

# THE DEVOLUTION OF DEMOCRATIC CITIZENSHIP

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The actual operation of United States citizenship today shows a dilution worse than during the decline of ancient Rome. The notion of duty and obligation, whether evidenced in voluntary military service or voluntary voting, has diminished to the point of no longer being a valid measure for who is a good or bad citizen. After an introduction in part one, this Article provides a brief history of the early Greek and Roman notions of citizenship and its devolution in the modern United States in part two. Next, parts three and four draw upon international norms and practices to evaluate three strategies for enhancing the meaning of U.S. citizenship: modifying birthright citizenship, mandatory (military) service, and universal civic duty voting. Part five concludes the Article with suggestions for more accurately characterizing, and effectuating, the meaning of American citizenship and strategies to modify the devolutionary path in a direction that more fully satisfies our democratic ideals.

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“We are concerned because too many Americans lack a basic understanding of our democracy—our institutions, our representative democracy, our obligation to those who came before, and what each of us can and must do to preserve the blessings of liberty.”

The Honorable Lee H. Hamilton<sup>1</sup>

“In your hands, my fellow citizens, more than mine, will rest the final success or failure of our course . . . Ask not what your country can do for you, ask what you can do for your country.”

President John Fitzgerald Kennedy<sup>2</sup>

“We’re looking at that very seriously, birthright citizenship, where you have a baby in our land, you walk over the border, have a baby, congratulations, the baby is now a U.S. citizen. . . . It’s frankly ridiculous.”

President Donald J. Trump<sup>3</sup>

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<sup>1</sup> Honorable Lee H. Hamilton, *What Does it Mean to be an American Citizen?* (Sept. 21, 2003) (transcript available at <http://www.civiced.org/pdfs/CivConSpeFinal.pdf>).

<sup>2</sup> *Id.*

<sup>3</sup> *President Trump Departs for Louisville, Kentucky*, C-SPAN (Aug. 21, 2019), <https://www.c-span.org/video/?463598-1/president-trump-takes-questions-reporters-south-lawn-white-house>; see also *Trump’s Positions Shift*, GOOD MORNING AM. (Aug. 22, 2019), <https://www.goodmorningamerica.com/news/video/trumps-positions-shift-65119744> (discussing Trump’s suggestion to end to birthright citizenship even though it is a “guarantee enshrined in the Constitution”); Patrick J. Lyons, *Trump Wants to Abolish Birthright Citizenship. Can He Do That?*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html> (discussing the legality of Trump’s call to abolish birthright citizenship).

## INTRODUCTION

Citizenship is not simply a “legal principle;” it is and must be connected to reality or “citizenship in fact.”<sup>4</sup> Democratic citizenship is composed of several categories of citizenship norms, including one focusing on autonomy and involving: (1) dialogue, which includes engaging with other citizens and forming your own opinions; (2) social order, which includes activities like serving on a jury and in the military, reporting a crime, and obeying laws; and (3) solidarity, which invokes social citizenship.<sup>5</sup>

While frequent and long-fought wars and conflicts have increased the number of veterans in recent decades, the percentage of the population enlisting in military service is not substantial.<sup>6</sup> Many people avoid jury service like, well, COVID-19.<sup>7</sup> Knowledge about national and international affairs as traditionally measured is at a low point.<sup>8</sup> Dialogue occurs as much (or more) through social media than through traditional fora, and solidarity may be at an all-time low, given the political divisiveness leading up to the 2020 presidential impeachment and 2020 presidential election.<sup>9</sup>

If participation is crucial,<sup>10</sup> then we must re-examine the methods of participation in our increasingly technologically-driven nation. A new description of “political activity” may include cyber-interactions more than personal ones, activism online more than activism in the streets or at the voting booth.

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<sup>4</sup> See John A. Powell & Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 ST. LOUIS U.L.J. 1153, 1170, 1176 (2008); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 867–68 (2007) (Breyer, J., dissenting) (“[T]he promise of true racial equality . . . sought one law, one Nation, one people, not simply as a matter of legal principle, but in terms of how we actually live.”).

<sup>5</sup> See Russell J. Dalton, *Citizenship Norms and Political Participation in America: The Good News Is . . . The Bad News Is Wrong* 5 tbl.1 (Jan. 1, 2006) (not formally published manuscript) (available at [https://www.researchgate.net/publication/254429353\\_Citizenship\\_Norms\\_and\\_Political\\_Participation\\_in\\_America\\_The\\_Good\\_News\\_Is\\_the\\_Bad\\_News\\_Is\\_Wrong](https://www.researchgate.net/publication/254429353_Citizenship_Norms_and_Political_Participation_in_America_The_Good_News_Is_the_Bad_News_Is_Wrong)). Participation and social order seem to be related in terms of the right and duty to vote. See *id.* at 4–6.

<sup>6</sup> See Kristen Bialik, *The Changing Face of America’s Veteran Population*, PEW RSCH. CTR.: FACT TANK (Nov. 10, 2017), <https://www.pewresearch.org/fact-tank/2017/11/10/the-changing-face-of-americas-veteran-population/>.

<sup>7</sup> See Josh Barro, *This Is Why People Hate Jury Duty*, FORBES (Feb. 27, 2012, 10:38 AM), <https://www.forbes.com/sites/joshbarro/2012/02/27/this-is-why-people-hate-jury-duty/>.

<sup>8</sup> See Hamilton, *supra* note 1; see also JAMES MADISON’S MONTPELIER, NATIONAL SURVEY RESULTS: FOR US, BY US: AMERICA’S CONFIDENCE IN, AND EXPECTATIONS OF, THE CONSTITUTION (last visited Feb. 5, 2021), <https://www.montpelier.org/learn/national-survey-results>; COUNCIL ON FOREIGN RELS. & NAT’L GEOGRAPHIC SOC’Y, U.S. ADULTS’ KNOWLEDGE ABOUT THE WORLD 4 (2019), [https://cdn.cfr.org/sites/default/files/report\\_pdf/NatGeo\\_CFR\\_US%20Knoweldge.pdf](https://cdn.cfr.org/sites/default/files/report_pdf/NatGeo_CFR_US%20Knoweldge.pdf).

<sup>9</sup> See Annika Bergström & Maria Jervelycke Belfrage, *News in Social Media: Incidental Consumption and the Role of Opinion Leaders*, 6 DIGIT. JOURNALISM 583, 583 (2018).

<sup>10</sup> See Dalton, *supra* note 5, at 4.

So, is participation actually declining? While voter engagement, defined as casting a vote on Election Day, may be lower, that infrequent opportunity to vote does not mean that engagement is lower when considering *other* ways of engaging.<sup>11</sup> So political activity depends on how we measure participation as democratic citizens.<sup>12</sup> Voting, taxes, and military service are not the only measures.

The conventional wisdom that young people have a lower level of citizenship engagement and do not internalize citizenship values is countered by evidence that they participate and use their citizenship in different ways, such as signing a petition, attending a protest, or engaging in a consumer boycott.<sup>13</sup> Whether in-person or through the Internet or social media, all of these avenues constitute types of political activity.<sup>14</sup> For instance, technology and platforms like Twitter, Snapchat, TikTok, and Facebook provide mechanisms for political activity that can be more significant participation than voting once or twice a year in various local, state, and national elections.<sup>15</sup>

Lack of education about the rights and responsibilities of citizenship and the ways in which these notions are discussed likely contribute to the

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<sup>11</sup> Dalton explains that “while election turnout has declined, the repertoire of political action has actually expanded, and people are now engaged in other ways.” *Id.* at 19 (citation omitted); see also SOPHIA A. NELSON, *E PLURIBUS ONE: RECLAIMING OUR FOUNDERS’ VISION FOR A UNITED AMERICA* 39 (2017) (listing basic tenets of informed and engaged citizens, which include staying informed about news and national affairs, “assembl[ing] ourselves as needed to stay vigilant about protecting our freedoms[,]” and “mak[ing] sure that we have the use of libraries, and access to a free press that keeps us informed and educated”).

<sup>12</sup> See Dalton, *supra* note 5, at 13–14. Dalton critiques the problem that too few people are voting, becoming disconnected from their fellow citizens, and losing faith in their government and national identity. See *id.* at 2, 11. Dalton explains how the norms of citizenship are important for understanding how Americans behave. See *id.* at 2, 13. Then, Dalton analyzes the notion of duty-based citizenship and its consequences, as well as engaged citizenship in terms of patterns of participation. *Id.* at 15–17. The survey Dalton analyzes asks how a good citizen should behave and reflects that “[p]articipation is a prime criterion for defining the democratic citizen and his or her role within the political process, and it is central to the theoretical literature on democracy.” *Id.* at 4.

<sup>13</sup> See *id.* at 9, 15–17.

<sup>14</sup> Dalton notes that “engaged citizens may still vote, but this is less central to their definition of citizenship and participation in other forms of action should be more common.” *Id.* at 15. Table 3 lists correlations between citizenship norms and participation for activities like voting in elections, working for a party, working for a campaign, donating money, contacting politicians, contacting media, signing petitions, participating in lawful or unlawful demonstrations, boycotting products, buying products to show support, visiting websites, forwarding political emails, and other web activity. *Id.* at 16 tbl.3.

<sup>15</sup> See Darrell M. West, *Ten Ways Social Media Can Improve Campaign Engagement and Reinvigorate American Democracy*, BROOKINGS INST. (June 28, 2011), <https://www.brookings.edu/opinions/ten-ways-social-media-can-improve-campaign-engagement-and-reinvigorate-american-democracy/>; see also Makena Kelly, *Ossoff Campaign Turns to TikTok and Snapchat Ahead of Special Election*, VERGE (Dec. 1, 2020, 8:00 AM), <https://www.theverge.com/2020/12/1/21754927/jon-oss-off-tiktok-snapchat-account-influencer-marketing> (discussing how Jon Ossoff’s Senate campaign utilized Snapchat and TikTok to reach young voters).

problem of civic disengagement.<sup>16</sup> Education is an important component of citizenship,<sup>17</sup> but a detailed analysis of how lack of education harms civic engagement is beyond the scope of this Article.<sup>18</sup> Nevertheless, much of our civics education focuses on “assimilationist citizenship.”<sup>19</sup> The values modeled include civic literacy, “patriotic identity,” and “tolerance for difference.”<sup>20</sup> But aspiring to mere tolerance is not necessarily a lofty goal because tolerance means only grudging acceptance of difference rather than true community.<sup>21</sup> Enhancing civics education to explain how the system actually, not ideally, works (such as teaching that the process by which a bill actually becomes a law includes lobbyists, regulators, pork barrel politics, and backroom deals) might lead to a more engaged citizenry.<sup>22</sup>

The actual operation of citizenship today shows a dilution worse than the Romans suffered under Caracalla. The notions of duty and obli-

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<sup>16</sup> Abowitz and Harnish suggest that “rather than blaming democratic disengagement on the apathetic choices of young people, we should perhaps be looking at how we reduce, confine, diminish, and deplete citizenship meanings in our formal and taught curriculum.” Kathleen Knight Abowitz & Jason Harnish, *Contemporary Discourses of Citizenship*, 76 REV. EDUC. RSCH. 653, 657 (2006). They also discuss the boundaries defined by citizenship discourse and the conception that civics education is about our political and national community rather than humanist or universalist ethics. See *id.* at 659 (discussing Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World*, in *THE CITIZENSHIP DEBATES: A READER* 75 (Gershon Shafir ed. 1998)).

<sup>17</sup> Powell and Menendian explain that the role of equality in citizenship must also focus on educational equality because there is “a connection between education and the civic purposes of the Fourteenth Amendment.” See Powell & Menendian, *supra* note 4, at 1184.

<sup>18</sup> See generally Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000).

<sup>19</sup> Abowitz & Harnish, *supra* note 16, at 670.

<sup>20</sup> *Id.* at 680. After their review of citizenship education texts, these authors conclude: “Citizenship as practiced in [United States’] schools is predominantly taught as civic republican literacy (factual consumption of American history, geography, and government), combined with varying degrees of patriotic identity and the liberal virtue of tolerance for difference.” *Id.*

<sup>21</sup> See Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 600–01 (2007). Volpp concludes that “[t]olerance presumes a difference that is to be tolerated, and a majority that does not practice those norms.” *Id.* at 601. She explains that the “need to ‘tolerate’” suggests that the majority does not practice particular norms, but sometimes “the practices to be tolerated are in fact norms of the community that tolerates, but are denied as such.” *Id.* She explains that “[t]he state will feel no need to assert the language of tolerance once the community at issue is considered to be made up of citizens, engaged in acts invisible to us as cultural practices. Unlike the bearers of cultural difference, citizens are part of our everyday world.” *Id.*

<sup>22</sup> Abowitz and Harnish surmise that “[c]itizenship education that engage[s] the debates, questions, and multiple discourses associated with civic and political life would prove to be far more enlightening, engaging, and inspiring for students than the current civics curriculum—with its vision of a more cleansed, idealized, narrow, and fairy-tale-like citizenship than actually exists. Many of our students are no doubt aware of this gap between school-constructed citizenship and citizenship as actually practiced; this awareness feeds the apathy and cynicism that we may be producing in our citizenship education in schools.” Abowitz & Harnish, *supra* note 16, at 681.

gation, whether evidenced in voluntary military service or voluntary voting, have diminished to the point of no longer being valid measures for who is a “good” or “bad” citizen.<sup>23</sup> In ancient Rome, the three roles of citizenship participation were “military, fiscal, and political,” and citizens were required to serve in the military, pay taxes, actively participate in government by assembling to debate, and vote on political issues.<sup>24</sup> In contrast, in the United States, while we are required to pay taxes, we are not required to participate in military service (except that men of a certain age must register for a draft that no longer occurs), and less than 60% of eligible citizens have voted in presidential elections in the past century, with only a few exceptions.<sup>25</sup>

In sum, democratic citizenship in the United States has become an “entitlement,” with the negative connotations that the word has come to convey in today’s political arena.<sup>26</sup> Some argue that the citizenship the Romans once enjoyed has become *even more passive* today and that entitlement to benefits without work or sacrifice has become the norm.<sup>27</sup> This devolution is based in part on efforts to reduce government involvement and impact in citizens’ lives by eliminating so-called “big government.”<sup>28</sup> Its related impact of constricting social and public services curtails the connections many citizens have or had with public service.

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<sup>23</sup> See CTR. FOR THE CONST. AT JAMES MADISON’S MONTPELIER, NATIONAL SURVEY OF AMERICANS’ AWARENESS AND UNDERSTANDING OF THE CONSTITUTION AND CONSTITUTIONAL CONCEPTS (2010), <http://onekit.enr-corp.com/1006938/Survey%20Results%20Final%20BVM%2009.16.2010.pdf>; Dalton, *supra* note 5, at 6, 11.

<sup>24</sup> See Elisabeth Zoller, *Citizenship After the Conservative Movement*, 20 IND. J. GLOB. LEGAL STUD. 279, 283 (2013); Claudine Lana Earley, *Popular Political Participation in the Late Roman Republic 354* (2009) (Ph.D. thesis, Victoria University of Wellington) (on file with author).

<sup>25</sup> See Dalton, *supra* note 5, at 17–18 & fig.3. The exceptions are the years 1960, 1964, and 2020. *Voter Turnout in Presidential Elections*, AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> (last visited Feb. 5, 2021); Drew Desilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR.: FACTTANK (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president>.

<sup>26</sup> Zoller explains that “citizenship nowadays has to be ‘earned’ through various tests whose legitimacy is questioned.” Zoller, *supra* note 24, at 280 (footnote omitted).

<sup>27</sup> See *id.* at 283. Zoller argues that because citizenship “does not equate with nationality,” conservative programs have had a “profound impact on citizenship.” *Id.* at 281. Zoller traces the history as a form of “unraveling” of the historical notions of the responsibilities associated with citizenship and discusses how the conservative definition of liberty—defined as the “absence of coercion”—over the last five decades took the definition much further than it had been in the past (from “Moral Liberty” to “Naked Liberty”). See *id.* at 284–90.

<sup>28</sup> See *id.* at 283, 297. Zoller provides an interesting historical analysis of the transformation of liberty in the nineteenth century with a brief discussion of utilitarianism. *Id.* at 286–90. Even in the late 1980s, citizenship still imposed duties, but the conservative movement “failed to provide for the means to effectively enforce [them] because of its top priority, to downsize government and public service, the most important means by which citizen’s rights are guaranteed.” *Id.* at 297.

By retreating from protecting the poor, the U.S. Supreme Court has contributed to the demise of citizenship with rulings on housing, food stamps, and educational access.<sup>29</sup>

This Article provides a brief history of early Greek and Roman notions of citizenship and its devolution in the modern United States in Part I. Next, Parts II and III draw upon international norms and practices to evaluate three strategies for enhancing the meaning of U.S. citizenship: modifying birthright citizenship, mandatory (military) service, and universal civic duty voting. The Article concludes with suggestions for more accurately characterizing and effectuating the meaning of American citizenship and suggestions to alter the devolutionary path in a direction that more fully satisfies our democratic ideals.

## I. THE ROOT NOTION OF DEMOCRATIC CITIZENSHIP

This section provides a brief summary of the history of citizenship. We begin with four ways of conceptualizing citizenship: (1) legal status, (2) rights, (3) political activity, and (4) identity.<sup>30</sup> Another way of understanding citizenship is through a discursive framework.<sup>31</sup> Discourse reproduces and circulates ideas or ideologies.<sup>32</sup> There are multiple

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<sup>29</sup> See *id.* at 300–02. Zoller discusses how reducing government and efforts to increase self-reliance led to the unraveling of the social fabric and reduced the salience of social rights. *Id.* at 298–99. Social rights that still exist are those that provide a “safety net for the elderly rather than . . . a social ladder for the young.” *Id.* at 299. She notes that “citizenship implies education, by definition. This is so true that education became compulsory in the nineteenth century precisely to enable citizens to fulfill their civic duties.” *Id.* at 301.

<sup>30</sup> Nancy K. Ota, *Paper Daughters*, 12 WASH. & LEE J.C.R. & SOC. JUST. 41, 52 (2005). Ota references Linda Bosniak’s four discourse categories:

First, citizenship as legal status, or what I will refer to as “formal citizenship.” This concept is what we mean when we think of nationality or a legal tie to the place from which you obtain your passport. Second, citizenship as rights, which reflects a concept of citizenship defined by the possession of political, civil, and social rights. Third, citizenship as political activity, refers to engagement in the life of the political community, and finally, citizenship as identity, which is psychological citizenship—a feeling of belonging or community membership.

*Id.* (discussing Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 455 (2000)). While Bosniak focuses on a theory of citizenship outside of the nation, Ota explains that Bosniak’s citizenship conception is useful internally as well. See *id.*

<sup>31</sup> See Abowitz & Harnish, *supra* note 16, at 654–55. Abowitz and Harnish address what it means to be a citizen in historical and current debates through their study analyzing “dominant and emerging discourses that shape citizenship education in schools.” *Id.* at 654. “Discourse” refers to “a body of rules and practices that govern meanings in a particular area.” *Id.*

<sup>32</sup> Abowitz and Harnish explain that ways of thinking about the world constitute ideas, and ideas become ideologies once they become belief systems, which explain how people behave and react. See *id.* at 655. They sample text from various fields of education to analyze the ways in which citizenship ideals were perpetuated and promoted. See *id.* at 655–56. They identified a number of patterns and found that “[t]he civic republican and liberal discourses continue to define and powerfully shape how U.S. society understands citizenship and the ways in which the society’s institutions, such as schools, thereby shape citizens.” *Id.* at 657. Abowitz and Harnish note that “[i]n political liberal discourses, citizenship requires an identity

discourses that could influence our conceptions of citizenship. The neoliberal discourse, which is very dominant, reasons that democratic citizens' freedom helps to maintain capitalism.<sup>33</sup> Difference feminist discourse suggests reforming society and the education around citizenship to include women as they are, rather than including them in the existing definitions of citizenship.<sup>34</sup> Cultural discourse focuses on the notion that one can be different from the dominant national community "without compromising one's right to belong[.]"<sup>35</sup> These aspects of citizenship are highlighted below.

### A. *Ancient Greece*

Ancient Greece defined citizens as those who were able to participate in the deliberations of the *polis* or city.<sup>36</sup> Citizens were to be active participants in political life as members of the particular community. Thus, citizenship presupposed the existence of a state or a "community."<sup>37</sup>

One aspect of citizenship—the right of *protection*—had a corresponding responsibility of *protecting*.<sup>38</sup> The state protected its citizens, and the citizens in turn protected the state through military service. The citizens owed a duty of allegiance to the *polis*, and that duty included

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that is neither autonomous nor necessarily separate from one's familial or religious beliefs, but that develops on the basis of the values and skills necessary to critically consider those and other beliefs." *Id.* at 663.

<sup>33</sup> See *id.* at 662.

<sup>34</sup> See *id.* at 668.

<sup>35</sup> *Id.* at 669 (citing Renato Rosaldo & William V. Flores, *Identity, Conflict, and Evolving Latino Communities: Cultural Citizenship in San Jose, California*, in *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS* 57 (1997)). Abowitz and Harnish go on to examine other discourses such as diva citizenship discourse and queer citizenship discourse. *Id.* at 674–75.

<sup>36</sup> See Powell & Menendian, *supra* note 4, at 1162 ("Greek conception of citizenship was understood as active membership of and participation in the body politic[.]" and "[t]his conception of the citizen was preceded by and contingent upon the development of the *polis*, or the Greek city state's political community.") (footnotes omitted).

<sup>37</sup> See *id.* Powell and Menendian note that "[i]n a community, membership is the most important good that human beings distribute to one another. Communities of people extend rights and privileges to members that are not granted to non-members. In that way, membership informs all other distributive choices . . ." *Id.* (footnote omitted); see also ARISTOTLE, *THE POLITICS* bk. III, at 87 (Carnes Lord ed. & trans., Univ. of Chi. Press 1984) ("Who the citizen is, then, is evident from these things. Whoever is entitled to participate in an office involving deliberation or decision is, we can say now, a citizen in this city; and the city is the multitude of such persons that is adequate with a view to a self-sufficient life, to speak simply.").

<sup>38</sup> See James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 429 (1999) (discussing fighting as a necessary characteristic of ancient Greek citizenship).



military service when necessary.<sup>39</sup> In exchange, the *polis* protected the citizens from outsiders; provided for common amenities (such as food, water, other supplies and trade); and allowed the people a voice, respectfully considered, in affairs of the state.<sup>40</sup>

Liberty was another important aspect of citizenship. Ancient Athens relied upon the native spirit of their citizens, providing broader freedoms and moderation, in contrast to the Spartan conception of extreme discipline in all aspects of life.<sup>41</sup>

The political activity component included participation, which equality promoted. The concept of equality recognized not only numerical equality, but also contextual equality.<sup>42</sup> For instance, ancient Greece had gradations of political participation in political membership because certain levels of certain classes were not able to hold certain political positions.<sup>43</sup>

On the issue of legal status, Solon, a political leader in ancient Greece, first divided the citizenry into four classes.<sup>44</sup> These classifications meant that “the capacity to rule was more a matter of status than of ability[,]”<sup>45</sup> as only certain persons within the society were classified as “‘statesmen,’ [which meant they were] fit to hold public office.”<sup>46</sup> The distinction was based on Aristotle’s seminal work, *The Politics*, which advocated for different levels of citizenship, in part distinguishing those who could rule or had the capacity to rule as opposed to mere commoners.<sup>47</sup> In reality, historians believe that Solon made these distinctions to help maintain the dominance of the wealthy.<sup>48</sup>

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<sup>39</sup> MOGENS HERMAN HANSEN, *POLIS: AN INTRODUCTION TO THE ANCIENT GREEK CITY* 116–17 (2006).

<sup>40</sup> See Powell & Menendian, *supra* note 4, at 1162.

<sup>41</sup> See THUCYDIDES, *THE PELOPONNESIAN WAR* bk. II, at 71–73 (Rex Warner trans., John H. Betts ed., Bristol Classical Press 1985) (Pericles’ funeral oration).

<sup>42</sup> See Powell & Menendian, *supra* note 4, at 1177–78; see also Julian Wonjung Park, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology*, 96 CAL. L. REV. 999, 1007 (2008) (“Above all else, the classical construction of citizenship stressed equality. . . . Aristotle posited that ‘a state is composite, and, like any other whole, made up of many parts; these are the citizens, who compose it.’”). In addition, Aristotle notes that citizens are dissimilar, and thus “there would still not be a single virtue of the citizen and the good man, since it is impossible for all the citizens to be similar.” ARISTOTLE, *supra* note 37, at 90.

<sup>43</sup> See Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 569–70 (2006).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 570.

<sup>46</sup> *Id.* at 569.

<sup>47</sup> See *id.* at 570; ARISTOTLE, *supra* note 37, at 93–94.

<sup>48</sup> See Román, *supra* note 43, at 570.

### B. Ancient Rome

Moving forward to ancient Rome, the connection to the city was the course of rights.<sup>49</sup> Our word “citizen” has Latin origins, and the dictionary definition is a “native or inhabitant of a city or a town”; that definition has evolved to include legal status, identity and participation in political activity.<sup>50</sup>

Initially, Rome had two classes of citizens, the patricians and the plebeians.<sup>51</sup> As Rome expanded her influence, the city began granting citizenship *sine suffragio* (without the vote) to other peoples in neighboring lands, which some scholars suggest was an intermediate stage towards full citizenship, thus opening up membership to disparate groups of people.<sup>52</sup> It was in the fourth century that Rome granted the “new kind of second-class or limited citizenship” in certain Latin cities, denying them full political rights—though they had legal and economic rights.<sup>53</sup> Rome greatly transformed the notion of citizenship by making it more universal, at least for free men, and thus more inclusive.<sup>54</sup>

In describing the political activity of voting practices in ancient Rome, the political philosopher Rousseau notes that each person voted aloud, and “[t]his practice was good as long as honesty prevailed among the citizens and each was ashamed to vote publicly for an unjust opinion or an unworthy subject.”<sup>55</sup> Prior to the use of tablets for voting, the assembly passed resolutions by “a show of hands and the undisciplined shouting of an inflamed mob.”<sup>56</sup> Voting was for the public good and not for private advantage.

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<sup>49</sup> Orrin K. McMurray, *Inter-Citizenship: A Basis for World Peace*, 27 *YALE L.J.* 299, 299 (1918). The root word *civis* means “a member of the city and it was one’s connection with the city that gave him rights. He who was not a *civis* was in the early Roman law regarded as destitute of legal rights.” *Id.*

<sup>50</sup> Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 *BYU L. REV.* 927, 953 & n.146, 954 (2005); see Bosniak, *supra* note 30, at 471 n.92; Ota, *supra* note 30, at 52.

<sup>51</sup> See A.N. SHERWIN-WHITE, *THE ROMAN CITIZENSHIP* 36 (2d ed. 1973).

<sup>52</sup> See *id.* at 40, 51 (discussing the conferral of *civitas sine suffragio* on the Campani); see also *id.* at 57 (explaining how membership in another secondary community was not incompatible with Roman citizenship).

<sup>53</sup> Román, *supra* note 43, at 571; see also SHERWIN-WHITE, *supra* note 51, at 73.

<sup>54</sup> See Román, *supra* note 43, at 570. Román explains that the Roman notion comes from their understanding of liberty where people were free to be their own masters and thus “free to exercise their sovereignty, free to determine their destiny, and were free to follow those laws and customs that represented the Roman way of life.” *Id.* at 571.

<sup>55</sup> JEAN JACQUES-ROUSSEAU, *ON THE SOCIAL CONTRACT: WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY* 119 (Roger D. Masters ed., Judith R. Masters trans., St. Martin’s Press 1978) (1762).

<sup>56</sup> Earley, *supra* note 24, at 56 (citing CICERO, IN *CATILINAM I-IV: PRO MURENA, PRO SULLA, PRO FLACCO* 459 (C. Macdonald trans., 1972)) (focusing on the sharing of decision-making power of the people and various classes of citizens).

On the equality issue, voting strength was diluted among the classes when citizens were assigned to particular tribes and each tribe had equal weight as a voting unit.<sup>57</sup> Freedmen eventually were added to certain tribes, depending on the circumstances and timing of their freedom, which led to some tension.<sup>58</sup> Other tensions existed between the urban tribes and the rural tribes because the former (who lived closest to the city center) were better able to participate in the active political life of the city of Rome (which held citizen assemblies as often as 20 times per year).<sup>59</sup>

### 1. The Rise of the Secret Ballot

The secret ballot—using tablets to record votes—was a significant development in protecting the integrity of votes.<sup>60</sup> Cicero praised the tablets because of their secrecy and the reduced pressure to conform to the expected voting behavior of seniors and patrons.<sup>61</sup> After secret ballots were introduced in 131 B.C., patrons had less influence over how their clients voted.<sup>62</sup>

While the movement to secret ballots may have been an innovation in some respects, e.g., allowing minority views to be expressed without repercussions, that change likely contributed to the reduction in public interest voting, as opposed to private interest voting. As citizens knew that no one else would connect their vote to them, many felt more comfortable voting for their individual self-interests rather than for the “common good.”

### 2. Other Forms of Political Participation

Voting was not the only type of political activity, however. *Con-tiones* (meetings to help to influence political decision making) allowed all citizens to be present.<sup>63</sup> Legislative assemblies consisted of the citizens, who constituted the legislative body.<sup>64</sup> Anyone who was a citizen could vote,<sup>65</sup> without the need to do anything else to claim the right to vote, like show identification or pre-register. There was no need to elect intermediaries to vote on popular measures.

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<sup>57</sup> See *id.* at 59; P.A. BRUNT, *SOCIAL CONFLICTS IN THE ROMAN REPUBLIC* 61 (1971).

<sup>58</sup> See Earley, *supra* note 24, at 58–59.

<sup>59</sup> See *id.* at 64 (describing the tribal distributions).

<sup>60</sup> *Id.* at 57.

<sup>61</sup> *Id.* at 57–58.

<sup>62</sup> *Id.* at 304.

<sup>63</sup> See *id.* at 283–84.

<sup>64</sup> See *id.* at 303–04 (stating that “[t]he only other well documented instance of such direct democracy in antiquity, in terms of influence on decision-making, is that of fifth century Athens”).

<sup>65</sup> *Id.* at 58.

Nevertheless, popular approval of the issues was important, as well as the opportunity to persuade. One criticism of the *contiones* is that because the speakers were mostly from the upper class,<sup>66</sup> some might consider these meetings undemocratic. However, speaking and voting were not the only activities at the *contiones*.<sup>67</sup> Historical evidence demonstrates that the audience members were able to give their opinion to the speakers through murmurs, slogans, shouts, and gestures as well as words.<sup>68</sup> Thus, by the late Roman Republic, popular political participation “resembled that of an emerging democracy.”<sup>69</sup>

Military service to Rome was another path to citizenship.<sup>70</sup> During the *Pax Augusta* era, scholars note a gradual dilution of the connection between citizenship and birthplace or culture, and the duties of citizenship became more passive rather than active.<sup>71</sup> The city granted honorary citizenship for services rendered, further diluting that connection.<sup>72</sup>

In summary, Roman citizenship began as tribal, then was based on allegiance, and finally, was based on status.<sup>73</sup> Eventually Rome made the ultimate extension when Emperor Caracalla, by edict, granted Roman citizenship to all free people in the world, thus excluding only those who were enslaved, barbarians, or criminals.<sup>74</sup> The broad edict of Caracalla

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<sup>66</sup> *Id.* at 282; see also BRUNT, *supra* note 57, at 46 (The centuries or “voting units” were “divided by property classes, and 98 out of 193 at first consisted of citizens who belonged to the highest class . . . . If they were in unanimous agreement, the remaining centuries were not even called. Citizens who had virtually no property . . . voted last, if at all.”).

<sup>67</sup> See Earley, *supra* note 24, at 283. Earley notes that such criticism “presupposes only one kind of participation at the *contio* itself, namely that of addressing the audience, followed by one kind of participation at the assembly, voting.” *Id.*

<sup>68</sup> See *id.* at 287–88, 294, 303.

<sup>69</sup> *Id.* at 359. Earley continues:

Citizens outside the senatorial and equestrian orders took on an increasing role in the decision-making process, although their role was on occasion extra-legal and untraditional. But the Romans had always taken pride in developing innovative new practices. The last days of the Republic were a preview of what was to come: the reining in of popular power as the people found themselves with increasingly few men willing to represent their cause. Caesar began what his successors in the principate would complete, usurpation of power by one man, the *princeps*.

*Id.* at 359–60.

<sup>70</sup> See SHERWIN-WHITE, *supra* note 51, at 390.

<sup>71</sup> *Id.* at 221–22, 267.

<sup>72</sup> See *id.* at 245, 249.

<sup>73</sup> See McMurray, *supra* note 49, at 299–300.

<sup>74</sup> See *id.* at 300.

In 212 A.D. the Emperor Caracalla conferred Roman citizenship upon all free members of the political communities within the empire. The possession of rights and the possession of citizenship were thus conferred upon all free men within the civilized world. But in legal theory, rights still depended upon citizenship as truly as in the earliest stages of Rome’s development, and the barbarian or the person deprived of citizenship as punishment for crime or otherwise had no rights except so far as they were recognized under the *jus gentium*.

changed the notion of citizenship from one of connection, loyalty, and duty to one of universalism.

### C. *The American Notion of Citizenship*

Borrowing and learning from ancient and modern examples, the United States articulated its own version of the duties of government and of citizens. Belonging to a community in exchange for allegiance to that community were two faces of the cornerstone for the Framers' concept of citizenship.<sup>75</sup>

#### 1. Rights

The Constitution granted Congress, as representative of “the people,” powers to collect taxes, regulate foreign commerce, create courts, and raise and support a military.<sup>76</sup> The Constitution was less clear about the obligations of citizens. Instead, it focused on the rights that citizens would enjoy, including the eligibility to be a representative in Congress,<sup>77</sup> the eligibility to be a senator,<sup>78</sup> and the ability to vote.<sup>79</sup> Other rights include being able to hold a federal job,<sup>80</sup> to carry a U.S. passport,<sup>81</sup> to travel from state to state,<sup>82</sup> to petition Congress, and to appear in court.<sup>83</sup>

Most of the rights granted in the U.S. Constitution are not limited to citizens.<sup>84</sup> Rather, they are available to all within the nation's borders. Thus, the Bill of Rights—which includes the rights to bear arms, to be free from warrantless or unreasonable searches and seizures, to jury trials, to due process, against double jeopardy, to speedy trials, to confron-

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*Id.* at 300; see also SHERWIN-WHITE, *supra* note 51, at 380–81 (discussing the offer of Roman citizenship to all free inhabitants of the empire).

<sup>75</sup> Zietlow, *supra* note 18, at 312–13 (“[I]t is clear that when the Framers spoke of citizenship, they had in mind the concept of belonging to a political community that had the responsibility to protect its members in exchange for their allegiance to that community. . . . In sum, the notions of belonging, protection and equality underlie individual rights that are guaranteed by federal citizenship.”).

<sup>76</sup> U.S. CONST. art. I, § 8.

<sup>77</sup> See *id.* art. I, § 2.

<sup>78</sup> See *id.* art. I, § 3.

<sup>79</sup> *Id.* amend. XXVI.

<sup>80</sup> Park, *supra* note 42, at 1012.

<sup>81</sup> *Id.*

<sup>82</sup> See Zietlow, *supra* note 18, at 297–98.

<sup>83</sup> *Id.* at 316. Zietlow further notes that “belonging” also includes political participation based on the fact that the courts have to “enforce[ ] the rights to vote, to petition Congress, and to appear in court, without outside interference, as essential to the nature of citizenship because citizenship implies the right to participate in one’s community.” *Id.* Zietlow goes on to cite multiple Supreme Court cases. *Id.* at 316 n.208.

<sup>84</sup> See *id.* at 316 n.207.

tation with adverse witnesses, and against cruel or unusual punishment—applies to “any person” within the United States’ jurisdiction.<sup>85</sup>

## 2. Legal Status

This Article proceeds from the baseline that throughout the early days of the United States, legal status varied by state, race, ethnicity, gender, wealth, and property-ownership status. A detailed analysis of U.S. legal status is beyond the scope of this Article. The Fourteenth Amendment formalized the constitutional definition of citizenship, stating that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]”<sup>86</sup> Of course, privileges or immunities were abridged early and often by, and perhaps because of, the inability to vote. Myra Bradwell argued not only that the disenfranchisement of women deprived them of their political voice<sup>87</sup> but also that privileges and immunities of citizenship should include the ability to practice her preferred profession.<sup>88</sup>

## 3. Political Activity

On the political activity aspect, citizenship is not “purely instrumental,” simply to “assist the deliberative process.”<sup>89</sup> It involves much more. Political rights, like the right to vote, are important, as is the right to run

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<sup>85</sup> See U.S. CONST. amends. I–X. Many of these protections extend to state citizens through the Fourteenth Amendment as well. *Id.* amend. XIV.

<sup>86</sup> *Id.* amend. XIV, § 1.

<sup>87</sup> See Phyllis Goldfarb, *Equality Writ Large*, 17 NEV. L.J. 565, 577 (2017). This Article is based on the research that Goldfarb did to participate in the writing of the book, *Feminist Judgments: Rewritten Opinions of the U.S. Supreme Court*, in which she authored a feminist revision to the 1873 *Bradwell v. Illinois* case. *Id.* at 565–66. The book provides an interesting historical background on the participation of women and legal theories of justice under the Fourteenth Amendment.

<sup>88</sup> *Id.* at 582. One interesting historical note is that the Supreme Court refrained from deciding the case until after the 1872 presidential election because afterwards, “there were fewer political costs for Republicans in rejecting the gender justice movement’s interpretation of the Fourteenth Amendment.” *Id.* at 581–82. Goldfarb then discusses Bradwell’s argument about the Privileges or Immunities Clause, which included the right to protection by the government and the right to pursue and obtain happiness, safety, life, and liberty. *Id.* at 582. However, the Court decided *The Slaughterhouse Cases* on the day before they decided the *Bradwell* case, practically destroying any import that the Privileges or Immunities Clause might have had. See *id.* at 584. Seymore takes this analysis one step further, discussing whether the Privileges or Immunities Clause was intended to protect “participatory privileges” such as the notion of self-governance because, if so, excluding naturalized citizens from the presidency seems to be in conflict. Seymore, *supra* note 50, at 982–83.

<sup>89</sup> Seymore, *supra* note 50, at 966. Seymore addresses the tension between the “thin” conception of citizenship and the “thick” conception of citizenship (which involves heavy public engagement). *Id.* at 965. Seymore then discusses the need for a constitutional amendment to permit naturalized citizens to serve as President. *Id.* at 991–94.

for political office.<sup>90</sup> Because of the high costs associated with running for political office, relative wealth shifts some would-be office-seekers out of the marketplace.<sup>91</sup> *Buckley v. Valeo* hastened this move.<sup>92</sup>

#### 4. Identity

The identity aspect of citizenship includes the salience of race and religion, which some say are the *most* salient aspects of identity;<sup>93</sup> both implicate culture<sup>94</sup> and the discourses noted above. The *Dred Scott* decision “polic[ed]” the meaning and context of citizenship such that “[b]eing White [sic] meant that you could become part of the political community.”<sup>95</sup> The Fourteenth Amendment changed that. When the Fourteenth Amendment imposed a definition of citizen on the states, it restructured the relationship between the state and federal government in a fundamental way.<sup>96</sup> State citizenship is less important, some posit, largely because it can be changed and thus is more closely akin to the concept of domicile.<sup>97</sup>

The Fifteenth Amendment attempted to reduce franchise restrictions based on race or color.<sup>98</sup> Subsequent amendments outlawed franchise re-

<sup>90</sup> Zoller, *supra* note 24, at 305.

<sup>91</sup> *Id.* at 307. In addition, the privatization of many public services leads to a decreased ability to hold public officials “accountable for the public policies supported while in office . . . .” *See id.* at 309–10. Zoller ends with a quote from Chief Justice Roberts, who held that the Affordable Care Act should be upheld on political, not economic reasons, based on the notion of “interdependence on each other”—which Zoller argues resurrected the “true meaning of citizenship in a republic.” *See id.* at 311–12.

<sup>92</sup> *See* 424 U.S. 1, 19, 52 (1976) (holding that governmental restrictions on expenditures by candidates themselves, or by their families, violated the First Amendment). This ruling enabled wealthy candidates to self-fund and outspend their less wealthy potential opponents.

<sup>93</sup> *See* Seymore, *supra* note 50, at 960. Seymore begins with the late Kenneth Karst’s conception of citizenship as “belonging” (and also cites to Rebecca Zietlow’s work discussed *supra*) and discusses the perception that “the ‘true’ citizen is a native-born, Anglo-Saxon, Protestant man.” *Id.* at 958 & n.171, 960.

<sup>94</sup> *See* Volpp, *supra* note 21, at 580–82. Volpp notes that “[c]ultural attachments are thought to inhibit one’s ability to engage in several distinct forms of citizenship.” *Id.* at 577. Volpp goes on to discuss Linda Bosniak’s four different discourses for separating citizenship. *Id.* at 578.

<sup>95</sup> Powell & Menendian, *supra* note 4, at 1163.

<sup>96</sup> *Id.* at 1166–67.

<sup>97</sup> McMurray, *supra* note 49, at 303 (“State citizenship in one of the states of our Union is of even less importance as an independent legal conception than citizenship in the United States.”). McMurray also addresses the concepts of *jus sanguinis* (whereby a child born in France to American parents is not a French citizen unless naturalized) and *jus soli* (place of birth). *Id.* at 309–10.

<sup>98</sup> U.S. CONST. amend. XV; *see also* Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 NEB. L. REV. 462, 491 (1991). Shavers notes that the “congressional debates on the [F]ourteenth [A]mendment make it clear that there was no universal agreement on the meaning of the amendment’s language. *Id.* “Some considered the language as encompassing only whites and blacks; others read it to also include Chinese, since there could be no restriction by race, but not to include Indians

strictions based on gender,<sup>99</sup> poverty,<sup>100</sup> and age.<sup>101</sup> Nevertheless, Asian Americans and Native Americans were routinely denied the franchise, as were African Americans, notwithstanding the expressed intent of the amendments.<sup>102</sup> Eventually, Native Americans received federal citizenship, but only by statute, which is subject to repeal.<sup>103</sup> Even after the Indian Citizenship Act of 1924 granted citizenship to Native Americans, some states rendered them ineligible to vote.<sup>104</sup>

Perhaps Congress expected that expanding citizenship eligibility to African Americans would chip away at the social structures maintaining racial hierarchy. Despite the Reconstruction Amendments, “citizenship in fact” remained largely unchanged.<sup>105</sup> As Powell and Menendian observed, “citizenship must be more than a matter of ‘legal principle’: it must speak to us in terms of how ‘we actually live.’”<sup>106</sup> So what was citizenship in fact? Román discusses the importance of citizenship and Chief Justice Rehnquist’s remark that “[i]n constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important.”<sup>107</sup> Because the Fourteenth Amendment’s citizenship clause prevents states from treating people as second-class citizens, “belonging” is formally, if not actually, enhanced by acknowledging citizenship on equal terms.<sup>108</sup> Thus, “citizenship in fact” is essentially belonging.

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because of their special situation; and others considered the language to include Indians if they had separated from their tribes.” *Id.*

<sup>99</sup> U.S. CONST. amend. XIX, § 1.

<sup>100</sup> *See* U.S. CONST. amend. XXIV, § 1 (prohibiting poll taxes).

<sup>101</sup> *See* U.S. CONST. amend. XXVI, § 1 (establishing eighteen as minimum voting age).

<sup>102</sup> *See* Shavers, *supra* note 98, at 483–85; Powell & Menendian, *supra* note 4, at 1170.

<sup>103</sup> Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2018)); Shavers, *supra* note 98, at 518.

<sup>104</sup> Shavers, *supra* note 98, at 497 (“[S]ome states attempted to exclude Indians from voting by using the ‘Indians not taxed’ clause . . .”); *see* U.S. CONST. art. I, § 2, cl. 3 (excluding Indians “not taxed” for purposes of congressional apportionment). Shavers concludes that:

Native Americans acquire citizenship based upon statutes which are always subject to amendment or repeal. While Congress has included Native Americans among the individuals that acquire citizenship upon birth in the United States, they are the only group of statutory citizens born in the United States. This could prevent their right of full participation in the political community unless *Elk* is construed to be limited in its application to the relationship of the federal government to Indians as it existed in the late nineteenth century.

Shavers, *supra* note 98, at 518.

<sup>105</sup> *See* Powell & Menendian, *supra* note 4, at 1170–71.

<sup>106</sup> *Id.* at 1176 (quoting Breyer’s dissent in *Parents Involved*, *supra* note 4, at 868).

<sup>107</sup> Román, *supra*, note 43, at 567 (citing *Sugarman v. Dougall*, 413 U.S. 634, 652 (1972) (Rehnquist, J., dissenting)). Román discusses the history of citizenship from the ancient Greeks and the Romans to the present-day United States. *Id.* at 564–68. Román identifies different levels of citizenship in the United States, particularly of indigenous populations and inhabitants of territorial islands. *Id.* at 579.

<sup>108</sup> *See id.* at 568.



It is also important to distinguish citizenship from nationality.<sup>109</sup> There is a long history in the United States and individual states of distrusting those who were foreign-born and using citizenship as a means of exclusion.<sup>110</sup> Consider the recent protests in India over its new citizenship law, which grants fast-track citizenship to non-Muslim people from the countries of Afghanistan, Bangladesh, and Pakistan (which are Muslim-majority countries).<sup>111</sup> That distrust has been transferred from the foreign born, to those who were born on U.S. soil, to foreign-born parents, as the next section explains.

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<sup>109</sup> See *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigr., Border Security, & Claims of the H. Comm. on the Judiciary*, 109th Cong. 7 (2005) [hereinafter 2005 Hearing] (statement of Dr. Stanley A. Renshon, Professor, City University of New York (CUNY) Graduate Center). Dr. Stanley A. Renshon explained that:

Citizenship is a legal term and refers to the rights and responsibilities that become attached to a certified member of the community. Nationality, which is what I'm talking about, is a psychological term and that refers to the emotional ties, core understandings about the world, and common experiences that bind Americans together. Of course, it is entirely possible to have the rights of a citizen, but little emotional attachment to the country that provides them. Citizenship, however, without emotional attachment, is the civic equivalent of a one-night stand.

*Id.*; see also Note, *The Functionality of Citizenship*, 110 HARV. L. REV. 1814, 1817 (1997) (arguing that "the United States cannot encourage qualities of 'national' identity using the legal tool of functional citizenship").

Nationality and functional citizenship can only coexist effectively within one concept if national sovereignties do not overlap—that is, when migration is low and no two sovereigns have bonds to the same population. The criteria of citizenship are then based exclusively on birth characteristics, which determine both whether one will enter the polity and whether one will have a personal tie to the state, either by virtue of the life within it or acculturation by one's parents.

*Id.*

<sup>110</sup> See, e.g., *United States v. Bhagat Singh Thind*, 261 U.S. 204, 213–15 (1923) (holding that a high-caste Hindu born in India is not a "white person" for purposes of naturalization); *Ex Parte Shahid*, 205 F. 812, 815–16 (E.D.S.C. 1931) (holding that a Syrian born in Asia does not meet the definitions of "free white persons," which was intended to refer to those of European descent); *In re Au Yup*, 1 F. Cas. 223, 224–25 (Cal. Cir. Ct. 1878) (holding that Chinese were excluded from naturalization opportunities).

<sup>111</sup> See Akanksha Singh, *Why India's Citizenship Law Crosses the Line*, CNN, <https://www.cnn.com/2019/12/31/opinions/india-citizenship-law-crosses-line-singh/index.html> (last updated Dec. 31, 2019, 6:15 AM) (describing how the Citizenship Amendment Act amended the law that used to prohibit undocumented migrants from becoming Indian citizens and now permits those of Hindu, Sikh, Buddhist, Jain, Parsi and Christian religions to apply for citizenship if they entered India on or before December 31, 2014).

## II. RE-EVALUATING BIRTHRIGHT CITIZENSHIP

More than 30 countries allow unconditional<sup>112</sup> birthright citizenship.<sup>113</sup> Other countries impose some limitations based on a parent's citizenship or on residency requirements.<sup>114</sup> For example, "[a] child born in Senegal is a citizen if at least one of his/her parents was also born there."<sup>115</sup> Restrictions like these blur the lines between *jus soli* and *jus sanguinis*.<sup>116</sup>

The United States confers citizenship in two ways.<sup>117</sup> *Jus soli* ("right of the soil"), or birthright citizenship, provides citizenship to an individual born within the territory of a nation.<sup>118</sup> *Jus sanguinis* ("right of blood") grants citizenship on a child of citizen-parents, regardless of the location of the birth.<sup>119</sup> Other than for the office of President, the Framers did not address birthright citizenship.<sup>120</sup> The right to be President was limited to those who were natural born (or otherwise a citizen in 1789).<sup>121</sup>

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<sup>112</sup> Many countries that have birthright citizenship, even when "unconditional," still bar children of diplomats and others in service of foreign countries born within their territories from citizenship. See LIBRARY OF CONG., GLOB. LEGAL RSCH. DIRECTORATE, BIRTHRIGHT CITIZENSHIP AROUND THE WORLD 1 (2018), <https://www.loc.gov/law/help/birthright-citizenship/birthright-citizenship-around-the-world.pdf> [hereinafter Birthright Citizenship Around the World]. Thus, as used in this Article, the term "unconditional" still does not include such children. *Id.*

<sup>113</sup> The majority of countries with unconditional birthright citizenship are located in the Americas and the Caribbean. *Id.* Per this report, countries that have unconditional birthright citizenship include Angola, Antigua & Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Cuba, Dominica, Ecuador, El Salvador, Fiji, Grenada, Guatemala, Guyana, Honduras, Jamaica, Lesotho, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent & the Grenadines, São Tomé e Príncipe, Tanzania, Trinidad & Tobago, Uruguay, and Venezuela. *Id.* at 2–38.

<sup>114</sup> *Id.* at 1.

<sup>115</sup> *Id.* at 33.

<sup>116</sup> See *id.* at 1.

<sup>117</sup> See Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS U. L.J. 219, 221 (2008).

<sup>118</sup> *Jus soli*, BLACK'S LAW DICTIONARY (11th ed. 2019); Birthright Citizenship Around the World, *supra* note 112, at 1.

<sup>119</sup> *Jus sanguinis*, BLACK'S LAW DICTIONARY (11th ed. 2019); Birthright Citizenship Around the World, *supra* note 112, at 1 ("In theory, the *jus soli* rule of citizenship stands in sharp contrast to the *jus sanguinis* rule . . . . In reality, the line between these approaches frequently blurs, as the various parent-based conditions for birthright citizenship . . . illustrate.").

<sup>120</sup> 2005 Hearing, *supra* note 109, at 25–26, 29 n.82 (statement of Dr. Stanley A. Reshion, Professor, CUNY Graduate Center). Representative Sheila Jackson Lee from Texas noted that the Framers did not define citizenship, and "citizenship by naturalization" was not defined until the Naturalization Act of 1790—"citizenship by birth" was left undefined. *Id.* at 93 (statement of Rep. Sheila Jackson Lee, Ranking Member, Subcomm. on Immigr., Border Security, & Claims).

<sup>121</sup> U.S. CONST. art. II, § 1.

Birthright citizenship has its roots in the Roman Empire.<sup>122</sup> Modern birthright citizenship was passed down from Roman to English law and then to the United States.<sup>123</sup> Birthright citizenship existed at common law<sup>124</sup> and as early as 1606 in some of the colonies that later became U.S. states.<sup>125</sup> The Fourteenth Amendment codified the practice,<sup>126</sup> al-

<sup>122</sup> See Michael H. LeRoy, *The Labor Origins of Birthright Citizenship*, 37 HOFSTRA LAB. & EMP. L.J. 39, 59–60 (2019) (“The legal genealogy for American birthright citizenship germinated in Rome . . . . In the preceding centuries, Roman law evolved in increments that connected marriages, births, manumission, and naturalization to citizenship that—taken together—approximated *jus soli*. In other words, Roman citizenship was neither limited to the offspring to Romans, nor beyond reach for slaves: As Rome expanded to naturalize foreigners and free slaves, and as marriage and birth laws treated their offspring as citizens, births in the empire resulted in more citizens. In short, these laws created a citizenship melting pot, much like the United States.”) (footnotes omitted).

<sup>123</sup> See *id.* at 67; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMANS. 73, 73–74, 83 (1997) (“[The English] *Calvin’s Case* [in 1608] established a territorial rule for acquisition of subject status at birth: ‘Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of—therefore, according to our common law, owes allegiance to—the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.’”) (citing HERBERT BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW, AND EXEMPLIFIED BY CASES 31 (George L. Denman ed., W. Maxwell & Son 2d ed. 1885)); see also JACK MASKELL, CONG. RSCH. SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT 2 (2011) (“There appears to be little scholarly debate that the English common law at the time of independence included at least all persons born on the soil of England (*jus soli*, that is, ‘law of the soil’), even to alien parents, as ‘natural born’ subjects (unless the alien parents were diplomatic personnel of a foreign nation, or foreign troops in hostile occupation). As noted by the Supreme Court of the United States, this ‘same rule’ was applicable in the colonies and ‘in the United States afterwards, and continued to prevail under the Constitution’ with respect to ‘natural born’ U.S. citizenship.”).

<sup>124</sup> *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830) (“Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.”). *But see* Price, *supra* note 123, at 142–43 (“Yet just twenty-seven years later, in the famous case of the freed slave Dred Scott, the Supreme Court would disregard the settled common-law rule in favor of a rule for federal citizenship which derived from pedigree and ancestry. For black inhabitants, at least, *Dred Scott* invoked a rule more akin to the *jus sanguinis*, while the rule of territorial birthright citizenship appears to have been a settled rule for white inhabitants.”) (footnote omitted).

<sup>125</sup> See, e.g., FIRST CHARTER OF VIRGINIA OF 1606, ch. XV (“Also we do, for Us, our Heirs, and Successors, declare, by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”); see also LeRoy, *supra* note 122, at 52 (“Virginia’s original charter, granted in 1606, conferred birthright citizenship to English subjects in the newly formed colony. . . . [B]irthright citizenship was essential for people to seek opportunities in the New World.”) (footnote omitted).

<sup>126</sup> U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

though not for all groups—as it did not apply to Native Americans.<sup>127</sup> With few exceptions, anyone born on U.S. soil—even to female tourists and undocumented immigrant women—automatically becomes a U.S. citizen.<sup>128</sup>

### A. *Proposed Restrictions on Birthright Citizenship*

Efforts to strip citizenship from native, indigenous, and natural-born citizens have arisen.<sup>129</sup> Despite the common law history of birthright citizenship dating back to 1606 and the Fourteenth Amendment’s clear purpose to grant citizenship to freed slaves, who were brought to the United States legally and illegally, politicians have repeatedly debated whether birthright citizenship should be curtailed or eliminated for certain groups.<sup>130</sup>

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they reside.”); *see also* LeRoy, *supra* note 122, at 79–83 (discussing the passing of the Fourteenth Amendment and “racial consent arguments” against birthright citizenship).

<sup>127</sup> Price, *supra* note 123, at 144 & n.371.

<sup>128</sup> The only exceptions are children of diplomats, children born to invading enemy aliens in enemy-occupied territory, and children born aboard a foreign sovereign’s ships. Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 721–22 (2012); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 682 (1898) (“The real object of the [F]ourteenth [A]mendment of the [C]onstitution, in qualifying the words ‘all persons born in in the United States’ by the addition ‘and subject to the jurisdiction thereof,’ would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.”). Additionally, at the time of ratification, the Fourteenth Amendment was not intended to provide birthright citizenship to Native Americans, who were not considered to be within the jurisdiction of the United States. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that Native Americans were not “subject to the jurisdiction of the United States.”); Gerald Walpin, *The 14th Amendment Does Not Grant Citizenship to Babies Born to Illegal or Transient Immigrants on U.S. Soil*, 17 ENGAGE 18, 22 (2016), <https://fedsoc.org/commentary/publications/birthright-citizenship-two-perspectives>. It was not until 1924 that birthright citizenship was extended to include Native Americans. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2018)); Walpin, *supra*, at 20.

<sup>129</sup> *See* Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2582 (2007). Somewhat prophetically, Volpp notes that “citizens through birth cannot have their citizenship involuntarily stripped,” but that is exactly what past and current proposals to eliminate birthright citizenship seek to do. *Id.* at 2582–83. Volpp focuses on Muslim identity in the aftermath of 9/11 and argues that their citizenship is “weaker,” analogous to that of naturalized citizens, as they become collateral damage to the “war on terror.” *Id.* at 2582, 2584. This treatment has been repeated with the so-called Muslim ban instituted by President Trump in 2017. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

<sup>130</sup> *See, e.g.,* Nick Petree, *Born in the USA: An All-American View of Birthright Citizenship and International Human Rights*, 34 HOUS. J. INT’L L., 147, 148–50 (2011). Petree discusses the notion of birthright citizenship and international human rights, the history of the citizenship clause, and a catalog of the calls for repeal. *See id.* Petree specifically addresses

For instance, in a 2005 congressional hearing, Representative Lamar Smith from Texas explained that America is like Barbuda, Lesotho, and Tuvalu—one of the few countries that automatically gives citizenship to the children of undocumented immigrants.<sup>131</sup> More recently, in 2019, Representative Steve King from Iowa introduced a bill to severely limit *jus soli* in the United States.<sup>132</sup> Relying upon the phrase “subject to the jurisdiction” of the United States in the Fourteenth Amendment, proponents of birthright citizenship restrictions have argued that because undocumented immigrants are not legally within the nation, their children should not automatically become citizens, even if they are born in this country.<sup>133</sup> This reasoning led to calls to amend the current interpretation

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that eight countries, including Australia, France, India, Ireland, Malta, New Zealand, Portugal, and the United Kingdom, have abandoned *jus soli* citizenship. *Id.* at 154, 155 & n.50. Petree discusses the interpretation of the Fourteenth Amendment, its historical context, the *Wong Kim Ark* case, and the incorporation of international law and international instruments. *See id.* at 159–80; *see also* Walpin, *supra* note 128, at 18 (arguing that the Fourteenth Amendment should not grant citizenship to children born in the United States if born to parents that are illegal or transient immigrants); *Birthright Citizenship: Is It the Right Policy for America? Hearing Before the Subcommittee on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong. 3 (2015) [hereinafter 2015 Hearing] (statement of Rep. Zoe Lofgren, Ranking Member, Subcomm. on Immigr. & Border Security) (“The question that we are asked to consider is whether birthright citizenship is the right policy for America.”).

<sup>131</sup> 2005 Hearing, *supra* note 109, at 3 (statement of Rep. Lamar Smith, Member, Subcomm. on Immigr., Border Security, & Claims).

<sup>132</sup> The bill’s proponents intended to limit birthright citizenship by narrowly defining the term “subject to the jurisdiction,” referring to the United States, in the Fourteenth Amendment. *See Birthright Citizenship Act of 2019*, H.R. 140, 116th Cong. (2019). The bill would have required that a person only

[Be] considered ‘subject to the jurisdiction’ of the United States . . . if the person is born in the United States of parents, one of whom is—(1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the armed forces.

*Id.* § 2(a)(3). Such attempts to restrict birthright citizenship are not a new phenomenon. *See, e.g.*, H.R. 319, 106th Cong. (1999); Citizenship Reform Act of 1995, H.R. 1363 104th Cong. (1995). In 1999, then Representative Robert Stump of Arizona introduced a similar bill to limit birthright citizenship that would have denied citizenship to any person born to

[A] mother who is neither a citizen or national of the United States nor admitted to the United States as a lawful permanent resident, and which person is a citizen or national of another country of which either of his or her natural parents is a citizen or national, or is entitled upon application to become a citizen or national of such country, [and would have] considered [the person] as born subject to the jurisdiction of that foreign country and not subject to the jurisdiction of the United States within the meaning of section 1 of [the Fourteenth Amendment] and [would] therefore not be a citizen of the United States or of any State solely by reason of birth in the United States.

H.R. 319.

<sup>133</sup> 2015 Hearing, *supra* note 130, at 2 (statement of Rep. Steve King, Member, Subcomm. on Immigr. & Border Security). *See id.* at 32 (testimony of Professor Lino A. Graglia, A.W. Walker Centennial Chair in Law, University of Texas School of Law) (“It is difficult to imagine a more irrational and self-defeating legal system than one that makes unauthorized entry into the country a criminal offense and simultaneously provides the greatest possible

of birthright citizenship.<sup>134</sup> Opponents relied upon the Framers' intent, arguing that a conservative reading of "subject to the jurisdiction" of the United States is contrary to that intent.<sup>135</sup>

The contemporary debate in the United States over birthright citizenship since and during the 2016 election has focused on so-called "anchor babies," "birth tourism," and the political attempt to end both.<sup>136</sup> Although there was similar anti-immigrant sentiment in arguments for eliminating birthright citizenship in the United Kingdom, the United Kingdom was able to change its birthright citizenship laws much more easily than can be done in the United States.<sup>137</sup>

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inducement to illegal entry, a grant of American citizenship."); *see also* LeRoy, *supra* note 122, at 47–50 (discussing a book by Professors Peter Schuck and Rogers Smith, who argue that citizenship should be based on consent); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 8 (2009) ("It appears . . . that the Constitution, far from clearly compelling the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant."); John C. Eastman, Comment, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 957–58 (2008) ("As an original matter, mere birth on U.S. soil alone was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., *not* owing allegiance to another sovereign) was the constitutional mandate—a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization.").

<sup>134</sup> *See, e.g.*, H.R. 140. Representative Steve King, who introduced the 2019 bill, introduced similar bills in the House five times since 2011. *See H.R. 140 (112th): Birthright Citizenship Act of 2011*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/hr140> (last visited Feb. 5, 2021). Opponents of birthright citizenship argue that undocumented immigrants come to the United States wanting to stay in the country and choose to have a baby, i.e. "anchor babies," to "thereby anchor the parents" in the United States. *See, e.g.*, Walpin, *supra* note 128, at 18. Opponents also argue that the United States' expansive birthright citizenship promotes "birth tourism," whereby pregnant women from other countries travel to the United States specifically to give birth and ensure that their babies have U.S. citizenship. *See, e.g., id.*, 22 n.4; 2015 Hearing, *supra* note 130, at 3, 6, 54 (statement of Rep. Steve King, Member, Subcomm. on Immigr. & Border Security; statement of Rep. Robert Goodlatte, Chairman, Comm. on the Judiciary; and testimony of Jon Feere, Legal Policy Analyst, Center for Immigration Studies).

<sup>135</sup> *See, e.g.*, David B. Rivkin, Jr. & John C. Yoo, *The 14th Amendment Guarantees Birthright Citizenship to Every Person Born on U.S. Soil*, 17 ENGAGE 21, 21–22 (2016); *see generally* Ing, *supra* note 128, at 721–24 (arguing that, under an originalist interpretation of the Citizenship Clause of the Fourteenth Amendment, birthright citizenship should be extended to all children born in the United States, including children born to undocumented immigrants, and only excluding children of diplomats, children of invading alien enemies in enemy occupied territory, and children born aboard a foreign sovereign's ship).

<sup>136</sup> Katherine Nesler, *Resurgence of the Birthright Citizenship Debate*, 55 WASH. U.J.L. & POL'Y 215, 228–230, 229 n.80 (2017). Nesler argues that birthright citizenship is important to our national identity and worth maintaining. *Id.* at 236. Nesler writes: "Birthright citizenship is a longstanding and integral practice in the United States with numerous benefits [that] should be preserved." *Id.* at 242.

<sup>137</sup> Despite the messaging of President Trump, birthright citizenship is enshrined in the Fourteenth Amendment of the Constitution. *See* U.S. CONST. amend. XIV, § 1; Donald Trump (@realDonaldTrump), TWITTER (Oct. 31, 2018, 9:25 AM), <https://twitter.com/realDonaldTrump/status/1057624553478897665> ("So-called Birthright Citizenship, which costs our Country [sic] billions of dollars and is very unfair to our citizens, will be ended one way or the

### B. *The Demise of Birthright Citizenship in Other Nations*

Regardless of our view of the Framers' intent, it is instructive to analyze how the United Kingdom addressed the issue of immigrants birthing citizen-children. Beginning in the 1960s, Parliament passed a series of laws limiting immigration.<sup>138</sup> Then, in 1981, the United Kingdom eliminated birthright citizenship.<sup>139</sup> Part of the reason for the departure from unconditional birthright citizenship was due to anti-immigrant sentiment.<sup>140</sup> Now, a child born in the United Kingdom or a qualifying territory automatically becomes a citizen of the United Kingdom *only if* one or both of her parents, at the time of birth, are (1) U.K. citizens or (2) are settled in the United Kingdom or the qualifying territory where the child was born.<sup>141</sup>

Other nations have responded similarly. For instance, Australia restricted birthright citizenship in response to perceived excessive immigration along with concerns that people were abusing the immigration

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other. It is not covered by the 14th Amendment because of the words 'subject to the jurisdiction thereof.' Many legal scholars agree. . . ."). While bills have been introduced in Congress to redefine the Citizenship Clause such that children born of undocumented aliens would not be conferred *jus soli* citizenship, some scholars argue that such legislation would be unconstitutional and that the correct way to redefine birthright citizenship would be via a constitutional amendment. See, e.g., Michael Robert W. Houston, Note, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693, 738 (2000). Comparatively, the United Kingdom does not have a written constitution, and U.K. courts cannot strike down legislation. Houston, *supra*, at 714 ("Thus, 'Parliamentary Supremacy' denotes the power of the legislature in the United Kingdom to procure laws that fundamentally alter the national constitution, an example of which is the [British Nationality Act].") (footnote omitted).

<sup>138</sup> Houston, *supra* note 137, at 702–03. Restrictions included the Commonwealth Immigrants Act of 1962, the Commonwealth Immigrants Act of 1968, the Immigration Act of 1971, and the British Nationality Act in 1981. *Id.*

<sup>139</sup> This was accomplished through legislation. British Nationality Act 1981, c. 61, §§ 1(1)–(1A).

<sup>140</sup> Houston, *supra* note 137, at 702 ("One purported reason was the increase in anti-immigrant sentiment in the United Kingdom following World War II."); see generally Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 567–77 (1995) (discussing the history of racism and anti-immigrant attitudes in the United Kingdom after World War II and up to 1981, when the British Nationality Act was passed).

<sup>141</sup> British Nationality Act 1981, §§ 1(1)–(1A); Houston, *supra* note 137, at 702. Furthermore, the term "settled" requires that the parents not be in violation of U.K. immigration law, thus precluding children of undocumented immigrants from gaining U.K. citizenship through *jus soli*. British Nationality Act 1981, §§ 50(2)–(4); see also Houston, *supra* note 137, at 705.

system.<sup>142</sup> There was no definition of citizenship in Australia<sup>143</sup> until a 1948 law granted unconditional birthright citizenship for those born in the country.<sup>144</sup> In 1986, amendments restricted birthright citizenship<sup>145</sup> and now a person born in Australia is a citizen *only if* at the time of birth, at least one of her parents is an Australian citizen or permanent resident, or “the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.”<sup>146</sup>

More recently, in 2005, New Zealand also restricted birthright citizenship.<sup>147</sup> Under the 2005 Act, a person is a New Zealand citizen by birth only if, at the time of birth, at least one of her parents is a New Zealand citizen or “entitled in terms of the Immigration Act 1987 to be in New Zealand indefinitely, or entitled to reside indefinitely in the Cook Islands, Niue, or Tokelau.”<sup>148</sup> One perceived rationale for this restriction is that *jus soli* was limited by a New Zealand Supreme Court decision ruling that parents, who were undocumented immigrants, could not be deported because that would be detrimental to their New Zealand-born citizen-children.<sup>149</sup> However, it may be that New Zealand’s motivation for eliminating birthright citizenship was not in response to concerns regarding increased immigration or nativist attitudes, but rather a misinterpretation of how international law impacted child welfare.<sup>150</sup>

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<sup>142</sup> See Kim Rubenstein, *Citizenship and the Centenary—Inclusion and Exclusion in 20th Century Australia*, 24 MELB. U. L. REV. 576, 589 (2000) (“[I]n an international environment where population movements are increasing exponentially, and where Australia is seen by many as a desirable destination, it would be inappropriate to allow migration laws to be circumvented through the acquisition of Australian Citizenship status by children born in Australia to temporary or illegal entrants. Such an approach would compromise Australia’s migration program as well as being inequitable to the many thousands of people who apply to migrate to Australia every year through proper channels.” (quoting AUSTL. CITIZENSHIP COUNCIL, AUSTRALIAN CITIZENSHIP FOR A NEW CENTURY: A REPORT BY THE AUSTRALIAN CITIZENSHIP COUNCIL 40 (2000))).

<sup>143</sup> Michael Klapdor et al., *Australian Citizenship: A Chronology of Major Developments in Policy and Law*, PARLIAMENT OF AUSTL. (Sept. 11, 2009), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0910/AustCitizenship](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/AustCitizenship); see also *Australian Citizenship Act 1948* (Cth) ss 10–11.

<sup>144</sup> *Australian Citizenship Act 1948* s 10.

<sup>145</sup> See Rubenstein, *supra* note 142, at 588. For a further discussion on the evolution of Australian citizenship law and the effects of immigration on it, see generally RAYNER THWAITES, REPORT ON CITIZENSHIP LAW: AUSTRALIA (2017), <https://cadmus.eui.eu/handle/1814/46449>.

<sup>146</sup> *Australian Citizenship Act 2007* (Cth) s 12.

<sup>147</sup> See Citizenship Amendment Act 2005, s 5.

<sup>148</sup> *Id.* at s 5, subs (1)(b)(i)–(ii).

<sup>149</sup> See Caroline Sawyer, *The Loss of Birthright Citizenship in New Zealand*, 44 VICTORIA U. WELLINGTON L. REV. 653, 661 (2013) (“There is a pervasive perception, including amongst lawyers, that the reason for the abandonment of the *jus soli* in New Zealand was the line of cases that culminated in the decision of the Supreme Court in *Ding and Ye*.”).

<sup>150</sup> See *id.* at 661–63 (noting that the 2005 Act was a “cure for the [non-existent] problem” because the New Zealand Supreme Court’s holding was with respect to how to interpret the United Nations Convention on the Rights of the Child).



### C. *Why the U.S. Should Keep Birthright Citizenship*

Birthright citizenship has long been a mechanism of inclusion,<sup>151</sup> but perhaps some modifications are in order.<sup>152</sup> For instance, we often impute the illegal status of the parent to the child in certain court situations (e.g., deporting citizen-minors with their undocumented parents) but go the other way on the issue of access to education (e.g., treating the children as worthy citizens).<sup>153</sup> We need to develop the extent of the privileges and duties that attach to birthright citizenship.

The United States and Canada still grant automatic citizenship without any major qualifications, and they are the only two countries with so-called “advanced economies” that grant it to virtually all persons born in their territories.<sup>154</sup> Canada, too, is engaging in the debate regarding the appropriateness of continuing the practice of birthright citizenship.<sup>155</sup> In

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<sup>151</sup> Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2529 (2007) (“[T]he right to territorial birthright citizenship was a marker of equality and inclusion.”).

<sup>152</sup> See generally Robert F. Ley, *Are We Punishing “Illegal Citizen” Children to Deter Parents? Critiquing Birthright Citizenship Through the Citizens-Benefits Question and Citizenship Reductionism*, 33 *BUFF. PUB. INT. L.J.* 23 (2014–2015). Ley cautions that “both the concept of birthright citizenship and its attendant benefits must be modernized to address the realities of the people to whom the status extends and matter most: those who are at the borders of the law.” *Id.* at 61. Part III is an interesting part of this Article and deals with the “citizen-benefits” question and “citizenship reductionism.” *Id.* at 54–84. Ley describes the noncitizen parents’ “Hobson’s choice” of revealing their own status in order to retrieve their child, which often results in the parents’ deportation. *Id.* at 43. If the parents are deported, the child often goes with them for family-unification purposes; thus, the best-interest-of-the-child standard that applies to children of U.S. citizens does not protect citizen-children of non-citizens. See *id.* at 43–44.

<sup>153</sup> *Id.* at 64.

<sup>154</sup> 2015 Hearing, *supra* note 130, at 54 (testimony of Jon Feere, Legal Policy Analyst, Center for Immigration Studies); *Reform Birthright Citizenship*, NUMBERSUSA, <https://www.numbersusa.com/solutions/reform-birthright-citizenship> (last visited Feb. 5, 2021).

<sup>155</sup> Compare Eric Stober, *Conservatives Vote to End Policy That Allows ‘Birth Tourism’ in Canada*, *GLOB. NEWS* (Aug. 26, 2018, 3:44 PM), <https://globalnews.ca/news/4410446/conservative-convention-birth-tourism-canada/> (discussing Canada’s conservative party’s policy stance in 2018 against unconditional birthright citizenship in an attempt to end birth tourism in the country), and Cheryl Chan, *Richmond Woman’s Petition Calls for End of Birth Tourism in Canada*, *VANCOUVER SUN* (Mar. 28, 2018), <https://vancouver.sun.com/news/local-news/petition-calls-for-end-of-birth-tourism-in-canada> (discussing a petition started by a Canadian woman in 2016 to end *jus soli* in Canada, which ultimately failed, and another petition started by the same woman in 2018 to specifically end birth tourism in Canada), with Michael McKiernan, *Debate over Birthright Citizenship Emerges*, *LAW TIMES* (Feb. 4, 2019), <https://www.lawtimesnews.com/practice-areas/immigration/debate-over-birthright-citizenship-emerges/263403> (“Eliminating birthright citizenship would be an overreaction to fears about a growth in birth tourism, according to an Ottawa immigration law professor.”), and Paula Simons, *Paula Simons: Conservative Rejection of Birthright Citizenship Is the Real Threat to Canadian Identity*, *EDMONTON J.* (Aug. 28, 2018), <https://edmontonjournal.com/opinion/columnists/paula-simons-conservative-rejection-of-birthright-citizenship-is-the-real-threat-to-canadian-identity/> (arguing that Canada should not eliminate birthright citizenship because it “is part of our Canadian identity, something that sets us apart from many other countries that simply don’t work that way.”).

contrast to the U.S. discussions that tend to focus more on migrants lacking entry documents or visitors overstaying their visas, much of the debate in Canada focuses on the notion of “birth tourism,”<sup>156</sup> wherein pregnant women visit Canada on various visas and stay there to give birth.

While many of the larger European powers do not have birthright citizenship,<sup>157</sup> eliminating birthright citizenship in the United States would jeopardize the generations of European immigrants who have long enjoyed citizenship for their descendants.<sup>158</sup> Repealing birthright citizenship could create an “intergenerational caste system,”<sup>159</sup> could arguably violate international covenants,<sup>160</sup> and would violate the Fourteenth-Amendment promise of equal protection under the law.<sup>161</sup> This is not the time to reduce equal protection under the law.

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<sup>156</sup> See Konrad Yakabuski, *Canada Needs an Honest Debate About Birthright Citizenship*, GLOBE AND MAIL (Nov. 1, 2018), <https://www.theglobeandmail.com/opinion/article-canada-needs-an-honest-debate-about-birthright-citizenship/>. According to one study, more Canadians (40%) believe birthright citizenship in general is a good policy than those who do not (33%). *Birthright Citizenship: Plurality of Canadians See It as Good Policy, but Also Say Some Changes Are Needed*, ANGUS REID INST. (Mar. 14, 2019), <http://angusreid.org/birthright-citizenship-birth-tourism/>.

<sup>157</sup> “France, Germany, Greece, Italy, Portugal, Spain, and the United Kingdom all recognize birthright citizenship in exceptionally narrow circumstances subject to specific qualifications.” Nesler, *supra* note 136, at 215. Nesler addresses the history of citizenship and the case law prior to the Fourteenth Amendment. *Id.* at 218–19. She also analyzes the case of *Elk v. Wilkins*, where the Court held that the Fourteenth Amendment did not confer citizenship to Native Americans upon birth due to the interpretation of the phrase “subject to the jurisdiction thereof.” *Id.* at 220. This was subsequently changed by congressional legislation. See *supra* note 103 and accompanying text.

<sup>158</sup> Ngai, *supra* note 151, at 2528. Ngai concludes that “birthright citizenship has been a mechanism for incorporating new immigrants, and its disavowal a mechanism for exclusion.” *Id.* at 2530.

<sup>159</sup> For instance, Peter Spiro testified that “if we abandon the rule of birthright citizenship, one is talking about establishing an intergenerational caste, a permanently dispossessed class of individuals, which is really antithetical to our citizenship norm of equality.” 2005 Hearing, *supra* note 109, at 91 (statement of Peter Spiro, Associate Dean for Faculty Development and Dean and Virginia Rusk Professor of International Law, University of Georgia School of Law).

<sup>160</sup> “[T]he Charter of the United Nations, the United Nations General Assembly’s Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights can be read to impose an affirmative duty on the United States to maintain the status quo of birthright citizenship.” Petree, *supra* note 130, at 170–71 (footnotes omitted).

<sup>161</sup> *Id.* at 166. Petree concludes that “[r]epealing birthright citizenship would deny persons born in the United States of their right to nationality as a result of that person’s parentage, and would create a perpetual class of stateless individuals denied equal protection under the law. This denial of access to social membership would violate international law, as well as the very principles of the United States of America.” *Id.* at 185.

### III. ASSESSING OBLIGATIONS FOR CITIZENS: MANDATORY (MILITARY) SERVICE AND VOTING

Another aspect of citizenship discourse is a privilege-based notion that evolves from the Roman concept of conferring citizenship in exchange for military service.<sup>162</sup> The privilege could include a duty to serve.

#### A. *Compulsory Military Service in Democratic Nations*

Several countries require citizens to perform military service.<sup>163</sup> Some countries only require a few months, while others require several years.<sup>164</sup> For most, the range is between one and two years of service.<sup>165</sup> Israel, since its founding as a nation, has had mandatory military service for its citizens.<sup>166</sup> Men must serve a minimum of 32 months and women

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<sup>162</sup> See *supra* note 70 and accompanying text. Gotanda also notes the racialized implications of “fully developed consensual citizenship” as well as a potential perpetual minority status for racial minorities in the popular vote, which could have greater implications, despite the military service benefits. See Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People” – A Review Essay on Citizenship without Consent*, 76 OR. L. REV. 233, 240–43, 240 n.31 (1997).

<sup>163</sup> According to the Central Intelligence Agency’s World Factbook, the following countries have compulsory military service: Algeria, Angola, Armenia, Austria, Azerbaijan, Belarus, Benin, Brazil, Cabo Verde, Cambodia, Chad, China, Colombia, Democratic Republic of the Congo, Côte d’Ivoire, Cuba, Cyprus, Denmark, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Finland, Georgia, Greece, Guinea-Bissau, Iran, Israel, North Korea, South Korea, Kyrgyzstan, Laos, Mali, Mexico, Moldova, Mongolia, Morocco, Mozambique, Niger, Norway, Paraguay, Qatar, Russia, São Tomé and Príncipe, Singapore, Somalia, South Sudan, Sudan, Sweden (abolished compulsory military service in 2010 but reinstated it in January 2018), Switzerland, Syria, Tajikistan, Thailand, Tunisia; Turkey, Turkmenistan, Ukraine, United Arab Emirates, Uzbekistan, and Vietnam. *Field Listing – Military Service Age and Obligation*, CIA: WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/military-service-age-and-obligation/> (last visited Feb. 5, 2021) [hereinafter World Factbook Military Service Age and Obligation].

<sup>164</sup> See *id.* For example, in Denmark, compulsory military service can be as short as four months. *Id.*

<sup>165</sup> See *id.*

<sup>166</sup> See Joshua Mitnick, *The Israel Defense Forces*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/the-israel-defense-forces/> (last visited Feb. 5, 2021). One possible description of Israeli citizenship is as “not merely a bundle of rights (or a ‘passive’ entitlement to membership in the body politic), [but] rather . . . an *active* practice epitomized in one’s military service and ultimate willingness to sacrifice one’s life for the nation.” Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 238 (1999).

a minimum of 24 months.<sup>167</sup> Several exemptions apply for religion,<sup>168</sup> Arab-Israelis,<sup>169</sup> and maternal status.<sup>170</sup> Penalties for draft avoidance range from two to five years in prison.<sup>171</sup>

In South Korea, men must, and women may, serve in the military.<sup>172</sup> Men are enlisted at the age of 18.<sup>173</sup> The length of mandatory service ranges from 18 to 24 months,<sup>174</sup> and is scheduled to be reduced

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<sup>167</sup> *Our Soldiers*, ISRAELI DEFENSE FORCES, <https://www.idf.il/en/minisites/our-soldiers/> (last visited Feb. 5, 2021); see Shachar, *supra* note 166, at 260 (describing mandatory military service as an obligation of Israeli citizenship such that there is a “profound connection between having full citizenship and the duty of military service”); Leah Kaufman, *We Want YOU: Constitutionality of Conscription in the United States and Israel*, 37 WHITTIER L. REV. 193, 204 (2016) (“[T]he majority of citizens in Israel consider military service an essential part of everyday life[.]”).

<sup>168</sup> Israel exempts from service ultra-Orthodox men who are studying the Torah full-time at a religious institution called a *yeshiva*. Shachar, *supra* note 166, at 259; Mitnick, *supra* note 166; Kaufman, *supra* note 167, at 219. However, the Israeli government has been trying to draft a law to change this exemption for some time, but the parties cannot agree on what should be done. See Judah Ari Gross, *IDF Thinks It Recruited 1,788 Ultra-Orthodox Men in 2018, but Isn't Sure*, TIMES OF ISR. (June 9, 2020 9:34 PM), <https://www.timesofisrael.com/idf-thinks-it-recruited-1788-ultra-orthodox-men-in-2018-but-isnt-sure/> (describing the challenges to Knesset-proposed bills under Israel’s equality laws). The exemption for ultra-Orthodox men is a large source of contention in Israel. Mitnick, *supra* note 166; RUTH LEVUSH, ISRAEL: MILITARY DRAFT LAW AND ENFORCEMENT 2–5 (2019), <https://www.loc.gov/law/help/military-draft/israel-military-draft.pdf> (illustrating the tumultuous legislative history of multiple draft deferment laws for yeshiva students); see generally Gary Schiff, *Is Haredi Refusal to Serve in the IDF Crippling Israeli Politics?*, ALGEMEINER (Feb. 4, 2020, 9:43 AM), <https://www.algemeiner.com/2020/02/04/is-haredi-refusal-to-serve-in-the-idf-crippling-israeli-politics/> (discussing multiple ultra-Orthodox, otherwise known as *haredi*, viewpoints towards military service). At least one scholar has argued that exempting ultra-Orthodox men and Arab-Israeli citizens from military service creates different “degrees of citizenship.” See Shachar, *supra* note 166, at 233 (exploring different power disparities between citizens that is either exacerbated or preserved by the connection between civic duty and military service).

<sup>169</sup> Israel exempts from mandatory military service Arab-Israelis under the guise of “the consideration that their military service might put them into a situation where they would be forced to engage in combat with relatives from neighboring Arab armies.” Mitnick, *supra* note 166.

<sup>170</sup> Women who have children or are pregnant are exempted from military service, and women who are married may choose to volunteer and participate in the military. Shachar, *supra* note 166, at 262–63 (“The duty of motherhood, it seems, takes precedence over women’s other citizenship duties, namely military service, if these obligations are deemed to be in direct conflict with each other.”). However, there is no similar exception for married men or men who have children. *Id.* at 263.

<sup>171</sup> LEVUSH, *supra* note 168, at 1.

<sup>172</sup> Military Service Act, art. 3(1), *translated in* Korea Legislation Research Institute’s online database, [https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do) (search required).

<sup>173</sup> *Id.* art. 8.

<sup>174</sup> Service terms vary among the military branches, and those terms are scheduled to decrease by 2022. Service in the army and marine corps will be reduced from 21 months to 18 months, service in the navy will be reduced from 23 months to 20 months, and service in the air force will be reduced from 24 months to 22 months. *South Korea to Reduce Length of Mandatory Military Service*, CHANNEL NEWS ASIA (July 28, 2018, 2:22 AM), <https://www.channelnewsasia.com/news/asia/south-korea-military-service-reduce-length-army-10569914> [hereinafter *South Korea Reduced Military Service*]; see also Yeo Jun-Suk, *S. Ko-*

along with the size of its military.<sup>175</sup> Penalties for evading enlistment include imprisonment for up to three years,<sup>176</sup> and even conscientious and religious objectors were punished with imprisonment for 18 months, until a 2018 court ruling declared the punishment unconstitutional.<sup>177</sup> Interestingly, a male born in the United States (which abides by *jus soli*) to South Korean (which abides by *jus sanguinis*) parents, is a dual citizen of the United States and South Korea at birth.<sup>178</sup>

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*rea Military Seeks to Cut Service Period to 18 Months*, KOREA HERALD (May 3, 2018), <http://www.koreaherald.com/view.php?ud=20180503000809> (explaining President Moon Jae-In's five-year plan to scale back mandatory service periods).

<sup>175</sup> “The military also plans to slash the total number of its forces from the current 618,000 active-duty troops to 500,000 by 2022, as well as cut the number of its generals from 436 to 360 . . . .” South Korea Reduced Military Service, *supra* note 174; *see also* Yeo, *supra* note 174 (explaining changes to South Korea’s armed forces proposed by President Moon Jae-In’s “Defense Scheme 2.0”). This reduction in size is due, at least in part, to a demographic shift caused by a low birth rate in South Korea. South Korea Reduced Military Service, *supra* note 174 (“South Korea seeks to streamline its military in the face of technological advancements, and demographic changes sparked by a low birth rate.”). “The number of men in their [twenties] in South Korea was 350,000 in 2017, but that number is expected to drop to between 220,000 and 250,000 by 2022 as the country’s decades-long low birthrate begins to bite. At the current rate, the pool of military servicemen is expected to shrink by 20 to 30,000 every year from 2023.” *Military Personnel*, GLOBALSECURITY, <https://www.globalsecurity.org/military/world/rok/personnel.htm> (last visited Feb. 5, 2021).

<sup>176</sup> Military Service Act, art. 88.

<sup>177</sup> Yonhap, *Supreme Court Approves Not-Guilty Verdict for 111 Conscientious Objectors*, KOREA HERALD (Feb. 13, 2020, 20:12), <http://www.koreaherald.com/view.php?ud=20200213000890> (“Since the 1950s, around 19,000 conscientious objectors, most of them associated with the Jehovah’s Witnesses, have been arrested and served jail terms of 18 months for rejecting conscription.”). In June 2018, South Korea’s Constitutional Court ruled that the Military Service Act was unconstitutional because it did not provide an alternative form of service for those who conscientiously objected to military service. Jo He-Rim, *[Feature] Conscientious Objectors Wait for Alternative Service as Legislators Remain Idle*, KOREA HERALD (Sept. 23, 2019, 17:40), <http://www.koreaherald.com/view.php?ud=20190923000705>. However, the new “alternative service” conscientious objectors must perform in lieu of serving in the military requires three years of “work in a jail or other correctional facility,” which is considerably longer than the required military service of 21 to 24 months. *South Korea: Alternative to Military Service is New Punishment for Conscientious Objectors*, AMNESTY INT’L (Dec. 27, 2019, 16:07), <https://www.amnesty.org/en/latest/news/2019/12/south-korea-alternative-to-military-service-is-new-punishment-for-conscientious-objectors/> (arguing that the alternative service option for conscientious objectors “‘does not respect their right to freedom of thought, conscience, religion or belief’” and thus violates their human rights).

<sup>178</sup> Such a dual citizen must choose one nationality—U.S. or South Korea—by the end of March of the year he turns 18. *Military Service*, CONSULATE GEN. OF REPUBLIC OF KOREA IN S.F., [http://overseas.mofa.go.kr/us-sanfrancisco-en/wpage/m\\_4775/contents.do](http://overseas.mofa.go.kr/us-sanfrancisco-en/wpage/m_4775/contents.do) (last visited Feb. 5, 2021). If he does not choose by this time, he may be subject to mandatory military service and cannot choose which citizenship he wants to keep until after he completes his service. *Id.* This happened to Young Chun, a Korean-American man, who was born and raised in the United States and moved to South Korea temporarily to teach English. Andrew Salmon, *Military Service a Must for Korean-Americans*, ASIA TIMES (Dec. 12, 2019), <https://asiatimes.com/2019/12/military-service-a-must-for-american-koreans/>. Chun tried to enlist in the U.S. Army at a U.S. base in South Korea, but he was stopped by the South Korean immigration authorities when he tried to leave the country. *Id.* Chun, despite barely speaking Korean when he was

Norway is the first country in Europe and NATO to include women in its mandatory conscription practice.<sup>179</sup> Not all men or women are required to serve, however. Every nineteen-year-old Norwegian must submit to the armed forces' physical examination and mental aptitude test.<sup>180</sup> Based on the test results of the approximately 60,000 potential recruits, the Norwegian military selects about 8,000–10,000 people to serve.<sup>181</sup> Compulsory service lasts 19 months.<sup>182</sup> Norway is “completely gender-blind” in assigning a conscript to a unit and permits women to serve in any military specialty.<sup>183</sup>

Thus, mandatory military service is not incompatible with democratic freedom. In the United States, since 1973, service in the U.S. military has been all voluntary.<sup>184</sup> Military service has not been compulsory, but all men must register with the Selective Service System (SSS).<sup>185</sup> Congress has the power to reinstate the draft if there is a national emergency.<sup>186</sup> If instated, those drafted must then report to serve in the U.S. military.<sup>187</sup> A reinstatement of the draft even under wartime circum-

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enlisted in the South Korean Army, was required to serve two years and was deployed to Afghanistan during his service. *Id.* Once Chun completed his service, he was forced to choose between keeping his U.S. or South Korean citizenship—he chose to keep his U.S. citizenship. *Id.*

<sup>179</sup> *Norway's Military Conscription Becomes Gender Neutral*, DEUTSCHE WELLE (Oct. 14, 2014), <https://www.dw.com/en/norways-military-conscription-becomes-gender-neutral/a-17995882>. Norway began drafting women both for gender equality and to reinforce its numbers for security purposes. *Conscription for Women in Norway*, DEUTSCHE WELLE (June 7, 2017), <https://www.dw.com/en/conscription-for-women-in-norway/av-36748146>.

<sup>180</sup> See Elisabeth Braw, *Norway's Gender-Neutral Draft*, WAR ON THE ROCKS (June 23, 2016), <https://warontherocks.com/2016/06/norways-gender-neutral-draft/>. Nineteen is the age of conscription in Norway. World Factbook Military Service Age and Obligation, *supra* note 163.

<sup>181</sup> See ANDERS DALAAKER, PERMANENT DELEGATION OF NOR. TO THE OSCE, STATEMENT BY NORWAY ON GENDER EQUALITY IN THE MILITARY – UNIVERSAL CONSCRIPTION (2017), <https://www.osce.org/files/f/documents/b/9/304861.pdf>; Braw, *supra* note 180.

<sup>182</sup> World Factbook Military Service Age and Obligation, *supra* note 163. Norway requires 12 months of initial service followed by four to five training periods thereafter. *Id.*

<sup>183</sup> Braw, *supra* note 180. The units have unisex bunks. *Id.*

<sup>184</sup> See KRISTY N. KAMARCK, CONG. RSCH. SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS 1 (Version 13 2020), <https://fas.org/sgp/crs/misc/R44452.pdf>. “The United States has used federal conscription at various times since the Civil War era, primarily in times of war, but also during peacetime in the aftermath of World War II.” *Id.*

<sup>185</sup> *Historical Timeline*, SELECTIVE SERV. SYS., <https://www.sss.gov/history-and-records/timeline/> (last visited Feb. 5, 2021). Men must register within 30 days of their eighteenth birthday. *Id.* The SSS collects the information of all men in the U.S. between the ages of 18 and 25 for use in the event of a draft. See KAMARCK, *supra* note 184, at 25, 28.

<sup>186</sup> *Selective Service*, USA.GOV, <https://www.usa.gov/selective-service> (last updated Apr. 13, 2020).

<sup>187</sup> *Id.*

stances may be unlikely, given how few congresspersons have actually served.<sup>188</sup> In the 116th Congress, less than 18% have served.<sup>189</sup>

Other than in times of war or armed conflict (in which we seem to be perpetually engaged), there would be many objections to mandatory military service in the United States;<sup>190</sup> other types of service might be more useful, and there might be more palatable ways to enhance the salience of democratic citizenship.<sup>191</sup> For instance, proposals have been made to require service as teachers (Teach for America), as well as tutoring disadvantaged children, building homes for low-income residents, or cleaning up natural disasters.<sup>192</sup> Retired Army Colonel William Raymond Jr. suggests four ways to fulfill an alternative national service obligation: (1) in the military, (2) through AmeriCorps (which includes helping the elderly and tutoring children, among other services), (3) Homeland Security, and (4) the Peace Corps.<sup>193</sup>

### B. Another Alternative: Universal Civic Duty Voting

Another option is a universal call to political participation, which can include voting as well as recognizing and encouraging other forms of political activity.<sup>194</sup> Though voting was not compulsory in ancient

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<sup>188</sup> See Neal Devins, *Bring Back the Draft?*, 19 GA. ST. U. L. REV. 1107, 1118–19, 1118 n.47 (2003) (stating that, at the time, only 35% of senators and 27% of representatives had ever served in the military (citing George C. Wilson, *Thinking About the Draft*, 35 NAT'L J. 121 (2003))).

<sup>189</sup> Leo Shane III, *Veterans in the 116th Congress, by the Numbers*, MIL. TIMES, <https://www.militarytimes.com/news/pentagon-congress/2018/11/21/veterans-in-the-116th-congress-by-the-numbers/> (last updated Dec. 18, 2018).

<sup>190</sup> See Doug Bandow, *Mend, Never End, the All-Volunteer Force*, 44 ORBIS 463, 463–64 (2000); Devins, *supra* note 188, at 1122; Diane H. Mazur, *Why Progressives Lost the War when They Lost the Draft*, 32 HOFSTRA L. REV. 553, 555 (2003). “There currently appears to be a widespread general consensus among politicians, military leaders and academics that the military draft is no longer a viable policy option for the United States in the twenty-first century.” Col. William M. Raymond Jr., *Uncle Sam Says, “I Want You!” – The Politics of the Draft and National Service iii* (May 26, 2005) (unpublished manuscript) (on file with the Defense Technical Information Center).

<sup>191</sup> See Raymond, *supra* note 190, at 34, 50; Devins, *supra* note 188, at 1121.

<sup>192</sup> See Paul Glastris, *First Draft: The Battle to Create Universal National Service Has Just Started. Here's How It Can Be Won*, 35 WASH. MONTHLY 11, 13 (2003).

<sup>193</sup> Raymond, *supra* note 190, at 48.

<sup>194</sup> Dalton, *supra* note 5, at 21.

Rome<sup>195</sup> and ancient Greece,<sup>196</sup> more than 20 countries currently use compulsory voting,<sup>197</sup> requiring all of their citizens to participate in elections with few exceptions.<sup>198</sup> Most have low penalties for non-compliance.<sup>199</sup>

In the United States, there has been some debate about whether compulsory voting could or should be implemented.<sup>200</sup> A national move-

<sup>195</sup> In the Roman Republic, the one-citizen, one-vote system was not recognized. See Robert A. Dahl et al., *Democracy: The Roman Republic*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/democracy/The-Roman-Republic> (last updated Feb. 19, 2020); Valentina Arena, *Elections in the Late Roman Republic: How Did They Work?*, BBC: HISTORYEXTRA (June 15, 2018, 1:05 PM), <https://www.historyextra.com/period/roman/elections-in-the-late-roman-republic-how-did-they-work/>; N.S. Gill, *How the Romans Voted in the Roman Republic*, THOUGHTCO., <https://www.thoughtco.com/how-romans-voted-in-roman-republic-120890> (last updated July 29, 2019). Instead, Rome was separated into voting units, and if the majority of citizens in a unit voted one way, that unit was deemed to have voted that way, and the majority of units determined the outcome of the vote. Valentina Arena, *supra*; Dahl et al., *supra*.

<sup>196</sup> In ancient Greece, participation in politics was encouraged, and, for some time, attendance at political assemblies was compensated to reimburse citizens who participated, but voting was never made mandatory. See Mark Cartwright, *Athenian Democracy*, ANCIENT HIST. ENCYC. (Apr. 3, 2018), [https://www.ancient.eu/Athenian\\_Democracy/](https://www.ancient.eu/Athenian_Democracy/); N.S. Gill, *Myth vs. Fact: Were All Ancient Greeks Required to Vote?*, THOUGHTCO., <https://www.thoughtco.com/were-ancient-greeks-required-to-vote-118831> (last updated July 19, 2018). For information on how men voted in ancient Greece, see generally Alan L. Boegehold, *Toward a Study of Athenian Voting Procedure*, 32 HESPERIA: J. AM. SCH. CLASSICAL STUD. ATHENS 366 (1963).

<sup>197</sup> Elzbieta Kuzelewska, *Compulsory Voting in Belgium. A Few Remarks on Mandatory Voting*, 20/A BIALOSTOCKIE STUDIA PRAWNICZE 37, 38 (2016). It should be noted that compulsory voting is a bit of a misnomer as compulsory voting laws do not tend to require a person to actually cast a valid ballot. See *id.* at 45. A person may submit an invalid ballot or a blank ballot and not be subject to any penalty. See *id.* at 45–46.

<sup>198</sup> See *Field Listing - Suffrage*, CIA: WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/suffrage/> (last visited Feb. 5, 2021) [hereinafter World Factbook Suffrage]. According to the Central Intelligence Agency's World Factbook, countries that have compulsory voting include Argentina, Australia, Belgium, Bolivia, Brazil, the Democratic Republic of the Congo, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Honduras, North Korea, Luxembourg, Mexico, Nauru, Paraguay, Peru, Singapore, Thailand, and Uruguay. *Id.*

<sup>199</sup> See WORKING GROUP ON UNIVERSAL VOTING, LIFT EVERY VOICE: THE URGENCY OF UNIVERSAL CIVIC DUTY VOTING 20 tbl.2 (2020), [https://www.brookings.edu/wp-content/uploads/2020/07/Br\\_LIFT\\_Every\\_Voice\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2020/07/Br_LIFT_Every_Voice_final.pdf). The report suggests incentive-based systems, recognizing that paying for votes is illegal under current law. *Id.* at 21, 28. The conveners studied lessons from abroad including the Australian model that achieves more than 90% voter turnout with a penalty for nonvoters that does not exceed the equivalent of \$14 USD. See *id.* at 17, 20. Most of the penalties, like Australia's, are rated "low" or "medium" in severity, although a few countries have "high" severity penalties for non-voting. See *id.* at 20 tbl.2.

<sup>200</sup> Some scholars argue that the United States should implement compulsory voting. See Eric Lund, Comment, *Compulsory Voting: A Possible Cure for Partisanship and Apathy in U.S. Politics*, 31 WIS. INT'L L.J. 90, 92 (2013); Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 592–93 (2007); Sean Matsler, *Compulsory Voting in America*, Note, 76 S. CAL. L. REV. 953, 955 (2003). However, other scholars argue that compulsory voting should not be implemented in the United States. See Ihaab Syed, *How Much Electoral Participation Does Democracy Require? The Case for Minimum Turnout Requirements in Candidate Elections*, 66 UCLA L. REV. 2024, 2066, 2074 (2019) (arguing that minimum turnout requirements should be implemented to increase voter turnout and argues against



ment was recently launched to begin the process of adopting at the local level, a universal civic duty mandate.<sup>201</sup> A working group prepared the “Lift Every Voice Report,” which presents aspirational proposals toward inculcating a notion of civic responsibility voting.<sup>202</sup> Civic responsibility voting means mandatory attendance at the polls (or filling out an absentee or mail-in ballot); it does *not* require that a vote be cast for any particular person or party.<sup>203</sup>

### 1. Compulsory Voting in Other Countries

Of the more than 20 countries with some form of mandatory voting, voting is considered “a right but also an obligation.”<sup>204</sup> Some concessions are made, allowing voluntary voting for those at both ends of the age spectrum.<sup>205</sup> Each country enforces it differently,<sup>206</sup> and some coun-

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compulsory voting in the United States as an effective response to low voter turnout); Michael J. Pitts, *Opt-Out Voting*, 39 HOFSTRA L. REV. 897, 897–98, 913 (2011) (arguing that compulsory voting is “draconian” and that “opt-out voting,” whereby registered voters by default would vote for a particular candidate and could choose to opt out of such vote, would be a superior method to increase voter turnout in the United States). In 2015, President Obama mentioned the idea of implementing compulsory voting in the United States, which received mixed responses from politicians. See Jesse Byrnes, *Obama’s Mention of Mandatory Voting Stirs Activists*, THE HILL (Mar. 22, 2015, 8:00 AM), <https://thehill.com/homenews/administration/236517-obamas-mention-of-mandatory-voting-stirs-activists>. Some states, while not going as far as compelling participation in elections, have recently begun automatically registering people to vote. See Gavin Rynard, *How to Unlock the Voting Block: Oregon’s Sweeping Solution to Poor Voter Turnout: Automatic Registration*, 24 U. MIA. INT’L & COMP. L. REV. 517, 519 (2017). As of January 2021, the following 19 states and the District of Columbia have either implemented or enacted legislation to implement automatic voter registration: Alaska, California, Colorado, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Nevada, Oregon, Rhode Island, Vermont, Virginia, Washington, and West Virginia. *Automatic Voter Registration*, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> (last updated Jan. 4, 2021).

<sup>201</sup> See WORKING GROUP ON UNIVERSAL VOTING, *supra* note 199, at 52.

<sup>202</sup> *Id.* at 6.

<sup>203</sup> See *id.* at 7. The Lift Every Voice Report explains why higher turnout should be a priority and demonstrates the change in voter turnout across demographic characteristics between the 2014 and 2018 midterm elections. *Id.* at 11, 13 tbl.1.

<sup>204</sup> *E.g.*, *Voting in Luxembourg*, JUST ARRIVED, <https://www.justarrived.lu/en/administrative-procedures/voting-luxembourg/> (last visited Feb. 5, 2020). Any citizen over 18 years old residing in Luxembourg is automatically registered to vote. *Id.* If a person abstains from voting in an election, she may be penalized with a fine between \_100 to \_1,000. *Id.*

<sup>205</sup> For example, in Argentina, voting is compulsory for those between eighteen and seventy years old. World Factbook Suffrage, *supra* note 198; see SARAH BIRCH, FULL PARTICIPATION: A COMPARATIVE STUDY OF COMPULSORY VOTING 12 (2009). Voting is voluntary for sixteen- and seventeen-year-olds and those over seventy years old. World Factbook Suffrage, *supra* note 198; see BIRCH, *supra*. Similarly, in Ecuador, voting is only compulsory for those between eighteen and sixty-five years old but is voluntary for sixteen- and seventeen-year-olds and those over 65 years old. World Factbook Suffrage, *supra* note 198.

<sup>206</sup> For example, in Luxembourg, non-voters face potential fines as high as \_1,000 for repeat offenders. See *Voting in Luxembourg*, *supra* note 204. While in Brazil, a non-voter may be fined a small amount—between one to three Brazilian reals (approximately \$0.50 to

tries do not have any sanctions for non-voters.<sup>207</sup> Of those who do, many impose fines,<sup>208</sup> while others limit or remove a non-voter's rights to civic participation,<sup>209</sup> withhold salary,<sup>210</sup> or imprison them.<sup>211</sup> Sanctions are not regularly enforced in many countries.<sup>212</sup>

In 1893, Belgium introduced compulsory voting and was perhaps the first country to do so in the modern era.<sup>213</sup> Previously, eligible voters were men over 25 who paid property taxes.<sup>214</sup> Compulsory voting there requires being present at the polling location; there is no requirement to actually cast a vote.<sup>215</sup> If a person does not show up to vote in an election, she must later appear before a magistrate to explain the absence

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\$1.65)—but repeat offenders can be barred from working in the public sector, have their government paychecks withheld, or be barred from receiving an identification card or passport. See Timothy J. Power, *Compulsory for Whom? Mandatory Voting and Electoral Participation in Brazil, 1986–2006*, 1 J. POL. LATIN AMERICA 97, 107 (2009).

<sup>207</sup> For example, Costa Rica, the Dominican Republic, Greece, Honduras, Mexico, and Panama all have compulsory voting, but they do not have sanctions to enforce it. Lauren Liebhaber, *Countries That Have Mandatory Voting*, STACKER (Sept. 13, 2019), <https://thes-tacker.com/stories/3485/countries-have-mandatory-voting#1>. In 2000, Greece eliminated sanctions for failure to vote. *Id.* Before that time, non-voters were prevented from obtaining a passport, license, or occupational license. *Id.*

<sup>208</sup> There is a wide range of fines: In Schaffhausen, Switzerland, the fine for not voting is three Swiss francs; in Belgium, the first instance of non-voting is fined \_25–50 and the second instance is fined \_50–125; in Luxembourg, if a person repeatedly does not vote, fines can be as high as \_1,000. BIRCH, *supra* note 205, at 8.

<sup>209</sup> In Belgium, if a person does not vote in four elections over 15 years, that person is removed from electoral rolls for 10 years, and she may not cast a vote during that time period. *Id.* In Singapore, if a person does not vote, her voting rights are removed, and she must pay a fine in order to reinstate such rights. *Id.* Other countries, such as Argentina, Bolivia, Brazil, Singapore, and Thailand, do not allow a person who did not vote to run as a candidate in later elections. *Id.* at 9.

<sup>210</sup> In Bolivia, after a person votes, she is given a card as proof of participation and upon her inability to produce such card during the three months following an election, she will be barred from receiving her salary from the bank. Liebhaber, *supra* note 207.

<sup>211</sup> Imprisonment for non-voting is rare, but it does happen, albeit generally for short durations. See BIRCH, *supra* note 205, at 9–10. In Australia, if a person does not vote and refuses to pay the fine, she may be imprisoned. *Id.* After the 1993 election, 43 people who did not vote were sentenced to one to two days in prison. *Id.* at 10.

<sup>212</sup> For example, in Luxembourg, the last time a person was actually sanctioned for not voting was in the 1960s. *Is Voting in Luxembourg Really Compulsory?*, LUX. TIMES (May 23, 2014), <https://luxtimes.lu/archives/17075-is-voting-in-luxembourg-really-compulsory>.

<sup>213</sup> Liebhaber, *supra* note 207.

<sup>214</sup> See Kuzelewska, *supra* note 197, at 39. In 1893, compulsory voting was initiated nationwide, and property ownership was dropped as a requirement for voting. *Id.* However, in the early days of compulsory voting “[f]athers and landowners, as well as higher education diploma holders, were privileged in the number of votes they had[,]” getting two to three votes in each election. *Id.* Eventually, the one-person (at the time, one-man) one-vote method was implemented. *Id.* at 41. In 1948, women gained the ability to vote in Belgium and compulsory voting rules were extended to them. *Id.* at 39–41. In 2004, Belgium extended the right to vote in local elections to non-citizens who have lived in Belgium for at least five years. *Id.* at 42–43.

<sup>215</sup> *Id.* at 45. A person need only show up to the polls, register, and may then leave without even casting a ballot. *Id.* at 43 (“According to Belgian law, voters are required to turn

(such as illness) and provide any required documentation (such as a doctor's note).<sup>216</sup> Fines range from €5–150.<sup>217</sup> Repeated failures to vote may result in temporary removal from the electoral rolls.<sup>218</sup>

In 1924, Australia also mandated national compulsory voting.<sup>219</sup> Since then, Australia's voter turnout has averaged around 95%.<sup>220</sup> The fine for non-voters is approximately AUD 20,<sup>221</sup> which currently equates to around \$15.<sup>222</sup> The fines are waived if the non-voter provides a valid and sufficient reason, such as "illness, having to save a life, natural disasters or car crashes."<sup>223</sup> Not paying the fine may result in more extreme punishment, including a brief jail sentence.<sup>224</sup>

Luxembourg has compulsory voting<sup>225</sup> and exempts from mandatory voting those over seventy-five and "people who can not [sic]

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up at a polling station and confirm their identity to the members of the electoral commission. They do not have to mark the ballot paper in any way.")

<sup>216</sup> See *id.* at 43.

<sup>217</sup> *Id.*

<sup>218</sup> CODE ELECTORAL, art. 210; Liebhaber, *supra* note 207. A person who does not vote at least four times in 15 years is taken off the electoral register for 10 years, and they may not be nominated or hold public office. Kuzelewska, *supra* note 197, at 43. This is an especially important sanction in Belgium because about 16% of its citizens are employed in the public sector. *Id.*

<sup>219</sup> AUSTRALIAN INSTITUTE OF GOVERNMENT, *COMPULSORY VOTING: ENSURING GOVERNMENT OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE 1* (2019), <https://australianinstitute.org.au/wp-content/uploads/2020/12/P691-Compulsory-voting-briefing-note-WEB.pdf>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 2. This 20 AUD fine is at the federal level; states and territories also enforce 1 fines for abstention from voting. *Id.* at 3–4. These state and territory fines range from 20 to 126 AUD. *Id.* at 4 fig.3.

<sup>222</sup> 20 AUD Conversion to USD, MYCURRENCYTRANSFER.COM, <https://www.mycurrencytransfer.com/currency-converter/AUD-to-USD/> (enter "20" in the "Amount" field under "Converting From").

<sup>223</sup> Adrianna Zappavigna, *Federal Election 2019: What Happens if You Don't Vote?*, NEWS.COM.AU (May 19, 2019, 9:42 AM), <https://www.news.com.au/national/federal-election/federal-election-2019-what-happens-if-you-dont-vote/news-story/daa05114821daf73288bf0cd422755eb/>.

<sup>224</sup> *Electoral Backgrounder: Compulsory Voting*, AUSTRALIAN ELECTORAL COMMISSION, [https://www.aec.gov.au/about\\_aec/publications/backgrounders/compulsory-voting.html/](https://www.aec.gov.au/about_aec/publications/backgrounders/compulsory-voting.html/) (last updated Apr. 4, 2019). If a non-voter does not pay the 20 AUD fine, then she must provide a valid and sufficient reason. See *id.* The Australian Electoral Commission determines if a reason for not voting is valid and sufficient. Zappavigna, *supra* note at 223. Then, a "court may take further action" that "may involve community service orders, seizure of goods, or a short period in jail." *Electoral Backgrounder: Compulsory Voting*, *supra*.

<sup>225</sup> See *Voting in Luxembourg*, *supra* note 204.

vote for professional reasons.”<sup>226</sup> Fines range from \_100–1,000<sup>227</sup> but are not regularly enforced.<sup>228</sup>

More than half of the nations with compulsory voting are located in Latin America.<sup>229</sup> Since 1988, Brazil has been the country with the largest eligible voting pool to compel voting,<sup>230</sup> which applies to those between 18 and 70 years old.<sup>231</sup> Non-voters must appear before a “Tribunal Regional Eleitoral” judge within sixty days.<sup>232</sup> In 2006, fines ranged from BRL 1.06 to BRL 3.51, although the judge has discretion to multiply the fine by up to a factor of 10.<sup>233</sup> The more severe sanctions for non-voting attach to repeated violations and can include losing eligibility for government identification (like passports) and government employment.<sup>234</sup> That loss of eligibility also means one cannot enroll in a public school or university nor engage in some banking and other business opportunities.<sup>235</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*; see also *Luxembourg: Parliamentary Elections*, NORSK SENTER FOR FORSKNINGSDATA, [https://nsd.no/european\\_election\\_database/country/luxembourg/parliamentary\\_elections.html/](https://nsd.no/european_election_database/country/luxembourg/parliamentary_elections.html/) (last visited Feb. 5, 2021) (“Failure to vote is punishable by a fine of between 100 and 250 euros. In case of repeated abstention over a period of five years, the fine can increase to between 500 and 1,000 euros and citizens risk having their names removed from the voters’ roll.”). The last time a person was fined for not voting in Luxembourg was in the 1960s. *Is Voting in Luxembourg Really Compulsory?*, *supra* note 212.

<sup>228</sup> See *Is Voting in Luxembourg Really Compulsory?*, *supra* note 212.

<sup>229</sup> Power, *supra* note 206, at 98; see also Shane P. Singh, *Beyond Turnout: The Consequences of Compulsory Voting*, POL. STUD. ASS’N (Oct. 1, 2014), <https://www.psa.ac.uk/psa/news/beyond-turnout-consequences-compulsory-voting/> (“Today, compulsory voting is widespread in Latin America, with 14 countries currently making voting obligatory.”). The Latin American countries with compulsory voting include Argentina, Bolivia, Brazil, Costa Rica, Ecuador, Honduras, Panama, Paraguay, Peru, and Uruguay. See *Compulsory Voting*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting/>. Four other countries in Latin America recently abandoned compulsory voting: Chile (in 2012), the Dominican Republic (in 2010), Venezuela (in 1993), and Guatemala (in 1990). *Id.*

<sup>230</sup> See Power *supra* note 206, at 98.

<sup>231</sup> *Id.* People who are 16 and 17 years old, over 70 years old, or illiterate are exempt from compulsory voting. *Id.*

<sup>232</sup> *Id.* at 106. There, they must provide a reason for not voting and present any required written records of proof. *Id.* Accepted documentation includes doctor’s notes or travel documents showing that the non-voter was not in the electoral district at the time of the election; however, memos from private sector employers do not suffice because there is no exemption for private sector workers from compulsory voting. *Id.* at 106–07.

<sup>233</sup> *Id.* at 107. Such increase in fine is based on unusual circumstances and the person’s ability to pay. *Id.*

<sup>234</sup> *Id.* For instance, if a person does not vote in three consecutive elections, she can have her voter registration card canceled. *Id.* Without such card, the non-voter cannot hold any form of government employment; if employed by the government already, she could have her pay withheld for a month. *Id.*

<sup>235</sup> *Id.* Other limitations include an inability to obtain credit at a state-owned bank, an inability to do business with a state or parastatal enterprise, and an inability to participate in any activity that would require proof of military service or payment of income taxes. *Id.*; see

## 2. Constitutional Challenges to a Universal Voting Mandate

The next question is whether a civic duty voting requirement would be constitutional. Such a mandate may not be considered an unconstitutional regulation of expressive conduct because participating in an election is not inherently expressive.<sup>236</sup> As long as the speaker does not have an intent to convey a particular message by voting, (such as “I approve of democracy”) and that message would not be understood to be meant by the speaker (e.g., when I see you vote, it’s as if I hear you saying, “I approve of democracy” or “I respect the two-party system”), then it would not violate free speech rights.<sup>237</sup> Having a “none of the above” (NOTA) option further supports this point.

We also need to consider the potential implications of compelled speech. The current U.S. Supreme Court might consider compulsory appearance at the polling place or submission of a ballot (even if the only marking on it says “none of the above”) to be compelled speech.<sup>238</sup> However, it is unlikely to do so,<sup>239</sup> because as long as there is an opportunity for conscientious (or other moral objections under the latest Supreme Court precedent in *Little Sisters of the Poor*),<sup>240</sup> the mandate, like for the decennial Census forms,<sup>241</sup> could be permissible.<sup>242</sup> In addition, disclo-

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also Singh, *supra* note 229 (“Nonvoters are also barred from making banking transactions in neighbouring Bolivia and Peru.”).

<sup>236</sup> WORKING GROUP ON UNIVERSAL VOTING, *supra* note 199, at 25. Government regulations of expressive conduct can violate the First Amendment of the U.S. Constitution.

<sup>237</sup> See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” (citing *Spence v. Washington*, 418 U.S. 405, 410–11 (1974))).

<sup>238</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”).

<sup>239</sup> See WORKING GROUP ON UNIVERSAL VOTING, *supra* note 199, at 25–26, 58 n.62 (citing Matsler, *supra* note 200, at 972) (noting that while some may claim that attending an election amounts to a form of speech, this “anarchist” argument has been rejected along the same lines as compulsory jury duty and selective service registration).

<sup>240</sup> See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84, 2386 (2020).

<sup>241</sup> See U.S. Const. art. I, § 2, cl. 3. (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”)

<sup>242</sup> See Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013) (cited in WORKING GROUP ON UNIVERSAL VOTING, *supra* note 198, at 27). United States Code Title 13 provides authority for the Census, governs its processes, and requires a response by law. See 13 U.S.C. §§ 2, 21, 141, 221, 224 (2018). Section 221 requires everyone living in the United States to answer the questions on the Census. See 13 U.S.C. § 221. The mailed census form is followed by direct contact if not responded to. See *How We Conduct Our Surveys*, U.S. CENSUS BUREAU, <https://>

asures for Internal Revenue Service forms and traffic stops have been upheld,<sup>243</sup> which support a similar result for voter information. Financial penalties, of not more than \$100, can attach to those who willfully fail to respond.<sup>244</sup> Of course, the appearance-at-the-polls requirement would have to be modified during the COVID-19 crisis to permit absentee or mail-in ballots.

### 3. Will Voters Choose Mandatory Voting?

Currently, in the United States, most voters surveyed do not support this idea of universal civic duty voting, while the level of support ranges among various age groups, political parties, ideologies, genders, and races.<sup>245</sup> The only category for which a majority supported civic duty voting was those who consider themselves as “very liberal.”<sup>246</sup> Nevertheless, the majority of almost every demographic group believed that voting is both a right and a duty.<sup>247</sup>

Specific objections focus on liberty and on disparate effects of enforcement penalties. To address these concerns, proponents of universal civic duty voting suggest starting small in local, municipal, and county elections experimentally to test their recommendations on the ground (or in the mailrooms during the COVID-19 health crisis).<sup>248</sup>

The Lift Every Voice Report concludes with eight policy recommendations to begin the process of implementing their proposal:

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[www.census.gov/programs-surveys/surveyhelp/we-conduct-surveys.html](http://www.census.gov/programs-surveys/surveyhelp/we-conduct-surveys.html) (last updated Oct. 16, 2020). If the person refuses or neglects to answer questions, they shall be fined up to \$100. See 13 U.S.C. § 221. Note that the Sentencing Reform Act of 1984 has increased fines for misdemeanors up to \$5,000. See 18 U.S.C. § 3571(b)(6). In practice, it appears that no one has been prosecuted for failing to respond to the Census since 1970. See *A Boycott of the 2020 Census Could Be Costly*, AM. BAR ASS'N, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/a-boycott-of-the-2020-census/> (last visited Jan. 17, 2021). Since 2000, the Census Bureau has also conducted the American Community Survey (ACS) annually. U.S. CENSUS BUREAU, *AMERICAN COMMUNITY SURVEY: INFORMATION GUIDE 1* (2017). The Bureau claims authority under Title 13, but its ability to compel response has not been tested judicially. See 13 U.S.C. § 2; *Dep't of Com. v. New York* 139 S. Ct. 2551, 2566 (2019) (“The text of [the Enumeration Clause] ‘vests Congress with virtually unlimited discretion in conducting the decennial “actual Enumeration.”’ and Congress ‘has delegated its broad authority of the census to the Secretary.’” (citing *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996))).

<sup>243</sup> Michael Lewyn, *In Defense of the American Community Survey*, 18 CONN. PUB. INT. L.J. 109, 123 & nn. 104–05 (2019). Lewyn also addresses the argument that the Census Bureau cannot authorize data collection for purposes other than apportionment. *Id.* at 127–28. Compelled disclosure of religious affiliation was halted by Congress in 2018. 13 U.S.C. § 221(c) (2018).

<sup>244</sup> 13 U.S.C. § 221(a) (2018).

<sup>245</sup> WORKING GROUP ON UNIVERSAL VOTING, *supra* note 199, at 32, 34 tbl.4.

<sup>246</sup> *Id.* at 35.

<sup>247</sup> *Id.* at 33 tbl.3.

<sup>248</sup> See *id.* at 49. The Lift Every Voice Report also lists what state, city, county, and town governments should do as well as what community members, businesses, and organizations can do to promote their proposal. *Id.* at 52–53.

- (1) Universal civic duty voting should be applicable for all major general elections but not for party primaries.<sup>249</sup>
- (2) The voting requirement should be enforced through a small fine for not voting—no more than \$20.<sup>250</sup>
- (3) Jurisdictions should consider creating incentives for voting for eligible citizens.<sup>251</sup>
- (4) An official or agency should be designated with the responsibility to design and implement a program at the appropriate level of government.<sup>252</sup>
- (5) Legislation should be carefully tailored to ensure access for all communities and protect against misuse or unintended negative consequences.<sup>253</sup>
- (6) All levels of government must dramatically expand funding for an election administration.<sup>254</sup>
- (7) Election officials should conduct extensive and energetic public education.<sup>255</sup>
- (8) School should expand civil civics education.<sup>256</sup>

#### CONCLUSION: MODIFYING THE PATH TO MORE MEANINGFUL CITIZENSHIP

Some believe citizenship should be a matter of choice.<sup>257</sup> Others suggest that a consent-based notion of citizenship<sup>258</sup> that permits renun-

<sup>249</sup> *Id.* at 49.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* In addition, the administration of voting should maintain accurate voting lists and have adequate funding—both of which are unlikely to occur given the current and anticipated future financial crises. *See id.* at 47.

<sup>253</sup> *Id.* at 50. The Life Every Voice Report stresses the “urgency of complementary reforms” which include expanding opportunities to register through same-day voter registration, automatic voter registration, online registration, preregistration of high school students, and restoring the right to vote for citizens with felony convictions. *Id.* at 43–45. In addition, the report recommends expanding options for voting by allowing early voting, allowing voting by mail, and conveniently placing accessible precincts and voting centers. *Id.* at 45–47.

<sup>254</sup> *Id.* at 50.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 51.

<sup>257</sup> *See generally* Rogers M. Smith, *The Meaning of American Citizenship*, THIS CONST.: A BICENTENNIAL CHRON. (D.C.), Fall 1985, at 12 (describing the difference between liberal, Republican, and nativist conceptions of citizenship and the various combinations and influences that have pervaded at different times in American society). Smith explains that the liberal conception conceives of citizenship as “a matter of choice, not inheritance or prescription, and as involving at root only a duty to abide by the laws of regimes in which human rights are honored and a multitude of private and public activities flourish.” *Id.*

<sup>258</sup> *See e.g.*, Gotanda, *supra* note 162, at 239–40 (analyzing Peter H. Schuck and Rogers M. Smith’s argument for consent-based citizenship in their book entitled *Citizenship Without Consent: Illegal Aliens in the American Polity*). Gotanda notes that the “customary division of citizenship laws into *jus soli* (place of birth) or *jus sanguinis* (blood line)” are ascriptive,

ciation to avoid certain obligations can enhance the allegiance of those who remain.<sup>259</sup> Still others advocate for a privilege-based notion that returns to the Roman concept of conferring citizenship in exchange for military service or service to the nation through the Peace Corps.<sup>260</sup>

Another option is dual citizenship, which ancient Rome permitted.<sup>261</sup> It would accommodate immigrants who wish to maintain their other birth country identities,<sup>262</sup> but also invites criticism of divided loyalties.<sup>263</sup>

Those who seek to become citizens, who take the citizenship test and apply for naturalization, are required to know more about American history than our average citizen who has the status simply through the entitlement of *jus soli* or birthplace.<sup>264</sup> And yet, citizenship tests reveal

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“which derive[ ] status from external circumstances” rather than consensual principles. *Id.* at 239. Schuck and Smith argue for a concept of mutual consent both by the government and the governed. *Id.* at 240. And thus, under their proposal, Congress would set the rules—such as residency requirements—and the individual would be free to accept or reject citizenship on those terms. *Id.* Gotanda notes that if citizenship were fully consensual through a majority of Congress, then that “combined with majoritarian democratic principles, would raise the possibility of majority discrimination against an unpopular minority.” *Id.*

<sup>259</sup> See *id.* at 241. For instance, Schuck and Smith argue that a renunciation option would have made a difference during the Vietnam War, if young men were permitted to renounce their citizenship and then expatriate themselves by heading to Canada; they argue that the United States might have had a better time claiming the allegiance of those who remained and did fight. See *id.* Gotanda notes that Schuck and Smith omit any mention of the Renunciation Act of 1944, which offered “voluntary expatriation” to Japanese-Americans. *Id.* at 242.

<sup>260</sup> See *supra* note 193 and accompanying text.

<sup>261</sup> See SHERWIN-WHITE, *supra* note 51, at 295.

<sup>262</sup> See 2005 Hearing, *supra* note 109, at 72. Peter Spiro, Associate Dean and Professor at the University of Georgia School of Law, testified that “[d]ual citizenship is an almost entirely benign phenomenon.” *Id.* Spiro then explains that

[i]f “hyphenated Americans” can undertake such political action without threatening our system, surely the system can absorb the political empowerment of “ampersand Americans,” nor would the maintenance of origin nationality retard the cultural assimilation of new Americans. In the contemporary context, dual citizenship has emerged as a way of expressing one’s continuing homeland identity. Maintaining alternate Italian or Irish citizenship is akin to membership in the Knights of Columbus or the order of the Hibernians. It has become a way of saying who we are.

*Id.* at 73.

<sup>263</sup> *Id.* at 54 (“Are we a ‘nation of assimilated immigrants’ or are we a nation, whose citizens have divided political loyalties?”). Dr. Renshon’s testimony in the 2005 congressional hearing admits that people can have multiple attachments, as he testified that dual citizenship “leads to conflicts of interest, attention and, most importantly, attachment.” *Id.* at 7–8 (statement of Dr. Stanley A. Renshon, Professor, CUNY Graduate Center). Another witness testified that “[w]e are a civic, not an ethnic nation. American citizenship is not based on belonging to a particular ethnicity, but on political loyalty to the American democracy.” *Id.* at 33 (testimony of John Fonte, Senior Fellow, The Hudson Institute).

<sup>264</sup> See *National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test*, WOODROW WILSON NAT’L FELLOWSHIP FOUND. (Oct. 3, 2018), <https://woodrow.org/news/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/>.



implicit biases,<sup>265</sup> focusing on the important contributions of white immigrants and discounting those of indigenous peoples and immigrants of color.<sup>266</sup> While citizenship principles need not exclude people of color from the community, the current approach is not as welcoming to these enthusiastic would-be citizens.<sup>267</sup>

Most would-be citizens make the application because they wish to vote, they wish to continue living in the United States, or they love the United States.<sup>268</sup> These naturalizing citizens want to participate in the life of the polity.<sup>269</sup>

But racialized identity in ancestry also impacts belonging.<sup>270</sup> Race, ethnicity, and immigrant status impact the use and enjoyment of citizen-

<sup>265</sup> Park notes that “[a] close reading of the citizenship test items themselves reveal that, while seemingly neutral on their face, the questions reflect deep-seated assumptions about citizenship: who can be citizens, who is excluded, what the applicant acquires and must give up in becoming a U.S. citizen, and what historical legacy citizens share.” Park, *supra* note 42, at 1002.

<sup>266</sup> See *id.* at 1022–23. Immigrants (other than the Founders and those from England) are hardly mentioned in the citizenship exam. See *id.* at 1020. Non-white minorities are largely excluded as well. See *id.* at 1022–23. Park concludes that while the citizenship test purports to be based on a universalist ideology, it “actually masks an exclusionary construct that alienates the immigrant and the ethnic other from a privileged circle of white citizenship. The error is not in upholding a principle-based citizenship, but rather, in assuming that a principle-based citizenship is incompatible with being black, Hispanic, or Asian—that is, anything but white.” *Id.* at 1030–31.

<sup>267</sup> See *id.* Gordon and Lenhardt discuss Judith Shklar’s book, *American Citizenship*, and the “conception of ‘citizenship as standing,’ which [Shklar] roots in two activities: voting and earning.” Jennifer Gordon & Robin A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493, 2513 (2007). Gordon and Lenhardt suggest a “constructive joint exploration that draws on the insights of both immigration and Critical Race scholarship [that] would be conducted through a perspective that . . .” among other things, recognizes the importance of globalization and migratory patterns, the unique struggles of African Americans in the United States, the tension between domestic concepts of citizenship bounded in nation, and also the intersection of identities. See *id.* at 2515–16.

<sup>268</sup> See Jonathan Weinberg, *The End of Citizenship?*, 107 *MICH. L. REV.* 931, 937 (2009) (“[T]he top three reasons would-be citizens gave, in anonymous surveys, as to why they were seeking citizenship were, ‘I want to vote’ (86.6%); ‘I plan to live in the United States for the rest of my life’ (83.9%); and ‘I love the United States’ (73.6%). Only about 44% offered ‘I want to help my relatives come to the United States,’ and only about 27% ‘I am afraid I will lose government services.’”). Weinberg also notes that we should prefer “criteria for citizenship to be rule bound rather than standards based.” *Id.* at 940.

<sup>269</sup> See *id.* In advocating for a principle-based citizenship, Park explains that equality is a basis for citizenship. *Id.* at 1007. The tension between concepts of citizenship is between “universalism and boundedness.” *Id.* at 1007–08 (relying upon the writings of Aristotle, John Stuart Mill, John Locke, and Alexis de Tocqueville).

<sup>270</sup> See *supra* Part I.C.4. Ngai discusses the concept of alien citizenship, which seems like a racialized misnomer that is actually expressed in laws and official policies. See generally Ngai, *supra* note 150, at 2521 (describing the relationship between juridical and cultural citizenship and the notion of citizenship nullification). Ngai also provides a summary of *jus soli* citizenship contrasted with *jus sanguinis* citizenship; the legacy of discrimination against freed slaves, the Chinese, and other immigrant groups; and the 1898 Supreme Court case of *Wong Kim Ark*. *Id.* at 2524, 2526, 2528.

ship benefits.<sup>271</sup> To more broadly confer these benefits regardless of race and ethnicity is one way of increasing the sense of belonging, but there is a tension between reducing discrimination by expanding who is eligible for citizenship and with diluting the benefits<sup>272</sup> and national identity.<sup>273</sup>

Naturalized citizens also face the danger of losing their citizenship and having it stripped for various behaviors pursuant to the legal status aspect of citizenship.<sup>274</sup> Cicero said, “once it is possible to take away citizenship it is impossible to preserve liberty.”<sup>275</sup>

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<sup>271</sup> See Gordon & Lenhardt, *supra* note 267, at 2494–97 (discussing their concern with “citizenship as ‘belonging’—that is, with the realization by individuals and groups of genuine participation in the larger political, social, economic, and cultural community—and with the ways that race, ethnicity, and immigration status complicate the full achievement of citizenship in this sense”) (footnote omitted).

<sup>272</sup> See, e.g., Seymore, *supra* note 50, at 965 (recognizing that naturalized citizens cannot fully politically participate because they cannot become president). Seymore begins with a poignant story rejecting the idea that every American child can become president; she has two daughters who were adopted from China and then became naturalized citizens, not natural-born citizens, because their birth occurred in a foreign country. See *id.* at 928–29. Seymore also briefly addresses John Rawls’s vision of society and citizenship, which one enters by birth. *Id.* at 930 & n.19. The Article discusses the presidential qualification in the Natural-Born Citizen clause and analyzes its history and implications. *Id.* at 933–41. Seymore provides some useful historical background, such as James Madison and John Jay’s views of this clause and their motivation by a fear of foreign influence, expressed also by Alexander Hamilton. *Id.* at 937–40. More recent historical moves to expand the ability of naturalized citizens to become president include that of Henry Kissinger. *Id.* at 949.

<sup>273</sup> Gordon and Lenhardt note that Dr. Peter Spiro refers to this tension as the “Citizenship Dilemma.” Gordon & Lenhardt, *supra* note 267, at 2502 (explaining that immigration law scholars focus on this tension whereby expanding citizenship status may “more accurately reflect those who live in and contribute to the country” but also have “negative effects on the apportionment of benefits, the construction of national identity and democracy, and the demands a nation can make from its members.”). Some argue that promoting the benefits attached to citizenship—thereby promoting assimilation and commitment to the identity of the United States—will increase “the inherent value of citizenship.” Ley, *supra* note 151, at 55. Ley also notes that the benefits that currently exist are not sufficient to encourage immigrants to “meaningfully incorporate themselves.” *Id.* at 60–61. Ley writes: “If we want citizenship to matter once more, the way the status confers benefits and the reasons why such rights are conferred in the first instance must be critically evaluated.” *Id.* at 61.

<sup>274</sup> See Volpp, *supra* note 128, at 2579 (describing the case of a father and son, who were citizens, that declined readmission back to this country based on their ties to a relative who had been convicted of providing support to terrorists). This brief essay analyzes the dismantling of citizenship for those who are naturalized as opposed to those who have birthright citizenship. See *id.* at 2582. Volpp raises the issue of whether the father and son’s citizenship would be nullified if they were unable to return to the only country for which they could claim citizenship. *Id.* at 2579–80. Volpp describes the weaker citizenship that naturalized citizens have in public perception. *Id.* at 2582–83. While this particular family was allowed to return home, Volpp laments that there has been a “change in the citizenship of all Muslim Americans who, at this moment, and into the foreseeable future, can only experience a citizenship at risk of being undone.” *Id.* at 2586; see also Seymore, *supra* note 50, at 955 (“[T]he Court has held that a naturalized citizen could be stripped of citizenship on grounds less than those that would cause a birthright citizen to be stripped of citizenship.”).

<sup>275</sup> CICERO, PRO LEGE MANILIA, PRO CAECINA, PRO CLUENTIO, PRO RABIRIO PERDUELLIONIS REO 195 (H. Grose Hodge trans., 1927); Earley, *supra* note 24, at 77 (“For how can a

In conclusion, let us not strip away citizenship by eliminating birth-right *jus soli* citizenship for the children of resident, undocumented immigrants. Let us instead explore expanding public service, military, and civilian obligations, and fostering greater participation in our democracy. And above all, VOTE!

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man enjoy his rights to the freedom of a Roman citizen if he is not among the number of Roman citizens?" (citing CICERO, *supra*)

