

Citizenship with a Vengeance

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This Article situates contemporary shifts in citizenship law within a story of the relationship of globalization and illegal migration. The central argument is that citizenship as a formal legal status is enjoying a resurgence of authority at present. This mirrors the paradoxical nature of globalization itself: along the vector of citizenship, both inclusions and exclusions are increasing at present. As states are increasingly unable to assert exclusive power in a range of policy domains, immigration and citizenship law are transformed into a last bastion of sovereignty. Many shifts in citizenship law are explained through an understanding of how migration law and citizenship law work in tandem to form the border of the national community. Recent changes in citizenship law respond to two trends: a crackdown on extra-legal migration and a desire to reassert authority over diasporic populations. While the focus of the Article is on citizenship as a formal legal status, the importance of amnesty programs for extra-legal migrants demonstrates that ultimately the bifurcation of formal and substantive citizenship is untenable.

INTRODUCTION

This Article considers what citizenship laws mean for illegal migration. It reflects part of a longer argument about how globalization's forces both foster and construct illegal migration. Like migration laws, citizenship laws in prosperous Western states are displaying an increasing similarity at present, with more states permitting dual citizenship in at least some circumstances

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and more states opting for citizenship rules which come somewhere between the *jus sanguinis* and *jus soli* principles.¹ Citizenship, as the most privileged form of membership, seems remote from illegal migration. Nonetheless, both popular and scholarly talk of illegal migration introduce citizenship into the discussion in fairly short order. This happens because citizenship is easy shorthand for legitimacy, and because citizenship law and migration law work in tandem to create the border of the nation.

My central assertion is that citizenship as a formal legal status is enjoying a resurgence of authority at present and this is directly linked to the worldwide crackdown on illegal migration. I begin by considering how migration law and citizenship law work in tandem. Given this relationship, I then outline how the pressures of globalization on migration laws are transferred through the migration law "buffer" to citizenship laws. This leads to the conclusion that citizenship law is an ideal site for observing the paradoxical nature of globalization, as we see here that inclusions and exclusions are increasing at the same time. Finally, in briefly considering the role that amnesty plays in both the politics and the law of illegal migration, the fiction of formal legal citizenship is unmasked.

In leading to this point, my focus is on citizenship as a legal status. Further, because of my interest in illegal migration, I am primarily interested in how citizenship status is transferred to migrants, the process often referred to as naturalization. This concern is, of course, at the margins of citizenship analysis as most people in the world are born into a citizenship and do not change it. While there has been a resurgence of scholarship about citizenship over the past two decades, its central concerns have not been legal structures and provisions. Instead, a sustained conversation has developed about social citizenship and participatory citizenship, citizenship as a measure of inclusion and respect.² Most recently, in the context of globalization, there

1 This trend is canvassed in T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* (2002).

2 Much of this work can be traced to the influence of T.H. Marshall, whose seminal collection of essays, *Citizenship and Social Class*, is a touchstone for contemporary work. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950). Other influential books in this area include WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); *CITIZENSHIP AND SOCIAL THEORY* (Bryan Turner ed., 1993); SEYLA BENHABIB, *CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN A GLOBAL ERA* (2002). A survey of this literature is presented in Will Kymlicka & Wayne Norman, *The Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 *ETHICS* 352 (1994). The growth in work about citizenship has continued steadily since this survey was published. Some exceptions to the trend include KIM RUBENSTEIN, *AUSTRALIAN CITIZENSHIP LAW IN*

has been considerable analysis of the extent to which citizenship is losing its relevance, or in a related way, becoming "denationalized" or deterritorialized.³ In these arguments, it is formal legal citizenship that is losing ground, not its more robust counterparts. My argument is at least a partial counter to both of these trends. I argue that formal legal citizenship persists, that it merits its own conversations, and that it is shifting rather than losing ground, and in some cases even gaining it.

A focus on the bare legal relationship between the individual and the state remains vital because it underlies work considering interpretations of the relationship it asserts, or perspectives that can be added to it.⁴ When Alexander Aleinikoff argues for a new legal status of "denizen" to acknowledge the membership of those who are not citizens but not "others," the argument is grounded in the persistence of formal citizenship status.⁵ Inquiries into how citizenship is "denationalized" or how it is disaggregated also set markers against the formal categorization.⁶ Citizenship has also retained a role as a bare legal status, the importance of which is being reasserted in the face of the contemporary politics of a global war-on-terror. From Guantanamo Bay to Syrian jails, the thin line of formal citizenship is asserting itself with crucial consequence.⁷ Citizenship in this legal sense is a creature of the law, a formalized categorical designation; but it also attracts the

CONTEXT (2002) and T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP* (2002).

- 3 DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* (1996); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447 (2000); YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994).
- 4 This observation and starting point are taken up to different ends by Audrey Macklin in her contribution to this volume. Audrey Macklin, *The Citizen and the Other: Considering the Heft of Citizenship*, 8 *THEORETICAL INQUIRIES L.* 333 (2007).
- 5 This is one of the key contributions of ALEINIKOFF, *supra* note 2.
- 6 Linda Bosniak inquires into how citizenship is denationalized across a range of discourses and asks when and why this *should* take place. Bosniak, *supra* note 3. She notes that denationalization is least likely in legally bounded renditions of citizenship. Seyla Benhabib argues that the elements of citizenship are being disaggregated in a way that separates social membership from political membership and thus creates a space for membership without citizenship. *See* BENHABIB, *supra* note 2.
- 7 Citizens of prosperous Western states have received attention and some assistance from their governments after being detained at Guantanamo Bay. On September 26, 2002, Maher Arar, a dual citizen of Canada and Syria, was removed to Syria by the United States and reportedly was detained and routinely tortured for more than a year. The Canadian government negotiated his release and return to Canada on

protection of the law and triggers the now somewhat old-fashioned right of the state to act on behalf of its citizens. The original version of the international legal principle of state diplomatic protection is what has been asserted in the Guantanamo Bay and Maher Arar instances.⁸ In both settings, the importance of citizenship formulated as *a right of the state* has prevailed where human rights arguments of individuals have failed. It is true the United Kingdom has been more effective in protecting its citizens in Guantanamo than either Canada or Australia, but this reveals more about the power and efforts of respective states than about the legal concept itself.⁹

Legal citizenship remains, as Audrey Macklin has described it, "a thin but unbreakable guard rail."¹⁰ The formal rights associated with legal citizenship make for a short list, far short of the aspects of participation and identity which are the basis of a robust participatory engagement in social and political life. In the migration context, citizenship means the right to enter and remain. It typically also permits formal political participation and, often, public service employment. These rights do not add much to legal permanent residency, but the pressures of globalization are affecting even the permanence of permanent residency status.¹¹ Narrow, formal, legal citizenship has never been irrelevant. Part of my argument here is that it is undergoing a resurgence of importance in globalizing times. Understanding the persistence of citizenship in its robust theoretical spheres beyond formal legality is a compelling enterprise, and

October 6, 2003. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Dec. 12, 2006), <http://www.ararcommission.ca/eng/>.

8 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 391-92 (2003).

9 Britain successfully negotiated for the repatriation of its nationals to Britain from Guantanamo in early 2005. Canadian Omar Khadr and Australian David Hicks remained detained. In 2004, David Hicks began the process of asserting his claim to British citizenship in the hopes of benefiting from the negotiated release. Mark Dunn, *Lawyers Say It's Citizen Hicks*, HERALD SUN, May 8, 2006, at 10 (Austl.); David Rose, *How Ashes Triumph Could Save the 'Last Brit' in Guantanamo*, OBSERVER, Sept. 25, 2005, available at <http://www.guardian.co.uk/guantanamo/story/0,,1577983,00.html>.

10 Audrey Macklin, *Exile on Mainstreet: Popular Discourse and Legal Manoeuvres Around Citizenship*, in LAW AND CITIZENSHIP 22, 24 (Law Comm'n of Can. ed., 2006).

11 In the United States, the scrutiny of permanent residents from the Islamic Middle East was heightened dramatically following the events of September 11, 2001. In Canada, recent legislative changes have reduced rights for permanent residents being stripped of their status for residency violations or criminal activity. In Australia, permanent residency rights for some refugee claimants have been sharply curtailed since 2001, most strikingly by making it virtually impossible for those who arrive by boat to ever become full citizens.

citizenship law itself can be reasonably dull. But the ways that citizenship is legally framed are an important starting point for any analysis that considers citizenship beyond this context. Whatever else citizenship is or is to become, it remains tied to national legal texts. I hope in this argument to contribute to an understanding of these foundations, including how and why they are shifting at present.

I. THE CITIZENSHIP LAW-MIGRATION LAW DICHOTOMY

In prosperous Western nations with developed immigration programs, migration law rather than citizenship law is the principal effective hurdle to formal membership.¹² This is especially true in settler societies such as Australia, Canada, the United States or New Zealand that have built part of their national mythology around being "nations of immigration." In part this is because the distinctions between those with permanent legal residency status and those with citizenship are small. More important, however, is the fact that once newcomers are accepted as migrants, the hurdle for full membership in the form of citizenship is a low one. Typically, a certain number of years of legal permanent residency must be accumulated,¹³ one must have a minimal knowledge of the "national" language,¹⁴ and one must pledge to defend the nation and respect its laws. Applicants must also be of good character, a hurdle that may become more significant in these ominous times. Australia, Canada, and the United States also require that new citizens have some knowledge of the nation they are joining, but this testing requirement is not onerous for those who have lived in the country for the required number of years.¹⁵ In general, applying for citizenship is cheaper, easier and quicker, with a far greater likelihood of success, than applying for permanent immigration status.

12 I have made this argument in more detail in Catherine Dauvergne, *Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics*, 24 MELB. U. L. REV. 280 (2000).

13 In the United States, the requirement is five years residency with permitted absence of up to a year. In Australia the requirement is two years, and in Canada it is three years.

14 There is a language component in the United States, Australia and Canada. In each case, the standard is one of basic communication skills.

15 The knowledge requirement focuses on history, politics and citizenship rights. The United States and Canada both administer a formal written test at approximately a primary school level of difficulty. Some applicants in each country are exempted from this testing. In Australia, testing focuses on rights and responsibilities of citizenship and is administered orally, testing English language skills at the same time.

Applications for permanent residency are more onerous, as well as more expensive. Applicants are subject to medical examinations and to more rigorous character assessments. The nature of state scrutiny of an immigration application varies with the category. For family class applicants, the focus of eligibility, and therefore scrutiny, is personal relationships. For economic applicants, scrutiny focuses on financial affairs and on qualifications. In humanitarian categories (the most formalized of which is refugee status)¹⁶ the scrutiny will depend on the particular nature of the claim being made. Refugees must have a story to tell, and must be able to tell it.¹⁷ Other humanitarian migrants are typically required to demonstrate both need and desert. Prospective migrants are confronted with legal regimes where, generally speaking, the state agents have more powers than the police and individuals have fewer rights protections than criminal accuseds.

The group of permanent residents who are eligible to become new citizens is a group recruited and constituted by migration law. Migration laws aim to discriminate — to determine who will be admitted and who will be excluded. This is one juncture where a focus on formal citizenship is directly linked to the concerns of substantive inquiries into citizenship. The underlying assumption of the immigration preferences of prosperous Western nations is that liberal nations are generally morally justified in closing their borders.¹⁸ That is, the discrimination inherent in this law is justified by the need of the liberal community for closure and its right to identity.¹⁹ Racist provisions

16 In the United States, status can be granted to both "refugees" and "asylees." Both categories follow the refugee definition set out in the Convention Relating to the Status of Refugees, ch. 4, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

17 This point is well made by Audrey Kobayashi, *Challenging the National Dream: Gender Persecution and Canadian Immigration Law*, in NATIONALISM, RACISM AND THE RULE OF LAW 61 (Peter Fitzpatrick ed., 1995). Kobayashi argues that refugee women are confined by the victimization they must portray to attain their status.

18 Michael Walzer's assertion of this view has been the most influential. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-63 (1983). See also my discussion in Catherine Dauvergne, *Amorality and Humanitarianism in Immigration Law*, 37 OSGOODE HALL L.J. 597 (1999).

19 Some liberal thinkers have taken an "open borders" position, see, e.g., Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Joseph Carens, *Open Borders and Liberal Limits*, 34 INT'L MIGRATION REV. 636 (2000); Joseph Carens, *Refugees and the Limits of Obligation*, 6 PUB. AFF. Q. 31 (1992), but it is less prevalent than a closed borders argument. I have argued that the dispute between open borders liberals and closed borders liberals is not resolvable and is one reason for the intransigence of political debate about migration provisions. See Dauvergne, *supra* note 18.

eventually came to be seen as abhorrent to liberal principle, but the basic logic of a migration law which discriminates between applicants on the basis of choosing those who best meet the needs and values of the nation has not been impugned. The criteria that immigration laws enshrine read as a code of national values, determining who some "we" group will accept as potential future members. These messages of acceptance overlap the preoccupations of substantive citizenship: Who do we value and why? Who can contribute to vital social sectors: the economy and the family? Who is deserving of our protection and our humanity? The migration law filter gives legal form to the answers to these questions. The bodies for whom these answers are a fit can pass through this filter and become formal legal citizens. This is not the only way of conceptualizing membership, and it does not guarantee full social inclusion, but it is undeniably a privilege, whatever its drawbacks.

The citizenship law-migration law dichotomy functions to ensure for citizenship law a rhetorical domain of formal equality and liberal ideals. The messy policing of the national boundary by inquiring into debt and disease, criminality and qualifications, is left to migration law. Most prosperous contemporary states would not tolerate a citizenship regime that excluded individuals from naturalizing because of having a child with an intellectual disability, being poor, or dropping out of high school. Migration law specializes in precisely this type of distinction. In the citizenship law-migration law coupling, migration law does this dirty work. Citizenship law addresses loyalty and national values more directly, and its exclusionary impulses are obscured and minimalized. This relationship is important in understanding how current changes in both legal texts take effect.

Considering the citizenship law-migration law pairing in this way also allows a clear view of what it is not. The people with disabilities, poor people and people with little formal education mentioned above are often denied full participation within a polity, regardless of their citizenship status and of how they obtained it. It is importantly the rhetoric of liberal equality that is reserved to citizenship law through this dichotomy, not a full and unproblematic substantive equality. The two legal texts work together to construct the border of the nation; as such, they are both implicated in excluding, and in drawing a line between inclusion and exclusion. Citizenship law perfects the exclusionary mechanism of migration law by cloaking it in a discourse of inclusion. While the majority of permanent residents can move comparatively easily to citizenship status in the "new world" nations of migration, the final screening of citizenship law still has teeth. Its bite is felt in exclusions of those with criminal convictions, and the surveillance attached to a citizenship application may even imperil

immigration status. The point of separating them in this way is to draw attention to the final formal phase for migrants seeking membership in a new polity.

II. SHIFTS IN FORMAL LEGAL CITIZENSHIP

We are presently seeing two types of shifts in formal legal citizenship. Both can be read through the lens of the migration law-citizenship law dichotomy. While at first glance these trends may seem to oppose each other and thus to illustrate globalization's paradoxical nature, both movements express states' desire to assert control over migration, a point I will return to after considering some examples. For those trying to fit their lives into these provisions, the effects are paradoxical in the following way. For the privileged subjects of globalization, citizenship is becoming more flexible,²⁰ more states tolerate dual citizenships (which are especially meaningful for migrants), formal inequalities are being worked out of citizenship laws, and citizenship requirements are more perfunctory.²¹ For those already disadvantaged and excluded however, citizenship law is becoming increasingly exclusionary. For illegal migrants, the story is one of citizenship with a vengeance. This Part takes up three types of examples. The most straightforward are moves to make citizenship laws more stringent. The next set is shifts that appear innovative but nonetheless serve states' interests through their maintenance of the citizenship law-migration law dichotomy. Finally, I consider the much touted "innovation" of European Union citizenship and its attempt to move in both these directions, which in the end reifies national citizenship in a quite traditional way.²²

20 We owe the term "flexible citizenship" to AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* (1999). Ong has more recently written a companion study of the most disadvantaged migrants, focusing on refugees from Cambodia arriving in the United States in the 1980s. In AIHWA ONG, *BUDDHA IS HIDING: REFUGEES, CITIZENSHIP, THE NEW AMERICA* (2003), she makes the argument that economic globalization has contributed to deterritorializing citizenship. Her argument rests on contemporary social theory and a nuanced understanding of the making of citizen-subjects. I hope that my argument parallels the point she is making but with attention instead to the narrower realm of formal legal citizenship.

21 Kim Rubenstein, *Citizenship in a Borderless World*, in *LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY* 183 (Antony Anghie & Garry Sturgess eds., 1998); Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 *IND. J. GLOBAL LEGAL STUD.* 519 (2000).

22 This argument runs counter to that of Rainer Bauböck, *Why European Citizenship?*

Thus far in this Article, I have been considering citizenship law as it expresses rules for naturalization, because of its role as the final movement in migration. The principal function for citizenship law, however, is in setting out rules for citizenship from birth. Traditionally citizenship regimes have been divided into two broad categories, according to whether the state permits citizenship to be passed down on the basis of parentage (*jus sanguinis*) or whether citizenship is based on birth within national territory (*jus soli*). Most *jus soli* regimes have long had some exceptions for nationals giving birth away from home. More recently, however, the bedrock idea of birthright citizenship represented by the *jus soli* principle is eroding. This is significant because of the bold, migration-embracing narrative of a *jus soli* regime. It announces that those who are born here are our members. What came before does not matter; birth in the new land establishes equal entitlement. In the United States, birthright citizenship is constitutionalized, signifying a fundamental commitment.²³

In places where *jus soli* is being modified, the change has been motivated by a desire to ensure that the children of undesirable migrants do not "accidentally" obtain citizenship by birth. In Australia this change was made in 1985 in the months following the High Court of Australia's decision in *Kioa v. West*, which suggested that the Australian citizenship of a child whose parents had no migration status might alter the substance of natural justice in deportation proceedings.²⁴ Despite this constrained reading, and the fact that nothing turned on this aspect of the Court's reasoning, the law was changed soon after to ensure that only the children of citizens and permanent residents are Australian from birth.²⁵ In Ireland, the central politicking of the 2004 citizenship referendum revolved around a desire to ensure that Irish citizenship (and thus European citizenship) was not available to the children of women willing to travel, pregnant, to Ireland to give birth but who otherwise had no connection to the place.²⁶ In each of these cases, the legal change

Normative Approaches to Supranational Union, 8 THEORETICAL INQUIRIES L. 453 (2007) in this volume, and I encourage readers to consider these assessments side by side.

23 This is provided by the U.S. CONST. amend. XIV. See Joseph Carens, *Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States*, 37 U. TORONTO FAC. L. REV. 413 (1987).

24 *Kioa v. West* (1985) 150 C.L.R. 550 (H.C.A.).

25 Citizenship Act, 1948 § 10(2) (Austl.). In 2004, the High Court of Australia decision in *Singh v. Commonwealth of Australia*, (2004) 222 C.L.R. 322, confirmed the constitutionality of this change in citizenship law. This case is discussed in this volume by Kim Rubenstein, *Advancing Citizenship: The Legal Armory and its Limits*, 8 THEORETICAL INQUIRIES L. 509 (2007).

26 Following approval of the constitutional change, Irish citizenship law was amended

ensures that the functioning of the citizenship law-migration law dichotomy is intact: citizenship law may be about formal equality but it is predicated on migration law functioning as an effective pre-screening of potential members.

Alongside these developments, there is also an emerging story of states making membership provisions, through citizenship laws, more meaningful. These changes are more varied, and make a challenge to my citizenship law-migration law dichotomy that I will address shortly. The Canadian government, in a variation on the impulse to limit birthright citizenship, has proposed ramping up restrictions on rules for citizens outside Canada passing on their citizenship.²⁷ In the United States, there have recently been calls for a "national language" to strengthen homogeneity; presumably, this would involve making the present language requirement more stringent.²⁸ In Australia, there have been moves to extend the time-period people must reside in Australia before becoming citizens and to make the language and knowledge tests more stringent.²⁹ While none of the U.S., Canadian or Australian proposals have yet been translated into law, they all illustrate significant political will to make citizenship a more substantial commitment. In this way, these proposals are related to recent changes in the citizenship laws of three nations with well established global diasporas: Italy, Ireland and India. In these countries as well, citizenship laws have recently been changed to make citizenship more meaningful. However in these cases, all of which show citizenship law in nations which have been primarily migrant-sending rather than migrant-receiving, the citizenship law-migration law dichotomy is instructive in a somewhat different way. In these instances, citizenship is made a harder (or less desirable) tie to break, rather than a harder one to obtain.

The April 2006 Italian election was the first election following a

to provide that citizenship would be acquired by those born in Ireland whose parents were Irish citizens or entitled to be Irish citizens. *See also* John Harrington, *Citizenship and the Biopolitics of Post-Nationalist Ireland*, 32 J.L. & SOC'Y 424. Case C-200/02, *Zhu & Chen v. Sec'y of State for the Home Dep't*, 2004 E.C.R. I-9925, was also part of the political backdrop to these events. Chen traveled pregnant to Ireland from the United Kingdom to ensure European citizenship for her child.

27 Bill C-18, *Citizenship of Canada Act*, 2d Sess., 37th Parl., 2002 (2d reading Nov. 8, 2002). This proposal has been floated by several recent governments, most recently in 2002. To date the measure has not passed through Parliament, primarily because it has never been a sufficiently high priority item for the government of the day.

28 Michael Martinez & Amer Madhani, *English Bill's Meaning Lost in Translation*, *Experts Say*, CHI. TRIB., May 20, 2006, at 1.

29 *See* Australian Citizenship Bill, 2006, available at <http://www.austlii.edu.au/au/legis/cth/bill/acb2006264>.

2001 change in electoral laws to allow Italian citizens living abroad to elect representatives in four overseas constituencies.³⁰ It is not unusual for expatriate citizens to have a right, or in some cases an obligation, to vote in national elections. The Italian electoral reforms, however, go a significant step further in terms of formalizing the relationship between the nation's government and its dispersed citizens. The "Overseas Constituency" is divided into four electoral zones: Europe, South America, North and Central America and, finally, Africa, Asia, Oceania and Antarctica.³¹ Each zone may elect one member of each the upper and lower houses, with the remaining seats (totaling six in the Senate and twelve in the Chamber of Deputies) divided according to numbers of eligible voters in each zone. Italian citizens are eligible to vote, whether or not they are dual citizens of some other state. Bars to running as a representative of a zone in the Overseas Constituency include holding an elected office in another state. In the closely contested April 2006 election, the Overseas Constituency became an important factor.³²

The Italian Overseas Constituency gives Italian citizenship important new meaning for those living outside of Italy. The right to elect overseas representatives to parliament has the potential to introduce new issues and new perspectives to "domestic" political discussion. It also changes the gravitas of casting a vote for members of the diaspora, who are now entitled to choose between voting in the Overseas Constituency and voting in the constituency of their former residence. Overseas candidates in the April election campaigned in reference to both domestic and overseas issues. For example, it is unlikely that any domestic candidate would have raised issues such as the quality of consular services and satellite reception of state broadcasting services.³³ This new constituency also portrays the state's recognition that membership does not cease at territorial borders. It is impossible to predict whether Italy will continue with this experiment, in part

30 Provisions Governing the Right to Vote of Italian Citizens Abroad, Law No. 459 of Dec. 27, 2001, Gazz. Uff. No. 4 of Jan. 5, 2002.

31 *Id.* art. 6.

32 Commentators argue that the overseas votes may have played a critical role in breaking a tie between Prodi and Berlusconi. Prodi won four of the six seats in the Senate, while Berlusconi won only one. The remaining seat went to an independent party. See John Hooper, *A Triumph of Sorts as the Professor Beats the Clown*, GUARDIAN, Apr. 12, 2006, available at <http://www.guardian.co.uk/international/story/0,,1751945,00.html>; *Italy's Berlusconi Demands Election Recount* (CTV News television broadcast Apr. 11, 2006), available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060411/italy_election_060411?s_name=&no_ads=.

33 Barbara McMahan, *The Expat Factor*, GUARDIAN, Mar. 23, 2006, available at <http://www.guardian.co.uk/elsewhere/journalist/story/0,,1738183,00.html>.

because of its extraordinary success. The experiment was successful because more than one million expatriates turned out to vote³⁴ and because prominent expatriates entered the electoral race, prepared to devote their time and energy to the homeland and to at least partially "repatriate" in order to do so. However, the greatest marker of success was that the Overseas Constituency influenced the electoral outcome.³⁵

Recent changes in Ireland and India are less dramatic, but they do illustrate a willingness to formally specify membership, if not full citizenship, outside of territory. One aspect of Ireland's 1998 Good Friday agreement was the amendment of key membership provisions of the Irish Constitution.³⁶ The headline story about the amended articles 2 and 3 is that they establish a constitutional framework that recognizes both the existing territorial limits of the Irish state and the aspiration of many that the state extend its sovereignty over the entire island.³⁷ This is, of course, a compromise for relinquishing

34 *A Million Italians Abroad Vote*, ASSOCIATED PRESS, Apr. 9, 2006, available at http://web.lexis-nexis.com/universe/document?_m=898ee8fa6a0c6d41162bbdf6a657b292&_docnum=1&wchp=dGLbVlz-zSkVA&_md5=1fdadc743179dda1c4c3203a2aa305f7.

35 See *supra* note 32.

36 The Good Friday Agreement (formally: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, U.K.-Ir., Apr. 10, 1998, 2114 U.N.T.S. 472, known as the Belfast Agreement) was signed by the British and Irish governments on April 10, 1998 and was voted on by the people of North Ireland and the Republic of Ireland in a referendum on May 22, 1998. The Agreement recognizes the right to self-determination of the peoples of North and South Ireland, lays out a political framework for this self-determination, and remains committed to a process of reconciliation in Ireland. See Desmond M. Clarke, *Nationalism, The Irish Constitution, and Multicultural Citizenship*, 51 N. IR. L.Q. 100 (2000).

37 IR. CONST., 1937, arts. 2, 3, read as follows:

Article 2: It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3: (1) It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

constitutional claim to the entire territory. The constitutional reforms formally shift sovereignty from the territory to the people. The Irish "nation" has had a prominent place in the Irish Constitution since 1937. This use of nation clearly draws on an ethnic understanding of nation, rather than a more contemporary constructed or contingent version.³⁸ In the Irish Constitution, there is a considerable overlap between the nation and its citizens, which speaks directly to concern about the partition. The sidebar story of the 1998 constitutional reforms is, therefore, the constitutional recognition of the Irish diaspora. This results from the compromise language used to make a membership claim to the entire island without a reference to its politically contested geography. In unhinging the Irish nation from its territory, there is a potential to re-establish ties of membership that may have been severed through the inevitable shifting of citizenships which occurs in all diasporaic communities. While the "special affinity" is far from a rights entitlement, it parallels the political impulse of the Italian electoral reform by tugging at ties of distant belonging as a response to domestic political tensions.

In India, amendments late in 2005 created a new legal form of membership known as "overseas citizenship of India."³⁹ This is a status distinct from dual citizenship, which is not (yet) permissible in Indian law. Overseas citizenship of India, however, provides members of the India diaspora with the potential of a formal legal linkage with India despite having become citizens elsewhere. The status functions as a lifelong multiple entry visa, and

(2) Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.

38 There has been a strong shift in scholarship about "nation" over the past twenty years. While this term was first strongly associated with an ethnic coherence, ANTHONY SMITH, *THE ETHNIC ORIGINS OF NATIONS* (1986), more recent work has argued that this coherence is constructed and not essential to nation, BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991); WILLIAM ROGERS BRUBAKER, *NATIONALISM REFRAMED: NATIONHOOD AND THE NATIONAL QUESTION IN THE NEW EUROPE* (1996); ERIC J. HOBBSBAWN, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* (2d ed. 1992). What is interesting about this shift is that the parsing of nation and ethnicity that is well established in academic discourses has not effectively penetrated popular or political discourse. It leaves "nation" as a term that is difficult to use with any precision at all, and in this way perhaps contributes to the academic turn towards "citizenship" as a discursive framing of membership, which, because of its legal formality, is a term within which formal precision is often argued against.

39 The Citizenship Act, No. 57 of 1955, §§ 7A, 7B, 7C, 7D.

can be used as a transitional step to resuming full citizenship. Despite the inclusion of "citizenship" in the title, most of the core rights usually reserved to citizens are absent. Overseas citizens of India cannot vote or run for office, nor can they hold constitutionally named government posts or indeed most forms of government employment. Instead, this status acts as an exemption to provisions typically found in the text of migration laws, border crossing rights and the right to participate in the economy.⁴⁰ This fledgling provision is novel in its repackaging of the bundle of citizenship rights. It appears to aim at facilitating economic participation, and therefore fostering a return of wealth to India.⁴¹

These shifts all show states moving to re-establish or maintain membership ties through the vehicle of formal legal citizenship, with those who have, in the ideologically charged language of migration, *chosen* to establish their lives elsewhere. The formal posture of citizenship law is, in this instance as well, at odds with the lived reality of migration. These legal transformations extend membership and enrich its substance. As citizenship is enriched, exclusion from it is a greater deprivation. It is clear that one impetus behind the increase in possibilities for dual citizenship is a desire of states to retain an attachment with members. In combination with an erosion of *jus soli* principles, these moves show a trend towards reasserting citizenship's linkage to a hereditary community. As global migration increases, this trend can be cast as a thinly disguised reassertion of *jus sanguinis*. A *jus sanguinis* logic allows illegal migration status and deprivation to be passed down to subsequent generations, so that children may inherit a status of legal transgressor at birth. They also contribute to moving the line between "us" and "them" away from the national boundary, complementing the shift which is achieved by labeling part of the population "illegal" and thus excluding it despite its presence within borders. These changes contribute to showing formal citizenship rules as an assertion of sovereignty, defined as a control over a defined "people," regardless of their geographical location. The mechanics of inclusion and exclusion are maintained in the face of migration contexts that shift their geography. The most important contemporary example of this trend arises through considering European Union citizenship.

The European Union has, famously, moved citizenship to the supranational level and is most recently committing to make this citizenship more meaningful.⁴² European citizenship is important to the story of globalization,

40 Restrictions on ownership of agricultural and plantation property remain.

41 Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001).

42 Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, created European

and is written about extensively in this context. There are two points about this new form of citizenship that fit into my analysis of citizenship law and globalization. The first is that in the push to harmonize rules about European borders and their crossings, citizenship rules in member states are not being harmonized. The second is that the invention of European citizenship has succeeded in reversing the trend identified by Saskia Sassen as devaluing citizenship.⁴³ Both of these facts tell us something about the importance of the migration law-citizenship law dichotomy, and I will consider each in turn.

Since the Treaty of Amsterdam (1997, taking effect in 1999)⁴⁴ and the Tampere Conclusions (1999),⁴⁵ Europe has embarked on the creation of an Area of Freedom, Security and Justice. A central focus of this is harmonization of the most controlling aspects of migration regulation.⁴⁶ Extensive work has been done to harmonize both substantive and procedural aspects of refugee law,⁴⁷ and progress has also been made in coordinating responses to illegal migration.⁴⁸ At the same time, however, it has been made plain that member states will retain discretion in selecting temporary and permanent migrants in the area of economic migration. The push to build the Area of Freedom Security and Justice includes commitments to European citizenship. Now as ever, European citizenship is derivative. No one is solely a citizen of the European Union; this citizenship is based on first having citizenship in a member state.

Citizenship in a member state is still determined on the basis of national

citizenship in 1993. Since that time, commitments to strengthening it have been repeated, most recently in Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 O.J. (C 53) 1 (EU), agreed upon in 2004.

43 SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

44 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 (entered into force May 1, 1999).

45 Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999), *available at* www.europarl.europa.eu/summits/tam_en.thm.

46 This is even clearer in the articulation of the Hague Programme, endorsed by the European Council in November 2004, which picks up where the five-year mandate of Tampere ends.

47 Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC); Council Directive 2005/85, 2005 O.J. (L 326) 13 (EC). The provisions calling for provision of legal aid in refugee appeal matters is to be transposed into national laws by December 2008.

48 Council Recommendation of 22 December 1995 on Harmonizing Means of Combating Illegal Immigration and Illegal Employment and Improving the Relevant Means of Control, 1996 O.J. (C 5) 1 (EU).

rules and there has not been any sustained discussion regarding coordinating these rules. Where such rules do in fact converge, this harmonization is viewed as coincidental rather than being a key plank in building European citizenship or even the Area of Freedom Security and Justice. The result of this is that as European citizenship becomes an increasingly valuable prize, the states that control access to this privileged status have increased power. Citizenship is cast as the state's revenge. The functioning of the migration law-citizenship law dichotomy is important here because the very terms of the harmonization texts put control over desirable migration explicitly in the hands of member states, and thus member states are the gatekeepers not only to their own citizenship but to citizenship of the entire Union. Each move to make the supranational phenomenon of European citizenship more meaningful thereby inscribes increased sovereign power to the states.

One result of privileging European citizenship is to make the distinction between citizens and permanent residents more important than it was in the 1980s or early 1990s. This is, in turn, a way of reasserting the importance of national citizenship. It counters the argument made by Sassen and others that the most meaningful distinction is now between those with legal status in any state and those without it, rather than citizenship itself. This argument is typically supported by examining the spread of human rights norms and how courts in liberal states have applied these to legal migrants. However, despite permanent residents acquiring the same rights as citizens across a range of areas, and human rights protections being extended with increasing regularity to temporary residents, the increasing importance of European citizenship means there is now more difference between national citizens and permanent residents than there was previously. Citizens have free passage across Europe's borders and can vote (and run) in local and European elections,⁴⁹ creating new distinctions between citizens and permanent residents. While

49 European Parliament and Council Directive 2004/38, On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77 (EC); Council Decision of 25 June and 23 September 2002 Amending the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom 2002 O.J. (L 283) 01 (EC); Council Directive 96/30, Amending Directive 94/80 Laying Down Detailed Arrangements for the Exercise of the Right to Vote and to Stand as a Candidate in Municipal Elections by Citizens of the Union Residing in a Member State of Which They Are Not Nationals, 1996 O.J. (L 122) 14 (EC); Council Directive 93/109, Laying Down Detailed Arrangements for the Exercise of the Right to Vote and Stand as a Candidate in Elections to the European Parliament

permanent residents have generally not been qualified voters, the significance of governance at a supranational level means that some non-nationals are still subject to governance by a body that represents them in some way and has some measure of accountability to them. This makes the right to vote more significant than it was formerly. Looking at the European citizenship law-migration law dichotomy, migration law remains the key mechanism for policing membership, even while in this new configuration, citizenship law recovers importance. This evidence is not enough to invert Sassen's assertion, but it does temper the argument and signal that formal legal citizenship is a key site to monitor in future evaluations of rights entitlements. The contours of European citizenship parallel both the examples I have considered above. On the one hand, European citizenship enriches and deterritorializes the national citizenships it derives from. On the other, it is part of a movement aimed at cracking down on illegal migration.

Changes to citizenship laws including curtailing birthright citizenship, extending membership beyond territory, and European supranational citizenship, all reinforce the citizenship law-migration law dichotomy. Each of these changes is aimed at making citizenship a more valuable prize, and each change is cast in the lofty language of inclusion. As such, each strengthens the role of migration law in marking exclusions more pointedly. None of these changes aims at reducing the role of migration law in controlling access to citizenship for new members of the polity. In each case, we can also trace migration shifts as a motivator of the citizenship law change. While most people only ever have one citizenship, contemporary changes in citizenship laws are being driven by migration. For Ireland, India and Italy, the new provisions extend the reach of membership to emigrants, as the nation state seeks to define itself in defiance of geography. The other Irish reform, as well as the Australian, American and Canadian proposals all aim to ensure that migration law retains its policing role. The way European citizenship is managed ensures that European states have control over both legal migration and citizenship, and that each part of the dichotomy is now more meaningful. The sharp edge of these shifts is made clearer still in linking them directly to illegal migration.

for Citizens of the Union Residing in a Member State of Which They are Not Nationals, 1993 O.J. (L 329) 34 (EC).

III. IN LIEU OF CONCLUDING: CITIZENSHIP AND ILLEGAL MIGRATION

Even as citizenship is multiplying and transforming, dualizing and deterritorializing, for those without citizenship there is less than ever. The crackdown on all forms of illegal migration is translated through the citizenship law-migration law dichotomy into increased exclusion for those who are already most disadvantaged. The global crackdown means that access to new citizenships is more and more closed for those with less, and more and more open for those with more. As increasing numbers of migrants are defined out of "legal" migration and into "illegal" migration, they lose any eligibility to citizenship. And meanwhile, dual citizenship becomes more freely available and formal legal citizenship begins, tentatively, to shed its geographies even while shoring up the embattled sovereignty of nations beleaguered by the onslaught of globalization. Citizenship law thus becomes a site to observe a sharp illustration of globalization's paradoxical nature: both inclusions and exclusions are multiplied here. It is also a site for national reconstruction, a place to counter the myth of the powerless state.

At the edge of this analysis, we find the spectacle of amnesty for illegal migrants, a story which I sketch only briefly here, and in a concluding voice. Amnesties exist because the fiction of formal legal citizenship does not hold fast. Even as prosperous states move to close their borders more firmly, they also move to forgive this trespass. Amnesty functions as a purification ritual in a number of respects. By "amnesty," I mean any broad legal shift through which a group of people without immigration status or legal rights to remain is granted that right.⁵⁰ Amnesties may result in temporary or permanent residency status. This distinction is not particularly important, as either status puts migrants on the citizenship track by removing the stain of illegality.⁵¹ The significant features for my brief analysis are that amnesties are granted to a group of people who clearly have no legal basis for

50 While individuals may also be exempted from immigration law provisions, this is a routine matter on an ad hoc basis and does not shift the law. I have had a long interest in individual exemptions and have written about them in CATHERINE DAUVERGNE, *HUMANITARIANISM, IDENTITY AND NATION: MIGRATION LAWS OF AUSTRALIA AND CANADA* (2005).

51 When states grant temporary residency only, they undoubtedly intend this distinction to be meaningful. Nonetheless, overall trends suggest that temporary status is often convertible to permanent status and thus to citizenship. Distinctions between temporary and permanent membership are increasingly fictive.

their presence within national territory. Amnesties are always "gifts" of the state, there is no legal compulsion for them. They are structured on the basis of enumerated criteria and are often temporally limited (structured as statutes of limitations). Amnesties achieve the important state objective of reducing the size of the extra-legal population. This has the effect of instant policy success for governments concerned about an inability to limit this population through border control measures. Importantly, however, amnesties have never been solely about this objective. Bolstered by globalization's economic rationale, current amnesty proposals in the United States, Spain and Canada are all linked to economic productivity, whereas significant earlier policies had been based on territorial presence alone, or on failed asylum bids.⁵² The idea of amnesty is evidence of the impossibility of maintaining a strict separation between formal and substantive citizenship discourses. Amnesties are legal exceptions, structured to bridge the gap between "illegality" and membership, putting people on the citizenship track (directly or indirectly). They convey a sense of desert, as those granted amnesty are read as already contributing to the nation, for which in contemporary times we can read as "the economy." But amnesties draw a significant measure of political currency from the strength of substantive citizenship. There is a public discourse of support for individuals who are law abiding and hard working and have come to this (for which substitute: any) country to make better lives for themselves and their children. This migration trope is really a citizenship story. When migrants give us, as a nation, what we most want from citizens, they confound legal attempts to keep the stories separate. In other words, the beneficiaries of an amnesty are already acting as citizens. Amnesty converts substantive citizenship to formal legal citizenship. This opens another plane of struggle, as once formal citizenship is established, many beneficiaries of migration amnesties may well find that they are not fully included citizens. Nonetheless, considering the operation of this device reveals another vista on the citizenship law-migration law dichotomy. Here, it is that migration law ceases to function as rule of law, as amnesty is an exceptional act of grace. Migration law is again doing the dirty work for citizenship law, displaying law's weakness and un-legal construction, working as a purification ritual at this site, rather than disturbing the orderly function of citizenship law.

52 I discuss these proposals in detail in my forthcoming manuscript CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: MIGRATION LAWS FOR GLOBAL TIMES* ch. 7 (forthcoming 2008) ("Citizenship and the Advance of Exclusion"). See Adriana Kemp, *Managing Migration, Reprioritizing National Citizenship: Undocumented Labor Migrants' Children and Policy Reforms in Israel*, 8 *THEORETICAL INQUIRIES* L. 663 (2007) for a carefully nuanced case study example.

