

# Beyond Earned Citizenship

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*For more than a decade, a single rubric for legalization of the 11 million undocumented people in the United States has dominated every major proposal for comprehensive immigration reform, and continues to do so today: earned citizenship. Introduced as a rhetorical move intended to distinguish such proposals from amnesty, the earned citizenship frame has shaped the substantive provisions of the legislation by conditioning legalization on the performance of economic, cultural, and civic metrics. In order to regularize status, earned citizenship would require undocumented individuals to demonstrate their ongoing societal contributions at multiple intervals over a probationary period of many years, and they would remain subject to deportation for failure to do so. Such a behavioral approach expresses a particular moral basis for legalization and a normative vision of citizenship, and it aspires to place millions of people on a path to citizenship. And yet, despite the centrality of earned citizenship in contemporary immigration debates and the magnitude of its ambition, there has been virtually no scholarly treatment of its substance, ideology, or normative claims. While the election of Donald Trump has rendered progressive immigration reform improbable in the next several years, this is all the more reason to examine the failed logic and structure of recent reform proposals. This Article explores the origins and illuminates the deep structure of earned citizenship, and it critically evaluates its virtues and shortcomings as matters of politics, morality, policy, and law. Although laudable for its inclusionary promise, earned citizenship suffers from serious and previously unaddressed theoretical and conceptual flaws that reinscribe the moral claims of restrictionists, illuminate and imperil our larger understandings of citizenship, and invite consideration of alternative frameworks for legalization. The rightward electoral shift has closed a window for progressive reform for now, but when it is next pried open, a different moral and legal framework for legalization may be required.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	258
I. IMMIGRATION REFORM: FROM AMNESTY TO EARNED CITIZENSHIP . . . . .	264
II. THE SUBSTANTIVE AND NORMATIVE CONTENT OF EARNED CITIZENSHIP . . . . .	273
A. <i>Description: S. 744 as a Paradigm of Earned             Citizenship</i> . . . . .	274
B. <i>Competing Ideologies of Earned Citizenship</i> . . . . .	278

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1. <i>Neoliberalism and Work as the Measure of Worthiness</i> .....	279
2. <i>Communitarianism and Assimilation</i> .....	285
3. <i>Penalty and Rectification</i> .....	286
C. <i>Earned Citizenship's Faulty Epistemic Assumptions About Undocumented Immigrants</i> .....	288
III. UNEARNED CITIZENSHIP .....	291
A. <i>Moral Arbitrariness and Birthright Citizenship</i> .....	292
B. <i>Strategies of Moral Differentiation: Racialization, Criminalization, and the Invention of the Anchor Baby</i> .....	296
C. <i>Leveling Down: Selective Incorporation of Earning Requirements</i> .....	298
D. <i>Leveling Up: Liberalizing the Earnings Requirements</i> ..	301
CONCLUSION .....	303

## INTRODUCTION

For more than a decade, a single rubric for legalization of the 11 million undocumented people in the United States has dominated every major proposal for comprehensive immigration reform, and continues to do so today: earned citizenship. Introduced as a rhetorical move intended to distinguish such proposals from amnesty, the earned citizenship frame has shaped the substantive provisions of immigration legislation by conditioning legalization on the performance of economic, cultural, and civic metrics. In order to “earn” their citizenship, undocumented individuals would be required to demonstrate their ongoing societal contributions over a probationary period of many years, and would remain subject to deportation should they fail. Such a behavioral approach expresses a particular moral basis for legalization and a normative vision of citizenship, and it aspires to place millions of people on a path to citizenship. And yet, despite the centrality of earned citizenship in contemporary immigration debates and the magnitude of its ambition, there has been virtually no scholarly treatment of its substance, ideology, or normative claims. This Article explores the origins and illuminates the deep structure of earned citizenship, and critically evaluates the virtues and shortcomings of earned citizenship as matters of politics, morality, policy, and law. Although laudable for its inclusionary promise, earned citizenship suffers from serious and previously unaddressed theoretical and conceptual flaws that reinscribe the moral claims of restrictionists, illuminate and imperil our larger understandings of citizenship, and invite consideration of alternative frameworks for legalization.

A close examination of earned citizenship demonstrates that, while ideologically heterogeneous, it is predominantly neoliberal and punitive in orientation; it disciplines the putative citizen through expectations of economic productivity and moral self-governance and under threat of various

sanctions.<sup>1</sup> The neoliberal and punitive aspects of the framework cast the undocumented in a deficit position. In doing so, earned citizenship implicitly subscribes to the core claim of restrictionists<sup>2</sup> — namely, that undocumented immigrants have committed moral transgressions that require some form of moral recompense. Such an approach is empirically flawed because it ignores the complex, structural causation of undocumented migration, and it is conceptually flawed in that it locates legalization within the restrictionists' terms of the debate.

However, an examination of earned citizenship is productive not only to enhance an understanding of recent proposals for legalization, but also to illuminate the larger structure of prevailing citizenship practices. Earned citizenship begs the question of why some should have to demonstrate their worthiness for citizenship while, for most, citizenship is conferred merely by the accident of birth. By highlighting the prevailing practice of *unearned* citizenship, earned citizenship exposes the moral instability of the contemporary citizenship structure as a whole, and imperils the citizenship claims of all Americans. Ultimately, mapping these contours of earned citizenship and its relationship to citizenship more generally may enable the development of alternative moral frameworks for justifying and advocating legalization of the undocumented population.

Earned citizenship emerged as a reaction to the political fallout of the last large-scale legalization program, the Immigration Reform and Control Act of 1986 (“IRCA”).<sup>3</sup> Although that program successfully regularized the status of approximately three million people, it failed to halt the employment of undocumented workers or the future flow of undocumented migrants.<sup>4</sup> Its many shortcomings cast a deep and persistent shadow over future immigration reform efforts. Derided as an “amnesty” — a something-for-nothing giveaway that, according to its critics, not only rewarded past law-breaking but incentivized future immigration violations by implicitly promising future legalizations — IRCA is the *bête noire* of immigration reform history. That reputation has created a political imperative to differentiate future reform efforts. Earned citizenship is, according to its advocates, “not amnesty.”

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<sup>1</sup> The term neoliberalism is used differently in various contexts. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 2 (2014) (“Neoliberalism is an overlapping set of arguments and premises that are not always entirely mutually consistent . . .”). As discussed in greater detail below, *see infra* Section II.B.1., I use the term here to denote an ideology that premises social and political inclusion on conformity with expectations of economic self-sufficiency and moral self-governance, in a manner that upholds market values and imperatives, reifies unequal political power, and marginalizes states as providers and protectors of individual and collective well-being.

<sup>2</sup> I use the term restrictionist to describe those who favor imposing substantial limitations on current levels of immigration and those who oppose any significant legalization program. Such positions may be based on a variety of economic, cultural, racial, political, and ethical motivations.

<sup>3</sup> Pub. L. No. 99-603, 100 Stat. 3445.

<sup>4</sup> *See infra* notes 47–51 and accompanying text.

While citizenship via naturalization or previous legalization programs such as IRCA has long been earned in some sense, in that any substantive requirements for citizenship could be construed as earnings, the contemporary earned citizenship regime is materially different. The new regime's foremost focus on earning rationales and requirements renders citizenship as a prize for performance rather than a status of equality. IRCA sought to wipe clean the population of undocumented immigrants in one fell swoop, by quickly converting their status from undocumented to lawful permanent residents in wholesale fashion. In contrast, earned citizenship front-ends many naturalization-like requirements and creates a long period of probationary status for millions of individuals during which these requirements must be satisfied. Earned citizenship holds out lawful permanent residence and citizenship thereafter as a capstone achievement for successful societal contribution and integration. Whereas IRCA was built on a prior understanding that lawful permanent residence is preparatory for citizenship as a basis from which an individual could build the competencies necessary to naturalize, earned citizenship creates an intermediate, precarious status in which individuals must perform their economic, civic, and cultural contributions to the nation before even advancing to lawful permanent residence. As a result, citizenship is tested more stringently and progressively over a period of years. Moreover, unlike IRCA — whose end goal arguably was lawful permanent residence — earned citizenship is a regime that, as its name implies, contemplates citizenship, integrates that goal into the regime, redefines its substantive requirements, and redistributes those requirements across a lengthy period of performance.

The terminology of earning seeks to shift the discourse of immigration reform away from the pejorative of reward for bad behavior and toward the attribute of merit. But the move is not merely rhetorical; unlike IRCA, which had minimal requirements and a short path to lawful permanent residence,<sup>5</sup> earned citizenship proposals construct new and lengthy periods of probationary lawful residence; impose substantial work, language, and civics requirements, as well as the payment of fines, as conditions for obtaining permanent residence; punish the failure to satisfy the probationary terms with the threat of deportation; and make citizenship unavailable for more than a decade.<sup>6</sup> Earned citizenship regimes thus construct a long, multi-stage, and precarious pathway to citizenship punctuated by performance benchmarks that must be met to advance from one station to the next or even to remain in the same station.

While appealing in many respects for its emphasis on individual merit and its basic goal of liberal enlargement of the circle of belonging, earned citizenship is ideologically heterogeneous and conceptually complex. A close examination of the most robust earned citizenship proposal to date, a

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<sup>5</sup> See *infra* notes 34–41 and accompanying text.

<sup>6</sup> See, e.g., S. 744, 113th Cong. § 2102 (2013).

2013 comprehensive immigration reform bill,<sup>7</sup> reveals that the framework is by turns communitarian and assimilationist, but predominantly neoliberal and penal. Through a system of penalty and reward, earned citizenship promises to incorporate the undocumented immigrant, but demands economic, cultural, and civic conformity in return. The substantive requirements of earned citizenship conjure and project an idealized citizen who is, fundamentally, a neoliberal actor, one who through economic and moral self-sufficiency is deemed worthy of reward. By conditioning benefits upon such performance, earned citizenship thus disciplines the previously unruly immigrant.

The emergence of the earned citizenship regime tracks broader shifts in the rhetoric, substance, and ideology of social welfare policy. Specifically, federal welfare reform of the 1990s, which transformed federal assistance to poor families from an entitlement to a performance-based, “welfare-to-work” program, anticipates the framework of earned citizenship, which arrived on the scene only a handful of years later. In both cases, provision of a social good — financial assistance or legal status — is conditioned upon an individual’s satisfaction of neoliberal performance metrics. And in both cases, those metrics reflect a neoliberal conception of citizenship, whereby worthiness is measured by economic productivity and moral rectitude.

But the neoliberal aspects of earned citizenship, combined with its punitive provisions, place undocumented individuals in a starting position of moral deficit that recapitulates the moral framework of immigration restrictionists. Earned citizenship requires each applicant for legalization to demonstrate that she is worthy of citizenship. Although its political goal is to incorporate several million individuals into the polity, earned citizenship begins with the principal argument of immigration restrictionists — namely, that the large, undocumented population is the product of *individual* decisions to violate the nation’s immigration laws; it is such moral deficit that necessitates the earning of citizenship by each undocumented person. Thus, while deeply motivated by the political imperative to differentiate from amnesty, earned citizenship nonetheless yokes itself to the logic of amnesty’s central argument. This epistemic error traps earned citizenship within the discourse of amnesty, and more troublingly ignores the complex causation of undocumented immigration. Rather than recognize the role that government acquiescence, private sector incentives, and global economic and governance developments have played in the production of the large undocumented population,<sup>8</sup> earned citizenship reduces the problem to the aggregation of several million individual, agentic decisions to break the law. Echoing the social construction of welfare recipients,<sup>9</sup> this is a pathological understanding of undocumented immigration. Such an “individual responsibility” ap-

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<sup>7</sup> *Id.*

<sup>8</sup> See *infra* notes 140–48 and accompanying text.

<sup>9</sup> See *infra* notes 84–107 and accompanying text.

proach ignores the structural features of migration and unfairly allocates the entirety of the moral burden for undocumented immigration to immigrants themselves. Earned citizenship thus imposes individual responsibilities for collective failures and conceives of citizenship as a reward for good behavior rather than an imperative of equality.

The earning of citizenship, based upon performance metrics, is incompatible with an Arendtian understanding of citizenship as a fundamental bulwark against societal, territorial, and legal dispossession.<sup>10</sup> If we understand juridical citizenship, or citizenship as status, as an infeasible claim of belonging and concomitant state protection, then from a moral standpoint barriers to citizenship should be low.<sup>11</sup> And yet, earned citizenship pulls in the opposite direction, as it is by design a far more complex system for citizenship acquisition than previous legalization programs.

A sustained focus on earned citizenship reveals an even deeper conceptual difficulty, one which is not internal to the debate over legalization but rather extends to the larger structure of citizenship. The very notion of earned citizenship forces consideration of what constitutes unearned citizenship. In fact, for the majority of people in the United States (and the world), citizenship is unearned. The principal forms of citizenship transmission — *jus sanguinis* (citizenship by descent) and *jus soli* (citizenship by territorial birth) — ultimately confer citizenship based on the accident of birth. Such a citizenship regime suffers from a fundamental tension, as citizenship

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<sup>10</sup> See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 11–78 (new ed., Harcourt, Brace & World, Inc. 1966) (1951). Arendt famously defined citizenship as “the right to have rights,” *id.* at 298, by which she meant that first-order rights such as the right against deprivation of life or liberty could only be meaningfully secured through membership in the political community. Understood in these terms, citizenship as political membership is essential to safeguarding one’s humanity.

<sup>11</sup> Of course, this is hardly the only conception of citizenship. Alternative understandings focus on citizenship as a right of political participation, a right to social welfare, or a right of equal membership. For an incisive discussion of competing typologies of citizenship discourse, see Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 456–88 (2000). Importantly, citizenship can promote national solidarity essential for the promotion of equality. As Hiroshi Motomura writes:

The most persuasive justification for immigration and citizenship laws is that national borders create bounded societies in which equality and individual dignity can flourish. Borders foster equality in any society because they reinforce civic solidarity — some sense of bonds among members of a community, some sense of being involved in a joint enterprise for some common purpose. As political scientist Sarah Song reminds us, civic solidarity is important for several reasons. It is integral to the pursuit of distributive justice based on some belief in equal treatment. Mutual trust is necessary before all members of a society will participate in strengthening it. This type of trust requires that members believe that other members are like themselves in some meaningful sense. Civic solidarity is also important for the full sort of democracy that extends beyond voting to meaningful deliberation within a society. Such genuine democracy requires a concern for the common good. That concern requires solidarity. And solidarity is the basis for equal treatment.

Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 *U.C. IRVINE L. REV.* 359, 365 (2012) (citing Sarah Song, *What Does It Mean to Be an American?* *DÆDALUS*, Spring 2009, at 31–32).

promises equality but its distribution is morally arbitrary. By endorsing behavioral bases for citizenship acquisition for some but not others, earned citizenship exacerbates this tension. Such asymmetric application of behavioral requirements to citizenship transmission is morally unstable, and invites pernicious social and political practices in order to justify the asymmetry.

The predominance of birthright citizenship practices creates an imperative to avoid their moral indictment, even as earned citizenship focuses attention on them. This can be done in at least three ways. First is a process of moral differentiation, whereby aspiring citizens are demeaned such that birthright citizens are correspondingly exalted. Earned citizenship's location of undocumented persons in a place of moral deficit exemplifies this approach. So, too, are complementary strategies of criminalization and racialization of immigrants, which have the collective effect of debasing the moral claims of belonging of immigrants. Second, the problem of unearned citizenship could be mitigated through a leveling down of birthright citizenship. This would involve the importation of behavioral requirements for citizenship into the requirements for birthright citizenship. Such an approach is evident in the persistent attacks on territorial birthright citizenship, themselves grounded in an invented, narrative of the "anchor baby," a quasi-criminal figure and the object of racial contempt. Similarly, proposals for citizenship-stripping would impose behavioral requirements on citizens even after their status was secured, effectively rendering citizenship probationary rather than a permanent status of equality. Earned citizenship echoes this approach as well, as it features a lengthy probationary period before citizenship may be secured.

Finally, the problem of unearned citizenship could be addressed through a leveling up — that is, a liberal program of legalization and naturalization, free of unnecessary performance metrics, so as to narrow the gap between earned and unearned citizenship. This approach is bedeviled by its own baseline problem (whom do we let in? whom do we keep out?), but it avoids the pernicious impulses of the prior two moves. It may not explain exactly where to draw the line, but it does point in the direction of lower barriers to entry, rapid incorporation into full citizenship, and the maintenance of citizenship once conferred as an unimpeachable claim of equality.

Despite its inclusionary ambitions, earned citizenship comes at a significantly regressive cost. Its logic renders earned citizenship complicit in a faulty and insidious moral economy of demonization and stigma, and it unwittingly affirms the morally shaky foundation of unearned citizenship. This may well be a pragmatic strategy, recalling the insight of Joel Handler and Yeheskel Hasenfeld that successful political reform of morally complex issues frequently requires a reaffirmation of dominant ideology rather than a

rupture with it.<sup>12</sup> But the predominance of the earned citizenship framework crowds out alternative moral and political claims for legalization that would focus our attention on the structural causes of undocumented immigration and the collective moral harm suffered by allowing the persistence of a large-scale, long-term, racially marked, low-wage population that by law and social practice is confined to the margins of society. Moreover, the 2016 presidential election suggests that the moral compromise implicit in earned citizenship was insufficient to overcome the deep-seated “amnesty” objection to legalization.

Part I of the Article traces the history of the concept of earned citizenship and demonstrates how the political memory of IRCA demanded the development of an alternative to the notion of legalization as amnesty. Part II explores the substance of the most recent earned citizenship legislation, a 2013 bill that passed in the Senate but was never voted on in the House, and articulates its competing ideological underpinnings. It demonstrates the ideological resonance of earned citizenship with welfare reform, and illustrates how earned citizenship remains trapped within the logic and discourse of amnesty, such that citizenship is rendered a form of recompense rather than a form of equality. Part III considers earned citizenship in relation to the unearned citizenship practices of *jus soli* and *jus sanguinis*, and argues that because earned citizenship is corrosive of these practices, it magnifies the imperative to preserve them, often in troubling ways. The Article concludes by arguing that vacating the earned citizenship regime opens an imaginative space to develop stronger and more coherent moral claims for legalization of the undocumented population.

## I. IMMIGRATION REFORM: FROM AMNESTY TO EARNED CITIZENSHIP

Across the political spectrum, the consensus view is that the American immigration system is broken, as evidenced from the size of the undocumented population in the country today.<sup>13</sup> But this gross diagnosis masks dramatic differences as to the underlying causes and optimal solutions to the problem. As with any complex system, there are many moving parts susceptible to intervention and reform. Legalization opponents focus on a large and semi-permeable Southern border, logistical and technological difficul-

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<sup>12</sup> JOEL F. HANDLER & YEHESKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 8 (1991) (“[U]nless political interests can garner broad legitimacy through attachment to dominant cultural symbols, they are unlikely to enter the public agenda.”).

<sup>13</sup> See, e.g., *Remarks by the President in Address to the Nation on Immigration*, Nov. 20, 2014, <https://www.whitehouse.gov/issues/immigration/immigration-action#>, archived at <https://perma.cc/635Z-WL32>, at 2 (President Obama: “But today, our immigration system is broken — and everybody knows it.”); Paul Ryan, *Immigration*, <http://paulryan.house.gov/issues/issue/?IssueID=9970>, archived at <https://perma.cc/2YZT-V4QX>, at 1 (“Our immigration system is broken, and the evidence is overwhelming. Eleven million undocumented immigrants are living in the United States.”).



ties in ensuring that noncitizens on temporary visas depart when their visas expire, and the willingness of noncitizens to breach American law.<sup>14</sup> Business interests highlight the caps on visas for both low-skilled and high-skilled labor, the cumbersome nature of labor certification processes for employment-based immigration, and the specific demands for seasonal migrant labor in the agricultural industry.<sup>15</sup> Immigrants' rights advocates and organized labor highlight the labor exploitation, social and political exclusion, and persistent fear of deportation and resulting family separation experienced daily by some 11 million undocumented people.<sup>16</sup> The politics of immigration are compounded by tensions between nativism and cultural conservatism at one end of the spectrum and multiculturalism at the other, and often diffuse concerns about national security. To varying degrees, comprehensive immigration reform legislative proposals of the past decade have credited nearly all of these causal claims and national interests, and have attempted to solve them in an omnibus fashion. Earned citizenship likewise seeks to accommodate these competing interests, and it has emerged as a key technology in the legislative machinery of comprehensive immigration reform.

An interest group account of the contemporary debate over immigration identifies five major constituencies in favor of reform: organized labor, business, agriculture, Latinx communities,<sup>17</sup> and the civil rights community. Legalization opponents are more difficult to classify in interest group terms, and instead reflect a mix of rule-of-law moralism (often conflating civil im-

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<sup>14</sup> See, e.g., *Stop Amnesty*, NUMBERSUSA, (Aug. 5, 2014), <https://www.numbersusa.com/solutions/stop-amnesty>, archived at <https://perma.cc/6AJS-RDQ2>; Mark Metcalf, *Immigration Court Evasions*, CTR. FOR IMMIGR. STUD. (June 12, 2014), <http://cis.org/metcalf/immigration-court-evasions>, archived at <https://perma.cc/J63N-C292>; *The Current State of the Border Fence*, FED. FOR AM. IMMIGR. REFORM (Jan. 2017), <http://www.fairus.org/issue/us-mexico-border-fence-and-patrol-operations>, archived at <http://perma.cc/RMX3-TLLG>.

<sup>15</sup> See, e.g., Marie-Astrid Langer, *Silicon Valley Wants High-Skilled Immigration on Campaign Agenda*, WALL ST. J.: TECH 1, 1–2 (Sept. 18, 2015), <http://blogs.wsj.com/digits/2015/09/18/silicon-valley-wants-high-skilled-immigration-on-campaign-agenda>, archived at <https://perma.cc/EPV2-HSTA>; *Statement to the Senate Committee on Homeland Security and Government Affairs, Securing the Border: Defining the Current Population Living in the Shadows and Addressing Future Flows*, Chamber of Commerce, 114th Cong. 3 (2015) (statement of Randel K. Johnson, Senior Vice President of Lab., Immigration, and Emp. Benefits, U.S. Chamber of Com.); Patrick O'Brien, John Kruse & Darlene Kruse, *Gauging the Farm Sector's Sensitivity to Immigration Reform via Changes in Labor Costs and Availability*, AMER. FARM BUR. 8, 23 (2014), [http://www.fb.org/files/AFBF\\_LaborStudy\\_Feb2014.pdf](http://www.fb.org/files/AFBF_LaborStudy_Feb2014.pdf), archived at <https://perma.cc/96GR-H6BC>.

<sup>16</sup> See *Comprehensive Immigration Reform: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 113–119 (2013) (statement by Janet Murguia, President and CEO, Nat'l Council of La Raza); Executive Council, *Executive Action to Protect Worker Rights*, AFL-CIO, (July 31, 2014), <http://www.aflcio.org/About/Exec-Council/EC-Statements/Executive-Action-to-Protect-Worker-Rights>, archived at <https://perma.cc/Y43L-42FZ>.

<sup>17</sup> Other ethnic communities, including Asian Americans, are also active in promoting immigration reform. I highlight the Latinx population because of its size, electoral power, and the resulting influence of Latinx identity groups in contemporary immigration debates.

migration violations with criminality),<sup>18</sup> labor market protectionism, cultural conservatism, and nativism.<sup>19</sup> As with other large-scale reforms, the politics of immigration reform demand that otherwise oppositional groups — organized labor and the Chamber of Commerce, for example — find common ground.<sup>20</sup> And while national polls consistently have shown a majority of Americans favor immigration reform, including a path to citizenship for the undocumented,<sup>21</sup> legislative efforts repeatedly have stalled, most recently in 2013. Even before the 2016 election, a generation of concerted bipartisan efforts to reform immigration policies had failed repeatedly, and the election makes such grand bargain reform all the more unlikely for the foreseeable future.

In an attempt to harmonize the competing interests in immigration reform, and to overcome the largely values-based opposition to it, recent comprehensive immigration reform proposals typically have included four components: enhanced border security and interior enforcement, reformed agricultural and guest worker programs, revised priorities for lawful immigration (particularly in Science, Technology, Engineering and Math (STEM) fields), and pathways to legalization.<sup>22</sup> Legalization entails a conversion from undocumented status to lawful permanent residence, typically with the opportunity to naturalize, and thus is often referred to as a pathway to citizenship.<sup>23</sup> Legalization, then, is a critical component of comprehensive immigration reform, but one that always must be complemented by other programs so as to build sufficient political support.

The legacy of IRCA hangs over the current political configuration and demands differentiation.<sup>24</sup> While IRCA was itself comprehensive in design

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<sup>18</sup> See, e.g., Jon Feere, *The Myth of the “Otherwise Law-Abiding” Illegal Alien*, CTR. FOR IMMIGR. STUD. at 15 (2013), <http://cis.org/sites/cis.org/files/feere-illegal-myths.pdf>, archived at <https://perma.cc/CTL9-KKCL>.

<sup>19</sup> Racism and xenophobia undoubtedly animate some of the opposition to immigration reform, and I do not discount those, particularly in light of the 2016 election and the blatant appeals made to such attitudes by the Trump campaign. At the same time, I seek to identify and engage what might be considered legitimate and genuinely held objections to reform.

<sup>20</sup> See, e.g., Ashley Parker & Steven Greenhouse, *Labor and Business Reach Deal on Immigration Issue*, N.Y. TIMES, March 31, 2013, at A14.

<sup>21</sup> See, e.g., Jeffrey M. Jones, *In U.S., 65% Favor Path to Citizenship for Illegal Immigrants*, GALLUP (Aug. 12, 2015), <http://www.gallup.com/poll/184577/favor-path-citizenship-illegal-immigrants.aspx>, archived at <https://perma.cc/ES5P-K6S2>.

<sup>22</sup> See *infra* note 68.

<sup>23</sup> Although there has been some political debate as to whether legalization should culminate in permanent residence or entail the opportunity to naturalize, most legalization proponents advocate a pathway to citizenship. See Jones, *supra* note 21 (“At 80%, Democrats overwhelmingly favor allowing illegal immigrants to stay in the U.S. and to have an opportunity to become citizens.”).

<sup>24</sup> See, e.g., Philip E. Wolgin, *The Top 5 Reasons Why Immigration Reform in 2013 Is Different Than in 1986*, CTR. FOR AM. PROGRESS (June 12, 2013), <https://www.american-progress.org/issues/immigration/news/2013/06/12/66208/the-top-5-reasons-why-immigration-reform-in-2013-is-different-than-in-1986/>, archived at <https://perma.cc/SG73-PQ7N> (“The specter of the 1986 Immigration Reform and Control Act, or IRCA, has haunted every immigration-reform effort over the past few decades and continues to influence the 2013 reform debates.”); Rachel L. Swarns, *Failed Amnesty Legislation of 1986 Haunts the Current Immi-*

— including enforcement, guest worker, and legalization components — and succeeded in legalizing approximately 2.6 million people,<sup>25</sup> it is frequently characterized as having failed in many of its ambitions.<sup>26</sup> For over a decade, IRCA has been denigrated as amnesty, a term meant to denote a something-for-nothing giveaway. The political memory of IRCA is so bitter that legalization proponents have been at pains to avoid the amnesty moniker, and opponents have suspected an amnesty lurking behind every legalization proposal. The term “earned legalization,” and subsequently “earned citizenship,” emerged as a naming device and a substantive programmatic structure designed to defeat the amnesty claim.<sup>27</sup>

Passed in 1986 and signed by President Reagan, IRCA was the culmination of a series of legislative efforts to enact legislation to address the problem of illegal immigration that began with a plan submitted to Congress by President Carter in 1977. The legislation built upon recommendations made in 1981 by a congressionally appointed Select Commission on Immigration and Refugee Policy,<sup>28</sup> whose principal objective was to reduce illegal immigration. Although it also included agricultural and guest worker programs, the core of IRCA was a “three-legged stool” featuring increased border and interior enforcement, a new regime of sanctions for employers who knowingly hire undocumented workers, and a general legalization program.<sup>29</sup> Legalization sought to solve the existing undocumented problem, employer sanctions were intended to dry up demand for undocumented labor, and increased border and interior enforcement was supposed to provide the state with an apparatus for detection, apprehension, and return of those excluded from legalization and of new, would-be undocumented immigrants. By this account, the moral wrongs of undocumented immigration were to be forgiven in favor of the administrative and law enforcement gains that would result from regularization of status.

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*gration Bills in Congress*, N.Y. TIMES, May 23, 2006, at A20 (“There is no denying, however, that the 1986 amnesty has cast a long shadow over the [then-pending] legislation. It is the invisible enemy lurking in nearly every Congressional debate, challenging and dogging even the most eloquent champions of immigrants. These days, skeptical senators pepper their speeches with repeated references to its failures.”).

<sup>25</sup> Nancy Rytina, *IRCA Legalization Effects: Lawful Permanent Residence and Naturalization through 2001*, Exhibit 1 (Washington, D.C.: U.S. Immigration and Naturalization Service, Office of Policy and Planning, October 25, 2002), [www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf), archived at <https://perma.cc/P6K4-XCNF>.

<sup>26</sup> See, e.g., NICHOLAS LAHAM, RONALD REAGAN AND THE POLITICS OF IMMIGRATION REFORM 195 (2000) (describing IRCA’s employer sanctions regime as “an unmitigated failure” and noting that IRCA “failed to solve the problem of illegal immigration”).

<sup>27</sup> See *infra* notes 61–64 and accompanying text.

<sup>28</sup> For a history of the legislation, see SUSAN GONZÁLEZ BAKER, *THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT 25–54* (1990).

<sup>29</sup> Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA’s Legacy Lives On*, MIGRATION POL’Y INST., POLICY BEAT (Nov. 16, 2011), <http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives>, archived at <https://perma.cc/BDX2-X54Y>.

In the immigration context, amnesty has not always been a dirty word.<sup>30</sup> In 1984, President Reagan expressed his support for “amnesty for those who have put down roots and lived here, even though some time back they may have entered illegally,”<sup>31</sup> and through the course of legislative debate, legalization proponents used the term unapologetically.<sup>32</sup> This unproblematic use of the term reflected an understanding of IRCA as grand-bargain legislation, a one-time-only wiping clean of the slate.

Exactly what constitutes “amnesty” is the subject of some debate.<sup>33</sup> As Linda Bosniak has written, we can understand amnesty in the immigration context in at least three different senses: forgiveness and forgetting, administrative reset, and validation. An understanding of amnesty as forgiveness and forgetting draws from the Greek etymology of the word (*a* and *mnestis*, meaning non-remembrance, or oblivion).<sup>34</sup> By this account, amnesty is “an act of official forgetting.”<sup>35</sup> The forgetting is total and absolute, not merely the resolution of a charge but its legal effacement. The second understanding, administrative reset, views amnesty as a pragmatic attempt to “bring the law and actual behavior into closer alignment for purposes of effective governance and systemic legitimacy.”<sup>36</sup> Finally, the validation model understands amnesty as a form of freedom that follows from a “normative reversal” of perpetrator and victim.<sup>37</sup> By this understanding, amnesty justifies the transgressions to be forgotten and implicitly indicts the conduct of the forgiving power.

IRCA can be understood to comport with all three understandings of amnesty, to varying degrees. First, IRCA legalization was intended not only

<sup>30</sup> See Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 301 n.64 (2008).

<sup>31</sup> *A Reagan Legacy: Amnesty for Illegal Immigrants*, NAT'L PUB. RADIO (July 4, 2010, 2:12PM), <http://www.npr.org/templates/story/story.php?storyId=128303672>, archived at <https://perma.cc/4LWC-TEDS>.

<sup>32</sup> E.g., “Fortunately, this bill does provide amnesty, for those illegal aliens who entered this country prior to January 1, 1982 . . . .” 132 CONG. REC. 33213 (1986) (statement of Sen. Moynihan).

<sup>33</sup> As the Supreme Court noted in *Ex parte Garland*, 71 U.S. 333, 348 (1866), “[n]either the English law nor our laws throws [sic] great light upon the” meaning of amnesty as used in U.S. law.

<sup>34</sup> Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRIT. REV. INT'L. SOC. & POL. PHIL. 344, 346 (2013); see also Norman Weisman, *A History and Discussion of Amnesty*, 4 COLUM. HUM. RTS. L. REV. 529, 529 (1972).

<sup>35</sup> Bosniak, *supra* note 34, at 346. This is consistent with ancient Greek and Roman uses of the concept, as well as modern French understandings. As the Supreme Court rehearses in *Ex parte Garland*, “[t]he Romans, too, had their amnesty, which they called *Abolitio*, and which is thus defined in their law: ‘*Abolitio est deletio, oblivio, vel extinctio accusationis.*’” 71 U.S. 333, 349 (1866). The Court quotes with approval from a case from the French Court of Cassation stating that “the object of the amnesty is to efface, completely, the past — that is to say, to replace the amnestied in the position in which they were before the condemnation had been incurred . . . .” *Id.* at 351 (quoting De Villeneuve & Carrette, vol. 1850, part 1, 672–73).

<sup>36</sup> Bosniak, *supra* note 34, at 348.

<sup>37</sup> *Id.* at 350. As Bosniak explains further, this reversal results because “the purported perpetrators were actually in the right, while the government itself is at least partly culpable.” *Id.*

to resolve undocumented status, but to obliterate it legally. Thus, for those qualifying for legalization, IRCA erased their undocumented status and in relatively short order rendered them lawful permanent residents. This approach was also consistent with the administrative reset model. IRCA was plainly intended to start the project of immigration enforcement anew by zeroing out the undocumented population and ensuring that a new one was not created. As Alex Aleinikoff has written, “The claim in 1986 was that we were going to end illegal immigration forever.”<sup>38</sup> Finally, although the claim is rarely made explicitly,<sup>39</sup> one can understand IRCA legalization as an implicit acknowledgment that the prior immigration enforcement regime was unworkable and unfair. As President Reagan wrote in his signing statement, “The legalization provisions in this act will go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of a free and open society.”<sup>40</sup>

Consistent with the administrative reset goal, IRCA imposed relatively limited restrictions on legalization eligibility.<sup>41</sup> The general legalization program, which benefited approximately 1.6 million people,<sup>42</sup> was available to those undocumented immigrants who could prove five years of continuous

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<sup>38</sup> T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1313, 1314 (2007-08). Even at the time this claim was being made, however, several supporters of the legislation expressed skepticism that it would work. For example, then-Representative Charles E. Schumer, who strongly supported the legislation stated, “The bill is a gamble, a riverboat gamble. There is no guarantee that employer sanctions will work or that amnesty will work. We are headed into uncharted waters.” Robert Pear, *President Signs Landmark Bill on Immigration*, N.Y. TIMES (Nov. 7, 1986), <http://www.nytimes.com/1986/11/07/us/president-signs-landmark-bill-on-immigration.html>, archived at <https://perma.cc/WB8P-KYLH>, (quoting Rep. Schumer). For examples of other skeptical views even among the legislation’s advocates, see, e.g., Muzaffar Chishti & Charles Kamasaki, *IRCA in Retrospect: Guideposts for Today’s Immigration Reform*, MIGRATION POL’Y INST. ISSUE BRIEF 9 at 1–2 (Jan. 2014) (collecting floor statements of members of Congress).

<sup>39</sup> As Bosniak writes:

[A]mnesty supporters very rarely express the idea that amnesty rightfully emancipates irregular immigrants from unjust laws or unjustified enforcement of laws — that is, that amnesty represents a necessary repudiation of the country’s border control policies which construct them as illegal — in the first instance. Nor do they maintain that the original act of the immigrants (whether via unauthorized entry or visa overstay) was justified. Although one occasionally sees intimations of such views in pro-amnesty rhetoric, this is not a standard framing. Indeed, in most cases, advocates conspicuously avoid such claims, and instead conjoin their call for amnesty with a commitment to a renewed enforcement of national borders.

Bosniak, *supra* note 34, at 352.

<sup>40</sup> Statement on Signing S. 1200 Into Law, Immigration Reform and Control Act, 16 WEEKLY COMP. PRES. DOC. 1534 (Nov. 6, 1986).

<sup>41</sup> *But see* SUSAN GONZÁLEZ BAKER, THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT 26 (1990) (“Legalization as it emerged in IRCA was not an ‘amnesty’ in the broadest sense of the term, but rather a targeted program that balanced the offer of legalization with stringent requirements.”).

<sup>42</sup> Rytina, *supra* note 25, Exhibit 1. A legalization program for agricultural workers benefited approximately 1 million additional people.

residence prior to January 1, 1982<sup>43</sup>; paid a \$185 filing fee<sup>44</sup>; and could establish they were not likely to become a public charge.<sup>45</sup> Upon satisfaction of these three requirements, the applicant received an 18-month temporary residence card, work authorization, and travel authorization.<sup>46</sup> In order to advance to permanent resident status, the applicant was required to make a modest English language/civics education program commitment within one year of the expiration of the 18-month temporary residence period.<sup>47</sup> Certain exclusions also applied: applicants were ineligible for most public benefits for a period of five years, and those with a felony conviction or three misdemeanors were ineligible for both temporary and permanent residence.<sup>48</sup>

Despite its wipe-the-slate-clean ambitions, IRCA was the source of a persistent undocumented population and its substantial growth in subsequent years. At the time of IRCA's enactment, the undocumented population was estimated at 3 to 5 million people.<sup>49</sup> IRCA's legalization programs (both the general legalization and one specific to agricultural workers) adjusted the status of approximately 2.6 million people, thus reducing the undocumented population. Following implementation of the legalization and employer sanction programs, the undocumented population was estimated at between 1.8 and 3 million people.<sup>50</sup> IRCA's eligibility requirements excluded as many as 2 million people by virtue of the cutoff date for physical presence, and another approximately 500,000 people who were eligible but failed to legalize. This population became "the nucleus of today's large unauthorized population."<sup>51</sup> For much of the 1990s and 2000s, the undocumented population grew by 5–10% per year,<sup>52</sup> spurring exponential growth in spending on border enforcement (under \$700 million in 1986, \$11.7 billion in 2012) and overall immigration enforcement (\$1.2 billion in 1986, \$18 billion in 2012).<sup>53</sup>

The failure to control the undocumented population is attributable to several flaws in the legislation: structural defects in the employer sanctions regime, ineffective enforcement of sanctions, exclusion of immediate family

<sup>43</sup> 8 U.S.C. § 1255a(a)(2).

<sup>44</sup> *Id.* § 1255a(c)(7)(A); 8 C.F.R. § 103.7(b) (1987).

<sup>45</sup> 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV).

<sup>46</sup> *Id.* §§ 1255a(a) & 1255a(b)(3).

<sup>47</sup> The statute specified that applicants either satisfy the English language and civics requirements for naturalization, or that they are "satisfactorily pursuing a course of study" to satisfy those language and civics requirements. *Id.* § 1255a(b)(1)(D).

<sup>48</sup> *Id.* §§ 1255a(b)(2)(B)(ii) & 1255a(h).

<sup>49</sup> Michael E. Fix & Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight*, URBAN INST. 23–24 (May 1994), [http://webarchive.urban.org/UploadedPDF/305184\\_immigration\\_immigrants.pdf](http://webarchive.urban.org/UploadedPDF/305184_immigration_immigrants.pdf), archived at <https://perma.cc/BZ7H-G97J>.

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

<sup>51</sup> Chishti & Kamasaki, *supra* note 38, at 6.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> Compare David Dixon & Julia Gelatt, *Immigration Enforcement Spending Since IRCA*, 6 MIGRATION POL'Y INST. (2005), with Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, 20 MIGRATION POL'Y INST. (Jan. 2013). Figures are in dollar terms for 1986 and 2012, respectively.

members who did not meet the cutoff date from legalization eligibility, and perhaps most importantly, a failure to reform the future flow of legal immigration.<sup>54</sup> These defects were compounded by allegations of widespread fraudulent applications for legalization.<sup>55</sup> Of course, the legislation alone was not to blame; the existence of a long, geographically permeable border separating two dramatically unequal economies makes total control of undocumented immigration implausible.<sup>56</sup> The notion that IRCA might eliminate — or even control — undocumented immigration thus proved grandiose, and left many politicians believing that they did not get the benefit of the bargain; legalization was to be the price to be paid for controlling undocumented immigration, and yet the growth of the undocumented population only accelerated.

IRCA legalization came to be understood as a giveaway rather than a tradeoff, and amnesty was transformed from a neutral term to a pejorative. Legalization opponents use the term to capture a set of related objections. First and most important is the claim that legalization rewards illegality. This concern is objectionable in its own right, on rule-of-law grounds, but also because it incentivizes future unauthorized migration. Relatedly, an understanding of legalization as an unjust reward constructs undocumented immigrants as free-riders vis-à-vis citizens and the lawful immigrant population. Finally, elevating the status of undocumented immigrants is viewed by some as conferring unfair advantage, to the detriment of prospective immigrants who are awaiting visas under the ordinary immigration process. These specific complaints animate broader concerns regarding economic competition, criminality, terrorism, and cultural preservation.

While amnesty retained its neutral connotation through the 1990s, by 2000 it was increasingly used as a derogatory term.<sup>57</sup> When President

<sup>54</sup> Chishti & Kamasaki, *supra* note 38, at 2–6, 9–11; *see also id.* at 6 n.35 (discussing how even the family unity program created by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 301 “contributed to multi-year backlogs in the family second-preference category reserved for spouses and dependent children of lawful permanent residents”); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (arguing more broadly that employment sanctions have “strengthened the ‘jobs magnet’ that [they] aimed to weaken [and] . . . encouraged illegal immigration”); Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 689, 694 (2007) (“While the program did offer legal status to a considerable number of undocumented migrants, it was an inadequate effort by Congress to take into account what could (and ultimately would) arise in the future: an additional, even larger flow of immigrants . . .”).

<sup>55</sup> Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At its 25th Anniversary, IRCA’s Legacy Lives On*, MIGRATION POL’Y INST. (NOV. 16, 2011).

<sup>56</sup> My thanks to Stephen Legomsky for this observation.

<sup>57</sup> Bryn Siegel has demonstrated a shift in the use of amnesty in debates surrounding the renewal of section 245(i) of the Immigration and Nationality Act, which allowed certain noncitizens who entered without inspection to legalize status without leaving the country. Whereas amnesty was used neutrally in debates around extension of the section in 1994 and 1997, congressional debate regarding extension in 2000 was significantly more negative. Siegel, *supra* note 30, at 301. In a news release describing its implementation of the 2000 legislation, the Justice Department explicitly disclaimed the label of amnesty. News Release, U.S. Dep’t

George W. Bush introduced an immigration reform proposal in 2004 — an idea he had promoted since 2001 — Congressional Republicans derided it as amnesty.<sup>58</sup> By the time the Senate took up comprehensive immigration reform legislation in 2006, amnesty was anathema. As opponents literally sought to brand reform legislation as amnesty,<sup>59</sup> proponents protested that the term was inaccurate and a slur.<sup>60</sup> Amnesty was reduced to a signifier — or, by some accounts, a dog whistle — and thus compelled advocates to attempt to reframe the debate.

In response to the growing toxicity of the term, reform advocates developed and propagated a counter-frame: first “earned legalization,” and somewhat interchangeably, “earned citizenship.” Backed by polling and focus group data suggesting that such language made legalization more appealing to voters — and Republican voters in particular — Democrats embraced the language of earning.<sup>61</sup> As early as 2002, then-House Minority Leader Richard Gephardt, a Democrat, introduced the Earned Legalization and Family

of Justice, Immigration and Naturalization Serv., INS Implements Section 245(i) Provision of the LIFE Act (Mar. 23, 2001), [http://www.uscis.gov/files/presentation/Section245iLIFEAct\\_032301.pdf](http://www.uscis.gov/files/presentation/Section245iLIFEAct_032301.pdf), archived at <https://perma.cc/53QA-2HWU> (demonstrating the need to defend the law from attracting this label: “it is not amnesty for all persons unlawfully in the United States”). As Siegel notes, § 245(i) was allowed to expire on April 30, 2001. Siegel, *supra* note 30, at 303.

<sup>58</sup> David D. Kirkpatrick, *Republicans Squaring Off Over Bush Plan on Immigration*, N.Y. TIMES (Jan. 27, 2005), <http://www.nytimes.com/2005/01/27/politics/republicans-squaring-off-over-bush-plan-on-immigration.html>, archived at <https://perma.cc/NME3-E4KZ>.

<sup>59</sup> As Dana Milbank wrote:

It was all fire and brimstone as House Republicans gathered yesterday in the Capitol basement to denounce their Senate counterparts for proposing to legalize illegal immigrants.

Rep. Steve King (R-Iowa), behind a pulpit adorned with a “Just Say No to Amnesty” sign, thundered: “Anybody that votes for an amnesty bill deserves to be branded with a scarlet letter, ‘A’ for amnesty, and they need to pay for it at the ballot box in November.”

Dana Milbank, Opinion, *The Great Senate Immigr’A’tion Debate*, WASH. POST (Mar. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/30/AR2006033001798.html>, archived at <https://perma.cc/CEP9-JEJZ>. See also Editorial, *It Isn’t Amnesty*, N.Y. TIMES, Mar. 29, 2006, at A22 (“Attackers of a smart, tough Senate bill have smeared it with the most mealy-mouthed word in the immigration glossary — amnesty — in hopes of rendering it politically toxic.”).

<sup>60</sup> See, e.g., Milbank, *supra* note 59 (“‘It is not amnesty,’ [Senator Arlen] Specter rebutted. ‘This word “amnesty” is a code word. It is a code word to try to smear good-faith legislation.’”); Jaime Fuller, *The History of ‘Amnesty’ in the Immigration Debate*, WASH. POST: THE FIX (Nov. 21, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/11/21/when-did-amnesty-eat-up-the-entire-immigration-debate/>, archived at <https://perma.cc/NS8G-Q7WF> (reporting the political history of the term).

<sup>61</sup> Beyond the Ballot, *Immigration Reform through the Lens of Republican Primary Voters*, RESURGENT REPUBLIC (Mar. 28, 2013), <http://resurgentrepublic.com/research/immigration-reform-through-the-lens-of-republican-primary-voters>, archived at <https://perma.cc/YV99-D2HP>; see Scott Keeter, *Where the Public Stands on Immigration Reform*, PEW RES. CTR. (Nov. 23, 2009) (reporting on polling results showing that a smaller majority supported a ‘path to citizenship’ objective of a comprehensive immigration bill when it was described as ‘amnesty,’ particularly among Republicans who “were evenly divided on the question when the policy was described as” such).



Unification Act,<sup>62</sup> and immigration reform advocates adopted the term during the Immigrant Worker Freedom Ride campaign in 2003.<sup>63</sup> In response to President Bush's guest worker proposal in 2004, Congressional Democrats laid out principles for an "earned legalization" program,<sup>64</sup> and continued to use that language when reform legislation was introduced in 2006. It has remained the dominant framework for legalization proposals ever since, most notably in the 2013 bill, S. 744, which passed in the Senate but was never taken up by the House of Representatives.<sup>65</sup>

Although earned legalization and earned citizenship were once used interchangeably, by 2013 the latter term gained distinct meaning in the face of some proposals for legalization that would culminate in a permanent lawful status without the possibility to naturalize.<sup>66</sup> Thus both "earned" and "citizenship" carried weight: status was to be earned and not rewarded, and the status would culminate in citizenship.

Just as reform proponents have claimed that amnesty is a code word, so, too, have opponents made the same claim about earned citizenship. For opponents, earned citizenship, and most any other proposal that would result in the regularization of status for undocumented immigrants, is mere code for amnesty.<sup>67</sup>

## II. THE SUBSTANTIVE AND NORMATIVE CONTENT OF EARNED CITIZENSHIP

The political rhetoric of earning has shaped both the substantive content of immigration reform proposals and the normative claims underwriting them. This Part begins with a description of the most recent earned citizenship proposal, as it best illustrates the defining characteristics of such legislation. In order to counter the something-for-nothing reputation of IRCA legalization, earned citizenship is premised on the notion of exchange: immigrants must do something in order to merit legalization and eventual citizenship. This principle of reciprocity is encoded in a legalization process that establishes intermediate economic, civic, and cultural benchmarks that must

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<sup>62</sup> H.R. 5600, 107th Cong. (2d Sess. 2002).

<sup>63</sup> David Feldman, *Whose Immigration Reform? Co-Optation and Resistance in the Wake of a DREAM-Turned-Nightmare*, LA REVUE DES DROITS DE L'HOMME at 4 (2013).

<sup>64</sup> *Democrats offer plan on aliens*, WASH. TIMES (Jan. 29, 2004), <http://www.washington-times.com/news/2004/jan/29/20040129-122045-1558r?page=1>, archived at <https://perma.cc/58E5-J6EC>.

<sup>65</sup> See *infra* Section II.A.

<sup>66</sup> See Julia Preston, *A Path to Citizenship Divides Congress and, Polls Show, Confuses Country*, N.Y. TIMES (Apr. 4, 2013), <http://www.nytimes.com/2013/04/05/us/politics/in-immigration-reform-path-to-citizenship-divides-and-confuses.html>, archived at <https://perma.cc/2CE2-XR75>.

<sup>67</sup> See, e.g., *Sensenbrenner: Senate Bill Amounts to Amnesty*, CNN (May 26, 2006), <http://www.cnn.com/2006/POLITICS/05/26/immigration/index.html>, archived at <https://perma.cc/QDD8-ML7M> ("What's going on now, in calling it a pathway to citizenship or earned legalization, is not honest because it is amnesty . . .").

be satisfied over a number of years in order to advance from one stage of the process to the next and ultimately to culminate in full citizenship. As the subsequent discussion demonstrates, these substantive requirements, their sequencing, and the system of penalty and reward that they constitute reflect a conception of citizenship acquisition that is by turns communitarian and assimilationist, but overwhelmingly neoliberal and penal.

### A. *Description: S. 744 as a Paradigm of Earned Citizenship*

Although the earned citizenship rubric has been used to describe at least five different bills over the past decade,<sup>68</sup> there are several core characteristics that define the framework. S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, a 2013 bill that passed in the Senate and had the President's support but was never brought to the House floor,<sup>69</sup> plainly embodies these features. The bill represents the most mature form of earned citizenship and is the closest that such legislation has come to passage. And while the Trump presidency has closed the window on progressive immigration reform for at least some years, S. 744 may yet serve as a benchmark for future reform efforts should the political pendulum shift again.

Following the three-legged architecture of IRCA, S. 744 sought to bolster border security<sup>70</sup> and interior immigration enforcement,<sup>71</sup> prevent unauthorized employment,<sup>72</sup> and create pathways for legalization for the large undocumented population.<sup>73</sup> Unlike IRCA, the bill also sought to revise significantly the programs for lawful permanent residence and temporary, non-agricultural worker programs. The bill contains three legalization programs — one for agricultural workers,<sup>74</sup> one for DREAMers,<sup>75</sup> and a third, general

<sup>68</sup> S. 2611, 109th Cong. (2006); S. 1639, 110th Cong. (2007); Comprehensive Immigration Reform for America's Security and Prosperity Act (CIR-ASAP) of 2009, H.R. 4321, 111th Cong.; S. 3932, 111th Cong. (2010); S. 744, 113th Cong. (2013).

<sup>69</sup> S. 744 – Border Security, Economic Opportunity, and Immigration Modernization Act, <https://www.congress.gov/bill/113th-congress/senate-bill/744/actions?q=%7B%22search%22%3A%5B%22s.+744%22%5D%7D&r=2>, archived at <https://perma.cc/V8JC-LLHT>.

<sup>70</sup> S. 744, 113th Cong. (2013) §§ 1101–1203.

<sup>71</sup> *Id.* §§ 3101–3911.

<sup>72</sup> *Id.* § 3101.

<sup>73</sup> *Id.* §§ 2101–2244.

<sup>74</sup> *Id.* §§ 2211–21.

<sup>75</sup> *Id.* § 2103. DREAMers are individuals who came to the United States as children and who seek to legalize, so named after the Development, Relief and Education for Alien Minors (DREAM) Act, itself a prototypical form of the earned citizenship regime. S. 744 incorporates core components of the DREAM Act. Introduced periodically since 2001 — roughly contemporaneous with the emergence of the language of earned legalization — the DREAM Act would provide conditional residence to individuals under age 35 who arrived in the U.S. before the age of 16 and who have obtained a U.S. high school diploma or its equivalent. S. 1291, 107th Cong. (2002). The conditional status would be removed after six years, and lawful permanent resident status and the opportunity to naturalize granted, if the individual completes at least two years of post-secondary education or military service and maintains good moral character. *Id.* Structurally, then, the legislation bears the hallmarks of staged incorporation of

legalization program that is the focus of the discussion that follows. Each program was also subject to a series of exclusions.<sup>76</sup> Like many of its predecessors, the S. 744 legalization program proposed a multi-staged process: from undocumented status, to Registered Provisional Immigrant (RPI) status, to lawful permanent resident (LPR or green card) status, to citizenship. In order to proceed from one stage to the next, an individual would have to meet criteria that fall into four principal categories: continuous presence; the payment of fines, fees and taxes; employment and education; and English language and civics knowledge.

First, subject to certain exclusions,<sup>77</sup> the program would grant RPI status to individuals who have been continuously present in the United States for at least two years, pay a fine and application fee, and pay outstanding federal income taxes.<sup>78</sup> RPI status is renewable after six years, but only if

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the undocumented into citizenship subject to satisfaction of performance metrics intended to ensure the immigrant's productivity and contribution to society. The language of earning is sometimes used in reference to the legislation. *See, e.g.*, Durbin Statement on DREAM Act And Administrative Action to Help Young Immigrants, June 15, 2012, <http://www.durbin.senate.gov/newsroom/press-releases/durbin-statement-on-dream-act-and-administrative-action-to-help-young-immigrants>, archived at <https://perma.cc/CSH7-SQXB> (quoting Sen. Richard Durbin, original sponsor of the DREAM Act, as saying, "For over a decade, I've been working to pass the DREAM Act — a bill that would give these immigrant students the chance to earn citizenship."); Luis Miranda, *The Dream Act: Good For Our Economy, Good For Our Security, Good For Our Nation*, THE WHITE HOUSE (Dec. 1, 2010), <https://obamawhitehouse.archives.gov/blog/2010/12/01/get-facts-dream-act>, archived at <https://perma.cc/KKS6-RE7L> (describing DREAM Act as "limited, targeted legislation that will allow only the best and brightest young people to earn their legal status after a rigorous and lengthy process"); Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J. L. & HUMAN. 110, 143–44 (2011) (describing DREAM Act as a form of earned citizenship that privileges rootedness as an equitable basis for legalization). However, the political narrative around the DREAM Act differs significantly from that of general legalization proposals. Indeed, the narrative claim of DREAM proponents is not that its beneficiaries should be allowed to earn their citizenship, but that by virtue of their youth and upbringing, they are already American except on paper. *See, e.g.*, Remarks of the President in Meeting With DREAMers, THE WHITE HOUSE (Feb. 4, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/04/remarks-president-meeting-dreamers>, archived at <https://perma.cc/75BR-UJW7> ("I don't think there's anybody in America who's had a chance to talk to these six young people who [sic] or the young DREAMers all across the country who wouldn't find it in their heart to say these kids are Americans just like us and they belong here"). The paradigmatic DREAMer is innocent (i.e., has come to the United States through no fault of her own), culturally assimilated, educationally accomplished, and career-oriented. *See* Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform, and Citizenship*, 14 NEV. L. J. 101, 150–51 (2013). The DREAM Act thus is an important point of reference in an understanding of earned citizenship, but in light of the particular attributes of DREAMers, is a limited vehicle for evaluating the earned citizenship regime.

<sup>76</sup> *See* National Immigration Law Center, *Analysis of Senate Immigration Reform Bill: Title II: Immigrant Visas*, (June. 23, 2013) [hereinafter "NILC, *Analysis of Senate Immigration Reform Bill*"].

<sup>77</sup> S. 744 §§ 2101–02. Grounds for ineligibility include certain criminal convictions and inadmissibility grounds such as national security threats and terrorism involvement.

<sup>78</sup> *Id.* § 2101. Continuous residence would have been required from December 31, 2011. *Id.* § 2101(a) (proposing amendments to the INA, § 245B(b)(2)(A)). RPI status could be granted within 180 days of enactment of the bill, subject to the Secretary of Homeland Security submitting to Congress a Southern Border Fencing Strategy. *Id.* § 5. Applicants would be required to pay a \$1000 fine and an application fee, to be set "at a level that is sufficient to

the individual can demonstrate the satisfaction of certain employment, income and education requirements, the payment of taxes, an application fee, and a penalty.<sup>79</sup> Renewal is necessary in order to progress because only upon ten years of RPI status may an individual transition from RPI to LPR status. The transition to LPR status also requires that the individual has maintained continuous presence in the country; pays an additional penalty, additional application fees and tax liabilities; once again satisfies employment, income and educational requirements; meets English language and U.S. civics education requirements; and does not otherwise become inadmissible by committing a crime or engaging in other prohibited conduct.<sup>80</sup> Finally, after three years in LPR status, the individual may apply for U.S. citizenship according to the ordinary requirements of naturalization.<sup>81</sup> Thus, there are four distinct stages at which an applicant must satisfy certain substantive standards: initial RPI application; RPI renewal; adjustment from RPI to LPR status; and naturalization.

The employment, income, education, English-language, and civics requirements necessary to transition from RPI to LPR status form the core of the earned citizenship regime and as such are worthy of further description. First, in order to renew RPI status, an immigrant must demonstrate that she is regularly employed throughout the 10-year RPI period, without a period of unemployment of more than 60 days;<sup>82</sup> or that she has an income or resources of at least 125% of the federal poverty level;<sup>83</sup> or that she is enrolled in secondary or higher education or certain other educational programs.<sup>84</sup> Second, upon ten years in RPI status, an RPI seeking to adjust to LPR status must demonstrate that she continues to satisfy those same employment, income and educational requirements, and in addition, must either satisfy the English language requirements currently necessary for naturalization or be enrolled in a course of study to achieve sufficient knowledge of English and U.S. history and government required for naturalization.<sup>85</sup>

While this structure and content bear some similarity to IRCA legalization — that, too, had a provisional status prior to lawful permanent residence and requirements relating to continuous presence, language, education, and

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recover the full costs of processing the application.” *Id.* § 2101(a) (proposing amendments to the INA, § 245B(c)(10)(A)(ii)). Tax liability would be limited to actually assessed federal taxes. *Id.* (proposing amendments to the INA, § 245B (c)(2)(B)).

<sup>79</sup> *Id.* § 2101(a) (proposing amendments to the INA, § 245B(c)(9)).

<sup>80</sup> *Id.* § 2102(a) (proposing amendments to the INA, § 245C(b)). The transition from RPI to LPR status would require payment of another \$1000 fine and an application fee, to be set at a level that is sufficient to recover the processing costs. *Id.* § 2102(a) (proposing amendments to the INA, § 245C(c)(5)).

<sup>81</sup> *Id.* § 2101(a) (proposing amendments to the INA, § 245B(c)).

<sup>82</sup> *Id.* § 2101(a) (proposing amendments to the INA, § 245B(c)(9)(B)). The individual must also demonstrate that she is not likely to become a public charge as defined in INA § 212(a)(4). *Id.*

<sup>83</sup> *Id.* § 2102(a) (proposing amendments to the INA, § 245C(b)(3)(A)(ii)).

<sup>84</sup> *Id.* The bill provides a range of waivers and exceptions to the employment requirement. *Id.* § 2102(a) (proposing amendments to the INA, § 245C(b)(3)(E)).

<sup>85</sup> *Id.* § 2102(a) (proposing amendments to the INA, § 245C(b)(4)).

fees — the statutes differ in several respects. First, whereas IRCA's eligibility requirements were nearly all retrospective, a key feature of S. 744, and earned citizenship more generally, is prospective performance. Second, provisional status under IRCA was for a relatively short duration (18 months)<sup>86</sup> and largely administrative; its purpose was to quickly register all those who satisfied the initial residency requirement for legalization and to channel them into what would be a bureaucratically more complex application process. In contrast, the provisional status under S. 744 is a minimum of ten years, and does not merely serve the administrative registration function, but introduces a lengthy period of probationary status. Third, the substantive requirements that must be met in order to transition out of RPI status and into lawful permanent residence are far more significant: although IRCA had similar English language and civics requirements, it contained no employment or higher education obligations. Finally, although IRCA legalization required the payment of a fee, earned legalization requires both fees and penalties, the latter often coupled with an explicit acknowledgment that the applicant has violated U.S. law.<sup>87</sup> Relatedly, only S. 744 requires the payment of all outstanding, assessed federal tax liability, as well as payment of taxes during the RPI status.

Critically, a failure to meet the requirements necessary to advance from one stage to the next may leave the immigrant in a precarious status and may subject her to removal. For example, failure to meet the requirements necessary to renew RPI status would deprive the immigrant of lawful status. An immigrant who meets the renewal requirements but is unable to satisfy the additional obligations necessary to adjust to LPR status would be able to continue renewing RPI status, but only so long as she continued to meet the renewal requirements; by virtue of the work requirements, such an individual would effectively become part of a guest worker program, susceptible to removal whenever she should cease to meet the employment requirements for RPI renewal. Prolonged precarity thus is an essential feature of the earned citizenship regime.

Some but not all of the requirements of earned citizenship are recognizable from other citizenship practices. For example, the assimilationist requirements (regarding English language and U.S. civics) are equivalent in substance, although accelerated in time, to the requirements for naturalization and can be plausibly defended on the grounds of national cohesion and democratic participation.<sup>88</sup> It is reasonable to assume that those either born

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<sup>86</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a(b)(1)(A).

<sup>87</sup> See Marc R. Rosenblum, Randy Capps & Serena Yi-Ying Lin, *Earned Legalization: Effects of Proposed Requirements on Unauthorized Men, Women, and Children*, 2–3, MIGRATION POLY INST., (Jan. 2011), <http://www.migrationpolicy.org/research/earned-legalization-effects-proposed-requirements-unauthorized-men-women-and-children>, archived at <https://perma.cc/U5MR-XNYA>.

<sup>88</sup> See Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. L.J. 479, 480 (1999) (identifying two defenses to naturalization requirements — “‘broad assimilationism,’ under which naturalization barriers serve to protect and maintain cohesion within the national com-

in the United States or to U.S. citizens are likely to be assimilated into the cultural and civic aspects of American life by virtue of their upbringing and thus to exclude such children from having to demonstrate that they have done so.<sup>89</sup> Likewise, a duration of residency requirement is inoffensive so long as it is not unduly long, as it may serve as a reasonable measure of attachment to the nation-state.<sup>90</sup> Such a metric is familiar to statutory provisions for *jus sanguinis* citizenship,<sup>91</sup> and may be unnecessary for *jus soli* citizens because most will live where they are born. In contrast, the work and penalty provisions reflect considerations unique to legalization of undocumented immigrants, and find no analogue, implicit or explicit, in prevailing citizenship practices.

### B. Competing Ideologies of Earned Citizenship

A closer examination of the substantive requirements of S. 744 illuminates a set of competing ideologies — neoliberal,<sup>92</sup> communitarian, assimilationist, and penal — that underwrite earned citizenship. Taken together, these illustrate how earned citizenship not only shifts the political framing of the legalization debate, but premises legalization on a normative conception of the idealized citizen.

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munity; and ‘political assimilationism,’ under which naturalization preserves the basic integrity of American democracy” — and arguing that current naturalization requirements are unnecessary to satisfy either).

<sup>89</sup> For children born outside the U.S. or its territories to a U.S. citizen parent or parents, the INA imposes various parental residency prerequisites in order for the child to derive citizenship. See 8 U.S.C. § 1401. Prior versions of the statute imposed residential conditions subsequent on the child. These restrictions on *jus sanguinis* citizenship have survived due process challenges on the grounds that Congress has legitimate interests in discouraging dual nationality, and residency requirements are a reasonable proxy for electing nationality. See, e.g., *Rogers v. Bellei*, 401 U.S. 815, 831–33 (1971). Insofar as parental residency may serve as a proxy for embrace of American civic and cultural values, such requirements may also provide the basis for presuming acculturation on the part of children born abroad to U.S. citizen parents.

<sup>90</sup> For a discussion of time as a proxy for belonging, see JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* 152–54 (2013); Linda Bosniak, *Response to the Case for Amnesty*, BOSTON REV., (May 1, 2009), <http://www.bostonreview.net/forum/case-amnesty/basic-rights-short-term-immigrants-also-need-protection-linda-bosniak>, archived at <https://perma.cc/UMF9-8WBE>.

<sup>91</sup> For example, citizenship by birth is conferred upon a person born outside the United States and its outlying possessions to two U.S. citizen parents so long as one parent has had a residence in the U.S. or an outlying possession prior to the child’s birth. 8 U.S.C. § 1401(c). Similarly, citizenship by birth is conferred on a person born outside the United States to parents only one of whom is a citizen of the United States if that citizen parent has been physically present in the United States or an outlying possession for a continuous period of one year prior to the birth of the child. *Id.* at § 1401(e).

<sup>92</sup> I acknowledge the imprecision of the concept of neoliberalism and use it advisedly. See Grewal & Purdy, *supra* note 1, at 2 (“Alongside diverse academic uses of neoliberalism, political leaders and social movements deploy the term variously in concrete struggles in different national settings. . . . We gladly acknowledge that neoliberalism is not conceptually neat and cannot be defined by a set of necessary and sufficient conditions for its use . . .”).

### 1. *Neoliberalism and Work as the Measure of Worthiness*

At the core of earned citizenship is the long period of provisional status and the work, education, civics, and English-language requirements necessary to obtain permanent lawful status. Such a contractualism is a familiar feature of neoliberalism,<sup>93</sup> all the more evident from the prominence of economic earning in the earned citizenship rubric. By virtue of the work requirements (for which education is an acceptable alternative), earned citizenship heavily weights economic performance in its worthiness calculus. As discussed above, provisional status is tantamount to a guest worker program with a pathway to citizenship. The requirement for regular and gainful employment of the undocumented immigrant is complemented by the obligation that she not be subject to the public charge ground of inadmissibility — that is, that she not require public assistance.<sup>94</sup> Relatedly, the provisional status immigrant is excluded from nearly all forms of social welfare, including health care under the Affordable Care Act. Taken together, these features of earned citizenship posit economic self-sufficiency as a moral value establishing worthiness. The requirements that the provisional status immigrant satisfy her tax obligations and not become inadmissible on crime-related grounds further reinforce a neoliberal expectation of individual responsibility and economic and social self-regulation.<sup>95</sup> The immigrant who successfully earns her citizenship thus matches neoliberalism's "underlying moral image of the individual [a]s one of the autonomous, free, rational and self-regulating citizen[s] who disciplines her/his nature under the influence of the civilization processes s/he underwent."<sup>96</sup> In this regard, then, earned citizenship's pathway to citizenship is a pathway to neoliberal belonging.

The focus on economic performance may be understandable given that the undocumented population is principally the product of labor migration, and an economic conception of immigration features prominently throughout the American system; many permanent and temporary visa categories

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<sup>93</sup> See ANNE McNEVIN, *CONTESTING CITIZENSHIP: IRREGULAR MIGRANTS AND NEW FRONTIERS OF THE POLITICAL* 61 (2011) (observing that according to neoliberal reasoning, "[s]ocial and political relations are conceived less in terms of common civic endeavors and more in terms of contractual relations on the basis of market exchange."); NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* 165 (1999); Friso van Houdt et al., *Neoliberal Communitarian Citizenship: Current Trends Towards 'Earned Citizenship' in the United Kingdom, France and the Netherlands*, 26 *INT'L. SOC.* 408, 412 (2011).

<sup>94</sup> See 8 U.S.C. § 1182(a)(4) (rendering inadmissible any noncitizen "likely at any time to become a public charge"). While the requirement that one not be likely to become a public charge is properly understood as a requirement for economic performance, the work requirements of S. 744 far exceed the threshold requirement to be free of need for public assistance.

<sup>95</sup> See AIHWA ONG, *NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY* 11 (2006) ("[N]eoliberal reasoning is based on both economic (efficiency) and ethical (self-responsibility) claims.").

<sup>96</sup> van Houdt et al., *supra* note 93, at 411 (citing MITCHELL M. DEAN, *GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY* (1999)).

are based upon employment and subject to some evaluation, however imperfect, of labor market needs.<sup>97</sup> But legalization has never previously been based upon individual economic performance (even as economic arguments have been made about the overall effect of large-scale legalization).<sup>98</sup> Moreover, the earned citizenship regime does not credit past economic contribution or recognize the structural nature of migrant labor as a feature of the late-capitalist American economy. Rather, earned citizenship requires that the worker-immigrant clock in as if for the first time and establish not her identity as a laborer, but her neoliberal bona fides.<sup>99</sup>

Aversion to the charge of amnesty provides a historical explanation for why contemporary legalization proposals look different than IRCA, but it does not provide an ideological account of the turn to either economic performance or individualized earning. Instead, the conditioning of social benefits upon individualized demonstration of one's worthiness, particularly in the workplace, finds a recent antecedent in federal welfare reform. Indeed, the neoliberal citizen projected by the requirements of earned citizenship bears a striking resemblance to the citizen imagined by the welfare-to-work requirements adopted by Congress in 1996,<sup>100</sup> and earned citizenship borrows heavily from the same ideological underpinnings and programmatic structure of welfare reform. A comparison of the two further illuminates the deep structure of earned citizenship.

Welfare, work, and worthiness long have been inextricably linked. As Joel Handler and Yeheskel Hasenfeld have demonstrated, competing norms of labor market regulation, charity, ideological commitments to work, and traditionally gendered family structure<sup>101</sup> animate welfare policy such that it is "a policy about morality" that hinges upon a distinction between the worthy and unworthy poor.<sup>102</sup> Those who are worthy are excused from work and provided public assistance, while those deemed unworthy are either denied

<sup>97</sup> See Demetrios G. Papademetriou et al., *Aligning Temporary Immigration Visas with US Labor Market Needs: The Case for a New System of Provisional Visas*, MIGRATION POL'Y INST. 6 (July 2009) ("The United States has a demand-driven, employer-led labor market immigration system."). The vast majority of lawful permanent migration is family-based. Annually, there are 480,000 visas available for family based immigrants. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY 3 (2014).

<sup>98</sup> See, e.g., Robert Lynch & Patrick Oakford, *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants*, CTR. FOR AM. PROGRESS (Mar. 20, 2013).

<sup>99</sup> There are countervailing practical reasons for not crediting past employment, as previous legalization bills would have done. In particular, applicants may have difficulty obtaining necessary proof of past, unauthorized employment, and the government may have concerns about fraudulent records, particularly for periods far in the past.

<sup>100</sup> See generally The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended primarily in scattered sections of 7 and 42 U.S.C.).

<sup>101</sup> HANDLER & HASENFELD, *supra* note 12, at 17–29.

<sup>102</sup> *Id.* at 8; see also Joel Handler, *What is Welfare Policy?*, TIDSKRIFT FÖR RÄTTSSOCIOLOGI 6(3) at 220 (1989) ("The deserving poor possess attributes that could readily justify public protection and care without challenging dominant cultural, economic, and political norms. The undeserving poor, mostly the able-bodied, are those whose behavior and attributes



aid or have that aid conditioned upon participation in the labor market. Failure of the able-bodied to work is deemed a moral failure rather than a material one. Work thus becomes the currency of worth, and the imposition of work requirements on welfare recipients serves to reinforce moral and ideological claims of the dominant society.<sup>103</sup>

Work requirements have been a part of welfare policy since the 1960s, but they came to predominate in the 1990s. As the moral debate over welfare, dependency, and family structure intensified from the 1960s through the 1980s, and the figure of the undeserving welfare recipient — a black, single mother gaming the system (Reagan’s “welfare queen”)<sup>104</sup> — took hold among a white middle class, work requirements increasingly became the preferred policy tool for adjudging worthiness. This culminated in 1996, when the main federal assistance program for families, Aid to Families with Dependent Children (“AFDC”), ceased to operate as an entitlement and was replaced with Temporary Aid to Needy Families (“TANF”), a time-limited program in which aid is conditioned upon satisfaction of work requirements.<sup>105</sup> While other aspects of the federal welfare reform law aim to promote marriage (and therefore reduce out-of-wedlock birth) and strengthen child support obligations of fathers, the primary ideological and programmatic feature of the law was work.<sup>106</sup> TANF eviscerated the promise of baseline subsistence as a social right, as weakly expressed as that promise was in the form of AFDC. Instead of offering class-wide financial support on the basis of categorical eligibility criteria, TANF created a performance-based system for establishing individual moral worth. The catchphrase for reform, “welfare to work,”<sup>107</sup> captured the notion of a pathway not only from poverty to self-sufficiency, but from moral failure to social respectability. Work was both the method and the goal, a process and an identity. The goal and the identity were full and unstigmatized membership in society — in other words, citizenship.

The figure of the neoliberal citizen is plain in welfare reform. Each individual head of household must demonstrate her ability to self-regulate; the state largely withdraws its support from the individual and the family, in

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challenge those norms. Much of the history of public relief and welfare can be seen as cyclical attempts to draw boundaries between the worthy poor and the pauper.” (citations omitted)).

<sup>103</sup> HANDLER & HASENFELD, *supra* note 12, at 15–16 (“The distinction between the ‘deserving’ poor and the ‘undeserving’ poor is a moral issue; it affirms the value of the dominant society by stigmatizing the outcasts.”).

<sup>104</sup> See Paul Krugman, Opinion, *Republicans and Race*, N.Y. TIMES (Nov. 17, 2007), [http://www.nytimes.com/2007/11/19/opinion/19krugman.html?\\_r=0](http://www.nytimes.com/2007/11/19/opinion/19krugman.html?_r=0), archived at <https://perma.cc/RVH3-GPCA>.

<sup>105</sup> The Personal Responsibility and Work Opportunity Reconciliation Act § 103, Pub. L. No. 104-193 (“This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”).

<sup>106</sup> See generally LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986).

<sup>107</sup> See, e.g., ROUTLEDGE HANDBOOK OF POVERTY IN THE UNITED STATES 241 (Stephen Haymes, et al. eds., 2015) (describing TANF as “the centerpiece of the ‘welfare-to-work’ philosophy toward social welfare”).

favor of the market; and market-based performance is understood not only to provide economic support, but to cure moral defect. Work is rendered not merely economically significant but morally transformative, and because it is time-limited, the period of public assistance becomes transitional. The shiftless welfare recipient is rendered economically productive and morally upstanding. In exchange for her labor, stigma is lifted and the welfare recipient moves from the margins to the center of society.

As Joel Handler has observed, welfare-to-work programs reverse the logic of T.H. Marshall's liberal conception of social citizenship.<sup>108</sup> In Marshall's classic formulation, social rights represent the triumph of status over contract as a baseline of protection such that support is granted by the state to its citizens rather than by employers to its workers.<sup>109</sup> As a historical matter, Marshall argued, the acquisition of rights was staged, beginning with civil rights, proceeding to political rights, and culminating with social rights.<sup>110</sup> By this account, citizenship is "a device of societal integration"<sup>111</sup> in which individuals participate merely by virtue of their citizenship. As Marshall wrote, "social rights imply an absolute right to a certain standard of civilisation which is conditional only on the discharge of the general duties of citizenship. Their content does not depend on the economic value of the individual claimant."<sup>112</sup> By conditioning social welfare eligibility on individual performance as welfare-to-work programs do, social citizenship flows "from status to contract,"<sup>113</sup> turning on its head Marshall's supposition that the content of social rights is independent of individual economic contribution. Achieving social citizenship is "an obligation, not a right; an effort of the individual, not of society."<sup>114</sup>

Just as welfare-to-work replaced a system of unconditional support premised upon a commitment to social rights with a rubric of conditional relief based on individual performance, so, too, does earned citizenship represent a turn from citizenship as status to citizenship as contract. In both instances, citizenship — whether social or juridical — must be earned, and the earnings structure is market-based and full of exclusionary potential; ostensibly a framework for social inclusion, each system excludes those who fail to satisfy performance standards.

Earned citizenship is hardly the first time that immigration and welfare policy have intersected. Long before the emergence of the welfare state, U.S. immigration law has been an instrument of class regulation. Gerald

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<sup>108</sup> JOEL F. HANDLER, *SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE* 209 (2004).

<sup>109</sup> See T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 154 (1950).

<sup>110</sup> *Id.* at 149. For criticisms of Marshall's understanding of citizenship, see Lawrence M. Mead, *Citizenship and Social Policy: T.H. Marshall and Poverty*, 14 *SOC. PHIL. & POL.* 197, 200–03 (1997).

<sup>111</sup> CHRISTIAN JOPPKE, *CITIZENSHIP AND IMMIGRATION*, vi (2010).

<sup>112</sup> MARSHALL, *supra* note 109, at 152.

<sup>113</sup> HANDLER, *supra* note 108, at 2.

<sup>114</sup> JOPPKE, *supra* note 111, at 79.

Neuman has written, “Perhaps the most fundamental function of immigration law has been to impede the movement of the poor.”<sup>115</sup> Since 1882, federal immigration law has excluded from admission individuals deemed likely to become a “public charge,”<sup>116</sup> but the exclusion of immigrants — including lawfully admitted immigrants — from welfare benefits has become a special preoccupation since the 1990s. Beginning with California’s Proposition 187, which sought to exclude undocumented immigrants from education,<sup>117</sup> welfare, and other public services, the trope of welfare-consuming immigrants imposing an unfair burden on states gained prominence through much of the decade.<sup>118</sup> In 1996, the same year that Congress enacted federal welfare reform, it excluded legal immigrants from most public benefits for a period of five years — the same period of time that lawful permanent resident status must be maintained in order to naturalize.<sup>119</sup>

The earned citizenship regime of S. 744 extends this form of social exclusion. The bill would exclude individuals from eligibility for most public benefits until they either accrue five years of lawful permanent residence status or become U.S. citizens; they are ineligible for the duration of their time in provisional status. Thus, the exclusionary period would run for a minimum of thirteen years. The Affordable Care Act deviates from this model in some respects. For example, legal immigrants qualify for marketplace insurance without the five-year waiting period, but the five-year bar continues to apply to those who might otherwise benefit from Medicaid expansion.<sup>120</sup> With respect to undocumented immigrants, the model is undis-

<sup>115</sup> GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 23 (1996).

<sup>116</sup> See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. Rev. 1509, 1520 (1995). Prior to the federalization of immigration law, states often excluded or removed “foreign paupers.” See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1847–59 (1993).

<sup>117</sup> The educational exclusion of Proposition 187 was intended as a direct challenge to *Plyler v. Doe*. See, e.g., Phillip J. Cooper, *Plyler at the Core: Understanding the Proposition 187 Challenge*, 17 CHICANO-LATINO L. REV. 64, 64 (“[T]here is no question that Proposition 187, at its core, was a direct challenge to *Plyler v. Doe* . . .”).

<sup>118</sup> See generally Daniel J. Tichenor, *Splitting the Coalition: The Political Perils and Opportunities of Immigration Reform*, in BUILDING COALITIONS, MAKING POLICY: THE POLITICS OF THE CLINTON, BUSH, AND OBAMA PRESIDENCIES 75 (MARTIN A. LEVIN et al., eds., 2012).

<sup>119</sup> See Personal Responsibility in Work Opportunity Reconciliation Act § 403, Pub. L. No. 104-193; Illegal Immigration Reform and Immigrant Responsibility (IIRIRA) Act of 1996, Pub. L. No. 104-208, §§ 506–10, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.) (amending PWRORA to require proof of citizenship for applying for public benefits and setting perimeters for discontinuing public benefits for noncitizens who were already receiving public benefits). Unlike earned citizenship, which privileges economic performance over status, the 1996 exclusion arguably was in keeping with Marshall’s description of the historical evolution of citizenship and rights, as it allowed immigrants to secure social rights only at the moment that political rights — voting — become available. See MARSHALL, *supra* note 109, at 152.

<sup>120</sup> See *Immigrants and the Affordable Care Act (ACA)*, NATIONAL IMMIGRATION LAW CENTER, (rev’d Jan. 2014), <https://www.nilc.org/issues/health-care/immigrantshcr/>, archived at <https://perma.cc/774W-GCPL>.

turbed: they are categorically ineligible for ACA benefits, and under S. 744, they would not become eligible until they transitioned from provisional to lawful permanent immigrant status.<sup>121</sup> Thus, S. 744 imposes a ten-year bar for ACA benefits, literally doubling down on the social welfare restrictions of the 1990s.<sup>122</sup>

The exclusion from social welfare programs until completion of the provisional status period renders social rights a core component of what is to be earned.<sup>123</sup> Although eligibility for benefits does not technically require naturalization, by delaying eligibility until such time as an individual is either eligible to naturalize (in the case of public benefits programs) or on the verge of eligibility (in the case of the ACA), these forms of noncitizen exclusion effectively redefine the substantive content of citizenship itself. It follows, then, that a key technology of earned citizenship is to ensure that citizenship itself is meaningfully differentiated from mere lawful residence. Social welfare policy thus threatens to impoverish the noncitizen but enrich the citizen, thereby reinforcing citizenship's central contradiction: the promise of belonging for some through the exclusion of others.<sup>124</sup> Citizenship is rendered a prize that not only must be earned, but which is deemed valuable enough to in fact earn.

The analogy between welfare reform and immigration reform is inexact for at least two reasons. First, the principal moral defect ascribed to welfare recipients has always been their failure to participate in the labor market. As such, work as curative of moral failure is congruent with this understanding of welfare in a way that is inapposite to immigration reform. Indeed, while stereotypes of the lazy, welfare-cheating immigrant have recurred periodically,<sup>125</sup> today the image of the undocumented worker (albeit one who undermines U.S. worker wages and workplace conditions) predominates. Second, the understanding of citizenship at issue in each context differs; in the welfare context, work offers a pathway to social citizenship, in Marshall's sense

<sup>121</sup> See S. 744 § 2101(d)(4)(C) (2013).

<sup>122</sup> The Trump election has jeopardized the ACA for everyone. See Maggie Haberman & Robert Pear, *Trump Tells Congress to Repeal and Replace Health Care Law 'Very Quickly,'* N.Y. TIMES, Jan. 10, 2017, at A1; Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, Jan. 20, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/20/executive-order-minimizing-economic-burden-patient-protection-and-affordable-care-act-pending-repeal>, archived at <https://perma.cc/626B-2U39>.

<sup>123</sup> See van Houdt et al., *supra* note 93, at 413 (noting that in the British context, social rights are "earmarked as rights to be earned").

<sup>124</sup> Linda Bosniak has referred to this double-edged quality of citizenship as its "Janus-faced" nature. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 99 (2008); see also Muneer I. Ahmad, *Developing Citizenship*, 9 ISSUES IN LEGAL SCHOLARSHIP Iss. 1, Article 9 (2014) ("By its very nature, citizenship offers the promise of inclusion through the practice of exclusion, the composition of a coherent 'us' through the rebuffing (or expelling) of the 'them.'").

<sup>125</sup> DEBORAH J. SCHILDKRAUT, *AMERICANISM IN THE TWENTY-FIRST CENTURY: PUBLIC OPINION IN THE AGE OF IMMIGRATION* 161 (2011) ("The image of immigrants as lazy free-loaders featured prominently in national debates about Proposition 187 in California and about national welfare reform . . .").

of that term,<sup>126</sup> while in the immigration context, work promises juridical citizenship. Thus, welfare reform conditions full membership for those already a part of the polity, whereas immigration reform seeks to enlarge the circle of membership to those excluded by law. These differences notwithstanding, one can see in both examples the construction of an individualized process for determining the allocation of a social benefit and the use of market value as the principal determinant of worthiness.

## 2. *Communitarianism and Assimilation*

Despite this predominantly neoliberal bent to earned citizenship, other ideologies also animate the legalization regime. While the English language requirements might be read into a framework of economic self-sufficiency, they and the civics knowledge requirements more squarely advance communitarian goals of preparation for and participation in civic life in the United States, along with assimilationist demands for a particular aesthetic of belonging.<sup>127</sup> English language is understood not only to enable employment advancement, but also to integrate the immigrant into local cultural life.<sup>128</sup> English language and civic knowledge are further understood to prepare the immigrant for responsible, collective, democratic decision-making in the form of voting, and communitarian accountability in the form of jury duty. These practices, reserved for U.S. citizens, help to constitute democratic values as not merely a part of the national governance structure, but as features of national identity. Knowledge of English language and American civics serves as a proxy for an ongoing process of assimilation in which cognitive knowledge translates to values-based commitment. Thus, the individualized nature of earned citizenship's work requirements is complemented by requirements of cultural and civic assimilation into the community. "Earning one's citizenship then amounts to a thoroughly individualized cultural conversion to the communitarian ideal of a nation defined by a bounded set of values."<sup>129</sup>

The cultural and civic assimilationist demands for citizenship acquisition are familiar in U.S. law. Indeed, the language and civics requirements

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<sup>126</sup> See MARSHALL, *supra* note 109.

<sup>127</sup> Communitarianism emerged as a critique of liberalism. Whereas liberalism elevates the self and individual rights, communitarianism privileges communities, common values, and a shared commitment to protecting and transmitting such values through appropriate social and political institutions. See generally AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY* (1993). I use the term assimilation to denote the adoption of dominant social and cultural practices as a means of incorporation into a community or society. See generally MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964).

<sup>128</sup> *But see* Spiro, *supra* note 88, at 489–501 (criticizing the English language and civics requirements as unreasonable barriers to naturalization, neither being integral to either broad or political assimilationist objectives).

<sup>129</sup> Van Houdt et al., *supra* note 93, at 425.

of S. 744 are essentially identical to existing naturalization requirements,<sup>130</sup> and some version of those requirements has existed since at least 1906.<sup>131</sup> Similarly, the Immigration and Nationality Act requires that a naturalization applicant be “a person of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the United States.”<sup>132</sup> There is, then, some degree of path dependency to the legal regime of earned citizenship.

Such path dependency notwithstanding, the economic performance requirements that predominate earned citizenship are innovations in U.S. immigration law. But these, too, can be understood in assimilationist and communitarian terms. As argued above, the principal contribution of the work requirements of earned citizenship, and the economically productive citizen they imagine, is itself cultural. The earned citizenship regime thus highlights economic success as a feature of cultural assimilation, and elevates economic productivity as a national value to be transmitted through law. The more traditional requirements of cultural and civic assimilation in S. 744 are complemented by newly articulated expectations of economic productivity such that the neoliberal, assimilationist, and communitarian ideologies converge.

### 3. *Penalty and Rectification*

Earned citizenship is also explicit in its penal goals. For example, S. 744 requires the payment of a \$1000 fine in order to transition from undocumented to provisional status, an additional \$1000 fine to renew that status,<sup>133</sup> and yet another \$1000 to adjust from provisional to lawful permanent resi-

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<sup>130</sup> Subject to exceptions based on age and disability, the Immigration and Nationality Act requires that applicants for naturalization demonstrate “an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language” and “a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States.” 8 U.S.C. § 1423. As the regulations elaborate:

Attachment implies a depth of conviction which would lead to active support of the Constitution. Attachment and favorable disposition relate to mental attitude, and contemplate the exclusion from citizenship of applicants who are hostile to the basic form of government of the United States, or who disbelieve in the principles of the Constitution.

8 C.F.R. § 316.11(a).

<sup>131</sup> Spiro, *supra* note 88, at 489.

<sup>132</sup> 8 U.S.C. § 1427. This language was added in 1795 and supplemented in the twentieth century “with disqualifications for persons holding specific disfavored ideas,” such as anarchism in the 1906 Naturalization Act, advocacy for the overthrow of the U.S. government in the Nationality Act of 1940, and Communism in the Immigration and Nationality Act of 1952. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 16 IMMIGR. & NAT'LITY L. REV. 83, 100–01 (1994).

<sup>133</sup> S. 744 § 2101(a) (proposing amendments to the INA, § 245B(b)(10)(C)).

dent status<sup>134</sup> — significant financial burdens for a principally impoverished population.<sup>135</sup> Advocates trumpeted the penalty component of S. 744 as further evidence that earned citizenship is not amnesty.<sup>136</sup>

The requirement to pay fines reflects an acquiescence to the charge that undocumented immigrants bear a moral and legal culpability for their immigration status. Payment of fines begs the question of what conduct is being sanctioned; the unstated answer is the act of unauthorized entry or overstay. The base charge of “illegality” by reform opponents is thus implicitly conceded, such that immigrants must “get right with the law,” as President Obama stated, “before they can get in line and earn their citizenship.”<sup>137</sup> This notion of first rectifying past unlawful conduct before benefiting from legalization is extended in the requirement to pay assessed back taxes. Rather than a penalty, this requirement responds to the free-rider dimension of the amnesty charge.

Earned citizenship’s lengthy provisional status period might also be understood in penal terms. The minimum ten-year period from initial registration to lawful permanent residence is effectively probationary. A probationary period can be understood in prospective terms as a process of graduated incorporation, as in the employment context. The five-year period of lawful permanent residence prior to becoming eligible to naturalize fits this understanding. But as in the criminal context, probation can also be understood as the tail to a sentence, and as such, an element of punishment.<sup>138</sup> The requirement to meet performance standards in order to advance from provisional to permanent status suggests that provisional status fits the gradual incorporation model of probation. And yet, the duration of the provisional status period — a minimum of ten years — coupled with the penalties for non-compliance with the terms for maintenance of status, as well as the public benefits ineligibility discussed above, suggest that the goal is ex-

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<sup>134</sup> *Id.* § 2102(a) (proposing amendments to the INA, § 245C(c)(5)(B)); NILC, *Analysis of Senate Immigration Reform Bill*, *supra* note 76, at 3.

<sup>135</sup> Sixty-four percent of the undocumented population has a family income of less than 200% of the poverty level. MIGRATION POL’Y INST., PROFILE OF THE UNAUTHORIZED POPULATION: UNITED STATES, <http://www.migrationpolicy.org/data/undocumented-immigrant-population/state/US>, archived at <https://perma.cc/KQ9Z-ACWC> (estimates based on 2009-2013 American Community Survey and 2008 Survey of Income and Program Participation (SIPP) by James Bachmeier of Temple University and Jennifer Van Hook of Pennsylvania State University). The federal poverty level in 2011 was \$22,350 for a family of four. U.S. DEP’T OF HEALTH AND HUM. SERVS., ASSISTANT SECRETARY FOR POLICY EVALUATION, *The 2011 HHS Poverty Guidelines*, <http://aspe.hhs.gov/poverty/11poverty.shtml>, archived at <https://perma.cc/H5BT-FPPT>.

<sup>136</sup> See Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GEORGIA L. REV. 65, 94 (2009) (arguing that imposition of punishment is incompatible with amnesty).

<sup>137</sup> Remarks at American University, 2 PUB. PAPERS 1001, 1005 (July 1, 2010).

<sup>138</sup> See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 294 (2016) (arguing that conditions of probation “(a) set[] standards for the conduct and character of people on probation, and (b) create[] an enforcement structure to monitor and penalize probationers for acts that fall short of those standards.”).

clusionary rather than incorporative. If nothing else, the length of the provisional status period reminds us once more that even as it promises a pathway to citizenship for millions of undocumented individuals, earned citizenship is built upon an architecture of exclusion.

*C. Earned Citizenship's Faulty Epistemic Assumptions About Undocumented Immigrants*

The predominantly neoliberal bent of earned citizenship, combined with its penal and disciplinary measures, constructs an understanding of undocumented immigration that is conceptually flawed. Deeply motivated by the political imperative to differentiate from amnesty, earned citizenship nonetheless yokes itself to the logic of the legalization-is-amnesty argument — namely, that the undocumented population is the result of individual violations of the law, and more profoundly, a moral transgression of the rule of law. Because the moral story of earned citizenship begins with immigrants in a deficit position — it is the fact of deficit that necessitates a regime of earning — it has already committed to the restrictionists' epistemic understandings of the immigration "problem." The problem is understood as originating in individual transgression, and therefore, as requiring a demonstration of individual moral worthiness. The original sin of immigration violation is atoned for through the moral test of earned citizenship. Thus, rather than transcending the amnesty charge, earned citizenship remains trapped within its logic.

By accepting as its starting point the restrictionists' account of the origins and nature of the immigration problem, earned citizenship suffers from two conceptual limits. First, despite its fines, long path to citizenship, and array of work, language, and civics requirements, most restrictionists still equate earned citizenship with amnesty. For them, the earning contemplated by S. 744 and similar measures is either too meager or will never be sufficient to remedy the rule of law transgression. This objection is strengthened by the overtly political goal of earned citizenship to legalize the vast majority of the undocumented population. Although a regime of earning connotes selectivity, the political success of the program in the eyes of its proponents depends upon it being relatively permissive. And yet, the more permissive it is, the more it fails to overcome the amnesty objection. Moreover, while earned citizenship was constructed so as to counter the amnesty charge, its focus on individual culpability and moral worth reinscribes a discourse of amnesty. Earned citizenship thus is defined and delimited by the terms of its antithesis: amnesty.

In light of the lack of political success of earned citizenship to date, one might expect future political bargaining to render the conditions for legalization more stringent in order to win sufficient support for passage. Earned citizenship is a flexible and capacious framework that, through calibration of its constituent elements, may be rendered more or less inclusionary. De-



pending on the politics of the moment, it could be bargained either up or down; lacking any intrinsic political valance, the very nature of the earned citizenship rubric lends itself to such bargaining. Even in the current, Trump-induced moment of hostility to immigration, we may expect the language of earning and merit to shape immigration discourse, but for the earnings levels to be set so high as to be fundamentally exclusionary.<sup>139</sup>

The second limit concerns the source and nature of the large undocumented population in the United States. By relying upon a regime of individual merit, earned citizenship tacitly accepts the restrictionists' claim that the undocumented population is the result of millions of individual decisions to disregard U.S. law. Echoing the social construction of welfare recipients, this is a pathological understanding of undocumented immigration: undocumented immigration is the product of the moral failings of those who entered without inspection or overstayed their visas. Earned citizenship promises to redeem those moral failings through a neoliberal program of moral worthiness: fines, work, self-reliance, education, and assimilation. But it is naïve to understand the creation of the undocumented population as the aggregation of so many individual moral failings. Such an "individual responsibility" approach ignores the structural features of migration and unfairly allocates the entirety of the moral burden for undocumented immigration to immigrants themselves.

A more accurate appraisal would take account of the historical and contemporary practices that have produced the category of undocumented immigrant and the large, contemporary undocumented population. Far from an organic social category, undocumented status, or illegality, is a legal construction with its origins in racial exclusion.<sup>140</sup> As Hiroshi Motomura, Stephen Legomsky, and others have described, illegality has been constructed through a history of racial restriction on lawful immigration, employment-based immigration preferences that have failed to meet employer demands for low-skilled labor, and government acquiescence to large-scaled undocumented labor through selective enforcement.<sup>141</sup> "In short, unauthorized migration to the United States is a story of labor and race, and of de facto government policy that tolerates and acquiesces in unauthorized migration."<sup>142</sup> The moral story is further complicated by the role the United States

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<sup>139</sup> There is some evidence that a language of earning has already been co-opted by the new president. See Julianne Hing, *How Donald Trump Will Make America White Again*, NATION (Jan 4, 2017), <https://www.thenation.com/article/how-donald-trump-will-make-america-white-again/>, archived at <https://perma.cc/CW4R-TVTF> (relating Trump's calls for a "merit-based" immigration system to restrictionists' proposals for immigration reform).

<sup>140</sup> See generally MAI M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

<sup>141</sup> See generally HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014); see also Legomsky, *supra* note 136, at 97.

<sup>142</sup> Hiroshi Motomura, *Children and Parents, Innocence and Guilt*, 128 HARV. L. REV. F. 137, 139 (2014-15).

has played, in many parts of the world, in creating or contributing to conditions that motivate or even compel migration.<sup>143</sup>

While there is a specificity to undocumented immigration in the United States, the rapid growth of the population in the past two decades and the concentration of undocumented workers in low-skilled work is emblematic of global trends. As Saskia Sassen has convincingly demonstrated, contemporary unauthorized immigration is not merely the product of the exercise of state sovereignty. Rather, it is constitutive of a system of *de facto* transnational labor regulation, a logical and necessary companion to the deregulation of capital and goods that characterizes globalization.<sup>144</sup> “Immigration is at least partly an outcome of the actions of the governments and major private economic actors in receiving countries.”<sup>145</sup>

One might view these arguments regarding past and present state practices as implicitly factored into earned citizenship as evident from the fact that a legalization program is being proposed at all. By this account, earned citizenship is a moral framework for public consumption but does not express the complete moral calculus of immigration reform. But if this is true, it exposes a further weakness of earned citizenship. By leaving the full moral basis for legalization unarticulated, it renders earned citizenship newly vulnerable to suspicion as a stealth amnesty program. The incongruity between public policy and its stated rationale, of conferring citizenship solely by dint of earning, may undermine public confidence in the measure, thus jeopardizing not only the prospects for its legislative enactment, but its perceived legitimacy assuming a bill is in fact passed. And yet, a more complex causal story would render the earning rubric incongruous; if the source of the large undocumented population is attributable to structural explanation, then why should legalization turn upon individual performance of worthiness?

In sum, earned citizenship is ideologically loaded. Significantly neoliberal and penal, and inextricably linked to restrictionists’ moral claims regarding amnesty and blameworthiness, it implicitly endorses a pathological understanding of undocumented immigration that is at odds with earned citizenship’s inclusive ambitions. But beyond these problems with earned citizenship, a deeper problem lurks: earned citizenship imperils the moral claims of the vast majority of people for whom citizenship is unearned.

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<sup>143</sup> *Id.*; see also SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 13 (1998) (recounting the impact of U.S. sugar subsidies on employment in Caribbean Basin countries and subsequent increases in immigration to the United States).

<sup>144</sup> SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* 126–70 (1988); see SASSEN, *supra* note 143, at 13 (“Large-scale international migrations are embedded in rather complex economic, social, and ethnic networks. They are highly conditioned and structured flows.”).

<sup>145</sup> SASSEN, *supra* note 143, at 8.

## III. UNEARNED CITIZENSHIP

The notion of earned citizenship begs the question of what constitutes unearned citizenship. While the genealogy of the term suggests that earned citizenship's opposite is amnesty,<sup>146</sup> the universe of unearned citizenship is broader than IRCA legalization. In fact, the principal methods of citizenship acquisition in the United States and the world — *jus soli* and *jus sanguinis*<sup>147</sup> — are themselves forms of unearned citizenship because they derive from nothing more than the accident of birth. S. 744 and proposals like it would create a citizenship economy in which some must earn their citizenship while most others obtain it by mere happenstance. While such arbitrariness in the distribution of social goods is commonplace,<sup>148</sup> S. 744 reinscribes it in citizenship law. Thus, earned citizenship exposes and exacerbates the soft underbelly of liberal citizenship practice: citizenship, the supposed ultimate guarantor of equality, is granted through vastly unequal means.

Legalization proponents often confront a baseline question of who is entitled to citizenship and on what basis. For restrictionists, the baseline is effectively zero, because the moral transgression of unauthorized presence is irredeemable. But even assuming that is true, it fails to answer the baseline question for *jus soli* and *jus sanguinis* citizenship. In a liberal democracy, neither inheritance nor luck should determine rights or life outcomes, and yet, under contemporary U.S. citizenship practices, that is exactly what happens.

This Section begins by establishing the high degree of moral arbitrariness that characterizes birthright citizenship — both *jus soli* and *jus sanguinis* — and the ways in which the earned citizenship regime exacerbates the problem by exposing the unearned nature of prevailing modes of citizenship transmission. It then argues that because a citizenship regime that encompasses both earned and unearned citizenship is morally unstable, the introduction of earned citizenship creates strong incentives to shore up the moral claims of *jus soli* and *jus sanguinis* citizens. This can be done in three ways: (1) moral differentiation of earned and unearned citizens, through the deployment of criminalization, racial contempt, and selective attacks on birthright citizenship in the form of the anchor baby narrative; (2) a leveling down of earned citizenship, which would selectively incorporate earning requirements into *jus soli* and *jus sanguinis* citizenship; and (3) a leveling up, which would support abandoning the earnings regime and liberalizing the bases for legalization.

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<sup>146</sup> See *supra* notes 24–67 and accompanying text.

<sup>147</sup> See AYELET SCHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 21 (“The vast majority of today’s global population (97 out of every 100 people) have acquired their political membership solely by virtue of birthplace or pedigree.”).

<sup>148</sup> *Id.* at 3.

### A. *Moral Arbitrariness and Birthright Citizenship*

Ordinarily the charge that birthright citizenship is morally arbitrary is associated with restrictionists. Indeed, in the same moment that restrictionists have pressed the case that legalization of undocumented immigrants is amnesty, they have engaged in a complementary strategy to eliminate birthright citizenship for the children of undocumented parents.<sup>149</sup> Specifically, these efforts seek to limit eligibility for *jus soli* citizenship (citizenship determined by the territory in which one is born) under the Fourteenth Amendment.<sup>150</sup> The same claim of something-for-nothing undeservingness that underwrites the amnesty charge animates the attack on birthright citizenship. By this account, the mere accident of birth on the territory of the United States should not result in citizenship. Rather, as several failed legislative efforts have suggested, *jus soli* citizenship should be limited to the children of citizens or lawful permanent residents.<sup>151</sup> The Citizenship Clause of the Fourteenth Amendment provides, “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.”<sup>152</sup> Such bills seek to curtail the reach of the Fourteenth Amendment through a restrictive statutory definition of the term “subject to the jurisdiction.” A 2015 bill, for example, would limit the meaning of the term to the children of U.S. citizens, lawful permanent residents, or noncitizens in active service in the U.S. Armed Services, thereby excluding the children of undocumented immigrants (and the children of most noncitizens other than LPRs).<sup>153</sup>

If the accident of birth should not inure to the benefit of children of undocumented parents, then why should it do so for the children of citizens? In ethical terms, when viewed from the perspective of the child, citizenship by birth, whether *jus soli* or *jus sanguinis*, is always an accident of birth. The child of a U.S. citizen has done no more to deserve her citizenship than has the child of an undocumented parent, and yet, by the restrictionists’ ac-

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<sup>149</sup> See, e.g., Margaret Mikyung Lee, *Birthright Citizenship Under the 14th Amendment of Persons Born in the United States to Alien Parents*, CONGR. RESEARCH SERV. 9 (Aug. 12, 2010) (recounting efforts to eliminate birthright citizenship through statutory and constitutional amendment); *Reform Birthright Citizenship*, NUMBERS U.S.A., <https://www.numbersusa.com/solutions/reform-birthright-citizenship>, archived at <https://perma.cc/3R85-3ZEZ> (endorsing legislation to limit birthright citizenship).

<sup>150</sup> Although this is often referred to as an attempt to limit birthright citizenship, that term is overbroad, as there are two forms of citizenship acquisition at birth in U.S. law: *jus soli*, which under the Fourteenth Amendment provides citizenship to those born in the United States (subject to limited exceptions), and citizenship by descent, which by statute, subject to certain conditions, grants citizenship to children of U.S. citizens even if they are born abroad. Compare U.S. CONST. amend. XIV § 1, with 8 U.S.C. §§ 1401, 1409. In contrast to naturalization, these forms of citizenship acquisition operate based upon circumstances at birth. Cf. 8 U.S.C. § 1427. As such, both may be considered forms of birthright citizenship.

<sup>151</sup> See, e.g., Birthright Citizenship Act of 2015, H.R. 140, 114th Cong. (2015) (introduced Jan. 6, 2015).

<sup>152</sup> U.S. CONST. amend. XIV § 1.

<sup>153</sup> Birthright Citizenship Act of 2015, H.R. 140 (introduced Jan. 6, 2015).

count, one is worthy of citizenship while the other should be deported, presumably to a country with significantly less resources and often substantially worse life chances. Birthright citizenship, as Ayelet Shachar has described, is a birthright lottery.<sup>154</sup> That the accident of birth should have such vast distributive effects is, of course, contrary to basic notions of justice.<sup>155</sup>

Peter Schuck and Rogers Smith's controversial theory of citizenship by consent provides a plausible rejoinder to this argument, and promises to rescue *jus soli* citizenship from moral arbitrariness.<sup>156</sup> Indeed, proponents of the bills seeking to restrict *jus soli* citizenship for children of undocumented parents have frequently invoked their scholarly work.<sup>157</sup> Schuck and Smith argued that the Citizenship Clause was premised upon a theory of reciprocal consent between the government and the citizen. According to their argument, the drafters of the Fourteenth Amendment sought to override the Supreme Court's decision in *Dred Scott v. Sandford*,<sup>158</sup> which denied *jus soli* citizenship to African Americans, while maintaining the exclusion from *jus soli* citizenship of Native Americans who remained members of their tribes, and achieved this through the "subject to the jurisdiction" language of the amendment.<sup>159</sup> This language, Schuck and Smith argue, reflects a theory of citizenship based upon "a reciprocal relationship between . . . [the individual and the government] at the time of birth, in which the government consented to the individual's presence and status and offered him complete protection."<sup>160</sup> Drawing on the international law scholars Vattel and Burlamaqui, they argue that parents' consent to citizenship carries with it an implicit demand for citizenship for their children. Thus, the government's reciprocal consent to the parents' citizenship tacitly acknowledges the citizenship of their children.<sup>161</sup> This, Schuck and Smith argue, explains how the "subject to the jurisdiction thereof" language could sweep African Americans within the ambit of *jus soli* citizenship while continuing to exclude members of Native American tribes; by virtue of their continued membership in tribes, Native Americans were not consenting to citizenship in the United States, nor was the U.S. government consenting to their citizen-

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<sup>154</sup> SCHACHAR, *supra* note 147, at 4.

<sup>155</sup> See, e.g., JOHN STUART MILL, *SOCIALISM* 67 (W.D.P. Bliss ed., 1891); JOSEPH H. CARENS, *ALIENS AND CITIZENS: THE CASE FOR OPEN BORDERS* 252 (1987) (describing citizenship as "the modern equivalent of feudal privilege — an inherited status that greatly enhances one's life chance."); SHACHAR, *supra* note 147, at 3.

<sup>156</sup> See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 7–8 (1985) [hereinafter "SCHUCK & SMITH, *Citizenship Without Consent*"].

<sup>157</sup> See Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 J. CONST. L. 1329, 1332–33 (2009) [hereinafter Smith, *Birthright Citizenship*] (recounting legislative attempts to limit birthright citizenship and their reliance on Schuck and Smith's work).

<sup>158</sup> 60 U.S. 393, 396 (1857).

<sup>159</sup> SCHUCK & SMITH, *Citizenship Without Consent*, *supra* note 156, at 72–82.

<sup>160</sup> *Id.* at 86.

<sup>161</sup> *Id.* at 117–18.

ship.<sup>162</sup> This theory of consensual citizenship, they contend, empowers Congress to define the categories of people, other than citizens and lawful permanent residents, to whom consent to citizenship is granted.

Schuck and Smith's argument has been fiercely criticized,<sup>163</sup> and it suffers from many shortcomings.<sup>164</sup> The historical and interpretive accuracy of the argument notwithstanding, consent does provide one basis for distinguishing the claim of *jus soli* citizenship of the children of citizens (and LPRs) from that of the children of undocumented immigrants. Yet, even if the consensual theory is operative, *jus soli* citizenship for the children of citizens remains unearned.

Alternatively, it might be argued that implicit in a government's consent to citizenship is a judgment that such citizenship is warranted. Consent to citizenship thus may be understood not only in consensual terms, but in terms of worthiness. By this argument, consent has been granted because of some prior determination of the parents' desirability. Such an account would make an earned citizenship regime for the undocumented more palatable, as it would imply an earning requirement for all citizens. But such a strained argument is at odds with the history of *jus soli*, a common law practice with roots in feudalism.<sup>165</sup> As its name implies, *jus soli* citizenship was about land, not individuals, and provided that any person born on a given territory was subject to and owed allegiance to the ruler of that territory.<sup>166</sup> In this

<sup>162</sup> *Id.* at 80–82.

<sup>163</sup> See generally, e.g., Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO. L. REV. 485 (1987); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L. L. 278 (1985). For replies, see ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS IN U.S. HISTORY* 308–10 (1997); Peter H. Schuck & Rogers M. Smith, *Membership and Consent: Actual or Mythic? A Reply to David A. Martin*, 11 YALE J. INT'L L. 545 (1986) [hereinafter "Schuck & Smith, *Membership and Consent*"]. Schuck and Smith themselves believe that Congress has the power to narrow the scope of the Citizenship Clause, but contend that this argument is not intended as a policy recommendation. *Id.* at 545. In recent years, Smith has also suggested that the repeated failure of birthright citizenship bills may be tantamount to consent to the children of undocumented citizens. Smith, *Birthright Citizenship*, *supra* note 157, at 1333–34.

<sup>164</sup> For example, as Gerald Neuman has argued, the inclusion of the children of lawful permanent residents within the scope of the Fourteenth Amendment's *jus soli* citizenship, but not the children of other noncitizens, rests uneasily within the consent framework given that such status is revocable by the government. As Neuman contends, Schuck and Smith's treatment of lawful permanent residents as a category to which the government has consented is compelled less by a theory of consent and more by the landmark decision of *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898), which held that under the Citizenship Clause, a child born to Chinese parents legally residing in San Francisco was a citizen, even though the parents were statutorily ineligible to naturalize. Neuman, *supra* note 163, at 493–94. Moreover, *Wong Kim Ark* rejects the very consent-based notion of citizenship that Schuck and Smith advocate. *Id.* at 494 (noting that the dissent embraced a consensual understanding of citizenship, relying upon Vattel). Neuman and others have also argued that a more straightforward meaning of the "subject to the jurisdiction" language of the Amendment enables the exclusion of Native American tribes, without making recourse to a theory of consensual citizenship.

<sup>165</sup> See Patrick Weil, *Access to Citizenship: A Comparison on Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 17, 19 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

<sup>166</sup> SCHUCK & SMITH, *Citizenship Without Consent*, *supra* note 156, at 13–17.

context, the ruler, and later the state, was indiscriminate as to the qualities of the citizens it made by virtue of *jus soli*. *Jus soli* was an instrument for the production of fealty, not the selection of good citizens.

History aside, consent is an ill-fitting proxy for earning. There are many reasons a government might consent to citizenship, including humanitarianism (as in the case of refugees),<sup>167</sup> pragmatism (such as IRCA legalization),<sup>168</sup> or evolving notions of justice (for example, the granting of immigration benefits to same-sex spouses of U.S. citizens).<sup>169</sup> It is difficult to assimilate these into a rubric of earning. But even if one could reduce consent-based citizenship to a theory of earning, the earning justification weakens over time. This is because consent-based citizenship effectively transforms *jus soli* into a form of *jus sanguinis* citizenship (citizenship by bloodline); under a consent-based model, the citizenship of a child depends upon the status of the parent, and thus bloodline becomes largely dispositive of citizenship. With each succeeding generation, the original consensual deal between individual and government becomes ever more attenuated, and consent-as-merit approaches consent-as-heredity. Heredity is, as Mill noted, the antithesis of earning.<sup>170</sup>

There are, of course, legitimate grounds for *jus sanguinis* citizenship, such as preventing statelessness,<sup>171</sup> fostering normative notions of family,<sup>172</sup> ensuring care and protection of children,<sup>173</sup> and promoting intergenerational development of the political community,<sup>174</sup> not to mention mere convenience. But none of these are merit-based arguments. Moreover, a regime of *jus sanguinis* in the absence of *jus soli* citizenship tends toward ethnonationalism, because it entrenches the citizenship claims of those ethnic

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<sup>167</sup> Under the Refugee Act of 1980, refugees are granted a legal status that is adjustable to lawful permanent residency after one year, from which status the individual typically may naturalize after another five years. See 8 U.S.C. §§1159, 1427.

<sup>168</sup> See *supra* notes 24–40 and accompanying text.

<sup>169</sup> See IMMIGRANT LEGAL RESOURCE CTR., MARRIAGE EQUALITY IN IMMIGRATION LAW: IMMIGRATION BENEFITS FOR SAME-SEX MARRIED COUPLES (2013), [https://www.ilrc.org/sites/default/files/documents/marriage\\_equality\\_in\\_immigration\\_law\\_-\\_immigration\\_benefits\\_for\\_same-sex\\_married\\_couples.pdf](https://www.ilrc.org/sites/default/files/documents/marriage_equality_in_immigration_law_-_immigration_benefits_for_same-sex_married_couples.pdf), archived at <https://perma.cc/N9ND-C9Q6> (summarizing Department of Homeland Security treatment of immigration benefit petitions filed on behalf of same-sex spouses following the Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013)).

<sup>170</sup> JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY, Book 5, Ch. 9 (1848).

<sup>171</sup> CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR, AND RONALD Y. WADA, 7–91 IMMIGRATION LAW AND PROCEDURE § 91.01.

<sup>172</sup> See generally Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

<sup>173</sup> See Kerry Abrams, *No more blood*, European Union Democracy Observatory on Citizenship: CITIZENSHIP FORUM, <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1389-bloodlines-and-belonging-time-to-abandon-jus-sanguinis?showall=&start=8>, archived at <https://perma.cc/AH22-DQSZ>.

<sup>174</sup> SHACHAR, *supra* note 147, at 21–43.

groups already incorporated into the nation.<sup>175</sup> *Jus sanguinis* is status-preserving rather than status-creating, and as Shachar has shown, treats citizenship as a form of inheritance.<sup>176</sup> A convergence of *jus soli* and *jus sanguinis* citizenship, as the restrictions on birthright citizenship would force, thus sharpens the line between unearned citizenship for those already present and a requirement of earning for those seeking admission.

*B. Strategies of Moral Differentiation: Racialization, Criminalization, and the Invention of the Anchor Baby*

In a tacit recognition of the shaky moral basis for eliminating *jus soli* citizenship, restrictionists have not merely decried citizenship for the children of undocumented parents resulting from happenstance, but have invented a trope of intentional moral culpability for their movement: the anchor baby. The mythological anchor baby<sup>177</sup> is the product of a devious plan by undocumented, pregnant women who connive to enter the United States unlawfully just in time to give birth on American soil.<sup>178</sup> Once born, the child not only becomes a U.S. citizen but, according to the mythology, becomes the legal and sociological basis for legalization of an entire family — mother, father, siblings, and others.<sup>179</sup> The specter of a late-term pregnant Mexican woman crossing the border in order to unfairly avail herself and her family of the benefits of citizenship (legal status, eligibility for social welfare) recalls the figure of the welfare queen used so effectively in the 1980s and 1990s to eliminate welfare as a social entitlement.<sup>180</sup> In both cases, the

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<sup>175</sup> See Costica Dumbrava, *Bloodlines and Belonging: Time to Abandon Jus Sanguinis?*, European Union Democracy Observatory on Citizenship: CITIZENSHIP FORUM, <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1389-bloodlines-and-belonging-time-to-abandon-ius-sanguinis?showall=&limitstart=>, archived at <https://perma.cc/XQF5-MNX5>.

<sup>176</sup> SCHACHAR, *supra* note 147, at 21–43.

<sup>177</sup> See, e.g., Louis Jacobson, *Fact-Checking the Claims About ‘Anchor Babies’ and Whether Illegal Immigrants ‘Drop and Leave’*, POLITIFACT.COM (Aug. 6, 2010, 6:15 PM), [www.politifact.com/truth-o-meter/statements/2010/aug/06/lindsey-graham/illegal-immigrants-anchor-babies-birthright/](http://www.politifact.com/truth-o-meter/statements/2010/aug/06/lindsey-graham/illegal-immigrants-anchor-babies-birthright/), archived at <https://perma.cc/E9AG-TN7Z>.

<sup>178</sup> See, e.g., Amy Davidson, *The Anchor-Baby Question at the G.O.P. Debate*, NEW YORKER (Sept. 15, 2015), <http://www.newyorker.com/news/amy-davidson/the-anchor-baby-question-at-the-g-o-p-debate>, archived at <https://perma.cc/GUY4-C9NS> (recounting “anecdotal and demagogic” definitions of anchor baby, including “[Donald] Trump’s talk of a woman practically in labor stumbling over the border for twenty-four hours to give birth, or accounts of ‘maternity tourism.’”).

<sup>179</sup> See Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 60, (2012).

<sup>180</sup> See PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES 194–99, 239–40 (2005); Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 J. GENDER, SOC’L. POL’Y & L. 247, 256–66 (2014) (discussing history of the term).



trope is racialized, gendered, and criminal, as the offender cheats taxpayers and cynically takes advantage of the nation's generosity.<sup>181</sup>

The invention of the anchor baby trope was necessary in order to strengthen the moral claim for *jus soli* citizenship for the children of citizens over that of the children of undocumented parents. By providing a claim to worthiness based not on some affirmative performance, as earned citizenship requires, but on the absence of criminality, the trope recharacterizes "accidents of birth" as conspiracies to commit fraud, recapitulating the "rule of law" claim of the restrictionists and defeating the claim of unfair treatment of such children. Undocumented immigrants thus are charged with moral culpability that overcomes the accident-of-birth objection.

In recent years, the anchor baby narrative has been supplemented by the specter of terrorism. For example, restrictionists frequently seek to shore up their calls for curtailing birthright citizenship by pointing to the case of Anwar Al-Awlaki, the U.S. citizen believed to have become a spiritual leader, recruiter and propagandist for Al Qaeda. Al-Awlaki, restrictionists point out, was born to non-immigrant parents while his father was on a student visa, and is "an example of how Birthright Citizenship has the potential to benefit enemies of the United States."<sup>182</sup> The case of Yaser Hamdi, captured in Afghanistan in 2001 and held as an "enemy combatant," similarly led to calls to curtail birthright citizenship.<sup>183</sup> Hamdi was born in Louisiana to Saudi parents on a temporary work visa,<sup>184</sup> and his citizenship by birth became the basis on which he was transferred out of the purgatory of Guantánamo and into a military brig in South Carolina that afforded full due process protections.<sup>185</sup> As in the mythological case of the border-crossing pregnant Mexican woman, the terrorist trope's deployment of a racialized, criminal figure both masks and attempts to fortify the moral legitimacy of *jus soli* for the children of citizens.

The anchor baby trope epitomizes a maneuver enabled by the baseline problem of birthright citizenship: moral differentiation by way of criminalization and racialization, in order to save birthright citizenship from the charge of moral arbitrariness. Defenders of *jus soli* citizenship have argued

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<sup>181</sup> See Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO J. POVERTY L. & POL'Y 389, 389, 397–99 (2004); Keyes, *supra* note 75, at 150–51.

<sup>182</sup> See, e.g., NUMBERS U.S.A., *supra* note 149.

<sup>183</sup> See, e.g., Howard Sutherland, *Citizen Hamdi*, AMER. CONSERVATIVE (Sept. 27, 2004), <http://www.theamericanconservative.com/articles/citizen-hamdi/>, archived at <https://perma.cc/35AN-NAHU>.

<sup>184</sup> See *id.*

<sup>185</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) ("We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."). Hamdi was eventually released from U.S. custody and sent to Saudi Arabia, where he had grown up, on the condition that he renounce his U.S. citizenship. See Settlement Agreement, *Hamdi v. Rumsfeld*, No. 2:02CV439 (E.D. Va., Sept. 17, 2004), <http://news.findlaw.com/hdocs/docs/hamdi/911704stlagmnt.html>, archived at <https://perma.cc/939W-BWAP>.

primarily on historical grounds. They cite the Supreme Court's decision in *United States v. Wong Kim Ark*<sup>186</sup> and the role of birthright citizenship as an essential legal feature of Reconstruction, and argue that these constitutional protections should not be the object of political tinkering or mischief.<sup>187</sup> But the baseline problem leaves *jus soli* vulnerable to pernicious, false, and nativist attack.

Paradoxically, earned citizenship relies upon the same structure of moral differentiation as do the attacks on birthright citizenship, even as one is expansionary and the other restrictionist. As discussed previously,<sup>188</sup> earned citizenship situates undocumented immigrants in the place of moral deficit, implicitly crediting the restrictionists' law-breaker narrative. Of course, earned citizenship does not traffic in the racism of the anchor baby or terrorist tropes, but its probationary and punitive qualities reinforce the immigrant-as-criminal narrative that restrictionists so regularly invoke.<sup>189</sup>

### C. *Leveling Down: Selective Incorporation of Earning Requirements*

The imperative to buttress the moral basis of birthright citizenship might also be met by importing behavioral requirements into *jus soli* and *jus sanguinis* citizenship. Rather than subject only legalizing immigrants to performance tests, the same could be done for citizens by birth. By this account, citizenship would be earned by all. And yet, it is far more likely that this kind of leveling down of citizenship would be selective in its application, and create new forms of citizenship vulnerability. Such patterns are evident in two examples: the persistent attacks on *jus soli* citizenship, discussed above in relation to moral differentiation, and more recent proposals for citizenship-stripping.

The attacks on territorial birthright citizenship effectively subject the parents of putative *jus soli* citizens to a behavioral test. For example, the

<sup>186</sup> 169 U.S. 649 (1897). *Wong Kim Ark* involved a man born in San Francisco to Chinese immigrants who, after leaving the country to visit his parents in China, was denied entry upon his return under the Chinese Exclusion Act. *Id.* at 649. The Court held that the Citizenship Clause of the Fourteenth Amendment confers citizenship on children born in the United States to noncitizens permanently domiciled in the country and not employed in a diplomatic or official capacity under a foreign government. *Id.* at 702–03. As such, the Chinese Exclusion Act did not apply. *Id.* at 699. In reaching this conclusion, the Court interpreted the “subject to the jurisdiction thereof” language of the Citizenship Clause to mean within the political jurisdiction of the United States. *Id.* at 702–05. The case constitutes the Supreme Court’s fullest explication and defense of *jus soli* citizenship. See generally Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in *IMMIGRATION STORIES* 51–85 (David A. Martin & Peter H. Schuck, eds. 2005); see also LUCY SALYER, *LAW HARSH AS TIGERS* 98–99 (1995); Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 *AMER. U. L. REV.* 331, 331–34, 381 (2010).

<sup>187</sup> See, e.g., Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 *U. PENN. J. CONST’L. L.* 1363, 1364–66 (2009).

<sup>188</sup> See *supra* Section II.C.

<sup>189</sup> See *supra* Section II.B.3.

Birthright Citizenship Act of 2015 would limit birthright citizenship to the children of U.S. citizens, lawful permanent residents, or those in active military service.<sup>190</sup> The inclusion of military service is explicitly performance-based, and echoes similar preferential treatment in citizenship law for those who have served in the armed forces.<sup>191</sup> But as evident from the anchor baby trope, the alienage restrictions of such bills are implicitly behavioral tests; U.S.-born children of the undocumented are excluded from citizenship because of the actions of their parents to enter or remain in the country, fraudulently and criminally. Thus, the behavioral requirements to refrain from criminal activity and to conform to a script of neoliberal self-governance, which animate the earned citizenship framework,<sup>192</sup> have been selectively incorporated into *jus soli* citizenship and applied with racial exclusion as its obvious goal.

If birthright bills represent a leveling down of citizenship at the front end, then expatriation bills constitute a similar degradation at the back end. In January 2015, Senator Ted Cruz introduced the Expatriate Terrorist Act, which would expand the grounds on which a citizen, whether by naturalization or by birth, may be stripped of her citizenship.<sup>193</sup> The expanded grounds include the provision of “material support” to a foreign terrorist organization,<sup>194</sup> a notoriously broad category<sup>195</sup> that appears in both immigration and criminal law.<sup>196</sup> In 2010, then-Senator Joseph Lieberman introduced a similar bill.<sup>197</sup> Here again, citizenship is subjected to a behavioral test. Whereas

<sup>190</sup> See *supra* note 153 and accompanying text.

<sup>191</sup> For example, noncitizens who served honorably in active-duty status in the military during periods of military hostilities are eligible to naturalize immediately. See 8 U.S.C. § 1440(a); Exec. Order 13,269, Fed. Reg. 45,287 (Jul. 3, 2002) (designating noncitizens serving in the military on or after September 11, 2001, as eligible for immediate citizenship under 8 U.S.C. § 1440). Noncitizens serving in peacetime also qualify for naturalization on an accelerated basis. See 8 U.S.C. § 1439. In addition, DREAM Act proposals provide for military service as an alternative basis to post-secondary education for obtaining lawful permanent residence. See *supra* note 75.

<sup>192</sup> See *supra* Section II.B.1.

<sup>193</sup> Expatriate Terrorist Act, S. 247, 114th Cong. (2015).

<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., Opening Brief for Humanitarian Law Project at 3–4, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2009) (Nos. 08-1498, 09-89) (describing lawful, nonviolent activity that government charged as constituting material support). But see *Holder*, 561 U.S. at 18-19 (rejecting argument that 18 U.S.C. § 2339B was unconstitutionally vague or overbroad as applied).

<sup>196</sup> See § 8 U.S.C. 1182(a)(3)(B)(iv)(VI); 18 U.S.C. § 2339A. A material support provision was eventually imported into the law governing military commissions held at Guantánamo Bay. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v(b)(28), 120 Stat. 2630 (codified as amended at 10 U.S.C. §§ 948a-950w (2006)), [http://www.loc.gov/frd/frd/Military\\_Law/pdf/PL-109-366.pdf](http://www.loc.gov/frd/frd/Military_Law/pdf/PL-109-366.pdf), archived at <https://perma.cc/2SH7-GUS3>, replaced by Military Commissions Act of 2009, 10 U.S.C. § 950t(25) (2012); Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT'L. L.J. 1, 57–61 (2013).

<sup>197</sup> Terrorist Expatriation Act, S. 3327, 111th Cong. (2010). Representative Charlie Dent introduced an identical bill in the House. See Terrorist Expatriation Act, H.R. 5237, 111th Cong. (2010).

territorial birthright bills would condition citizenship on ex ante good behavior, expatriation bills would extend the behavioral requirements ex post. In so doing, these bills would move citizenship away from a permanent status and toward a probationary one, not unlike the lengthy probationary period of Registered Provisional Immigrant status under S. 744.<sup>198</sup> The focus on terrorism, and the disparate negative impact these expatriation bills likely would have on citizens of Arab, Muslim, and South Asian descent,<sup>199</sup> mirrors the racialization of the anchor baby narrative, and once more represents a selective application of performance metrics to citizenship. The result is to create racially determined tiers of citizenship, an outcome that contradicts the essential liberal purpose of citizenship as a uniform and indivisible status of equality that transcends ascriptive difference,<sup>200</sup> and undermines the constitutional promise of equal citizenship to “guard[ ] against degradation or the imposition of stigma.”<sup>201</sup> Moreover, these bills represent a sharp departure from modern Supreme Court jurisprudence on the law of expatriation that has interpreted the Fourteenth Amendment as providing near-absolute protection against the involuntary removal of citizenship,<sup>202</sup> permitting expatriation only under the most stringent of circumstances.<sup>203</sup>

Although neither birthright citizenship nor expatriation bills have been enacted to date, it would be a mistake to conclude from this that birthright citizenship is forever secure against such attacks. The anchor baby trope has helped to propel an extremist politics in the United States of a kind that has not been seen in generations; during the 2016 campaign, Donald Trump argued that birthright citizenship was “the biggest magnet for illegal immigration,”<sup>204</sup> and routinely inveighed against “anchor babies.”<sup>205</sup> Meanwhile,

<sup>198</sup> See *supra* notes 86–87, 138 and accompanying text.

<sup>199</sup> For a discussion of the legal, cultural, social, and political practices that have helped to shape the racial construction of the terrorist, see generally Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575 (2002); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Hate Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).

<sup>200</sup> See generally Muneer I. Ahmad, *The Citizenship of Others*, 82 FORDHAM L. REV. 2041 (2014);

<sup>201</sup> Kenneth L. Karst, *The Supreme Court 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977). As Karst writes:

The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs.’ Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant.

*Id.*

<sup>202</sup> For an outstanding history of U.S. expatriation law, see generally PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* (2013), and Peter Spiro, *Expatriating Terrorists*, 82 FORDHAM L. REV. 2169 (2014).

<sup>203</sup> See, e.g., *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (“Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”).

<sup>204</sup> *Immigration Reform That Will Make America Great Again* (undated), DONALD J. TRUMP, <https://www.donaldjtrump.com/images/uploads/Immigration-Reform-Trump.pdf>, archived at <https://perma.cc/92R5-9CMW>.

civil rights advocates have argued that the government has achieved racially targeted expatriation through alternative means, such as overseas passport revocations.<sup>206</sup> Many European and Western countries, such as the United Kingdom, Ireland, Australia and New Zealand, have restricted *jus soli* citizenship in recent decades (even as Germany has expanded it),<sup>207</sup> and several countries, including the United Kingdom and Canada, have enacted citizenship-stripping bills as part of their anti-terrorism initiatives.<sup>208</sup> The American constitutional basis for *jus soli* citizenship, and its inextricability from Reconstruction and a positive vision of racial equality,<sup>209</sup> suggests that territorial birthright citizenship may be more robust in the United States. At the same time, the long history of denaturalization,<sup>210</sup> including its contemporary forms, suggests the historical contingency of citizenship practices.

#### D. *Leveling Up: Liberalizing the Earnings Requirements*

As the previous discussion illustrates, the strategies of moral differentiation and selective incorporation of earnings requirements, mitigate the asymmetry between earned and unearned citizenship, but at significant risk of unfounded moralizing and racial contempt of immigrants. A third approach would reduce the corrosive effect on unearned citizenship by liberalizing the earnings requirements for legalization, thereby ameliorating the corrosive effect on unearned citizenship. Such an approach might abandon the language and structure of earning entirely, so as to avoid the morally uncomfortable and normatively unjustifiable distinction between earned and unearned citizenship, as well as the pernicious tendencies that frequently characterize defenses of unearned citizenship.

While one might expect different bases for citizenship acquisition as between those territorially present at birth and other citizens on the one

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<sup>205</sup> See, e.g., Reena Flores, *Donald Trump: "Anchor babies" aren't American citizens*, CBS NEWS (Aug. 19, 2015), <http://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens/>, archived at <https://perma.cc/Q37D-5QT8>.

<sup>206</sup> See generally Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014) (describing revocation of dozens, if not hundreds, of passports of naturalized U.S. citizens from Yemen, and placing them in context of broader, racially, and religiously targeted counterterrorism practices).

<sup>207</sup> For a summary of these developments, see generally Mae N. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521 (2007).

<sup>208</sup> See Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 QUEEN'S L.J. 1, 2 (2014) (comparing Canadian, British, and American approaches to expatriation and noting that "politicians in various states have recently pondered citizenship stripping as a way to convert the terrorist into a foreigner").

<sup>209</sup> See, e.g., *Benny v. O'Brien*, 58 N.J.L. 36, 40 (N.J. 1895) ("The Fourteenth Amendment, by the language, 'all persons born in the United States, and subject to the jurisdiction thereof,' was intended to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race."), quoted with approval by *United States v. Wong Kim Ark*, 169 U.S. at 692–93.

<sup>210</sup> See WEIL, *supra* note 202, at 1–12.

hand, and immigrants on the other,<sup>211</sup> a leveling up approach would interrogate and minimize those differences; the acquisition of citizenship, and not just the terms of citizenship once obtained, should be subject to moral inquiry.<sup>212</sup> If “the idea of citizenship is ‘isonomy’”<sup>213</sup> — that is, equal rights achieved through symmetric application of law<sup>214</sup> — then this same principle should apply to citizenship acquisition. There may be good and practical reasons that identical rules cannot apply as between citizenship-at-birth and subsequently acquired citizenship, but incongruity in citizenship acquisition may taint the equality of citizenship once acquired. This is especially true where, as in the case of earned citizenship, the path to citizenship features a long, probationary period during which lawful status is precarious. For this reason, such dissonance should be minimized wherever possible. The asymmetric application of an earnings regime in the context of legalization runs counter to this goal of equal citizenship.

Moreover, a more expansive legalization program is consistent with the Arendtian view of citizenship as a prerequisite for securing basic rights.<sup>215</sup> A requirement to demonstrate one’s worthiness for rights protection is incompatible with the human rights understandings of citizenship. While the existence of *jus soli* and *jus sanguinis* regimes of citizenship obviously cannot preclude rules for naturalization,<sup>216</sup> an understanding of citizenship as the essential prerequisite of equality counsels that the barriers to citizenship for those who are members of the society be kept low. Rather than relegating immigrants to an uncertain fate for a decade or more, such a citizenship approach would accelerate the full incorporation of immigrants into the polity so as to reduce social stigma, economic vulnerability, and insecurity as to residence, while promoting full and meaningful social and political participation. A rapid and unencumbered path to citizenship is, then, a path to equal citizenship.<sup>217</sup>

The difficulty with such a liberal legalization program is that even as it mitigates the baseline problem of *jus soli* and *jus sanguinis*, it presents its own baseline quandary: what is the source of claim for citizenship, and what are its limits? Without answering this question, the bogeyman of open borders looms even more potently than the charge of amnesty. The earned citizenship framework attempts to resolve the problem through its elaborate system of worthiness metrics, but as discussed here, it does so at significant cost. It is possible that earned citizenship ultimately will prove to be a polit-

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<sup>211</sup> See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 60, 165–66 (1983).

<sup>212</sup> See SHACHAR, *supra* note 147, at 44–69.

<sup>213</sup> FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 164 (1960).

<sup>214</sup> See JOPPKE, *supra* note 111, at 5–6.

<sup>215</sup> See ARENDT, *supra* note 10, at 267–303.

<sup>216</sup> Congressional authority to prescribe rules of naturalization is provided for in Article I, Section 8 of the Constitution.

<sup>217</sup> Karst, *supra* note 201, at 5–11.

ically viable framework for resolving the status of the current undocumented population, but it remains normatively unsustainable, and thus invites consideration of alternative approaches to legalization.

#### CONCLUSION

Having so predominated the politics of immigration reform for the past fifteen years, the earned citizenship/amnesty debate has crowded out the discursive space for alternative understandings of legalization. It is possible, and perhaps even likely, that changing demographics and the growing electoral power of Latinx voters ultimately will propel the earned citizenship narrative to legislative success in a post-Trump era. But such a strategy would entrench a narrative of individual moral accountability for a problem of obviously structural dimension, create a morally unstable structure of earned and unearned citizenship, and place unnecessary and unproductive pressure on the shaky moral foundation for birthright citizenship. In light of the costs of this approach, we should consider letting go of the earned citizenship framework in order to open a space to imagine new moral and political framings of immigration.

One option would be to consider the current condition of undocumented immigration as a problem of caste. Over the past two decades, undocumented immigration has become increasingly normalized. Even as the politics around the issue have flared — most notably in the form of state and local efforts to regulate immigration on the one hand,<sup>218</sup> and social mobilization in favor of legalization on the other<sup>219</sup> — undocumented immigrants have become a fixture in American society. And yet, the space they occupy is, by law, marginal. The undocumented population today consists of some 11 million people, most of whom have been here for nearly a generation, are racially marked, disproportionately poor, categorically disenfranchised, systematically discriminated against, and relegated by law to the absolute margins of the economy. These are the hallmarks of caste.

Caste is anathema to constitutional commitments to equality, and the persistence of the large undocumented population in American society could be understood as violating anti-caste commitments embedded in the Due Process and Equal Protection Clauses.<sup>220</sup> The creation and persistence of

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<sup>218</sup> 2010 *Immigration-Related Laws and Resolutions in the States* 1, NAT'L CONF. OF STATE LEGISLATURES, (Jan. 5, 2011), <http://www.ncsl.org/research/immigration/2010-immigration-related-laws-and-resolutions-in-t.aspx>, archived at <https://perma.cc/UE9D-LD7Q> (noting that states “enacted a record number of laws and resolutions addressing immigration issues in 2010,” with nineteen states passing thirty-seven laws).

<sup>219</sup> See Keyes, *supra* note 75 (describing the history of the DREAMer movement as well as push for legalization in the 2000s).

<sup>220</sup> Many scholars have interpreted the Fourteenth Amendment’s due process protections as having been intended to eliminate caste status. See, e.g., Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2436 (1994) (arguing that Reconstruction Amendments were intended to address both discriminatory legislation and “a social status quo that, through his-

caste thus is constitutionally and socially intolerable. As Justice Harlan stated in his dissent in *Plessy v. Ferguson*, “There is no caste here.”<sup>221</sup>

The anti-caste principle does not resolve the question of unlawful status that has animated the amnesty charge, but it does provide an alternative frame for understanding the current circumstance of undocumented immigration, and supplies a moral and legal imperative for action to resolve it. It neither accedes to the individual culpability premise of restrictionists nor attempts to resolve the complex causality of undocumented migration. Instead, a focus on caste forces consideration of the current realities of racialized inequality. It gives substance and specificity to the amorphous claim that legalization is consistent with American values.<sup>222</sup> And it recognizes that long-term, large-scale undocumented immigration not only diminishes the well-being of undocumented immigrants, but degrades the principle of equality. The maintenance of an equality regime, for the enjoyment of all citizens, depends upon the elimination of caste. The coexistence of citizenship and caste is the destruction of citizenship itself.

Undoubtedly there are yet other moral and political framings available. Their development should be encouraged, and in a manner that recognizes that the problem to be solved is not some conjured moral deficiency of the undocumented, but a collective responsibility for our societal well-being.

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torical and current practices, creates second class status”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 150–51 (1976) (arguing that a “group-disadvantaging principle” of the Equal Protection Clause espouses “an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time.”); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1515 (2d ed. 1988) (discussing the “antisubjugation principle, which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens”); see also William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 7–15 (1999) (discussing various liberal constitutionalists’ theories of caste); see generally Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT 257 (1996); Karst, *supra* note 201; Frank I. Michelman, *The Supreme Court 1968 Term — Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 1 (1969). For a discussion of the Citizenship Clause interpreted in accord with the anti-caste principle, see generally Rodríguez, *supra* note 187, at 1365. Although these arguments address only Fourteenth Amendment equal protection, they may be applied by analogy to the Fifth Amendment Due Process Clause.

<sup>221</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>222</sup> See, e.g., Mary Giovagnoli, *Overhauling Immigration Law: A Brief History and Basic Principles of Reform*, AM. IMMIGRATION COUNCIL, <http://www.immigrationpolicy.org/perspectives/overhauling-immigration-law-brief-history-and-basic-principles-reform>, archived at <https://perma.cc/4XTD-7X86> (arguing that path to citizenship for undocumented immigrants is one of basic principles for immigration reform that supports American values).