3-2013

Undocumented migration, the fourteenth amendment and the enduring battle over who counts

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Recommended Citation
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Undocumented Migration, the Fourteenth Amendment, and the Enduring Battle Over Who Counts

A Thesis

Presented in

Partial Fulfillment of the

Requirements for the Degree of

Master of Arts

March 2013

BY

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Chapter 1 - Introduction

Decolonisation, the end of the Cold War, the break-up of the Soviet Union, the violent dismantling of Yugoslavia, and the formation of the European Union are all events that represent the shifting relationship between states and people and between the states themselves. The changing structure of states, globalization, the allocation of resources, and migration contribute to the contemporary debates about citizenship. This thesis examines the contemporary debate on citizenship and the evolving concepts of citizenship and political membership. Using a contemporary debate from the United States regarding immigration and an undocumented population, this thesis will suggest that this is not only a debate about citizenship and immigration, but it is about statelessness as well. Rather than focus on citizenship and the attainment of certain liberties, this thesis examines statelessness as the actual condition of possibility for exclusion as part of the conversation about citizenship.

The Undocu-bus, a protest caravan carrying a group of undocumented immigrants, travelled from Phoenix, AZ through Texas, Mississippi, Alabama, and Georgia, en route to North Carolina. Each of these states, beginning with Arizona, have passed or proposed legislation that targets, criminalizes, and seeks to exclude the undocumented population. The undocumented immigrants on this bus, in traveling openly and without proper proof of US citizenship through states that would seek to deport them on that basis alone, challenged this recent wave of legislation at a crucial political moment in the United States crafting of immigration policy and the discourse
surrounding citizenship. The group departed from Phoenix to protest the passage of Arizona's state law, SB 1070.¹ The message of their campaign is "No Papers, No Fear" in response to the proposed state laws that target, discriminate against, and ultimately seek to exclude the undocumented population within their territory. The caravan arrived at the Democratic National Convention in Charlotte, NC on September 4, 2012² to present their argument that their status and fight for citizenship is an issue of civil rights and human rights. This bus and its passengers represent a political and legal struggle between the states and the federal government over citizenship and immigration that has already been argued at the level of the Supreme Court.³ But, this struggle has broader implications for international politics. In fact, at a theoretical level this is a fight over who counts as a citizen, who is entitled to political, economic, and social membership in a polity, as well as an opportunity to analyze how inclusion/exclusion works in contemporary states.

In this case, the bus riders represent a very small percentage of the almost 12 million undocumented immigrants in the United States yet they can be understood as representative of the undocumented population as a whole. They often have mixed status

¹ SB 1070 transfers immigration law enforcement from the federal government to the state. Verifying immigration status is the legal responsibility of the federal government but in Arizona, this means that the police will be able to stop and detain any person and attempt to ascertain their immigration status. If the person is undocumented, the police can detain them and begin the process of deportation. SB 1070 grants the police the power to make the questioning of immigration status a primary reason for a stop, and that section is referred to as the 'show me your papers' provision. Any person can become a suspect and it is at the discretion of the officer to make the determination as to what about the person makes them suspicious as to their immigration status. Rather than providing police protection to any person in the country by virtue of their physical presence, SB 1070 and similar proposed laws in other states, undermine that protection and target a population for legal discrimination.
² On Twitter: @undocubus; www.nopapersnofear.org
³ Arguments began on April 25 2012 regarding the constitutionality of AZ SB 1070. The Supreme Court, on June 25 2012, issued a split verdict. The 11th Federal Circuit Court of Appeals struck down portions of AL HB 56 on August 20 2012. This represents only the beginning of legal challenges to state laws targeting undocumented immigrants.
families in terms of legal status and citizenship. The Pew Hispanic Center estimates that there are 4 million citizen children with at least one undocumented parent for example. Since 1868, the United States has granted birthright citizenship to any person born in the territory, which can lead to this mixed status. Birthright citizenship is known as *jus soli* and is guaranteed by the Fourteenth Amendment to the Constitution. In the political debate on immigration, legislation has been introduced that would remove the birthright citizenship clause of the amendment as a means of more stringent immigration control. The target of this legislation is the same as the state laws like SB1070 - undocumented immigrants. Restricting birthright citizenship, or repealing it, exposes a population to exploitation and exclusion, even potential statelessness. This population, born into the government's territorial jurisdiction would be excluded from political membership. It is possible, depending on the family’s origin, that children born in the U.S. to undocumented parents be granted political, economic and social membership in a country of origin, though that is not guaranteed. Repealing the birthright citizenship clause of the Fourteenth Amendment would create a population within the state that would not receive state protection that comes with citizenship and expose them to exploitation and potential violence without political and civil rights.

I suggest that the undocumented population faces insecurity, vulnerability, exclusion, and potential violence as do the effectively stateless population. While they (the undocumented population) may be able to claim citizenship in their country of origin, they do not have recourse to that state structure and can be considered conceptually stateless. This new form of contemporary, conceptual statelessness is a
product and function of capitalism and neoliberal globalization and demonstrates the imperative of citizenship as a guarantor of political, economic and social membership.

This is not merely an academic exercise in theorizing citizenship and political membership. The United Nations estimates that there are 12 million stateless people in the world. These people are excluded from the legal, political, economic and social institutions of the 192 nation-states that grant citizenship. The vulnerability and insecurity of this population can be seen in practical terms. There is no freedom of mobility, no right of representation in politics, limited or no access to formal economic systems, and limited or no access to education and healthcare. These are non-derogable human rights, which means that they are non-negotiable and should be afforded to every person. The United Nations seeks to protect these rights through treaties and conventions signed by UN member states. The foundational text that future treaties, convention and laws build upon for protection of human rights is the Universal Declaration of Human Rights (1948). Specifically, regarding statelessness, Article 15 states that everyone has a right to a nationality.

This thesis ultimately argues for expanded definitions and conceptions of both citizenship and statelessness that take into account the undocumented migration of people. The concept of effective nationality allows for political membership and citizenship in addition to the guarantee of birthright citizenship protected by the Fourteenth Amendment. A more critical understanding of statelessness reveals that it is
not just an international concern to be resolved by the international human rights regime.\(^4\)

The history of the Fourteenth Amendment shows government concern, with political, economic and social implications, for a stateless population in the polity. The current debates on immigration and birthright citizenship are disconnected from a history of statelessness.

The second chapter explores the debate on citizenship and examines its relationship to neoliberal political economy. Critical citizenship scholars problematize the notion of the nation-state as the only source of political membership and belonging but are limited due to the legal limitations of state issued citizenship. Undocumented populations including ‘illegal’ immigrants, and trafficked people, not just in the United States, are a challenge to citizenship studies. Yet, statelessness is under-theorized in citizenship studies as it is not critical to how political belonging and membership is theorized. This chapter argues that where people are located in terms of their status of belonging is function of political economy and governance.

The third chapter examines a much older debate around the Fourteenth Amendment in order to contextualize the history of citizenship and statelessness in the

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\(^4\) While the Universal Declaration of Human Rights is the foundation, there are other key conventions and treaties that have become the basis for international law that seeks to protect rights for humans rather than solely rights for citizens. The conventions and treaties that seek to prevent marginalization, discrimination, insecurity and acts of violence against individuals and targeted groups include: the 1951 Convention Relating to the Status of Refugees, the 1954 Convention Relating to Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1967 Protocol which updated the 1951 Convention, and the 1989 Convention on the Rights of a Child. The 1951 Convention Relating to the Status of Refugees defined in specific terms of time and place what people could be considered refugees as well as the principle of non-refoulement. This principle provides legal protection to the refugee so that they will not be returned to the country from which they seek refuge. The 1967 Protocol updated the definition of a refugee to remove the restrictions on when and where a person became a refugee. The 1961 Convention on the Reduction of Statelessness is a commitment from member states to prevent and reduce statelessness.
U.S. The Fourteenth Amendment emerged out of a specific context and historical concern for protecting vulnerable, potentially stateless people. The debates surrounding the amendment's passage expose statelessness as a concern for government. Drawing on primary material from the debates on Reconstruction following the Civil War, this chapter shows that the Fourteenth Amendment was an attempt to protect freed slaves from discrimination, exclusion and violence. The Fourteenth Amendment guaranteed citizenship and political membership for the freed slaves and their future generations. The debate addressed both statelessness and citizenship in that citizenship was the remedy for a stateless, disenfranchised population in the polity.

The fourth chapter explores the contours of the contemporary political and legal debates surrounding undocumented migrants, citizenship and the Fourteenth Amendment. The attempts to restrict and rescind citizenship create a vulnerable and insecure population and ignore the political and economic history of the Fourteenth Amendment. That history demonstrates the need for a debate on statelessness not just citizenship that is ignored in the current political debates.

The United States is not unique in terms of an undocumented population living and working amid its citizenry. This thesis finds that the political economy of a state, immigration policies and citizenship are inexorably linked. Capitalism and neoliberal political and economic globalization are marked by the migration of capital and labor, or people, and the demands of the market are not always the same as the demands and laws of the state regarding people. Restricting access to citizenship and political membership
does not resolve the "problem" migration of labor. It rather creates the undocumented, "illegal" people.
Chapter 2 - Political Membership: Citizenship and Statelessness

Images of stateless people pepper documents and reports on the problem of statelessness, published by the United Nations as well as NGOs. These documents contain facts about stateless populations, causes of statelessness, and legal tools to prevent statelessness in addition to the photographs of stateless people. The facts and figures are staggering in their own right. An estimated 12 million stateless people do not receive state protection in the form of citizenship. The rights that this population can be said to enjoy come in the form of human rights, guaranteed by international human rights treaties and laws. In case the facts and figures used to describe this population were not sufficient to prompt concern and alarm, the accompanying photographs show the individual faces of the stateless population. There are images of men, women, and children in various forms of extreme hardship, suffering and vulnerability. They are, in a way, a contemporary visual representation of Hannah Arendt's description of the stateless population created by World War II, "once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth."\(^5\) Arendt's description is as evocative and provocative as the images of the contemporary stateless people are meant to be. The images are meant to evoke sympathy and aid on the basis of a shared humanity yet there is something deeply dehumanizing about them. The stateless population exists in binary opposition to a population made up of citizens. This is

problematic state-of-being in a world that is divided into bounded, bordered states populated by citizens.

Theories of citizenship and political membership do not often theorize statelessness as a political condition in itself. However, statelessness is always tied to citizenship insofar as citizenship resolves the problem of statelessness. Statelessness, then, is treated as a problem to solve rather than a 'thing' to analyze in the context of a liberal capitalist political economy. This chapter offers a critical analysis of citizenship studies in order to demonstrate that the notion of statelessness is underserved in theories of political belonging and membership that rely on the nation-state as the ultimate referent. The field of Critical Citizenship Studies problematizes the supremacy of the nation-state. It places under scrutiny the notion of national citizenship as the sole indicator for full political membership and belonging. Critical Citizenship Studies recognizes the political economy of neoliberal globalization as a destabilizing force that challenges both conceptions of the citizen and the nation-state. The 12 million currently stateless people notwithstanding, statelessness is more than the lack of citizenship. Rather, I argue that contemporary statelessness is a function of neoliberal globalization; economic liberalism and capitalism produce inherently vulnerable populations.

In what follows, I examine the political economy of membership and migration. From there I review contemporary academic literature on political membership to show how both citizenship and statelessness are being problematized and destabilized. My aim is to describe the contours of the debate on statelessness and make a case for a critical
reassessment of both citizenship and statelessness. This analysis allows me to show that
statelessness is connected to political economy. Citizenship is being transformed through
the contemporary political economy of global capitalism and neoliberalism. The needs of
state, capital, and people acting as labor do not correspond to the current global economic
system and state structure. Critical Citizenship Studies (hereafter CCS) recognizes that
citizenship is connected to political economy and I will show that statelessness is also
connected to, and a function of, political economy.

Political Economy, Membership and Migration

There is a strand of political economic thought that addresses the way in which
the emergence of a 'free' market through economic liberalism, transformed people into
commodities for the labor market. Human beings were able to freely enter the
marketplace and sell their labor at a value set by the rules of the market. The market
works according to laws which offer no protection to man, no guarantee that the needs of
the market align with the needs of man acting as the commodity of labor. It is political
intervention in the economic realm of the market that creates laws and legislation to
protect workers, who are the fictitious commodity of labor. It is the work of human
beings and human beings themselves that enter the market as a commodity like any other
though with vastly different properties than competing commodities. The utopian idea
of a self–regulating market as described in The Great Transformation required real and

7 For example, if the price of gold drops to one cent an ounce, it won't cry or have to explain to its family why they are starving to death.
fictitious (man as labor, nature as property) commodities to be subject to laws that were not rooted in society or morality. The needs of human beings are in this case subject to the needs and laws of the market. The market operates as a system of trading commodities for exchange or profit, and it has increasingly come to organize not just the economy, but society as well. Capitalism’s commodification of man has universal effects. The needs of human beings are in this case subject to the needs and laws of the market. The market operates as a system of trading commodities for exchange or profit, and it has increasingly come to organize not just the economy, but society as well. Capitalism’s commodification of man has universal effects. The level of state-led political intervention determines to what extent human beings are protected from the effects of an unregulated market. Polanyi sees the same violence in the labor market as he does in colonialism and slavery, as they all require, "smashing up of social structures in order to extract the element of labor from them." Polanyi describes the emergence of a double movement as the market and labor collide: the movement to separate the market from society is countered by a movement that seeks to protect society from the power of a self-regulating market. Polanyi traces the origins of intervention to the double movement and emphasizes the class component as critical. It was the “working and landed classes” with less power than the trading classes who sought the social protection. They had the market system imposed on them and were fighting for self-preservation. There has been and continues to be a struggle between proponents of the free market and interventionists. The struggle represents the fight to maintain the recognition that people are what make up the commodity known as labor.

Polanyi was hopeful that economic liberalism and the idea of a self-regulating market was a failed utopian dream replaced by embedded liberalism, or the welfare state. David Harvey traces the political and economic history of the last 40 years and sees a

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9 Ibid., 138.
turn from embedded liberalism to neoliberalism, with detrimental effects on society that Polanyi warned of. With institutionalized, globalized free trade, people/workers are even more vulnerable when society is organized around servicing capital accumulation and the market, " neoliberalization seeks to strip away the protective coverings that embedded liberalism allowed and occasionally nurtured." Neoliberal policies promote the 'freedom' of the market first and foremost. Freedom in the sense that there is a freely functioning market, a free market unrestricted by the state. The free market is a condition that guarantees 'freedom' for individuals. Constraints on the market by the state exist in seeming opposition to the pursuit of individual freedom. In this context, restrictions on the market, in the form of political intervention, come to equal restrictions on the individual (person or corporation) in their pursuit of accumulating wealth.

Neoliberal economic policy reduces the role of the state and redirects funds that had previously been used by the state to provide a safety net to society. The role of the state is reduced to the role of providing institutions that allow the market to function and provide protection (military, fiscal, police) against forces that would seek to undermine the functioning of the market. Neoliberal policies required significant changes, or structural adjustments, in economic and social policy. Economic policy changes included raising the interest rate, tax rate cuts, and deregulating industry. Changes in social policy altered or removed rights and access in areas like education and healthcare. Privatization of previously state supported or subsidized services most significantly impacted those in society without the means to buy the rights that had previously been granted as a

11 Ibid., 168.
condition of citizenship. State intervention ensures conditions for successful capital accumulation at the expense of human security under neoliberal policies and "transformations in the spatial and temporal co-ordinates of the labor market" are a direct result. With respect to the migration of labor, this is particularly problematic as Harvey points out,

> the geographical mobility of capital permits it to dominate a global labor force whose own geographic mobility is constrained. Captive labor forces abound because immigration is restricted. These barriers can be evaded only by illegal immigration (which creates an easily exploitable labor force)...under neoliberalization, the figure of 'disposable worker' emerges as a prototypical upon the world stage."  

International migration, whether authorized or unauthorized, planned or coerced, is a critical component of neoliberal capitalism and globalization. The commodification of labor dehumanizes man. It creates a class of human that is not recognizable as anything other than labor that both produces commodities and has become commodified. The political economy of global capitalism, with neoliberal contours, reinforces the supremacy of the market and the requirements of the market over the needs of the state or the majority of people. The laws and demands of the market do not always align with the laws and demands of a world divided by sovereign nation-states. Labor migrates to capital. This means that people migrate to participate in market activities. Unauthorized or forced migration also means that the demands of capital and the state do no always align.

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12 Harvey, *A Brief History*, 168.
13 Ibid., 169.
Concepts of Citizenship

Citizenship is political, rather than natural or neutral. States regard as citizens those who are marked for inclusion, for membership in a territory and a polity. Full political citizenship/membership offers equal legal protection but not social equality. The process by which certain people are granted protection and access to the political, economic and social structures of a state is politically determined. Thus, while citizenship offers protection to those included, it also delineates those who are excluded. The history of rights, political access and membership, particularly in the United States, demonstrates vividly that equality and citizenship are not synonymous. The most obvious examples are blacks and women who fought for citizenship, equality and full political membership, and even with legal equality, continue to fight for full access and recognition. The struggles for access and rights, to be recognized as full and equal members in a society (while already full legal citizens), emerges in the civil rights or women's rights movements, and in the contemporary struggles for disability rights, LGBQT rights, and marriage equality. Further, states often acknowledge non-citizens and make provisions for their presence among the citizenry of the bounded nation-state. As a regulated category distinct from the citizen, the "non-citizen or alien" is subject to limitations regarding rights and access to the political, economic and social systems and structures. The right to vote in the United States for example is only granted to citizens in the United States, not long-term resident non-citizens. There are also restrictions regarding access to social services for non-citizens. The state determines who is eligible
for inclusion and protection. This matters for people in a world marked by sovereign boundaries and borders. National citizenship indicates where someone belongs.

Citizenship Studies is an active and multi-disciplinary field. Citizenship is theorized across many disciplines including political science, sociology, law, political theory, immigration studies, feminist studies, critical race studies, economics and post-colonialism to name a few. Citizenship is not a stable category or concept as even a cursory glance at the multi-disciplinary nature of the literature reveals. Each of the following can be found in the mainstream literature on citizenship: 1 - "citizenship as legal status", 2 - "citizenship as rights", 3 - "citizenship as political activity" and 4 - "citizenship as a form of collective identity and sentiment."

The Citizenship Debates provides what the editor suggests is "the cutting edge of the debates on contemporary citizenship" and the collection of essays represents the major strands of citizenship studies. These include the liberal, the communitarian, the social democratic, and the nationalist strands of conceptions of ‘citizenship’.

Liberal and republican concepts

Liberal conceptions of citizenship emphasize rights, duties and legal status. Republican and communitarian conceptions of citizenship emphasize the political activity and participation. Both the liberal and the republican strands of citizenship naturalize the categories of both the citizen and the nation-state. They assume the stability of both the

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16 Contributors include John Rawls, T.H. Marshall, Iris Young, Michael Walzer, Linda Gordon and Yasemin Soysal
citizen and the nation-state. In seeking to unpack citizenship, it is helpful to think about to whom the concept applies and what it means. People, human beings, are the who in citizenship. They are the objects of debate. The political behavior of people is the what of citizenship. Absent from these debates are any political economic context or recognition that the concept of a citizen is constructed and useful. As Immanuel Wallerstein notes,

The concept, citizen, forced the crystallization and rigidification—both intellectual and legal—of a long list of binary distinctions which have formed the cultural underpinnings of the capitalist world-economy in the nineteenth and twentieth centuries: bourgeois and proletarian, man and woman, adult and minor, breadwinner and housewife, majority and minority, White and Black, European and non-European, educated and ignorant, skilled and unskilled, specialist and amateur, scientist and layman, high culture and low culture, heterosexual and homosexual, normal and abnormal, able-bodied and disabled, and of course the ur-category which all of these others imply—civilized and barbarian.17

There is a benign quality to the liberal and republican conceptions and debates on citizenship that hides the problematic relationship of the citizen and the state, and its changing nature. The conceptions of citizenship that are concerned with the collective identity of the population can easily lend themselves to nationalism. The privilege and protection of a select group of people, united by a national identity, excludes as much as includes. While looking at the development and production of citizens, Wallerstein notes, "they tended to act as though they wished to secure a place on a lifeboat called citizenship, but feared that adding others after them would overload it."18 He is referring to the 'first' liberal citizens post French Revolution and the managed acquisition of rights to every subsequent group and class of people. Not all people in the polity were full

18 Ibid., 657.
citizens and access to full political, economic and social rights was only for the privileged, the citizens. Citizenship in this sense only protects the privileged and is treated as a thing that needs to be protected. This is also an appropriate description of the communitarian concept of citizenship. Communitarianism privileges the citizen over the non-citizen for protection. The privileged community of citizens has the right to exclude to protect their own interests from outsiders. These interests can be political, economic or social and they are for the most part marked exclusively for citizens.

Liberal and republican strands of citizenship theory both explore the relationship between the nation-state and the citizen. The nation-state is crucial in this formula. The inadequacies of citizenship or membership tied solely to the nation-state get revealed in how the role of the state changes in response to neoliberal globalization and the rise of supranational organizations and state bodies like the United Nations and the European Union. The critiques of liberal citizenship provided in _The Citizenship Debates_, specifically relating to locations of citizenship, demonstrate the inadequacies and are a starting point for problematizing citizenship. Political membership as guaranteed by citizenship is a critical factor for all people. The nation-state system favors citizens. Those who fall outside of that system are subject to international treaties that were formulated specifically to deal with the 'problem' of the non-citizen and the stateless. Currently no alternative exists for the allocation of political membership outside of national citizenship.
Problematizing citizenship

Critiques of nation-state centered citizenship provide the most useful starting point for expanding the definition of statelessness. Neoliberal globalization is changing the state and its relationship to its citizens. Scholars who argue for expanded definitions of the citizen away from the confines of the nation-state have coined terms, which are now widely used and include: cosmopolitan citizenship\textsuperscript{19}, transnational citizenship\textsuperscript{20}, post-national citizenship\textsuperscript{21}, and denationalized citizenship.\textsuperscript{22} The goal of these terms is to describe changes affecting people and states due to the changing political, economic, and social force of neoliberal globalization. They deal with questions regarding the changing nature of the state, the rise of the international human rights legal regime, how demographic shifts impact membership in a population as a citizen, and the extent to which theorizing citizenship outside of the nation-state is anything other than a utopian exercise. While the rise of the international human rights legal regime offers rights and protection to de jure stateless populations, the nation-state, or a consortium of nation-states like the EU, grants citizenship and nationality. This legal fact limits any immediate change in policy that this theorizing suggests. These terms are useful however in that they continue to destabilize notions of citizenship tied solely to the nation-state. The critical assessments of the supremacy of national citizenship also provide a place for the discussion of the alien/other that recognizes the political economy of contemporary

\textsuperscript{22}Linda Bosniak, "Citizenship Denationalized" \textit{Indiana Journal of Global Legal Studies}, Vol 7, No. 2 (Spring, 2000).
migrational and its impact on citizens.

Expanding notions of citizenship in academic debates reveal the struggle to align the reality of migration and globalization. Whether it be claims of transnational, cosmopolitan, global, post-national, or denationalized citizenship, they all seek to find a concept that reflects the changes occurring in the relationship between people and the state and question whether or not the state should be the sole determinant for political membership and belonging. Generalized descriptions of the concepts of citizenship that I find especially analytically useful are:

1. *Transnational citizenship* is a concept that allows for membership in more than one state and thus signals the weakening of the bond between a citizen and the state. The acceptance of dual nationality is relatively recent and had been discouraged for reasons of allegiance. This is a useful concept in that it allows for expanded notions of membership and belonging outside of one solitary state.

2. *Cosmopolitan or global citizenship* is more idea than practical reality. While transnational citizens may have two nationalities, and legally carry two passports, a global citizen carries one, maybe two, passports but feels an allegiance with all of humanity rather than for solely fellow members of a bounded territory.\(^{23}\) Following Kant's cosmopolitan right of hospitality, Seyla Benhabib argues for moral universalism and federal cosmopolitanism for the reason that,

\(^{23}\) see Seyla Benhabib
The international system of peoples and states is characterized by such extensive interdependencies and the historical crisscrossing of fates and fortunes that the scope of special as well as generalized moral obligations to our fellow human beings far transcends the perspective of the territorially bounded state centric system.24

A key reason that this, like other conceptions of citizenship that challenge the nation-state as the sole determinant for political membership and belonging is more idea and ideal than practical reality, is that, "the right to universal hospitality is sacrificed on the altar of state interest."25

Benhabib highlights the challenge of cosmopolitanism in overcoming the rigidity of state borders and rights derived from the state,

The right of hospitality is situated at the boundaries of the polity; it delimits civic space by regulating relations among members and strangers. Hence the right of hospitality occupies that space between human rights and civil rights, between the right of humanity in our person and the rights that accrue to us insofar as we are members of specific republics.26

Like other cosmopolitan theorists of citizenship, Benhabib argues for 'porous' borders, (and border regimes that regulate entry to a territory) which align with patterns of migration, whether authorized or unauthorized.

3. Like cosmopolitan citizenship, post-national citizenship and denationalized citizenship are concerned with the location of citizenship. The nation-state is no longer the only location for membership, belonging and citizenship. National citizenship and membership are no longer the only markers for political identity. The notion of global

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25 Ibid., 177.
26 Ibid., 27.
civil society, in which people align themselves with causes and ideals, demonstrates that the nation-state is not the only source of political identity and belonging. Like the case of global citizenship however, this does not translate into a change in the practical legal status that attaches to national citizenship. While people identify and act outside of the boundaries of the nation-state, it is still the nation-state that grants citizenship and the attached rights and protections. Linda Bosniak, in both "Citizenship Denationalized" and The Citizen and the Alien: Dilemmas of Contemporary Membership, surveys the changing conceptions of citizenship. For Bosniak concepts of citizenship can be categorized four ways: as legal status, as a system of rights, as a form of political activity, and as a form of identity and solidarity. These categories align with the who and what of citizenship for Bosniak but still beg the question of the where of citizenship. As noted previously, the who in citizenship is the citizen subject who receives the legal status for protection and associated rights. This subject is the focus of liberal theories of citizenship that emphasize the individual as a rights bearer. The what of citizenship aligns with the republican theories that emphasize the practice of citizenship. In both cases, the nation-state and the citizen are already established entities. In the case of the nation-state, post-national claims to citizenship recognize that the status and practice of citizenship is not solely defined in national terms,

Against the image of the nation-state as the site in which liberal and egalitarian values may best be realized, therefore, it seems to me one must place another: that of an institution premised upon the marginalization and exploitation of outsiders. Nationalisms may sometimes be enabling, but only for some people some of the time. Much depends on whether one happens to be graced with membership in one of the world's most privileged nations. Those who are not so lucky

commonly experience the privileged liberal nation-states as deeply exclusionary and self-aggrandizing and sometimes violent institutions.\(^{28}\)

Grace and luck are two ways that Bosniak describes how some people become members/citizens in a state. While that is true, it is equally important to view membership in the context of political economy. The state as a site of exploitation and exclusion is visible when the needs of capital and the market differ from the needs and politics of the state. The people not "lucky" enough to be "graced" with membership in the location where the demands of the market have led them demonstrate the shortcomings of citizenship solely defined in national terms. Understanding the connection between political economy and national citizenship lays the foundation for a more critical understanding of statelessness.

**The Non-Citizen in Citizenship Studies**

Although statelessness (*de jure* and *de facto* statelessness) is not central to how citizenship is theorized, the non-citizen, whose presence is deemed legal by the state, does appear in debates that question the privileges of membership and the extent to which rights are available to outsiders.

The question of *who* has access to what rights is the central theme of *The Citizen and the Alien: Dilemmas of Contemporary Membership*.\(^{29}\) Rather than centering the citizen in the analyses of citizenship, here the outsider occupies the center point - the

\(^{28}\) Bosniak, "Citizenship Denationalized", 503.

vantage point from which citizenship is analyzed and consequently problematized. In many cases that are examined in the book, regulated and unregulated migration for reasons of political economy produces the alien other. The other takes many forms and in most cases is deemed worthy of some of the same rights and protections that are offered to citizens. Liberal democratic, immigrant-receiving nation-states created and maintain legal and political structures to regulate immigration patterns and immigrants themselves. Categories of immigrants and alien/others include: permanent legal residents, guest worker, and business, student and tourist visa holders. While all are 'aliens', all are regulated and enjoy some form of state protection. In the U.S., like many countries, restrictions still exist despite access to some aspects of citizenship. Full access to the political system is limited to citizens but non-citizens can access education, healthcare, police and legal protection. The legal history of protection for people, not just citizens, indicates that there is something that people need protection from.

*Jus Nexit as basis for citizenship*

CCS posit that, "citizenship's meaning has always been contested and is sure to remain so. Exponents of post- or transnational citizenship have simply opened a new front in the struggle to define the concept."\(^{30}\) However, another strain seeks to destabilize how citizenship/membership is allocated. This is an attempt to not just relocate and redefine citizenship, but to redefine the basis for membership. Birthright citizenship is granted in one of two ways - either *jus sanguinis* or *jus soli* referring to blood or soil.

\(^{30}\) Bosniak, "Citizenship Denationalized", 489.
The concept of *jus nexis* relates to connection, union or linkage rather than blood or soil.

Under the concept of *jus nexis*, birth right citizenship,

...provides a state-sponsored apparatus for handing down from generation to generation the invaluable security and opportunity that attach to membership in a stable, affluent and rule of law society. It also allows members of well off polities an enclave in which to preserve their accumulated wealth and power through time.31

Birthright citizenship through blood or soil is treated as inherited property, and citizenship is the title to membership. While problematic in that it commodifies citizenship, it is useful as a reminder that migration does not always correspond to the established laws. For reasons of justice and equality, expanded notions of membership and belonging that recognize the importance of not just blood or soil, but the connection that people actively establish, represent the continued struggle to redefine citizenship.

**Statelessness and Citizenship - Human Rights and Citizenship Rights**

The emphasis in post-national conceptions of citizenship is on the *where* of citizenship and how it relates to rights, protection, and status. The *where* matters for people in practical, legal terms. Each state sets the terms for who can become a citizen and thus is included for protection and granted access to the political, legal and social structures and systems of the territory. Statelessness, or the absence of citizenship, means that there is no state protection or guarantee of rights. In practical terms this means that for these people there is no freedom of mobility, no right of representation in politics, 31

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limited or no access to formal economic systems, and limited or no access to education and healthcare. Human rights law serve as protection for stateless peoples. The United Nations assumes responsibility for administering the most basic rights in the absence of citizenship rights. Through declarations, treaties and conventions, the United Nations works to protect the rights of the stateless. The only guaranteed legal recourse against discrimination, injustice, or violence is assurance by the United Nations and the international community that there is protection in the form of non-derogable human rights. The conventions and international law asserts that all human beings have human rights that are distinct from rights that are conferred through citizenship, or legal membership in a state. And even this is problematic, because only states themselves are represented by the UN and can bring suit in most global institutions like the International Criminal Court and World Trade Organization.

The United Nations' role regarding stateless peoples emerged in response to the refugee population created during the Second World War and the remaking of territorial boundaries following its conclusion. Refugees and stateless people had no guarantee of protection or rights via citizenship in a nation-state and the UN attempt to fill that void at the supranational level. The tools that the United Nations, via commitments from the international community, has to protect the rights of stateless people are conventions and treaties, that when ratified by member states become the basis for international law. The Universal Declaration of Human Rights issued in 1948 is the foundation on which other UN treaties and conventions are based. The additional conventions and treaties are attempts by the international community and the United Nations to prevent

There are an estimated 12 million stateless people according to the United Nations. This means that these people are excluded from the legal, political, economic and social institutions of the 192 states that grant citizenship. The lack of protection and denial of access and rights mark these as vulnerable bodies. There are two accepted definitions of statelessness - *de jure* and *de facto*. *De jure* statelessness refers to the formal legal lack of a nationality. *De facto* statelessness applies when there is formal nationality but it is ineffective. There are many reasons for statelessness that include: war or other violent conflict that creates refugees; paternal citizenship whereby only the father passes citizenship to the child; loss or acquisition of territory whereby the nation-state that confers citizenship no longer exists or is recognized as such. Regardless of the initial reason for statelessness, the result is that the stateless population lacks protection and timely legal recourse for any violation of their rights.

This chapter examined the concepts of citizenship and statelessness and their connection to political economy. This will allow me to explore a case that demonstrates a state's concern with a stateless, disenfranchised population in the polity and the legal
solution to prevent continued discrimination, exploitation of and violence against that population. Citizens and stateless people represent two classes that are distinguished by their legal membership and access to the political, economic and social systems of the state. In the next chapter, I will first explore the historical case that led to the Fourteenth Amendment to the U.S. Constitution, which expanded the legal definition of citizen and established birthright citizenship. From there, I will examine a contemporary response to the presence of a stateless, disenfranchised population. In both cases, the reason for the presence of this population is connected to political economy: slavery in the first case and undocumented migration in the second.
Chapter 3 - Citizenship as a Political and Economic Remedy

As discussed in the previous chapter, a stateless population is restricted in their access to the political, economic, and social structures of a state and lack protection against discrimination and violence. Citizenship as a concept does not solve problems of inequity or exploitation. It is not a panacea for marginalization. It is a notion that is essentially and fundamentally contested. Having said this, we do know that it offers protections that are ethically desirable. CCS demonstrates the contours of the current contemporary academic debate regarding how citizenship and political membership are theorized in relation to the changing role of the state and people due to neoliberal capitalist globalization. This chapter explores the contours of a historic debate about citizenship and statelessness brought on by the end of the political economy of slavery in the United States. In this case, approximately 4 million people, who had not previously been considered people in a legal sense, were granted citizenship as a remedy to the system of slavery, discrimination, exploitation, and violence. While this historical case predates CCS, it portends the issues and questions of citizenship and political membership that are a function of political economic structures regardless of what those structures are and when those structures are. In this historical case, the political economic structures have to do with the abolition of slavery and the incorporation of people who had been property and free labor into the capitalist economy, whereby they compete with workers for jobs.
I will review the history of the Fourteenth Amendment in order to examine the concern with a disenfranchised, stateless population that the abolition of slavery created. Here, I first provide a brief overview of historic political and economic climate from which the Fourteenth Amendment was created. I then highlight the relevant systems and structures of the United States government that are the foundation for this political decision. From there, I review the political debates, using a combination of primary and secondary sources that led to the passage of the amendment. These debates reveal a governmental concern with statelessness.

**Re-historicizing the Fourteenth Amendment**

The history of the Fourteenth Amendment is inextricably linked to the institution and politics of slavery as well as federal versus states rights. The Fourteenth Amendment to the U.S. Constitution was ratified in 1868, three years following the conclusion of the Civil War. This amendment, along with the Thirteenth and Fifteenth Amendments represent a direct response to issues unresolved by the conclusion of the Civil War and previous court rulings.\(^\text{32}\) The legislative response targeted the new class of freedmen that emerged following the conclusion of the Civil War. Together, these amendments known as the Reconstruction Amendments respectively abolish slavery, guarantee citizenship and equal protection, and prohibit restrictions on voting based on race and prior status. Though popularly described as a war between the north and the south over the issue of slavery and its abolition, the broader issue of federal versus states rights is crucial to the

\(^{32}\) As will be outlined later, the Dred Scott decision by the U.S. Supreme Court declared that slaves were not people but property. The Emancipation Proclamation declared slaves free, but did not change their legal status or abolish the institution of slavery.
discussion of civil rights, citizenship, and reconstruction. Citizenship and determining who counts for inclusion could not be decided on a state-by-state basis. Passage and ratification of the Fourteenth Amendment was a condition of re-admittance for the seceding states. The amendment guarantees citizenship and equal protection to all persons born or naturalized in the United States. Freed slaves were the explicit and intended targets as their position was legally reframed from property to citizen. The passage of the amendment was an attempt to legally and politically ensure that freed slaves, and their future generations, would be protected, as rights bearers and with legal status, as equal citizens for membership and belonging. The debates surrounding expanding definitions of citizenship and political membership reveal a state's concern with and response to a stateless population.

**Political Structure of the State**

The United States' governmental system is federalist in nature, meaning that each state possesses/maintains its own government with its own powers over education, police, militias, and the regulation of its borders. Still, the federal government has powers of its own, including the power to regulate currency, national economics, the military and legislation on foreign policy, immigration, and the granting of citizenship. However, each state government has limited powers within its own borders to legislate on certain issues; the central federal government, and in this case the Constitution, decides the bare minimum of rights and laws. Thus, the popular legal saying that the Constitution is the
"Law of the Land." The states may not derogate from this baseline, although they may afford their own state citizens additional or expansive rights.  

**Political Economy of Slavery**

Prior to the Civil War, the political and economic system of slavery was regulated by individual states. The federal government banned the import of slaves in 1808 though that did not eliminate the system and structure of slavery. Despite the federal law, domestic trading, familial reproduction, and illegal importation maintained the supply of slaves. The market's needs did not align with the laws of the nation-state as evidenced by the continued illegal slave trade. Individual state laws protected slave owners and preserved the political economy of slavery. The slave states were concentrated in the South. Northern states that had abolished slavery still placed restrictions on property ownership and voting rights, for example, on "free" black slaves. (These same restrictions applied to women and other minorities.) While there were "free" black men and women in the North, that freedom did not translate into full or equal citizenship.

*Dred Scott and citizenship - the law of the land*

Three years before the start of the Civil War the US Supreme Court sided with slave owners and asserted state sovereignty in the Dred Scott decision. This case centers on a slave who previously resided in a slave state (Missouri) was taken to a free state (Illinois), and then to another state (New York). Having lived in both slave and free

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33 This is seen contemporarily in the various state responses to marriage equality in the absence of a federal law or Constitutional amendment.

states, Dred Scott sought to purchase his freedom to which he claimed he was entitled as a resident of free states, IL and NY. The state courts sided with the owner and Scott brought his case to the federal court where the Supreme Court ultimately reviewed it. The U.S. Supreme Court upheld the owner's claim: first, under the "case and controversy" clause of the federal Constitution, the court could only hear cases brought by citizens - and as a slave, the Court reasoned that Scott was not a citizen. The Court also stated that, it was reluctant to award Scott his freedom, lest he venture into any state and demand that the rights and immunities afforded to all "citizens" of the free state he came from be applied to him. Finally, the Court said that despite Scott and his family's residence in free territory, the Court did not have jurisdiction to decide on laws that were properly under the power of the state. This precedent setting case assigned supremacy to state laws, "The Supreme Court ruled that Congress could not grant citizenship to slaves or their descendants; this would be a taking of property from slave owners without due process or compensation."35 Ultimately, the decision affirmed the legal and moral assertion of slaveholders that a slave is not a person, but property, and not a citizen, but 3/5 of a human being. The ruling dictated that the states, not Congress, determined who, as citizens, received protection and a guarantee of rights.

Civil War - property or personhood

At the beginning of the Civil War in 1860, there were 4 million slaves in the United States. Describing the lead up to the Civil War, Zinn notes:

The clash was not over slavery as a moral institution - most northerners did not care enough about slavery to make sacrifices for it, certainly not the sacrifice of war. It was not a clash of peoples (most northern whites were not economically favored, not politically powerful; most southern whites were poor farmers, not decisionmakers) but of elites. The northern elite wanted economic expansion - free land, free labor, a free market, a high protective tariff for manufacturers, a bank of the United States. The slave interests opposed all that; they saw Lincoln and the Republicans as making continuation of their pleasant and prosperous way of life impossible in the future.36

Federal versus states rights for power and control of commerce, trade, and taxation are a fight for political and economic interests - a fight over maintaining and expanding power and control of productive assets and capital. While often discussed as a war to end slavery, abolishing slavery was a consequence of the war. Slaves were property prior to the Civil War and treated as property or a productive asset.

The Emancipation Proclamation issued in 1863 declared that slaves held in territories still aligned with the Confederacy were now free - however, it did not declare them United States citizens nor did it end slavery. The Thirteenth Amendment abolished slavery in 1865 at the conclusion of the Civil War, and reads in its entirety,

Section I. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

These two decisions created a new class in the U.S., the freed slave. While these decisions were in direct contrast to the 1857 Dred Scott ruling, the issues of citizenship and federal versus state rights were not resolved. Further, the law did not offer federal protection to this new class of freed slaves.

36 Zinn, A People's History, 189.
The Thirteenth Amendment and the Black Codes

The Thirteenth Amendment abolished slavery but did not address the legal, citizenship status of the freed slave. At the conclusion of the Civil War, in the absence of federal legislation or Constitutional amendments, the states maintained control of their populations and determined who was a citizen and in turn entitled to access to the political, economic and social systems. This also meant that it was up to the individual states to determine who was entitled to protection: protection against violence, discrimination, and exploitation in all aspects of political, economic and social life. The law regarding citizenship and freed slaves at this point still reflected the Dred Scott decision from 1857. In light of this, the seceding states, upon readmission to the Union continued to target this new vulnerable class through the institution of Black Codes beginning almost immediately following the passage of the Thirteenth Amendment in 1865. In order to respect the federal mandate regarding slavery, the state laws, the Black Codes, did not violate existing federal law, the Thirteenth Amendment, but for all purposes codified the previous relations under slavery in restricting the rights and access of freed slaves. As highlighted by Zinn:

...these returned southern states enacted 'black codes,' which made the freed slaves like serfs, still working the plantations. For instance, Mississippi in 1865 made it illegal for freedmen to rent or lease farmland, and provided for them to work under law contracts which they could not break under penalty of prison. It also provided that the courts could assign black children under eighteen who had no parents, or whose parents were poor, to forced labor, called apprenticeships - with punishment for runaways.37

These laws varied by state though the methods and intent were consistent and continued the violence and discrimination of slavery. The laws targeting and regulating the freed

37 Zinn, A People's History, 199.
slave and their children were designed to maintain the system and profits of slavery. Abolishing slavery did not change the political and economic need for labor. The Civil Rights Act of 1866 provided federal protection of rights against discrimination, as a safety net for the vulnerable population of freed slaves against state laws that targeted them. Despite the Emancipation Proclamation, the Thirteenth Amendment, and the Civil Rights Act, the law regarding citizenship and freed slaves reflected the Dred Scott decision. States did not have to include the freed slaves as citizens until the passage of the Fourteenth Amendment.

**Debating Citizenship**

The 39th Congress, beginning in December 1865, formed a committee to explore how to reconstruct the union and enforce federal laws over state laws. This committee eventually proposed what would become the Fourteenth Amendment, recognizing that, "the mere exercise of one congress of the national power to protect equality and to secure justice within the states was not enough. That meant that a rule had to be written into the Constitution, which could then not be amended as easily as a law could be repealed."38 The congressional committee on reconstruction understood that the former confederate states, and even the new president Andrew Johnson, were not interested in a substantive change to slavery in anything but name. Johnson supported the Black Codes and sought to appease the secessionist states rather than assert federal rights. Johnson's message to

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the 39th Congress, a committee of which was crafting what would become the Fourteenth Amendment, is worth quoting at length,

The country is in need of labor, and the freedmen are in need of employment, culture and protection. While their right of voluntary migration and expatriation is not to be questioned, I would not advise their forced removal and colonization. Let us rather encourage them to honorable and useful industry where it may be beneficial to themselves and to the country; and, instead of hasty anticipations of the certainty of failure, let there be nothing wanting to the fair trial of the experiment. The change in their condition is the substitution of labor by contract for the status of slavery. The freedmen cannot fairly be accused of unwillingness to work, so long as a doubt remains about his freedom of choice in his pursuits, and the certainty of his recovering his stipulated wages. In this the interests of the employer and the employed coincide. The employer desires in his workmen spirit and alacrity, and these can be permanently secured in no other way. And if one ought to be able to enforce the contract, so ought the other. The public interest will be best promoted, if the several States will provide adequate protection and remedies for the freedmen. Until this is in some way accomplished, there is no chance for the advantageous use of their labor; and the blame of ill-success will not rest on them...now that slavery is at an end or near its end, the greatness of its evil, in the point of view of public economy, becomes more and more apparent. Slavery was essentially a monopoly of labor, and as such locked States where it prevailed against the incoming of free industry.  

The Thirteenth Amendment had abolished slavery and freed slaves were now able to participate in the market. Johnson frames the granting of citizenship to freed slaves in economic terms, in the tradition described by Polanyi, whereby man must be able to present himself freely and equally in the market. This appeal to secessionist states makes citizenship an economic concern first, rather than a political or moral concern. Free labor is celebrated for its mobility and service to capital.

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Despite the President's political view that slavery harmed free industry rather than people, the committee debating the construction of the Fourteenth Amendment understood that it was people, not just an abstract notion of free labor for capital, that were affected by slavery and the ensuing Black Codes. The protection that the vulnerable class required for political, economic and social rights could only be legally provided by the federal government by asserting its power over the states, as guaranteed by the Constitution. The Fourteenth Amendment asserted the primacy of United States citizenship, which is distinctly federal. The committee, "hoped to determine once and for all the concept that there was to be a single citizenship, and the belief that this was not to be considered a 'white man's country' but rather a country for and of all of the people born or naturalized here."  

The Fourteenth Amendment was proposed in 1866, ratified in 1868, and provided citizenship in the United States to anyone born or naturalized in the territory, as well as legal due process and equal protection. The Fourteenth Amendment contains five sections with the first addressing citizenship and equal protection:

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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40 Meyer, *The Amendment that Refused to Die*, 80.
This amendment overturned the Dred Scott decision and directly addressed the failures of the Thirteenth Amendment regarding the legal and political position of newly freed slaves. The enactment of the Black Codes had demonstrated that unless there was a federal mandate, the states had no reason to alter the spirit and structure of discrimination, violence and slavery. The act of granting citizenship to the freed slaves while also forbidding the states to deny equal rights to citizens of the United States achieved a legal protection against violence and discrimination that had not previously existed,

No man can be sure of the preservation of his own rights unless every other man is protected. The practice of wrong upon one man implies that injustice may be done to another. If a man may be ignored because he is black, another man may be treated in the same manner because he is poor. Every man's safety consists in the maintenance of laws that shall protect every other man.\(^4\)

For the committee, the Fourteenth Amendment was an attempt to depoliticize the criteria for citizenship by making it a federal issue, a Constitutional right rather than political state-by-state issue.

The debates surrounding the language and implementation of the Fourteenth Amendment reveal the intentions of the committee to use the legal status of citizenship as protection from violence and discrimination. The committee members from the North, supporting the rhetoric of abolition, understood that in light of the Black Codes,

What was politically essential was that the north's victory in the civil war be rendered permanent and the principles for which the war had been fought rendered secure, so that the south, upon readmission to full participation in the union, could not undo them. The XIV amendment must be understood as the

republican party's plan for securing the fruits of both the war and of the three
decades of antislavery agitation preceding it.\textsuperscript{42}

The congressmen debated the meaning of freedom, political representation, legal status
and protection in the form of citizenship, and the value of the Constitution. The
statements from the congressmen reflect their states position regarding slavery before and
during the Civil War. Delivering a "Message on Reconstruction", Congressman G. Clay
Smith of Kentucky did not believe that equal citizenship and representation was
appropriate for freed slaves,

\begin{quote}
You may amend the Constitution if you please, so as to bring this question of
negro suffrage directly before the States, cutting off a part of their representation,
if they will not allow the black man to vote; but by such attempts you but irritate
and excite the two races, the one against the other. Having been born in the
South, having been reared in the very midst of the systems of slavery, I believe
that the effort to bestow the right of suffrage upon the negroes throughout the
country is not calculated to promote their advancement or secure their best
interests. In my own State, I have never met more than two or three of these
people who asked to be endowed with the right of suffrage. I received the other
day a letter from a negro who in 1862 was my property; and in that letter he urges
me to resist this effort because of the prejudice prevailing in this country against
his race. It seems to me that justice and humanity to these people require that we
should not force this thing too rapidly upon them and the country.\textsuperscript{43}
\end{quote}

Smith makes clear that he favors maintaining a system of inequality by denying a
political voice to the class of freed slaves. Rather than see instability in a system
whereby a stateless population exists in the polity, he sees instability resulting from
political equality. The Black Codes that restricted freed slaves' rights and sought to
mimic the political economy of slavery helped maintain the interests, political and

\textsuperscript{42} William Nelson, \textit{The Fourteenth Amendment: From Political Principle to Judicial Doctrine}

\textsuperscript{43} Congressman G. Clay Smith, January 19, 1866, in \textit{The Congressional Globe} http://memory.loc.gov; last
accessed 8/15/12. See Appendix.
economic, of the former slaveholders. Reflecting a different notion of justice and humanity, Congressman G. W. Julian of Indiana offered this statement regarding representation,

We may not be able, in a single bound, to escape the benumbing influence of slavery. Our exodus from the long and sore bondage of the past may be tedious and toilsome. Our dwarfed manhood may require time and judicious tonics to restore it to its original vigor...Let us recognize no such anomaly in our free system of government as a disfranchised citizen, innocent of crime, but prize the franchise as so sacred that a man without it shall everywhere, and of necessity, wear the brand of a convicted enemy of society. Let us not preach a mere lip democracy, while we confess by our acts, our faith in the maxims of despotism....Let us not make enemies and outlaws of four million people, among whom no traitor or sympatheizer with treason has ever yet been found.44

Unlike, Congressman Smith, Julian's concern is with the political status of freed slaves rather than the economic status. A disenfranchised, stateless population is criminalized and excluded from the rest of the population. The freed slaves are penalized and denied membership and belonging as only enemies or outlaws should be. This population has not committed a crime outside of their presence and change in legal status. Denying the freed slaves political membership and participation would only reinforce their exclusion.

Freedom without full political, economic, and social citizenship was meaningless for Congressman James Garfield, later President Garfield, of Ohio,

Have we given freedom to the black man? What is freedom? Is it a mere negation; the bare privilege of not being chained, bought and sold, branded and scourged? If this be all, then freedom is a bitter mockery, a cruel delusion, and it may well be questioned whether slavery were not better...Mr. Speaker, I know of nothing more dangerous to a Republic than to put into its very midst four million

people stripped of every attribute of citizenship, robbed of the right of representation, but bound to pay taxes to the government. 

Garfield's statement highlights a historical precedent of government concern with statelessness. Under the political economy of slavery, and the law of the land expressed by the Dred Scott decision, slaves were not people. Freedom without rights protected via citizenship did not make the class of freed slaves any more secure or less vulnerable, and in fact maintained a system of exploitation by only recognizing the economic utility of the freed slave.

Legacy of the Fourteenth Amendment

Ratified in 1868, the Fourteenth Amendment changed the 'law of the land' to legally re-categorize the slave from property and 3/5 of a human being, to a full citizen entitled to equal protection as a citizen of the United States. As an amendment to the Constitution the equal rights and protection of all citizens, including freed slaves and their offspring, could not legally be subverted by individual states.

The last quarter of the 19th century was marked by industrialization and large migrations of people following industry. The Fourteenth Amendment had a bearing on how those people were legally treated that is as significant today. The portion of the amendment that granted citizenship to freed slaves also protects their offspring from future discrimination by declaring that "all persons born...in the United States...are


[46] This does not ignore or deny subsequent Congressional acts and Supreme Court rulings that permitted Jim Crow laws or affirmed the legality of 'separate but equal' in Plessy v. Ferguson.
citizens of the United States and of the State wherein they reside.\textsuperscript{47} The Supreme Court affirmed that in a case involving a child born in the territorial U.S. to non-citizen Chinese parents when the citizenship of the child was questioned. The Supreme Court reaffirmed the law (1868) of territorial birthright citizenship, or \textit{jus soli}.\textsuperscript{48} Another test of the Fourteenth Amendment specifically addressed the equal protection clause of the amendment in regards to aliens, or non-citizens (1886). The Supreme Court affirmed in 

Yick Wo v. Hopkins that,

\begin{quote}
The XIV amendment to the Constitution is not confined to the protection of citizens...[Its] provisions are universal in their application, to all persons within the territorial jurisdiction without regard to any differences of race, color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.\textsuperscript{49}
\end{quote}

Laws are influenced by politics and rhetoric and they can be changed as a result. The Constitutional amendment reflects recognition of the importance of protecting rights from changing rhetoric and politics. In this case, national citizenship emerged as the solution to provide protection and inclusion in the political, economic, and social system. Citizenship, and with it the offer of full political membership and belonging, was a remedy for an excluded, vulnerable, insecure and otherwise stateless population. CCS offers a way to analyze changing contemporary concepts of belonging and membership outside of the confines of the state. This case shows how a state responded to the presence of a stateless population in a way that served both the state and the stateless, freed slaves.

\textsuperscript{47} U.S. Constitution  
\textsuperscript{48} U.S. v. Wong Kim Ark  
\textsuperscript{49} Chemerinsky, \textit{Constitutional Law}, 738.
Statelessness was a function of the end of the political economy of slavery. This chapter examined the historical conversation surrounding statelessness and citizenship in the debate on the Fourteenth Amendment. In the next chapter, I will explore a contemporary debate on citizenship and immigration and show that it is de-historicized and detached from a critical understanding of statelessness.
Chapter 4 - Debating Citizenship Redux

Chapter 2 analyzed different definitions of citizenship and the way in which political economy contributes to the migration and location of labor/workers/people. In the previous chapter, I reviewed a case where the state was concerned with the instability of a stateless, disenfranchised group in the polity. The government chose to grant citizenship as a solution to statelessness and exclusion, rather than maintain a population that would be, through lack of political membership and belonging, marked as enemies, outlaws, or outsiders. In this chapter, I explore the rhetoric of a contemporary political and legal debate surrounding immigration and citizenship that focuses on a population that is undocumented, stateless, and criminalized. This population demonstrates what was discussed in the second chapter - that migration and the political economy of neoliberal capitalist globalization do not always align with the political economy or borders of the state. The broader definitions of citizenship that emphasize membership outside of or beyond the confines of the state offer a way to look at how membership can be allocated to a stateless population within a state that also correlates with the case in the previous chapter. The expanded and critical definitions of citizenship described in chapter 2 take into account an ethical concern that was also found in the debates on citizenship for freed slaves.

Here, I will analyze the contours of the current debate regarding the "problem" of the "illegal" or undocumented population in the United States. Political theory and concepts of citizenship that reify the state and the nation offer tools to analyze the rhetoric of the political debate. From there, I will examine the proposed laws that are the
outcome of this rhetoric and reflect an essentialized notion of difference to justify narrowing or restricting citizenship. The rhetoric in this current debate works to decontextualize the history of migration and its political and economic ties. The presence of an undocumented population in the polity is a reality for many states and raises issues and questions of national identity, immigration and citizenship. The debates surrounding membership and citizenship are replicated throughout the world and are not unique to the U.S. The tension between the laws of the state, the needs of capital and the needs of labor/workers is seen in this contemporary debate on 'illegal' immigration playing out in the United States.

**Reading the Rhetoric**

According to the Pew Research Center there were almost 12 million undocumented immigrants in the United States in 2008 that represented close to 5% of the total population. Reading the rhetoric of the debates on immigration and citizenship makes clear that unlike the debates on the Fourteenth Amendment where the government sought to remove difference, this debate essentializes difference. Much of the discussion is about the immigrants as a class that has no legal entitlement to residence let alone the political, economic or social community. This discussion is premised on liberal notions of rights and citizenship and primarily questions of who should be included or excluded. The language in the political debates is derogatory and dehumanizing and ignores any feature of the population except their legal status. A critical feature however is that there

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are many mixed status families that have come from the almost 12 million undocumented immigrants. A child born to an undocumented immigrant in the United States becomes a U.S. citizen due to the birthright citizenship clause of the Fourteenth Amendment. In the past, this clause meant that the children born to freed slaves would also be citizens and would not reproduce a vulnerable, excluded, stateless population. The children of freed slaves could not be an excluded class as a result of the Fourteenth Amendment. Yet, today the same legal birthright has the potential to tear apart families.

Target of the debate

Since the Fourteenth Amendment grants citizenship to anyone born in the territorial United States, regardless of the legal status of the parent, the Pew Hispanic Center estimates that about 5 million American citizen children have at least one parent who is an undocumented immigrant. The contemporary application of birthright citizenship can result in mixed status families with undocumented parents of citizen children. It is not just the undocumented parents however who are targeted in the political and legal debates but any future children. The Center for Immigration Studies (a think tank that favors more restrictive immigration policy) critiques the Fourteenth Amendment for weakening the United States' immigration policy. In a study produced in 2010, the Center notes that, "only 30 of the world's 194 countries grants automatic citizenship to children born of illegal immigrants and that no European country grants automatic citizenship to children born of illegal aliens." The study suggests that the

U.S. is out of step with trends restricting citizenship and suggests that a repeal of the Fourteenth Amendment's birthright citizenship clause is a necessary step to protect the national population from the perceived threat to stability that expanding membership and citizenship could bring.

*Essentialized difference*

As mentioned in chapter 2, some definitions of citizenship reify the state, the nation and citizenship. Liberal, republican and communitarian concepts of citizenship accept the state, the nation and citizenship as stable categories. These conceptions often conflate the state and the nation. Further, citizenship elides unequal access to resources. As Wallerstein noted, citizenship is treated as a privileged seat on a lifeboat that must be protected so as not to upset the balance.\(^{53}\)

To essentialize difference is a political act. The political and economic colonial enterprise was premised on essentialized difference. In the introduction to Aime Cesaire's *Discourse on Colonialism*, Robin D.G. Kelley writes,

> The Africans, the Indians, the Asians cannot possess civilization or a cultural equal to that of the imperialists, or the latter have no purpose, no justification for the exploitation and domination of the rest of the world. The colonial encounter, in other words, requires a reinvention of the colonized, the deliberate destruction of the past - what Cesaire calls 'thingification'.\(^{54}\)


Essential difference refers to distinguishing characteristics that may be contingent and socially constructed, but are attributed to some natural essence. The practice of essentializing difference has been part of colonial oppression and has worked to dehumanize the 'other'. For my purposes in this chapter, I want to make note of this process of 'othering' in order to show how it is manifested in policy. For the moment, the compartmentalization of people into components is purposeful (read: political) and serves to dehumanize them. The same rhetoric that supported colonialism informed the justification for slavery whereby slaves were not considered human beings rhetorically or legally, as the Dred Scott decision showed.

Academic and political theories that promote a closed community of citizens or a privileged community also promote a notion of an essential difference. In other words, they believe the notion that an 'other' exists that is distinct from the national collective identity. The sentiment of the study from the Center for Immigration Studies is reflected in the political views of those advocating for more restrictive immigration policies, including the repeal of the Fourteenth Amendment, "we're not being mean, we're just saying it takes more than walking across the border to become an American citizen. It's what's in our souls."55 This view of citizenship, of a closed, exclusive community with unique characteristics, emphasizes and essentializes difference, which is critical to perpetuating racism and xenophobia. A state representative from Pennsylvania, Daryl Metcalfe underscored the purpose and the spirit of the bills,56 when he stated "We want to

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56 The bills are explained in the next section on the legal response.
bring an end to the alien invasion that is having such a negative impact on our states.⁵⁷

Undocumented immigrants become dehumanized and at the same time sensationalized as an invading force to be feared. The imagery of non-human aliens invading is reminiscent of decades of horror and science fiction movies, but rather than citizens of Earth being afraid of attack and annihilation, it is the community of privileged citizens of certain states who are under attack.⁵⁸

In a similar vein, the term 'anchor babies' emerges as a common sense notion in popular, policy and political debates. The Center for Immigration Studies also targets 'anchor babies' and chain migration.⁵⁹ In terms of 'illegal' immigration, the study points to 'anchor babies', with pregnant women arriving the U.S. to give birth to babies who will become U.S. citizens and thus, the first step in the chain. The study posits the rationale for this in that upon reaching legal maturity these children will petition to reunite their families. This framing of future invading forces is meant to evoke fear. The rhetoric surrounding 'anchor babies' has escalated to the point that the American Heritage Dictionary changed the definition to reflect that it is an offensive term. The definition for anchor baby now reads,

\[ n. \]
\[ Offensive \]
Used as a disparaging term for a child born to a noncitizen mother in a country that grants automatic citizenship to children born on its soil, especially when the

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⁵⁸ In political rhetoric as well as popular film, see "District 9".
⁵⁹ Center for Immigration Studies, "Birthright Citizenship in the United States: A Global Comparison", August 2010. Chain migration is concerned with family unity in the sense that families will form a chain to stay together.
child's birthplace is thought to have been chosen in order to improve the mother's or other relatives' chances of securing eventual citizenship.\textsuperscript{60}

The executive editor of the dictionary is quoted in the \textit{New York Times}, "The term is now treated similarly to how the dictionary treats a wide range of slurs."\textsuperscript{61} This language and rhetoric exploits difference and politicizes belonging and identity. The notion that there is an essential difference creates an oppositional relation against a community of citizens that are treated in liberal, republican and communitarian concepts of citizenship as a privileged group. Essential and oppositional difference is naturalized by both political theory and political rhetoric and this allows legislation that marginalizes an already vulnerable group. But, the authors of the Fourteenth Amendment aimed to guard against precisely this potential inequality.

\textit{The Fourteenth Amendment and equal protection}

As noted above, the derogatory language in the popular and political debates essentializes difference and creates a distinct class that can become the target of discrimination. The study produced by the Center for Immigration Studies concludes with a recommendation to repeal the birthright citizenship clause of the Fourteenth Amendment. There is an explicit concern with maintaining an exclusive and privileged community of citizens,

Extending the XIV amendment birthright citizenship to any class of persons is a momentous matter because it confers very valuable benefits and imposes very

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\textsuperscript{60} American Heritage Dictionary, last accessed 5/26/12
http://ahdictionary.com/word/search.html?q=anchor+baby

serious obligations on children who have no say in the matter and it also has long-lasting and important effects on the size and composition of the US population.\(^6\)

If we look at the Fourteenth Amendment as a response to laws (the Black Codes) that the secession states passed targeting freed slaves, we can see that it is a mechanism for protecting specific people. It also protects the state from the potential instability caused by the inequity and disparity of legal privilege for select groups. The contemporary debates and proposed laws in the United States surrounding undocumented migration target specific bodies for exclusion: undocumented migrants, their current offspring, and any future offspring. The population that is being targeted, discriminated against, and excluded by rhetoric and state law is protected, even as non-citizens, by the Constitution. The Fourteenth Amendment provides for equal protection of the law to "any person" within the United States.

In recognition of the discriminatory spirit of the laws and the historical meaning of the Fourteenth Amendment, the president of the Leadership Conference on Human and Civil Rights stated, "For the first time since the end of the Civil War, these legislators want to pass state laws that would create two tiers of citizens, a modern-day caste system."\(^6\) The trends in citizenship studies, reviewed in chapter 2, that problematize citizenship are all concerned with expanding the concepts of citizenship and membership. The trends in state laws are concerned with restricting both membership and citizenship. Next, I briefly review the state legislation targeting undocumented immigrants.

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\(^6\) Center for Immigration Studies study

Legislative Outcomes - Arizona and Alabama

Despite established law, every Congress since 1993 has introduced legislation to restrict birthright citizenship. The most prominent state legislations are AZ SB 1070 (popularly referred to as the "Show Me Your Papers" law) and AL HB 56. They are considered to be the most prominent by virtue of the number of copycat laws and the federal challenges to their constitutionality and implementation. Both states' proposed laws reflect the rhetoric of citizenship as a scarce resource to be protected, though the reasons for the protection differ. The governor of Arizona espoused the concept of citizenship as a closed community not just a national identity and community but a state/regional specific community, "I was stunned at the audacity of the Obama administration to file suit against an individual state seeking to safeguard its people." Without going into too much detail, or repeating the political structure of the state, the state of Arizona is able to propose these laws as a matter of state vs. federal jurisdiction and is one of the key reasons that this state law is being challenged at the level of the Supreme Court. Prosecution of illegal entry and deportation occur routinely as a remit

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64 Center for Immigration Studies: "Birthright Citizenship in the United States: A Global Comparison" 8-2010. The most recent legislation was introduced in the 112th Congress. H.R. 140 - Birthright Citizenship Act of 2011 was sponsored by Rep. Steve King, R-IA. S. 723 with the same name was sponsored by Senator David Vitter, R- LA. The House bill had 90 co-sponsors, while the Senate bill had 4 co-sponsors.

65 See chart in Appendix from ACLU.


of the federal government and, in fact the federal government has specific courts and regulations to address violations of immigration policy. Alabama has also passed a state law similar to that of Arizona though one of the sponsors of the bill did not invoke state's rights in the same way as Governor Brewer. The argument is explicitly discriminatory and tied to political economy. Representative Micky Hammon was succinct in his advocacy for a closed, privileged community of citizens in his statement; "This is a jobs creation bill for Americans. We really want to prevent illegal immigrants from coming to Alabama and to prevent those who are here from putting down roots."\(^{68}\) In this case, the intent is not to secure the border, but to secure jobs.

An undocumented population is like a stateless population in that they are also insecure, vulnerable, and excluded. In both cases access to the political, economic, and social systems is restricted and only the most basic needs are provided by a state, or supranational organization. Popular and political rhetoric cast them as outsiders, and even something to be feared. The legal and legislative response reflects the rhetoric surrounding the 'alien' and the 'abuse' of birthright citizenship. The proposed state laws target and criminalize the undocumented population in a way that violates federal law. This is significant given the history and role of state vs. federal rights and the Fourteenth Amendment, especially in light of the debate about who is a person and entitled to rights and protection. Previously, the state resolved the instability of a disenfranchised, stateless population by expanding access, political membership and rights. In each contemporary case, the proposed legislation restricts membership and rights. The

rhetoric that marginalizes and dehumanizes an "other" is a necessary condition for the legal response.

**What Is Left Out of the Conversation**

Here, I will briefly discuss the connection between labor and membership to show that CCS offers ways to think about the connection between political economy and migration that is missing from this contemporary debate.

*Labor, migration, and statelessness*

Unlike the debates on the passage of the Fourteenth Amendment, which acknowledged the political economy of slavery, the current debates on who should be included for full political membership and belonging do not take into account the political economy driving migration. Where people are located is a function of political economy and the determination as to whether they are citizens or stateless is a political one. A clear recognition of the relationship between where people are located and the political economy that structures their daily lives underpinned the debates on whether to grant citizenship and political membership to freed slaves. As I showed in chapter 2, citizenship and political membership are a function of political and economic structures regardless of the configuration of those structures.

The contemporary discussion around restricting immigration and citizenship in the United States is detached from the history of migration. While the case from chapter
3 on the passage of the Fourteenth Amendment briefly touched on the history of
migration related to slavery, the contours of that debate did not ignore the political
economy. Economic liberalism, as theorized by Polanyi, or in the current political and
economic form, neutralizes the political and politics of belonging in that everyone is
equal entering the market. Citizenship and political membership are mechanisms and
resources to create that political equality. The market however does not recognize the
designation of privileged citizen over undocumented migrant. The laws of the state
exclude undocumented migrants from political membership and the proposed laws
marginalize them even further. The population that is rhetorically, for political purposes,
deemed "illegal" represents a threat to the population of citizens, and resources. Access
to resources for citizens and non-citizens alike is increasingly limited under neoliberal
economic policy that emphasizes privatization. The rhetoric of the discussion presented
here treats citizenship, and access to the political and economic system (or just a job), as
a resource for the privileged.

Membership and citizenship

Immigration policy and birthright citizenship are two ways of allocating
membership and citizenship. An immigration policy that favors immigration and
naturalization can ameliorate the restrictive citizenship policies that allocate membership
based on blood or soil. There is however a balance that all states are trying to achieve in
terms of distribution of resources, including membership. This is reflected in practical as
well as ethical decisions regarding entry and membership. Contemporary immigration
policy and law have humanitarian considerations for refugees and asylum seekers for
example that are distinct from other entrance policy regulations. As mentioned in chapter 2, CCS provides another way of thinking about allocating membership and citizenship. The concept of *jus nexis* allows for the recognition that the needs of the market and the laws of the state are not always aligned but does not have to produce an 'illegal' or stateless population. The political conversation that advocates repealing birthright citizenship to protect the citizenry is reminiscent of Congressman Smith's concern for political stability mentioned in chapter 3. He was more concerned with fear of the instability that would be created by granting political equality when he indicated that people who were formerly his property did not want to participate politically, that it was they who were afraid of instability not him. Allocating political membership and citizenship based on multiple factors, not limited to where someone was born reduces the maintenance and reproduction of stateless populations.

The almost 12 million undocumented immigrants in the United States are the contemporary targets of a dehumanizing rhetoric that positions them as an 'alien other' and something to be feared for an essential difference. CCS provides definitions of citizenship that are inclusive and do not naturalize a difference between a citizen and an 'alien'. In this sense, these definitions are useful tools for thinking of ways to include rather than exclude this undocumented population. It will not however offer a solution to the production of undocumented populations. Even if *jus nexis* were to replace or be accorded equal consideration with *jus soli* or *jus sanguinis* as a means of allocating political membership and citizenship, that does not resolve the systemic political and economic problems that create and maintain an undocumented or stateless population.
Chapter 5 - Conclusion

In the preceding pages, I make the case that there needs to be an expanded definition of statelessness that accounts for the undocumented populations resident within the state. Concepts of citizenship are evolving beyond the state as the nature of the state is changing due to globalization, though it is ultimately the state that grants and guarantees citizenship. Global capitalism, influenced by political and economic policies that privilege the market over people, creates migration patterns that may be contra the stated political and economic needs of the state. The migration of people and their needs do not always align with the political and economic needs of the state. The tension between the laws of the market and the political needs of the state is evident in the response of the state to restrict the rights of the undocumented and stateless population.

The historic case demonstrates a specific state response to the political and economic end of slavery. The state had to decide whether or not to provide political membership and citizenship to a stateless and disenfranchised population resident in the polity. The Fourteenth Amendment expanded the legal definition of citizenship and has guaranteed birthright citizenship and equal protection. A contemporary debate surrounding undocumented migrants and citizenship seeks to restrict and/or repeal the birthright citizenship clause of the Fourteenth Amendment. The transition in time yields a very different government response to questions of political access. The contemporary debate ignores the political and economic structures that drive migration, whether documented or not.
The implication of what I am saying is that there is a need for a new vocabulary to describe the condition of people shaped by neoliberal globalization. A discursive opening in the conversation on citizenship and statelessness allows concepts like *jus nexit* to be conceived as a solution to the contemporary stateless population. States will need to respond to these populations either in situ or as part of the international community that supports and maintains stateless populations. The state has political, economic, social and ethical considerations in determining citizenship and immigration policies. The historic case of the freed slaves shows that the state recognized its own vulnerability and potential instability in the face of a large stateless and disenfranchised population present and being reproduced.

This is important because the political debate that demonizes undocumented migrants ignores the fact that these are real people who live and work and go to school and serve in the military and cry when they lose a job, or have to rip their family from their home because they are mixed status in the wrong state. People are not a commodity like gold and people do cry when their loved ones are detained and deported. The faces of statelessness presented in the documents from the United Nations are of vulnerable people subject to constant danger and violence. Those images should include the economic migrants ('illegal', 'undocumented' immigrants) who are presented in public discourse as threatening the stability of the nation-state.
As mentioned earlier, concepts of citizenship tied to the nation-state are being questioned as the nature of the state changes due to globalization. The concept of effective nationality, as opposed to state based citizenship, is a way that theory and rhetoric can influence policy. This concept is a way of legally implementing *jus nexis* and acknowledges the displacement of people due to the political economy of neoliberal globalization and contends, "that effective nationality takes into account a much broader notion of citizenship. It is not concerned with the formal legal status of an individual, nor solely with allegiance, but with issues of social fact, identity, and justice in a given situation."\(^{69}\) The United Nations and the international human rights legal regime emphasize every person's right to a nationality. It is the law of each state however that determines who has nationality through citizenship. The concept of effective nationality can be read in the history of the Fourteenth Amendment and applied as a contemporary solution for undocumented populations denied political membership in their place of residence.

Citizenship is not a panacea. Market fundamentalism, neoliberalism as theorized by Margaret Somers, has had the effect of creating stateless citizens. As previously mentioned, there were structural adjustments made to economic and social policy under neoliberalism. Privatization of many state services, as well as restrictions on access to services, means that people now have to buy 'rights' that had previously been granted as protections of citizenship. For Somers,

The result is increasing numbers of stateless citizens - socially excluded people who hold de jure citizenship but no longer de facto citizenship. When the state no

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longer carries out its role of constraining capitalism, people are left fully exposed to the unmediated market. With no meaningful participation and only the thinnest of connections to civil and legal rights, they are in effect, left stateless and rightless.\textsuperscript{70}

By virtue of the presence of a large undocumented population within the territorial United States, there is a basic level of protection that does not derive from citizenship status but rather from being human and present. This makes necessary a more critical understanding of statelessness. The protections afforded people, not just citizens, by the Constitution, reflect the historical connection and recognition by the state that for reasons of politics or economics there are people present in the polity who while not citizens, are 'worthy' of protection.

As Linda Kerber states, "In our time, the opening years of the twenty-first century, the 'undocumented alien' describes a condition of danger in relation to statelessness. Documentation or its lack is a defining aspect of the production of statelessness today."\textsuperscript{71} It is not a single act that creates statelessness. It is produced and reproduced. Kerber demonstrates the need to embed this conversation in context, "To historicize statelessness is to write a history of the practices of race, gender, labor, and ideology, a history of extreme otherness and extreme danger."\textsuperscript{72} A more rigorous analysis of statelessness problematizes concepts of the state, citizenship, political membership and their relationship to political economy. Future research might seek to

\textsuperscript{71} Linda Kerber. "Toward a History of Statelessness in America." \textit{American Quarterly}, vol 57, no 3 (Sep 2005): 736.
\textsuperscript{72} Ibid., 731.
explore the privatization of the prison industry and the growth of private detention facilities.
Bibliography


Appendix
SB 1070 is Arizona’s controversial anti-immigrant law

The Supreme Court has upheld SB 1070’s provision “show me your papers,” providing a basis for appeal that could be overturned by lower courts. This provision has been struck down in lower courts in Arizona and other states, including California, New Mexico, and Utah. The provisions that were overturned include provisions that allow local police to arrest someone if they believe they are a deportable illegal alien, and provisions that allow local police to detain someone if they believe they are a deportable illegal alien.

4 Main Provisions Considered Before the Supreme Court

1. Police demand show me your papers if they believe the person is deportable.
2. Police arrest deportable illegal aliens if they believe they are deportable.
3. Immigrants who are deportable illegal aliens are subject to deportation.
4. Immigrants who are deportable illegal aliens are subject to deportation.

The Supreme Court’s decision

Federal courts have blocked major provisions in each of these states. Legal challenges to SB 1070 and the five provisions continue on other constitutional grounds.

Most states reject Arizona’s approach

After observing the widespread harms caused by these laws, legislatures in many states are distancing themselves from this discriminatory model.

Not one state passed an Arizona-inspired law in 2012.

Provisions similar to those considered by the Supreme Court are also in Alabama, Georgia, Indiana, South Carolina, and Utah’s laws.

Arizona copycats considered or passed 2010-2012

For more information: www.aclu.org/sb1070

Pledge Share: www.aclu.org/581070

Police: Facebook: aclu.org/facebook Twitter: acluconsla
APPENDIX TO THE CONGRESSIONAL GLOBE.

39TH CONG., 1ST SESS.

Message of the President.

SEAT. & HO. OF REPS.

en, and southwestern. Such an act would have created a new class of voters, and would have been an assumption of power by the President which nothing in the Constitution or laws of the United States would have warranted.

On the other hand, every danger of conflict is avoided when the settlement of the question is referred to the several States. They can, each for itself, decide on the measures, and whether it is to be adopted at once and absolutely, or introduced gradually and with conditions. In my judgment, the freedmen, if they show patience and manly virtues, will sooner obtain a participation in the elective franchises which the States have from the General Government, even if it has power to intervene. When the tumult of emotions that have been raised by the suddenness of the social change shall have subsided, I fancy they will receive the kindred whose some of those on whom they have heretofore most closely depended.

If I have said thus much, I do not that, after the close of the war, it is not competent for the General Government to ordain the distinction of races. That distinction can only be removed by that process of education which is to the permanent and permanent change of the ages of man. The new institutions that are in the process of formation will have a necessity that they should be in every way possible equal rights, and in every case that they are in every case equal in every respect to the civil rights and civil rights of every other branch of society.

We should secure a just and satisfactory peace between the sections of the country, and that the negro shall have the same political rights and privileges as the white man.

The Constitution conveys on Congress the right to regulate commerce among the several States, and in the first section, for the maintenance of the Union, that the commerce between the States might be prohibited, and commerce between the States might be thus prohibited. But it is not to be denied that the several States provide adequate protection for the freedom of the negro. In this state of society, there is no case of the advantage of the labor of the negro. But it is no less true that the several States provide adequate protection for the freedom of the negro.

I know that sincere philanthropy is earnest for the immediate realization of its remoter aims. It is one of the greatest acts on record to have brought millions of people into free labor. The career of free industry must be opened to them; and then their future prosperity and their progress is to be secured. If they fail, and so perish away, tell us to be careful not to let the innocent victim of the conspiracy be used to aid the work of the oppressor. In all that relates to the destiny of the freedmen, we are not to act in a similar spirit.

Now that slavery is at an end and near its end, the condition of the freedmen, in the present view of public economy, becomes more and more ap-
ask him if he has any authority, if he has any information, direct or indirect, that the State authorities of South Carolina have in any way, at any time, under any condition, attempted to interfere with or overthrow the Government, the Constitution, or laws of the United States.

In other words, I ask you whether the State government of South Carolina is not to-day in perfect conformity to the laws and polity of the United States.

Mr. SMITH. I have not the means of answering that question; but I incline to think that the State government of South Carolina, or rather the present organization of South Carolina, will be found to be antagonistic to the Government when examined.

But I do not yet get an answer to my question; and that is, as to the proposition of the President, which is the legitimate successor of the old one that did exist there, or a new creation; and if a new creation, how created, and by what authority, since I am not aware that Congress ever sanctioned a new creation of States within any part of the conquered territory.

Mr. SMITH. The gentleman seems indisposed to receive my answer, which I thought was very explicit. I say to him that the power by which South Carolina was organized emanated from the people; it was by the people there that this organization has been done, just as it has been done in the States of Tennessee and of Arkansas and Virginia and other States. It has gone back to the people, and the people have elected their Governor, their Legislature, and their Courts; and in that sense, they have created the Government of the State, as has been done in the State of Tennessee, for instance. What makes us ask whether that State has done this, so far as it relates to the General Government? I am not speaking of the laws of the State; but I am speaking of the Convention of the State.

Mr. SMITH. This body, which has elected one of the most unconditional Union men of the United States as her Governor. She has sent here the very best men she has in her State to represent her in Congress. She has a Legislature elected by the people who alone have the power to elect; all who were in the rebellion having been excluded except those who took the oath, having been conscripted and forced into the rebel army.

Now, when, how, and why are you disposed to disregard that organization, and when it is to be said that she is in the State in the Union? Gentlemen may say it is a great ground of contention, and I want somebody to answer it, if they please, without interrupting me; when they say that there is no constitutional provision, and that it was done against the Constitution; what guarantees can you put in the form of a statute; I do not care how voluminous or how strong in words or terms. I do not care what provision you put in the Constitution. But what power is there in this Government to prevent the people of New England, or the people of the middle States, from rebelling when they want to? We thought before that our Constitution was secure against rebellion; we thought the laws we had were sufficient to prevent rebellion; we were continually legislating to quiet the different sections of the country; but we had a rebellion; it came upon us, and the only way we suppressed it was by force. I care not what laws you put upon the statute-book; if they choose to rebel again they will do it, and the only way the Government can prevent them will be by force, as it did in the past.

The right of rebellion is an inherent right in the people; and whether they agree to-day to laws or not is a question of power to determine, and that we have given the rebel against them a year at this time from this day to do it, but it is within the power of the Government to prevent the rebellion, to put it down, to suppress it if they choose. I say, I do not believe in the right of the people to revolt against the Government and undertake its overthrow until that Government becomes oppressive. Our Government has never been oppressive; it has been the best and most beneficial in the world, and therefore our people readily agree to laws necessary to promote quiet and harmony throughout the country.

But, gentlemen, allow me to say one thing.

The course to be pursued by a great people and its Legislature during a time of war may not be the best course to be pursued after that war is over. If there is any class of people whom you should be prepared to hold up as examples for their crimes, then, in the name of justice, of law, and of the injuries they have inflicted upon the country, bring them to justice, hang them if need be, and I shall be rather than weep over it. I have always believed, as I have reiterated in Congress time and time again, that whoever makes such sedition laws and terrible in the sight of the people of this country that all men will be slow to come to it again.

Mr. SMITH. Congress has altered their relations to the General Government, first, by war; and they have come to distrust various by peace, and coming back into the Union and adopting the rules we have laid down for them.

Mr. SMITH. I mean to say that the war did change materially the relations of the States to the General Government; but it is simply a question between the Government and its citizens or citizens of the United States.

Mr. SMITH. I mean to say that the war did change materially the relations of the States to the General Government; but it is simply a question between the Government and its citizens or citizens of the United States.

But in the few minutes I have remaining, I wish to insist upon this one simple proposition, or what I call a humble judgment, the great party to which I belong, and with which I worked, and which I worked for when I was in the army, when I was in the army, when I was in the army, and which I believe, in this great crisis, which is so great a crisis, and which I am not, when I can so consistently, in making one of the most important mistakes of the party ever made. I have no doubt that they are seeking to inaugurate into their political creed something that has nothing to do with the Government, and which will expose it to more danger and more loss than has hitherto.

I mean to say to rebellion as you choose, and I will consent to all that you may say. You may denounce all those who were engaged in it as criminals to all time.

Mr. SMITH. I mean to say that the war did change materially the relations of the States to the General Government; but it is simply a question between the Government and its citizens or citizens of the United States.

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I mean to say to rebellion as you choose, and I will consent to all that you may say. You may denounce all those who were engaged in it as criminals to all time.

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Mr. SMITH. The relations that Maryland, Delaware, Kentucky, and Missouri bear to the Government of the United States at this time are very different from what they were in 1800. They have been the relations of slave States, and they were regarded and represented as such slave States, with certain rights under the Constitution and laws of the United States.

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APPENDIX TO THE CONGRESSIONAL GLOBE.

[January 31st, 39th Cong., 1st Sess.]

Reconstruction—Mr. Smith.

Ho. of Reps.

Themselves are, with few exceptions, afraid of the future in reference to this question of universal suffrage. They fear that if they do not ratify the Constitution if you please, so as to bring this question of negro suffrage directly before the States, coming out of the nomination of their representation, if they will not allow the black man to vote, yet by such attempts you best irritate and excite the two races, the one against the other. Having been born in the South, having been reared in the very midst of the system of slavery, I believe that the effort to bring the trial of negro suffrage upon the Convention, and to have the same reared in the Convention of negroes throughout the country is not calculated to promote the advancement or secure their best interests.

In my own State, I have never met more than two or three of these people who are not afraid. It is a very fearful thing to see the negroeslistening to his property, and in the latter he urges me to resist this effort because of the prejudice prevailing in this country against his race. It seems to me that justice and humanity to these people require that we should not force this thing too rapidly upon them and the country.

I further, and reiterate the sentiment uttered by me at the last session of the Thirty-eighth Congress, that I am utterly and entirely opposed to this doctrine of negro suffrage. I believe that God Almighty never intended that the white people and the black people should be on an equal footing in this country. Whether the negroes have been in slavery or not, that same rule, to me, ought to be applied.

I feel for the negro to attempt to accomplish what nature has determined shall not exist. Now, Mr. Speaker, what I had to say upon this question of the wonderful amalgamation of different races among the negroes in the South, of which different and distinct races become commingled politically and socially cannot in the very nature of things endure.

Now, here is the plain proposition. I care not whether that does voting or not. Nevertheless, may be, when he settles in this country, with his family around him, every one of the same class of people recognizes the fact that at some future day the little child that is tattered at his heels, is to be brought in full the equal rights in social and political position of the white man, the man again a man in the land. It is a part of natural law. It was so ordained by the Creator; and you can never bring any man down to the position of a serf, an English Saxon, will consent to any such thing. Now, what is the plan of doing it?

In that way to bring about such a relation as was never intended, and which would be detrimental to the Government of the United States.

I say this as an argument to support my position against negro suffrage. I do not believe that it would be wise to put on the part of the American people at this time. What may be done in the future I am unable to say. What I am willing to say that the negroes who have only a few blacks, and those educated, have persistently refused to vote for twenty-five years to grant to that class of their people the right of suffrage. The Pennsylvania Legislature, now in session, has just passed by one branch of the body a resolution instructing the Representatives in Congress for that State to vote for the bill granting universal suffrage in the District of Columbia. Why do not the people in Pennsylvania adopt a Convention and so amend their Constitution as to allow the twenty or thirty thousand educated negroes in that State to vote? They will not do it; not a bit of it. They will not do it in Illinois. They will not do it in Ohio. They will not do it in Ohio. They will not do it in any of those States; but when they come to us we have been as loyal as they have, who have manifested our loyalty as earnestly as any other, the only thing they say must be a punishment on those who have been in the rebellion. It is if alone affected those men. I would not have anything to say about it; but when you punish fifty thousand men in Kentucky who were rebels you punish a larger number of the other sides who were rebels and never for one moment did anything against the United States Constitution and the rights of their rights are. Will you let a voice come up from the South that has not been punished for the wrong that they have done to the country? If those people have rights to be represented? It is not a question of party, because, as the gentleman from Maine [Mr. Livermore] remarked the other day, they were like Tray, in bad company. Sir, if that is the case, if we are to be tested by that rule, there would not be many of us here. I do not presume there is not a district in the whole country that has not what you believe to be bad men—cooperleaders, so-called, rebels at heart; but, before these men by being in bad company are not entitled to seats, neither are you, and you ought not to vote.

But many things come over us. Some say that revolutions never go back; that this is a progressive age; and that we are to march on in our career. I, too, believe that revolutions never go back. But my judgment is, that sometimes a party that has been a success as a revolutionary party, so called, may go so far as to fail for that they themselves become the obstacles of revolutions and destructive to the country. There is danger in the apprehension. We have a great and good Union party in this country. There are differences of opinion between us upon some of the great questions of our day, not to say they are not out of the Union. Some of them are entitled to representation some of them are not. What are you going to do? When are you going to let them in? When you have a government, you say, that they will send you over. We say you say you will admit them. They then send good men. But we say that you can say that they will not the very next year and bad men. We say you will fill up the country with emigrants, and create a large population and create great political parties. Then you are not in the Union. We have no objections. But they may send bad men. We say you say you will admit them. They then send good men. But we say that you can say that they will not the very next year and they will fill up the country with emigrants, and create a large population and create great political parties.
73 not long since, "that when this whole amendment shall be adopted Congress will have the constitutional power—be its exercise of this power wise or unwise—to regulate interstate commerce, to control our whole country, root and branch, leaf and fruit, and guard effectually against its return in any form, or under any guise, or to any extent."

The nation, in other words, having given freedom to four millions of people, can make that freedom a blessing by conferring it in substance, as well as in name. It cannot only do this, but securely bind to do it. The right to freedom exercised with this respect, is a right to vote on the ballot. Without the freedom of these people a delusion and a lie. The franchise of the South is not free, and cannot be, when left to the domination of their federal masters, exasperated by their defeat in a war which outraged civilization by thus aiming to perpetrate their rule. I need not argue this proposition, because no man will now debate it without ignoring the most obvious principles of human nature, and closing his eyes to well-authenticated facts of recent occurrence in the island of Jamaica and in the Black Sea. Sir, every gentleman on this floor knows what a scandal and a mockery the freedom of negroes purchased at the cost of millions of lives, freed by the Constitution, and that to consult the real interests of society, a greater number of white rebels would be like committing the lamb to the jaws of the wolf. But if I am right in this, and there is no doubt of it, we can reasonably place the ballot in the hands of the loyal freedmen, and thus see them with the power of self-determination, and save them from a condition ofidian servitude, in which they are now placed. Their position would be a blessing. I ask gentlemen, therefore, to remember, that should any proposed amendment, or any part of the Constitution before the House be voted down, we shall not, I think, be worse off than we are now. Instead of restricting representation to actual suffrage, we can extend the franchise of the whites, and the state which excludes it will be better off.

It is true the power of Congress to grant its guaranty, in the States through its intervention with the question of suffrage, has never been so much as discussed. In its shaping hand, as we believe, will no longer mold our national policy as here or abroad. Its evil genius we no longer inspire our public men, and give law to our actions. But let us remember, too, in the moonshine radiance of universal liberty, the Government, I trust, in all its departments, will find its greatest strength in the true spirit of the past. Such, at least, is my hope, that we may be taken away by means of color or race, and in that perfection of the organic law the nation would avoid any phlegm which by any possibility would admit a construction so fatal to the fundamental principle of all free government.

Why temporize by adopting half-way measures and a policy of indifference? The shortest distance between two points is a straight line. Let us follow it, in so important a work as amending the Constitution. The advocates of the proposed amendment do not profess to be satisfied with it. They confess its defects, and are ready to meet them. The argument that the proposed amendment should be so altered as to admit of a 50 per cent. Disenfranchisement of white men and women in the black and white States because the federal government could not accept them without opposition or disunion. Again, Mr. Speaker, I humbly suggest that the proposed amendment, should it prevail, must fail of its purpose till after the session of 1875. If I am not mistaken, there could be no new call of Representatives among the Southern States prior to that time. If I am mistaken, and the Constitution will permit us to take another census when we choose, it will not make any practical difference, as no one proposes that measure, and if adopted the reconstruction government could not take effect sooner than the time I have named. In all cases, therefore, these rebel States must have their full representation under the government which they selected by their Representatives must be kept out of Congress. If they should be admitted, prior to the passage of the amendment, the prospective representatives could be no coercive authority in the hands of the Executive, and the Senate could not fulfill its duty, and the amendment, it could not be ratified. If the Southern Representatives should not be admitted, then the evils of unequal rep-
eral head, but have utterly demolished their municipal governments.

Now, let us inquire how the surrender of the military power of the rebellion affected the legal condition of those States. When the rebellion collapsed, and the last armed man of the con-

federacy surrendered to our forces, I affirm that there was not in one of those States a single government that we did or could recognize.

There was not in one of those States, from Gov-

ernor down to constable, a single man whom we could recognize as authorized to exercise any official function whatever. They had formed governments alien and hostile to the Union. Not only had their officers taken no oaths to support the Constitution of the United States, but they had beaped oath upon oath to destroy it. For any and all of these States there were no constitutions of any kind binding force and effect; none that we could recognize. A constitution in this case, can mean nothing less than a constitution of government. A constitution must constitute something or it is no constitution.

When we speak of the constitution of Alabamas we mean the constitution of the gov-

ernment of Alabama. When the rebels surren-
dered there remained no constitution in Al-

abamas, because they remained no government.

Those States reverted into our hands by victo-
rion; and the municipal right and every municipal authority utterly and completely swept away. Whose duty was it to assume the constitution and government of the several States? In the first instance it was the duty of the President of the United States. Congress was not then in session. Military resistance to the armies of the conquerors was not restrained, and the laws of war pervaded every inch of the conquered territory. I appeal to the highest authorities in international law, as quoted by Hale, chapter thirty-two, section one:

"It is the duty of the conqueror to occupy and govern the territory wrested from his enemy, and the government of the conqueror is immediately and necessarily established by the laws of nations. The conqueror gains the right over the conquered, both in respect to persons and property, directly from the laws of war, as established by the usages and dictates of nations, and the law of nations, which is the law of nature, as applied to war, and is derived to the conqueror by the conquest of the conquered, and by the laws of war, and that which is in the hands of the conqueror is established over an enemy's territory during its military possession. His government is immediately established over the conquered, and is subject to all the restrictions of public law in its intercourse with the conqueror, and the conqueror's government is immediately established over the conquered and is subject to all the restrictions of public law. It is the duty of the conqueror to occupy and govern the territory wrested from his enemy, and the government of the conqueror is immediately and necessarily established by the laws of nations. The conqueror gains the right over the conquered, both in respect to persons and property, directly from the laws of war, as established by the usages and dictates of nations, and the law of nations, which is the law of nature, as applied to war, and is derived to the conqueror by the conquest of the conquered, and by the laws of war, and that which is in the hands of the conqueror is established over an enemy's territory during its military possession. His government is immediately established over the conquered, and is subject to all the restrictions of public law in its intercourse with the conqueror, and the conqueror's government is immediately established over the conquered and is subject to all the restrictions of public law. It is the duty of the conqueror to occupy and govern the territory wrested from his enemy, and the government of the conqueror is immediately and necessarily established by the laws of nations. The conqueror gains the right over the conquered, both in respect to persons and property, directly from the laws of war, as established by the usages and dictates of nations, and the law of nations, which is the law of nature, as applied to war, and is derived to the conqueror by the conquest of the conquered, and by the laws of war, and that which is in the hands of the conqueror is established over an enemy's territory during its military possession. His government is immediately established over the conquered, and is subject to all the restrictions of public law in its intercourse with the conqueror, and the conqueror's government is immediately established over the conquered and is subject to all the restrictions of public law.

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