

# 1 INTRODUCTION

## Empowering Citizenship

The foundational nature of United States citizenship and the rights it empowers constitute essential bedrocks of American democracy. *Citizenship as Foundation of Rights* explores the unique constitutional and political bases and ramifications of American citizenship. It advances this understanding by explaining the character, fundamentals, meanings, powers, and consequences of American citizenship in its most basic rights.

Specifically, the book expounds on the meanings and policy ramifications of American citizenship for political, work, and travel rights. Here citizen rights and their exercise derive directly from the nature of citizenship: rights are exercisable by the empowerment of citizenship. The book explains political citizenship rights as inviolable and empowering, and thereby extends and deepens the discussion of the right to vote. Further, it explicates the right to employment in its constitutional and political aspects and thus extends fundamental citizen rights to working. It also develops the right to travel in its historical and constitutional dimensions, and locates citizen mobility rights in the natures of both political and economic union.

The current debates around citizenship, immigration, and national security generally neglect the nature of citizenship as a source of empowerment for citizens and others aspiring to join them. Similarly, most of these debates neglect the corrosive effects of anti-terrorism or immigration policies undermining citizenship and its rights by imposing identification regimes on the exercise of rights to work or travel. The book explains why requirements and restrictions, for instance, on citizens' political, work, and travel rights by identification requirements

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degrade the foundations and meaning of citizenship and democracy. It reveals why the “thick” empowerment of strong citizenship rights benefits all persons, including noncitizens, whose personhood, natural rights, and human rights provide significant but restricted protections. It explains why debates today need to include the benefits of exercising citizenship rights and highlight the detrimental effects of identification requirements and systems for those basic rights.

“Political and legal thought today are suffused with talk of citizenship.” In Bosniak’s terms (2006, 1), “citizen talk pervades our popular political discourse.” The word “citizenship” is in the air today in profound and popular ways. From “path to citizenship” (Zamora, 2014) to “citizen scientists” (Ormes et al., 2014) to “citizen musicians” (Ma, 2013), the phrases are current and conversational. But the meaning of American citizenship at its most empowering levels needs a more thorough explanation and explication to inform both scholarly and policy debates. Alternative approaches to citizenship that emphasize benefits, responsibilities, human rights, cosmopolitanism, or global reach complement the conception here that concentrates on rights and empowerment of US citizenship.

In short, *Citizenship as Foundation of Rights* holds that American citizenship is constituted in fundamentally empowering political and proto-political rights. Those rights are exercisable *per force* of citizenship, and government must abet, and may not abridge, their exercise.

### **COMPONENTS OF CITIZENSHIP**

The dimensions of “the most basic institution of our public life . . . American citizenship” (Shklar, 1991, 23) are currently incompletely specified. From the “formal bundle of rights at the heart of the institution of citizenship” (Sassen, 2003, 16) flow the basic “political rights such as voting, jury service, militia service, and office holding” (Amar, 2006, 391). While the political rights are the most tightly held “bundle of rights” that “standing as republican citizens” embodies (Shklar, 1991, 17), citizenship empowers other rights. As elements of a unique democratic political system, the fundamental natures both of the US polity and of its basic rights require that natural-born, and

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naturalized, American citizenship and its concomitant rights be unassailable. Citizens exercise “full citizenship” (R. Smith, 1997, 506) in pursuing “the priority of the liberties of citizenship” (Rawls in R. Smith, 1997, 640), in experiencing a unique “package of rights” (R. Smith, 1997, 544) that are “peculiar to citizenship” (R. Smith, 1997, 593), and in following “the fundamental rights belonging to citizens of all free governments” (Field, 140, in R. Smith, 1997, 592).

Because citizenship originally derived from residency in states, which are the organic constituents of the more perfect union, state citizenship once encompassed national citizenship. Since the original US Constitution “left the status of citizenship undefined,” “[l]acking any explicit definition of American citizenship, the Founders’ Constitution was widely read in the antebellum era as making national citizenship derivative of state citizenship” (Amar, 2006, 381). During that era, citizenship was mainly limited to the basis that states residency bestowed it, except for particular persons who could not become citizens by birth or naturalization.

Chief Justice Roger Taney’s opinion in *Dred Scott v. Sandford* (60 U.S. 393) in 1857 restricted the nature of membership in the polity to white citizens alone. While citizens play the central role in the political community, one may be part of the American community without being a citizen. Sovereignty as the locus of both political authority and the right to representation resides in the people here, not, as in Britain, in the parliament. Taney neglected the state’s power to grant citizenship. He ignored the five Northern states in New England the *Scott* dissents pointed out as granting both citizen and voting rights to blacks. As Rogers Smith noted, “The Constitution proclaims itself the creation of ‘We the People of the United States,’ words that suggest a national political community and one not necessarily confined to its citizens” (R. Smith, 1997, 119).

After the Civil War, the Fourteenth Amendment overturned *Dred Scott* and fundamentally recognized citizenship in ways the original Constitution had not: “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 they reside.”

“Citizenship is commonly portrayed,” in Bosniak’s framework, “as the most desired of conditions, as the highest fulfilment of democratic

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and egalitarian aspiration.” Furthermore, “[t]he idea of citizenship is commonly invoked to convey a state of democratic belonging or inclusion” (Bosniak, 2006, 1).

Citizenship is “a binding relationship between the individual and the political community under which the polity is obligated to guard and respect certain fundamental rights” (Bobbitt, 1982, 89 in Bosniak, 2006). Citizens have their rights so firmly anchored that the government may not take them away. These protections are intrinsically intertwined with the Thirteenth Amendment’s abolition of both slavery and involuntary servitude and the Fourteenth Amendment’s protections of the rights of citizenship, particularly by birth. Citizenship is a bulwark against governmental actors’ reimposing subservience. “It is only citizenship perceived as a natural right that bears a promise of equal political standing in a democracy” (Shklar, 1991, 57). There is no notion more central in politics than citizenship (Shklar, 1991 in Bosniak, 2006, 17).

Citizenship rests on an organic connection to the body politic. It is fundamentally about belonging to a community, comprising part of a “membership sphere” (Bosniak, 2006, 49). It derives from membership in the social community underlying membership in the political community (Marshall, 1965, 79). It is part of a “Marshallian rights-based conception of citizenship” (Bosniak, 2006, 20) in “Marshall’s well-known formulation, not only with the rights of political participation, but also with civil rights (rights to legal personality)” (Bosniak, 2006, 20). “[L]egally and politically significant,” it encompasses “an ensemble of rights enjoyed” by “formal members of the nation” (Bosniak, 2006, 82–83).

“Citizenship is a status bestowed on those who are full members of a community” (Marshall, 1965, 92). It is “always understood to denote . . . membership in a political community or common society” (Bosniak, 2006, 103). It is “a binding relationship between the individual and the political community” (Bosniak, 2006, 183). “Citizenship designates formal, juridical membership in an organized political community . . . in citizenship’s classically political dimension” (Bosniak, 2006, 19). Similarly, “[c]itizenship is a precondition of influencing these [political] processes and institutions” because “citizens without citizenship are not really free” (Thompson, 1970, 3). Hence, citizenship must remain virtually immutable.

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Citizenship is “a binding relationship between the individual and the political community under which the polity is obligated to guard and respect certain fundamental rights of individuals” (Note, 1989, 1931). It provides certain “nontextual guarantees” to members of the political community (Bosniak, 2006, 185).

As James Madison noted, “in Europe, charters of liberty have been granted by power [while] in America . . . charters of power [are] granted by liberty” (*The National Gazette*, January 19, 1792). Here “the sovereign is the people and the people are sovereign” (Sassen, 2003, 17). Indeed, Lincoln’s Attorney General, and former rival, Edward Bates, reminded him that “[t]he Constitution itself does not make the citizens; it is, in fact, made of them [and] recognizes such of them as are natural–home born” (Bates, 1862). The generative nature of American citizenship in the people’s creation of both sovereignty and the state further bulwarks it for the generation and protection of rights that remain fundamental to the body politic against transient majorities.

Fundamental political rights – full privileges and immunities – are anchored more securely for citizens than other persons (Amar, 2005, 384). The most completely grounded citizenship rights belong to native-born citizens whose births to American parents occur in the United States, because native citizenship embodies *jus soli* (birthplace) with *jus sanguinis* (descent). “Citizenship is automatically extended to those born in the national territory” (Bosniak, 2006, 135).

All birthright citizenship rules make citizenship “an inherited entitlement” that “secures the ability of its holders to enjoy a share in specific rights [and] protections” (Bosniak, 2006, 136). Also, constitutionally founded, if less secure, is birthright citizenship by *jus soli* for those born here of alien parents. Citizenship acquired by birth “ma[kes such] infants ‘natural-born citizens’” (Schuck and Smith, 1985, 50). The children of US citizens born abroad are also native citizens (by *jus sanguinis*), if properly recorded (Naturalization Statute of 1790). Validly naturalized citizens have the same rights, except for presidential eligibility. Less rights protected are permanent residents, and other persons, including aliens.

The distinctiveness and “distinctive worth” (R. Smith, 1997, 489) of citizenship is maintained because birthright citizenship exists separately from governmental action, while fundamental rights to be free

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and sovereign flow from citizenships. Hence, natural and valid naturalized citizenship is not removable by government. One cannot lose natural-born citizenship by any governmental act, even for treason (R. Smith, 1997, 156). Citizens may only shed their standing by voluntary renunciation through expatriation. Only naturalized citizenship obtained illegally (8 U.S.C. Section 1451) can be lost by denaturalization, the government removal of citizenship (R. Smith, 1997, 578). “Native born Americans . . . could never truly be non-Americans” (R. Smith, 1997, 578).

“Text, history, judicial precedent, and Executive Branch interpretation confirm” that citizenship is granted exactly as the Fourteenth Amendment says, to “all persons born or naturalized in the United States” (Ho, 2006, 76). Citizenship is ascribed to those born here. Birthright citizenship trumps the state because government may not take native citizenship away. The potential threat of governmental removal of birthright citizenship would weaken the foundation. Hence, citizenship by birth must be immutable.

Denying birthright or naturalized citizenship would “mean that a society could freely denationalize citizens against their will . . . even leaving them stateless” (Schuck and Smiths, 1985, 37). British and American common laws grant citizenship by birth as a fundamental right retained by the people against the enumerated government powers (Schuck and Smith, 1985, 42, 58). By necessity, birthright citizenship must remain an asymmetric relationship of individual sovereignty in which right inheres in the citizen and the burdens fall on the government. While citizens may sever their political band, “the government could never do so” (Schuck and Smith, 1985, 87). Citizenship is “of constitutional dimension, one not subject to the whims and prejudices of transient majorities” (132–133).

“Citizenship [is] beyond the power of any governmental unit to destroy” (*US v. Wong Kim Ark*, 1898). As Dellinger summarizes (1995, 5), “the text and legislative history of the citizenship clause [of the Fourteenth Amendment] as well as consistent judicial interpretation make clear that the amendment’s purpose was to remove the right of citizenship by birth from transitory political pressures.”

Birthright citizen protections are intrinsically intertwined with the Thirteenth Amendment’s abolition of both slavery and involuntary

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servitude by selection of place of birth (*jus soli*) for citizenship (naturalization appeared in the founding Constitution). “This is hardly surprising,” Shklar notes, “since the fear of slavery had always been at the very core of this particular conception of citizenship” (1991, 57).

### EXPLAINING EMPOWERING CITIZENSHIP

The foundations, sovereignty, presumptions, and empowerments of citizenship, particularly by birthright, rest on the basis that citizens, by the nature of citizenship, have political and proto-political rights. Citizenship ultimately encompasses the rights and requisites to determine the nature of society and government. Citizens may exercise rights *per force* by the empowerment in citizenship.

As Chief Justice Rehnquist noted in dissent in *Sugarman v. Dougall* in 1973, the Constitution includes almost a dozen rights only citizens may exercise (cf. Smith, 115, 149). These rights typically exceed the essential protections for persons and human rights (R. Smith, 1997, 534). Citizenship laws, designating the criteria for membership in the political community and the “key prerogatives that constitute members,” are among the “most fundamental of political creations.” “They distribute power, assign status and define political purpose” (R. Smith, 1997, 30–31; Sparrow, 2006, 227).

Fundamental citizen rights are exercisable as parts and presumptions of citizenship. Among rights in the US Constitution reserved to citizens alone (federal offices, jury duty, diversity suits), citizens’ political rights provide the clearest demonstration of reserved prerogatives.

Requirements to produce government identification before exercising basic rights undermine the foundations of citizenship and those freedoms. Rights that exist *per force* of citizenship may not be impeded by the prior requirement to prove citizenship or identity through official documents. The right to vote and the right to employment are political in the sense of exercising authoritative actions essential to the nature of the polity (Sobel, 1989, 1994). The privileges and immunities clause is a “shield for citizens . . . substantive rights that inhere in American citizenship” (R. Smith, 1997, 538). If a citizen has to wait to exercise a right until proofed by the requirement to show

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government identification, then that person is constructively not a citizen and does not have the right.

Identification regimes, instead, threaten the sovereignty of citizenship and self-government. The debasing of fundamental rights occurs as a concomitant of requiring identification to exercise rights. The harm of an identification requirement measured only by the magnitude of burden trivializes the reality that restrictions on a right such as voting abridge a most fundamental right of citizenship. The policy consequences of making citizen voting rights contingent, for instance, on identification documents constitute constructive disenfranchisement and denationalization by the state selecting which citizens can participate in elections. Identification regimes accomplish what government laws may not otherwise do: stripping citizens of their citizenship rights prior to producing identification, the constructive equivalent of denaturalization or exile.

Moreover, requirements to obtain and provide identification prior to exercising basic rights transform and invert government by consent of the people into a regime of citizens' praying for privileges to be granted by permission of the government. This inversion of the proper relation of citizens to state undermines the nature of democratic and republican politics and government (Sobel and Fennel, 2007). Explicating the debilitating nature of a national identification regime for citizenship (Sobel, 2002a, 2002b) provides the basis for policies and mobilizations to enhance citizens' rights protections to reverse this inversion. The process thereby removes sovereignty from the people. Three of the clearest examples of threats to citizen rights occur in identification requirements for politics, work, and travel. The fundamental nature of citizenship rights raises the issue of how voter, worker, and travel identification requirements undermine citizen rights and are profoundly anti-constitutional.

### **THE RIGHT TO VOTE**

Voting right inheres in the nature of a constitutional republican democracy. Civil rights-era court decisions such as *Reynolds v. Sims* (1964), *Wesberry v. Sanders* (1964), and *Harper v. Virginia Board of Education*



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(1966) empowered disenfranchised voters by explicating voting as a fundamental constitutional right of citizenship, not to be abridged. The right is more recently contradicted by the *Burdick v. Takushi* (1992) administrative regime embedded in *Crawford v. Marion County* in 2008. The latter decision burdens the exercise of the franchise, for instance, by requiring official photo identification in order to vote. Instead, explicating the fundamental nature of the franchise in citizenship provides intellectual foundations for strengthening voting rights.

## THE RIGHT TO EMPLOYMENT

Similarly, the right to take employment has long been fundamental for citizens. From the early republic to the civil rights era, US Supreme Court decisions from *Corfield v. Coryell* (1823) to *Butcher Union Co.* (1884) and *Truax* (1915) to *Roth* (1972) recognized that taking employment is a foundational citizenship right. The right to earn a living parallels suffrage (Shklar, 1991), and “the choice of profession” is “fundamental” (Urofksy, 561–562, 619). On this basis, citizens are guaranteed the right to take employment (though not promised a job). In short, a citizen may work without government permission.

## THE RIGHT TO TRAVEL

Equally essential, the right to travel is a privilege and immunity of citizens in a broad federal union as guaranteed explicitly in Article IV of the Articles of Confederation and therefore implicitly in Article IV of the US Constitution and its Fourteenth Amendment. From *Corfield* (1823) to *Dulles* (1958) and *Guest* (1967) to *Saenz* (1999), courts have recognized that the right to travel makes America a more perfect union and sustains Americans as free in their pursuit of happiness. Identification restrictions tether travel rights. Requirements to carry and show identification like driver’s licenses or passports for domestic travel impede the fundamental right of free movement across the republic.

## **VOTING RIGHTS RESTRICTIONS**

The emergence of voter identification laws began after the spate of contested elections over the past two decades. While states began to consider voter identification laws in the late 1990s, the first laws in Missouri, Indiana, and Georgia in the early 2000s imposed stricter requirements on voters, with disparate impact on minorities. Though the Missouri Supreme Court outlawed voter ID under the state constitution, a split US Supreme Court permitted the Indiana voter ID law to remain in effect in 2008. More laws and further challenges based on the constitutional burdens the law imposes have ensued. At stake is not only voter identification burdens, especially on minorities and poor, but also restrictions on other voting procedures such as early voting and same-day registration that permit a wider range of voters to get to the polls.

## **EMPLOYMENT RIGHTS RESTRICTIONS**

Recurring proposals since the 1980s to require national “worker” identification reinforce the barrier to what should be a directly exercisable employment right, with implications for the right to travel. Requiring first a simple ID and then a national one, ultimately to include fingerprints, digital photograph, or other biometrics in a government database and on identification cards in order for citizens to be “official” or “documented,” compounds the separation of citizen rights from their political and economic exercise.

The problem for citizen employment began with a 1986 Immigration Reform and Control Act (IRCA) requiring citizens to produce government identification to get official permission to take employment. This prior restraint on exercising a basic occupational right of citizens constructively severed citizens from taking employment. The electronic verification system (E-Verify) is the more recent high-tech version of enforcing separation between citizenship and work rights that requires not only identification but location in a national databank.

Immigration laws and other social policies often abridge the rights of citizens and immigrants, legal or otherwise. The pejorative terms “illegal” or “undocumented immigrants” imply that people can be “illegal” and