

Individuals, Corporations and the Pedagogy of Citizenship

*Lua Kamál Yuille**

Education is deeply implicated in the politics of culture. The curriculum is never simply a neutral assemblage of knowledge, somehow appearing in the texts . . . of a nation. It is always part of a selective tradition, someone's selection, some group's vision of legitimate knowledge. It is produced out of the cultural, political, and economic conflicts, tensions, and compromises that organize and disorganize a people [T]he decision to define some groups' knowledge as the most legitimate, as official knowledge, while other groups' knowledge hardly sees the light of day, says something extremely important about who has power in society.

I. INTRODUCTION

Among the most enduring of Americans' national symbols is the Statue of Liberty, today recalled as an emblem of Emma Lazarus' sonnet inscribed in its base: "From her beacon-hand [g]lows world-wide welcome 'Give me your tired, your poor, [y]our huddled masses yearning to breathe free, [t]he wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!'"² This is the quintessence of the "nation of immigrants" ideal.³ That ideal, however, "hides as much as it illuminates in lumping together all immigrants and all forms of immigration."⁴ One of the

* Associate Professor, University of Kansas School of Law. As always, a special thanks to the late Frank T. Jansson.

1. Michael W. Apple, *The Politics of Official Knowledge*, 95 *TCHRS. C. REC.* 222, 222 (1993).

2. Emma Lazarus, *The New Colossus*, in *THE POEMS OF EMMA LAZARUS, VOL. I, NARRATIVE, LYRIC, AND DRAMATIC 202-03* (New York, Houghton, Mifflin & Co. 1889).

3. The literature attesting to this rhetorical vision is broad. See, e.g., OSCAR HANDLIN, *THE UPROOTED: THE EPIC STORY OF THE GREAT MIGRATIONS THAT MADE THE AMERICAN PEOPLE* (1951) ("Once I thought to write a history of the immigrants in America. Then I discovered that immigrants were America."); JOHN F. KENNEDY, *NATION OF IMMIGRANTS* (1964); ALEJANDRO PORTES & RUBEN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* (2006); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* (1998); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY AND THE FASHIONING OF AMERICA* (2006).

4. SUSAN F. MARTIN, *A NATION OF IMMIGRANTS 2* (2010).

complexities it hides is a “profound ambivalence”⁵ about immigration in American law and consciousness.⁶ That ambivalence has carved the contours of immigration history since its beginning in 1790, catalyzed its greatest triumphs and its basest injustices, and stymied efforts at reform for a quarter century.⁷ These very tangible, formative consequences, which animate pressing doctrinal questions, obscure another, arguably more foundational, reflection of immigration ambivalence—one about citizenship and its function as the currency of identity and belonging.

II. DISPARATE EXPERIENCES IN THE MARKET

Like any other, the market for citizenship is a domain in which actors controlling, seeking to control, and competing over valued resources—in this case, identity and belonging—endeavor to produce favorable settlements through negotiation and exchange. In the United States, the formal strictures and structures of that market (i.e., the rules governing the ways actors in the market are allowed to wield and accumulate power)⁸ are primarily comprised of the laws relating to immigration and naturalization.⁹

5. *Id.* at 1.

6. See, e.g., Elizabeth Keyes, *Examining Maryland's Views on Immigrants and Immigration*, 43 U. BALT. L.F. 1, 9 (2012) (“Maryland’s split-personality immigration policies occur very much in the wake of the actions and inactions occurring at the federal level, and reflect deep ambivalence in federal immigration policy generally.”); HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 9 (2001) (“More than any other dynamic, the story of immigration policy in the United States is a tale of ambivalence towards new arrivals.”); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1726 (2010) (describing a “pervasive national ambivalence about immigration outside the law”); Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 1, 1 (1991) (“Americans feel a special skittishness and ambivalence about [immigration]. Our self-contradictions abound.”); see also Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956 (“Undocumented immigrants . . . have long occupied a unique, deeply ambivalent place in the United States.”).

7. Marisa S. Cianciarulo, *The “Arizonification” of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 95–96 (2012) (“Ambivalence over immigration is nowhere more apparent than in Congress, where immigration reform measures have consistently failed.”); MICHAEL C. LEMAY, *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY* 1–2 (Michael LeMay ed., 1989) (discussing the “shifts in policy” reflecting “two conflicting values perspectives” in U.S. immigration history).

8. Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 37, 37 (2014) (defining market structure as the set of political decision “about how players in that market will be allowed to use their power”).

9. The primary document contemplated by this description is the Immigration and Nationality Act of 1952, which remains the attempt to address all aspects of immigration and naturalization policy in a comprehensive, single statutory scheme. Immigration and Nationality Act of 1952

Actors in this market, to an ever-increasing degree, are treated as indistinguishable from a legal perspective. For example, the Immigration and Nationality Act and the Fourteenth Amendment speak of and to individuals as the subjects of citizenship.¹⁰ As a proxy for the powerful concepts of identity and belonging, citizenship discourse is largely conceived in personalized, even if not always individualized, terms. At the same time, business entities are being imbued with the same anthropomorphic characteristics that are the focus of immigration and citizenship individualism. Moreover, the rhetorical anthropomorphizing of the corporation is gaining increasing constitutional force.

In *Citizens United v. Federal Election Commission*,¹¹ the Supreme Court extended the boundaries of political personhood—for the purpose of political speech—to the corporation.¹² And, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court concluded that corporations can and may exercise religion.¹³ If the actors in the market for citizenship are indistinguishable, then their generalized experiences in the market for citizenship are expected to be substantively the same. In mainstream economics terms, corporations and individuals, alike, should be participating in the market for citizenship subject to the same barriers to entry (if any), with equal information, and unable to impact “prices” (or the terms of participation) at the margin.

It is also taken for granted that the market contemplates a largely indivisible good: citizenship. While that concept is contested, it is an overwhelmingly positive, “multivalent and evocative signifier of legal status, social identity, ideals, and ideas”¹⁴ that draws the boundaries between and among insiders and outsiders. Whatever the concept may mean or however it is being used, citizenship is taken as an all or nothing

(INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). Citizenship by birthright—specifically *jus soli*—is established in the Fourteenth Amendment to the U.S. constitution. U.S. CONST. amend. XIV. However, this market is governed by a broad set of other rules that govern identity and belonging. See, e.g., Michael S. Kirsch, *The Tax Code As Nationality Law*, 43 HARV. J. ON LEGIS. 375, 377 (2006) (discussing the definition of citizenship in the tax code).

10. See INA, 66 Stat. 163; U.S. CONST. amend. XIV.

11. 130 S. Ct. 876 (2010).

12. Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 725 (2011).

13. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). And, while that seems paradoxical to many, it is actually par for the course. Indeed, volumes could be written chronicling the ways corporations behave like and demand the benefits of citizenship. So, it is not surprising that the Supreme Court recognized this fact.

14. Mary De Ming Fan, *Citizenship Perception Strain in Cases of Crime and War: On Law and Intuition*, 2010 MICH. ST. L. REV. 1, 7 (2010).

notion. One is either a citizen or a noncitizen.¹⁵ One is either an insider or an outsider. One either belongs or does not belong. One is either a member or an other.

Upon closer inspection, however, these clear images of the market for citizenship become blurred. Consider the following vignettes that challenge the myth of the market.

A. Burger King, or the Freedom of Corporate Expatriation

During the spring of 2014, several high-profile U.S. companies, including Pfizer,¹⁶ Chiquita, and Walgreens,¹⁷ decided to emigrate. More specifically, they indicated an interest in merging, or plans to merge, or attempts to merge with non-U.S. firms. Then, Burger King Worldwide, Inc. went ahead and did it. It immigrated to Canada.¹⁸ These developments were highly controversial and set out a wave of debate about the method by and the reasons for which they would effect their emigration—the “corporate inversion” or expatriation transaction.¹⁹

Although they can take many forms, in most corporate inversions, a U.S. corporation becomes a wholly-owned subsidiary of a foreign corporation (through a merger into the foreign corporation’s subsidiary) or transfers its assets to the foreign corporation.²⁰ When successful, the now expatriated company can avoid a broad range of U.S. taxes on now-

15. The INA uses what is, today, a controversial term, “alien,” to denominate noncitizens. This essay avoids that term, as its use forms part of the pedagogical function and impact of immigration and citizenship law that is the core of the ideas presented here.

16. See Jad Chamseddine, *Pfizer Eyes AstraZeneca, and Lower Tax Rate*, CQ ROLL CALL (Apr. 29, 2014), available at 2014 WL 1674670 (explaining that New York-based Pfizer Inc., the largest pharmaceutical company in the world, sought to acquire the British-Swedish AstraZeneca Plc and move to a UK domicile).

17. See Michael Glass, *Chiquita Inversion Threatened as Company Postpones Shareholder Meeting*, CQ ROLL CALL (Sept. 8, 2014), available at 2014 WL 4388700 (explaining that Chiquita Brands International Inc. planned to acquire Fyffes Plc and reincorporate in Ireland, as a wholly owned subsidiary of ChiquitaFyffes Plc, a public limited company organized in Ireland).

18. See Jad Chamseddine, *Burger King Edges Closer to Canada Move*, CQ ROLL CALL (Dec. 10, 2014), available at 2014 WL 6914802 (describing one of the largest inversions announced in 2014 between Burger King Worldwide, Inc. and Tim Hortons, Inc.).

19. See Jad Chamseddine, *Walgreen to Stay in U.S., Buy Rest of Alliance Boots*, CQ ROLL CALL (Aug. 6, 2014), available at 2014 WL 3844090 (explaining that Illinois-based Walgreen Co. planned (but abandoned) a takeover of Alliance Boots GmbH, a Swiss company). An earlier wave of controversial inversions occurred in the early 2000s, including less high-profile companies like Accenture, Ingersoll-Rand, Nabors Industries, Transocean Offshore, and Xoma. See e.g., Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 314 n.2 (2004) (listing companies involved in corporate inversions that elected to expatriate to Bermuda, costing the United States over \$1 billion in revenue).

20. Kun, *supra* note 19, at 317 (describing this process as the “prototypical ‘pure’ inversion transaction”).

foreign operations, income, and distributions and payments to the foreign parent.²¹ In simplest terms, the practice of corporate expatriation has been diagnosed as a response to economic opportunity.²² Corporations make this decision because they are “[f]rustrated with the perceived complexity and scope of the current U.S. international tax rules, as well as the competitive disadvantage at which these rules supposedly place U.S. businesses operating in the global market.”²³ And, though anti-trust law and, in the United States some “anti-inversion” tax provisions limit access to the market,²⁴ the technical process is no more complex than a typical domestic merger.²⁵

This is exactly the experience of Miami-based Burger King. The already multinational, but unequivocally-American fast food chain agreed to acquire the Canadian chain, Tim Hortons Inc., known for its coffee and donuts.²⁶ Pursuant to the transaction, both brands would become wholly-owned subsidiaries of a new parent company, Restaurant Brands International, with global headquarters in Ontario, Canada.²⁷ The new subsidiary Burger King, which will continue to operate as an independent company from the new subsidiary Tim Hortons, will have its “global home” in Miami.²⁸

21. *See id.* at 317–18 (discussing how the 1994 Helen of Troy transaction was able to avoid U.S. tax liability).

22. *See* Hale E. Sheppard, *Fight or Flight of U.S.-Based Multinational Business: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend*, 23 NW. J. INT’L L. & BUS. 551, 551 (2003) (discussing how U.S. companies have resorted to relocating to countries with more favorable tax laws to avoid a global “competitive disadvantage”).

23. *Id.* *But see* Edward D. Klienbard, “Competitiveness” Has Nothing to Do with It, (Univ. of S. Cal. Legal Studies Working Paper Series, Paper No. 130, 2014), available at <http://law.bepress.com/usclwps-130/> (arguing that the “competitiveness narrative is largely fact-free The recent surge in interest in inversion transactions is explained primarily by U.S.-based multinational firms’ increasingly desperate efforts to find a use for their stockpiles of offshore cash (now totaling around \$1 trillion), and by a desire to ‘strip’ income from the U.S. domestic tax base through intragroup interest payments to a new parent company located in a lower-taxed foreign jurisdiction.” (citing the Abstract)).

24. 26 U.S.C. § 7874 (2015) (limiting the recognition as foreign of certain “expatriated entities”).

25. This is not to say that corporate inversions are simple transactions. Rather, they are no more convoluted than any other complex merger.

26. Jad Chamseddine, *Burger King to Buy Tim Hortons, Move to Canada*, CQ ROLL CALL (Aug. 26, 2014), available at 2014 WL 4197498.

27. *Id.*; *see also* Louis Jacobson, *Burger King Says it’s “Not Moving” and “Will Continue to Pay All” of Its Taxes*, TAMPA BAY TIMES: POLITIFACT.COM (Aug. 29, 2014, 5:29 PM), <http://www.politifact.com/truth-o-meter/statements/2014/aug/29/burger-king/burger-king-says-its-not-moving-and-will-continue-/> (discussing the headquarters of Burger King and Tim Hortons).

28. *See* Jacobson, *supra* note 27 (discussing headquarters of Burger King).

Thus, in a few short months,²⁹ for a sticker price of about \$11.4 billion (which does not include legal and logistical costs, of course) what had been a U.S. corporation changed its country of residence and, thus, its citizenship.³⁰ As a result of Burger King's expatriation, it will allegedly reap significant tax savings and other benefits of its Canadian domicile, without significantly changing the U.S. subsidiary's operating structure or losing the benefits of being a U.S. company.³¹

While Burger King was the highest profile example of the corporate restructuring (rather than total renunciation) of its citizenship, more than forty large U.S. companies have recently engaged in this "foreignization."³² What their experiences suggest is that, for the corporation, the market for citizenship is active, fluid, and vibrant. Companies enter and exit based, largely, on autonomous calculations relating to the costs and benefits market participation. It also suggests that corporate citizenship is not an indivisible concept. Instead, the corporate immigrant, it appears, is able to structure its immigration experience and consequences to best fit its goals. Through its Tim Horton transaction, Burger King was able to slough off perceived inconvenient tax obligations that were the costs of citizenship, while retaining its perceived benefits.

B. Michael Brown, or The Precarity of a Black Man Walking

Contrast Burger King's experience in the market for citizenship to that of Michael Brown (or Eric Garner,³³ or Oscar Grant,³⁴ or insert the

29. See *Long-awaited Burger King-Tim Hortons Merger Completed*, NASDAQ (Dec. 15, 2014, 1:50 PM), <http://www.forbes.com/sites/robertwood/2014/07/21/swiss-walgreens-4-billion-tax-cut-at-corner-of-happy-healthy-tax-free/>. The deal was announced on August 26, 2014 and closed on December 15, 2014. *Id.*

30. *Id.*

31. See *id.* (discussing criticism of Burger King's actions).

32. Harold McClure, *Corporate Inversions, Stateless Income, and Transfer Pricing*, 41 CORP. TAX'N 10, 10 (2014) (quoting Robert W. Wood, *Swiss Walgreens? \$4 Billion Tax Cut Considered at Corner of Happy, Healthy & Tax-Free*, FORBES (July 21, 2014, 8:45 AM), <http://www.forbes.com/sites/robertwood/2014/07/21/swiss-walgreens-4-billion-tax-cut-at-corner-of-happy-healthy-tax-free/>).

33. Eric Garner was the unarmed man who was killed by police in New York attempting to arrest notwithstanding his pleas, "I can't breathe." J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>. The determination of a Staten Island Grand Jury not to indict the officer involved sparked nation-wide protests coordinated with those related to the events in Ferguson, Missouri. *Id.*

34. Oscar Grant was the 22-year old young man who was fatally shot in the back on an Oakland subway platform after he had been subdued facedown. Jesse McKinley, *In California*,

name of any of the at least twenty-two other unarmed Black men killed by police and reported in the media since 2000)³⁵ Brown's now well-known story tells that of an 18-year-old, unarmed black student from Ferguson, Missouri, who was shot in August 2014 by a police officer who would describe the wounded youth as a "demon," "Hulk Hogan."³⁶ His death sparked a nation-wide debate about the relationship of communities and the police that serve them.³⁷ But, in the interstices of that debate lies a picture of a market for citizenship that is largely closed and inaccessible.

Modern immigration and naturalization laws are, by and large, facially neutral when it comes to the question of race.³⁸ And, Michael Brown was born in the United States, so his advantage in the market for citizenship is presumed. Indeed, as a citizen (pursuant to the formal legal definition), Brown was entitled to access to a whole range of legal provisions designed, ostensibly, to enforce the benefits of his membership in the American demographic space: the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1964, the Fair Housing Act of 1968, and others.

Nevertheless, much of the commentary surrounding his death and the protests that grew therefrom centered on problematizing the fact that Brown did not belong. By virtue of his race, Brown did not belong.³⁹ The narrative was one of the perpetual "otherizing" of Black men, specifically, and people of color, in general.⁴⁰ Thus, the Michael Brown story was a powerful reminder of the ways certain groups can enjoy formal citizenship but, in many ways, exist on the margins or even

Protests After Man Dies at Hands of Transit Police, N.Y. TIMES (Jan. 8, 2009), <http://www.nytimes.com/2009/01/09/us/09oakland.html>.

35. See Alice Brennan & Fidel Martinez, *A Look at 22 Unarmed Black Men Shot and Killed by Police Since 2000*, FUSION (Aug. 21, 2014) <http://fusion.net/story/6351/a-look-at-22-unarmed-black-men-shot-and-killed-by-police-since-2000/>.

36. *Darren Wilson Testimony: Michael Brown Looked "Like a Demon"*, HUFFINGTON POST (Nov. 25, 2014), http://www.huffingtonpost.com/2014/11/25/darren-wilson-com/2014/11/25/darren-wilson-t-find-the-testimony_n_6216620.html.

37. Michael Schwirtz & Richard A. Oppel Jr., *Experts Weigh Officer's Decisions Leading to Fatal Shooting of Michael Brown*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/ferguson-experts-weigh-darren-wilsons-decisions-leading-to-fatal-shooting-of-michael-brown.html>.

38. Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 532 (2000).

39. For an explicit narrative describing the ways Brown was otherized, see The Editorial Board, *The Death of Michael Brown: Racial History Behind the Ferguson Protests*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html?_r=0.

40. *Id.*

outside the bounds of belonging defined by citizenship. If Burger King enjoys an a la carte buffet or “choose your own adventure” of all that citizenship has to offer, Black men, the Michael Brown narrative suggests, obtain a more or less empty shell of citizenship.⁴¹

C. *“Aliens,” or Uncertainty Personified*

Finally, compare the market experience of the run-of-the-mill immigrant. While, in popular consciousness, the idea of the immigrant may conjure up visions of swarthy, desperate visaged, costumed individuals alighting ships and crossing borders and notwithstanding the dedicated efforts to keep alive the negative imagery generated by slurs like “wetback,”⁴² there is no one image or story that highlights the salient features of the immigrant experience in the market for citizenship. That is because immigrants, as a class, face a schizophrenic array of possibilities in that market.

Justin Bieber and Iggy Azalea—high profile immigrant pop stars with histories of criminal offenses,⁴³ unlawful presence,⁴⁴ and unauthorized work⁴⁵—face a market for citizenship that is markedly different from an immigrant student, and from a seasonal worker, and from the unauthorized migrant mother of a U.S. citizen. But, it is not just the type of immigration or the type of immigrant that frames this schizophrenia. Geographic, demographic, and political factors all play important roles. For example, the treatment of and prospects for immigrants from unpopular countries differs markedly from that of

41. The preceding characterization of the citizenship lesson taught by Michael Brown’s death makes no normative judgments about the legality of Darren Wilson’s conduct. Even after the prosecutor, the impaneled grand jury, and the U.S. Department of Justice concluded that there was insufficient evidence to charge Wilson with any crime, Michael Brown’s death remains the catalyst for the debate described above. Like the other deaths of unarmed Black men, it represents and forms part of a particular narrative of lived experience, even if it may not factually represent the paradigm described. The paradigmatic legitimacy of Brown’s story is bolstered by the Department of Justice’s report on its investigation of police practices in Ferguson which clearly indicated that Black people were treated as objects of the Ferguson citizenry rather than members or subjects of that polity.

42. Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1548 (2011) (describing Justice Rehnquist’s defense of the word and explaining that the term “focuses on immigration-related characteristics such as illegality, ethnicity, and invasion, while concealing other characteristics such as personhood, diversity, and belonging,” which leads to a correlated scope of outcomes).

43. Sadhbh Walshe, *Justin Bieber Is Lucky That He’s Rich. Poor Immigrants Don’t Get Off So Lightly*, *THE GUARDIAN* (Jan. 2014, 7:30 AM), <http://www.theguardian.com/commentisfree/2014/jan/29/justin-bieber-us-immigrant-deportation-crime>

44. *American Dreamin’: Iggy Azalea [Special Interview]*, *BOSS LADY.TV* (Feb. 20, 2013), <http://bosslady.tv/american-dreamin-iggy-azalea-special-interview/> (last visited May 25, 2015).

45. *Id.*

immigrants from favored countries.⁴⁶ It is well-established that, for example, enforcement efforts are almost exclusively concentrated on the border of the United States and Mexico, with little attention paid to migration related to the Canadian border.⁴⁷ The same disparate outcomes accompany differences in political opinion, socio-economic status, and religion.

Depending on an array of fluid markers and characteristics, an immigrant will face the flexibility seen by Burger King, the rigid exclusion represented by the Michael Brown narrative, or something in between. This ultimately reinforces the image of the market for citizenship not only as the definer of the boundaries of belonging but also an ongoing tool by which that belonging is reiterated, reaffirmed, and recast.⁴⁸ However, it also undermines the market as a stable site where resources are exchanged and obtained. Instead, for the immigrant the market for citizenship is a lottery.

These vignettes paint in broad strokes to create imperfectly nuanced pictures of the market for citizenship. Nevertheless, they are usefully emblematic of a very real diversity of experiences. This positive account has no normative aim. Rather, it is juxtaposed against the idea of citizenship and the ambivalence of American law about that idea to raise another question: If the market for citizenship is the mechanism by which society determines who is in and who is out, what is the lesson taught by these disparate experiences?

III. THE PEDAGOGY OF THE MARKET FOR CITIZENSHIP

A definitive—indeed any—answer to this question is beyond the scope of this essay. Instead, the pages that follow suggest that insight can be found in the analysis of the pedagogy of citizenship law. At the core of this unique methodology for legal analysis is the conviction that law is an educative process aimed at and resulting shaping and managing behaviors to ends deemed best for society. From this perspective the inputs that constitute the market for citizenship are not merely accidents reflecting the ambivalence about citizenship. Instead, they have

46. Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 770 (2000).

47. See, e.g., Peter Andreas, *A Tale of Two Borders: The U.S.-Mexico and U.S.-Canada Lines After 9-11* 6, (Ctr. for Comparative Immigration Studies, Univ. of California, San Diego, Working Paper No. 77, 2003) (“Barely policed—only 334 agents police the northern border compared to over 9,000 agents assigned to police the U.S.-Mexico border.”)

48. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 5–6 (2007).

significant, tangible, and constitutive impacts on societal understanding and commitment to the ideals represented by citizenship.

A. Defining Pedagogy

To suggest that law operates as a “societal pedagogy,” as the pedagogy of law does, it serves to establish what is meant by the concept of pedagogy. As used here, the pedagogy of law does not refer to the content, method and practice of teaching law within the law school context.⁴⁹ That definition also dominates political debates on education more generally within the United States. However, the dominant view of pedagogy expressed implicitly and explicitly among education scholars is broader. John Dewey, whose work influenced many fields including law and education, defined education, in the broadest sense, as “just a process of leading or bringing up” some sort of behavior, activity, or thinking.⁵⁰ It is a “process of forming fundamental dispositions, intellectual and emotional, toward nature and fellow men.”⁵¹ When that process has a purposeful outcome, education becomes pedagogy.⁵² This expanded image, with its roots in classroom education, can be elaborated to meaningfully inform an analysis of alternative educative sites, like law. For example, Henry Giroux characterized such pedagogy as “a configuration of textual, verbal and visual practices that seek to engage the processes through which people understand themselves and the possible ways in which they engage others and their environment.”⁵³ Elsewhere, Giroux and Robert Simon, described pedagogy as any “deliberate attempt to influence how and what knowledge and identities are produced within and among particular sets of social relations.”⁵⁴

These constructions capture what is going on in classrooms, as well as a much wider range of educative social relations,⁵⁵ and provide a

49. A growing body of literature exists exploring and debating this theme from varied perspectives. Still influential in that debate is Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875 (1985) (advocating law faculty engage in an active critique of the current legal education paradigm to improve the quality of teaching students receive).

50. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 12 (1916).

51. *Id.* at 383.

52. *Id.* at 12.

53. HENRY A. GIROUX, *BORDER CROSSINGS: CULTURAL WORKERS AND THE POLITICS OF EDUCATION* 3 (1992).

54. Henry A. Giroux & Roger I. Simon, *Schooling, Popular Culture, and the Pedagogy of Possibility*, 170 J. EDUC. 9, 12 (1988).

55. This view of pedagogy also undergirds an incipient strand of education research examining fundamental questions posed by “spaces, sites, and languages of education and learning that exist

foundation for the elaboration of a pedagogy of law, which is the purposeful process by which law influences how and what knowledge and identities are produced within a multitude of social relations.

B. *Applying Pedagogy*

The notion of law as pedagogy is powerful, and it is used as a rhetorical device—without examination or citation—to bolster the importance of a claim or critique.⁵⁶ However, under the definitions of pedagogy outlined above, the laws that structure the market for citizenship, clearly, function in a pedagogical manner. Superficially, the Immigration and Nationality Act is aimed at defining insiders and outsiders and creating sanctioned pathways to obtain insider status. More deeply, it promotes the ideological commitments that its technicalities ostensibly embody. For example, the language employed in the law clearly categorizes actors in the market. Individuals who have not yet gained full entrance to citizenship are “aliens.”⁵⁷ Those “aliens” are further categorized as “qualified” or “unqualified;”⁵⁸ “admissible” or “inadmissible.” Companies who sponsor migrant workers are referred to as “importing” those workers.⁵⁹ These semantic markers serve to

outside schools,” or as most commonly denominated, “public pedagogy.” Jake Burdick & Jennifer A. Sandlin, *Inquiry as Answerability: Toward a Methodology of Discomfort in Researching Critical Public Pedagogies*, 16 QUALITATIVE INQUIRY 349, 349 (2010); see also HANDBOOK OF PUBLIC PEDAGOGY: EDUCATION AND LEARNING BEYOND SCHOOLING 1 (Jennifer A. Sandlin, Brian D. Schultz, & Jake Burdick eds., 2009).

56. See, e.g., Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 277 (2011) (“[T]he law is a teacher, setting forth clear standards for behavior.”); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 740 (2007) (“[T]he law is a teacher.”); Robert Peters, *It Will Take More Than Parental Use of Filtering Software to Protect Children from Internet Pornography*, 31 N.Y.U. REV. L. & SOC. CHANGE 829, 842 (2007) (“Law is a teacher”); Robert P. George, *What's Sex Got to do with it? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 84 (2004); Marie Summerlin Hamm, *Opportuning Virtue: The Binding Ties of Covenant Marriage Examined*, 12 REGENT U. L. REV. 73, 79 (2000) (“Despite our discomfort with the notion, the law is a teacher.”); Stephen J. Morse, *Excusing and the New Excuse Defenses: a Legal and Conceptual Review*, 23 CRIME & JUST. 329, 334 (1998) (“The law is a teacher that sets moral and social standards for conduct.”); Jeffrey L. Harrison, *Order, Efficiency, and the State: A Commentary*, 82 CORNELL L. REV. 980, 991 (1997) (“[The] law is a teacher about what is right and wrong.”); Christopher R. Brauchli, *From the Wool-Sack*, 23 COLO. LAW. 2731, 2731 (1994) (“The law is a teacher that never sleeps.”).

57. See Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1568 (2011).

58. See Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 165 (1998) (discussing implications of “unqualified”).

59. Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 40 (2006).

directly influence how individuals understand themselves and the ways in which they engage others.

The idea of pedagogy outside of the classroom is not novel. “Public pedagogy” scholarship has expanded from its origins in studies of the pedagogy of popular culture to examine the pedagogical dimensions of sites as diverse as those with formal or institutional pedagogical aims (e.g., parades, museums, and other “places of memorialization”) to a wide range of sites whose pedagogical function is obscured or implicit (e.g., public spaces, like parks; social movements and other spaces of civil engagement; corporations and places of commercial engagement; art, music and other media; the human corporeal body).⁶⁰ Once articulated, even perfunctorily, the idea of public pedagogy is so intuitively appealing that it is easy to accept that pedagogical regimes are endemic to all social relations. And, it is easy to identify evidence of pedagogical outcomes.

Of course, the danger of the intuitiveness of pedagogy as a descriptive device is the tendency toward over-application coupled with under-theorization. If every phenomenon is pedagogy, its epistemological utility becomes ephemeral and, regardless of any logical or factual accuracy, pedagogy loses its value as an analytical tool. Moreover, if the task of pedagogy as an inquiry is to engage in the discourse surrounding “how people come to know,” it is an insufficient project to create a list of sites of pedagogy and compendia of pedagogical outcomes.

This infirmity can be avoided by returning to conceptions of conventional (i.e., classroom) pedagogies. Pedagogy, as described here, is the purposeful process of education.⁶¹ Formal pedagogical analysis interrogates the intent, substance, and form of educative experiences.⁶² These inquiries—into the structure of pedagogy, or the curriculum—are central to understanding the pedagogical process.⁶³

60. For an in depth exploration of public pedagogy, see HANDBOOK OF PUBLIC PEDAGOGY, *supra* note 55.

61. Chris Watkins & Peter Mortimore, *Pedagogy: What Do We Know?*, in UNDERSTANDING PEDAGOGY AND ITS IMPACT ON LEARNING 1–19 (Peter Mortimore, ed., 1999) (reviewing definitions and conceptions of pedagogy).

62. Anna Hickey-Moody et al., *Pedagogy Writ Large: Public, Popular and Cultural Pedagogies in Motion*, 51 CRITICAL STUD. IN EDUC. 227, 232–33 (2010).

63. William H. Schubert, *Outside Curricula and Public Pedagogy*, in HANDBOOK OF PUBLIC PEDAGOGY: EDUCATION AND LEARNING BEYOND SCHOOLING 10 (Jennifer A. Sandlin et al., eds., 2010). For a brief discussion of the role of curriculum studies see Henry A. Giroux et al., *Introduction and Overview to The Curriculum Field*, in CURRICULUM & INSTRUCTION (Henry A. Giroux et al., eds, 1981); Landon E. Beyer & Michael W. Apple, *Values and Politics in the Curriculum*, in THE CURRICULUM: PROBLEMS, POLITICS AND POSSIBILITIES 3–11 (Landon E. Beyer

In the present context, pedagogical analysis asks whose will, power, or agency is expressed by what happens in the market for citizenship? It asks whose and what knowledge the law codifies; and, it asks how actors engage with and are engaged by that knowledge. Answering these questions unpacks the question presented by the disparate experiences of actors in the market for citizenship, creating space for meaningful debate about commitments to citizenship, rather than simple observations hypothesizing ambivalence.

IV. CONCLUSION

Citizenship—writ large—is a contested concept. The role of citizenship in American law is disputed. Nonetheless, as the currency of identity and belonging it is universally accepted as a powerful resource. Indeed, the U.S. Supreme Court has recognized that “[i]t would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men.”⁶⁴ Thus, it seems odd that corporations and business entities, even in light of their unprecedented anthropomorphization, experience a market so much more favorable than people of color and immigrants—the express subjects of the concept. Viewing law as a societal pedagogy—as the education of the masses—could help unravel the mystery.

& Michael W. Apple, eds., 1998).

64. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).