

## § 16 The Citizenship Duality

*Alvin Padilla-Babilonia\**

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### *I. Introduction*

Citizenship is a contested concept full of irresolvable contradictions. On the one hand, citizenship embodies a commitment to equality and full membership in a political community.<sup>1</sup> Under the ‘Marshallian paradigm’, based on T.H. Marshall’s classic *Citizenship and Social Class*, all citizens should be entitled to civil, political and social rights to become equal

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1 TH Marshall, ‘Citizenship and Social Class’ in TH Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto Press 1992 [1950]).

members. This is the standard account of citizenship; one that conceptualizes it as a source of rights and full membership. On the other extreme, however, citizenship is also a tool to facilitate governability and to homogenize diverse populations. Citizenship, then, is not only a source of rights, but also an instrument of power; an ‘institution of domination and empowerment’.<sup>2</sup>

Because of this duality, citizenship is a fertile ground for exploring the topic of this book: the relationship between law, objectivity, and power. In particular, this chapter will examine the dialectical relationship between citizenship as a source of rights and full membership, and citizenship as an instrument of power. This categorization is not new and has parallels in social theory and legal scholarship.<sup>3</sup> What is often overlooked, however, is what ‘order and meaning’ can be found within these two seemingly contradictory sides of citizenship.<sup>4</sup> Here, the focus on their structural relationship, will illustrate how the idea of full citizenship can both undermine and reproduce the power dynamics and social inequalities between individuals and states. This citizenship duality will be revealed through the relationship between citizenship and colonialism in the United States of America.

This chapter will proceed in three parts. The first two parts sketch the historical foundations of these two conceptions of citizenship and illustrate their presence in the formation of the nation-state. Part I examines how citizenship, since its birth as a political concept in Ancient Greece, has been tied to notions of equality, rights and membership. It was not

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2 Engin F Isin, ‘Citizenship in Flux: The Figure of the Activist Citizen’ (2009) 29 *Subjectivity* 367, 371.

3 Ediberto Román uses the concepts of ‘citizenship dialectic’ and ‘duality’ to describe the coexistence of full citizenship and exclusionary citizenship. While similar, my focus here is how the discourse of full citizenship and citizenship as an instrument of power, which goes beyond its exclusionary character, can be mutually self-reinforcing. See Ediberto Román, ‘The Citizenship Dialectic’ (2006) 20 *Georgetown Immigration LJ* 557, 562 (2005). For a recent dialectical argument on how citizenship is both emancipatory and oppressive, see Christiaan Boonen, ‘Étienne Balibar On the Dialectic of Universal Citizenship’ (2021) 0 *Phil & Soc Crit* 1.

4 See Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harv L Rev* 1685, 1712 (‘The method I have adopted in place of contextualization might be called, in, a loose sense, dialectical or structuralist or historicist or the method of contradictions. One of its premises is that the experience of unresolvable conflict among our own values and ways of understanding the world is here to stay... But ... there is order and meaning to be discovered even within the sense of contradiction.’).

until the 1950s, however, that T.H. Marshall first canonized the idea that citizenship guarantees certain civil, political and social rights that are crucial for full and equal membership in a community. Ironically, while the ‘Marshallian paradigm’ gained much notoriety throughout the second half of the twentieth century, during this time citizenship as a source of rights was also challenged on two grounds. First, because of the proliferation of international and human rights agreements, the creation of supranational governments, and globalization and transnational movement, personhood and residence, rather than citizenship, became the key source of rights. Second, it was apparent that formal citizenship coexisted with discrimination on the basis of race, gender, class, and ethnicity. Despite the rhetorical popularity of citizenship as a source of rights, the ideal of full citizenship lived rather comfortably alongside forms of second-class citizenship.

According to the discourse of full citizenship, unequal membership based on gender and race is eventually superseded by the rhetorical strength of citizenship as a source of rights and equality. Yet since Roman times, full and unequal citizenship are co-constitutive of each other and legal citizenship has been used as an instrument of power to facilitate governing diverse populations and territories. Part II explores the historical basis of this conception of citizenship. It also provides different examples of how nation-states use citizenship as an instrument of power. As with Part I, Part II concludes with two challenges to the power-dimension of citizenship. First, while states might impose citizenship with certain policy objectives in mind, because citizenship is ‘performed’ and a tool for ‘claims-making’, individuals can reclaim their citizenship and assert their right to full citizenship.<sup>5</sup> Second, if pushed to the limit, the idea of citizenship as a mere instrument—exemplified by external citizenship and investor citizenship—could lead to the devaluation of the concept of citizenship, limiting its ability to work as an instrument of power.

The third and final part applies these concepts to two case studies in order to illustrate how both sides of citizenship interact and reinforce one another. Accordingly, Part III examines the dual nature of citizenship for the Indigenous peoples and territories of the United States of America, such as Puerto Rico. For these groups, U.S. citizenship is ‘just another tool of the conqueror’ contributing to ‘Native disappearance’, and a ‘crucial element in the reproduction of American hegemony among the Puerto Rican

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5 Isin (n 2) 370; Irene Bloemraad, ‘Theorising the Power of Citizenship as Claims-Making’ (2018) 44 *J Ethnic & Mig Stud* 4.

population'.<sup>6</sup> While citizenship functioned as an instrument of power to erase their collective identity, citizenship was reclaimed by Native Americans and Puerto Ricans as a symbolic reference for claims for more rights and equal membership. Through this process, citizenship transformed the political identity of these groups; from one based on collective identity and self-determination to one grounded on national identity and individual rights. By reclaiming citizenship, Native Americans and territorians strived to undermine the unequal membership. However, they also reinforced the power relation between state and community by providing one final step toward the erasure of their distinct political identity. In that regard, the 'Americanization' imposed by citizenship as an instrument of power was fortified, not diminished, by the discourse of citizenship as a source of equal and full membership.

## II. *Citizenship as a Source of Rights and Full Membership*

Citizenship, as a concept, is known for its indeterminacy and multiplicity.<sup>7</sup> The word 'citizenship' is used as synonymous with nationality, to describe the members with political rights, as the highest normative ideal within a society, or simply as the freedom to leave and return. Moreover, citizenship creates a bond between a state and its members that produces legal duties and demands. These duties include the duty to pay taxes, serve in the military, and obey the law, among others.<sup>8</sup> Common usage of the term usually does not distinguish between these and many other meanings. My focus on rights and power does not aim to 'split' citizenship into two elements or to provide a complete descriptive account of citizenship, but rather to showcase how they reinforce one another. As these genealogies will illustrate, neither full and equal citizenship nor citizenship as an instrument of power respond exclusively to one of the three main

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6 Stephen Kantrowitz, 'White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment' (2020) 10 J Civ War Era 29, 31, 45; Efrén Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (APA 2001) 145.

7 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995).

8 Richard Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights' (2015) 21 Eur LJ 558.

citizenship traditions: republicanism, liberalism, and ethno-nationalism.<sup>9</sup> Instead, both concepts – which can take multiple and contradictory shapes – borrow from each of these citizenship traditions.<sup>10</sup>

### 1. Historical foundations

Citizenship as a source of rights and full membership has a long history. In Ancient Greece the citizen was, according to Aristotle, the ‘one who both rules and is ruled’.<sup>11</sup> Citizenship meant active participation in the political community. The citizen acted according to the best interests of the public realm (*polis*), instead of his economic self-interest or the private realm (*oikos*). This republican tradition of citizenship, which can also be described as political citizenship, equated citizenship with political activity, through voting and holding public office.<sup>12</sup> Because of the importance of the economic independence of the citizen for political participation, republican citizenship was premised on the exclusion of women and slaves. Accordingly, this classical conception of citizenship was not only republican, but also ascriptive, in ways that anticipate the ethno-national conception of citizenship based on common ancestors, race, language and religion, to the exclusion of others who do not share these traits. A republican conception of citizenship, therefore, went hand-in-hand with ascriptive notions. Citizens were full members of the community, but only by limiting citizenship to a select few.

While closely identified with the city-state of Ancient Greece, this republican citizenship is not tied to any one form of political organization. It started with the Greek city-state, then transformed itself during the Roman Empire, until finally becoming a key component of the nation-state in modern times.<sup>13</sup> In fact, it was during Roman times that republican

9 Kenneth A Stahl, *Local Citizenship in a Global Age* (CUP 2020) 21. See also Rogers M Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale UP 1997) 3.

10 See Michael Mann, ‘Ruling Class Strategies and Citizenship’ (1987) 21 Soc 339, 340 (discussing other citizenship traditions beyond liberalism, republicanism and ethno-nationalism).

11 JGA Pocock, ‘The Ideal of Citizenship Since Classical Times’ in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press 1995) 29, 30–31.

12 Christian Joppke, ‘The Instrumental Turn of Citizenship’ (2019) 45 J Ethnic & Mig Stud 858.

13 Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 Ind J Glob L Stud 447, 472–473.

citizenship came to be associated with institutional forms – the rule of law, separation of powers, representative democracy – that outlasted the Romans.<sup>14</sup> During this process, however, the republican model was soon supplemented by a legal model of citizenship, also referred to as liberal citizenship, which conceptualized citizenship as a source of rights.<sup>15</sup> This liberal conception came along as political communities became more ‘populous, diverse, and geographically dispersed’, in contrast with the city-state of Ancient Greece.<sup>16</sup> Citizens were granted certain rights and benefits that were denied to noncitizens, among them, the right to marry another citizen, to pay lower taxes, and to trade.<sup>17</sup> For the liberal ideal of citizenship, conceptualized later on by John Locke, citizenship was synonymous with the protection of natural rights, among them, the right to private property, rather than civic participation.<sup>18</sup> Protection of the private sphere and economic self-interest became the central theme of liberal citizenship. In addition to individual rights, liberalism also emphasized equality under the law. This idea of equality eventually led to the elimination of property qualifications for voting, which were previously defended on the republican grounds that landless people were not independent.

While the republican tradition emphasized political membership, the liberal tradition focused on rights. Both traditions capture crucial elements of citizenship as a source of rights and full membership. A third tradition – ethno-nationalism – intensified the ascriptive notions that previously precluded certain groups from republican and liberal citizenship. After the international recognition of nation-states after the Peace of Westphalia of 1648, citizenship coupled together nation and state without presupposing neither rights nor political participation.<sup>19</sup> Instead, citizenship worked as an ‘international filing system, a mechanism for allocating persons to states’,<sup>20</sup> which was mutually recognized by other states.<sup>21</sup> Through the establishment of nation-states, citizenship policies became internally

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14 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999) 284-285; Peter Riesenberg, *Citizenship in the Western Tradition* (U North Carolina 1992) 56–57.

15 Joppke (n 12) 860.

16 Stahl (n 9) 24.

17 Derek Heater, *A Brief History of Citizenship* (New York UP 2004) 31.

18 Stahl (n 9) 24.

19 Rainer Bauböck, ‘Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship’ (2019) 45 *J Ethnic & Mig Stud* 1015.

20 Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard UP 1992) 31.

21 Bauböck (n 19).

inclusive, while externally exclusive.<sup>22</sup> As a final step in this history, the two nation-states that followed the American and the French Revolutions reconceptualized citizenship, ‘based on the principles of fundamental legal equality among members of a political community’.<sup>23</sup> The modern discourse of citizenship as a source of rights and full and equal memberships was, therefore, shaped by each of these traditions and historical developments.

## 2. Social and legal scholarship

Despite the ubiquity of citizenship as a source of rights and full membership, citizenship as a subject was only addressed ‘peripherally in classic social theory’.<sup>24</sup> This omission in contemporary scholarship ended with the publication of *Citizenship and Social Class*, by British sociologist T.H. Marshall. Marshall’s essay, which began as a series of lectures at Cambridge, makes two main contributions to the idea of full citizenship. First, Marshall equates citizenship with ‘full membership’ in a community, and ‘the principle of equality’.<sup>25</sup> Second, Marshall broke down citizenship into three parts or elements – civil, political, and social rights – each corresponding to a century of English history from the eighteenth to the twentieth century. The eighteenth century saw the development of civil rights, those ‘necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice’.<sup>26</sup> Meanwhile, political rights, such as voting or holding public office, were expanded in the nineteenth century by extending the franchise beyond property owners. This century of political rights culminated with the Act of 1918, which abolished property qualifications for men, and enfranchised certain women. Finally, Marshall associates the twentieth century with the rise of social rights, among them, the right to economic welfare, security, and the right to education.

While this tripartite interpretation of citizenship has become conventional in scholarship, Marshall was the first to thoroughly link these rights with the concept of citizenship by studying their consecutive development

22 Brubaker (n 20).

23 Dieter Gosewinkel, ‘Introduction: Neither East nor West’ (2009) 16 *Eur Rev History* 499.

24 Christian Joppke, *Citizenship and Immigration* (Polity 2010) 9.

25 Marshall (n 1) 6, 8.

26 *ibid* 8.

in English history. Political rights were first seen as the embodiments of citizenship. Later on, social rights, especially education, were considered more significant and as preconditions for the true exercise of political rights. Today, Marshall's paradigm still dominates public discourse, as we can see by the desire to add cultural, economic, sexual and ecological rights to the canonical civil, political and social rights.<sup>27</sup>

Marshall made famous the idea of citizenship as a source of rights and full membership. Soon after, the term 'citizenship' became increasingly important as a way to conceptualize rights and the principle of equality among the members of a political community. In his dissenting opinion in *Perez v. Brownell*, Chief Justice Warren stated that '[c]itizenship is man's basic right for it is nothing less than the right to have rights'.<sup>28</sup> This idea of citizenship as the 'right to have rights' was famously popularized by Hannah Arendt,<sup>29</sup> and is still one of the most common articulations of citizenship.<sup>30</sup> In the American context, for instance, Charles Black derived the various rights recognized by the Warren Court—to vote on equal terms, to be treated fairly, to a private life—from a structural conception of American citizenship.<sup>31</sup> This tradition of equating citizenship with full and equal membership continued with scholars such as Kenneth Karst and Judith Shklar.<sup>32</sup>

### 3. Challenges to citizenship as a source of rights and full membership

The Marshallian tradition of citizenship faces challenges from two sides. On one hand, the advent of international human rights, supranational citizenship, globalization and transnational movement, blurred the line

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27 Bosniak (n 13) 464.

28 356 US 44, 64 (1958).

29 Hannah Arendt, *The Origins of Totalitarianism* (rev edn, Harcourt 1976) 296. For stateless persons, in particular, the right to citizenship means the right to be part of a political community.

30 Margaret R Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (CUP 2008).

31 Charles L Black, 'The Unfinished Business of the Warren Court' (1970) 46 Wash L Rev 3, 8–10.

32 Kenneth L Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale UP 1989); Judith N Shklar, *American Citizenship: The Quest for Inclusion* (Harvard UP 1991).



between citizens and noncitizens, especially as it relates to rights.<sup>33</sup> On the other side, formal citizenship itself is not enough to guarantee equal membership in a political community, as it is shown by the current and historical treatment of women, racial and ethnic minorities, indigenous and LGBTQ communities, among many others. Accordingly, the discourse of citizenship as a source of rights and full membership masked the many limitations of citizenship to address social inequality.

#### a. Non-exclusiveness

Today, holding legal citizenship is increasingly less important for the enjoyment of the traditional rights of citizenship, among them, protection by the state, and political, social and economic rights. Because of international human rights, regional and supranational citizenship, residence and personhood are often more important than citizenship for access to rights. Although the degree to which personhood has displaced citizenship as a source of rights is often overstated,<sup>34</sup> '[h]uman rights have come to provide a vocabulary for making moral claims'.<sup>35</sup> Since the 1970s, human rights have fundamentally transformed our self-perception as rights-bearing individuals.<sup>36</sup> This has led Yasemin Soysal and David Jacobson to assert that we are currently experiencing a 'post-national citizenship'.<sup>37</sup>

When international human rights are not self-enforcing, states often provide noncitizens civil and social rights, and even local voting rights. Without explicitly invoking international human rights, constitutional courts often refuse to use the noncitizen status as a basis to deny access to important social rights, such as education. For example, the Supreme Court of the United States struck down a state law that denied education to noncitizens.<sup>38</sup> The decision recognizes that education is a necessary precondition to become an equal member, as Marshall once stated, but refused to limit that right to legal citizens.

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33 Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol UP 2020) 151.

34 Joppke (n 24) 22.

35 Bosniak (n 13) 468.

36 Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard UP 2010) 106.

37 Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago UP 1994) 12; David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins UP 1996).

38 *Phyller v Doe*, 457 US 202 (1982).

Even noncitizen voting rights are defended as part of the commitment to 'global human rights norms'.<sup>39</sup> In fact, a few states, like Chile, New Zealand and Uruguay, recognize national voting rights for noncitizens, regardless of their openness or perceptions of immigrants.<sup>40</sup> Moreover, many states recognize regional or local voting rights. Finally, while some federal systems (e.g. Germany and Austria) forbid state governments from recognizing state voting rights to noncitizens, others (e.g. United States and Switzerland) allow the regional governments (state and cantonal) to decide—an important example of the regional and local spheres of citizenship.<sup>41</sup>

In addition to international human rights, supranational organizations, such as the European Union, have also transformed the meaning of citizenship. While European citizenship seems to operate under the Marshallian paradigm of articulating citizenship as the source of rights, it also challenges the exclusive claim of nation-states of defining their citizenry and their corresponding rights. One of the most significant examples is the right of European citizens to vote and run for office in the municipal elections of the Member-State in which they reside, regardless of whether they are national citizens.<sup>42</sup> Moreover, EU passports allows EU citizens to enter and return to any of the Member States, one of the key features of national citizenship. In this regard, European citizenship has often displaced national citizenship as the main source of rights and membership.

### *b. Not enough*

But the non-exclusiveness of national citizenship is not the only threat to the Marshallian paradigm. Legal citizenship often does not carry rights or full and equal membership in a political community. Instead, citizens only hold a *second-class citizenship* where they are denied rights and equality. For Iris Marion Young, second-class citizenship is the consequence of the 'universality of citizenship', under which equality only means sameness and homogeneity.<sup>43</sup> This leads to 'cultural assimilation', which can mean

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39 Jamin B Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141 U Pa L Rev 1391, 1457.

40 Cristina M Rodríguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8 I•CON 30, 49.

41 *ibid*; Shaw (n 33) 41–42.

42 Article 40 of the Charter of Fundamental Rights of the European Union.

43 Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 Eth 250, 255.

the alteration or elimination of a group's identity.<sup>44</sup> Rather than measure women, gender, and ethnic minorities against the White male 'universal' citizen, politics should adopt the concept of *differentiated citizenship* to 'realize the inclusion and participation of everyone in full citizenship'.<sup>45</sup> Moreover, Young argued that if the proponents of the expansion of citizenship ignore how citizenship enforces sameness, they will 'implicitly support the same exclusions and homogeneity'.<sup>46</sup> In other words, claims of full citizenship could perpetuate, rather than disrupt, the use of citizenship as an instrument of power.

The United States of America provides one of the better-known examples of how second class-citizenship coexisted with the rhetoric of full citizenship. The Fourteenth Amendment to the U.S. Constitution was adopted to compel the states to obey the Bill of Rights and 'protect all rights of citizens'.<sup>47</sup> Soon after, however, the Supreme Court denied any prospect of equalitarian citizenship. First, it denied that the Amendment, through its privileges or immunities of the national citizens, provided any source of rights against the states.<sup>48</sup> Then it decided that, even though women were U.S. citizens since the founding, they did not possess the right to vote.<sup>49</sup> Most famously, cases like *Plessy v. Ferguson* and *Giles v. Harris* denied African Americans full equal status, rendering the Fourteenth Amendment essentially meaningless for black emancipation.<sup>50</sup>

This second-class citizenship status is in no way limited to the United States. For example, the American model of second-class citizenship influenced the Nuremberg Laws enacted by Nazi Germany in 1935.<sup>51</sup> Likewise, in Australia, 'legal citizenship status has not always accorded full and equal membership rights, as the position of the Aboriginal people illustrates'.<sup>52</sup> Even though indigenous Australians were formal citizens, they 'were denied the most basic rights of citizenship, such as voting and

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44 *ibid* 272.

45 *ibid* 250–251.

46 *ibid* 251.

47 Michael K Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke UP 1986) 15.

48 *Slaughter-House Cases*, 83 US (16 Wall) 36 (1873).

49 *Minor v Happersett*, 88 US (21 Wall) 162 (1875).

50 163 US 537 (1896); 189 US 475 (1903).

51 James Q Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton UP 2018) 37–43.

52 Kim Rubenstein & Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 (2) *Ind J Glob L Stud* 519, 523.

travel'.<sup>53</sup> Unfortunately, this pattern of second-class citizenship is still common in many democracies. Today, Indigenous Australians, residents of British Overseas Territories, and Muslims in India are excluded from full and equal citizenship.<sup>54</sup> The non-exclusiveness of state-based citizenship and its willingness to coexist with other forms of inequality challenge the Marshallian idea that national citizenship is the source of rights and that it means full and equal membership in a community.

### III. *Citizenship as Instrument of Power*

Post-national and transnational understandings of citizenship pose a challenge to state-based citizenship as a source of rights and full membership. Moreover, the rhetoric of full citizenship comes up short in tackling racial, gender, ethnic and class inequalities. Are these forms of second-class citizenship inconsistent with the truer understanding of citizenship as a source of rights and full membership? Or do they reveal how citizenship can be an instrument of power because it can mask those inequalities? As with the previous section, the objective here is not to essentialize citizenship as only a source of rights and an instrument of power. Instead, this analysis of the historical foundations, scholarship and challenges of citizenship as an instrument of power aims to illustrate how these two notions often reinforce one another in political discourse, as will become clearer with the examples of the third and final part.

#### 1. *Historical foundations*

The historical foundations of citizenship as an instrument of power parallels the development of citizenship as a source of rights and full membership. As mentioned above, political citizenship, the human as *zoon politikon*, was limited to a very few adult males who would participate actively in political life in Ancient Greece or the Roman Republic. Meanwhile, legal citizenship, the human as *legalis homo*, extended far and wide, but did not carry the expectation that all citizens participate collectively in ruling each other. Under these circumstances, a citizen could not rule, if to rule 'meant determining what the law of the community should be; there

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<sup>53</sup> *ibid.*

<sup>54</sup> Shaw (n 33) 143, 164–165, 215–216.

was no assembly of all mankind'.<sup>55</sup> Instead, the citizen was the member of a community of laws, the one who, as the bearer of 'rights' – most importantly, the right to property – was 'constituted by them'.<sup>56</sup>

The idea of citizenship as an instrument of power owes much to this legal conception of citizenship. The Roman expansion of the fourth century BC was not the sole result of Rome's military power; while 'not sufficiently stressed by modern scholars', Rome's growth owes as much to 'remarkable development of legal mechanisms and techniques'.<sup>57</sup> Chief among these is the creation, for the first time in history, of 'a kind of second class or semi-citizenship'.<sup>58</sup> More than two thousand years before European empires elaborated similar schemes, Rome extended Roman citizenship during their conquests.<sup>59</sup> For instance, the residents of the conquered city of Tusculum 'were offered full Roman citizenship while maintaining their own municipal form of government'.<sup>60</sup> In 338 BC, however, the residents of other cities, such as Latium and Campania, were granted a form of second-class citizenship.<sup>61</sup> They were citizens with civil rights (such as, the right to trade or to marry a Roman), but without political rights, such as the right to vote or hold office. This *civitas sine suffragio*, or citizenship without the vote, 'hollowed out the very essence of the *civitas*'.<sup>62</sup> It seemed to contradict the very notion of citizenship as full membership in a political community.

Instead, Roman legal citizenship redefined the concept of citizenship to legitimize Roman rule and facilitate governability.<sup>63</sup> Rather than a one-size-fits-all approach, this citizenship was 'imperial, universal, and multi-form'.<sup>64</sup> The decision to grant forms of second-class citizenship vis-à-vis full citizenship was just one of the ways the law was used as an instrument of power. While full citizenship was granted to groups that shared 'a strong, cultural, linguistic, and most likely legal affinity with Rome,' it was denied those peoples 'more distant from Rome both geographically

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55 Pocock (n 11) 38.

56 *ibid* 44.

57 Luigi Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth* (CUP 2014) 97.

58 Heater (n 17) 33.

59 *ibid*.

60 *ibid*.

61 Capogrossi Colognesi (n 57) 122–123.

62 *ibid*.

63 Elizabeth F Cohen, *Semi-Citizenship in Democratic Politics* (CUP 2009) 106.

64 Pocock (n 11) 37.

and culturally'.<sup>65</sup> Roman legal citizenship, therefore, was an instrument of power, of forced assimilation, that was eventually reproduced by the modern nation-state.

## 2. Social and legal scholarship

While often overlooked, the idea that citizenship is an instrument of power, rather than a source of full membership, lies latent in classical sociological theory. In *On the Jewish Question*, Karl Marx associates citizenship with the 'sophistry of the political state itself'.<sup>66</sup> For Marx, as understood by Jeffrey C. Isaac, citizenship conceals class inequalities and 'elevates' the alienated individual, but without providing 'real and effective equality'.<sup>67</sup> Echoing Marx one hundred years later, T.H. Marshall asserts that 'citizenship has itself become, in certain respects, the architect of legitimate social inequality'.<sup>68</sup> However, according to Marshall, citizenship also embodies equality and social rights aimed at redressing the inequalities of capitalism. This ambiguity suggests that, for Marshall, citizenship simultaneously masks and rectifies class inequalities; functioning as both an instrument of power and a source of rights.

Following Marx, Michael Mann views citizenship policies – among them, decisions regarding civil, political or social rights – as 'ruling class strategies' and 'concessions' to ameliorate social conflict.<sup>69</sup> Mann presents a more complex picture under which citizenship rights need not follow Marshall's evolutionary process. While Nazi Germany and the Soviet Union provided social rights without civil or real political rights, the United States recognized civil and political rights, but without meaningful social rights. For Bryan S. Turner, however, Mann presents a view of citizenship strategies from above that ignores 'any analysis of citizenship from below'.<sup>70</sup> The idea of 'rights as privileges handed down from above in return of pragmatic cooperation', must be contrasted with the idea of 'rights

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65 Capogrossi Colognesi (n 57) 104.

66 Karl Marx, 'On the Jewish Question' in Michael W Foley and Virginia Ann Hodgkinson (eds), *The Civil Society Reader* (New England UP 2009) 103.

67 Jeffrey C Isaac, 'The Lion's Skin of Politics: Marx on Republicanism' (1990) 22 *Polity* 461, 476.

68 TH Marshall (n 1) 7.

69 Mann (n 10) 340.

70 Bryan S Turner, 'Outline of a Theory of Citizenship' (1990) 24 *Soc* 189, 199.

as the outcome of radical struggle by subordinate groups for benefits'.<sup>71</sup> Social movements, moreover, contribute to the 'expansion of citizenship from below'.<sup>72</sup> In contrast to Marx and Mann, for Turner, 'citizenship does not have a unitary character',<sup>73</sup> it can be both—a ruling strategy from above and a source of rights from below.

Both Mann and Turner, however, agree on the historically contingent nature of citizenship. Whereas for some time citizenship signified belonging to a city (a fact emphasized by Max Weber in *The City*) it was later reconceptualized in terms of nationality.<sup>74</sup> Nationality provided an answer to the question of how to provide unity and solidarity once the scale of citizenship moved from the city to the state. Nationality was one of the two solutions – the other being citizenship as human identity – given by Durkheim when he examined how states were to survive the decline of religion, in itself a source of integration.<sup>75</sup> Recognizing the links between citizenship and nationhood, Rogers Brubaker described citizenship law as 'an instrument of social closure'.<sup>76</sup> Through formal citizenship, states assert the exclusive claim to define who is a member within its borders. In that sense, citizenship is both 'internally inclusive' and 'externally exclusive'.<sup>77</sup> The resulting citizenry is usually conceived as a nation that is enclosed within a territory.<sup>78</sup>

Despite its legal significance, then, citizenship 'is not simply a legal formula', but 'an increasingly salient social and cultural fact'.<sup>79</sup> As we have seen in our earlier example, Roman citizenship played a central role in the process of 'Romanization' and eventual elimination of earlier Italian traditions and cultures. According to Rogers Smith, citizenship laws 'proclaim the existence of a political 'people' and designate who those persons are as a people, in ways that often become integral to individuals' senses of

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71 *ibid.*

72 *ibid* 200.

73 *ibid* 201.

74 Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton UP 2004) 37.

75 Bryan S Turner, 'Contemporary problems in the theory of citizenship' in Bryan S Turner (ed), *Citizenship and Social Theory* (Sage 1993); Joppke (n 12) 858–859. See also Emile Durkheim, *Professional Ethics and Civil Morals* (rev edn, Routledge 1992).

76 Brubaker (n 20) 21.

77 *ibid* 72.

78 *ibid* 21–22.

79 *ibid* (n 20) 22.

identity as well'.<sup>80</sup> As such, citizenship policies contribute to our 'stories of peoplehood'.<sup>81</sup> Moreover, through citizenship promotion, nation-states 'resolve and foreclose debates about the legitimate right of the state to rule over all of the citizens and territory of the state'.<sup>82</sup>

### 3. Mapping citizenship law as an instrument of power

Because of the identity dimension of citizenship, changes in citizenship law should impact 'belongingness' described by Michael Walzer as 'not merely the sense, but the practical reality, of being at home in (this part of) the social world'.<sup>83</sup> Because of the individual need for belongingness, through citizenship policies nation-states can use citizenship as an instrument of power. Citizenship policies include the three essential elements of formal citizenship law: acquisition, relinquishment, and rights derived from citizenship.<sup>84</sup> Since the rights component of citizenship was already discussed, this section focuses on the rules for acquiring and relinquishing citizenship, and how they influence belongingness and serve as instruments of power.

The rules of acquiring citizenship include the process of naturalization for noncitizens, and also birthright citizenship through either birthplace (*jus soli*), parentage (*jus sanguinis*), or both. Naturalization policies function as a 'gatekeeper'.<sup>85</sup> While the elimination of ethnic and racial restrictions for naturalization is part of the de-ethnicization of citizenship, probity and self-sufficiency tests could serve as a subterfuge for the exclusion of certain groups.<sup>86</sup> Naturalization rules – residence requirements, language proficiency, knowledge of civic culture – compel noncitizens to assimilate or

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80 Smith (n 9) 31.

81 Rogers M Smith, *Political Peoplehood* (Chicago UP 2015) 2.

82 Will Kymlicka, 'Multicultural citizenship within multination states' (2011) 11(3) *Ethnicities* 281, 287.

83 Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983) 106.

84 Roger M Smith, 'The Unresolved Constitutional Issues of Puerto Rican Citizenship' (2017) 29 *Centro Journal* 56, 58.

85 Liav Orgad, 'Naturalization', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 337.

86 Christian Joppke, 'Citizenship between De- and Re-Ethnicization' (2003) 44 (3) *Eur J of Soc* 429; Shaw (n 33) 55.



acculturate themselves to the primary group before becoming a citizen.<sup>87</sup> Moreover, many states still distinguish between birthright and naturalized citizenship, with lesser protections and rights for the latter.

The choice between *jus soli* and *jus sanguinis* can also impact the sense of belongingness to the nation-state. For instance, Brubaker argued that the differences in acquiring citizenship in France, through birthplace (*jus soli*), and Germany, through parentage (*jus sanguinis*), illustrated how the French model of citizenship was assimilationist, while the German model was differentialist.<sup>88</sup> Regardless of the merits of that particular distinction, there is no doubt that the many legislative choices regarding *jus soli* and *jus sanguinis* – adoption of *double jus soli*, gender restrictions on *jus sanguinis*, among others – can manifest how citizenship is an instrument of social closure.

Finally, the renunciation or relinquishment of citizenship includes rules regarding the voluntary abandonment of citizenship and the revocation of citizenship. Citizenship deprivation – often justified in terms of national security and public safety – is one of the clearest examples of citizenship as an instrument of power.<sup>89</sup> The medieval idea of banishment has been revitalised in recent years through executive sanctions with limited judicial review.<sup>90</sup> The main debate concerns the stripping of citizenship in the case of terrorism. In Canada, for instance, constitutional courts have validated citizenship stripping for convicted terrorists.<sup>91</sup> Meanwhile, in the United States, because the Supreme Court has narrowed the acts that amount to the renunciation of citizenship,<sup>92</sup> the controversy has turned, instead, on whether the individuals obtained their citizenship unlawfully.<sup>93</sup>

This element of citizenship also includes the measures governing dual citizenship: whether one can be a citizen of two or more states. Until the 1960s, the international consensus was against the recognition of dual citizenship. Soon after, however, there was great liberalization of the

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87 Thomas Faist, 'Transnationalization in International Migration: Implication for the Study of citizenship and culture' in Rainer Bauböck (ed), *Transnational Citizenship and Migration* (Routledge 2017) 177, 199.

88 Brubaker (n 20) 3.

89 Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 *Eur J of Mig* 222.

90 Ivó Coca-Vila, 'Our "Barbarians" at the Gate: On the Undercriminalized Citizenship Deprivation as a Counterterrorism Tool' (2020) 14 *Criminal L and Philosophy* 149.

91 *Galati v Canada* (Governor General), [2015] FC 91.

92 *Afroyim v Rusk*, 387 US 253 (1967); *Vance v Terrazas*, 444 US 252 (1980).

93 See *US v Iyman Faris*, 2020 WL 532890 (SD Illinois).

rules limiting dual citizenship. While defended as a human right,<sup>94</sup> dual citizenship policies are a clear example of the ‘power politics’ and the ‘re-ethnicization’ of citizenship, especially in the context of diaspora communities.<sup>95</sup> Diaspora encompasses the nationals that left the state or left the territory before it was recognized as a state. Diaspora policies may include the recognition of external citizenship and external voting rights.<sup>96</sup> Through these policies, states create transborder populations, while preserving the power to disconnect them from the political community.<sup>97</sup>

These diaspora policies illustrate the dialectical relationship between the two sides of citizenship. For example, the Hungarian citizenship law of 2011 recognized the dual citizenship and voting rights of ethnic-Hungarians residing outside of Hungary.<sup>98</sup> But this inclusion towards the diaspora was not incompatible with exclusion towards noncitizens residing in Hungary. In fact, these politics of inclusion and exclusion actually reinforced each other. While citizenship is a source of rights for non-resident Hungarians, it is also used as an instrument of power to promote an ethno-nationalist conception of Hungarian citizenship and to exclude noncitizens residing in Hungary. Through dual citizenship policies, states can ‘include absent ethnic kin and emigrant diasporas, revive territorial claims, and even justify the denationalization of undesirable persons’.<sup>99</sup>

Each of these components of citizenship law – acquisition, relinquishment, and rights – contribute to both citizenship as a source of rights and citizenship as an instrument of power, since they influence the effectiveness of citizenship law in building a common sense of membership and belonging.<sup>100</sup>

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94 Peter J Spiro, ‘Dual Citizenship as Human Right’ (2010) 8 I•CON 11.

95 Heino Nyssören and Jussi Metsälä, ‘Dual Citizenship as Power Politics: The Case of the Carpathian Basin’ (2019) 76 Eur Ethnica 50; Joppke, ‘Citizenship between De- and Re-Ethnicization’ (n 86).

96 Joppke (n 12) 869.

97 Rogers Brubaker and Jaeeun Kim, ‘Transborder Membership Politics in Germany and Korea’ in Rainer Bauböck (ed), *Transnational Citizenship and Migration* (Routledge 2017).

98 Szabolcs Pogonyi, ‘The Passport as Means of Identity Management: Making and Unmaking Ethnic Boundaries Through Citizenship’ (2018) 45 J Ethnic & Mig Stud 975.

99 Yossi Harpaz and Pablo Mateos, ‘Strategic Citizenship: Negotiating Membership in the Age of Dual Nationality’ (2019), 45 J Ethnic & Mig Stud 843, 853.

100 However, recent empirical research questions whether variances in citizenship law – the rules of acquisition, relinquishment, and rights – can make a difference at building a sense of national belonging. See Kristina Bakkaer Simonsen,

#### 4. Challenges to citizenship as an instrument of power

Citizenship can be an instrument of power in several ways: when nation-states compel citizens to fulfil their duties; when access to full citizenship is conditioned upon assimilation; when citizenship is denied or stripped; when external and dual citizenship solidify an ethno-national conception of the state, among many others. Yet, instrumentalizing citizenship can have two unintended consequences. The first one is that citizenship is performed and reclaimed. In that sense, while nation-states can grant or deny citizenship as a way to legitimate power and facilitate governability, citizens and even noncitizens can act and perform citizenship as a source of rights and full membership to make demands on the state. The second one is that exploiting citizenship as an instrument of power can, in fact, diminish its instrumental value and its salience.

##### a. Reclaiming citizenship

Even if citizenship is imposed to forcefully assimilate a population or to compel the fulfilment of its duties, citizenship can be reclaimed and repurposed to make demands. According to Engin F. Isin, the idea of ‘performative citizenship’ describes how individuals perform their citizenship through contestation and making claims.<sup>101</sup> Citizenship should be understood as a concept that is ‘in flux’ and ‘dynamic’.<sup>102</sup> Citizenship cannot be reduced to ‘empowerment’ (that is, citizenship as a source of rights and full membership), nor to ‘domination’ (that is, citizenship as an instrument of power).<sup>103</sup> Instead, ‘[c]itizenship can be both domination and empowerment separately or simultaneously’.<sup>104</sup>

Whereas citizenship as an instrument of power suggests a ‘top-down relationship between the state and individuals’, the ideas of performative and cultural citizenship are bottom-up approaches that ‘focus on practice,

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‘Does Citizenship Always Further Immigrants’ Feeling of Belonging to the Host Nation?’ (2017) 5(3) *Comp Mig Stud* 1.

101 Engin Isin, ‘Performative Citizenship’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 501.

102 Isin, ‘Citizenship in Flux: The Figure of the Activist Citizen’ (n 2) 377.

103 *ibid* 369.

104 *ibid*.

participation and belonging'.<sup>105</sup> Citizenship, then, can also be conceptualized as 'membership through claims-making'.<sup>106</sup> Even though there are forms of second-class citizenship, and rights are being de-coupled from legal citizenship, citizenship, as a social construct, retains a 'normative power'.<sup>107</sup> For Irene Bloemraad, this idea of citizenship as claims-making, while overlooked, has been present all along in T.H. Marshall's work, since he conceptualized citizenship as 'a *claim* to be accepted as full members of the society'.<sup>108</sup> Quoting Isin, Bloemraad asserts that we should ask ourselves 'what makes the citizen' (i.e. claiming rights), rather than 'who is the citizen' (i.e. full member).<sup>109</sup> When citizens claim rights and challenge government power, they undermine the idea of citizenship as an instrument of domination through the imposition of duties or assimilation.<sup>110</sup> To sum up, citizenship can be an instrument of power, but, paradoxically, the performance of citizenship subverts the power dynamics that formal citizenship law sought to preserve.

#### *b. Instrumental turn of citizenship*

The many examples of citizenship as an instrument of power – compelling loyalty and duties, assimilation, citizenship stripping, the re-ethnicization of citizenship through external citizenship – do not all work in the same way or follow the same internal logic. While for assimilation purposes the identitarian dimension of citizenship needs to be stressed, requiring military service or paying taxes do not require it to the same extent. However, some forms of citizenship as an instrument of power – for instance, dual and external citizenship – may also diminish the identity value of citizenship that is needed for assimilation. The 'instrumental turn of citizenship', understood as the way states and citizens use citizenship for their own

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105 Bloemraad (n 5) 4.

106 *ibid.*

107 *ibid* 5.

108 *ibid* 11 (citation omitted).

109 *ibid* 12 (citation omitted).

110 In a similar light, Chacón argues that noncitizens, by 'making claims to citizenship, also play an important role in shaping the meaning of citizenship'. Jennifer M Chacón, 'Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions' (2018) 52 UC Davis L Rev 1.

strategic reasons, can, therefore, undermine citizenship's resourcefulness as an instrument of power.<sup>111</sup>

The difference between political citizenship and legal citizenship is at the root of what Christian Joppke describes as the 'instrumental turn of citizenship'.<sup>112</sup> On the one hand, political citizenship, which was highly exclusive, was closely linked with the identity-dimension of citizenship. On the other hand, legal citizenship was more inclusive towards foreigners, but without requiring political participation. According to Joppke, the legal model of citizenship anticipated the 'parting of ways between status and identity' that is characteristic of instrumental citizenship.<sup>113</sup> If citizenship is more inclusive and less substantive, then legal citizenship and identity do not overlap as closely. Some of the examples of instrumental citizenship include investor citizenship, external citizenship and external voting rights (e.g. Hungary), and EU citizenship. These instrumental uses of citizenship are 'part of a general trend toward legal individualism in liberal societies', which 'reflects a weakening of the exclusive, loyalty commanding nexus between citizen and nation-state'.<sup>114</sup>

These separations between status and identity, between citizen and nation-state, could undermine the idea of citizenship as an instrument of power. Rainer Bauböck, however, argues that the instrumental value of citizenship and its non-instrumental identity value 'do not conflict, but complement each other'.<sup>115</sup> While Joppke sees multiple and external citizenship as an example of citizenship parting ways and disincentivizing identity, Bauböck argues that the toleration of dual citizenship since the 1960s recognizes the ways globalization has led people to 'develop genuine links to two or more states'.<sup>116</sup> Meanwhile, the full marketisation of citizenship would only radically change its nature and diminish its instrumental value. For coercive government to be legitimate, '[c]itizens must see governments as being *their* governments', which would not be possible under a fully marketized citizenship.<sup>117</sup>

Joppke and Bauböck distinguish between the instrumental value of citizenship and its identity value. But while Joppke sees them as currently parting ways, Bauböck argues that they go hand-in-hand. However, neither

111 Joppke (n 12).

112 *ibid.*

113 *ibid* 862, 873.

114 *ibid* 875.

115 Bauböck (n 19) 1021.

116 *ibid.*

117 *ibid* 1024.

examines another instrumental value of citizenship – how nation-states can use legal citizenship, in the Roman model, to assimilate diverse peoples and facilitate governability. In contrast with other forms of citizenship as an instrument of power, here, the instrumental value of citizenship is not only complementary, but rests upon the identity value of citizenship. In the context of indigenous peoples and colonial subjects, the identity value of citizenship is instrumentalized to facilitate colonial rule.

#### IV. *Indigenous Peoples and Territorians*

The dualistic relationship between the two sides of citizenship can be exemplified through a closer look at the relationship between constitutional liberal democracy and colonialism in the United States of America. The interaction between American citizenship and colonialism is often neglected in accounts of American constitutional development.<sup>118</sup> However, examining the effects of American citizenship for Indigenous peoples and territorians,<sup>119</sup> those residing in U.S. territories such as Puerto Rico, can illustrate broader patterns that might translate across sites and times. In both places, American citizenship was used as a tool to facilitate central government, and the elimination of the collective identity of Indigenous peoples and territorians through their ‘Americanization’. However, as Native Americans and territorians came to see themselves as ‘Americans’, they reclaimed citizenship as a source of rights and equality. But by performing American citizenship and using it to make claims against the United States, they also contributed to the ‘Americanization’ of their identity. The focus was on individual rights as recognized by American constitutional discourse, rather than collective self-determination and liberation from empire.

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118 See Aziz Rana, ‘How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire’ (2020) 130 Yale LJ Forum 312, 314.

119 The terms *Indigenous peoples*, *Indian nations* and *Indians* will be used throughout to describe the native people of the United States of America and their descendants. See Robert B Porter, ‘The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples’ (1999) 15 Harv Black Letter LJ 107, 108 n 4. Finally, *territorians* is the name of the inhabitants, mostly Aborigines, who still live in the Northern Territory of Australia. The Northern Territory, like Puerto Rico, is not a state and has limited self-government. Here, however, I will borrow the term to collectively describe the residents of the territories of the United States.

Neither of the two categories here examined – Indigenous peoples and territorians – are a unified monolith, since each is composed of different stateless nations with different relationships and demands on the federal government. However, the controversies of citizenship in these places share the use of citizenship as an instrument of power, and the reclaiming of citizenship as a source of rights and equal membership. Citizenship facilitated territorial rule and veiled the relationship of political subordination, while unintentionally creating a discourse that strived to undermine that unequal membership. But paradoxically, through performing U.S. citizenship, Native Americans and territorians also reinforce the instrumental power of citizenship in erasing their collective identity.

### 1. *Indigenous peoples*

Throughout history, the legal status of Indigenous peoples has changed according to the interests of the federal government and the different uses of citizenship as an instrument of power. After independence, the U.S. followed the British precedent of considering the tribes separate nations and formalizing the relationship through international treaties. The Supreme Court, in three cases penned by Chief Justice Marshall, continued the rhetoric of domestic nations, while also infantilizing the tribes and constituting them as dependent peoples.<sup>120</sup> By the 1840s, Native nations were removed and circumscribed to the territory known as ‘Indian Country’. To govern this territory and facilitate taking their land for White settlers, state officials in the 1840s and 1850s extended U.S. citizenship to Native Americans; ‘a legal and jurisdictional incorporation that would sooner or later sweep away tribal governments, collective land claims, and Native cultures’.<sup>121</sup> Instead of being a source of rights, citizenship was a means to dispossess Native people of their lands by dissolving their collective claims and making them ‘indistinguishable’ from the settler society.<sup>122</sup> In the words of Senator Orville Platt, citizenship served to ‘wipe out the line of political distinction between the Indian citizens and other citizens of the Republic’.<sup>123</sup> Alongside forced education and the elimination of land

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120 Porter (n 119) 129–130.

121 Kantrowitz (n 6) 38.

122 *ibid* 31–32.

123 Porter (n 119).

in common, citizenship was a tool of civilization to ‘kill the Indian and save the man’.<sup>124</sup>

The extension of citizenship of Indigenous peoples responded to the ‘logic of elimination’ of settler colonialism, a pattern repeated in other White settler societies like Australia, Canada and New Zealand.<sup>125</sup> Citizenship ‘quickly led to land loss and social devastation’, and even Indigenous groups who had at first embraced citizenship quickly rejected it, to no avail.<sup>126</sup> For the Creeks and Seminoles, for example, U.S. citizenship meant that their nations would cease to exist. Moreover, the extension of citizenship was also tied to its duties, such as paying taxes and, later, forced military service. In all these ways, citizenship was used as an instrument of power.

In 1924, the Indian Citizenship Act imposed American citizenship to the remaining indigenous peoples who were not already citizens. This consolidated their status as American citizens, even though the separate nations and wards statuses still survive. Meanwhile, the classification of Indians as racial or political minorities is also contradictory. In *Morton v. Mancari*, the Supreme Court held that federal laws can treat Indians as political minorities.<sup>127</sup> Thus, the Bureau of Indian Affairs could provide employment preference to Indians without facing the strict scrutiny standard if they were solely considered a racial minority. However, when federal actors are not involved, Indians are deemed a racial minority for equal protection purposes.

While citizenship was imposed as a tool to eliminate Indigenous identity, throughout the twentieth century, individuals of Indian ancestry also reclaimed their American citizenship ‘as a tool for native survival’ and ‘equal rights’.<sup>128</sup> Since the civil rights movement, Indians have formed the Red Power Movement and the American Indian Movement, started voting and participating in the legislative process through lobbying. Through these acts of citizenship, Indians sought to assert their right to full citizenship and shape the meaning of American citizenship.

However, their desire for equal and full membership also clashed with their claim to self-determination and sovereignty. This debate has been

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124 *ibid* 108.

125 Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (Bloomsbury Publishing 1999) 27.

126 Kantrowitz (n 6) 38.

127 417 US 535 (1974).

128 Kantrowitz (n 6) 46; see Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.–Indigenous Relations* 97–112 (Minnesota UP 2007).



framed as a conflict between uniqueness versus uniformity. *Uniqueness* refers to the recognition of tribal governments, *uniformity* to the assimilation of indigenous individuals.<sup>129</sup> While uniqueness confronts citizenship as an instrument of power, uniformity claims citizenship as a source of rights and equal membership. For those who reject reclaiming citizenship, '[t]he degree to which Indigenous people avail themselves of the American citizenship (...) is directly related to the degree to which the Indigenous population has assimilated into American society and the degree to which Indigenous sovereignty has been jeopardized'.<sup>130</sup> Through performing and claiming full citizenship, Native Americans seek to confront their unequal membership, yet, they also reinforce a citizenship discourse designed to eliminate their collective identity. They are performing American citizenship by, in the words of Engin Isin, 'adopting modes and forms of being an insider (assimilation, integration, incorporation)'.<sup>131</sup> Indian nations, then, illustrate the danger of adopting the discourse of full citizenship without recognizing how it legitimates exclusion and homogeneity.

## 2. *Territorians*

The U.S. territories share many of the anomalies and mistreatments of Indigenous peoples. Since its founding, the United States has consisted of states and territories. The Northwest Ordinance – which established the rules governing the Northwest Territory – even preceded the Constitution. However, at the turn of the twentieth century, the United States took control of a different type of territory. Territories like Puerto Rico and the Philippines could not be settled by White Anglo-Saxon Protestants and were deemed to lack the capacity for self-rule. Constitutional scholars of the time debated different solutions to the question of the status of the territories and the rights of their inhabitants. Following their lead, in the infamous Insular Cases, the Supreme Court held that annexed territories did not have to become states or its inhabitants' citizens.<sup>132</sup> Instead, it created the legal distinction between incorporated and unincorporated territories. Unincorporated territories were not promised statehood and its inhabitants were not citizens, but subjects. The Court's reasoning had clear

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129 Bruyneel (n 128) 10.

130 Porter (n 119).

131 Isin, 'Citizenship in Flux: The Figure of the Activist Citizen' (n 2) 372.

132 *Downes v Bidwell*, 182 US 244 (1901).

racial overtones, as when it contrasted incorporating a distant possession with peoples of a different race and a 'contiguous territory inhabited only by people of the same race'.<sup>133</sup>

Some years later, American citizenship was finally imposed on Puerto Rico.<sup>134</sup> However, the Supreme Court rejected that the grant of American citizenship incorporated Puerto Rico for the purposes of eventual statehood.<sup>135</sup> Today, Puerto Rico continues as an unincorporated territory with no guaranteed path to statehood, and its limited self-government is overseen by a financial board enacted by Congress without local consent.<sup>136</sup> Its residents possess only second-class citizenship with no national political rights and unequal access to social rights. Congress continues to deny access to social rights, for example, Supplemental Security Income, based on residence in Puerto Rico, a controversy currently being evaluated by the Supreme Court.<sup>137</sup>

However, citizenship still has significant cultural and sociological consequences for Puerto Ricans and other territorians. In Puerto Rico, American citizenship did not aim to eradicate colonialism. Instead, it was meant to 'make those subject to it more easily governable'.<sup>138</sup> In the words of the Secretary of War, citizenship was considered a step towards 'assuring a continuing bond'.<sup>139</sup> Thus, American citizenship in Puerto Rico, rather than fulfilling its suggested notions of equality and membership, 'obscur[ed] the colonial relationship between a great metropolitan state and a poor overseas dependency'.<sup>140</sup> Citizenship, therefore, masked colonialism itself.

But while citizenship was a tool used to facilitate territorial government and to erase the collective identity of territorians, it also had unintended consequences. In Puerto Rico, citizenship created a new political subject: Puerto Ricans as American citizens.<sup>141</sup> Thus, U.S. citizenship facilitated, in

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133 *ibid* 282.

134 While Cabranes (n 140) believes that Congress did not impose citizenship on the Puerto Rican population, Rivera Ramos (n 6) 152 argues that since 1912, five years before the Jones Act, Puerto Ricans became disillusioned with the American regime and official representatives of Puerto Rico from 1914 to 1916 opposed the citizenship provision of the Jones Act.

135 *Balzac v Puerto Rico*, 258 US 298 (1922).

136 *Financial Oversight and Management Board for Puerto Rico v Aurelius Investment, LLC*, 140 SCt 1649 (2020).

137 *US v Vaello-Madero*, 956 F3d 12 (1st Cir 2020) (petition for cert granted).

138 Rivera Ramos (n 6) 156.

139 *ibid* 148.

140 José A Cabranes, *Citizenship and the American Empire* 397-398 (Yale UP 1979).

141 Rivera Ramos (n 6) 163.

the words of Efrén Rivera Ramos, ‘a discursive instrument for the formulation of reciprocal demands between the United States and Puerto Rican society’.<sup>142</sup> Claims about full membership aim to turn colonialism upside down by relying on the constitutional discourse of the metropole against it. Ironically, *American* citizenship is conceptualized as a path towards eliminating the political subordination. Alternatives to colonial rule are conceived in ways that emphasize the ‘free determination of citizens’ and the right to vote for the president.<sup>143</sup> In November 2020, Puerto Ricans celebrated a plebiscite on whether it should become a state of the United States of America. The pro-statehood party emphasized that, as American citizens, Puerto Ricans deserved to become equal members and that statehood was the only alternative that guaranteed American citizenship. Statehood narrowly won. While it remains to be seen whether Puerto Rico becomes a state, during the electoral process citizenship was performed and used as a tool for claims-making against the federal government.

Like Native Americans, who also had citizenship imposed upon them, Puerto Ricans reclaimed citizenship as a tool to demand equality and rights. But the performance of American citizenship also diminishes their collective identity and the long-standing legacy of U.S. imperialism in Puerto Rico. By anchoring their claims on their citizenship status, they reproduce the exclusion and homogeneity inherent in the universal ideal of citizenship. In conclusion, citizenship facilitates territorial governability and conceals the relationship of political subordination, while creating a discourse of full citizenship that seeks equal membership at the expense of assimilating themselves to the universal ideal of citizenship.

This dialectical relationship between these two sides of citizenship also pervades debates over self-determination and assimilation in other uninhabited territories. In contrast to Puerto Ricans, American Samoans are U.S. nationals, rather than American citizens. Because they are not citizens, even when they move to the continental United States, they still cannot vote in federal or state elections.

Certain Samoans have filed lawsuits claiming birthright citizenship, pursuant with the Fourteenth Amendment. In *Tuaua v. U.S.*, the U.S. Court of Appeals rejected their claim to birthright citizenship.<sup>144</sup> What is noteworthy, however, is that the Court was conscious of the identity dimension of citizenship, and its use as an instrument of power. According

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142 *ibid* 164.

143 *ibid* 169.

144 788 F3d 300, 308 (DC Circuit 2015).

to the Court, American Samoans ‘have not formed a collective consensus in favour of United States citizenship’.<sup>145</sup> Integral to Samoan culture are some unique kinship practices, such as extended family, and social structures, including a system of communal land ownership. The Court of Appeals highlighted that ‘[r]epresentatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life’.<sup>146</sup> Considering this opposition, it would be ‘anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives’.<sup>147</sup> The Court concluded that citizenship meant adoption of an identity; a tie to a political community with reciprocal obligations. Imposing citizenship would be akin to cultural imperialism and ‘offensive to the shared democratic traditions of the United States and modern American Samoa’.<sup>148</sup>

The respect for the cultural identity of American Samoans is consistent with the ideas of recognition and differentiated citizenship. A universal ideal of citizenship may lead to the alteration or annihilation of their group identity, rather than equal and full membership. However, federal courts have not been consistent in their approach to the relationship of citizenship and colonialism. Guam, another unincorporated territory, wanted to narrow the participation on a plebiscite concerning its political status with the United States to the Native Inhabitants of Guam, known as Chamorros. Relying on *Morton v. Mancari*, Guam argued that the Native Inhabitants of Guam were a political category referring to ‘a colonized people with a unique political relationship to the United States’, rather than a racial category.<sup>149</sup> However, in *Davis v. Guam*, the Court of Appeals deemed that this eligibility restriction was a proxy for race and violated the Fifteenth Amendment which forbids denying the right to vote on account of race.<sup>150</sup> While *Tuaua* opted for a differentiated citizenship approach, *Davis* illustrates how, in the words of Young, a ‘strict adherence to a principle of equal treatment tends to perpetuate oppression or disadvantage’.<sup>151</sup>

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145 *ibid* 309.

146 *ibid* 310.

147 *ibid*.

148 *ibid* 312.

149 *Davis v Guam*, 932 F3d 822, 841 (9th Cir 2019).

150 See *Rice v Cayetano*, 528 US 495 (2000) (for a similar decision regarding Native Hawaiians).

151 Young (n 43) 251.

Instead of recognizing Guam's colonial history, the Court of Appeals uses the constitutional prohibition against race discrimination to protect the right to vote of White settlers and their descendants on the question of Guam's political future.

In 2021, a different U.S. Court of Appeals reached the same conclusion as *Tuau*, denying birthright citizenship to American Samoans and stressing 'grave misgivings about forcing the American Samoan people to become American citizens against their wishes.'<sup>152</sup> If the Supreme Court reviews the decision, it will have to wrestle between two opposing and self-reinforcing conceptions of citizenship. On the one hand, the claim that citizenship is a source of rights and equal membership. On the other, the contention that the extension of citizenship will make Samoans invisible and indistinguishable. In other words, that citizenship will be just another tool of the conqueror, an instrument of power to facilitate central rule over the territories.

## V. Conclusion

Since the days of the Roman Republic, citizenship has been both a source of rights and an instrument of power. Yet, until recently, social and legal scholarship have paid little interest to the interaction between these dimensions of citizenship. This is unfortunate, since one of the pressing issues of our times is constructing political communities that are inclusive and multicultural, while also preserving territorial stability and a sense of peoplehood and belongingness.

The problem with 'modern citizenship' is that 'it masquerades as universal, thereby concealing from view other plausible ways of being and relating to each other'.<sup>153</sup> Debates and claims against the state place citizenship at its centre, which can have unintended harmful consequences, as illustrated by the Indigenous peoples and territorians. Instead, we must articulate new ways of making claims against the state,<sup>154</sup> and the ideas of citizenship and membership must be negotiated among all political actors according to their distinct histories as people.<sup>155</sup> This will require, however, a deeper understanding of the dialectical and self-reinforcing relationship between citizenship as a source of rights and full membership and citizenship as an instrument of power.

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152 *Fitisemanu v United States*, 1 F4th 862, 874 (10th Cir 2021).

153 *Shaw* (n 33).

154 See Tendayi Bloom, *Noncitizenism: Recognising Noncitizen Capabilities in a World of Citizens* (Routledge 2017).

155 Kymlicka (n 82) 289.