Reconsidering US Immigration Reform: The Temporal Principle of Citizenship

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The uncertain political status of America's millions of undocumented immigrants and their children has exposed deep and ongoing disagreement about how US citizenship should be accorded to foreign-born persons. I identify the principle of *jus temporis,* a law of measured calendrical time, that has worked in concert with *jus soli* and consent to construct citizenship law since the nation's founding. *Jus temporis* translates measured durations of time such as "time in residence" or "time worked" into entitlement to rights and status. It creates temporal algorithms in which measured calendrical time plus additional variables (e.g., physical presence, education, or behavior) equals consent to citizenship. I explore recent scholarly references to temporal principles and trace the history of how *jus temporis* was invoked by the nation's first Supreme Court jurisprudence on citizenship and the first Congressional debates about immigration and naturalization. Scholarly convergence on the principle of *jus temporis* as well as its originalist pedigree imbue this principle with the potential to resolve contemporary disagreements about the rights and status of foreign-born persons in the US.

The year 2011 marks the twenty-fifth anniversary of the infamous Immigration Reform and Control Act (IRCA). Both at the time when illegal immigration first revealed itself to be a thorny political problem, and now that the problem is in full flower, scholars of immigration interested in making intellectually and politically compelling arguments about the inclusion and exclusion of immigrants have confronted two questions. First, how can principles for immigration policy be deduced from a Constitution written by people who did not and perhaps could not anticipate undocumented immigration as we know it today? Second, how can we make those principles square with the sometimes conflicted normative underpinnings of the US approaches to immigration? While responses to the second question can draw on a vast array of sources, responses to the first question have generally focused on the intent and application of the Fourteenth Amendment to the US Constitution's Citizenship Clause. Because the authors of this Amendment could not have anticipated illegal immigration as we know it today, immigration restrictionists and liberals alike strain to show how the Citizenship Clause and related jurisprudence support their normative goals for immigration.

In this article, I question this intense focus on the Fourteenth Amendment, and argue for redirecting attention toward earlier sources of constitutional jurisprudence that address the rights and citizenship claims of people living with irregular citizenship statuses in the US. I frame this argument with a brief genealogy of the thought of three scholars of immigration and citizenship—Joseph Carens, Peter Schuck, and Rogers Smith—who made singularly influential arguments in the 1980s. I illustrate how their thinking has evolved and, in important ways, converged, in recent years. In doing so, I identify a common theme that each author either tacitly or directly makes pivotal to their revised claims about the status of illegal immigrants. That theme is the importance of the length of time that immigrants spend in a host society.

Along with many policymakers, a range of scholars make claims for the rights of some immigrants in which "time in residence" or "time worked" serves as a conduit for entitlement to rights and statuses. I argue that there is very strong evidence that a temporally based principle of citizenship—what I call *jus temporis*—was treated as decisive when, following the founding, the US Supreme Court and many state courts issued their decisions about

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the status of the first US residents to whom irregular citizenship status was ascribed. I bolster this with evidence that early legislators applied their own version of this belief about the importance of time to the development of the nation's first naturalization procedures and standards. This body of evidence demonstrates that *jus temporis* has, at pivotal moments, been applied in concert with other principles of citizenship, namely *jus soli* and *consent*. It could therefore serve as a conceptual and practical tool for making determinations about the rights and status of undocumented persons living in the US today.

Framing the Illegal Immigration Debate

The Fourteenth Amendment is one of the only direct statements about rules for conferring citizenship in the US Constitution. Its Citizenship Clause states that "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." While this clause clearly states a rule of *jus soli* (citizenship based upon place of birth) that was intended to replace the rule of *jus sanguinis* (citizenship based in blood lineage) that had disenfranchised black Americans for generations, it does not address itself to immigration. Despite this silence, the clause has been central to debates about the attribution of citizenship. This is particularly true in disputes involving the children of undocumented immigrants, who of late have come to be identified by conservatives with the politically charged moniker "anchor babies," denoting a growing suspicion that undocumented immigrants are using the Citizenship Clause's rule of *jus soli* to gain citizenship through their US-born offspring.

Much of the legal evidence and rhetoric surrounding the Citizenship Clause of the Fourteenth Amendment marshaled by immigration restrictionists draws directly on the arguments articulated in Peter Schuck and Rogers Smith's 1985 book *Citizenship Without Consent*.[1] They open with a close reading of the early modern theorists of consent, particularly Jean-Jacques Burlamaqui and Emerich deVattel, who informed early American jurisprudence on naturalization and the conferral of citizenship. The authors use this as background for their argument that the framers of the Fourteenth Amendment intended to enfranchise black Americans while ensuring the perpetual disenfranchisement of Native Americans, who were not taxed. Their claim is rooted in the phrase "subject to the jurisdiction thereof," which the Supreme Court interpreted as denying citizenship to the children of Indians born in the US in *Elk v. Wilkins*.[2] Among the consequences of this, Schuck and Smith assert, is a delegitimization of political claims by undocumented immigrants, particularly with respect to the citizenship of their children born on US soil. They conclude their book with a measured but ultimately restrictionist argument that the children of undocumented immigrants who grow up in the US ought be required to elect their citizenship upon reaching the age of majority rather than receiving it automatically at birth.[3] An array of people who seek to restrict immigration cite Schuck and Smith's work, ranging from academic restrictionists such as Samuel Huntington to judges such as Richard Posner.[4]

By far the most dramatic and frequently-cited counterpoint to such restrictive views on immigration can be found in Joseph Carens' 1987 "Aliens and Citizens: The Case for Open Borders," published one year after IRCA was passed and two years after *Citizenship Without Consent* appeared. In this widely cited and much scrutinized essay, Carens carefully articulates a series of abstract arguments against restricting immigration and in favor of opening borders. He concludes that libertarianism, Rawlsian liberalism,[5] and utilitarianism all demonstrate the incoherence of closed borders. Carens also entertains objections from communitarians, concluding that while the abstract communitarian defense of communal self-determination exists, societies that claim to adhere to liberal traditions will automatically ally themselves with doctrines that support open borders.

In the two and a half decades since they first entered the US debate about illegal immigration, Schuck and Smith's restrictionist position and Carens's open borders argument have each received sustained critique. In response, Schuck and Smith have disavowed attempts to appropriate their academic arguments on behalf of restrictionist legislation in Congress and, independently, have revised their initial stance.[6] Carens, in turn, has engaged in a series of printed critical exchanges about his open borders arguments.[7] In the process of fielding critics, and in response to the course that immigration politics has taken, each thinker's contemporary stance amends the conclusions that they reached in the 1980s. These modifications have resulted in a curious convergence of their once diametrically opposed arguments.

Smith, while not disavowing *Citizenship Without Consent*, believes that its conclusion cannot readily be applied today. In 2009, he wrote:

> Since the 1990s, the nation's legislators and one political party have raised and debated the issue of birthright citizenship for undocumented aliens, with strong advocacy for exclusion. These efforts have all failed. Indeed, none has come anywhere close to winning congressional approval or broader popular support. It therefore makes much more sense than it did in 1985 to say that Americans have, through their representatives and their votes for their representatives, consented to reading the Fourteenth Amendment to provide birthright citizenship to children of all aliens born on American soil. . ."[8]

While Smith does not amend the normative and jurisprudential interpretations he and Schuck developed in *Citizenship Without Consent*, his more recent writing essentially appends a caveat about the effect of repeated formal

public deliberation about, and electoral consent to, undocumented immigration. He concludes that adequate opportunities have arisen in which exclusionary measures could have been adopted in the US. Since they were not, Smith now believes that children born on US soil can and should be considered US citizens.[9]

In a similar move, Peter Schuck now advocates according citizenship to immigrants based on a "principle of genuine connection."[10] To advance this position he moves away from restrictive interpretations of constitutional doctrine and toward an inclusionary normative political theory. His position is similar to Ayelet Shachar's principle of *jus nexi,* which would replace birthright citizenship, an institution that Shachar regards as analogous to property. In its stead, ties such as "employment, residence, and social attachment" would determine one's citizenship.[11] As immigrants develop such ties they qualify themselves for naturalization.

Finally, with characteristic clarity and efficiency, Carens has recently made a normative claim that all non-citizens in the US ought to be entitled to regularize and naturalize after a period of residency.[12] Among the arguments and evidence he marshals is an analogy first made by Mae Ngai, that regularizing long-term residents is tantamount to creating a statute of limitations for the prosecution of basic border-crossing violations.[13] Carens's amendment reverses his initial position advocating open borders in favor of national boundaries, albeit ones that can be crossed. His revised position appears to reflect the repeated critiques he received from communitarian skeptics who argued that Carens did not adequately attend to the ethical sources of authority that ground nation-state citizenship.

Assessing Contemporary Positions on Illegal Immigration

Carens, Schuck, and Smith each tacitly or directly invoke what I would term a "temporal algorithm" for determining citizenship. In each temporal algorithm, Time + another variable (e.g., physical presence, education, or Congressional attention and elections) = consent to citizenship.[14] Schuck measures "genuine connection" by either "a certain number of years of residency" or a "certain number of years of education in American schools."[15] Smith's view is complementary, making reference to the consent of US citizens.[16] Smith expands the idea of consent upon which he and Schuck initially relied, describing a time period in which public deliberations about immigration among US citizens has occurred. This passage of time is tantamount to tacit consent in Smith's view. Carens makes the starkest temporal claim, arguing that time-in-residence creates an entitlement to naturalization on the part of the non-citizen and an obligation to grant naturalization on the part of the host country.[17]

Carens, Schuck, and Smith present a complementary array of persuasive normative reasons for applying a law of time to undocumented immigrants, and by association, to their children as well. What none of the aforementioned academic discussions include is any sustained reference to jurisprudential sources of authority for a temporal algorithm that would regularize irregular immigrants. While Carens never spoke in jurisprudential terms, Schuck and Smith, writing as restrictionists in *Citizenship Without Consent,* made ample reference to the Citizenship Clause and the court's interpretations of its language.[18] As each has moved away from restrictionist arguments, they have also left the interpretation of the Fourteenth Amendment to the restrictionists.[19] In turn, immigration restrictionists have pounced on the "subject to the jurisdiction thereof" phrase of the Citizenship Clause, as well as the *Elk v. Wilkins* interpretation, in order to advance an agenda that would disentitle undocumented immigrants and their children from citizenship.[20] The fact that such prominent scholars now advocate liberal positions on immigration, but do so without making jurisprudential arguments, has the effect of ceding half the intellectual ground at stake in the debate about immigration to restrictionists. I will advance an argument that responds to this imbalance in the immigration debate. To accomplish this I direct attention away from interpretations of the now-exhaustively discussed Citizenship Clause of the Fourteenth Amendment and focus instead on earlier sources of constitutional authority about alienage and citizenship status.

The Jurisprudence of *Jus Temporis*

Despite the frustrating constitutional silence about undocumented immigration, a jurisprudence that was used to assign citizenship to aliens living in US territory early in the nation's history does exist. At the time they were developed, these principles were applied to aliens who posed very grave threats to American society and the basic political integrity of the nation. The language of the court cases that developed the legal framework for this tradition reveals an architecture for deciding questions about the citizenship of aliens, including those related to the status of undocumented persons and their children. Crucially, it articulates a lucid and emphatic vision of *jus temporis*: a law of time that operates in concert with the *jus soli* and consent principles of citizenship throughout US history.

The initial establishment of citizenship in the US created a set of persons who could have been considered, for various reasons, illegal aliens. The legal term for the group of persons to which I refer is *antenati.*[21] *Antenati* are persons born prior to the establishment of sovereignty, who by virtue of this fact hold an allegiance to a sovereign other than the one currently in power. At the time of the founding this group included: persons born before the Revolution; before the treaty concluding the Revolution; and before the adoption of both the national and state constitutions. Further complicating these divisions was the existence of people who had sided with Americans;

loyalists who had sided with the British but whose circumstances of birth, residence, and various behavioral factors, led American authorities to consider them American; and finally "Real British Subjects," whose affiliation with the Crown was never in question.[22] The country also needed to establish who among US citizens were no longer simultaneously British and US subjects, thus raising an early iteration of complex dual nationality questions.[23] In addition, there were questions about the *antenati* living in England, who at one time had shared allegiance to the same sovereign as *antenati* living in America. In short, the Declaration of Independence, Revolutionary War, and founding produced a very large set of potential "illegal aliens" living in the US. Furthermore, these potential illegal aliens were regarded by skeptics as persons whose existing allegiance(s) posed potentially mortal threats to the fragile young republic. As fraught as contemporary conflicts are today about the effects of illegal immigrants on the nation's security, society, and economy, these earlier disputes were even graver. Following the founding, it fell to the Supreme Court to decide who among these persons were actually citizens.

Beginning in 1804, a set of decisions established a means to determine who among these individuals was a US citizen. The Supreme Court's earliest words on the subject of the American *antenati* came in the case *McIlvaine v. Coxe's Lessee.*[24] The defendant, Daniel Coxe, found his allegiance and eligibility for US citizenship brought into doubt by virtue of the fact that he had been a loyalist during the Revolutionary War. The arguments on each side were complex, pointing to where Coxe resided at specific temporal intervals marked by the declaration of war in 1776, the signing of Jay's Treaty in 1794, and interim legislation in New Jersey that explicitly enumerated the acts that would henceforth be considered treasonous.[25]

Ultimately, the decision declared Coxe to be a citizen by virtue of the fact that he had tacitly given consent to citizenship by residing in the state of New Jersey at the time of its founding (the adoption of the state constitution) all the way to the point at which the state passed laws defining its citizenship. The decision reads, "Daniel Coxe lost his right of election to abandon the American cause, and to adhere to his allegiance to the King of Great Britain; because he remained in the state of New-Jersey; not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to the new government." In the terms of *McIlvaine,* Coxe's citizenship comes into existence by virtue of his continued residence in New Jersey during this period of time.[26] Thus, in the decision, the judge identifies three principles of American citizenship: consent ("right of election"); *jus soli* ("remained in the state of New-Jersey"); and a principle of measured time (*jus temporis*).[27] All three variables—land, time, and consent—work together to determine not only Coxe's citizenship but also that of the many persons with similar standing. In this way, the court facilitated the incorporation of a group of potentially illegal aliens whose prior allegiances may have made them suspect or unwelcome, but who were also integrated into the society and polity.

The mutually constitutive relationship between time, place, and consent is fleshed out in even more useful detail in the 1830 decision written by Justice Thompson, as well as Justice Story's frequently cited concurrence, in *Inglis v. Trustees of Sailor's Snug Harbor.*[28] On the subject of durational time and consent, Thompson states that "to say that the election must have been made before, or immediately at the declaration of independence, would render the right nugatory."[29] In this way he gave voice to a belief repeated throughout *antenati* cases, asserting that a government to which citizens could subscribe within the space of a reasonable period of time was consensual.[30] Justice Story's concurrence affirmed this relationship between time and consent. He went so far in his *Inglis* concurrence as to argue that durational time and residence together formed an "*overt* act or consent . . . to [citizens'] right of election."[31] He asserted that "this choice was necessarily to be made within a reasonable time."[32] What this decision tells readers is that consent requires reason, and reason is measured in specific durations of time. Both *McIlvaine* and *Inglis* reflect the exact terms that Smith and Carens invoke. Consent to citizenship occurs over time (Carens) as specific political events unfold (Smith).

Given that contemporary restrictionists are now waging their fight against incorporating illegal immigrants at the state level,[33] it is notable that early US state judges writing on the subject of potentially illegal alien *antenati* also affirmed this conception of a temporal duration in which people could elect their own citizenship.[34] In Pennsylvania, Chief Justice McKean wrote that, following a civil war, "the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government, who have not freely assented to it. What is a reasonable time for departure, may, perhaps be properly left to the determination of a court and jury."[35] North Carolina passed a law in April 1777 allowing citizens a period of election lasting until October 1778.[36] Writing for the Supreme Court of North Carolina, Judge Johnston affirmed this in *Stringer v. Phillips,* stating that "the assembly meant to retain and actually reserved the power of restoring to such *the rights which to them once belonged,* if within the limited time they would apply for that purpose."[37] Delaware stretched its waiting period for full rights of office-holding to five years.[38] Following the war, Georgia moved from a xenophobic system that had singled out Scottish immigrants for exclusion, to rules that required an oath, affirmation of character, and a 12-month waiting period. The terms of Georgia's citizenship act affirm what

the judicial decisions cited in the preceding paragraphs asserted. Minors who left the country for three or more years for their education would, upon their return, be considered aliens for the purposes of civil, military, and legislative or executive office for the exact length of their absence.[39] By instituting such a policy, Georgia effectively created a temporal algorithm that both expressed and "solved" the problem of Americanization by taking into account a person's age, length of absence, and period of voluntary re-immersion into American society, economy, and politics.[40]

Over and over again, judges writing decisions about the *antenati* explicitly called for "reasonable" periods of time in which persons whose citizenship was unclear or in transition could elect to become citizens. These durations were, in fact, times of actual critical political reasoning during which people had information (such as constitutional language and social and political context) available in order for them to make enlightened decisions about their consent.[41] These times of reason ensured that the American *jus soli* avoided the arbitrariness inherent in British citizenship rules. British *jus soli* was considered arbitrary because it imposed citizenship upon birth without inserting a consent principle. This effectively excluded those not born into citizenship from achieving full membership while it forced citizenship on those who were born with that status.[42] As formulated by American judges, consent to citizenship occurs within a reasonable duration of time and within a specific territory. Because of this, *McIlvaine* allowed the full incorporation of *antenati* who were ineligible for full subjecthood under pure *jus soli* or *jus sanguinis* rules. The consensus that emerged from these decisions was that, by living through a time of election in the sovereign territory of the nation, *antenati* created what I would term a "lived consent" that was neither truly active[43] nor completely tacit in exchange for their citizenship.

While skeptics might quickly point out that undocumented workers and *antenati* do not arrive in a country under the same circumstances, it is the case that *antenati* who were loyalists at the time of the Revolution were potentially threatening and noxious interlopers. In this sense, the *antenati* cases speak directly to contemporary concerns about foreign nationals whose presence in the US is the result of legally problematic choices. Thus the decision to incorporate them after a period of residence may represent a more powerful statement about whether and how to include people present in US territory who are not citizens, and whose allegiance is questionable, than does the Citizenship Clause of the Fourteenth Amendment and its interpretations.

Furthermore, the reasoning applied by the judges writing in the *antenati* cases was neither exceptional nor was it at all divorced from ongoing political discussions about immigration. In fact, one of the first subjects the nation's first Congress took up was the creation of naturalization procedures. Just as they do today, legislators discussing rules for naturalization then evinced worries about the danger of creating inequalities among the population, foreign ideologies, external influences, the purchase of offices, and the dangers of an illiberal society. To read the debates over the Naturalization Act is to come face to face with an almost obsessive concern with the relevance of specific durations of time to a foreign-born person's claim on citizenship.[44] All of the fears and aspirations of the representatives were expressed in arguments about different durational residence requirements for newcomers.

Prior to the compromise creating a rule for naturalization, Madison's record of the deliberations evinces equal parts suspicion of foreigners and fears that exclusion would "give a tincture of illiberality to the Constitution;"[45] and "discourage the most desirable class of people from emigrating."[46] George Mason demanded a seven-year period for eligibility for election to the House in order to prevent "foreigners and adventurers" from making American law and to ensure adequate civic knowledge for all lawmakers. Mason even worried about foreign conspiracies to purchase influence in the US. Gouverneur Morris and Charles Pinckney advocated a 14-year wait for the Senate. The nation's first legislators identified probationary time periods prior to naturalization as a means of measuring "fidelity and allegiance."[47] Other concerns surfaced as well. One Congressman said, "an actual residence of such a length of time would give a man an opportunity of esteeming the Government from knowing its intrinsic value, was essentially necessary to assure us of a man's becoming a good citizen."[48] Other advocates of a probationary time period, including James Madison, connected the amount of time an immigrant is in residence with an understanding of the value of citizenship itself, rather than just the government and laws.[49] Madison also connects it with shedding "prejudices of education, acquired under monarchical and aristocratical governments [that] may deprive them of that zest for pure republicanism which is necessary in order to taste its beneficence"[50] and, taking this one step further, with forms of civic knowledge that will make these persons good citizens. Another representative wanted to see the "title of citizen of America as highly esteemed as that of old Rome. I am clearly of the opinion that, rather than have the common class of vagrants, paupers, and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants." He goes on to insist that a period of residence was a conduit for obtaining testimonials to the character of persons seeking citizenship.[51]

Because the origins of probationary periods preceding citizenization are Roman, the application of *jus temporis* to transform non-citizens into citizens is hardly unique to the early modern or the Anglo-American context. All

European states apply a rule of *jus temporis* with respect to the time between immigration and naturalization.[52] Following the breakup of the Soviet Union into its constituent republics, Latvia, Estonia, and Lithuania famously excluded from citizenship large numbers of people who had been born in their territories during the Soviet Era, and who were present during separation, but whose parents and grandparents had not been present prior to the moment at which point the Soviet occupation began.[53] In these cases, the use of calendrical time is demarcating citizens (*postnati*) from non-citizens (*antenati*).[54] Similarly, despite its association with strong rules of *jus sanguinis*, Germany's Basic Law defines citizens as persons present or related to those present as of December 31, 1937, as well as anyone expelled between January 30, 1933 and May 8, 1945, as long as those persons were also present after May 8, 1945 within German territory.

The force of these claims has also not gone unnoticed by contemporary lawmakers. In point of fact, the "amnesty" provisions in IRCA created their own temporal algorithms that entitled those who had been continuous residents in the US since 1982 or agricultural workers who had worked at least 90 days a year in the US for three years to regularization. And lawmakers and policymakers responding to more recent anti-immigrant sentiments have deployed immigration status that structurally forecloses opportunities for non-citizens to make the kinds of temporally-based claims to the rights and status that IRCA offered. Reliance on short-term temporary work visas has increased since the 1980s. As Thomas Hammar has pointed out, time spent doing temporary labor is treated as legally worthless for the purposes of naturalization. The extension of temporary asylum and refuge (TPS) has also become prevalent, forcing many refugees to live in limbo from year to year, as they await either the renewal of their visas or deportation. The types of "genuine connection" that Schuck and Shachar describe cannot as readily be developed in this environment. Proponents of *jus nexi* or any temporal principle of citizenship therefore confront a policy environment that is structurally hostile to allowing immigrants adequate time in which to make political claims on their adoptive polities. However, the trend to restrict the claims of immigrants via temporary visas also implies that longer periods of residence do confer greater claims on rights and citizenship status.

Conclusion

Highlighting the principle of time and then attaching these claims to a constitutional tradition that accords great weight to durational time in matters of citizenship provides a concrete legal and political structure within which to realize abstract normative positions on the conferral of citizenship. Such "temporal algorithms" reappear in discussions of both consent-based and *jus soli* citizenship within normative theory, constitutional jurisprudence, and legislative debates and language.

As a political principle, *jus temporis* has several attributes that make it particularly relevant to current policy concerns stemming from ongoing efforts to reform immigration in the US and Europe. Of particular interest in the US context is the grounding of *jus temporis* in founding era jurisprudence. These roots in the founding upend the restrictionist assumption that liberal positions on immigration abandon original intentions. The case law and legislative history of *jus temporis* clearly demonstrate an original intent to provide a path to citizenship even for foreign-born persons with highly irregular political statuses. Furthermore, *jus temporis* rules have worked alongside *jus soli* and consent-based rules of citizenship throughout US history. While this would not quell the displeasure that racially motivated restrictionists such as Huntington express at the evolving national origins of the immigrant population, it vastly expands the kinds of reasoning that can be applied to pressing issues such as regularization for long-term residents, workers, and even people on temporary visas and frequently-extended temporary protection.

Yet despite the fact that *jus temporis* reclaims ground previously ceded to restrictionists, its normative effect is neither inherently liberal nor restrictionist. Temporal algorithms create a process for naturalization, but it is the length and nature of the imposed probationary period that determines whether their application will be liberal or restrictionist. They are therefore particularly useful for an additional reason: they pave the way for academic and political negotiations about the rights and status of undocumented persons and their children in which each side could conceivably draw upon language, if not conclusions, that is acceptable to their opponents. Moving beyond interpretations of the Fourteenth Amendment opens up fertile new terrain for discussions about how policies can be crafted to accommodate the reality of perpetually porous borders and a labor market that has absorbed millions of unauthorized immigrants. However, it is the application of *jus temporis* that will determine how immigrant semi-citizens are included or excluded from the American polity.

Notes

1 Schuck and Smith 1985.
2 *Elk v. Wilkins* 1884.
3 This conclusion is rooted in Burlamaqui's belief that *jus sanguinis* allowed children a "provisional political membership at birth" and that they could elect full citizenship upon reaching maturity; Schuck and Smith 1985, 44–6.
4 Huntington 2004; Stein and Bauer 1996. Richard Posner's concurrence in *Doris C. Oforji, Petitioner, v. John D. Ashcroft, United States Attorney General* cites Schuck and Smith's argument to suggest that legislators should correct the misapplication of the

Fourteenth Amendment to confer birthright citizenship on the children of undocumented immigrants.

5 It should be noted that Rawls himself explicitly and repeatedly disavowed open borders (Rawls 2005a, 2005b, 1999).

6 Smith 2009, 1329–1335.

7 Carens 2000, 636–643; Carens 1999, 1082–1097.

8 Smith 2009, 1333–34.

9 Presumably if more recent efforts to reinterpret the citizenship clause of the Fourteenth Amendment succeed, other arguments will be required to ensure the citizenship of children born to undocumented parents on US soil.

10 Schuck 2010, A19.

11 Shachar 2009, 167.

12 Carens 2010.

13 Ngai 2003.

14 Elsewhere I explore more general applications of the temporal algorithm to politics, including prison sentences, ages of majority, and waiting periods for benefits such as Medicaid and other public assistance; Cohen 2010.

15 Schuck 2010, A19. Ayelet Shachar's argument about *jus nexi* also includes qualitative measures of genuine connection; however, these can coexist with quantitative measures of calendrical time just as these quantitative measures coexist with variables such as physical location; Shachar 2009.

16 Smith 2009, 1329–1335.

17 Carens 2010.

18 Schuck and Smith 1985.

19 A notable exception is Rodriguez 2009.

20 Think tanks such as the Federation for American Immigration Reform (FAIR) and the Center for Immigration Studies (CIS) pepper their publications with references to both the language of the Citizenship Clause and *Elk v. Wilkens* (www.fairus.org; www.cis.org). Mae Ngai (2004) also details the prevalence of this view in her book on illegal immigration. Finally, legal and policy academic publications rely on it as well. For example, see Stein and Bauer 1996.

21 This term derives from British common law, specifically *Calvin's Case* (1608), which is generally recognized as the primary precedent for the establishment of citizenship in the United States.

22 Kettner 1978, 183.

23 Kettner (1976, 945) points out that a lively debate took place among British jurists over whether to acknowledge the US citizenship of the *antenati* as well as whether the *antenati* might simultaneously be US citizens and British subjects. About British court interpretations he writes

> The initial decisions respecting individual status were tenuous and contradictory. Crown law officers gave several opinions in the 1780's to the effect that Americans were aliens, at least within the context of the navigation acts. The Scottish Court of Sessions, on the other hand, held in 1792 that a person born in America before independence was not to be deemed an alien but rather a British subject residing abroad.

24 As was true of many of the early citizenship cases, *McIlvaine* involved the question of whether an *antenatus* was a citizen, and could therefore inherit land.

25 In *McIlvaine v. Coxe's Lessee* (1804: 8–9) the Judge wrote that

> The inquiry which the jury is directed to make, by the act of the 18th of April, 1778, in order to lay a foundation for the confiscation of the personal estates of these fugitives is, whether the person had, between the 4th of October, 1776, and the 5th of June, 1777, joined the armies of the king of Great Britain, or otherwise offended against the form of his allegiance to the state. The 7th section of this law is peculiarly important, because it provides not only for past cases, which had occurred since the 5th of June, 1777, but for all future cases, and in all of them, the inquiry is to be whether the offender has joined the armies of the king, or otherwise offended against the form of his allegiance to the state. During all this time, the real estates of these persons remained vested in them; and when by the law of the 11th of December, 1778, the legislature thought proper to act upon this part of their property, it was declared to be forfeited for their offences, not escheatable on the ground of alienage. This last act is particularly entitled to attention, as it contains a legislative declaration of the point of time, when the right of election to adhere to the old allegiance ceased, and the duties of allegiance to the new government commenced.

26 Kettner makes the corollary point that, prior to states passing treason laws, individuals were not prosecuted for treason even though Congress had defined the crime, implying "that individuals were generally allowed to choose sides before that time"; Kettner 1978, 194; see also Chapin 1964, 72, n.139.

27 *Jus sanguinis* is an implicit part of the decision as well, of course, because if Daniel Coxe had not been Anglo-Saxon, his standing likely would have been denied on the basis of his racial origins.

28 *Inglis v. Trustees of Sailor's Snug Harbor* 1830, 99.

29 Ibid., 28.

30 He cites de Vattel 1820, 560, sB. 1, Ch. 3, Sec. 33.

31 *Inglis v. Trustees of Sailor's Snug Harbor,* 1830, 3 Pet 99 at 159.

32 *Inglis v. Trustees of Sailor's Snug Harbor,* 1830, 3 Pet 99 at 160–2.

33 See, for instance, a recent statement by the State Legislators for Legal Immigration (SLLI) that supports Kansas Secretary of State Kris Kobach's policy initiative to create a form of state citizenship that would effectively deny birthright citizenship to children born on US territory to parents who are undocumented; Hing 2011.

34 Kettner 1978 used the term "volitional allegiance."

35 *Respublica v. Chapman* 1781.

36 Kettner 1978, 193.

37 Haywood 1806, 159.

38 Kettner 1978, 217.
39 Kettner 1978, 216, citing Act of Feb. 7, 1785, Col. Recs. Ga., XIX, pt.ii, 378.
40 The judges writing these decisions had a plethora of far more explicit and concrete means for affirming consent, some of which also bore the authority of having been drawn from the common law tradition. Oaths of allegiance, for example, are far more direct, concrete, and active expressions of consent for a population that had been divided against itself; Bodin and Franklin 1992, 141.
41 Here the word "enlightened" is a deliberate reference to the phrase "enlightened understanding" that Robert Dahl chooses to describe one of his key prerequisites for democratic decision-making; Dahl 1989, 397.
42 Indeed, time is critical to conferring legitimacy on the kind of "tacit consent" that Locke discusses and that is integral to social contractarian democracy; Simmons 1976, 279. Tacit consent is, however, a silent consent that need not mean that it is entirely passive. For a recent discussion of whether *jus soli* is consensual, see Lister 2010. On Locke's discussion of the political status of children, see Shapiro 1996, 269.
43 Note that *McIlvaine* describes Daniel Coxe as losing his right not to elect citizenship rather than simply saying he chose it (*McIlvaine v. Coxe's Lessee* 1804, 280).
44 Most scholars of citizenship who have studied the act attend to its presumption of *jus sanguinis,* pointing out that racialized restrictions were so ingrained that the discussion of the act did not include deliberation over whether non-whites could naturalize (Smith 1999, 736; Welke 2008, 345–386, 766–786). This is absolutely correct, yet this does not trivialize the subjects, namely probationary periods, on which lawmakers did focus.
45 Madison 1966, 419.
46 Ibid.
47 U.S. House of Representatives 1790.
48 Ibid., 1147–8.
49 Ibid., 1156.
50 Ibid.
51 Jackson, in U.S. House of Representatives 1790, 1152–3.
52 Marc Morjé Howard details these probationary periods in his exhaustive study of European citizenship laws; Howard 2009.
53 These are instances of a larger category of citizenship attribution issues associated with "restoration" or "restitution. See Bauböck 1994, 250; Chinn and Truex 1996, 133.
54 Citizenship laws in Bulgaria and Romania as well as the seven former Yugoslav republics followed similar patterns, establishing rules that singled out residence during specific time periods. For example, in Macedonia citizenship was accorded "if on 6 April 1945 he or she had municipal membership on the territory of the People's Republic of Macedonia; if before 30 June 1948 he or she made a statement in the presence of the town or regional council where he or she resided that he or she wished to be a citizen of PR Macedonia; or if on 28 August 1945 he or she was a resident outside the territory of the FPR Yugoslavia but before 6 April 1941 his or her last residence was somewhere in the territory of the People's Republic of Macedonia"; Spaskovska 2010, 5–6. Very similar provisions can be found in almost all of the citizenship laws instituted following the breakup of the Soviet Union. Rules of *jus temporis* were also invoked in the dismantling of the Empire into constituent, independent nations with independent citizenships. Date-based *jus temporis* allowed the British to slowly disown its colonial properties.

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