual Identity of Undocumented Workers Under United States Law, 1988 Wis. L. Rev. 988; Bosniak, Membership, Equality and the Difference That Alienage Makes, supra note []; Linda S. Bosniak, Immigrants, Preemption and Equality, 35 Vir. J. Int'l L. 179 (1994); Linda Bosniak, Opposing Proposition 187: Undocumented Immigrants and the National Imagination, 28 Connecticut L. Rev. 555 (1986); Bosniak, Universal Citizenship and the Problem of Alienage, supra;

to noncitizens on fairly liberal terms,¹¹³ granting what we often call “citizenship rights” to status noncitizens is not a constitutional wrong, but instead gives appropriate expression to the constitution’s universalist commitments.

III. UNIVERSAL CITIZENSHIP AND BOUNDED CITIZENSHIP

But even if citizenship for aliens is not objectionable in the way that second-class citizenship is, there remains the question of whether the notion of “alien citizenship” is coherent by its own terms. Can Ely, Bobbit, Karst and the others persuasively maintain that persons constitute the rightful subjects of most constitutional rights, while at the same time characterizing the substance of those rights as a form of citizenship?¹¹⁴ How far can the claim of citizenship for aliens extend?

At one level, answering this question is a matter of constitutional interpretation. Certainly, the scholars I have focused on see themselves as making interpretive arguments about the meaning of the Fourteenth Amendment; they are interested precisely in how that amendment accommodates (or fails to accommodate) the mandates of personhood rights and citizenship. Should the Constitution, after the Fourteenth Amendment’s passage, be read as “now identif[ying] personhood with United States citizenship,”¹¹⁵ or did the Amendment intend a sharp divide between them?

There are various aspects to the debate in the constitutional literature. Much of the debate has

¹¹³The concern is that noncitizens not be locked permanently into alienage status. For an important discussion of the injustice associated with permanent alienage, see Michael Walzer, *Spheres of Justice* (1983).

¹¹⁴Others have formulated arguments structured in this way. See e.g., Aleinikoff, Rereading Justice Harlan’s Dissent, *supra*, note [], at 977 (“In his dissent in *Plessy v. Ferguson*, Harlan eloquently envisions a national polity of free persons equally enjoying the fundamental rights of citizenship...”)

¹¹⁵Eisgruber, The Fourteenth Amendment’s Constitution, 69 *S. Cal. L. Rev.* 47, 71 (1995).

taken the form of a dispute over the relationship between the equal protection and due process clauses (which speak of persons), on the one hand, and the privileges or immunities clause, on the other.

Scholars have asked, among other things: Are these clauses to be read as overlapping in meaning?¹¹⁶ If so, is the privileges or immunities clause redundant? If not, what does its reference to “the rights of citizens” add to the mix (read both in light and in spite of *Slaughterhouse*)?¹¹⁷ Are the rights referred to narrower than the rights guaranteed to persons in the other clauses?¹¹⁸ Much ink has been spilled on these and related questions in the constitutional commentary, and scholars remain widely divided on these issues.

But assessing the coherence of the idea of alien citizenship is a matter that requires going beyond a parsing of constitutional history and text; it requires us to consider, as well, questions of normative constitutional theory. As Karst has written, citizenship -- equal citizenship -- is not merely a technical constitutional concept; it is also “an ideal, a cluster of value premises.”¹¹⁹ To evaluate the plausibility of the concept of alien citizenship, therefore, we need to consider it in light of these premises.

I have argued that any claim to the effect that aliens do and should enjoy aspects of substantive

¹¹⁶Karst, *Equal Citizenship Under the Fourteenth Amendment*, supra note [], at 15 (the Fourteenth Amendment’s framers “made no serious effort to differentiate the functions of the various clauses” of Section I).

¹¹⁷See e.g., Daniel Levin, *Reading the Privileges or Immunities Clause*, supra note [] at 609-611, 614 (arguing that the privileges or immunities clause is concerned with “the majoritarian, structural, and participatory rights of citizens,” and embodies commitments to “civil republicanism and participatory virtues,” unlike the due process and equal protection clauses which address the “the substantive rights of personhood,” namely, rights to private autonomy.”)

¹¹⁸See e.g., Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* (Liberty Fund, 1977) (“All in all, it will not do to read the rights of ‘persons’ more broadly than those that were conferred on citizens.”); But see Earl Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex and the Framers’ Ideal of Equality*, 7 *Const. Comm.* 251, 264, 271 (1990); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 *George Washington L. Rev.* 1241, 1245 (1998) (“there seems to have been a general consensus that, whatever the Equal Protection Clause guaranteed, it was something narrower than the Privileges or Immunities Clause.”)

citizenship amounts, effectively, to a claim that the constitutional tradition which accords rights to persons is perfectly compatible with an understanding of rights conceived as a form of citizenship. The question we are faced with, therefore, is whether the claim is true: whether the constitutional commitments of rights-to-persons and the constitutional conception of rights-as-citizenship are indeed complementary. The answer, it seems to me, is that their compatibility only goes so far. This is because rights citizenship is usually conceived as embodying not only universalist values, but nationalist values as well.

On first reading, the ideal of equal citizenship seems inextricably linked to an ethic of rights based on personhood. As many commentators have argued, the principle of equal citizenship embodies a commitment to universality. Kenneth Karst writes that under this principle, “[e]very individual is ...presumptively entitled to treatment in our public life as a person...deserv[ing of] respect.”¹²⁰ The ideal of equal citizenship is grounded in a commitment to justice and recognition “for all.”¹²¹ It is this grand universalism, which accords rights to persons by virtue of their common humanity, that accounts for much of the concept’s powerful political resonance.

Yet upon further review, it becomes clear that “everyone” does not quite mean *everyone*. For despite equal citizenship’s professed commitment to universality, the universality championed is, in fact, a circumscribed one. The constraints on universality’s scope are the result of the other core animating ideal of the equal citizenship principle -- that of community membership, or “belonging,” in Karst’s term. The notion of belonging is insistently inclusive within the community. Yet the value of “belonging” also presupposes community boundaries -- boundaries

¹¹⁹Karst, 1977, at 5.

¹²⁰Kenneth L. Karst, *Why Equality Matters*, 17 *Georgia L. Rev.* 245 248 (1983).

¹²¹Karst, *Belonging To America*, *supra* note [], at 1.

which ultimately divide insiders from outsiders.¹²² “By drawing a circle and designating those within the circle as sovereign and equal,” Alex Aleinikoff has written, “the concept of citizenship perforce treats those outside the circle...as less than full members.”¹²³

Most theorists of equal citizenship have tended to disregard citizenship’s exclusionary aspect in their work. Like many social and political theorists, they “tend[] to take the existence of a bounded national ‘society’ for granted and to focus on institutions and processes internal to that society.”¹²⁴ Their focus on citizenship within the national community, in turn, allows them to treat citizenship as a universalist ideal with an inherently expansive logic. Karst, for instance, writes of equal citizenship’s “expanding...circle of belonging”¹²⁵--though he has always acknowledged that the process of inclusion remains incomplete. This expansive conception of citizenship was expressed by political theorist Michael Walzer, who similarly posits a citizenship that progressively incorporates outsider groups. He writes: “Slaves, workers, new immigrants, Jews, Blacks, women--all of them move into the circle of the protected, even if the protection they actually get is still unequal or inadequate.”¹²⁶

This statement captures the predominant conception of citizenship among mainstream constitutional scholars. Focusing on the nation’s interior, they approach citizenship--at least

¹²²Bosniak, *Universal Citizenship and the Problem of Alienage*, supra.[]

¹²³T. Alexander Aleinikoff, *Citizenship*, (Update 2), *Encyclopedia of the American Constitution* (Leonard W. Levy and Kenneth L. Karst, eds., Macmillan, 2000), at 368.

¹²⁴ Brubaker, supra, at 22; Charles R. Beitz, *Political Theory and International Relations* (Princeton, 1979, 1999).

¹²⁵Kenneth Karst, *Belonging To America*, at 3.

¹²⁶Michael Walzer, *Citizenship*, in *Political Innovation and Conceptual Change* (Ball, Farr and Hanson, eds., Cambridge, 1996) at 217.

ideally--as a source of progressively inclusive and egalitarian values.¹²⁷ It has thus fallen to those scholars specifically concerned with the community's threshold to attend to citizenship's nationally-exclusionary dimension.¹²⁸ Most often, it is the analysts concerned with immigration and with the law's constraints on access to citizenship status who acknowledge and examine citizenship's boundary-enforcing aspect.¹²⁹

Yet while most scholars who champion the concept of equal citizenship tend to ignore citizenship's exclusionary face, it is ultimately presupposed in their project. First of all, as I have said, constitutional scholars often characterize equal citizenship not merely as the universal enjoyment of rights but also as the experience of community belonging, or membership. Communities, of course, have insides and outsides which are constituted by some sort of boundary, however permeable it may be.

Furthermore, many constitutional theorists make their case on behalf of equal citizenship by linking it to a particular form of community belonging which they express through the concept of "national union" or "national unity."¹³⁰ Karst, for instance, writes that "the union of

¹²⁷ This is true of most political and social theory concerned with citizenship as well. See generally, Bosniak, *Universal Citizenship and the Problem of Alienage*.

¹²⁸ I should note that it is not only constitutional scholars who tend to ignore citizenship's threshold aspects. Immigration scholars, for the most part, also fail to engage with the kind of equal citizenship discourse enered in mainstream constitutional theory.

¹²⁹ Something of a division of labor has developed in the citizenship field, pursuant to which threshold questions regarding both access to and the significance of, formal national citizenship status are treated as distinct from questions about the nature and quality of citizenship as practiced within the political community, "I have written elsewhere. "The former questions are usually confined to the domain of immigration scholarship, while the latter are treated as political and constitutional theory's core enterprise." Bosniak, *Universal Citizenship and the Problem of Alienage*, supra note [], at 965.

¹³⁰ In the Supreme Court's recent decision in *Saenz*--a case which has been regarded by many commentators as breathing new life into the privileges or immunities clause-- the majority opinion concludes with what F.H. Buckley calls "a paean to national unity." Buckley, *Liberal Nationalism*, supra note [], at 47. As Justice Stevens writes, "The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the

the American people is a constitutional value of the first importance.”¹³¹ And it is a value that is inextricably linked with the value of equal citizenship: national unity is seen as a precondition for the practice of equal citizenship; and equal citizenship, in turn, is viewed as a necessary condition for the continued well-being of the community.¹³² In Karst’s view, “constitutional equality can be seen as part of the social cement that holds our nation together,”¹³³ while the “interdependence of citizens that is the foundation for the national union” likewise serves to “strengthen the material and moral foundations of equal citizenship.”¹³⁴ A number of other constitutional scholars have similarly linked equal citizenship with a normative conception of “national unity.”¹³⁵

None of these scholars appears to see any inherent tension between the normative commitments associated with national unity and equal citizenship’s universalist commitments. On the contrary, they regard equal citizenship and national unity as mutually necessary and mutually reinforcing parts of a whole. And they are surely right that citizenship’s dual commitments are

theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” Saenz, 526 U.S. 489, 511 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

¹³¹Karst, *The Coming Crisis of Work*, supra note [], at 549.
¹³²*Id.*

¹³³Kenneth L. Karst, *Why Equality Matters*, 17 *Georgia L. Rev.* 245, 280 (1977).

¹³⁴Karst, *The Coming Crisis of Work*, supra, at 571. See also Karst, *Belonging to America*, supra note [], at 2 (“Equality and belonging are inseparably linked: to define the scope of the ideal of equality in America is to define the boundaries of the national community.”)

¹³⁵ A number of other constitutional scholars have similarly linked citizenship with a normative conception of “national unity.” See e.g., F.H. Buckley, *Liberal Nationalism*, 48 *U.C.L.A. Law Rev.* 221, 233 (2000) (proposing a “nationalist account of the privileges or immunities clause” according to which “basic constitutional liberties are constitutive of the American identity and deserve support as a symbol of American nationalism.”); Mark Tushnet, *Thinking About the Constitution At the Cusp*, 34 *Akron L. rev.* 21 (2000) (“In important ways the Constitution, with its opening words “We the People of the United States,” is a document about national unity; a document that tries to create -- at least through rhetoric -- a single people of the United States, notwithstanding our wide differences.); Christopher L. Eisgruber, *Political Unity and the Power of Government*, 41 *UCLA L. Rev.* 1297, 1336 (1994) (describing “political unity” as a central constitutional principle); Charles Black, []; William Eskridge, [].

often productively complementary within the ambit of the nation. In particular, it seems indisputable that schisms internal to the nation along class or caste or state lines have thwarted struggles for universal and equal rights within the nation; and conversely, it is clear that a sense of national identification and community solidarity has animated many efforts to give content and effect to the equal citizenship principle in this country.

Yet while these constitutional scholars apparently regard the ideal of national unity as an antidote to divisiveness and fragmentation *internal* to the nation,¹³⁶ I would contend that the practice of ensuring the “belonging” and “unity” of the nation’s members simultaneously, and inevitably, signals the existence of a sharp divide between insiders and outsiders to the nation. For one thing, the very rhetoric of national unity rather unavoidably serves to conjure up the specter of foreign threat . In general political and scholarly discourse, rallying to a position of “national unity” is quite often meant to evoke a defensive posture in relation to a danger posed by non-national outsiders -- at least as often as (and in the past few months, far more than) -- to evoke a domestic campaign against internal fragmentation and divisiveness.¹³⁸

While I am quite certain that those scholars who link equal citizenship with the ideal of national unity have no intention of conveying any such defensive, nationalist message, the term’s reverberations are hard to deny. And even if we discount such paranoiac associations, the ideal of “national unity” remains essentially a nationalist construct in ethical terms. Describing national unity as a foundation of the equal citizenship principle at the very least conveys the message that we maintain a special commitment to the well-being of members of our own national community--

¹³⁶This is made especially clear in Karst, *Belonging to America*, supra note [], at 177-181.

¹³⁸ While the term can no doubt be used in both senses, its double meaning or double connotation is inescapable, notwithstanding the fact that its users in this context don’t intend to deploy the term this way. The claim I make here is

that we feel a kinship with them and maintain moral obligations to them above all others.¹³⁹ In this ethical nationalist formulation, we still presume a class of foreigners whose existence defines a national “us,” and although they are not constructed as overtly dangerous, their experiences and interests are nevertheless assumed to be of lesser significance to us than those of our compatriots.¹⁴⁰

In sum, while constitutional scholars thus tend to avoid direct attention to citizenship in its bounded aspect and focus on the community’s interior, their substantive accounts of equal citizenship within the nation often presuppose such boundaries. Citizenship’s universalism is, in this regard, a circumscribed universalism, constrained by a concurrent commitment to ethical nationalism.

The fact that the normative ideal of equal citizenship in constitutional thought is, in the end, a nationally-bounded universalist project of course poses important questions at the level of political theory--including questions about the moral justifiability of preferring the interests of national insiders over national outsiders in a world characterized by vastly unequal life chances.¹⁴¹ While these are pressing matters, I am concerned for the moment not so much with the legitimacy of nationalism per se

that certain political phrases do certain kinds of rhetorical work quite independent of the speakers intention.

¹³⁹Mark Tushnet articulates a n explicit version of this argument. In a recent book he endorses a vision of constitutional law in which people are committed to a national community rather than a universal one. He urges “that the people *of the United States* continue to constitute ourselves by a commitment to universal human rights. We are citizens of the United States -- not citizens of the world at large, or cosmopolitans indifferent to the place we happen to find ourselves in---because of that commitment....Whatever the ultimate scope of the Declaration’s principles, the people of the United States do not yet have general responsibility for the well-being of people all over the world. At least for the time being, we can limit the benefits of *our* welfare state to those who are in some meaningful sense part of us.” Mark Tushnet, *Taking the Constitution Away From the Courts* 191, 193 (Princeton University Press 1999)(original emphases).

¹⁴⁰This is implicit in communitarian theory, and sometimes made explicit. See Oldfield, *supra* note [], a,t 81: “Citizenship is exclusive: it is not a person’s humanity that one is responding to, it is the fact that he or she is a fellow citizen, or a stranger. In choosing an identity for ourselves, we recognize both who our fellow citizens are, and those who are not members of our community, thus who are potential enemies.”

¹⁴¹See generally Ian Shapiro and Lea Brilmayer, eds., *Global Justice* (Nomos, XLI) (NYU 1999).

as with understanding the relationship between citizenship's nationalist and universalist commitments in the first instance. How can citizenship be both universalist and bounded simultaneously?

To the extent that the division between citizenship's dual commitments is acknowledged by scholars at all, the usual assumption is that each applies to a different jurisdictional sphere or domain.¹⁴² It is presumed, as a rule, that citizenship's nationalist commitments are relevant at the borders, facing outward, and that citizenship's universalist commitments are relevant within the community, facing in. It is presumed, in other words, that while citizenship embodies a universalist ethic within the community, it is exclusionary at the community's edges.¹⁴³

This Janus-like image of citizenship is often accurate--but not always. Because the practice of regulating the border is not always confined to the state's territorial perimeter. Especially in a world characterized by growing interdependence among national societies and economies -- a world in which people regularly cross national borders and in which the location of borders and sovereignties is itself sometimes contested—citizenship's exclusionary, nationalist commitments are sometimes brought to bear even *within* the nation's territory. When this happens, universal citizenship and bounded citizenship occupy the same terrain.

The case of aliens makes this clear -- and here we come full circle. On the one hand, the equal citizenship principle regards aliens as entitled to equal regard and recognition as persons residing in our community. Karst argues that "it is important to extend most of the content of the equal

¹⁴² Something resembling this common-sense model was articulated by Michael Walzer in *Spheres of Justice*. See Walzer, *supra* note []. For discussion of Walzer's argument about the proper reach of the membership sphere and implications for the treatment of aliens, see Bosniak, "The Difference That Alienage Makes."

¹⁴³ See e.g., Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard, 1992), at 21 ("Although citizenship is internally inclusive, it is externally exclusive.")

citizenship principle to aliens... because for most purposes [aliens] are members of our society.”¹⁴⁴

This is the universalist strand of the equal citizenship principle at work, and it has been highly influential, for aliens do enjoy many fundamental rights as members. At the same time, however, Karst also suggests that aliens -- even lawful permanent resident aliens-- may be properly regarded as outsiders to the nation’s “political community” by virtue of the primary allegiance they maintain to their home states. As a consequence, he maintains, they legitimately may be denied political rights, including the right to vote.¹⁴⁵ The principle of equal citizenship, in this context, permits and perhaps even requires, the exclusion of outsiders from the political community -- the same community in which universal equal citizenship is practiced.

The condition of undocumented immigrants further illustrates the dynamic. The equal citizenship principle is usually understood to demand the extension of core constitutional rights to the undocumented. The Supreme Court expressed the point plainly: “Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [basic] constitutional protection.”¹⁴⁶ Yet many proponents of equal citizenship also tolerate the exclusion of these immigrants-- particularly the culpable adults¹⁴⁷-- from other core benefits of membership,¹⁴⁸ and most seem to regard as acceptable, and perhaps even necessary, their subjection to deportation on grounds of

¹⁴⁴Karst, *Equal Citizenship*, at 45.

¹⁴⁵Id. Karst’s argument does not hold up given that we today consider dual citizens who likewise maintain allegiance to other states-- as entitled to vote in this country.

¹⁴⁶*Mathews v. Diaz*, 426 U.S. 67 (1976).

¹⁴⁷I refer to the reference in Justice Brennan’s opinion in *Plyler v. Doe* to “innocent children...”

¹⁴⁸See e.g., Schuck & Smith, *supra*; Eisgruber, *Birthright Citizenship and the Constitution*, *supra* note [], at 96, 96 n. 110 (while the people subject to the U.S. government’s sovereign power deserve a fair share of the benefits that result from the collective enterprise in which they participate, “[i]llegal aliens, who have violated the laws of the collective enterprise, may forfeit any claim to share in the common good.”)

unlawful entry or presence.¹⁴⁹ Significantly, the threat or actuality of deportation works to undercut equal citizenship not merely directly but also indirectly: the fact that these immigrants are often subject to expulsion serves to undermine, in practice, any rights to which they are formally entitled since they are often unwilling to invoke those rights for fear of coming to the attention of the immigration authorities. The result, once again, is that while equal citizenship requires rights for everyone, it also tolerates, and perhaps even demands, exclusion of certain territorially-present non-nationals--with the effect that the inclusive force of the principle of equal citizenship is both directly and indirectly compromised.

The ambiguous status of aliens under an equal citizenship regime makes clear that the marriage of personhood with equal citizenship proposed by Karst and the others is bound to be a partially unstable union. However compatible the idea of equal citizenship is with rights for persons *qua* persons in most cases, the idea of citizenship also presupposes a bounded national community. This is a community characterized by exclusionary commitments -- political commitments and territorial commitments-- that will inevitably clash with a pure personhood rights approach. And it is precisely in the context of aliens' rights where that tension is most likely to emerge.

For all of these reasons, the claim by Karst, Bobbit, Ely and the others to the effect that aliens can be the subjects of citizenship, and their suggestion that the revitalization of the idea of constitutional citizenship need not, in principle, result in a total diminution of rights for aliens, each seem quite plausible. There is, nevertheless, an intrinsic limit to the citizenship that aliens can

¹⁴⁹Efforts to enact a new amnesty or legalization program, which in the early part of 2001 looked promising, were shelved after the terrorist attacks of September 11.

enjoy. There is something of a second-class citizenship--though this is not second-class citizenship in its classical form, pursuant to which those afforded the formal status of citizenship are nevertheless denied many of the rights of citizenship. This is, instead, a second-class citizenship in which the individuals involved enjoy many of the substantive rights of citizenship even in the absence of formal citizenship status; and yet the scope of the rights they enjoy is, at the same time, constrained by virtue of citizenship's other substantive commitments, which include a commitment to national exclusivity and closure.

CONCLUSION

Constitutional citizenship is a divided construct. It is divided conceptually--as between status and rights-- and it is divided normatively--through its embodiment of both universalist and nationalist commitments. These divisions complicate the efforts by scholars to revive constitutional citizenship as the basis for our individual rights jurisprudence. At the very least, it requires those promoting the citizenship turn in constitutional law to recognize citizenship's multiple dimensions, and to engage directly with them in their work. As an important part of this process, we should hope to see increasing intellectual incursions -- in both directions-- across the professional divide that now separates scholars of rights citizenship and status citizenship. We should also hope for more direct acknowledgment among equal citizenship advocates of the usually unrecognized premises of normative nationalism embedded in their project.

I do not, on the other hand, expect that increased engagement across citizenship's various fracture lines will lead, in the end, to a more coherent and unitary theory of constitutional citizenship. On the contrary, I suspect that it will simply put us in a better position to understand constitutional citizenship's ultimate lack of unity and coherence. In his sweeping historical work

on American citizenship, political scientist Rogers Smith describes what he calls “the huge iceberg of anomalies and contradictions that lurk below the surface of American citizenship laws.”¹⁵⁰

Smith’s description, it seems to me, aptly characterizes not merely our citizenship laws¹⁵¹ but the concept of constitutional citizenship itself. This is our condition, and following Smith’s example, we ought to come directly to terms with it.

I have argued elsewhere that citizenship, in general, is a concept whose meaning is highly contested and multivalent.¹⁵² In constitutional law, the meaning of citizenship is only somewhat more certain. We know, more or less, what is meant when we speak of citizenship as status, but beyond this lies much uncertainty. To what extent is the constitution concerned with the rights of citizenship and what, precisely, would those be? How, as a textual matter, should we understand the relationship between the citizenships designated in the first and second sentences of the Fourteenth Amendment? What, in normative terms, ought citizenship to stand for in both or either of the Amendment’s citizenship-related clauses?

I think it is fair to say that these are not questions that have fixed answers that will subject themselves to a process of discovery. Rather, constitutional theorists of citizenship are engaged in the process of answering them as we go. Citizenship is a powerful term of political rhetoric which many seek to claim--though again, its precise denotative meaning is highly contested. I personally support understandings of citizenship that are inclusive and universalist, as against nationalist and

149. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*, (Yale, 1997), at 13. Smith goes on to write that “American citizenship...has always been an intellectually puzzling, legally confused, and politically charged and contested status.” *Id.*, at 14.

¹⁵¹By “citizenship laws,” Smith means “the statutes and judicial rulings that have defined what American citizenship [is] and who is eligible to possess it.” *Id.*, at 2.

¹⁵² Bosniak, *Citizenship Denationalized*. See also Judith N. Shklar, *American Citizenship: The Quest For Inclusion* (Yale, 1991) (“There is no notion more central in politics than citizenship, [yet] none more variable in history or contested in theory.”).

particularist conceptions. But the first step in any struggle over citizenship's future is to map its present contours. And for such a project, the category of alienage is indispensable.