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US Nationality Law and Mobility Privilege
Oxford Handbook of Comparative Immigration Law

Peter J. Spiro, Temple University

The United States is conventionally understood to enjoy a generous citizenship regime. As a historically immigrant-receiving state and in contrast to other developed countries, the United States is situated as having an expansive approach to birth citizenship and relaxed requirements for naturalization, even as it sustains restrictive immigration policies. The understanding coincides with the dictates of liberal theory, under which strict border enforcement is paired with low barriers to citizenship – hard on the outside, soft on the inside – and a self-governance paradigm. Consistent with that paradigm, U.S. citizenship is conceived as largely coextensive with territorial boundaries, both in terms of who has it and what it gets you.
This chapter describes this traditional framing of U.S. citizenship, along with the locational security associated with it.

The chapter then undertakes a critical perspective on the standard narrative. The U.S. citizenship regime may seem generous in global context. But it is both under- and over-inclusive, with important migration-related implications. It is under-inclusive insofar as it excludes most individuals who are born outside the United States, including those who become sociological members of the national community after birth. The plight of so-called Dreamers – individuals who enter the United States illegally at a young age, with no opportunity for regularization thereafter -- isn't usually connected to U.S. nationality practices. But it is the product of a citizenship allocation that essentializes the moment of birth to the exclusion of other proxies for community membership. The citizenship regime is also overinclusive by virtue of that narrow

window. Many individuals are allocated citizenship who have no continuing connection to the community. Overinclusion also results from jus sanguinis citizenship by descent, as well as a result of those who naturalize as part of an exit strategy.

With U.S. citizenship comes absolute rights of entry and settlement in the United States. U.S. citizenship also promises important mobility privileges with respect to third countries. The chapter considers the immigration implications of U.S. citizenship law, highlighting the growing consequence of citizenship outside of the country of nationality. Those who have citizenship in countries such as the United States enjoy dramatic advantages in worldwide mobility. This chapter closes by problematizing citizenship privilege, especially where it is allocated on an (inevitably) arbitrary basis.

U.S. Nationality Law: A Thumbnail History

In comparative perspective, U.S. nationality law has been considered expansive, with relatively low barriers to citizenship acquisition.[1] This liberality was historically and importantly qualified by racist elements, restricting citizenship access to white persons. With the elimination of those exclusions by the mid-twentieth century, the formal citizenship regime was color-blind. With the absolute rule of territorial birthright citizenship and comparatively light naturalization requirements, the United States by appearances entrenched a non-restrictive citizenship regime, which if not unique or a paragon for the world has not attracted substantial critique. The U.S. approach to citizenship by descent has been less exceptional and more constrained relative to

[1] See, e.g., Migrant Integration Policy Index 2020, https://www.mipex.eu/access-nationality (ranking the United States tied for fourth globally with respect to access to nationality, behind only New Zealand, Argentina, and Brazil).

European states but through the twentieth century grew increasingly generous with respect to those born outside the United States.

At its founding, the United States elided the formal delineation of territorial birthright citizenship. The U.S. Constitution included no provision regulating the provision of citizenship at birth.[2] In the absence of express constitutional provision, the United States adhered to the British common law rule of citizenship jus soli, extending citizenship at birth to white persons born in the United States. The possibility of national citizenship for free blacks was rejected in the U.S. Supreme Court's notorious 1858 decision in Dred Scott v. Sandford, an important marker on the way to civil war. Following the defeat of slaveholding states, the Fourteenth Amendment to the U.S. Constitution extended citizenship to all persons born in the United States "subject to the jurisdiction thereof."

Prior to the twentieth century, citizenship primarily implicated domestic rights unrelated to migration and locational security. Even as Dred Scott found blacks incapable of holding national citizenship, there was no suggestion that they would be subject to territorial removal.[3] There were no federal immigration controls through the middle of the nineteenth century; the constitution's drafters did not see to allocate an express power to regulate the movement of persons into the United States. The first test of U.S. citizenship practice at the intersection of immigration emerged with the Chinese Exclusion laws, a series of racist measures enacted in the 1880s and 1890s which barred the entry of Chinese laborers into the United States. The measures sandbagged Chinese immigrants who had been legally admitted into the United States and then returned to visit China. They had been legally guaranteed, at the time of exit, the right of

[2] Bickel argues that this reflected the insignificance of citizenship in the constitutional design.
[3] See Kettner at 319-20 (describing classification of free blacks by some Southern apologists as "denizens," thus implying rights of residency).

readmission, after which the law was amended to preclude reentry notwithstanding the advance permission. This migration regime implicated the scope of the Fourteenth Amendment to persons born in the United States to Chinese immigrants where they sought reentry. Without citizenship, they would be subject to the exclusion.

The Supreme Court found such individuals to hold citizenship in its 1898 decision in the Wong Kim Ark case, the leading U.S. judicial interpretation of birthright citizenship. The Court framed the Fourteenth Amendment as a codification of the common law rule. It highlighted legislative history evidencing an intention to include the children of Chinese immigrants, even though the immigrant parents themselves were ineligible to naturalize. In an earlier case not involving immigration or locational security, the Court had excluded persons born into Indian tribes from the Fourteenth Amendment as not being subject to the jurisdiction of the United States. But Wong Kim Ark applied the amendment to the children of immigrants, even where they might remain, at least formally, subjects of other sovereigns. The decision thus clarified the jus soli's broad scope in the U.S. context. The rule supplied an engine of integration; even if immigrants themselves did not naturalize, their children would have automatic citizenship. Wong Kim Ark put the question of territorial birthright citizenship largely to rest until its more recent reengagement with respect to children born to unauthorized migrants in the United States.

Naturalization, meanwhile, was routinized. The United States had been the first major state to adopt administratively regularized naturalization (that is, not requiring special legislative acts on an individualized basis). From 1802 forward, free white persons were eligible to naturalize after five years' residence and a demonstration of attachment to constitutional principles. Eligibility continued to be racially qualified to exclude Asians after naturalization was opened up to blacks in 1870. In the face of lax administration on the part of states, federal

authorities took control of naturalization in 1906. Naturalization was also conditioned on English language capacity as that year.

Finally, persons born outside the United States to U.S. citizens could in some circumstances acquire citizenship at birth. Included in the first naturalization law, in 1790 Congress provided that the children of U.S. citizen fathers would have citizenship at birth where that the father had resided in the United States. This sex discriminatory regime remained in place through the nineteenth century.[4] In 1934, Congress broadened the jus sanguinis regime to include the children of U.S. citizen mothers, but it also imposed a condition subsequent on those born to a citizen and a non-citizen parent, requiring the child to reside in the United States for at least five years prior to its eighteenth birthday. The 1940 and 1952 nationality acts modified the condition to require five years' continuous physical presence between the ages of 14 and 28, failing which birth citizenship was forfeited. Pursuant to the 1952 act, citizenship extended to the children born abroad of mixed status marriages only where the citizen parent had been physically present in the United States for ten years prior to the birth of the child, five of which must have been after attaining the age of 14.

In the early and mid-twentieth century, citizenship deployed for migration purposes was more often contested in the context of its possible loss. With the advent of robust immigration controls in the 1920s, entry into the United States became more restrictive. It was not just the Chinese and other Asians who were discriminated against, but also southern and eastern Europeans. (Women were also subject to a discriminatory regime under which they lost nationality upon marriage to a foreign man, but the disabilities mostly concerned rights unrelated to immigration.) Citizenship offered the only ticket for guaranteed entry. Citizenship claims were

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[4] Rogers v. Bellei, 401 U.S. 815, 823-24 (1971).

sometimes challenged in the context of so-called return migration. Naturalized immigrants returned to their homelands, sometimes with U.S.-born children in tow. These individuals and/or their descendants would in some cases look to move back to the United States as against government claims that U.S. citizenship had been forfeited.

The U.S. regime for loss of citizenship was more in line with European practice. Citizenship may have been easy to get, either through naturalization or place of birth, but it was also relatively easy to lose. Under the Expatriation Act of 1907, any person naturalizing in a foreign state automatically lost his U.S. citizenship. More important in the context of return migration, under the 1907 Act a naturalized citizen would presumptively forfeit her citizen if she resided for two years in her country of origin or for five years in any country outside the United States. These measures aimed to suppress the incidence of dual citizenship. Where citizenship was lost, so too were entry rights. A not-uncommon permutation during the early decades of the twentieth century involved a child born outside the United States to a putative U.S. citizen. If the parent were deemed to have forfeited citizenship before the child's birth, the child was determined never to have had citizenship and thus enjoy no right of entry into the United States. The expatriation regime was intensified with the nationality acts of 1940 and 1952. Under the 1940 act, for example, one could lose U.S. citizenship for voting in a foreign political election. Provisions relating to loss of citizenship served a boundary-policing function that reinforced immigration controls, especially in a context in which immigration was highly constrained.

U.S. Citizenship at the Intersection of Immigration

Citizenship rules continue to play an important though often submerged role in immigration regulation. As movement has become materially facilitated, immigration

enforcement has shifted to the border as well as the interior, in addition to through the process of visa issuance. The landscape has also changed with the regulation of immigration from western hemisphere states, including Mexico, from which movement was largely unencumbered through the mid-twentieth century. Finally, recent decades have witnessed the emergence of a persistent population of unauthorized immigrants.

The most important immigration-related element of U.S. citizenship practice is the near-absolute rule of territorial birthright citizenship in the context of this persistent population. Several hundred thousand children are born in the United States to unauthorized migrants. Under the jus soli practice, these individuals are extended citizenship at birth. Children born in the United States to other non-citizens are likewise extended citizenship at birth.

The current naturalization regime is also considered comparatively relaxed.[5] Applicants must have been a permanent resident for at least five years (three in the case of those married to U.S. citizens). Most applicants must demonstrate a knowledge of U.S. history and principles of government. Questions and answers are supplied in advance; the test has a pass rate around 90% and can be retaken. Demonstrated capacity in functional English is also required though elderly, longtime permanent residents are exempted. Although the oath of naturalization includes a renunciation clause, the United States has never enforced any requirement that prior citizenship be relinquished as a condition to naturalization. The naturalization rate is high in both relative and absolute terms, although countries that facilitate naturalization, for instance Canada, fare better on this metric.[6] Scholars have highlighted the lack of institutional support for naturalization, more a programmatic failure than a legal barrier to acquiring citizenship.[7]

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[5] Motomura, Americans in Waiting 145
[6] Bloemraad, Becoming a Citizen: Incorporating Immigrants and Refugees in the United States and Canada
[7] See Chen 45

Rules governing citizenship by descent have been progressively relaxed. In 1972, the residency required of the child born abroad was reduced from five years to two years between the ages of 14 and 28. In 1978, the child's residency requirement was eliminated altogether. The 1978 measure also reduced the parental presence requirement from ten years to five, at least two after turning 14. The current regime extends citizenship to children of two citizen parents born abroad so long as one of them has resided in the United States for any period prior to the birth of the child.

Finally, the citizenship termination regime has been transformed. When citizenship could once be forfeited on various grounds, most implicating nationality in another state, the government no longer terminates an individual's citizenship against her will. The shift was prompted by rulings from the U.S. Supreme Court constraining the government's constitutional capacity to strip citizenship. In 1958, the Court nullified the use of expatriation for punitive purposes. In 1967, it struck down a measure terminating citizenship for voting in a foreign political election. A 1978 ruling required the government to demonstrate that conduct-based grounds for loss of citizenship involved an individual's specific intent to relinquish citizenship, for instance, that in naturalizing in another country, the individual wanted to give up U.S. citizenship. This last decision triggered a decade of cases in which intent was contested (an individual arguing that conduct did not comprehend intent to relinquish). In 1991, the State Department adopted administrative guidance under which such intent is never assumed. Since then, it has been effectively impossible to lose U.S. citizenship against one's will. Citizenship is yours to keep.

The merits of the U.S. nationality regime are substantial. The jus soli practice insulates the children of unauthorized immigrants from the possibility of deportation. In the absence of the

jus soli rule, such individuals could remain subject to immigration enforcement notwithstanding birth and continued presence in the United States. In this respect, the United States generally maintains a liberal citizenship regime, if not uniquely, then at least most prominently among peer states. The birthright citizenship practice has come under sustained attack from restrictionist quarters; alone among components of the U.S. nationality regime, birthright citizenship is understood to present an important element of the U.S. migration regime. However, efforts to scale back birthright citizenship have made little headway. Legislative proposals (both statutory and constitutional) have been procedurally stillborn; none has yet been brought to a floor vote in the U.S. congress. Other than a brief moment when President Trump threatened to cancel birth citizenship for the children of unauthorized migrants on his own (disputed) unilateral authority, there has been no serious threat to the practice. Its resilience in the face of intensely polarized immigration politics suggests constitutional entrenchment, the lack of a direct judicial pronouncement on the question notwithstanding.[8]

Citizenship is relatively accessible through the naturalization regime. This has obviously salutary implications for purposes of legal and political equality. For migration purposes, naturalization guarantees locational security. Most permanent residents do not face a high risk of deportation, but naturalization is increasingly perceived as a kind of insurance in the face of rising anti-immigrant sentiment.[9] U.S. immigration law sometimes operates on a hair-trigger basis, mandating deportation for relatively minor crimes. One does not have to fit the colloquial description of "criminal" to face removal from the United States, even as a longtime permanent resident.

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[8] Joppke, Citizenship and Immigration, at 37-38

[9] Ming Hsu Chen, Pursuing Citizenship in an Era of Enforcement 3, 53

Unlike in Europe, naturalization is not a political flashpoint. There is an apparent equilibrium in which both immigrant advocates and restrictionists see naturalization as a low-priority agenda item. This may be explained in part by the focus on immigration policies as such, especially to the extent that restrictionists purport to support legal immigration. Immigration policy provides a kind of cover for naturalization policy. But immigration regulation is also contested in European states, which does not seem to insulate naturalization from intensive scrutiny. Dual citizenship has been a major political issue in some European states, Germany and the Netherlands for example, where in the United States a dramatic rise in the number of dual citizens has barely registered in the public or policy consciousness. Integration tests have also been intensively debated in a number of immigrant-receiving states, generally, though not invariably, leading to a tightening, or, in those states that had no such requirement, their introduction.[10] In the United States, the civics test is mostly featured as part of studies or anecdotal reports respecting the high proportion of native-born citizens who would fail.

Nor have regimes regarding citizenship jus sanguinis and the loss of citizenship generated much controversy. Continuing the trajectory described above, more individuals born abroad are extended citizenship at birth on the basis of parentage. Others are positioned to claim it as of right upon establishing permanent residency in the United States. Because the United States is not identified in ethnic or religious terms, or by a distinctive language, there has never been a sense of national identity detached from territory. Jus sanguinis citizenship rules have not been the object of much policy attention, save in the context of adopted foreign orphans. A recent controversy relating to the citizenship of children born through surrogacy which had the practical impact of discriminating against same-sex parents was resolved to include them. The

[10] Orgad, Naturalization, in The Oxford Handbook of Citizenship 336, 351-52

government's desistance from citizenship stripping has proved non-controversial, save in the relatively marginal context of counter-terrorism. Even there, in contrast to some peer states, the UK and Australia among them, proposals to terminate the U.S. citizenship of terrorists have not been seriously advanced.

In short, although the United States is riven with conflict respecting immigration, there is a sense that citizenship law and policy isn't part of the problem. This is true both within a domestic political context and as seen from other countries. The United States has many migration-related policies for which it can be brought to task, but nationality practices do not feature prominently among them.

Underinclusivity in the U.S. Citizenship Regime

U.S. citizenship practice is largely mobility-enhancing and protective of locational security. However, there are important respects in which it is under- and over-inclusive. Underinclusivity has clear suboptimal implications from justice and equality perspectives. The case against overinclusivity is more difficult to make, but there may be equality implications to extending citizenship beyond the sociological community.

To undertake this critique, one must first sketch out the benchmark against which inclusivity is to be measured. National citizenships are inherently exclusionary, perhaps most importantly today for mobility purposes. To argue for freely available citizenship would be to argue for open borders. There are powerful justifications for open borders. Once one admits to the legitimacy of immigration controls, however, it is necessary to establish a basis for measuring the legitimacy of how the terms of these controls. Nationality comprehends an

implicit but unconditional migration categorization, demanding distinctive justification (in contrast, say, to assessments relating to the admission of refugees).

Two leading candidates for orienting normative assessments of citizenship rules are territorial location and sociological membership in the community. Territorial location undergirds self-governance models of citizenship attribution. One who is subject to the laws should have a say in their making. Territorial location is a more awkward fit for the mobility and locational incidents of citizenship. Just because you are located here today does not necessarily mean that you should be guaranteed a right to continued presence or entry.

Territorial arguments tend thus to be durational and to bleed into arguments relating to community. Territorial presence over time, the argument runs, leads to community attachments supporting membership claims. Arguments relating to community are also founded in self-determination values. Self-determination justifies the exclusionary aspects of citizenship boundaries; states should be able to reinforce community through citizenship rules. (It is from this premise that liberal theory allows for the legitimacy of immigration controls.) That exercise can be pathological, however, where individuals who are sociological members of the community are excluded from citizenship. Where there is a mismatch between formal and actual community, injustice inevitably results from the disempowerment. This injustice could include locational insecurity as well as constrained mobility. (Until recent administrative action in the form of Deferred Action for Childhood Arrivals, through which the government has undertaken not to deport Dreamers, individual Dreamers were not able to leave and reenter the country.)

Along these dimensions, US citizenship practice can be critiqued for excluding some who are members of the community as a matter of fact. The most substantial population of such individuals is identified as the "Dreamers," individuals who entered the United States during

childhood or youth and who are out of status either because they entered illegally or violated the terms of a legal admission. Raised in the United States, these individuals are sociologically American, but do not hold U.S. citizenship. Although the Dreamer issue is typically identified as an immigration problem, the root cause relates to citizenship allocation (hence the call to give them a "path to citizenship"). The rule of territorial birthright citizenship excludes anyone born even a mile outside of the United States and anyone who enters the United States even a week after birth. In that respect jus soli looks if not arbitrary at least imperfect. The approach is inclusionary as far as it goes. But a major population is excluded, left without citizenship through any other mechanism.

Although resolution of the Dreamer issue is seen through a regularization, converting Dreamers first to legal residency before extending eligibility for citizenship, nationality law could supply a fix. Territorial birthright citizenship is best justified as a kind of proxy for eventual community membership. It makes most sense if most individuals born in a national territory stay in that territory after birth. But territorial presence, regardless of place of birth, seems a more accurate measurement of community membership. The Dreamers case is particularly compelling because of durational presence during formative youth, notwithstanding birth outside of the United States.

Comparative citizenship law suggests resolution. Several countries extend citizenship to individuals on the basis of specified durational residence during their minority, in some cases as of right without further conditions. If adopted by the United States, such a measure would resolve the Dreamer problem, more or less depending on its particular terms. This strategy would bring formal citizenship status better in line with sociological community, consistent with justice

intuitions. With citizenship, this class of sociological Americans would enjoy the locational and other rights that comes with the status.

This is not to suggest that such a revision of U.S. citizenship law poses a realistic reform. It would be a political non-starter. It could also pose policy and practical challenges in the context of unauthorized migration to the United States. Where birthright citizenship supplies a marginal incentive only for unauthorized immigration, legislation extending citizenship on the basis of youthful presence might present a more robust draw. That is, citizenship on the basis of physical presence in addition to place of birth might add to the problem of unauthorized migration rather than merely solve an incident thereof. What I seek to accomplish here is rather to highlight how the arbitrariness of the U.S. citizenship creates the problem and could, at least in theory, resolve it.

In an analogous context, legislation was enacted to correct a parallel phenomenon. Before 2000, adopted foreign orphan children were admitted to the United States as permanent residents. They were eligible for naturalization [after five years of residence]. However, the regime required parents (or children, upon reaching majority) to apply for naturalization. Many failed to apply, out of inertia or ignorance. Years later, a number of these individuals faced deportation on the basis of criminal convictions, with no possibility of relief. The nationality act was amended in 2000 to extend citizenship automatically to adopted children upon admission, to avoid deportation of individuals who have lived in the United States since infancy. Although unauthorized immigration was not part of the backdrop (in contrast to the Dreamers), the citizenship law revision successfully addressed a problem not unlike that presented by the Dreamers.

U.S. naturalization practice is also imperfect in underexamined respects. Only permanent residents are eligible for naturalization, thus excluding other legally present noncitizens on so-called nonimmigrant visas whose territorial presence, and accompanying community ties, may be longstanding. The test, while not onerous, may have a deterrent effect, especially among less educated, poorer immigrants. The naturalization fee is high compared to other OECD countries, almost $1000 per applicant and is often cited as a reason not to apply for naturalization.[11] Many who have become members of the community may not acquire citizenship in the face of these barriers.

Problematizing Overinclusivity

Thus, U.S. citizenship practice remains overinclusive in important respects. It is also overinclusive in the sense that it allocates citizenship to many individuals who have no or only tenuous sociological connection to the national community. Overinclusivity occurs through expansive birthright citizenship, on the basis of both place of birth and parentage. It also results from the current practice under which citizenship is impossible to lose involuntarily and under which dual citizenship is absolutely accepted. Overinclusivity is not often highlighted as a matter of concern. However, in the context of mobility it may aggravate passport inequalities and the arbitrariness of global mobility differentials. Overinclusivity is not distinctive to U.S. nationality practice.

Territorial birthright citizenship allocates citizenship to nontrivial numbers of individuals who despite birth in the United States will not become members of the national community. In some cases this is circumstantial, as when noncitizens present in the United States on a

[1111] Rose Cuisson-Villazor, Rejecting Citizenship, 120 Mich L. Rev. 1033, 1041-42 (2022)

temporary basis give birth to a child. That child has citizenship from birth even if she is relocated by her parents soon after birth, typically to a country of origin in which the child will also have citizenship (via jus sanguinis). These children are sometimes labelled "accidental Americans." In other cases, it is the result of agency on the part of the parents who seek to secure U.S. citizenship for the child by giving birth in the United States for that purpose. This so-called birth tourism has become increasingly popular among rich noncitizens. In these cases, the noncitizen mother may spend as little as a few weeks in the United States before returning home with the newborn. There is generally not even a pretense of continuing connection to the United States in the case of either accidental Americans or the progeny of birth tourism.

Jus sanguinis rules can also result in nominal citizenship. In the wake of relaxed jus sanguinis rules described above, those born with U.S. citizenship outside the United States are not themselves required to satisfy a residency requirement. One can maintain U.S. citizenship for life without setting foot in the United States. As described above, citizen parents have to satisfy residency or physical presence requirements before the child is born in order for citizenship to descend. Such requirements are intended to ensure a continuing connection to the United States. In many cases they will. For example, the child of a U.S. citizen and a non-citizen whose citizen parent grew up in the United States will typically enjoy a meaningful connection to the national community. But not always. The citizen parent need only spend five years in the United States, which could be satisfied with four years of college and a few vacations. The question will be contingent on many factors, which explains its relative breadth, but the regime allocates citizenship to some whose connection to the United States is thin.

Naturalization can also result in a kind of overinclusivity. In the conventional narrative, naturalization marks the immigrant's civic destination. It is either evidence of full membership in

the community or a final facilitation of such membership. In either version, the naturalized citizen belongs. But the relatively light requirements for naturalization – a virtue for purposes of inclusivity – also allow some who may not have acquired strong community connections. The five years' residency condition requires that the applicant be physically present in the United States for only half that period. Other parameters, discussed above, are unexacting. If the individual continues to live in the United States after naturalizing, one can assume the continuing accumulation of community ties. However, an apparently increasing number of individuals acquire naturalization by way of an exit strategy. That is, they acquire citizenship at the point where they return home.[12] Citizenship here is also strategic. It is acquired to ensure reentry rights and continuing other benefits of holding U.S. citizenship. The ties acquired during residence may be strong, or not.

Key to the overinclusive tendencies of all of these examples is the regime relating to loss of citizenship. Because citizenship is impossible to lose on an involuntary basis, it can be maintained without risk alongside other citizenships. (In effect, the end of involuntary termination of citizenship goes hand in hand with absolute toleration of dual citizenship.) Many individuals hold U.S. citizenship while living in another country in which they also hold citizenship, and which reflects their primary affective and effective attachment. The loss of citizenship regime enables the maintenance of U.S. citizenship even in the absence of sociological ties. It allows a kind of second-choice or add-on citizenship.

This overinclusivity is not often remarked upon. The only context in which it gives rise directly to justice concerns respects so-called accidental Americans, those who happened to be

[12] See Ozlem Altan-Olcay & Evrem Balta, The American Passport in Turkey 138 (2020); Greta Gilbertson, Regulating Transnational Citizens in the Post-1996 Welfare Reform Era: Dominican Immigrants in New York City, 2004 Latino Studies 90 (2004). Cf. Chen at 67-68 ("permission to travel freely" most often mentioned in naturalization interviews)

born in the United States to sojourning parents. U.S. citizenship is not without cost, insofar as U.S. citizens regardless of place of residence are subject to U.S. federal taxation. U.S. law allows for voluntary renunciation of citizenship, but the renunciation process is expensive and balky. Many U.S. citizens of moderate means are caught in the bind, some not even understanding themselves to be citizens prior to the recent adoption of a robust extraterritorial enforcement scheme. The United States is the only country in the world that taxes external citizens. The current regime is normatively problematic insofar as purely formal citizenship results in serious costs.

Otherwise, the downside of overinclusivity is non-obvious. Most commentators orient towards overinclusivity, implicitly framing citizenship as an unalloyed good. This reflects a conception of citizenship as a rights-extending, under which there are no problematic allocations of citizenship. The wider the circle the better. But this misses the consequences of detaching citizenship from identity. Hollow citizenship, as described by Ayelet Shachar, undermines the solidarities that have made citizenship and the nation-state a world-historic location for the redistribution of resources and the protection of rights.[13] To the extent that citizens feel a less distinctive bond with fellow citizens, they will be less willing to share with them or make sacrifices in the name of a common good. This effect is amorphous and theoretical with respect to U.S. citizenship, however. The fact that some number of individuals hold the status without any connection to an organic national community while living outside the United States does not contribute in any substantial way to a frayed sense of solidarity within, not the least because these individuals do not visibly draw on shared resources. (Of course solidarity within is now

[13] Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality

subject to a range of more serious stressors, which will inevitably tend to diminish the domestic dimensions of citizenship.)

Overinclusivity at the intersection of mobility may however pose more insidious implications. Most of those who acquire or maintain U.S. citizenship strategically are motivated by associated mobility privileges. For those with no sentimental attachment to the United States, U.S. citizenship is about the passport. This may in part be about status, as sociologists are beginning to document. But those who look affirmatively to secure the status, it is mostly about the material travel and settlement benefits that come with a premium citizenship. With U.S. citizenship comes absolute rights of entry and presence in the United States. It also affords the holder visa-free travel through much of the world. Citizenship now is as much about how it defines one's relationship with other states as with the state of nationality. For someone holding a less advantaged citizenship, this is a valuable benefit. Even rich people with sole citizenship in the Middle Eastern, African, and Latin American countries have to apply for visas to OECD destinations. To also hold a U.S. passport is a substantial advantage to anyone facing these travel barriers. For these people, U.S. citizenship is not about equality, identity, or domestic political rights. It is a laissez passer.

This growing proclivity to secure citizenship for mobility purposes only may not seem to pose any costs in and of itself. Citizenship is not a zero-sum proposition, least of all for passage. The fact that citizenship is allocated to an individual who may not merit it doesn't take it away from someone more deserving. One can assume that those who acquire or maintain U.S. citizenship strategically are not a burden on the public fisc. Most who hold U.S. citizenship for mobility purposes do not live in the United States. The overinclusive possibilities of U.S.

citizenship do not seem particularly problematic along other dimensions. This explains the lack of any policy valence to the phenomenon.

But nationality travel rights decoupled from identity will tend to erode conventional understandings of U.S. citizenship over the long run. Framing citizenship practice as overinclusive lends a neutral flavor to the decoupling, especially when overinclusion is framed as an antidote to more concerning underinclusion. But overinclusion can also be framed as arbitrary. The respects in which U.S. citizenship practice allocates citizenship untethered from sociological membership makes it look like a marker of privilege rather than a marker of equality. The difficulty can be suggested from several angles. First, overinclusion does not symmetrically compensate for underinclusion. As discussed above, there is a substantial class of individuals who are denied U.S. citizenship notwithstanding their sociological membership, namely the Dreamers. That many individuals are extended citizenship on an arbitrary basis puts in greater relief the deprivation of those who should by any measure enjoy the status.

Overinclusive, arbitrary allocations also seem problematic insofar as they will tend to correlate to class, thus aggravating both global and local inequalities. At the global level, differential mobility capacity and "passport apartheid"[14] have become more entrenched as holders of some passports are enabled to travel subject to minimal constraint while others face insuperable barriers. At the local level in other countries, possession of U.S. citizenship can give rise to substantial disparities of status and sociological opportunity. In a country like the Dominican Republic, for example, those who hold U.S. citizenship notwithstanding sometimes tenuous ties (including those who use naturalization as an exit option) are privileged relative to

[14] See Dimitry Kochenov, Ending the Passport Apartheid: The Alternative to Citizenship is No Citizenship, 18 Int'l J. Const L. 1525 (2021).

Dominican co-citizens who do not.[15] The fact that overinclusive citizenship is typically associated with multiple citizenship heightens the appearance, at least, and in many cases the reality of inequality.

The United States is not the only country allocating citizenship on an overinclusive basis. For European states, none of which have expansive jus soli regimes, it is so-called ancestral citizenship through which citizenship is allocated to those with tenuous sociological ties. Several states make eligible for naturalization those with a single grandparent (in some cases a more distant forebearer). This may qualify as a "genuine link" in international law terms (as does territorial birth)[16] and may equate to strong identity in some cases, but in others will simply be good luck. As in the American example, it is enabled by acceptance of dual citizenship, which has become prevalent in recent decades. Ancestral citizens may or may not correlate to class within states with large eligible populations (for instance, Chile and Argentina, where large populations are eligible – and have secured – Spanish and Italian citizenship). Ancestral citizenship schemes nonetheless create communities of haves and have-nots within states. They also exacerbate perceptions of global travel inequities insofar as one's mobility is no longer tied to residence or other identifiable markers of membership.

Conclusion

U.S. nationality law thus contributes to global trends detaching citizenship from identity at the same time that citizenship takes on outsize global significance. Citizenship is less about where you are "from." It is still largely luck of the draw (no one has ever chosen where to be born) but opportunity structures have arisen which allow for agency (parents can decide where to give birth, for example). The combination has begun to unmoor citizenship from identity at the

[15] See also Harpaz 81-82
[16] See Nottebohm

same time that it assumes a new kind of material advantage in the face of materially frictionless mobility potentialities. Today, a sizable proportion of the world's population would be able to resettle across the globe for economic and other purposes if it were simply a matter of buying a plane ticket. Citizenship differentials modulate that mobility by attaching or mitigating the consequences of border controls. An individual can probably get between any two transborder points, but the cost will vary enormously depending on how their nationality situates them relative to border control. Premium passports become a valuable asset, affording holders largely unobstructed global mobility.

U.S. citizenship practice is consistent with and reinforcing of these trends. Citizenship status maps less perfectly onto identity. Some who are American are denied the status where others with tenuous connections to the national community are able to maintain it. Those denied the status lack entry rights and locational security in the United States. Those who have citizenship notwithstanding thin ties have absolute rights of entry into the United States along with substantial mobility privileges other countries extend to U.S. citizens. Some of these citizens came about their status not through luck but planning. In the end, U.S. citizenship represents status not just in the sense of a legal classification but also in the sense of privilege. That privilege might be normatively defensible to the extent the classification conforms to sociological identity. The privilege seems problematic, at least, to the extent it does not.

There is little prospect that the citizenship rules of the United States or of other passport-advantaged states will revert to former practices under which citizenship and identity were better correlated, at least insofar as the rules have becomes overinclusive. (A fix for the Dreamers is possible, though it would come via a one-off regularization rather than a modification of the citizenship regime.) There is no political pressure to do so, hence no political pressure. Dual

citizenship, which enables the holding of nominal citizenships, is entrenched in the United States and elsewhere. The granting of U.S. citizenship does not trigger the kind of political opposition that characterizes issues relating to immigration where its denial often will. This is in part the result of citizenship's declining domestic significance. The mobility privileges afforded to U.S. citizens by other states are an externality; no one in the United States will care that U.S. citizenship affords entry into other states, nor are other states likely to care that some U.S. passport holders have no meaningful connection to the United States. Those mobility privileges are likely to be reinforced at the same time that American identity, in part through the operation of citizenship law, becomes more diffuse. As other states follow a similar trajectory, increasingly extending citizenship to individuals who lack sociological connection, the mobility regime begins to look arbitrary along a new dimension.