

EDITED BY

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≡ The Oxford Handbook of  
**COMPARATIVE**  
**CONSTITUTIONAL LAW**

THE OXFORD HANDBOOK OF

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COMPARATIVE  
CONSTITUTIONAL  
LAW

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## CHAPTER 48

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# CITIZENSHIP

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*Toronto*

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DESPITE all the fashionable predictions regarding the demise of citizenship, it is back with a vengeance.<sup>1</sup> Politicians worldwide stress its importance; public policymakers debate how best to make citizenship meaningful in an age of globalized economic and communication flows, as well as growing migration pressures. Legislatures have also taken an interest, introducing new citizenship tests and crafting more restrictive admission criteria for various migrant categories. Constitutional and high courts around the globe have become embroiled in citizenship matters, too. They have found themselves called upon to address not only perennial dilemmas (such as defining the boundaries of membership as they intersect, for example, with changing definitions of marriage and the family),<sup>2</sup> but also foundational questions concerning the constitutional limits of state power in determining whether to give legal sanction to indefinite detention of non-citizens, or the rationality of using immigration law as anti-terrorism law.<sup>3</sup>

Scholars, too, have turned their gaze to citizenship once again after many years of neglect. This renaissance of sorts has given birth to the multidisciplinary field of citizenship studies which has drawn insightful contributions from law to cultural studies, philosophy to international relations. This new scholarship frequently gives ample attention to emerging

<sup>1</sup> Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8 *Theoretical Inquiries in Law* 489.

<sup>2</sup> The growing recognition of same-sex marriage, eg, has led to expanded access to membership for gay and lesbian partners and spouses in many jurisdictions, removing inequalities that were based on sexual orientation. These changes have occurred through legislation, court decree, or executive order. The latter route was followed in the United States whereas Canada embarked on the legislative path. In South Africa, the Constitutional Court played a key role. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

<sup>3</sup> See also Chapter 21 on states of emergency and Chapter 22 on war powers in this volume.

postnational, supranational, or transnational conceptions of membership more than to the core legal and constitutional aspects of citizenship. This chapter aims to address this imbalance by bringing back into the heart of our discussion the role of law, institutions, and the state, highlighting from a comparative perspective the trials and tribulations of citizenship in a world of increased mobility and diversity.

The discussion is divided into three parts. Section I provides a concise overview of citizenship's multiple meanings and interpretations. Section II constitutes the bulk of the discussion. It begins by exploring questions of membership acquisition and transfer, which legally determine 'who belongs' within the boundaries of a given political community, either by birth or naturalization. It then assesses three recent developments: the growing recognition of dual nationality; the revival of debates about involuntary citizenship revocation; and the 'cultural turn' in citizenship discourse, which often makes inclusion in the body politic more difficult for those deemed 'too different' from the majority community. Section III charts the major challenges and opportunities facing citizenship in the twenty-first century.

## I. CITIZENSHIP MATTERS

While citizenship has been variously defined and gone through many transformations, the basic facts are simple enough. As Rogers Smith observes, the 'oldest, most basic, and most prevalent meaning [of citizenship] is a certain sort of membership in a political community'.<sup>4</sup> Although the scale and scope of the political community has ranged from city-state to empire, citizenship has always been associated (at least since Aristotle) with political relations. From the Athenians we draw the tradition of associating citizenship with collective self-governance. From the Roman tradition we carry forward the idea of citizen as possessing a formal legal status with certain associated privileges and responsibilities.<sup>5</sup>

Today, citizenship laws also serve to determine who is entitled, as a recent Canadian federal court put it, to 'full, legally sanctioned membership in a state . . . All free and democratic states at all times have established a unique status of this kind and all such states have always accorded some special rights and privileges to their citizens.'<sup>6</sup> This definition represents what we might call the *static* view of the relationship between the individual and the state, emphasizing the rights and obligations that accompany membership. Several aspects of this static view are being challenged today by a more dynamic reality of cross-border mobility, recognition of dual nationality and multiple affiliations, as well as the growing role played by regional and international human rights mechanisms and adjudicatory bodies that may grant protection to *persons* rather than just citizens. But before discussing these new frontiers, it is imperative that we step back and take into view the broader picture.

Most courts and commentators agree that 'Citizenship has entailed membership, membership of the community in which one lives one's life.'<sup>7</sup> Already under Roman jurispru-

<sup>4</sup> Rogers Smith, 'Citizenship: Political' in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Studies* (2001), 1857.

<sup>5</sup> The emphasis on citizenship as political relations is perhaps best captured by Aristotle's famous phrase that in democracies the citizen is both ruler and ruled in turn. For a now-classic account of the ancient Athenian and Roman conceptions of citizenship, and their impact on contemporary understandings of citizenship, see J.G.A. Pocock, 'The Ideal of Citizenship since Classical Times' in Ronald Beiner (ed), *Theorizing Citizenship* (1995), 29, 35-6.

<sup>6</sup> *Lavoie v Canada* [1995] 2 FC 623 (Federal Court, Trial Division); [2000] 1 FC 3 (Federal Court of Appeals); [2002] 1 SCR 769 (Supreme Court of Canada).

<sup>7</sup> David Held, 'Between State and Civil Society: Citizenship' in Geoff Andrews (ed), *Citizenship* (1991), 19, 20; Richard Bellamy, *Citizenship: A Very Short Introduction* (2008), 52.

dence, “citizen” came to mean someone free to act by law, free to ask and expect the law’s protection.<sup>8</sup> This status entitled the citizen to ‘whatever prerogatives and . . . whatever responsibilities are attached to membership.’<sup>9</sup> From the French Revolution onward, the modern state began to administer and assign citizenship, which has since come to signify equality of rights and duties among members of the same political community.<sup>10</sup> This government-designated entitlement also tells us ‘who the state considers a full member, how that membership is transmitted inter-generationally, and how it can be lost, gained, and reclaimed.’<sup>11</sup>

Even in today’s age of increased globalization and privatization, the power to provide access to, and formal membership in, the political community remains the prerogative of sovereign states.<sup>12</sup> Securing full membership in the political community remains one of the few goods that even the mightiest economic conglomerate cannot offer to an international migrant; only governments can bestow the legal status of citizen upon the individual.<sup>13</sup> International law still provides significant room for autonomy and discretion by states in defining their membership boundaries: that ‘It is for each [s]tate to determine under its own law who are its nationals.’<sup>14</sup>

By labeling certain individuals as members, citizenship offers, however, more than just a juridical, legal status and the promise of equality before the law. It also opens up a host of rights, opportunities, and privileges for those who count as full members. Citizenship also has the potential to play a significant role in societal struggles for recognition and inclusion by those once excluded because it bears the moral and legal force to make ‘a claim to be accepted as full members of the society’ hold firm.<sup>15</sup> As a multidimensional concept and institution, citizenship’s varied interpretations and dimensions are neither fixed nor closed, and potentially cut across each other. The most familiar elements in the citizenship bundle include: equal legal status, rights and obligations, political voice and participation, the freedom to enter and exit one’s home country, and the less tangible notions of identity, belonging, and a

<sup>8</sup> Pocock (n 5).

<sup>9</sup> Michael Walzer, ‘Citizenship’ in Terence Ball, James Farr, and Russell L. Hanson (eds), *Political Innovation and Conceptual Change* (1989), 211.

<sup>10</sup> Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (1992); Patrick Weil, *How To Be French: Nationality in the Making Since 1789* (Catherine Porter trans, 2008).

<sup>11</sup> Kim Barry, ‘Home and Away: The Construction of Citizenship in an Emigration Context’ (2006) 81 *NYU Law Review* 11, 20.

<sup>12</sup> Even in the European Union, which has developed the most advanced form of regional citizenship in today’s world, the grant of Union citizenship remains derivative. One must first acquire the nationality of a member state:

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

See Art 20, Consolidated Version of the Treaty on the Functioning of the European Union, OJ C115/56, 9.5.2008.

<sup>13</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (2009), 54–66.

<sup>14</sup> The terms nationality and citizenship are here used interchangeably. See Art 1 of the 1930 Hague Convention (Convention on Certain Questions Relating to the Conflict of Nationality Laws), April 12, 1930, 179 LNTS 89. The same principle is reasserted in Art 3(1) of the 1997 European Convention on Nationality, although Art 3(2) sets certain limitations for the acceptance of a given country’s nationality law by other states. The case law of the European Court of Justice has also clarified that

whenever a Member State, having due regard to Community law, has granted its nationality to a person, another Member State may not, by imposing an additional condition for its recognition, restrict the effects of the grant of that nationality.

See C-369/90 *Micheletti* [1992] ECR I-4239.

<sup>15</sup> T.H. Marshall, *Citizenship and Social Class* (1950), 8.

sense of home.<sup>16</sup> This multiplicity of meanings gives rise to the ever-possible reinterpretation and renegotiation of the content of citizenship, its boundaries, and its values.<sup>17</sup> In order to set the stage for these current debates, it is important to elaborate how, as a legal matter, we are assigned membership in ‘this or that political community’.<sup>18</sup> This is often referred by legal experts as the variety of ways, or the modes of acquisition, in which people can obtain the legal status of citizenship in a given country.

Reading the great books of liberal and democratic theory one might expect choice and consent of the governed to play a decisive role in the core legal principles defining who is assigned citizenship in the state and according to what criteria. Many are surprised to learn that the reality is quite different from the theory. The vast majority of the world’s population acquires citizenship not on the basis of individual volition, choice, and consent (as the theory predicts) but according to fortuitous circumstances that none of us control: where and to whom we are born. Although birthright entitlement has been discredited in virtually all other fields of public life, it remains the primary legal route through which citizenship is assigned in today’s world. This is a striking exception to the modern trend *away* from ascribed status.<sup>19</sup> The latest global statistics show that only a miniscule percentage (approximately 3 percent) of the world’s population have managed to gain a new membership affiliation *post*-birth, that is, through international migration and naturalization. Everyone else is largely ‘trapped’ by the lottery of their birth, at least in terms of the formal membership status they hold, typically, from cradle to grave. A recent report solemnly captures this last point: ‘Even in today’s mobile and globalized world, most people die in the same country in which not only they are born, but their parents as well.’<sup>20</sup>

## II. ON BECOMING A CITIZEN: THE LEGAL DIMENSION

As the US Supreme Court memorably pronounced in *Wong Kim Ark* (1898), there are ‘two sources of citizenship, and only two: birth and naturalization.’<sup>21</sup> I will elaborate the former before exploring the latter. The attribution of membership at birth is governed in virtually all countries by two dominant legal principles: *jus soli* (the territoriality principle) and *jus sanguinis* (the descent principle). I discuss each in turn.

### 1. *Jus Soli*: The Territoriality Principle

The most crucial factor here is whether the child was born *within* the territory over which the state maintains (or in certain cases has maintained or wishes to extend) its sovereignty.<sup>22</sup> The

<sup>16</sup> For excellent discussions of citizenship’s multiple dimensions and interpretations, see Irene Bloemraad et al, ‘Citizenship and Immigration: Multiculturalism, Assimilations and Challenges to the Nation-State’ (2008) 32 *Annual Review of Sociology* 153; Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 *Indiana Journal of Global Legal Studies* 447; Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (2000); Christian Joppke, ‘Transformation of Citizenship: Status, Rights, Identity’ (2007) 11 *Citizenship Studies* 37; Will Kymlicka and Wayne Norman, ‘Return of the Citizen: A Survey of Recent Work on Citizenship Theory’ (1994) 104 *Ethics* 352.

<sup>17</sup> Recent years have also seen the proliferation of arguments in favor of defining citizenship beyond the state. I describe these developments below.

<sup>18</sup> Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004), 141.

<sup>19</sup> I discuss this birthright-citizenship puzzle in detail in Shachar (n 13).

<sup>20</sup> See Maarten P. Vink and Gerard-Rent de Groot, *EUDO Citizenship Observatory—Birthright Citizenship: Trends and Regulations in Europe* (2010), 3.

<sup>21</sup> *United States v Wong Kim Ark* 169 US 649 (1898).

<sup>22</sup> Patrick Weil, ‘Access to Citizenship: A Comparison on Twenty-Five Nationality Laws’ in T. Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (2001).

*jus soli* principle, which is part of the common law tradition, implies a territorial understanding of citizenship. It recognizes the right of each person born within the physical jurisdiction of a given state to acquire full and equal membership of that polity. The *jus soli* principle finds its historical roots in the feudal system of medieval England, in which ‘ligeance’ and ‘true and faithful obedience’ to the sovereign were owed by a subject from birth: ‘for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign.’<sup>23</sup> In the landmark *Calvin’s Case*, decided in 1608, Lord Coke employed the concept of ligeance to explain the unmediated relationship that is created for life between the monarch and all subjects born within the monarch’s dominion. In its modern guise, *jus soli* no longer refers to the connection between a monarch and his or her subjects. Instead, it refers to the *political* relationship between elected governments and their citizens, offering full membership in the political community to each new generation born on the territory—irrespective of the legal status of the parents.

A main advantage of the *jus soli* principle in a world of growing international mobility is that it provides an attributive mechanism that prospectively incorporates the children of newly arrived immigrants who were born in the territory into full legal membership of the respective political community, thus avoiding the familiar second-generation phenomenon of inherited non-citizenship status that has long plagued European countries that relied primarily on the *jus sanguinis* principle. In its modern variant, *jus soli* is therefore seen as democratic and inclusive: children born to non-citizen parents (even if the latter are themselves barred from legalization and naturalization) are given a fresh start, with all the rights, protections, and opportunities that attach to full and equal membership.

Brazil, Canada, and the United States exemplify this generous model of conferral of automatic citizenship to everyone born within their borders. Brazil’s Constitution grants citizenship to ‘those born in the Federative Republic of Brazil, even if of foreign parents.’<sup>24</sup> In Canada, a statutory provision of the Citizenship Act establishes that a person ‘born in Canada’ is a citizen.<sup>25</sup> Perhaps the most famous articulation of the *jus soli* principle is found in the opening sentence of the Fourteenth Amendment of the US Constitution (the Citizenship Clause): ‘All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.’<sup>26</sup>

In other parts of the common law world the unqualified application of the territoriality principle has witnessed a retreat, however. In 1981, the British Nationality Act, section 1, changed the previous common law rule (where the place of birth was the sole determination

<sup>23</sup> *Calvin’s Case*, 77 Eng Rep 377 (KB, 1608), 382.

<sup>24</sup> Constitution of Brazil, Ch 3, Art 12.1.

<sup>25</sup> Citizenship Act, RSC, 1985, c C-29, para 3(1) (Canada).

<sup>26</sup> The Fourteenth Amendment’s Citizenship Clause overturned the infamous US Supreme Court *Dred Scott* (1857) decision. The Citizenship Clause has long been interpreted as providing a constitutional guarantee of birthright citizenship to all persons born within the territorial limits of the United States (with the very limited exception of children born in the United States of foreign diplomats). However, acrimonious debates in recent years have given rise to legislative attempts to restrict and narrow the application of the *jus soli* principle by defining the phrase ‘subject to the jurisdiction thereof’ to include only children born to US citizens or permanent resident aliens. To date, all such attempts have failed. Legal opinion strongly advises against such a change, which would break away with over a century of consistent application of the *Wong Kim Ark* decision that applies to all persons born in the United States. As the Office of Legal Council noted in a 1995 statement submitted to the Congressional Subcommittee on Immigration:

in 1862 President Lincoln’s Attorney General wrote an opinion for the Secretary of the Treasury asserting ‘[a]s far as I know . . . you and I have no better title to citizenship which we enjoy than the “accident of birth”—the fact that we happened to be born in the United States.’

in citizenship) to a modified birthplace principle that now takes into account the parents' status and residence considerations. Children born on the territory to unauthorized migrants can still acquire full citizenship status, if they fulfill the habitual residency requirement. Related changes have taken root elsewhere, including Australia (1986), Ireland (2004; through a constitutional referendum that is widely interpreted as an attempt to curtail the legal implications of the European Court of Justice's *Chen* decision<sup>27</sup>), and New Zealand (2006), to mention but a few prime examples.<sup>28</sup> Importantly, these legal changes do not amount to a retreat from the principle. Instead, they reveal a modification: the introduction of a *jus-sanguinis*-like component of descent into otherwise territorially centered membership rules.<sup>29</sup>

Another element to consider is the residual effect of gender and marital status on citizenship attribution, raising constitutional equality concerns when the legal capacity to transmit membership depends on the gender of the parent. While most countries have now repealed gender-discriminatory laws that only permitted fathers (and not mothers) to transmit citizenship to their children, some constitutions still do not regard mothers and fathers as holding equal standing in their ability to transmit citizenship to their offspring born outside the country.<sup>30</sup> For instance, the Malaysian Constitution defines who qualifies as a citizen, following the principle of gender equality in the transmission of citizenship when a child is born within the borders of that country. Alas, only a Malaysian father can transmit citizenship to a child born abroad. A similar provision, which held that a child born outside Kenya could only become a citizen at birth if the father was a Kenyan citizen, was recently overturned by the new Kenyan Constitution adopted in 2010. The new Constitution reinstates status to children born outside Kenya before its effective date, if either the mother or the father were Kenyan citizens.

The Canadian Supreme Court, too, had to weigh in on the intersection of citizenship and gender in the *Benner* (1997) case.<sup>31</sup> In that decision, a provision of the Canadian Citizenship Act, according to which a child born abroad to a Canadian father was automatically entitled to Canadian citizenship upon registration of his or her birth whereas a child born under similar circumstances to a Canadian mother was not automatically entitled to citizenship (such a child had to prove the absence of a criminal record and his or her willingness to swear an oath of allegiance), was challenged as violating the equality principle enshrined in the Canadian Charter of Rights and Freedoms. The Court struck down the provision, holding that it violated the Charter's equality guarantees (s 15) and was unjustifiable in a free and democratic

<sup>27</sup> Case C-200/02 [2004] ECR I-9925.

<sup>28</sup> There are additional variations. Eg the Constitution of Costa Rica recognizes the citizenship of a child born on Costa Rican soil to non-citizen parents, but requires that the parent register the minor child or that the child herself register by the age of 21. See Constitution of Costa Rica, Title 2, Art 13(3). Or consider another tactic for narrowing the application of the territorial-centered membership rules. The Dominican Republic follows the *jus soli* principle, providing automatic citizenship to children born on its territory, except for those born to persons in transit or to persons residing illegally in the Dominican Republic. This 'in transit' provision has been interpreted to mean that 'parents of Haitian heritage are perpetually in transit', thus barring automatic citizenship to their children born in the Dominican Republic part of the Hispaniola island.

<sup>29</sup> Randall Hansen and Patrick Weil (eds), *Towards a European Nationality: Citizenship, Immigration, and Nationality Law in the EU* (2001).

<sup>30</sup> Historically, under the common law doctrine of coverture a woman lost her citizenship when she married and acquired the citizenship of her husband, based on the theory that the husband and wife were one and the 'one' this union created was male—'subsuming' or covering the female. This also meant that the transmission of citizenship to children occurred through the father. An unmarried woman could, however, pass citizenship to her child born out of wedlock. These distinctions and categories have now by and large been erased from the law books of most countries, but their lingering effect is still found in the margins.

<sup>31</sup> *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 (Canada).



society (s 1) because it restricted access to citizenship 'on the basis of something so intimately connected to and so completely beyond the control of the [child] as the gender or his or her Canadian parent.'<sup>32</sup>

The United States has recently seen a string of constitutional challenges to the provisions of the Immigration and Nationality Act that distinguish between unwed mothers and fathers in their legal capacity to transmit citizenship abroad. In a trilogy of cases, *Miller* (1988), *Nguyen* (2001), and *Flores-Villar* (2011), the US Supreme Court had to decide whether mothers and fathers may be treated differently in determining whether their children may claim American citizenship, and whether such sex-based classifications violated equal protection principles.<sup>33</sup> The Supreme Court affirmed the statutory provisions, holding that they did not amount to constitutionally impermissible unequal treatment given the important governmental interests at stake. In *Nguyen*, the key issue was whether the provisions of the statute holding that a child born outside the country to an unwed mother will automatically receive citizenship whereas a child born outside the United States to an unmarried father will receive citizenship only if 'a blood relationship between the person and the father is established by clear and convincing evidence' violated the Equal Protection Clause. In a slim majority, the Court upheld the law, despite a sharply diverged minority opinion stating that the legislation at issue upheld

a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. . . . [R]ather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, [the majority] quietly condones the very stereotype the law condemns.

In addition to the argument that such regulation of the transmission of citizenship reinforces the gender-norm that fathers bear little responsibility to their non-marital children, the more general point at issue (resembling the approach of the Canadian Supreme Court) is this: in a society committed to equality between the sexes, the gender of the parent bears no relationship on the individual's ability to transmit citizenship. The most recent equality challenge in this trilogy, *Flores-Villar*, focused on the constitutionality of imposing longer residency periods on unwed fathers than on unwed mothers whose children were born abroad, a provision that, unlike the *Nguyen* case, does not turn on biological factors concerning the establishment of paternity. This challenge ultimately proved futile, ending with a Supreme Court deadlock (4:4 split, with the recusal of one judge). This leaves in place, for now, an affirmation by an equally divided court of the gendered differential imposed by the statute.

## 2. *Jus Sanguinis*: The Parentage Principle

Whereas *jus soli* elevates the fact of birthplace into a guiding constitutional principle, the *jus sanguinis* principle confers political membership on the basis of *parentage* and *descent*. The children of present members of the polity, irrespective of place of birth, are automatically defined as citizens of their parents' political community. Whereas *jus soli* is traditionally followed in common law countries, *jus sanguinis* is the main principle associated with civil law jurisdictions in Europe and well beyond the continent, making it the leading membership transmission principle globally in terms of the sheer number of countries that follow it and of the individuals and families that are affected by its parameters.

<sup>32</sup> Ibid 401.

<sup>33</sup> *Miller v Albright* 523 US 420 (1998); *Tuan Anh Nguyen v INS* 533 US 53 (2001); *Flores-Villar v United States* 564 US \_\_\_ (2011).

The modern inception of *jus sanguinis* came with the post-French Revolution Civil Code of 1804, which broke away from the territoriality principle. The French Civil Code held that *as citizens*, parents (specifically, fathers) had the right to transfer their status of political membership to their offspring at birth, regardless of whether the child was born in France or abroad.<sup>34</sup> During the Napoleonic period, the concept of attributing membership on the basis of descent was considered fresh and radically egalitarian. As Patrick Weil explains, the *jus sanguinis* principle broke away from the feudal tradition of *jus soli*, which linked subjects to a particular land (and to the lord who held the land).<sup>35</sup> In contrast, *jus sanguinis* linked citizens to each other (and to their joined political enterprise) through membership in the state. Together, they constituted 'a class of persons enjoying common rights, bounded by common obligations, formally equal before the law'.<sup>36</sup> Through codification and imitation, the nineteenth century saw the adoption of the *jus sanguinis* principle by many other European countries, including Austria, Belgium, Spain, Prussia, Italy, Russia, the Netherlands, Norway, and Sweden.<sup>37</sup> European colonial expansion, as well as legal 'transplanting', further spread the *jus sanguinis* principle to the four corners of the world.

For countries facing the combined pressures of immigration and emigration, *jus sanguinis* has the benefit of sustaining ties with citizens living abroad and their progeny.<sup>38</sup> Several constitutions explicitly provide easier access to citizenship to descendants, up to the third generation, of those who left the home country. This approach can be found in the Polish, Hungarian, and other Central and East European citizenship regimes. Armenia provides a simplified procedure for citizenship to individual of 'Armenian origin',<sup>39</sup> whereas the Irish Constitution highlights the significance of a cultural identity and heritage, declaring that the 'Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage'.<sup>40</sup> Israel establishes an entitlement to citizenship to those with a Jewish ancestry (as defined by the Law of Return), treating them as *in potentia* members of the state, thus creating a legal and symbolic link between existing members of the polity and a large diaspora community. This 'right to return' is extended to family members, up to a third generation, regardless of their own religious affiliation or place of birth, as long as they can claim a lineage to a person who would have been entitled to make *aliyah* (Hebrew: 'to ascend') to Israel, even if that person is already deceased or never actually settled there. These variations on a theme of heritage, lineage, and ancestry illustrate the family affinity of the *jus sanguinis* principle with what has been termed the cultural or ethno-national conception of citizenship.<sup>41</sup> The main concern with this conception of identity and belonging is that it bears exclusionary tendencies, turning members of the political community—who, despite holding the status of formal, legal citizenship, are not part of the dominant 'we' majority—into potential outsiders. I return to address this metamorphosis of protected and often vulnerable minorities into feared 'outsiders' from within, in discussing citizenship's 'cultural turn', which is raising its head again across Europe.

<sup>34</sup> Weil (n 22), 19.      <sup>35</sup> Ibid 19.      <sup>36</sup> Brubaker (n 10), 39.      <sup>37</sup> Weil (n 22), 21.

<sup>38</sup> Christian Joppke, 'Citizenship in between De- and Re-Ethnicization' (2003) 44 *Archives européennes de sociologie* 429.

<sup>39</sup> Constitution of Armenia, Ch 1, Art 11.3.

<sup>40</sup> Constitution of Ireland, Art 2.

<sup>41</sup> Gershon Shafir and Yoav Peled, 'Citizenship and Stratification in an Ethnic Democracy' (1998) 21 *Ethnic and Racial Studies* 408; Ayelet Shachar, 'Religion, State and the Problem of Gender: Reimagining Citizenship in Diverse Societies' (2005) 50 *McGill Law Journal* 3, 35–8.

Importantly, there is nothing intrinsic or inevitable in this cultural turn. It certainly is not a built-in feature of the parentage-based membership principle. Under any version of the *jus sanguinis* principle, the crucial question to determine is who gains the right to transmit membership to the as-yet-unborn generations. Most countries have resolved this constitutive dilemma by adopting what has been termed the ‘zero option’, whereby *all* persons residing in the territory of the newly established country on a particular day (usually declared soon after independence) are automatically granted citizenship. In theory, this permits the creation of a heterogeneous and inclusive community to be ‘reproduced’: when citizens procreate, this diversity of composition is transmitted to future generations through the parentage-based birthright principle, especially if coupled with naturalization provisions that make it relatively easy for immigrants from different parts of the world to acquire full membership status within the adoptive country.<sup>42</sup>

In practice, however, the reliance on descent in the transmission of citizenship may lead to exclusionary overtones associated with privileging the majority community, especially where there are few (if any) mechanisms for newcomers who do not already ‘belong to the fold’ on the basis of national, linguistic, religious, or cultural heritage, to gain access to citizenship. Reliance on ‘bloodline’ as the sole connecting factor for allotting automatic citizenship may, under such conditions, prohibit children of immigrants from becoming full members of the country in which they were born and raised due to a criterion that is firmly beyond their control—their ancestry.

Perhaps the most familiar, and now discredited, example of perpetual intergenerational exclusion (through *jus sanguinis*) of long-term permanent residents from full membership in the polity can be seen in German citizenship law, prior to its reform in 2000. In the past, German citizenship law attributed membership based exclusively on descent. Naturalization was exceptional. Thus, even lawful permanent residents born and bred on German soil had no legal right to become full members of the body politic. This non-citizen status would be propagated from generation to generation: once the parents were excluded from membership, neither they nor their children could alter this designation through residency, consent, or voluntary action. This policy created a class of second- and third-generation children of immigrants whose ancestry prevented them from obtaining citizenship—and the added layer of protection and opportunity that it grants—no matter their level of self-identification with the country, or the fact that they had resided there for their entire lives.

When this hard-won change in German citizenship law finally took effect, children born to *Gastarbeiter* and other settled immigrants gained the right to acquire German citizenship based on their birth in the territory, rather than on their ancestry. As with recent changes in *jus soli* countries that have added a component of *jus sanguinis* into their citizenship attribution regimes, there is no prohibition against modifying the *jus sanguinis* model, as in this example, by the addition of a *jus soli* component.

### 3. Emergent Trends: Borrowing, Dual Nationality, and the Loss of Citizenship

In the maze of constitutional provisions and citizenship laws defining formal access to membership we clearly need to keep track of each country’s distinct rules and procedures. But it is

<sup>42</sup> William Rogers Brubaker, ‘Introduction’ in William Rogers Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (1989).

also possible to identify emergent common themes. Most notable is the pattern of mutual ‘borrowing’ from one system to another, which is of course familiar to us from the broader field of comparative constitutional law. In the study of citizenship this is referred to as the convergence thesis.<sup>43</sup> Another significant trend is the growing recognition of dual nationality.<sup>44</sup> Whereas the Preamble to the 1930 Hague Convention on Conflict of Nationality Laws declared that ‘it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have *one nationality only*’, today, approximately half the world’s countries permit their citizens to hold dual nationality, either by birth or naturalization.<sup>45</sup> This transformation has led some commentators to claim that we are witnessing the ‘inevitable lightening of citizenship’.<sup>46</sup> There is some truth to this description, especially for those residing in well-off countries in Europe and North America. But even in these regions of the world, the picture is more complex. Arguably, it simultaneously reveals *both* the relaxation (‘lightening’) and the tightening (or ‘re-bordering’) of citizenship.

To provide one illustration of the latter pattern, consider the rekindling of the old debate about the revocation of citizenship: the involuntary stripping of an individual’s legal status as a member of the political community. The United Kingdom offers a telling example. The British Nationality Act was amended in 2002 and then again in 2006 with the adoption of the Immigration, Asylum and Nationality Act that broadened the power of the Home Secretary to revoke British citizenship in circumstances where ‘that deprivation is conducive to the public good’.<sup>47</sup> Heated debates surrounding categories such as ‘breach of allegiance’ or ‘disloyalty toward the state’ are of course anything but new.<sup>48</sup> The distinctiveness of this new provision, however, lies in the criteria for revoking citizenship that ‘is content with a vague determination (by the state) that the very holding of citizenship [rather than specific conduct] has become harmful to the public interest’.<sup>49</sup>

This broad authorization for the British government to deprive an individual from citizenship, what Hannah Arendt famously called, ‘the basic right to have rights’, stretches beyond what is currently permitted in other major countries that follow the common law tradition. Canada, for example, only permits the revocation of citizenship for reasons of fraud, false representation, or concealment of material circumstances.<sup>50</sup> In the United States, birthright citizens cannot have their citizenship involuntarily stripped, whereas naturalized citizens can have their citizenship revoked at any time, if that naturalization was illegally procured or procured by concealment of a material fact or by willful misrepresentation.<sup>51</sup> As a result of several constitutional challenges, including the landmark decision in *Afroyim v Rusk* (1967), the US Supreme Court ruled that Congress cannot revoke citizenship involuntarily, concluding that:

<sup>43</sup> This trend was identified by Hansen and Weil in their trailblazing work in the field. See Hansen and Weil (n 29).

<sup>44</sup> Peter J. Spiro, ‘Dual Citizenship as Human Right’ (2010) 8 *International Journal of Constitutional Law* 111.

<sup>45</sup> Preamble (emphasis added). Sejersen T. Brondsted ‘“I Vow Thee My Countries”—The Expansion of Dual Citizenship in the 21st Century’ (2008) 42 *International Migration Review* 523.

<sup>46</sup> Christian Joppke, ‘The Inevitable Lightening of Citizenship’ (2010) 1 *Archives européennes de sociologie* 9.

<sup>47</sup> Immigration, Asylum and Nationality Act 2006, s 56(1). For a thorough analysis, see Shai Lavi, ‘Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel’ (2010) 13 *New Criminal Law Review* 404.

<sup>48</sup> In the common law tradition, they have deep feudal roots. But civil law countries have also struggled with such categories. Eg French law permits the revocation of citizenship if one commits certain crimes, such as terrorism, that are held to be incompatible with the status of being French.

<sup>49</sup> Lavi (n 47), 410.

<sup>50</sup> Citizenship Act, §10 (Canada).

<sup>51</sup> Immigration and Nationality Act, §340, codified as 8 USC §1451. For further discussion, see Leti Volpp in ‘Citizenship Undone’ (2007) 77 *Fordham Law Review* 2579.

We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his [or her] citizenship, whatever his [or her] creed, color, or race. Our holding does no more than to give to this citizen that which is his [or her] own, a constitutional right to remain a citizen in a free country unless he [or she] voluntarily relinquishes that citizenship.<sup>52</sup>

This core notion of giving to a member of the political community that which is *already* hers—a constitutional right to remain a citizen—is at risk with the revival of the practice of the involuntary revocation of citizenship. One of history's little ironies is that the formal or legalistic aspect of citizenship, which postnational and other scholars have come to treat as irrelevant and anachronistic at best, may in fact prove of tremendous importance to protecting the individual in today's more turbulent world. It is this 'bare legal status' which grants, as it were, a basic shield or security of membership, operating like 'a thin but unbreakable guard rail'.<sup>53</sup>

#### 4. Naturalization: The Return of Culture

The *only* legal method for acquiring citizenship other than through birthright is by naturalization. When we speak of naturalization, we refer to the final step in the process of acquiring citizenship *after* birth. The word derives from *nasci* (Latin), which means 'to be born'; the term *naturalization* therefore suggests that the post-birth admission to citizenship is a symbolic and political 're-birth' into the new membership community. This usually requires agency, action, and expressed consent by the individual, as well as acceptance by the political community into which she emigrates.

To gain a shot at acquiring post-birth membership in a desired destination country, one must first reach its territory and establish lawful permanent residence. In a world of regulated borders, this may prove harder than is commonly thought: each polity is obliged to allow entrance to its territory only to its *own* citizens. A non-citizen has no similar right.<sup>54</sup> Global inequality patterns also make their mark here: citizens of countries perceived to be poorer or less stable are often subjected to more stringent requirements when they seek admission to more affluent countries. These inequalities are felt even when applicants are seeking short-term entrance visas only, let alone permits for permanent residence.<sup>55</sup>

While the precise requirements of naturalization may vary from one country to another, the basic premise is that 'the power to admit or exclude aliens is a sovereign prerogative'.<sup>56</sup>

<sup>52</sup> *Afroyim v Rusk* 387 US 253 (1967). The principle stated in *Afroyim* was unanimously reaffirmed by the US Supreme Court in *Vance v Terrazas* 444 US 252 (1980). See T. Alexander Alienikoff, 'Theories of Loss of Citizenship' (1986) 84 *Michigan Law Review* 1471.

<sup>53</sup> Audrey Macklin, 'Exile on Main Street: Popular Discourse and Legal Manoeuvres around Citizenship' in *Law and Citizenship* (2006), 24.

<sup>54</sup> The major exception here is the obligation that nations that signed the 1951 Refugee Convention have taken upon themselves to provide a safe haven to persons who qualify as refugees. Even then, the receiving country is obliged to provide temporary shelter only, not necessarily long-term residency.

<sup>55</sup> Most countries are committed to granting access on the basis of marriage or family ties to a person who is already a citizen or permanent resident of the destination country, where individuals have a right to bring certain categories of family members. In Europe, this commitment is enshrined in Art 8 of the European Convention on Human Rights. Here, too, there has been a good amount of legal gymnastics, as in the distinction between family reunification (permitted) and establishment of marriage life where one partner is not settled in the admitting country (limited). The new pre-entry integration tests that take place abroad apply to spouses in such applications.

<sup>56</sup> *Landon v Plascencia* 459 US 21, 32 (1982) is a classic example of the static view of citizenship.

Here, too, we can identify a double transition: certain naturalization requirements have been procedurally ‘lightened’, as exemplified by the reduction of the number of years of residence that a state can require of the individual before he becomes eligible to apply for citizenship.<sup>57</sup> At the same time, the substantive requirements have been tightened up and revamped, exemplified by the rise of citizenship tests from The Hague at the heart of Europe to Canberra in the far edges of the New World, contributing to the ‘wider agenda of reinforcing shared values’ (as a British government document recently put it). Another example of the renewed emphasis on integration as a condition for inclusion in the body politic hails from France, where immigrants are now required to sign the Contract d’accueil et d’intégration, which articulates the centrality of the principle of *laïcité* to the Republic. These developments, which I now turn to explore, can be labeled as the ‘cultural turn’ in citizenship discourse and practice, and they reflect a majoritarian tilt.

Typically, the most basic requirement for naturalization is that the applicant must have resided continuously in the admitting country for several consecutive years as defined in statutory or regulatory legal residency requirements. The applicant must demonstrate basic knowledge of their new home country’s language, political system, and forms of government. Another key requirement present across the spectrum of admitting countries is that the would-be citizen must not have a criminal record; an applicant who is deemed to pose a security risk to the state will also be disqualified. In the United States, even minor brushes with the criminal code are likely to bar a person from gaining citizenship, often leading to the deportation of the immigrant back to the country of origin. For those permitted to complete the transition process towards post-birth citizenship, the naturalization process culminates in a symbolic public ceremony, in which applicants pledge allegiance to their new home country (or its constitution), sing the national anthem, and salute its flag.<sup>58</sup> Taken together, these acts represent symbolically the culmination of a unidirectional and graduated transformation, or ‘re-birth’: from alien to citizen.

The description of the path to naturalization that I have just recounted is the classic narrative that is told from the viewpoint of the admitting society. Yet in a more dynamic global reality, the script may have to undergo a modification. Note the almost complete absence of the sending country from the narrative, or what Rainer Baubock calls the ‘external citizenship’ dimension of transnational migration, whereby certain individuals continue to hold and nourish meaningful ties to the new home country and the old. The growing recognition of dual nationality begins to capture this changed reality on the ground, but there are many challenges ahead. Indeed, some are suggesting that the pressures of globalization and the perception of a ‘loss of control’ over borders and membership boundaries are in part motivating a new zealous turn toward regulating who gets in and who of those not born as citizens can be defined as eligible for inclusion in the innermost circle of members through *naturalization*. The introduction of civic integration exams abroad—with the Netherlands taking the lead—and citizenship tests and ceremonies at home provide insights into the present ‘cultural turn’. These new developments have come to the forefront of the debate in Germany, Denmark, Australia, and the United Kingdom, to mention a few key examples.<sup>59</sup>

<sup>57</sup> Joppke (n 46).

<sup>58</sup> The symbolic meaning of such acts is discussed by Sanford Levinson, ‘Constituting Communities through Words that Bind: Reflections on Loyalty Oath’ 84 *Michigan Law Review* 1440 (1986).

<sup>59</sup> Amitai Etzioni, ‘Citizenship Tests: A Comparative, Communitarian Perspective’ (2007) 78 *Political Quarterly* 353; Liav Orgad, ‘Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe’ (2010) 58 *American Journal of Comparative Law* 53.

These citizenship tests feature civics questions about the adoptive country's system of government, the political process, and the values of a constitutional state. The more controversial aspects relate to matters of culture, identity, and ethics. As Liav Orgad observes, some of these new tests are designed to examine the applicant's personal beliefs and moral judgments, and are 'unusual in the intrusiveness of [the] questions . . . about gender equality, religion, conversion, politics, marital relations, promiscuity, and culture.'<sup>60</sup> In the German *Land* of Baden-Württemberg, a questionnaire that was later retracted and replaced by a federal citizenship test, originally included questions such as the following: 'Your adult daughter or your spouse would like to dress like other German girls and women. Would you try to prevent it? If yes, by which means?'<sup>61</sup> The Dutch, unlike the Americans, do not provide applicants with copies of prospective questions that may appear on their actual citizenship tests on the theory that 'the proper attitude . . . cannot be learnt by heart.'<sup>62</sup> As part of the effort to make citizenship meaningful, the centrality of the concept of integration has risen, and multiculturalism (a term that has come to serve as a scapegoat for any public policy that has granted some degree of recognition to cultural and religious diversity or explored whether legal accommodation is merited and justified) explicitly disavowed. Germany's Chancellor, Angela Merkel, perhaps best expressed this sentiment in stating that 'multikulti' had 'failed, and failed utterly'.

In the United Kingdom, this new commitment to integration has translated into heightened language requirements and the introduction of citizenship tests and ceremonies. This was soon followed by Australia, the only new-world society that did not previously adopt a formal citizenship test. These fast-paced changes reflect a commitment to actively promoting and 'strengthen[ing] the things—the values, the habits, the qualities—that we have in common', as *The Path to Citizenship* government document puts it.<sup>63</sup> Christian Joppke has caught the spirit of the moment in describing such tests as instances of 'repressive liberalism'. Others have used related labels, such as illiberal liberalism, cautioning that such measures 'violate the same values they seek to promote.'<sup>64</sup>

In addition to citizenship tests that apply to immigrants who already reside in the destination country, naturalization processes have also become more closely intertwined with immigration control.<sup>65</sup> This is evident, for example, in the Dutch policy of demanding visa applicants abroad to demonstrate knowledge and linguistic abilities *before* the person reached Dutch soil, effectively turning linguistic and cultural knowledge into a precondition for gaining an entry visa to the country, rather than the more traditional view of seeing it as a result of a process of integration that occurs only *after* settlement in the new home country.

Another manifestation of the cultural turn in citizenship discourse and practice can be found in the fierce controversies surrounding the legislation to ban head-to-toe veiling in public, especially the more extensive forms of face covering (the niqab and burqa). France was the first country in Europe to implement such a ban through legislation that prohibits

<sup>60</sup> Orgad (n 59), 67.

<sup>61</sup> *Ibid.*

<sup>62</sup> Dimitri Kochenov, 'Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice', EUI Working Paper, RSCAS 2011/06 (EUDO Citizenship Observatory, 2011), 8.

<sup>63</sup> Government Green Paper, *The Path to Citizenship: Next Steps in Reforming the Immigration System* (2008), para 42.

<sup>64</sup> Orgad (n 59), 92. The term 'repressive liberalism' is drawn from Christian Joppke, 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe' (2007) 30 *West European Politics* 1.

<sup>65</sup> In addition to this cultural turn, we are also witnessing the invention and implementation of what I have elsewhere called the 'shifting [territorial] border of immigration regulation'. See Ayelet Shachar, 'The Shifting Border of Immigration Regulation' (2007) 3 *Stanford Journal of Civil Rights-Civil Liberties* 165.

clothing concealing the face in public places. A woman wearing a face veil in defiance of the law risks a fine that can be accompanied or replaced by compulsory citizenship classes. Such state action purports to advance the goals of gender equality, secularism, and public order, but it may stand in tension with constitutionally protected principles of religious freedom, as well as the values of individual choice and autonomy. Such generalized bans and their compatibility with constitutional principles and human rights protections will surely occupy domestic and regional courts in years to come. At present, it remains undisputed that the relentless attention paid to veiling by Muslim women has only further politicized the matter. In this charged environment, every act of veiling (or its rejection) is interpreted by multiple actors as a statement about one's 'loyalty' and 'belonging'. What is often lost in the discussion is the recognition that immigrant women who belong to minority or marginalized religious communities are constantly negotiating their *multiple* affiliations (to their gender, their faith, their families, their new and old home countries, and so on) while operating within a tight space for action. Nevertheless, they—and their (covered) bodies—have become the visual markers of far broader struggles over power and identity, secularism and expression of 'difference', the blurring of once fixed lines distinguishing the metropolitan from the rest of the (once-colonized) world, the struggle to 'speak' for oneself as opposed to artificially being placed in predefined boxes and categories, in addition to reinforcing the majority culture as the norm and by default delineating certain communities as implicitly 'foreign'.

Many of these themes came to a head in the *Faiza M* ruling, in which the Conseil d'État upheld a decision to decline a naturalization request submitted by a Muslim female immigrant who was legally admitted to France, spoke fluent French, was married to a citizen, and had three French children, because 'she had adopted a radical practice of her religion, incompatible with the essential values of the French *communauté*, especially the principle of equality between the sexes.' This decision was based on Article 21-4 of the Civil Code as it applied in 2005, stating that, 'By decree in the Conseil d'État, the Government may, on grounds of indignity or lack of assimilation other than linguistic, oppose the acquisition of French nationality by the foreign spouse.' The formal legal basis for the denial was not the religious attire per se as much as the governmental assessment of Silmi's 'insufficient assimilation' into the French Republic. In practice, however, as one astute legal observer noted, 'it remains uncertain whether Silmi was denied citizenship due to her beliefs, or her conduct, or both.'<sup>66</sup> The practical result of the denial of Silmi's request for securing citizenship, the direct bond between the individual and the state—a status that is *independent* of her husband (once bestowed upon her), is that in the name of gender equality she was left in a dependent position vis-à-vis both her partner, who already had a secure legal status, and the political community at large. The turn to collective identity claims by the majority, then, has a sharp edge, making it potentially harder for non-dominant members of minority religions to gain full inclusion or even mere legal admission (if they are not yet citizens).

Beyond the growing significance of the claims of culture in determining who shall gain (or be denied) the 'final prize' of full, legal membership in the state, another kind of re-bordering of citizenship is occurring on a different plane; namely, the rising impact of economic and human-capital accretion considerations to shaping targeted immigration policies in countries that seek to gain or sustain a relative advantage. In this vein, governments are now willing to proactively use their control over allocating membership resources as part of their economic

<sup>66</sup> Orgad (n 59), 64.



or global competitive strategy to attract highly skilled migrants and wealthy individuals whose admission is seen as a net gain for the polity. At the same time, these very same destination countries are trying to do whatever they can within the bounds of legality to fend off 'unwanted' immigrants that they see as falling into the net-burden category. This selective migration policy is reflected, for example, in the tailoring of 'incentive packages' that contain the promise of putting certain migrants on the fast track toward acquisition of full membership.<sup>67</sup> This pattern of change touches upon the most delicate and contentious issues of citizenship: defining who may gain access to membership in the political community, and on what basis.

Just as admission is becoming harder and harder to secure for those trying to gain entry visas based on family ties or arriving from destinations that are perceived as culturally 'too different' from the majority society, the golden gates of immigration are being opened ever more widely to those regarded as the world's 'brightest minds' based on an assessment of their skills, innovation, and adaptability.<sup>68</sup> Related reconfigurations of citizenship are simultaneously occurring in emigrant-sending countries. Whereas in the past skilled migrants were regarded as lost causes who had 'betrayed' the home national community, these individuals are now courted as long-lost sons and daughters of the home nation, whose 'literal "worth" to the state is invoked, conjuring a vision of citizenship-by-economic contribution.'<sup>69</sup> This new interpretation allows successful migrants to maintain legal ties with their original home countries as well as the political communities in which they have settled.<sup>70</sup>

### III. PIERCING INTO THE FUTURE: CITIZENSHIP'S NEW FRONTIERS

The discussion thus far has proceeded on the assumption that citizenship is distinguished by the 'rules of access to citizenship status and the scope and quality of the rights this status entails within a given territory'.<sup>71</sup> This captures well the standard or static vision of citizenship, according to which 'all the members of the political community [are] bounded by the borders of the state—and only they—were to have equal rights and duties and an equal stake in decisions regarding matters of the state.'<sup>72</sup> This unified and state-centered understanding of citizenship has always been more of a myth than a reality, but it is arguably harder to sustain in an increasingly interconnected world that has given rise to new and more dynamic forms of multilevel governance and attachment that are proliferating, both above and below the nation state level. The classic example here is the creation of European citizenship at the supranational level. Although the grant of Union citizenship is still derivative on acquiring citizenship in the member states, according to their own nationality laws, the European Court of Justice

<sup>67</sup> For further discussion of these transformations, see Ayelet Shachar, 'The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes' (2006) 81 *NYU Law Review* 148.

<sup>68</sup> Ayelet Shachar, 'Picking Winners: Olympic Citizenship and the Global Race for Talent' (2011) 120 *Yale Law Journal* 2088.

<sup>69</sup> Barry (n 11), 124.

<sup>70</sup> Rainer Bauböck, 'Toward a Political Theory of Migrant Transnationalism' (2003) 37 *International Migration Review* 700; Devesh Kapur, 'The Janus Face of Diasporas' in Barbara J. Merz et al (eds), *Diasporas and Development* (2007).

<sup>71</sup> Eniko Horvath and Ruth Rubio-Marin, '"Alles Oder Nichts"'? The Outer Boundaries of the German Citizenship Debate' (2010) 8 *International Journal of Constitutional Law* 72.

<sup>72</sup> *Ibid* 72–3.

has famously and repeatedly declared that each individual EU citizen enjoys rights and owes duties that together make up this new status—EU citizenship—which is ‘destined to become the fundamental status of nationals of the Member States’.<sup>73</sup> Over time, the European Court of Justice has begun giving this declaration some teeth. Most recently, in the much anticipated *Zambrano* (2011) decision, the Court ruled that the non-EU parents of an EU citizen child must be allowed to live and work in the state in which their children were born, even if the parent(s) otherwise had no right to remain in that country.<sup>74</sup> This is the reversal of the classic *jus sanguinis* narrative: instead of parents passing down citizenship to their offspring, here, the EU-born children, as citizens of the Union—acquired by virtue of the *jus soli* principle or specialized provisions to avert statelessness—secure the residency status of their parents within the territory of the Union. As several commentators have noted, the unintended consequences of this expansive judgment might well be to create further incentives for member states, the gatekeepers of Union citizenship, to make it ‘all the more difficult for individuals to gain access to European citizenship in the first place.’<sup>75</sup> Such restrictions, motivated by ‘loss of control’ fears, would only further accentuate the re-bordering trends identified earlier in our discussion of the cultural turn. At the subnational level, greater attention is paid to the core role played by cities and localities in shaping the integration experience of immigrants. New York, London, and Amsterdam come to mind as prime examples. Regional and provincial distinctions also play a role in shaping the experience of citizenship. For instance, the cultural turn just discussed has been more pronounced in Quebec (which, like France, introduced legislation to prohibit face-covering in public spaces) than the rest of Canada; its effects more strongly manifested in the Flemish regions of Belgium than its Walloon parts.

Another important development on the ground is found in the pattern of circular migration and the emergent transnational understandings of membership. Here, the focus is less on legal status and more on the lived experience of individuals and families who have successfully managed to maintain active and meaningful connections, ventures, and opportunities in both their new home countries and the old. Of particular interest are attempts to extend and facilitate the rights of political participation (including voting rights) to emigrant citizens living abroad, allowing individuals to enjoy a wide range of associative and political relations across borders. A mirror-image development is found in campaigns to extend the franchise to noncitizens who are long-term residents of a given polity by granting them the right to vote in local, and possibly national, elections as well.<sup>76</sup>

Philosophers, ancient and contemporary, have idealistically envisioned cosmopolitan conceptions of citizenship, while others now speak of a borderless world, although this often takes the form of an ethical or aspirational plea to recognize and respect each person’s equal worth and dignity, irrespective of formal membership status, rather than an attempt to provide a legal and institutional blueprint for a new world order. Activists have called attention to ‘citizenship on the ground’ or ‘globalization from below’, whereby individuals assert rights and demand recognition through democratic politics, sometimes in total disregard of the fact that

<sup>73</sup> C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31.

<sup>74</sup> C-34/09 *Zambrano* [2011]; the Court removed the requirement of sufficient funds that was present in *Chen*, invoking Art 20 TFEU rather than the Citizen Directive 2004/38/EC.

<sup>75</sup> See Anja Wiesbrock, ‘The *Zambrano* Case: Relying on Union Citizenship Rights in “Internal Situations”’, EUDO Citizenship Observatory, March 2011.

<sup>76</sup> The right to vote in local elections is guaranteed to citizens of the EU, whichever member state they reside in. For detailed analysis, see Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and Restructuring of Political Space* (2007). See also Cristina M. Rodriguez, ‘Non-Citizen Voting and the Extra-Constitutional Construction of the Polity’ (2010) 8 *International Journal of Constitutional Law* 30.

formally they lack legal status in the eyes of the respective community or its established law and jurisprudence.<sup>77</sup>

Being political does not by itself suffice to shield one from the full force of existing categories, including those of removal and expulsion from the country in which one lives and 'acts' as a citizen, but it may help transform these very categories. A telling example of the deployment of citizenship as democratic action and participation is found in the recent campaign for the legalization of undocumented students in the United States, which saw these students mobilize politically by telling their own compelling life stories, including self-identification as lacking legal status, under the slogan of 'unlawful and unafraid'. Like so many other once-excluded groups and constituencies who were barred from formal citizenship (on the basis of race, gender, sexual orientation, and so on), the appeal here is to change the law so that the promise of equal membership is extended to new subjects and new domains. For these young men and women, many of whom were brought into the United States as babies or toddlers, the United States has become the center of their life. Yet under traditional principles of citizenship acquisition they are deprived of membership. Instead, they face the hanging sword of deportation from the only country they know as home. The urgency of reform is undisputed. It may include regularization programs or the addition of a new root of title to citizenship for those who already 'practice' it. This I have elsewhere labelled the *jus nexi* principle, which can operate alongside the *jus soli* and *jus sanguinis* principles, offering a more fitting interpretation of membership for a world of increasing mobility and interdependence.<sup>78</sup>

The constitutive elements of citizenship's simultaneous 'lightening' and 're-bordering' are now fully in view. This paradoxically fits in line with the historical record of citizenship, which rather than offering a linear story of progression is full of competing narratives.<sup>79</sup> Because it is an emancipatory promise, it is too early to bid citizenship farewell; it may be changing its scale and scope, but it still offers a baseline of security and protection to the individual that no other human rights instruments have to date achieved. Being relevant, and back with a vengeance, it turns out, is a measure of the great gaps that we still need to fill before we can give up on the ideal of equal membership in the political community, which, despite its many shortfalls, changing scales and ever-evolving interpretations, remains one of the finest institutions, to date, that we have created to justly govern our collective affairs and individual freedoms.

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<sup>77</sup> Luis Cabrera, *The Practice of Global Citizenship* (2010).

<sup>78</sup> Ayelet Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' (2011) 23 *Yale Journal of Law & the Humanities* 110.

<sup>79</sup> Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in US History* (1997).

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