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Bringing Culture Back: Immigrants' Citizenship Rights in the Twenty-First Century

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**BRINGING CULTURE BACK:
IMMIGRANTS' CITIZENSHIP RIGHTS IN THE
TWENTY-FIRST CENTURY**

Angela M. Banks*

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INTRODUCTION

The first thirty days of the Trump administration evoked a contentious debate about the rights of noncitizens. Can the President suspend the entry of Iraqi, Iranian, Libyan, Somalian, Sudanese, Syrian, and Yemeni citizens?¹ Can Immigration and Customs Enforcement (“ICE”) officers deport a Deferred Action of Childhood Arrivals recipient?² Does an unauthorized migrant have the right to a protective order against an abuser without running the risk of being deported?³ Should it matter if these individuals speak English, understand United States civics, or know how to enroll their child in elementary school? These and other questions about noncitizens’ rights and what criteria should be used to determine noncitizens’ rights are becoming a growing part of public discourse in the United States and in Europe.

Citizenship scholars actively engage these questions and a number of theories have been offered about how liberal democracies should distribute rights. This article focuses on postnational citizenship, global citizenship, and transnational citizenship theories.⁴ These theories make specific normative and descriptive claims about the availability of citizenship rights. The normative claim is that citizenship rights should be available to noncitizens based on their personhood and presence within a territory.⁵ The descriptive claim is that pursuant to the growth of the international human rights regime citizenship rights are now available based on personhood rather than national cultural belonging.⁶ Some of these scholars decry the

1. Exec. Order No. 13,769, 82 Fed. Reg. 8977, (Jan. 27, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-01/pdf/2017-02281.pdf>.

2. See Emily Goldberg, *What Immigration Raids Mean for Students*, THE ATLANTIC (Feb. 17, 2017), <https://www.theatlantic.com/education/archive/2017/02/why-was-a-daca-recipient-detained-by-ice/517134/>.

3. See Richard Gonzales, *ICE Detains Alleged Victim Of Domestic Abuse At Texas Courthouse*, NPR, (Feb. 16, 2017, 10:33 PM), <http://www.npr.org/sections/thetwo-way/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse>.

4. See Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 449 (2000).

5. See, e.g., JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY (2010); RAINER BABCÖCK, TRANSNATIONAL CITIZENSHIP (1994); Joseph H. Carens, *Citizenship and Civil Society: What Rights for Residents?*, in DUAL NAT’LITY, SOC. RIGHTS AND FED. CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP, 101-02 (Randal Hansen & Patrick Weil eds., 2002) [hereinafter DUAL NAT’LITY]; Saskia Sassen, *The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, 46 BERKLEY J. SOC. 4, 6 (2002); Saskia Sassen, *The Need to Distinguish Denationalized and Postnational*, 7 IND. J. GLOBAL LEGAL STUD. 575 (2000).

6. See, e.g., PETER SCHUCK & ROGERS SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); YASEMIN NUHOGLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 1 (1994); DAVID

diminishing role of the State in allocating and protecting citizenship rights,⁷ others applaud the development as a tool for ensuring that noncitizens have the rights that facilitate their economic, political, and social integration,⁸ and some contend that postnational citizenship is “partial, insubstantial, and insecure.”⁹

This article builds upon the critique that postnational citizenship is incomplete by arguing that despite the increasing number of rights made available to noncitizens based personhood and residence, three categories of rights that are critical for immigrant integration continue to have a national cultural belonging prerequisite: (1) immigration-related rights; (2) economic rights; and (3) political participation rights. Noncitizens’ access to these rights is conditioned on demonstrating cultural belonging in the form of civic integration. Citizenship scholars have noted that the postnational citizenship model is incomplete because it mainly addresses social rights, or that the rights provided by the international human rights regime are not self-executing.¹⁰ Less attention has been given to determining whether or not postnational citizenship grants noncitizens the rights that enable them to fully develop and benefit from their human capital. To facilitate this analysis, this article offers a new citizenship rights typology in which

JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP vii, 2-3 (1997); LAYTON-HENRY HAMMAR, THE POLITICAL RIGHTS OF MIGRANT WORKERS IN WESTERN EUROPE (1990); Miriam Feldblum, “*Citizenship Matters*”: *Contemporary Trends In Europe and the United States*, 5 STAN. HUMAN. REV. 97, 107 (1997); Peter Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 30 (1997); Culture as used in this article refers to values, norms, and practices. Adopting the sociological understanding of values and norms, values as used in this project refer to “abstract ideals” and norms refer to “principles and rules of social life that people are expected to observe.” ANTHONY GIDDENS ET. AL., INTRODUCTION TO SOCIOLOGY 54 (2012).

7. See, e.g., SCHUCK & SMITH, *supra* note 6; JACOBSON, *supra* note 6; Christian Joppke, *The Inevitable Lightning of Citizenship*, 51 EUR. J. SOC. 9 (2010) (discussing the “decreasing subjective value” of citizenship in Western states).

8. See SOYSAL, *supra* note 6; CARENS, *supra* note 5; Carens, *supra* note 5; Schuck, *supra* note 6, at 30.

9. Michael Jones Correa, *Seeking Shelter: Immigrants and the Divergence of Social Rights and Citizenship in the United States*, in DUAL NAT’LITY, *supra* note 5, at 236; see also AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 62-63 (2009); Schuck, *supra* note 6, at 30-33; see Jaya Ramji-Nogales, “*The Right to Have Rights*”: *Undocumented Migrants and State Protection*, 63 KAN. L. REV. 1045 (2015); Randall Hansen, *The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe*, 38 THEORY & SOC. 1, 12 (2009); Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999, 1005 (2006).

10. See Correa, *supra* note 9, at 235-36; Bosniak, *supra* note 4, at 467-68 (noting that international human rights “are made available to individuals only by way of their states, which must have affirmatively assumed obligations to enforce them under the various human rights treaties”).

citizenship rights are divided into human rights, resident rights, and membership rights. Use of this typology demonstrates that the postnational citizenship model only accounts for one of the three types of rights commonly thought of as citizenship rights. The citizenship rights typology offered and an analysis of noncitizens' rights within European Union member states illustrates that national cultural belonging, rather than personhood, continues to be the basis upon which critical citizenship rights are made available to noncitizens.

Immigrants' access to citizenship rights is important for at least two reasons. First, it determines the manner in which the State can interact with immigrants. For example, are noncitizens entitled to due process when being deported? Can lawful permanent residents returning to the United States be denied entry because of their nationality or religion? Citizens cannot be deported or denied entry into their country of nationality, but does the State have greater authority over noncitizens? The second reason immigrants' access to citizenship rights matters is because access to legal rights shapes immigrant incorporation patterns. Immigrant integration or incorporation occurs when noncitizens' participation in society is indistinguishable from the participation of native-born citizens.¹¹ For example, integration has occurred when the difference in educational attainment, language skills, access to healthcare, or the employment rates between citizens and noncitizens is imperceptible. Social scientists have empirically demonstrated and theoretically explained that immigrants' incorporation patterns are shaped by immigrants' "individual characteristics [and] motivations" and their context of reception.¹² Immigrants' context of reception, which includes government policy and legal rights, determines whether or not immigrants' individual human capital—language skills, education, and

11. ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 13, 232–41 (3d ed. 2006) [hereinafter PORTES & RUMBAUT, *IMMIGRANT AMERICA*]; RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 5–6, 11–12 (2003); ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION* 46–48 (2001) [hereinafter PORTES & RUMBAUT, *LEGACIES*]; Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 *LEWIS & CLARK L. REV.* 1149, 1159 (2012) "Immigrant incorporation is achieved when immigrants are integrated into U.S. society such that it is difficult to differentiate their legal protections, access to public resources, educational outcomes, language skills, and job opportunities from those of native-born citizens." Throughout this article the terms integration and incorporation are used interchangeably.

12. HELEN B. MARROW, *NEW DESTINATION DREAMING: IMMIGRATION, RACE, AND LEGAL STATUS IN THE RURAL AMERICAN SOUTH* 9 (2011). An immigrants' context of reception is the "structural and institutional features of the specific contexts that immigrants enter," which "influence their experiences and opportunities for mobility."

job skills—can be put to its best use.

While the postnational citizenship model is incomplete, it has made an important contribution to the study of citizenship in the twenty-first century. This body of scholarship highlights the important ways in which citizenship rights are disaggregated and decoupled from citizenship status.¹³ This reality demonstrates that citizenship status is not the exclusive vehicle for granting citizenship rights, and that it is possible to grant noncitizens citizenship rights that would facilitate integration and social cohesion. An accurate understanding of noncitizens' citizenship rights is necessary to determine which rights are outstanding, whether or not such rights alter an immigrant's context of reception, and whether or not such rights should be available based on personhood, lawful residence, or membership. This article is the first in a series of articles that undertakes this analysis to ascertain how best to ensure immigrant integration and better facilitate economic and social cohesion.

This article proceeds in four parts. Part I of the article introduces the human-resident-membership rights typology to facilitate a more precise examination of the claims made by postnational citizenship scholars. Disaggregating the rights that these scholars refer to as citizenship rights allows one to better analyze which rights are available based on universal personhood and which continue to be uniquely available to individuals who can demonstrate national cultural belonging. Part II introduces postnational citizenship, and demonstrates that the citizenship rights available to noncitizens within this model are human rights rather than resident rights or membership rights. Part III identifies how the key rights for immigrant incorporation—the right to enter and reside, the right to remain, economic activity rights, political participation rights, and education rights—are allocated within the European Union (“EU”). The article focuses on the EU because many of the descriptive claims made by postnational citizenship scholars are based on noncitizens' rights within the EU. The rights typology offered in Part II clarifies which of these rights are human rights, resident rights, or membership rights. The analysis provided in Part III illustrates the limitations of the postnational citizenship model. Finally, Part IV contends that membership within a polity continues to be measured in terms of national cultural belonging. Therefore, access to the membership

13. See ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS 6 (2009); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 1 (2004); Rose Cuison Villazor, *Interstitial Citizenship*, FORDHAM L. REV. (forthcoming 2017) (manuscript at 1676, 1678-79) (<https://ssrn.com/abstract=2772766>).

category of citizenship rights is only available to individuals who are able to demonstrate civic integration. This significantly limits noncitizens' ability to fully develop and utilize their human capital.

I. CITIZENSHIP RIGHTS

This article focuses on the role of immigration-related rights, economic activity rights, political participation rights, and education rights because these rights play a critical role in the immigrant incorporation process. Some of these rights are uniquely available to citizens, others are available based on personhood, and a final group are available based on lawful residence. This Part introduces the human-resident-membership rights typology to facilitate a more precise examination of the claims made by postnational citizenship scholars. By disaggregating the rights addressed in the postnational citizenship model, it is possible to determine which rights are available based on universal personhood and which continue to be uniquely available to individuals who can demonstrate national cultural belonging. The second section of this Part examines how States can allocate citizenship rights to individuals without citizenship status.

A. Rights Typology

Within the citizenship literature there is no agreed upon definition of citizenship rights. Scholars, advocates, and government officials use the term to refer to a wide range of rights.¹⁴ For example, the right to enter, reside, and remain in a State's territory, voting rights, the right to serve on a jury, the right to bear arms, the right to family life, freedom of assembly and association, and freedom of movement have all been characterized as citizenship rights.¹⁵ Yet access to these rights varies significantly. Some are only available to individuals with citizenship status, others are available to those who are lawfully present within the

14. See Correa, *supra* note 9, at 235-36 ("Rights for non-citizen residents are rarely part of a nation-state's core laws, its constitution. Because of this, I would argue, they do not deserve to be called *citizenship* rights."). T.H. Marshall's classic account of citizenship rights focuses on the substance of the rights provided rather than the categories of individuals who benefit from the rights. Marshall's typology divides citizenship rights into civil, political, and social rights. T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 10 (1950). The citizenship rights typology offered in this article builds on Marshall's insights but recognizes that noncitizens currently have civil and political rights despite lacking citizenship status.

15. See, e.g., SOYSAL, *supra* note 6, at 122; see Villazor, *supra* note 13, at 1712; see also Correa, *supra* note 9, at 235 ("Postnational citizenship theorists think of citizenship as a set of rights that are extended like an umbrella over permanent residents (whomever they may be in the polity).").

society, and others still are available to all who are present. This article offers a citizenship rights typology to clarify which rights are available to noncitizens and based on what criteria. Distinguishing between human rights, resident rights, and citizenship rights provides a basis for conducting a more nuanced analysis of postnational citizenship. This rights typology makes visible the disaggregation of citizenship rights and the decoupling of these rights from citizenship status. The typology also illustrates that national cultural belonging, rather than personhood, continues to be the basis upon which some rights traditionally viewed as citizenship rights are allocated.

Within citizenship-related discourse the term citizenship is used in a variety of different ways. Legal scholar Linda Bosniak developed a useful typology for differentiating the various ways in which the term citizenship is used.¹⁶ Citizenship can refer to a legal status, identity, legal rights, or political engagement.¹⁷ Bosniak's typology offers a tool for greater clarity and more insightful critiques in citizenship discourse. Just as citizenship is used in different ways so is citizenship rights. Some discussions about citizenship rights focus on the rights that all individuals within a particular territory have while others focus on the rights that are uniquely available to individuals with citizenship status.¹⁸ The citizenship rights typology offered here provides better clarity about the types of rights that scholars are referring to when discussing citizenship rights. Such clarity is necessary for properly determining how citizenship rights are allocated and understanding why certain rights are available to noncitizens.

The term citizenship rights refers to rights that are best understood as human rights, resident rights, and membership rights. Human rights are rights that are available to every individual by virtue of being human. These rights ensure that the inherent dignity of all people is recognized and protected by the State.¹⁹ Resident rights are rights that are available to individuals who are lawfully present within a State's territory. These rights facilitate non-members' economic and social participation, but they are granted in ways that protect full members' economic and social rights. Membership rights are rights that facilitate the fullest participation—economic, social, and political—of individuals deemed members of the society. It is my contention that

16. Bosniak, *supra* note 4, at 456-89.

17. *Id.*

18. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 31-34 (2008).

19. U.N. GAOR, UNIVERSAL DECLARATION OF HUMAN RIGHTS (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

membership is reserved for those individuals who have the most robust cultural connection to the State. The legal status of citizen conveys full membership within a State, and national cultural belonging is an explicit or implicit requirement for citizenship status. For those individuals that become citizens via naturalization, cultural belonging is explicitly tested during the naturalization process. For those who are citizens by virtue of birth within the country or birth to parents who are citizens it is assumed that their socialization process will ensure national cultural belonging. As will be evident in Parts III and IV, noncitizen's access to immigration-related economic activity and political participation rights become more robust with increasing levels of national cultural belonging.

Human rights, resident rights, and membership rights can be thought of as concentric circles with membership rights in the inner-most ring, resident rights in the middle ring, and human rights in the outer-most ring.²⁰

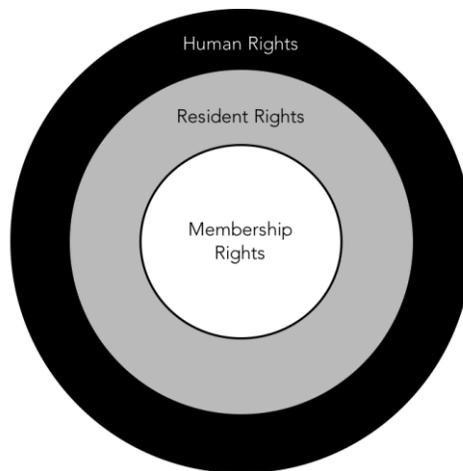


Figure 1

Within a given State everyone physically present will have human rights, those lawfully present will have resident rights and human rights, and members will have membership rights, resident rights, and human rights. The robustness of the resident and membership rights

20. See T. ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 49 (2016).

will depend on the purpose of residence and length of residence, which often correlate with immigration and citizenship statuses. For example, long-term residents or lawful permanent residents have a more robust right to enter their state of residence than first-time arriving foreign students.²¹ While both individuals are lawfully present residents, they were admitted based on different connections to the State, and the difference in connections allows the long-term resident to be viewed as more of a member than the student. Citizens, on the other hand, have an absolute right to enter their country of residence while long-term residents merely have a robust, but not absolute, right to enter their state of residence. Citizens are deemed to have greater connections to the State than long-term residents, which entitles citizens to a more robust membership status, and greater protection of membership rights.

As basic rights that protect the inherent dignity of all humans, human rights include rights such as the right to life, liberty, security of person, criminal procedure rights, freedom of thought, conscience and religion, freedom of expression, and freedom from discrimination.²² Resident rights include the right to work and engage in other economic activity in accordance with the rules governing one's immigration status, local political participation rights, and access social welfare benefits.²³ Finally, membership rights, include an absolute right to enter, reside, and remain in one's country of citizenship, the right to vote in national elections, run for public office, support political campaigns, and a fairly absolute right to work.²⁴

The postnational citizenship claim that citizenship rights are available based on personhood focuses on the availability of human

21. The terms "long-term resident" and "lawful permanent resident" are immigration statuses that grant noncitizens robust rights in their country of residence. Long-term resident status is given in EU member states, and lawful permanent resident status is given in the United States. Both of these statuses are available to noncitizens based on their family connections to the state or their proposed economic activity in the state of residence. Since the relevant status in EU member states is long-term resident, this article will utilize this terminology.

22. The right to freedom from discrimination on the basis of nationality does not extend to immigration-related rights such as the right to enter and remain. Courts have continuously held that States have the sovereign right to determine which noncitizens can enter the country. *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581, 606-07, 609 (1889).

23. *See, e.g., Treaty on European Union*, Feb. 7, 1992, art. 45, O.J. C 224/1, at 122 (1992) [hereinafter EU Treaty]; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, May 25, 2009, O.J. (L 155/17) art. 12(3) (2009) [hereinafter EC Council Directive]. This is a nonexhaustive list of resident rights.

24. *See, e.g., EU Treaty, supra* note 23. This is a nonexhaustive list of membership rights.

rights. While these rights have historically been limited to individuals with citizenship status, this category of rights are now available to all based on personhood.²⁵ Yet, there are two additional categories of citizenship rights that are not available based on personhood—resident rights and membership rights.

B. Unbundling & Decoupling Citizenship Rights

The idea that noncitizens could be the beneficiaries of citizenship rights may sound counterintuitive. Yet the citizenship rights typology introduced in the preceding section clarifies that when scholars, government officials, and civil society actors speak about citizenship rights they are often referring to human rights, resident rights, or membership rights. The umbrella term “citizenship rights” reflects different understandings and purposes of citizenship. For example, Bosniak’s work on the “citizenship of aliens” responds to the differentiation between “citizenship within the community” and “citizenship at the border.”²⁶ There is a universalist approach to “citizenship within the community” in which the goal is the “inclusion and participation of everyone.”²⁷ Simultaneously there is an exclusionary or particularist approach to “citizenship at the border” in which the focus is defining the boundaries of the community. In this context, the goal is not universal inclusion, but rather restricting membership, which is frequently viewed as “an essential part of a community’s process of self-definition.”²⁸ This dual approach to citizenship helps to explain why noncitizens would have certain citizenship rights, like human rights and resident rights, when they are physically present within a country.²⁹ However, the “citizenship at the border” approach to legal rights would make membership rights uniquely available to individuals with citizenship status. An example would be granting citizens and physically-present noncitizens different immigration-related rights. Differentiating between “citizenship within the community” and “citizenship at the border” provides a basis for understanding how and why human rights, resident rights, and membership rights can all be considered citizenship rights, and how

25. See, e.g., Bosniak, *supra* note 18, at 34.

26. *Id.*

27. *Id.* at 29 (quoting Iris Marion Young, *Polity and Group Difference: A Critique of the Idea of Universal Citizenship*, 99 *ETHICS* 250, 250-51 (1989)).

28. *Id.* at 33.

29. Rights like due process and equal protection are granted to all individuals within the community and noncitizens’ physical presence entitles them to human rights and resident rights.

they get allocated differently amongst citizens and noncitizens.

The citizenship rights typology introduced in Part I(A) exemplifies the unbundling of citizenship rights. Rather than viewing citizenship rights as a tight bundle of rights that are distributed as a unit, it is more accurate to view them as fundamental civil, political, economic, and social rights that are “independent of, rather than contingent upon, each other.”³⁰ This creates a divisible bundle of rights that can be allocated in numerous combinations.³¹

Conceptualizing citizenship rights as a disaggregated group of rights allows for a more complete and nuanced analysis of the allocation of citizenship rights. This approach to citizenship rights is explored by legal scholars Linda Bosniak and Rose Cuison Villazor, and political scientist Elizabeth Cohen. Bosniak’s work on the “citizenship of aliens” illustrates that noncitizens in most liberal democratic societies “are routinely entitled to a broad range of important civil and social rights—rights that are commonly described in the language of citizenship.”³² These rights include “full due process rights in criminal proceedings, . . . expressive, associational, and religious freedom rights, . . . the protections of the state’s labor and employment laws, and to the right to education and other social benefits.”³³ Akin to the arguments made by postnational scholars, Bosniak notes that these rights are available to noncitizens based on their territorial presence and personhood.³⁴ These are human rights within the human-resident-membership rights typology. Yet unlike most postnational scholars, Bosniak explicitly acknowledges that territorial presence and personhood do not give rise to immigration-related rights.³⁵ Bosniak implicitly differentiates between human rights and membership rights when she explains that noncitizens “always remain subject to potential deportation.”³⁶

Villazor’s work on “interstitial citizenship” similarly illustrates that individuals without citizenship status enjoy some citizenship rights.³⁷ Villazor’s work focuses on the rights of American nationals.

30. Villazor, *supra* note 13, at 1720-21; *see also* COHEN, *supra* note 13, at 6 (“an intertwining set or ‘braid’ of fundamental civil, political, and social rights, along with rights of nationality.”).

31. *See* COHEN, *supra* note 13, at 6 (noting that “[n]umerous configurations are conceivable”); BENHABIB, *supra* note 13, at 1.

32. Bosniak, *supra* note 18, at 34.

33. *Id.*

34. BOSNIAK, *supra* note 4, at 459.

35. Bosniak, *supra* note 18, at 34.

36. *Id.*

37. *See* Villazor, *supra* note 13.

National is a legal status that is distinct from citizen and alien, and nationals have citizenship rights that are not the same as either citizens or aliens. For example, like citizens, federal immigration law does not apply to nationals because they are not aliens, but like aliens, nationals are not eligible to vote in federal, state, or local elections because they are not citizens.³⁸ By analyzing the rights of American nationals Villazor demonstrates that “citizenship rights may be disentangled from formal citizenship and that citizenship is far more fluid and malleable than its conventional framing suggests.”³⁹ In describing nationals as interstitial citizens Villazor illustrates that citizenship rights are in fact a bundle of rights that can be disaggregated.⁴⁰

Cohen’s work on semi-citizenship not only demonstrates that citizenship rights can be, and often are, disaggregated and decoupled from citizenship status, but she also explains why this happens. Cohen explains that “because rights create political relationships it is crucial to states that they be able to disaggregate bundles of rights.”⁴¹ Disaggregating citizenship rights allows states to shape and manage “populations whose diverse elements could not all be governed by a single set of rules.”⁴² Membership status is one way of organizing the population that accounts for relevant diverse elements. Disaggregating citizenship rights gives rise to what Cohen terms, semi-citizenship.⁴³ Semi-citizens are individuals who are only accorded a subset of the fundamental civil, political, and social rights granted to citizens.⁴⁴ It is possible to disaggregate citizenship rights because they are “an intertwining set or ‘braid’ of fundamental civil, political, and social rights, along with rights of nationality.”⁴⁵ These rights not only become unbraided from each other, but each individual strand can fray. Types of citizenship rights can become disaggregated from one another and from their constituent parts. This suggests that citizenship rights are independent of, rather than contingent upon, each other; that is, each right exists because it is valuable in itself, not because it makes the exercise of other rights possible.⁴⁶

Cohen’s state-centric approach to explaining the existence of disaggregated citizenship rights provides a basis for understanding the

38. *Id.* at 1675-76.

39. *Id.* at 1678-79.

40. *Id.* at 1679.

41. COHEN, *supra* note 13, at 6.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

development of citizenship rights for noncitizens in the European Union. The desire to facilitate immigrant incorporation and the belief that secure legal rights enable immigrants to achieve the same economic and social outcomes as citizens would lead states to grant immigrants citizenship rights. However, states may still want to differentiate between individuals with different levels of connection or commitment to the state and grant these groups different combinations of rights. The European Union approach to noncitizen rights reflects a disaggregated approach in which rights are varied based on perceived commitment and connection to the state.

Bosniak's, Villazor's, and Cohen's work theoretically explain and empirically demonstrate the disaggregation of citizenship rights and the decoupling of these rights from citizenship status. The remaining parts of this article build on these theoretical insights to analyze the creation of a new citizenship rights regime to facilitate immigrant incorporation in the European Union. Contrary to the empirical claims made by postnational scholars, it is my contention that postnational citizenship only exists with regard to "citizenship within the community," it has no bearing on "citizenship at the border." Noncitizens are granted human rights within the postnational citizenship model, but immigration-related rights continue to be membership rights that are coupled with citizenship status. While such rights are not as tightly coupled to citizenship status as they are in the United States, postnational citizenship scholars fail to acknowledge that access to these rights continues to be dependent upon national cultural belonging, which does little to alter noncitizens' access to membership rights.

II. POSTNATIONAL CITIZENSHIP

Yasemin Nuhoglu Soysal's groundbreaking 1994 book, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE*, argued that noncitizens within Europe had a variety of citizenship rights despite their lack of citizenship status. Soysal named this new development postnational citizenship because citizenship rights were available "based on universal personhood rather than national belonging."⁴⁷ Soysal argues that this "new and more universal concept of citizenship" unfolded in the post-war era.⁴⁸ A defining feature of this new citizenship model is that rights that were previously

47. SOYSAL, *supra* note 6, at 1 (the traditional model national citizenship is "anchored in territorialized notions of cultural belonging"); *see also* JACOBSON, *supra* note 6, at vii, 2-3.

48. SOYSAL, *supra* note 6, at 1.

exclusively available to citizens are now available to noncitizens through the rubric of personal rights or human rights.⁴⁹ Soysal uses the post-World War II experience of guestworkers in European countries to demonstrate that noncitizens have experienced social, political, and economic incorporation in their states of residence.⁵⁰ Guestworkers' social, political, and economic participation in their countries of residence defies traditional understandings about distinctions drawn between citizens and noncitizens. Soysal notes that guestworkers "participate in the educational system, welfare schemes, and labor markets" and they "join trade unions, take part in politics through collective bargaining and associational activity, and sometimes vote in local elections."⁵¹

The traditional model of citizenship—national citizenship—is described as being "anchored in territorialized notions of cultural belonging."⁵² Soysal describes this approach to citizenship as defining "bounded populations, with a specific set of rights and duties, excluding 'others' on the grounds of nationality."⁵³ Pursuant to this citizenship model immigrants had to become national citizens before they would have the bundle of rights exclusively available to citizens.⁵⁴ The experience of guestworkers, however, demonstrates that noncitizens have a variety of rights within their states of residence despite lacking citizenship status.⁵⁵ This new model of citizenship—postnational citizenship—makes rights previously exclusively available to national citizens available based on personhood. Soysal explains that postnational citizenship "confers upon every person the right and duty of participation in the authority structures and public life of a polity, regardless of their historical or cultural ties to that community."⁵⁶

Soysal correctly contends that "individual rights, historically

49. *Id.*

50. *Id.* at 1-2. Throughout this article the terms integration and incorporation are used interchangeably to refer to the participation of noncitizens in the society of residence in manner that is indistinguishable from native-born citizens. PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 11, at 13, 232-41; ALBA & NEE, *supra* note 11, at 5-6, 11-13 (2003); PORTES & RUMBAUT, LEGACIES, *supra* note 11, at 46-48 (2001); Banks, *supra* note 11 ("Immigrant incorporation is achieved when immigrants are integrated into U.S. society such that it is difficult to differentiate their legal protections, access to public resources, educational outcomes, language skills, and job opportunities from those of native-born citizens.")

51. SOYSAL, *supra* note 6, at 2.

52. *Id.* at 3.

53. *Id.* at 2.

54. *Id.* at 3 ("immigrants were expected to be molded into national citizens").

55. *Id.* at 2.

56. *Id.* at 3.

defined on the basis of nationality, are increasingly codified into a different scheme that emphasizes universal personhood.⁵⁷ Yet the rights that noncitizens have by virtue of their personhood are limited. Access to two additional categories of rights, resident rights and membership rights, remain contingent on factors other than personhood. For example, Soysal's discussion of entry and residence exclaims that "[b]y the 1980s, well over half the foreigners in Europe already had permanent residency in their host countries—a virtually irrevocable status carrying with it varying rights and privileges of membership."⁵⁸ Yet this immigration status, and the corresponding rights, is not available based on personhood. It is available based on lawful residence in the state, and post-2000 it is conditioned on demonstrating civic integration. A similar situation exists for the social, economic, and political rights Soysal discusses. She notes that for social rights it is legal status and physical presence that are "the most important factors" in determining rights.⁵⁹ Economic activity rights are similarly based on immigration status. Soysal explains that immigration status categories "impose the principal constraints on migrants' exercise of economic rights. They determine the scope of noncitizens' engagement in professions and trades and their access to labor markets."⁶⁰ Soysal concludes by noting that "once migrants are in and established as legal permanent residents, they are entitled to take up any gainful activity."⁶¹ Soysal tends to focus on the rights of legal permanent residents to demonstrate that citizenship status is not dispositive in determining an individual's rights. Yet legal permanent resident status is not available based on personhood, and it is increasingly only available to individuals who can demonstrate national cultural belonging.⁶² Thus immigrants' access to citizenship looks more like the traditional citizenship model than the postnational citizenship model Soysal introduces.

III. RIGHTS AND INCORPORATION

Immigrant incorporation is the process by which immigrants are incorporated into the host society "such that it is difficult to differentiate their legal protections, access to public resources, educational outcomes, language skills, and job opportunities from those

57. SOYSAL, *supra* note 6, at 136.

58. *Id.* at 122.

59. *Id.* at 124.

60. *Id.* at 126.

61. *Id.* at 126.

62. *See infra* Part IV.

of native-born citizens.”⁶³ Naturalization is often viewed as an important part of the immigrant incorporation process because it can be the basis for obtaining rights that facilitate equitable access to public resources employment, or educational outcomes. Alternatively, naturalization can mark the culmination of the incorporation process.

For postnational citizenship scholars, naturalization is not a critical part of the incorporation process. Migrants have access to citizenship rights, rights that facilitate incorporation, based on their personhood rather than their citizenship status. Citizenship rights are important for immigrant incorporation because legal rights are part of the context of reception that immigrants encounter. An immigrants’ context of reception is the “structural and institutional features of the specific contexts that immigrants enter,” which “influence their experiences and opportunities for mobility.”⁶⁴ Social scientists have examined four distinct dimensions of immigrants’ context of reception—government policy, labor market conditions, existing ethnic or national communities, and reactions from the native population.⁶⁵ These aspects of an immigrants’ context of reception shape the “framework of economic opportunities and legal options available to migrants once they arrive.”⁶⁶ Postnational citizenship scholars contend that legal rights play a critically important role in immigrant incorporation. Law determines who can be admitted to a state, a migrant’s legal status within the host state, and the migrant’s “access to social and economic resources.”⁶⁷ Sociologists Alejandro Portes and Rubén G. Rumbaut explain that law is “the first stage of the process of incorporation because it affects the probability of successful immigration and the framework of economic opportunities and legal options available to migrants once they arrive.”⁶⁸

Many postnational citizenship scholars are excited about a membership model in which rights “previously defined as national rights become entitlements legitimized on the basis of personhood.”⁶⁹ Soysal explains that “[p]ostnational citizenship confers upon every

63. Banks, *supra* note 11, at 1159; *see also* ALBA & NEE, *supra* note 11, at 11–13; PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 11, at 13, 232–41; PORTES & RUMBAUT, LEGACIES, *supra* note 11, at 46–48.

64. MARROW, *supra* note 12, at 9. Immigrant incorporation is also shaped by immigrants’ “individual characteristics [and] motivations.”

65. Banks, *supra* note 11, at 1169 (citing Marrow, *supra* note 12, at 233; PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 11, at 92–93).

66. PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 11, at 93.

67. Banks, *supra* note 11, at 1171.

68. PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 11, at 93.

69. *See, e.g.*, SOYSAL, *supra* note 6, at 3.

person the right and duty of participation in authority structures and public life of a polity regardless of their historical or cultural ties to that community.”⁷⁰ Such a model of membership would support immigrant incorporation by ensuring immigrants equal access to economic and social resources, providing confidence that immigrants will be able to remain in their state of residence to reap the benefits of their material and non-material investments in their state of residence, and guaranteeing the ability of immigrants’ family members to join them so that they can enjoy the comfort and support that comes from living together as a family. However, the postnational citizenship model is unable to achieve these goals because immigration-related rights, the right to work, and political participation rights are not allocated based on personhood. Rather these rights are allocated based on connections to the State like residence, family, and culture.

Before turning to an analysis of five rights that are important for immigrant incorporation, the next section explains the unique situation of non-European migrants within Europe. With the creation of European Union citizenship in 1992, non-European citizens faced the possibility of being excluded from the rights allocated by the European Union because they lacked citizenship status in EU member states.⁷¹ This concern led to the enactment of secondary law that allocated citizenship rights to non-European migrants.⁷² This secondary law is an important source of rights that postnational citizenship scholars point to as evidence of the creation of postnational citizenship. This body of law goes a long way in creating a rights regime in which the rights of European citizens and non-European citizens are indistinguishable as claimed by postnational citizenship scholars. However, in the areas of immigration-related rights, economic rights, and political participation rights, the rights of non-European migrants are limited, or are conditioned on demonstrating civic integration. Returning to Bosniak’s discussion of citizenship, this secondary law implements the universalist principle of “citizenship within the community,” but not “citizenship at the border.”

A. Third-Country Nationals

European Union member states faced a challenge regarding the membership status of first, second, and third generation immigrants

70. *Id.*

71. See e.g., Michael A. Becker, *Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals*, 7 YALE HUMAN RIGHTS & DEVELOPMENT J. 132, 137-38 (2004).

72. *Id.*

who were long-term residents. A troubling number of these individuals did not have citizenship status in their states of residence despite long-term residence within the country.⁷³ For example, Rogers Brubaker noted in his 1992 study of citizenship in Germany and France that “nearly half a million second-generation Turkish immigrants, born and raised in Germany, remain outside the community of citizens.”⁷⁴ This reflected the sense that citizenship in Germany “refer[ed] to a ‘community of descent’, with little regard for birthplace and residence.”⁷⁵ Administrative regulations explicitly stated that “the Federal Republic is not a country of immigration [and] does not strive to increase the number of its citizens through naturalization.”⁷⁶ Germany significantly revised its citizenship laws in 2000 and granted birthright citizenship to the children of immigrants born within Germany if at least one parent has resided in Germany lawfully for at least eight years and has a right to permanent residence.⁷⁷ Despite changes in German citizenship law and the law of other European Union member states, a significant number of non-European citizens residing in the European Union were not citizens of their states of residence.⁷⁸

The legal status of these individuals, referred to as third-country nationals (“TCNs”), within the European Union presented a challenge because EU law granted certain rights based on EU citizenship, which is only available to the citizens of EU member states.⁷⁹ Freedom of

73. Many of these immigrants’ birth within the Member States’ territory did not give rise to citizenship within that Member State. See, e.g., Marc Morje’ Howard, *The Causes and Consequences of Germany’s New Citizenship Law*, 17 GERMAN POLITICS 41, 42 (2008). Additionally the requirements for naturalization were often significant. For example, before 2000 Germany required ten years’ residence and applicants had to renounce their prior citizenship. *Id.* at 61, n. 71.

74. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 75 (1992).

75. Howard, *supra* note 73, at 42.

76. BRUBAKER, *supra* note 74, at 77; see also Howard, *supra* note 73, at 42 (noting that pre-2000 “German citizenship refer[ed] to a ‘community of descent’, with little regard for birthplace and residence”).

77. *Entry & Residence, Law on Nationality*, GERMAN FED. FOREIGN OFFICE (last visited Aug. 4, 2016), http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/04_Recht/Staatsangehoerigkeitsrecht.html.

78. OECD/European Union, *Indicators of Immigrant Integration 2015: Settling In 332* (2015), available at http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/indicators-of-immigrant-integration-2015-settling-in_9789264234024-en#_WW-tv4jyvZs.

79. When the Treaty on European Union was being considered there were proposals to grant EU citizenship to third-country nationals, but they were resoundly rejected. Severine Picard, *The EU Constitutional Treaty: Towards A European Citizenship For Third Country Nationals?*, 1 J. CONTEMP. EUR. RESEARCH 73, 74 (2005), <http://www.jcer.net/index.php/jcer/article/viewFile/8/7>.

movement and other rights meant to facilitate the economic, political, and social goals of the EU would not be available to TCNs unless EU citizenship rights were extended to TCNs. Failing to develop a rights regime for TCNs was viewed as problematic for at least four reasons. First, TCNs made up a significant portion of the population within the European Union. In 1998, 10 million TCNs lawfully resided in EU member states.⁸⁰ While this only accounted for four percent of the total EU population, it represented a population larger than a number of EU member states.⁸¹ Second, it legitimated the unequal treatment of ethnic minorities. Most TCNs are “perceived as belonging to a visible minority” because of their family name, mother tongue, religion, and skin color.⁸² Thus, ethnic minorities and TCNs are often one in the same within EU member states and the allocation of rights based on citizenship status unintentionally limits the rights of ethnic minorities. Third, TCNs were long-term residents who were settled within the EU and would not be leaving. Contrary to the perception of many EU member states that the States were not countries of immigration, they had become just that. While the large-scale migration that took place post-World War II was viewed as temporary for decades, by the beginning of the twenty-first century it became impossible to continue to view migrants as temporary workers who would return home. These workers had settled in member states and had become a permanent part of society.⁸³ Finally, migration would continue such that the TCN population will not disappear over time.⁸⁴

The Council of the European Union (“the Council”) agreed that the incorporation of TCNs who were long-term residents was an important issue. In 1999, the Council concluded “the legal status of third-country nationals should be approximated to that of member states’ nationals.”⁸⁵ One approach offered for accomplishing this was granting TCNs who reside within a member state for a period of time and have a long-term residence permit “a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.”⁸⁶ This began to come to life in 2004 when the Council enacted

80. Kees Groenendijk & Elspeth Guild, *Converging Criteria: Creating an Area of Security of Residence for Europe’s Third Country Nationals*, 3 EUR. J. MIGRATION L. 37, 39 (2001).

81. *Id.*

82. *Id.*

83. *Id.* at 37.

84. *Id.* at 40.

85. Tampere European Council, Presidency Conclusions, SN 200/99, sec. 21 (Oct. 15-16, 1999), http://www.europarl.europa.eu/summits/tam_en.htm.

86. Council Directive (EC) No. 109/2003 of 25 November 2003, art. 4(1), 2003 O.J. (L

a directive concerning the status of third-country nationals who are long-term residents.⁸⁷ This directive explained that the incorporation of TCNs who are long-term residents was “a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty.”⁸⁸ Because of this commitment, postnational citizenship scholars correctly identify the development of a rights regime that is available to individuals based on something other than national citizenship. Yet this regime is not based solely on personhood. EU member states are increasingly conditioning immigration-related rights, economic rights, and political rights on civic integration. Civic integration, like national cultural belonging, requires migrants to demonstrate that they have adopted the member state’s values, norms, and practices before gaining these rights.⁸⁹

The remaining sections of this Part discuss noncitizens’ right to enter, reside, remain, vote, work, and be educated in a state in which they do not have citizenship status. This discussion illustrates that access to these rights varies based on levels of national cultural belonging measured by citizenship and immigration status.

B. Citizenship Rights in Practice

Citizenship rights are important for immigrant incorporation because legal rights are part of the context of reception that immigrants encounter. Four key aspects of immigrants’ context of reception are: government policy, labor market conditions, existing ethnic or national communities, and reactions from the native population.⁹⁰ The following sections examine the rights of TCNs in the areas of immigration, employment, political participation, and education. This discussion illustrates that none of these rights, except for education rights, are available to noncitizens based on personhood, but rather based on national cultural belonging in the form of civic integration.

1. The Right to Enter & Reside

The right to enter and remain within the territorial borders of a state are rights that continue to be governed based on traditional notions of state sovereignty. National citizens have an absolute right to

016) 44, whereas statement 2 (concerning the status of third-country nationals who are long-term residents) [hereinafter Long-Term Resident Council Directive].

87. *Id.*

88. *Id.* (whereas statement 4).

89. See discussion *infra* Part IV.A.

90. Banks, *supra* note 11, at 1169 (citing Marrow, *supra* note 12, at 233; PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 11, at 92-93).

enter their country of nationality, to reside there, and they cannot be deported. The ability to enter a state to work or join family, to have reasonable expectations about how long you can reside there, and to know that only serious criminal activity will lead to deportation creates a sense of security for immigrants. Such security allows immigrants to invest material and non-material resources in the country of residence that will enable them to achieve economic, social, and political incorporation. In the parlance of the human-resident-membership rights typology, the absolute right to enter and remain is a membership right, a robust right to enter and reside is a resident right, and there is no human right to enter and reside.⁹¹

a. EU Citizens

European Union citizens have freedom of movement, which gives them the right to enter and reside within the territory of a member state of which they are not a citizen.⁹² This state is referred to as the host member state.⁹³ The right to reside in a host member state for less than three months is without conditions for EU citizens and their family members.⁹⁴ The only EU citizens who have a right to reside in a host member state for more than three months are those who are workers or self-employed, “have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence and have comprehensive sickness insurance cover in the host member state,” or are students and have comprehensive health insurance.⁹⁵ EU citizens have the right to reside in the host member state as long as the conditions for residence continue to be satisfied.⁹⁶ The rights that EU citizens have to reside in a host member state are not absolute. Host member states retain the right to restrict these individuals’ freedom of movement and residence based on public policy, public safety, and public health grounds.⁹⁷ After residing in a host member state for five years, an EU citizen has the right to permanent residence in the host

91. This article does not address the rights of refugees or an individual’s right to a refugee determination within a state. The debates surrounding an individual’s right to enter in the refugee and asylum context is beyond the scope of this article.

92. Council Directive 2004/38, arts. 5-6, 2004 O.J. (L 158) 77, 91-92 (EC).[hereinafter EU Citizen Entry & Residence Directive].

93. *See e.g., id.*

94. *Id.* at art. 6. The EU citizens and their family members only need to have a valid identification card or passport.

95. *Id.* at art. 7.

96. *Id.* at art. 14(2).

97. *Id.* at art. 27.

member state.⁹⁸

b. Third-country nationals

TCNs' ability to enter and reside in an EU member state is dictated by domestic law.⁹⁹ Once a TCN obtains long-term resident status, however, that individual has a robust right to enter and reside in the country granting that status. Long-term resident status is available to TCNs who "have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application" pursuant to a Council Directive.¹⁰⁰ Member states must require TCNs to demonstrate that they have "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned" and health insurance.¹⁰¹ Finally, member states can require applicants to "comply with integration conditions, in accordance with national law."¹⁰² Once these requirements have been satisfied, the TCN obtains long-term resident status within the member state, which is a permanent status.¹⁰³

Long-term residents have a limited right to enter and reside in a member state other than the one that granted long-term resident status. This state is referred to as the second member state.¹⁰⁴ The long-term resident's ability to enter and reside in a second member state is contingent on the individual engaging in economic activity (employed or self-employed capacity), pursuing educational studies or vocational training, or other specified purposes.¹⁰⁵ These rights are not absolute because the second member state can limit the number of long-term residents from other member states allowed to enter and reside

98. EU Citizen Entry & Residence Directive, *supra* note 92, at art. 16(1).

99. See e.g., FRA EUR. UNION AGENCY FOR FUND. RIGHTS, HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION 26, 40 (2014), <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration> [hereinafter European Law Handbook].

100. Long-Term Residents Council Directive, *supra* note 86, at art. 3(2). The directive excludes individuals pursuing educational studies or vocational training, those who have applied for, or have been granted, temporary protection, and those who have applied for, or have been granted, "a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States."

101. Long-Term Resident Council Directive, *supra* note 86, at art. 5(1).

102. *Id.* at art. 5(2). See *infra* Part IV(C) for a more detailed discussion about the use of integration requirements.

103. Long-Term Resident Council Directive, *supra* note 86, at art. 8(1)-(2) (noting the Member State shall issue an EC residence permit that is valid for at least five years, and is automatically renewed upon expiry).

104. *Id.* at art. 2(d).

105. *Id.* at art. 14(2).

“provided that such limitations are already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of this Directive.”¹⁰⁶ Long-term residents who reside in a second member state are required to obtain a residence permit no later than three months after entering the second member state.¹⁰⁷ The second member state can require the long-term resident to demonstrate that they have “stable and regular resources which are sufficient to maintain themselves and the members of their families, without recourse to the social assistance system of the Member State concerned” and health insurance.¹⁰⁸ The second member state can also require the long-term resident to comply with integration measures.¹⁰⁹ Any requirement to satisfy integration requirements will not apply to long-term residents who had to satisfy integration requirements to obtain their long-term residence permit in the first member state.¹¹⁰ However, the second member state can require the long-term resident to attend language courses.¹¹¹ The second member state can also refuse a long-term residence application when the applicant “constitutes a threat to public policy or public security.”¹¹² In making the decision to deny a long-term residence application, the second member state is directed to “consider the severity or type of offence against public policy or public security committed by the long-term resident.”¹¹³

c. Derivative Rights

The family members of EU citizens and long-term resident TCNs have a derivative right to enter the territory of EU member states.¹¹⁴ The derivative right to enter the territory of member states stems from the European Union citizen’s or long-term resident’s right to free movement. The first rules adopted on the free movement of workers gave workers the right to be accompanied by their spouse, children under twenty-one years old, dependent children over twenty-one years old, and dependent parents and grandparents.¹¹⁵ The Free Movement Directive explicitly stated, “irrespective of their nationality” these

106. *Id.* at art. 14(4).

107. *Id.* at art. 15(1).

108. *Id.* at art. 15(2).

109. Long-Term Resident Council Directive, *supra* note 86, at art. 15(3).

110. *Id.* at art. 15(3).

111. *Id.* at art. 15(3).

112. *Id.* at art. 17(1).

113. *Id.* at art. 17(1).

114. Council Directive 86/2003, 2003 O.J. (L 251) 12 (EC) [hereinafter Family Reunification Council Directive].

115. *See* European Law Handbook, *supra* note 99, at 119-20

family members “have the right to install themselves with a worker who is a national of one member state and who is employed in the territory of another member state.”¹¹⁶ Similar rights were extended to the family members of long-term resident TCNs because they have a similar freedom to move throughout the European Union.¹¹⁷ The rights of family members to enter the territory of a state in which an EU citizen or long-term resident is working was based on the idea that if workers could not move with their family members the worker’s freedom of movement would be restricted.¹¹⁸

European Union citizens’ and long-term residents’ freedom of movement created a derivative right of entry for their family members. Yet this right only existed when the EU citizen or long-term resident was working in a state other than their state of citizenship or the state that granted long-term resident status. This led to a situation in which EU citizens residing within their state of citizenship and long-term residents residing within the state that granted long-term resident status had fewer rights to live with their non-citizen family members.

Paradoxically, in many EU Member States EU nationals exercising free movement rights enjoy far greater rights to family reunification than the states’ own nationals do. Family reunification for EU nationals who have not made use of free movement rights is regulated by national law, which remains more restrictive in some EU Member States.¹¹⁹

The European Court of Justice addressed two aspects of this issue in 2014. First, in *O v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B*, the court held that when EU citizens return to their country of citizenship after exercising their free movement rights in another member state, their

116. Long-Term Resident Council Directive, *supra* note 86, at art. 10(1).

117. Family Reunification Council Directive, *supra* note 114 (whereas statements).

118. See European Law Handbook, *supra* note 99, at 120. For long-term residents, the second member state can, but is not required, to authorize the entry and residence of other family members like dependent parents, dependent adult children, and unmarried partners. Long-Term Resident Council Directive, *supra* note 86, at art. 16(2). The admission of family members can be made contingent upon providing evidence that they “have resided as members of the family of the long-term resident in the first member state,” “have stable and regular resources which are sufficient to maintain themselves without recourse to the social assistance system of the Member State concerned or that the long-term resident has such resources and insurance for them” and health insurance. *Id.* at art. 16(4). The family members, like the long-term resident, can be denied entry if they “constitute[] a threat to public policy or public security.” *Id.* at art. 17(1). As with the long-term resident, the second member state is required to “consider the severity or type of offence against public policy or public security committed by the long-term resident or his/her family member(s), or the danger that emanates from the person concerned.” *Id.* at art. 17(2).

119. European Law Handbook, *supra* note 99, at 120.

family members have a derivative right of entry and residence in the EU citizen's state of origin.¹²⁰ The court interpreted a number of EU directives and concluded that depriving EU citizens of the ability to return to their state of citizenship with family members, when those familial relationships were created while exercising their free movement rights, would restrict the citizen's freedom of movement.¹²¹ Second, in *S & G v. Minister voor Immigratie, Integratie en Asiel*, the court similarly held that the same derivative right to enter and reside exists for third-country national family members of EU citizens when "the citizen resides in [their state of citizenship] but regularly travels to another Member State as a worker."¹²² The derivative rights to enter and reside are only available to the family members of EU citizens and long-term resident third-country nationals. These rights are not based on personhood, but rather family connections to citizens and individuals with the long-term resident immigration status.

d. Third-country nationals who are not long-term residents

For third-country nationals who are not long-term residents, their right to enter and reside within an EU member state is based on national law. While there is an EU Directive outlining the rights of TCNs workers within the EU, it only applies to those who are legally residing and authorized to work pursuant to national law or practice.¹²³ The family members of TCNs who are not long-term residents, but are authorized to enter and reside pursuant to national law, also have a derivative right of entry and residence.¹²⁴ The derivative rights only exist for the spouse and minor children of TCNs that have a residence permit issued by a member state that is valid for one year or more and "who has reasonable prospects of obtaining the right of permanent residence."¹²⁵ Member states can require children over the age of

120. Case C-456/12, *O. v. Minister voor Immigratie, Integratie en Asiel & Minister voor Immigratie, Integratie en Asiel v. B.*, 2014 E.C.R. 135, at para. 50.

121. *Id.*

122. Case C-457/12, *S & G v. Minister voor Immigratie, Integratie en Asiel*, 2014 E.C.R. 136, at para. 44.

123. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, 2011 O.J. L343/1, (2011) [hereinafter *Third-Country Nationals Directive*].

124. Family Reunification Council Directive, *supra* note 114, at 12.

125. *Id.* at art 3-4. These rights do not extend to individuals who have applied for, or have been granted, temporary protection, and those who have applied for, or have been granted, "a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States." *Id.* at art. 3(2). Other family members, such as dependent parents, dependent adult children, and unmarried partners may

twelve who “arrive[] independently from the rest of his/her family” to satisfy integration requirements provided for in existing legislation.¹²⁶ Member states can also deny these family members entry and the ability to reside on grounds of public policy, public security, and public health.¹²⁷

The ability of noncitizens to enter and reside in a country that is not their country of nationality is significantly limited. The United States treats the admission and residence of noncitizens as a privilege.¹²⁸ United States federal law outlines who is eligible for admission and residence, but no noncitizen has the right to enter and reside in the United States; not even the spouse or noncitizen children of a United States citizen.¹²⁹ European Union citizens have the right to enter and reside in member states that are not their state of nationality, and those rights extend to specified family members. However, even EU citizens’ right is not absolute. Host member states may prevent the entry and residence of other European Union citizens (and their family members) if those individuals pose a threat to public policy, public safety, or public health. Third-country nationals that have obtained long-term residence within a member state have similar rights to move throughout the European Union, but the initial grant of long-term residence status is based on national law. Additionally, the initial entry of third-country nationals into EU member states is based exclusively on national law. Neither international law nor regional law is playing a role in granting these noncitizens the ability to enter or reside in a state other than their state of nationality. This is an area in which national sovereignty remains quite strong and absolute. Thus, the right to enter and reside for noncitizens are resident and membership rights rather than human rights. These rights are only available to individuals with certain immigration statuses and citizens.

2. *The Right to Remain*

The right to remain, or the right not to be deported, is another right that traditionally has been limited to individuals with citizenship status. Only those individuals who are considered full members of the national community have been granted the right to remain and

be admitted to join the third-country national, but it is not required. *Id.* at art. 4(2-3).

126. *Id.* at art. 4(1).

127. Note that second Member States cannot deny a long-term resident’s family members entry and residence based on public health. Long-Term Resident Council Directive, *supra* note 86, at art. 17-18.

128. *See, e.g.*, 8 U.S.C. § 1101(a)(20).

129. *See, e.g.*, 8 U.S.C. §§ 1151(b), 1153.

protection against deportation, removal, or expulsion. Post-World War II the status conferring full membership within a State has been citizen.¹³⁰ While noncitizens do not have an absolute right to remain in a state of which they are not a citizen, deportation is regulated by law. Domestic law articulates the specific grounds upon which a noncitizen can be deported and domestic law and international human rights law specify the procedures that must be followed in doing so. These laws also protect noncitizens against arbitrary deportation and collective deportation.¹³¹ The United States and European countries protect the ability of noncitizens to remain differently. In the United States, all noncitizens are subject to the statutory deportation grounds. It does not matter what one's immigration status is, or how long one has resided in the United States.¹³² All that matters is that one is not a United States citizen. This approach is softened with the availability of discretionary relief from deportation. Immigration judges have discretion within certain boundaries to cancel a deportation order and allow the noncitizen to remain in the United States with lawful immigration status.¹³³ Due to concerns within Congress in the 1990s that immigration judges were exercising discretion favorably on behalf of noncitizens too frequently, fewer noncitizens are eligible for discretionary relief.¹³⁴ The European approach is different. Length of residence and immigration status determine which deportation grounds are applicable. The longer one has resided as a lawful resident the fewer deportation grounds apply. Personhood is not the basis for providing protection against deportation, rather it is citizenship, length of residence, and immigration status. Thus, the robust right to remain in EU member states should be viewed as a resident right and the absolute right to remain as a membership right.

While proportionality is institutionalized in deportation proceedings throughout Europe, national citizens are the only individuals with absolute protection against deportation. All other rights protecting noncitizens from deportation are limited; thus, national citizenship remains the "main determinant of individual rights

130. At earlier times in American and European history full membership has been based on local affiliations.

131. See, e.g., Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto, art. 4, Sep. 16, 1963, E.T.S. No. 46.

132. See 8 U.S.C. § 1227.

133. See 8 U.S.C. § 1229b.

134. See Banks, *supra* note 11.

and privileges” in the deportation context, contrary to Soysal's claim.¹³⁵ The limited rights that safeguard third-country nationals from deportation, however, are significant and they provide substantially more protection than is available in the United States.

Pursuant to EU law, there are three main categories of protection against deportation for EU citizens and their third-country national family members residing outside of the EU citizen's state of citizenship. First, deportation decisions based on public policy or public security must “take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin.”¹³⁶ Second, EU citizens and their family members with the right to permanent residence can only be deported based on “serious grounds of public policy or public security.”¹³⁷ Finally, EU citizens and their family members who have resided in a host member state for ten years and minors cannot be deported except for “imperative grounds of public security.”¹³⁸ Long-term resident TCNs have similar protections. They can only be deported when they constitute “an actual and sufficiently serious threat to public policy or public security.”¹³⁹ Before a long-term resident can be deported pursuant to this provision, the member state must consider the length of time of residence, the person's age, the consequences for the long-term resident and their family, and the person's “links with the country of residence or the absence of links with the country of origin.”¹⁴⁰

The use of a proportionality analysis to limit the deportation of EU citizens, their family members, and TCN long-term residents is based on the right to private life and family life. This right is protected pursuant to domestic law, the EU Charter of Fundamental Rights, the European Convention on the Protection of Human Rights, and Council Directives.¹⁴¹ There is robust European Court of Human Rights (“ECtHR”) jurisprudence on the interaction between a noncitizen's right to private life and family life and a state's sovereign authority to deport noncitizens.¹⁴² Article 8 of the European Convention on the

135. SOYSAL, *supra* note 6, at 12.

136. EU Citizen Entry & Residence Directive, *supra* note 92, at art. 28(1).

137. *Id.* at art. 28(2).

138. *Id.* at art. 28(3).

139. Long-Term Resident Council Directive, *supra* note 86, at art. 12(1).

140. *Id.* at art. 12(3).

141. *See, e.g.*, European Law Handbook, *supra* note 99, at 117.

142. *See* Chair and J.B. v. Germany, App. No. 69735/01, HUDOC (2007), <http://www.echr.coe.int>; Kaya v. Germany, App. No. 31753/02, HUDOC (2007),

Protection of Human Rights states, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹⁴³ Any interference with this right must be “in accordance with the law” and “necessary in a democratic society.”¹⁴⁴ The ECtHR has interpreted “necessary in a democratic society” to mean a measure that is “justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.”¹⁴⁵ Within the deportation context the ECtHR reviews a deportation order to see if the “legitimate [State] aim pursued” and the “seriousness of the interference with the applicant’s right to respect for their family life” have been appropriately balanced.¹⁴⁶ The State aim involved is generally preventing disorder as most third-party nationals are ordered deported based on criminal convictions.¹⁴⁷ Noncitizens have argued that the “seriousness of the interference” with private and/or family life was evident in the fact that deportation would separate them from their spouse, partner, children, parents or siblings, and that it “would be unreasonable for their family

<http://www.echr.coe.int>; Maslov v. Austria, 47 Eur. H.R. Rep. 20 (2007); Sezen v. The Netherlands, 43 Eur. H.R. Rep. 30 (2006); Üner v. The Netherlands, 45 Eur. H.R. Rep. 14 (2006); Lupsa v. Romania, 46 Eur. H.R. Rep. 36 (2006); Keles v. Germany, 44 Eur. H.R. Rep. 12 (2005); Radovanovic v. Austria, 41 Eur. H.R. Rep. 6 (2004); Jakupovic v. Austria, 38 Eur. H.R. Rep. 27 (2003); Mokrani v. France, 40 Eur. H.R. Rep. 5 (2003); Slivenko v. Latvia, 39 Eur. H.R. Rep. 24 (2003); Al-Nashif v. Bulgaria, 36 Eur. H.R. Rep. 37 (2002); Yildiz v. Austria, 36 Eur. H.R. Rep. 32 (2002); Amrollahi v. Denmark, App. No. 56811/00, HUDOC (2002), <http://www.echr.coe.int>; Ezzouhdi v. France, App. No. 47160/99, HUDOC (2001), <http://www.echr.coe.int>; Bensaid v. United Kingdom, 33 Eur. H.R. Rep. 10 (2001); Boulif v. Switzerland, 33 Eur. H.R. Rep. 50 (2001); Baghli v. France, 33 Eur. H.R. Rep. 32 (1999); Bouchelkia v. France, 25 Eur. H.R. Rep. 686 (1999); El Boujaïdi v. France, 30 Eur. H.R. Rep. 223 (1999); Mehemi v. France, 30 Eur. H.R. Rep. 739 (1999); Dalia v. France, 33 Eur. H.R. Rep. 26 (1998); Boujlifa v. France, 30 Eur. H.R. Rep. 419 (1997); Boughanemi v. France, 22 Eur. H.R. Rep. 228 (1996); C v. Belgium, 32 Eur. H.R. Rep. 2 (1996); Nasri v. France, 21 Eur. H.R. Rep. 458 (1995); Lamguindaz v. United Kingdom, 17 Eur. H.R. Rep. 213 (1993); Beldjoudi v. France, 14 Eur. H.R. Rep. 32 801 (1992); Moustaquim v. Belgium, 13 Eur. H.R. Rep. 802 (1991); Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322 (1988); see also Angela M. Banks, *Deporting Families: Political Question or Legal Issue?*, 27 GA. STATE. U. LAW REV. 489-563 (2011).

143. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221].

144. *Id.* at art. 8(2) (stating the interference must be “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

145. Moustaquim v. Belgium, 13 Eur. H.R. Rep. 802, at para. 43 (1991); see also Berrehab, *supra* note 142, at para 29.

146. Berrehab, *supra* note 142.

147. See Banks, *supra* note 142, at 532. The third-country nationals were ordered deported for criminal convictions running the spectrum of assault, burglary, drug trafficking, and rape. See, e.g., Beldjoudi, *supra* note 142; Aoulmi v. France, App. No. 50278/99, HUDOC (2006), <http://www.echr.coe.int>; Amrollahi *supra* note 142; Baghli v. France, 33 Eur. H.R. 32; Bouchelkia *supra* note 142.

members to join them in their state of nationality because of language barriers, economic opportunities, or distance from non-nuclear family members.”¹⁴⁸ In conducting this proportionality review the ECtHR weighs the state’s interest in public safety against the “noncitizen’s affiliation with the state of residence, but also with his or her state of nationality.”¹⁴⁹ In seventeen out of twenty-eight cases decided between 1988 and mid-2008, the ECtHR held that the state had violated a third-country national’s right to family life by ordering deportation.¹⁵⁰

The right to private life and family life is a right that is available based on personhood—it is available to all noncitizens. However, the ability of this right to limit a State’s power to deport a noncitizen depends on the noncitizen’s length of residence and immigration status. Adjudicators seek to balance the noncitizen’s interest in remaining in the state of residence and the State’s interest in protecting sovereign interests like public security. This type of proportionality analysis provides a great deal of protection to certain noncitizens, but it does not create an absolute right to remain. That right is only available to citizens. Thus, a robust right to remain in EU member states should be viewed as a resident right and the absolute right to remain as a membership right.

3. *Economic Activity Rights*

An individual’s ability to work or engage in self-employment depends on their citizenship status and immigration status. For citizens this right is absolute, however domestic law may limit the types of work that an individual can perform.¹⁵¹ For noncitizens, this right depends on the permission that was granted upon entry. Economic activity rights should be classified as resident rights and membership rights. Limited economic activity rights are resident rights and the more robust economic activity rights are membership rights because personhood is not the basis by which these rights are allocated. Once noncitizens are granted permission to work within a specific state they are generally granted the same protections as citizen workers. For example, protection against discrimination and the protection of workplace safety regulations.¹⁵² However, states can and do limit access to certain jobs based on citizenship status. For example, in the United States state governments can limit state government jobs to U.S.

148. Banks, *supra* note 142, at 528.

149. *Id.* at 539.

150. *Id.* at 538-39.

151. For example, in the United States sex work is illegal in most jurisdictions.

152. See, e.g., European Law Handbook, *supra* note 99, at 184-85.

citizens if the job “go[es] to the heart of representative government.”¹⁵³ The United States Supreme Court has held that peace officers, state troopers, and school teachers are such jobs.¹⁵⁴ Similarly within the European Union member states can restrict noncitizens’ access to jobs that involve “the exercise of public authority” and safeguarding the general public interest.¹⁵⁵

Unlike other rights that are key for immigrant incorporation, postnational citizenship scholars acknowledge that the right to work is not a right that is based on personhood. Soysal states that “a person’s specific legal status as a noncitizen is the most important [factor]” that determines a noncitizen’s right to engage in economic activity.¹⁵⁶ Because citizenship and immigration status dictate access to this right, it is best viewed as a membership right in its most robust form and a resident right in its weaker form.

Within the European Union citizenship status and immigration status dictate a noncitizen’s access to the labor market. Access to employment is regulated differently for EU citizens and TCNs. EU citizens’ freedom of movement includes the right to nondiscrimination in the employment context.¹⁵⁷ Thus, EU citizens have equal access to the labor market in any EU member state. However, there is a public service exception.¹⁵⁸ Additionally, an EU citizens’ right to work in a member state of which he or she is not a national can be limited based on public policy, public security, and public health.¹⁵⁹

Third-country nationals’ ability to work within the European Union is shaped by three factors: familial relationship with an EU citizen, length of residence, and immigration status. When an EU citizen exercises their freedom of movement and resides in a host member state, their third-country family members have the right to work in the host member state as well.¹⁶⁰ Long-term residents are entitled to the same access to the labor market as EU citizens.¹⁶¹ Long-term residents’ family members are able to work within the European

153. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

154. Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 434-35 (1997) (citing *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (peace officers); *Ambach v. Norwick*, 441 U.S. 68, 69-72 (1979) (school teachers); *Foley v. Connelie*, 435 U.S. 291, 297-300 (1978) (state troopers)).

155. EC Council Directive, *supra* note 23.

156. SOYSAL, *supra* note 6, at 125-26.

157. EU Treaty, *supra* note 23.

158. *Id.* at art. 45(4).

159. *Id.* at art. 45(2).

160. EU Citizen Entry & Residence Directive, *supra* note 92, at art. 23.

161. Long-Term Resident Council Directive, *supra* note 86, at art. 11(1)(a).

Union, but each member state determines the conditions for such employment.¹⁶² Member states are also free to restrict third-country nationals' parents' and adult unmarried children's access to the labor market.¹⁶³

For TCNs who do not qualify for long-term residence, the right to work is dictated by the terms of entry. For example, TCNs with a Blue Card have limited access to the labor market for two years, and then they have equal access to "highly qualified employment" for the remainder of their stay within the European Union.¹⁶⁴ The Blue Card grants a TCN the right to enter and reside within a European Union member state "for the purpose of highly qualified employment."¹⁶⁵ Highly qualified employment is a term of art defined as employment in which the worker is protected as an employee, is paid, and has "higher professional qualifications."¹⁶⁶ Blue Card holders can change their employment within the first two years, but have to obtain prior authorization by the relevant state authorities.¹⁶⁷ After two years such changes do not require prior authorization, but the Blue Card holder must inform the proper authorities.¹⁶⁸ Finally, TCN family members of Blue Card holders have access to the labor market.¹⁶⁹

TCN workers who are not engaged in "highly qualified employment," are granted access to the labor market for the "specific employment activity authorized under" their entry and residence permit.¹⁷⁰ This is similar to the nonimmigrant visa category in the United States. These noncitizens are entitled to equal treatment in working conditions, health and safety workplace protections, freedom of association and affiliation, and membership in an organization representing workers.¹⁷¹ If these workers qualify for family

162. Family Reunification Council Directive, *supra* note 114, at art. 14(2).

163. *Id.* at art. 14(3).

164. EC Council Directive, *supra* note 23, at art. 12(1). However, any restrictions that apply to nationals, E.U. citizens, or EEA citizens also apply to Blue Card holders. *Id.* at art. 12(4).

165. *Id.* at art. 1(a).

166. *Id.* at art. 2(b).

167. *Id.* at art. 12(2).

168. *Id.* at art. 12(2).

169. *Id.* at art. 15(1); *see also* Family Reunification Council Directive, *supra* note 114, at art. 14(1).

170. Council Directive 2004/38, arts. 5-6, 2004 O.J. (L 158) 77, 91-92 (EC); Directive 2011/98/EU Of The European Parliament And Of The Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, 2011 O.J. L343/1, art. 11(c) (2011) [hereinafter Third-Country National Workers Directive].

171. *Id.* at art. 23(1).

reunification, their family members are granted access to the labor market, subject to certain conditions.¹⁷²

Some TCNs are admitted to European Union member states for seasonal work.¹⁷³ Similar to the nonimmigrant visa category in the United States, these noncitizens have the right to exercise the specific employment activity specified in their entry and residence permit during the period of their authorized stay.¹⁷⁴ These noncitizens are entitled to equal treatment with citizens for employment terms, the right to “strike and take industrial action in accordance with host member state’s national law,” back payments for outstanding remuneration, and certain social security benefits.¹⁷⁵

Noncitizens’ access to the labor market in EU member states is based on their immigration status. The specific purpose for which a noncitizen is admitted determines their access to the labor market. Those noncitizens granted indefinite leave to reside are granted economic activity rights that closely mirror those of citizens. All other noncitizens’ access to the labor market and right to engage in economic activity is determined based on actual labor market needs. Noncitizens’ rights in this context closely mirror those of citizens when the noncitizens’ connections to the state mirror those of citizens. Absent such connections, the right to engage in economic activity is limited and based on national sovereign interests. Therefore, noncitizens’ limited economic activity rights are resident rights and the more robust economic activity rights are membership rights.

4. Political Participation Rights

Noncitizens’ ability to vote in national or local elections varies widely across Europe. Only in the United Kingdom and Portugal are TCNs able to vote in national elections.¹⁷⁶ However, this right to vote is limited to certain categories of TCNs. Access to local voting rights is more common. European Union citizens have local voting rights throughout Europe pursuant to the Treaty of Maastricht.¹⁷⁷

Third-country nationals have local voting rights in fifteen

172. Family Reunification Council Directive, *supra* note 114, at art. 14(1).

173. Directive 2014/36/EU of the Eur. Parliament and of the Council of 26 February 2014 on the Conditions of Entry and Stay of Third-Country Nat’ls for the Purpose of Emp. as Seasonal Workers, art. 3(2)(e), 2014 O.J. (L94) 36, (2014) [hereinafter TCNs Seasonal Worker Directive].

174. *Id.* at art. 11(c).

175. Third-Country National Workers Directive, *supra* note 170, at art. 23(1).

176. *International Key Findings*, MIGRANT INTEGRATION POL’Y INDEX (2015), <http://www.mipex.eu/key-findings> [hereinafter MIPEX].

177. EU Treaty, *supra* note 23.

European countries.¹⁷⁸ There are four common conditions used to determine noncitizen voting rights. The conditions are duration of residence, registration, residence status, or reciprocity.¹⁷⁹ The required period of residence ranges from three to five years. For example, TCNs must reside in Denmark, Estonia, Portugal, and Sweden for three years before being eligible to vote.¹⁸⁰ The residence requirement is four years in Finland and five years in Belgium, Luxembourg, and the Netherlands.¹⁸¹ Certain states require TCNs to register with local authorities. In numerous countries, such as Ireland, the Netherlands, the United Kingdom, and Nordic states the registration process is simple and mirrors that required of nationals when moving to a new address.¹⁸² However, Belgium requires more than simple registration. Applicants for voting rights must also “sign a declaration pledging respect to the Belgium Constitution and legislation.”¹⁸³ Another condition for voting rights is permanent residence or long-term residence status. For example, Estonia, Hungary, Lithuania, Slovakia, and Slovenia condition local voting rights on having this type of residence status.¹⁸⁴ Finally, certain states condition TCNs’ local voting rights on reciprocity. TCNs from state A are allowed to vote in local elections in state B if citizens of state B have similar voting rights in state A.¹⁸⁵ The Czech Republic, Malta, Portugal, and Spain all condition voting rights on the existence of bilateral agreements granting voting rights to their citizens.¹⁸⁶ However, the Czech Republic and Malta do not have any voting reciprocity agreements so TCNs do not have local voting rights in these countries.¹⁸⁷

More complex registration requirements, like those in Belgium, and permanent or long-term residence status requirements limit voting rights to TCNs who are able to demonstrate national cultural

178. Kees Groenendijk, *Voting Rights for Nationals of Non-EU States*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG (May 22, 2013), <https://perma.cc/7HBY-6H8M>. TCNs obtain voting rights after three years in Denmark, Estonia, Portugal, and Sweden. *Id.* After four years TCNs are eligible for local voting rights in Finland and after five years in Belgium, Luxembourg, and the Netherlands. *Id.*

179. *Id.* at 4.

180. *Id.*

181. *Id.*

182. *Id.* at 4-5.

183. *Id.*

184. Groenendijk, *supra* note 178, at 5.

185. *Id.* (meaning that nationals of country A can vote in country B only if nationals of country B can vote in country A, mostly on the basis of a bilateral agreement between the two countries).

186. *Id.* at 3.

187. *Id.* Spain has one such agreement with Norway and Portugal has a number of such agreements, adopting ten in recent years.

belonging.¹⁸⁸ In Belgium, national cultural belonging is measured based on a pledge to respect the national constitution and national laws.¹⁸⁹ In countries that condition voting rights on residence status, TCNs have had to demonstrate national cultural belonging in order to obtain permanent residence or long-term residence status. As will be discussed in Part III, before TCNs can obtain these residence statuses they must demonstrate integration with regard to language, country knowledge, and national values before obtaining permanent residence or long-term residence status.¹⁹⁰

The availability of voting rights is widely available to EU citizens throughout Europe, but it is more restricted for TCNs.¹⁹¹ Voting rights represent the most traditional form of political participation and non-citizen voting rights throughout Europe vary greatly.¹⁹² EU citizens have local voting rights throughout Europe, but TCNs' local voting rights are conditioned on duration of residence, registration, residence status, or reciprocity.¹⁹³ Contrary to the claims of postnational citizenship scholars, no European state grants TCNs voting rights based on personhood. This type of political participation is conditioned on national cultural belonging in states that have heightened registration requirements and those that condition voting rights on long-term residence status. Therefore, it is best to view voting rights as resident rights or membership rights depending on the regime used to allocate them. In countries that condition voting rights on residence or simple registration requirements, voting rights should be viewed as a resident right. For countries that condition voting rights on a status or registration requirements that measure national cultural belonging, voting rights should be viewed as membership rights.

5. Education Rights

Education is an important aspect of the immigrant incorporation process. Education in western democracies not only provides

188. *Id.*

189. *Id.* at 4-5.

190. The countries are Austria, Cyprus, Denmark, France, Germany, Greece, Italy, Lithuania, Malta, the Netherlands, Norway, Switzerland, and the United Kingdom. MIPEX, *supra* note 176. Groenendijk also notes that conditioning voting rights on permanent residence or long-term residence status “may severely limit the number of third-country nationals who can vote since the national governments in these countries grant the required status infrequently or only to specific categories of immigrants (e.g., co-ethnics).” Groenendijk, *supra* note 178, at 5.

191. Groenendijk, *supra* note 178, at 5.

192. *Id.*; Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 CITIZENSHIP STUDIES 607, 607-08 (2009).

193. Groenendijk, *supra* note 164, at 4.

individuals with skills and knowledge necessary for participating in the labor market, it also serves as an important site for socialization. This is the one right discussed in this article that most conforms to the claims made by postnational citizenship scholars. Access to primary and secondary education is available based on personhood.

The Charter of Fundamental Rights of the European Union guarantees all individuals, EU citizens and TCNs alike, a right to education, which includes the right to “free compulsory education.”¹⁹⁴ The language in this provision is universal, stating that “[e]veryone has the right to education and to have access to vocational and continuing training.”¹⁹⁵ Therefore, individuals who have long-term residence status, Blue Card holders, seasonal workers, and other workers, along with their family members, all have equal access to education and vocational training.¹⁹⁶ Pursuant to secondary EU law, “all third-country national children in the EU, except those only present for a short period of time, are entitled to access basic education.”¹⁹⁷ This right extends to TCN children who are unauthorized, but whose deportation has been postponed.¹⁹⁸

Unlike the right to enter, reside, remain, economic activity rights, and political participation rights, education rights do conform to the claims of postnational citizenship scholars because they are human rights. Education rights are granted based on personhood and are

194. EU Charter of Fundamental Rights art. 14 (The right to education “includes the possibility to receive free compulsory education.”). The European Union Citizen Entry & Residence Directive ensures that this right to education is realized for E.U. citizens residing outside of their country of nationality. EU Citizen Entry & Residence Directive, *supra* note 92, at art. 24(1); *see also* EU Treaty, *supra* note 23, at arts. 149, 150.

195. EU Charter, *supra* note 176.

196. Long-Term Residence Council Directive, *supra* note 86, at art. 11(1)(b); Family Reunification Council Directive, *supra* note 111, at art. 14(1)(a); EC Council Directive, *supra* note 23, at arts. 14(1)(c), 15(1) (granting family members the rights outlined in the Family Reunification Directive & granting Blue Card holders equal treatment with nationals of the host Member State with regard to education and vocational training); Third-Country National Workers Directive, *supra* note 170, at art. 12(1)(c); Family Reunification Council Directive, *supra* note 114, at arts. 3(1); TCNs Seasonal Worker Directive, *supra* note 173, at art. 23(1)(g). The family members of other workers and seasonal workers have equal access to education if they have a residence permit valid for one year or more and reasonable prospect of obtaining a right of permanent residence. Family Reunification Council Directive, *supra* note 114, at arts. 3(1), 14(1)(a). Other workers can be denied study and maintenance grants and loans or other grants and loans, and they can be required to pay fees for university and post-secondary education and vocational training that is “not directly linked to the specific employment activity.” Third-Country National Workers Directive, *supra* note 170, at art. 12(2)(a). Additionally, these workers can be required to demonstrate language skills to access university and post-secondary education and vocational training. *Id.*

197. European Law Handbook, *supra* note 99, at 197.

198. *Id.*

divorced from national cultural belonging. This is an important development in the protection of citizenship rights, yet it is the exception rather than the rule. Despite the disaggregating of citizenship rights and the decoupling of many of these rights from citizenship status, the majority of the rights critical for immigrant incorporation continue to be conditioned on national cultural belonging.

IV. CIVIC INTEGRATION

Post-World War II Western liberal democratic states have disaggregated citizenship rights, and the allocation of many of these rights has been decoupled from citizenship status. At the time that Soysal wrote her groundbreaking book, a growing number of rights were being made available to noncitizens. Yet, since 1994 an increasing number of EU member states are conditioning access to long-term resident status on civic integration. Rights that are critical for immigrant incorporation—the right to enter, reside, remain, work, and vote—continue to be allocated based on national cultural belonging rather than personhood. National cultural belonging has been a basis for granting citizenship status, and it is increasingly becoming a basis for granting long-term residence status. At least fourteen EU member states require third-country nationals (“TCNs”) to demonstrate integration with regard to language, country knowledge, and national values before obtaining a legal status that grants them citizenship rights.¹⁹⁹ Six of these countries require certain TCNs to demonstrate their integration before being allowed to enter the country.²⁰⁰ As the previous section explains, it is long-term residence status that enables noncitizens to have a robust set of citizenship rights to facilitate their long-term integration.

This Part analyzes the national rules governing access to long-term residence status in the Netherlands, France, and Germany. The focus is on these three countries because they are home to a significant number of TCNs. In 2014, forty-six percent of long-term resident TCNs arriving in Europe were in the Netherlands, France, and

199. These countries include Austria, Cyprus, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, and the United Kingdom. MIPEX, *supra* note 176.

200. Saskia Bonjour, *The Transfer of Pre-Departure Integration Requirements for Family Migrants among Member States of the European Union*, 2 COMPARATIVE MIGRATION STUDIES 205 (2014), <https://www.imiscoe.org/journal-cms-2/comparative-migration-studies-2014-2/68-5-bonjour-s-2014-the-transfer-of-pre-departure-integration-requirements-for-family-migrants-among-member-states-of-the-european-union/file>. The countries are Austria, Denmark, France, Germany, and the United Kingdom.

Germany.²⁰¹ These countries have also had different models of immigrant integration. The Dutch model has been termed “multicultural” in which the state provides easy access to citizenship status and recognizes the “right of ethnic minority groups to maintain their cultural differences.”²⁰² Scholars refer to the French model as “assimilationist” because the state provides easy access to citizenship status, “but requires from migrants a high degree of assimilation in the public sphere and gives little to no recognition of their cultural difference.”²⁰³ Finally, the German model has been described as “segregationist” or “exclusive.”²⁰⁴ Within this model, migrants who “do not share the ethnocultural background of the majority society” and are excluded “from the political community.”²⁰⁵ Migrants are not forced, however, “to give up their own cultures, and the state may even actively promote such cultures and discourage assimilation to the majority culture.”²⁰⁶ Despite decades of utilizing these different models for immigrant integration, the Netherlands, France, and Germany have come to adopt very similar integration requirements for long-term residents.²⁰⁷ The analysis in this section demonstrates that national cultural belonging remains an important basis for allocating citizenship rights even as citizenship rights are disaggregated and decoupled from citizenship status.

A. National Cultural Belonging

The postnational citizenship model distinguishes between national-based conceptions of citizenship and postnational conceptions of citizenship. The former are based on national identity, which requires a historical or cultural tie to the state.²⁰⁸ Alternatively, a postnational approach to belonging and citizenship is based on

201. *Immigration*, EUROSTAT (last visited Aug. 5, 2016), <https://perma.cc/RJ8H-LYYR>.

202. RUUD KOOPMANS ET. AL., *CONTESTED CITIZENSHIP: IMMIGRATION AND CULTURAL DIVERSITY IN EUROPE* 8 (2005).

203. *Id.*

204. *Id.*

205. *Id.* at 11.

206. *Id.* This model is based on the assumption that migrants will not become long-term residents. Rather they will only remain as guest workers for a limited period of time. Efforts to support migrants in maintaining the cultural heritage of their nationality was seen as “facilitating their eventual repatriation.”

207. For countries like Germany this new approach to immigrant integration reflects acceptance of the fact that TCNs are not guest workers who will return home after a short stay.

208. SOYSAL, *supra* note 6, at 3 (“The model of national citizenship, anchored in territorialized notions of cultural belonging, was dominant during the period of massive migration at the turn of the century, when immigrants were expected to be molded into national citizens.”).

personhood.²⁰⁹ Postnational citizenship scholars contend that their approach to citizenship allows a broader range of individuals to obtain citizenship rights because it divorces these rights from traditional ideas about national belonging that are rooted in cultural similarity.²¹⁰ Yet, as this section will demonstrate national cultural belonging remains a critical criterion for obtaining a legal status that provides access to important citizenship rights.

The development of a robust rights regime for TCNs grew out of concern that they were not sufficiently integrated into European society. TCN integration was an explicit EU agenda item at the 1999 Tampere European Council meeting.²¹¹ The Presidency Conclusions of that meeting envisioned “an EU immigration and integration policy that ensures ‘fair treatment’ of TCNs, granting them rights and obligations ‘comparable to EU citizens.’”²¹² The need for this approach to TCN integration grew out of two realities. First, TCNs were long-term residents within EU member states who would not be returning to their countries of origin. Second, a significant number of TCNs were not naturalizing in their state of residence. The failure to naturalize was often due to TCNs being ineligible to naturalize or onerous naturalization requirements. Once it became clear that TCNs would not be eligible for EU citizenship, the EU began to develop a comprehensive rights regime to ensure that long-term resident TCNs had rights approximating those of EU citizens. Basic or fundamental rights were allocated based on personhood, and thus covered TCNs, but other rights were based on national citizenship.²¹³ The EU adopted measures to extend these citizenship rights to TCNs based on their long-term residence. For example, freedom of movement is a right granted to EU citizens that would otherwise be unavailable to TCNs.²¹⁴ Pursuant to the Directive concerning the status of third-country nationals who are long-term residents, TCNs who obtain a long-term residence permit also have freedom of movement.²¹⁵

In adopting the Directive on Long-Term Residents, the EU

209. SARAH WALLACE GOODMAN, IMMIGRATION AND MEMBERSHIP POLITICS IN WESTERN EUROPE 2 (2014).

210. See e.g., SOYSAL, *supra* note 6.

211. Anja Wiesbrock, *Discrimination Instead of Integration? Integration Requirements for Immigrants in Denmark and Germany*, in ILLIBERAL LIBERAL STS.: IMMIGR., CITIZENSHIP AND INTEGRATION IN THE EU 299 (Sergio Carrera et. al., eds., 2009).

212. *Id.*

213. This reflects Bosniak’s idea of universal norms governing “citizenship within the community” but not “citizenship at the border.” Bosniak, *supra* note 4, at 33-35.

214. EU Citizen Entry & Residence Directive, *supra* note 92, at art. 6.

215. Long-Term Residents Council Directive, *supra* note 86, at art. 14.

Council acquiesced to member state desires to condition access to a long-term residence permit on evidence of cultural integration. The Directive states that “member states may require third-country nationals to comply with integration conditions, in accordance with national law” as a condition for obtaining long-term residence status.²¹⁶ At the time that the Directive was adopted, 2003, a number of EU member states required TCNs seeking prolonged residence or settlement to demonstrate proficiency in the host country language and knowledge of the country’s values, norms, and practices. These requirements grew out of a concern that a significant number of TCNs who had resided in EU member states had not been successfully integrated. Employment rates, educational attainment, language skills, access to health and social services, and residential patterns suggested that TCNs were trailing significantly behind member state citizens.²¹⁷ In addition to traditional measures of immigrant integration, there was a growing sense that TCNs, particularly those from the Maghreb, had values and norms that were at odds with the mainstream EU values and norms.²¹⁸ For example, the July 7, 2005, terrorist attacks in London committed by second-generation immigrants fueled the concern that TCNs were not culturally integrated.²¹⁹ Member states responded to this concern by requiring TCNs who desired long-term resident permits to demonstrate that they could speak the language and were knowledgeable about the state’s history, values, and norms. Member states viewed this requirement as a tool for maintaining social cohesion in the face of a culturally diverse immigration stream.

The growing use of civic integration prerequisites for long-term resident status undermines the claim made by postnational citizenship scholars that a “new and more universal concept of citizenship” exists in Europe that is “based on universal personhood rather than national belonging.”²²⁰ The idea that this new form of citizenship is based on the idea that “incorporation into a system of membership rights does not inevitably require incorporation into the national collectivity” can no longer be viewed as accurate.²²¹ Contrary to Soysal’s claim citizenship rights are not conferred “regardless of [a TCNs] historical

216. *Id.* at art. 5(2).

217. Christian Joppke, *Beyond National Models: Civic Integration Policies for Immigrants in Western Europe*, 30 W. EUROPEAN POLITICS 6, 9 (2007).

218. The Maghreb refers to Mauritania, Western Sahara, Morocco, Algeria, Tunisia, and Libya.

219. See *London Bombers: Key Facts*, BBC NEWS (5:24 PM, Jul. 21, 2005), <https://perma.cc/CKS2-GUFK>.

220. SOYSAL, *supra* note 6, at 1. See Wiesbrock, *supra* note 211.

221. SOYSAL, *supra* note 6, at 3.

or cultural ties to that community.”²²² Cultural ties to the national community remain critically important in allocating citizenship rights that facilitate immigration incorporation.

B. Testing Integration

The growing trend of conditioning long-term resident status on civic integration illustrates that liberal democracies in Europe have not broken away from the idea that national cultural belonging is a prerequisite for citizenship rights.²²³ While the EU has taken on a bigger role in regulating immigration, “the integration of third-country nationals (TCNs) is still essentially a matter of national control.”²²⁴ States are learning from one another and increasingly conditioning access to long-term residence status, and the corresponding citizenship rights, on similar integration requirements. The integration requirements focus on language skills, country knowledge, and national values to ensure that those granted citizenship rights culturally belong.²²⁵

1. The Netherlands

The Netherlands was the first country to condition permanent residence permits on demonstrating language skills, country knowledge, and national values.²²⁶ By the late 1990s, third-country nationals residing in the Netherlands were not successfully integrating into Dutch society.²²⁷ The majority of third-country nationals residing

222. *Id.* “The model of national citizenship, anchored in territorialized notions of cultural belonging, was dominant during the period of massive migration at the turn of the century, when immigrants were expected to be molded into national citizens.”

223. See MIPEX, *supra* note 1176. At the time that the TCNs Long-term Residence Directive was adopted many EU Member States had such an immigration status available that provided TCNs with the same rights as those required by the Directive. See Groenendijk & Guild, *supra* note 80, at 40-41 (noting convergence of Member State laws regarding TCNs).

224. Wiesbrock, *supra* note 211, at 299. (“By 2008, most member states have made the access to various rights, ranging from initial residence rights to acquisition of citizenship, subject to the compliance with integration conditions.”).

225. Sara Wallace Goodman, *Integration Requirements for Integration’s Sake? Identifying, Categorising and Comparing Civic Integration Policies*, 36 J. ETHNIC & MIGRATION STUDIES 753, 759 (2010).

Culture as used in this article refers to values, norms, and practices. Adopting the sociological understanding of values and norms, values as used in this project refer to “abstract ideals” and norms refer to “principles and rules of social life that people are expected to observe.” GIDDENS, *supra* note 6, at 54.

226. Goodman, *supra* note 225, at 759; Joppke, *The Inevitable Lightening of Citizenship*, *supra* note 7, at 6-7; SARAH WALLACE GOODMAN, IMMIGRATION AND MEMBERSHIP POLITICS IN WESTERN EUROPE 163 (2014).

227. Joppke, *Beyond National Models*, *supra* note 217, at 6.

in the Netherlands were from, and continue to be from, Turkey and the Maghreb, primarily Morocco.²²⁸ After the 1970s, the Netherlands, like most European countries, did not have significant labor migration.²²⁹ The majority of migrants were asylum seekers or family migrants and they were often low- or unskilled workers, had little formal education, and no Dutch language skills.²³⁰ In terms of traditional incorporation measures, ethnic third-country nationals' migrants' unemployment rates, welfare dependency, high school drop-out rates, and incarceration rates far exceeded those of Dutch citizens.²³¹ Additionally, residential segregation was high.²³² Government officials responded to this integration failure by adopting civic integration policies. The first significant policy adopted was the 1998 Newcomer Integration Law (Wet Inburgering Nieuwkomers) ("WIN").²³³ The goal of this law was facilitating "migrants' participation in mainstream institutions . . . and 'autonomy,' to be achieved through Dutch language acquisition and labour-market integration."²³⁴ This goal was to be achieved by requiring most third-country nationals seeking prolonged residence in the Netherlands to take a yearlong civic integration course.²³⁵ The course included "600 hours of Dutch language instruction, civic education, and preparation for the labour market."²³⁶

The WIN has been revised a number of times since 1998. Today two categories of migrants are required to pass a civic integration exam as a condition for prolonged residence in the Netherlands.²³⁷ The first category is most third-country nationals entering the Netherlands who intend to reside for a prolonged period of time.²³⁸ The second category

228. *Id.*

229. *See id.*

230. *Id.*

231. *Id.* at 6. For example, TCNs' unemployment rates were three to 5.4 times higher than the rates for Dutch citizens between 1999 and 2007.

232. *Id.* at 6.

233. Joppke, *Beyond National Models*, *supra* note 217, at 6.

234. *Id.*

235. *Id.*

236. *Id.*

237. When the WIN was first adopted most third-country nationals seeking prolonged residence in the Netherlands had to take a yearlong civic integration course. The course includes "600 hours of Dutch language instruction, civic education, and preparation for the labour market." *Id.*

238. INT'L ORG. FOR MIGRATION, *Laws for Legal Immigration in the 27 EU Member States* 404-05, (2009), <https://perma.cc/7GZ9-VCK4> [hereinafter *Laws for Legal Immigration*]. The integration requirement is a requirement for obtaining a residence visa. *Id.* at 404. Third-country nationals from developed OECD countries like the United States, Canada, Australia, New Zealand, and Japan are exempt from this civic integration requirement pursuant to bilateral treaties. *Id.* at 6, n.5.

is most third-country nationals residing in the Netherlands seeking permanent residence.²³⁹ Those in the first category must pass the civic integration exam before they are issued a visa to travel to the Netherlands.²⁴⁰ The exam is oral and it is taken at the Dutch embassy in their country of residence.²⁴¹ Applicants have their Dutch language skills and knowledge about the Netherlands tested.²⁴² For example, applicants can be asked about “Dutch lifestyle, geography, transport, history, constitution, democracy, legislation, Dutch language and the importance of learning it, parenting, education, healthcare, work and income.”²⁴³ Those in the second category do not have to take the civic integration test if they passed it to enter the Netherlands initially. Permanent residence permits are only available to lawfully present migrants who have resided in the Netherlands for five years.²⁴⁴

The Netherlands has conditioned many TCNs’ access to long-term residence status on national cultural belonging. This has been an intentional move to ensure that TCNs who will become long-term, if not life-long, residents in the Netherlands speak Dutch, have specific knowledge about the Netherlands, and are familiar with Dutch values.²⁴⁵ By 2004, the purpose of the WIN was described as “instilling dominant Dutch ‘values and norms.’”²⁴⁶ Civic integration requirements were adopted in an attempt to address immigrant integration failures and it was migrants from Morocco and Turkey that were driving these concerns.²⁴⁷

239. *Civic Integration*, IMMIGR. & NATURALIZATION SERV., <https://perma.cc/XV3H-4HKJ> [hereinafter *Civic Integration*]. Third-country nationals from developed OECD countries like the United States, Canada, Australia, New Zealand, and Japan are exempt from this civic integration requirement as well pursuant to bilateral treaties. Joppke, *Beyond National Models*, *supra* note 217, at 6, n.5.

240. International Organization for Migration at 404-05.

241. *Laws for Legal Immigration*, *supra* note 238; Joppke, *Beyond National Models*, *supra* note 217, at 7-8.

242. *Laws for Legal Immigration*, *supra* note 238, at 405.

243. *Id.* at 405.

244. *Id.* at 406. Others are exempt as well. For example, various categories of workers are not required to obtain the visa for which passing the civic integration test is a requirement. *Id.* at 406; *Civic Integration*, *supra* note 239. For example, those with a European Blue Card from another E.U. Member State are not required to apply for the residence visa. *Civic Integration*, *supra* note 239.

245. See Joppke, *Beyond National Models*, *supra* note 217, at 6-7; *Laws for Legal Immigration*, *supra* note 238, at 405.

246. Joppke, *Beyond National Models*, *supra* note 217, at 7 (internal quotation marks omitted).

247. Yet pursuant to a national court decision, migrants from Turkey are not subject to the civic integration requirements for initial entry, only when seeking a permanent residence permit. Bonjour, *supra* note 200, at 207, 214; *Civic Integration*, *supra* note 239. Turkey has an association agreement with the European Union and based on European Court of Justice jurisprudence regarding that agreement a Dutch national court held that integration

As outlined in Part III, it is third-country nationals with long-term residence status that have citizenship rights that most closely resemble those of national citizens. Requiring civic integration in the form of language skills and knowledge of Dutch culture and values for long-term residence status conditions citizenship rights on national cultural belonging.

2. France

France followed the Netherlands' approach of conditioning TCNs' long-term residence status on civic integration. France was a likely adopter of civic integration requirements because such requirements fit with the French approach to national membership—republican assimilation.²⁴⁸ This approach to immigration integration “requires a high degree of assimilation in the public sphere.”²⁴⁹

As in the Netherlands, concerns about immigrant integration gave rise to conditioning residence permits on the acquisition of French language skills and knowledge about French values. In 2003, the government began requiring all adult TCNs, and TCNs over the age of sixteen, intending to settle in France to enter into an integration and welcome contract.²⁵⁰ The integration and welcome contract begins by describing France as a democracy, a country of rights and duties, a secular country, and a country of equality.²⁵¹ The discussion on equality focuses exclusively on gender equality.²⁵² Other aspects of equality such as racial, ethnic, nationality, gender identity, and sexual orientation are not mentioned in this discussion of equality as a national value.²⁵³ The contract also explains that knowledge of the

requirements for family migration were incompatible with the EU-Turkey Association Agreement. *Bonjour*, *supra* note 200, at 214. The court's decision was limited to pre-departure integration requirements for family migration by TCNs.

248. Joppke, *Beyond National Models*, *supra* note 217, at 9.

249. KOOPMANS, ET. AL., *supra* note 202, at 8.

250. Joppke, *Beyond National Models*, *supra* note 217, at 11; *Laws for Legal Immigration*, *supra* note 238, at 267.

251. *Welcome to France*, MINISTRY FOR EMP., SOC. COHESION, AND HOUSING & NAT'L AGENCY FOR THE WELCOME OF FOREIGNERS AND MIGRATIONS (2007), <https://perma.cc/DJK7-Q86A> [hereinafter French Integration Contract].

252. *Id.*

253. The section on equality states, Equality between men and women is a fundamental principal of French society. Women have the same rights and the same duties as men. Parents are jointly responsible for their children. This principle is applied to all, French people and foreigners alike. Women are not subject either to the authority of their husband or to that of their father or brother, for example in terms of work, going out or opening a bank account. Forced marriages and polygamy are forbidden, while the integrity of the body is protected by law.
Id.

French language is critical for national unity.²⁵⁴ French language skills are described as “essential to your integration, and will encourage contact with the entire population.”²⁵⁵

The integration and welcome contract not only describes French society and values, it also creates obligations for the state and the TCNs. TCNs are required to participate in a day of civic training that addresses “the fundamental rights principles and values of the Republic, as well as the institutions of France,”²⁵⁶ to attend French language classes (if required), to pass a French language exam, and to attend interviews to monitor progress on fulfilling the contractual obligations.²⁵⁷ These requirements must be satisfied within the first year of residence or the noncitizens’ residence permit will not be renewed.²⁵⁸ Additionally, TCNs seeking a long-term residence permit, which is valid for ten years and has a right of automatic renewal, must satisfy the requirements of the integration and welcome contract.²⁵⁹

For TCNs who are seeking to migrate to France as the spouse, partner, or child of a French citizen or noncitizen with the right to family reunification, the integration evaluation must be completed before being granted permission to enter France. Individuals must demonstrate a basic level of French language skills and knowledge of “the values of the Republic” before being admitted to France.²⁶⁰

254. *Id.*

255. *Id.*

256. During civic training program TCNs watch a film entitled, “Vivre Ensemble, En France,” (“Living Together, in France”). The French agency responsible for immigrant integration describes the dual purposes of the film as present[ing] to newcomers the fundamental values of the French Republic as well as each citizen’s rights and duties (gender equality, secularism, human dignity and human rights). Then, to provide information about the CAI and explain the duty of each migrant to respect it in order to have their resident permit issued or renewed.

Living Together in France, L’OFFICE FRANCAIS DE L’IMMIGRATION ET DE L’INTEGRATION (last visited Aug. 4, 2016), <https://perma.cc/N7Y2-MQ6P>.

257. French Integration Contract, *supra* note 251.

258. Joppke, *Beyond National Models*, *supra* note 217, at 11; *Laws for Legal Immigration*, *supra* note 238, at 265, 267.

259. Joppke, *Beyond National Models*, *supra* note 217, at 11; *Laws for Legal Immigration*, *supra* note 238, at 268.

260. *Laws for Legal Immigration*, *supra* note 238, at 268.; Sara Wallace Goodman, *Controlling Immigration through Language and Country Knowledge Requirements*, 34 W. EUROPEAN POLITICS 235, 238-39 (2011) [hereinafter *Controlling Immigration through Language and Country*]. The French ministry of Foreign Affairs and International Development explains,

The third-country spouse of a French national must apply for a long-stay visa from the relevant consular office. He/she will be required to provide documentary evidence of the French nationality of his/her spouse, of his/her marital status, and proof of an adequate knowledge of French or of having followed the required French language training, in countries where the OFII has put in place the procedure for assessing knowledge of French

France offers courses outside of France that teach French language and values for free to prepare TCNs spouses, partners, and children to pass the required test.²⁶¹

France, like the Netherlands, has conditioned access to the long-term residence permit on national cultural belonging. This is important because long-term residence status is the status that gives TCNs citizenship rights that approximate those of EU citizens. Before a TCN can access freedom of movement, robust protection against deportation, or equal access to employment, the individual must demonstrate French language proficiency and be educated regarding French values.²⁶²

3. Germany

Until 2000 Germany was the quintessential example of citizenship acquisition via the *jus sanguinis* principle.²⁶³ Citizenship was only available to those with German parents and those of German descent.²⁶⁴ These citizenship acquisition rules excluded the large number of immigrants that arrived in Germany post-World War II.²⁶⁵ The children of these immigrants who were born in Germany were treated as immigrants.²⁶⁶ They were able to obtain permanent residence status, but not citizenship.²⁶⁷ In the late 1990s and early 2000s, Germany experienced the same push as the Netherlands and France to better incorporate long-term resident TCNs. TCNs in Germany, like those in the Netherlands and France, had lower levels of educational attainment and higher unemployment rates than German citizens.²⁶⁸ Like these

and the values of the Republic.

FAQ – Visas, FRENCH MINISTRY OF FOREIGN AFFAIRS & INT’L DEV. , (2016), <https://perma.cc/FCM6-CKFE>.

261. Bonjour, *supra* note 200.

262. A significant number of TCNs seeking to settle in France are from Francophone countries such that French language skills are not lacking. For example, when the integration and welcome contract requirement was first adopted it was predicted that only one-third of the TCNs subject to the contract would be required to enroll in French language courses. Joppke, *Beyond National Models*, *supra* note 217, at 9.

263. Gregory Baldi & Sara Wallace Goodman, Migrants into Members: Social rights, Civic Requirements, and Citizenship in Western Europe, W. EUR. POL. 1156 (May 22, 2015), http://faculty.sites.uci.edu/sgoodman/files/2011/03/Baldi-and-Goodman_WEP_2015.pdf.

264. BRUBAKER, *supra* note 68; Baldi & Goodman, *supra* note 263, at 1156.

265. While economic migration largely ended after the 1973-74 oil crisis due to a government moratorium, asylum seekers and family reunification migrants continued to arrive. *Id.* at 1156.

266. *Id.* at 1156-57.

267. *Id.*

268. *German Education Policy and the Challenge of Migration*, EUR. COMMISSION 7 (2007), <http://emilie.eliamep.gr/wp-content/uploads/2009/07/wp3-germany-formatted.pdf>;

countries, Germany implemented integration requirements for migrants seeking long-term residence. Germany had a long-term pre-existing integration program for integrating ethnic German migrants. The measures adopted to assist the integration of non-ethnic German TCNs essentially extended the existing program to new migrants.²⁶⁹

German law requires migrants seeking permanent residence²⁷⁰ in Germany to demonstrate German-language skills and to be familiar with the German legal system, culture, and history.²⁷¹ Spouses of German citizens and foreigners with the right to family reunification are required to demonstrate basic German-language skills before being granted a visa to travel to Germany.²⁷² These spouses cannot move to Germany until they can demonstrate basic German-language skills. This is part of the growing trend of pre-departure integration requirements. The Federal Office of Migration and Refugees justifies these requirements in stating that “[l]anguage skills are an elementary requirement to ensure successful integration” and that Germany “wishes to ensure that these people can participate in society from the outset.”²⁷³

All other migrants seeking permanent residence must participate in an integration course and pass a language and culture test if they “are unable to communicate at least at a basic level in the German language.”²⁷⁴ The integration course consists of approximately 600 hours of German language instruction and 30 hours of civics

International Migration Database, ORG. FOR ECON. CO-OPERATION & DEV. (last visited Aug. 4, 2016), <https://stats.oecd.org/Index.aspx?DataSetCode=MIG>.

269. Joppke, *Beyond National Models*, *supra* note 217, at 12. Joppke explains that [s]ince the 1990s Germany has offered language courses to would-be ethnic migrants in Eastern Europe and Russia, which prepared them for a ‘status test’ that had to be passed before they were entitled to immigrate to Germany, and after arrival there was additional state-funded language instruction and civic orientation for a period of six months.

270. Pursuant to the Residence Act permanent residence is “generally to be assumed if the foreigner receives a residence permit of at least one year’s duration or has held a residence permit for more than 18 months, unless the stay is of a temporary nature.” Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, GERMAN FED. MINISTRY OF JUST. AND CONSUMER PROTECTION, art. 44(1) (2015), <https://perma.cc/WQG7-KJ7F> [hereinafter German Residence Act].

271. *Id.* at art. 43(2).

272. *Id.* at art. 44a(1); *Subsequent Entry of Spouses*, FED. OFFICE OF MIGRATION & REFUGEES, (Jun. 14, 2013), <https://perma.cc/U9NE-ZXL5> [hereinafter *Subsequent Entry*]. The Residence Act requires that these individuals “possess a sufficient command of the German language at the time of issuance of a residence title.” German Residence Act, *supra* note 243, at 44a(1). Demonstrating German-language skills at the A1 level pursuant to the Common European Framework of Reference for Languages, a beginner basic user, is sufficient. German Residence Act, *supra* note 270, at 44a(1).

273. *Subsequent Entry*, *supra* note 272.

274. German Residence Act, *supra* note 270, at art. 44a(1).

instruction.²⁷⁵ Participants are required to demonstrate German language skills at the B1 level²⁷⁶ and pass the “Life in Germany” test.²⁷⁷ If an individual does not satisfy these requirements they run the risk that their residence permit will not be extended.²⁷⁸ Some residence permits, however, are available as of right and must be extended even if the integration requirements are not satisfied. For example, migrants present based on a right to family reunification pursuant to German constitutional law cannot have a residence permit extension denied for failing to satisfy the integration requirements.²⁷⁹

One final group of migrants are subject to integration requirements. Migrants seeking a permanent residence permit or an EU long-term residence permit are required to demonstrate “sufficient command of the German language,” and “possess [] a basic knowledge of the legal and social system and the way of life in the federal territory.”²⁸⁰ These requirements are deemed satisfied once an individual completes the integration course, demonstrates German-language skills at the B1 level and passes the “Life in Germany” exam.²⁸¹

In order to obtain a permanent residence permit or an EU long-term residence permit a TCN must have had a residence permit in Germany for five years. Since access to not only a permanent residence permit, but also a basic residence permit, requires German-language skills and knowledge about German legal system, culture, and history, national cultural belonging is a requirement for gaining the legal status that gives rise to important citizenship rights in Germany. The use of pre-arrival integration requirements for spouses of German citizens and noncitizens entitled to family reunification more

275. Joppke, *Beyond National Models*, *supra* note 217, at 12; Baldi & Goodman, *supra* note 263.

276. B1 represents an independent user with intermediate skills pursuant to the Common European Framework of Reference for Languages.

277. See Baldi & Goodman, *supra* note 263, at 1158.

278. German Residence Act, *supra* note 270, at art. 8(3). Residence permits in Germany are typically granted for no longer than one year and then must be extended.

279. *Id.* at art. 8(3); Joppke, *Beyond National Models*, *supra* note 217, at 13-14. Migrants whose right to residence is statutory rather than constitutional can be denied an extension

unless the foreigner furnishes evidence that he or she has achieved integration into the community and society by other means. In reaching a decision on this matter, due consideration shall be given to the duration of lawful stay, the foreigner’s legitimate ties to the federal territory and consequences of the termination of residence for dependents of the foreigner who are lawfully resident in the federal territory.

German Residence Act, *supra* note 270, at art. 8(3).

280. German Residence Act, *supra* note 270, at 9(2)(7-8).

281. See Baldi & Goodman, *supra* note 263, at 1158.

significantly limits TCNs access to citizenship rights. These individuals are unable to access German territory until they can demonstrate national cultural belonging. Political scientist Sarah Wallace Goodman explains that “[p]re-entry integration requirements mandate a degree of integration into the state while the applicant is physically and conceptually—vis-a-vis legal status—outside the state.”²⁸²

Contrary to the claim of postnational citizenship scholars, TCNs’ access to the citizenship rights critical for immigrant incorporation continue to be dependent upon their ability to demonstrate national cultural belonging. Absolute protection for these rights is exclusively available to citizens, but these rights are robustly protected for TCNs with long-term residence status. Yet, access to long-term residence status is substantively similar to access to citizenship status because both require demonstration of national cultural belonging. As a broader range of citizenship rights have been made available to third-country nationals, EU member states are increasingly conditioning access to those rights on TCNs having local language skills, being familiar with country-specific knowledge, and sharing national values. The discussion of The Netherlands, France, and Germany highlights how these requirements are conditioning long-term residence status on national cultural belonging.

C. Using Civic Integration to Identify Members

Critical rights for immigrant integration include immigration-related rights, economic activity rights, and political participation rights. The most robust version of these rights are reserved for individuals who are full members of the polity. The analysis offered in this article demonstrates that national cultural belonging continues to be a basis for measuring membership. While citizenship scholars and EU officials seek to ensure that long-term resident TCNs have access to citizenship rights that will facilitate their integration, disagreement remains regarding the basis upon which certain rights should be available to noncitizens. Early EU efforts suggested that long-term lawful residence should be sufficient for granting robust resident and membership rights. This suggested that long-term residence was a basis for identifying members. Yet, EU member states began to

282. *Controlling Immigration*, *supra* note 260, at 237. Goodman views these requirements as a new form of immigration restriction. *Id.* (“pre-entry integration requirements are a direct attempt to regulate immigrant intake through criteria of national membership.”).

conclude that long-term residence in the country did not give rise to the types of connections deemed desirable for membership. It is possible that EU officials assumed that the desirable cultural connections would exist by virtue of long-term residence, but EU member states are increasingly rejecting this assumption. Not only are EU member states testing noncitizens' cultural belonging after long-term residence, they are also denying entry to individuals who are unable to demonstrate successful progress toward national cultural belonging. These developments suggest that despite claims made by postnational citizenship scholars, national cultural belonging remains an important condition for obtaining rights that facilitate integration. Noncitizens' ability to fully develop their human capital and put it to its best use depends on their ability to demonstrate civic integration. Whether this is a legitimate or desirable approach to citizenship rights will be addressed in future work. This article demonstrates that in practice we are far from a world in which decisions about who gets citizenship rights are divorced from "territorialized notions of cultural belonging."²⁸³

CONCLUSION

The introduction posed a number of questions about the ability of a State to limit the rights of noncitizens or to condition the availability of rights on an individual's ability to speak English or know how to enroll their child in elementary school. Noncitizens have gained an increasing number of citizenship rights in the post-World War II era, but the analysis offered in this article illustrates the limited nature of noncitizens' rights in the areas most important for incorporation.

Postnational citizenship scholars noticed these developments and declared that a new approach to citizenship rights existed in which such rights are available "based on universal personhood rather than national belonging."²⁸⁴ The postnational citizenship model accurately identifies the unbundling of citizenship rights and decoupling of these rights from citizenship status, but the account is incomplete. The allocation of rights based on personhood rather than national belonging only describes human rights. The two other categories of citizenship rights—resident rights and membership rights—continue to be allocated based on lawful residence and national cultural belonging. The increasing use of civic integration requirements demonstrates EU member states' unease with granting robust membership rights to

283. SOYSAL, *supra* note 6, at 3.

284. SOYSAL, *supra* note 6, at 1.

individuals who are unable to demonstrate language skills, country knowledge, and national values. Robust protection of immigration-related rights, political rights, and economic rights is contingent on individuals demonstrating national cultural belonging—a commitment to the values, norms, and practices of the state. Individuals with citizenship status are presumed to have the requisite level of national cultural belonging, but noncitizens increasingly have the opportunity to demonstrate national cultural belonging outside of the naturalization context. A growing number of EU member states are conditioning admission and long-term residence status on civic integration, which measure national cultural belonging. These developments reveal the incompleteness of the postnational citizenship model as a strategy for limiting noncitizens' vulnerability.

The analysis offered in this article illustrates noncitizen's vulnerability to executive order travel bans in the United States. While personhood often effectively protects noncitizens within the borders of their states of residence, it rarely provides protection at the border. Access to legal rights not only determines the scope of government authority over immigrants, it enables immigrants to put their individual human capital—language skills, education, and job skills—to its best use. Returning to the questions asked in the introduction, noncitizen access to human rights does little to limit the government's authority to suspend the entry of noncitizens or deport unauthorized migrants. Immigration-related rights are extremely robust membership rights, limited resident rights, and nonexistent as human rights. An accurate understanding of noncitizens' citizenship rights is necessary to determine which rights are outstanding, whether or not such rights alter an immigrant's context of reception, and whether or not such rights should be available based on personhood, lawful residence, or membership. This article offers the first step of this analysis by outlining which rights are outstanding, and offering initial thoughts on the impact that limited access to immigration-related rights, economic activity rights, and political participation rights has on immigrants' integration patterns. Future projects will more fully explore this issue and explore whether or not immigration-related rights, economic activity rights, and political participation rights must be membership rights. The analysis presented in this article demonstrates that the continued conditioning of citizenship rights on national cultural belonging limits noncitizens' access to the rights that enable them to fully develop and utilize their human capital, which leaves them vulnerable.