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A NEW INTERNATIONAL LAW OF CITIZENSHIP

Peter J. Spiro*

Will international law colonize the last bastion of sovereign discretion? As a matter of traditional doctrine, international law has had little to say about the citizenship practices of states and the terms on which states determine the boundaries of their memberships. Through much of the Westphalian era, states have been essentially unconstrained with respect to who gets citizenship and on what terms. Historically, citizenship status has been considered a matter of national self-definition, jealously insulated more as a matter of reflex than justification. Nationality has been equated with identity, in most cases coinciding with ethnic, religious, or other sociocultural community markers, which, in turn, have more or less mapped onto territorial spaces.

That may now be changing on all levels. These continuities of space, identity, and nationality are eroding.¹ The instability—which is explained, in part, by globalization and increased mobility—is generating intense scholarly attention to citizenship as an institution.² The conditions of globalization are necessary, but not sufficient, to decouple citizenship status from other metrics of identity. Reframing citizenship status as an individual right is crucial to the shift. Insofar as citizenship is so framed, its delimitation can no longer turn on traditional membership criteria, many of which collide with other norms of both liberal democracy and international law.

The result may be a new international law of citizenship. Although international law has regulated nationality practice as a matter of conflict of laws, it has largely demurred from dictating

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¹ See, e.g., SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* (2006); Charles S. Maier, “*Being There*”: *Place, Territory, and Identity*, in *IDENTITIES, AFFILIATIONS, AND ALLEGIANCES* 67 (Selya Benhabib, Ian Shapiro, & Danilo Petranovich eds., 2007).

² See, e.g., RAINER BAUBÖCK, *TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* (1995); LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2008); STEPHEN CASTLES & ALASTAIR DAVIDSON, *CITIZENSHIP AND MIGRATION: GLOBALIZATION AND THE POLITICS OF BELONGING* (2000); CHRISTIAN JOPPKE, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* (2005); RUTH RUBIO-MARÍN, *IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES* (2000); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009). The place of American citizenship against the transformed global backdrop has also garnered renewed interest among legal scholars and social scientists. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); NOAH PICKUS, *TRUE FAITH AND ALLEGIANCE: IMMIGRATION AND AMERICAN CIVIC NATIONALISM* (2007); PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); Rogers Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century*, 122 HARV. L. REV. 907 (2009).

to states the terms of their membership rules.³ That is now changing. Bars on gender discrimination in citizenship practice, as well as constraints on the termination of citizenship, are hardening. Recent developments point to the emergence of norms that require the extension of territorial birthright citizenship in some cases and that limit discretion concerning naturalization thresholds. International law may also come to protect an individual's right to maintain multiple nationality.⁴ These and other elements of a new regime relating to citizenship practice are emerging through multiple channels of decentralized international lawmaking. Some are found in international human rights instruments. In recent years the treaty committees associated with these regimes have moved aggressively in applying treaty terms to citizenship practice. Regional institutions, especially those of Europe and the Americas, have been receptive to a rights conception of citizenship practice. State practice also points toward the new frame,⁵ the result of both horizontal and vertical pressures, including as applied by nonstate actors.

These trends reflect a reconceptualization of citizenship status, shifting from an identity to a rights frame. (The reconceptualization has reflected the shift away from the use of the term "nationality" to denote the formal tie between the individual and the state, and toward the now more appropriate use of "citizenship.")⁶ It is still not possible, however, to speak generally of

³ See, e.g., RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 17 (2d ed. 1994) ("[n]ationality may only be handled as a problem of the choice of law, when a tribunal has to decide what nationality law to apply").

⁴ On top of the general interest in citizenship theory, dual citizenship has attracted particular attention. See, e.g., ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* (2007); *DUAL CITIZENSHIP IN EUROPE: FROM NATIONHOOD TO SOCIETAL INTEGRATION* 171, 174 (Thomas Faist ed., 2007); *DUAL CITIZENSHIP IN GLOBAL PERSPECTIVE: FROM UNITARY TO MULTIPLE CITIZENSHIP* (Thomas Faist & Peter Kivisto eds., 2007); *DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP* (Randall Hansen & Patrick Weil eds., 2002); *RIGHTS AND DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS* (Kay Hailbronner & David A. Martin eds., 2003). The classic earlier treatment of the subject is Nissim Bar-Yaacov's 1961 study, *Dual Nationality* 266 (1961).

⁵ In addition to theory-oriented work, major recent collective initiatives have undertaken empirical studies of state citizenship practice. The European Union has funded a continuing project to document citizenship practices in Europe. See *ACQUISITION AND LOSS OF NATIONALITY: POLICIES AND TRENDS IN 15 EUROPEAN COUNTRIES* (Rainer Bauböck, Eva Ersböll, Kees Groenendijk, & Harald Waldrauch eds., 2005); *CITIZENSHIP POLICIES IN THE NEW EUROPE* (Rainer Bauböck, Bernhard Perchinig, & Wiebke Sievers eds., 2007). The Carnegie Endowment for International Peace sponsored a three-volume initiative on the subject: *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2002); *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001); *FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD* (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000); see also IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* (2006) (comparative study of naturalization); MARC MORJÉ HOWARD, *THE POLITICS OF CITIZENSHIP IN EUROPE* (2009) (undertaking quantitative empirical survey). Although much of this work has been focused on European and North American practice, important work has been undertaken on other regions. See, e.g., ERIN AERAN CHUNG, *IMMIGRATION AND CITIZENSHIP IN JAPAN* (2010); *CITIZENSHIP AND THE STATE IN THE MIDDLE EAST* (Nils A. Butenschon, Uri Davis, & Manuel Hassassian eds., 2000); BRONWEN MANBY, *CITIZENSHIP LAWS IN AFRICA: A COMPARATIVE STUDY* (2009); BRONWEN MANBY, *STRUGGLES FOR CITIZENSHIP IN AFRICA* 5 (2009).

⁶ In the modern era, "nationality" was used to designate the status by which an individual is tied to a state for international purposes, whereas "citizenship" denoted the status for purposes of municipal law. See, e.g., 3 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 273 (1906); Maximilian Koessler, *Subject, Citizen, National, and Permanent Allegiance*, 56 *YALE L.J.* 58, 62–63 (1946–47). The distinction was necessary in a world in which status was variable under domestic law, especially as between republican and nonrepublican systems, the latter denominating individuals as subjects (or slaves) rather than as citizens. Today, the distinction is vanishingly small. Many commentators use the terms interchangeably. See, e.g., RUBIO-MARÍN, *supra* note 2, at 19 n.7; Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 *NYU L. REV.* 11, 14 n.6 (2006); Karen Knop, *Citizenship, Public and Private*, 71 *LAW & CONTEMP. PROB.* 309, 309 n.1 (2008); see also

a “right to citizenship” (at least not one enforceable on particular states), and it remains difficult even to speak of a right to citizenship in particular cases. The trend in practice is not a concerted or broadly conscious one and would not satisfy traditional doctrinal standards for establishing customary law. Nevertheless, the shift is reflected in recent work of prominent political theorists, who are increasingly articulating a right to citizenship.⁷ This theoretical work supplies coherence to developments on the ground and may undergird the eventual hardening of an international law of citizenship. It is thus not too early to consider the contours of citizenship in a rights frame.

The emergence of an international law of citizenship has broad implications for the nature of the state. To the extent that an international right to citizenship status helps decouple citizenship from organic forms of community, the new law of citizenship could undermine the solidarities on which state capacities may depend. In other words, the unintended long-term result of situating citizenship practice in the realm of human rights may be to diminish the value of citizenship. As more individuals come to enjoy an entitlement to that status, citizenship may come to be worth less.

This is not to argue against efforts to advance an international law of citizenship. In the short and medium term, a right to citizenship will indirectly advance the protection of a range of other rights on national turf. The right to citizenship may serve a transitional purpose, cementing the protection of other rights through the still-vigorous institutional vehicle of the state. In the longer run, however, the right to citizenship may compound other forces that are eroding state power. This possibility points, in turn, to international law and institutions as the primary location for the protection of rights. Contrary to important recent scholarship,⁸ I do not believe that the development of stronger international human rights regimes will reinforce state power, in part because states will be less representative of organic community. The emergence of international citizenship law figures centrally in this critique.

Part I of this article describes what I call the early and middle eras of international law’s approach to citizenship practice. In the early period international law had little to say about

RAINER BAUBÖCK, TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION 24 (1994) (finding “nationality” to be “an unfortunate terminology” in face of plurinational states); BOLL, *supra* note 4, at 60 (although maintaining utility of distinction, conceding that the terms “have largely converged”). This article will use “nationality” in its historically appropriate context and “citizenship” for purposes of designating contemporary political membership for both domestic and international purposes.

⁷ See, e.g., BAUBÖCK, *supra* note 2; SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS (2004); BONNIE HONIG, DEMOCRACY AND THE FOREIGNER (2001); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1996); DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY (2000); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); Joseph Carens, *Immigration, Democracy, Citizenship*, in OF STATES, RIGHTS, AND SOCIAL CLOSURE: GOVERNING MIGRATION AND CITIZENSHIP 17 (Saime Ozcurumez & Oliver Schmidtke eds., 2008); see also Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994) (surveying literature). Michael Walzer’s *Spheres of Justice* set the baseline for liberal approaches to citizenship and naturalization. MICHAEL WALZER, SPHERES OF JUSTICE, ch. 2 (1984).

⁸ See DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1997) (arguing that states will be empowered in administering international human rights regimes); SASSEN, *supra* note 1, at 309 (“in most of the world, human rights are enforced through national law or not at all”); KIM LANE SCHEPPELE, THE INTERNATIONAL STATE OF EMERGENCY: CHALLENGES TO CONSTITUTIONALISM AFTER SEPTEMBER 11 (forthcoming 2011) (arguing that national executives use the cover of international law to undermine domestic constitutions at home); Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115 (2008) (arguing that delegation to international institutions may enhance state capacity).

nationality determinations. More precisely, international law did constrain state practice, but only insofar as state practice implicated the interests of other states—that is, as a matter of conflict of laws. The middle period, spanning the human rights revolution of the mid- and late-twentieth century, saw the advent of limited incursions on state discretion in the context of statelessness, gender equality, and denationalization. None of these constraints, however, significantly affected state capacity to define membership. Even today, many international law commentators characterize citizenship practice as a matter of sovereign power.

Part II sets out the contours of an international law of citizenship that does constrain national self-definition. This part highlights elements of citizenship practice that are moving into the orbit of international law. In contrast to developments in the early and middle eras, these new constraints affect the admissions component of citizenship practice and dictate to states—in a broadening range of situations—who is entitled to citizenship, either at birth or through naturalization. Moreover, to the extent that international law recognizes an individual right to maintain multiple nationality in certain contexts, international law may further undermine the capacity of states to delimit themselves relative to other states.

Part III situates these developments in a theoretical framework and confronts their significance for the future of the state as well as for the mediation of the individual and the global. Liberal political theory has long vouched for, or has at least assumed, the possibility of community closure and exclusion, which has typically translated into an acceptance of immigration controls and an insistence on minimal barriers to naturalization. As immigration, both legal and illegal, has swelled, the arguments for citizenship have moved to a rights frame. I accept this framing but question its putative instrumental purpose—namely, to buttress the liberal state. I argue, on the contrary, that a right to citizenship is made possible only by weakening the state as a location for identity. To the extent that this nexus supplies a liberal basis for maintaining state discretion in setting citizenship criteria, the position is overcome by other liberal values. In any event, attempts on the ground to resist expanding the right to citizenship are likely to fail.

“Nationality has no positive, immutable meaning,” the Harvard Research in International Law project (Harvard Research) concluded in 1929. “On the contrary its meaning and import have changed with the changing character of states. . . . It may acquire a new meaning in the future as the result of further changes in the character of human society and developments in international organization.”⁹ This observation has held true through the modern age, which has been characterized by the primacy of states, but it will hold no less true as that age enters its late phases.¹⁰

I. A SHORT HISTORY OF NATIONALITY PRACTICE AND SOVEREIGN DISCRETION

Through the mid-twentieth century, nationality practices were considered to be almost entirely outside the scope of international law, except when states stood consensually bound by treaty. This view was reflected in both commentary and practice. Derogations from the rule

⁹ Research in International Law of the Harvard Law School, *The Law of Nationality*, 23 AJIL 1, 21 (Special Supp. 1929) [hereinafter Harvard Research].

¹⁰ See Kim Rubenstein, *Globalization and Citizenship and Nationality*, in JURISPRUDENCE FOR AN INTERCONNECTED GLOBE 159, 159 (Catherine Dauvergne ed., 2003) (“citizenship, in its traditional meaning of participation in and membership of the nation state, will be fundamentally altered by globalization and will not continue to travel in the same manner that it has”).

emerged only when state practice impinged on the interests of other states by drawing their membership circles too broadly—especially when they laid claim to individuals over whom other states might establish better claims. International law confronted these issues as conflicts questions that did not, in theory, challenge a state's established prerogative to define membership. This characterization fits the most famous ruling on nationality practice from an international tribunal, the *Nottebohm* decision from the International Court of Justice.¹¹ International law had something to say about nationality, but only as a matter of order management. The early law of nationality was bounded by the interests of states vis-a-vis each other, not the interests of individuals. Only with the dawn of the human rights revolution in the mid-twentieth century did international law come tentatively to pose an alternate conception of nationality, one that took rights into account—but even then, only in ways that minimally affected the identity function of national rules.

Early-Era Failures

Nineteenth- and early-twentieth-century international law commentators disclaimed any international legal constraint on nationality determinations. In his late nineteenth-century treatise, W. E. Hall found that “[i]t follows from the independence of a state that it may grant or refuse the privileges of political membership Primarily therefore it is a question of municipal law to decide whether a given individual is to be considered a subject or citizen of a particular state.”¹² Four decades later, in 1926, Szymon Rundstein observed that “[t]here can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States. It is, indeed, the sphere in which the principles of sovereignty find their most definite application.”¹³

The sole exception to the full discretion afforded states regarding nationality involved the extension of that status to individuals to whom a state could not reasonably lay claim. As the Harvard Research observed:

If State A should attempt . . . to naturalize persons who have never had any connection with State A, who have never been within its territory, who have never acted in its territory, who have no relation whatever to any persons who have been its nationals, and who are nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law.¹⁴

¹¹ *Nottebohm* (Liech. v. Guat.), 1955 ICJ REP. 4 (Apr. 6).

¹² WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 200 (2d ed. 1884).

¹³ See League of Nations Committee of Experts for the Progressive Codification of International Law, *Nationality*, 20 AJIL 21, 23 (Special Supp. 1926) [hereinafter League of Nations Experts Committee] (“There is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to” the exclusive jurisdiction of individual states.); see also, e.g., PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 102 (1956) (“The power of a state to confer its nationality is derived from its sovereignty. It is an attribute of territorial supremacy.”); R. S. FRASER, *Nationality and Expatriation*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-THIRD CONFERENCE 54, 57 (1924) (“With the rise and growth of nations in Europe the doctrine of absolute sovereignty developed *pari passu* and carried with it a corresponding development of the doctrine of nationality.”).

¹⁴ Harvard Research, *supra* note 9, at 26 (further suggesting that if a state “should attempt to naturalize all persons living outside its territory but within 500 miles of its frontier, it would clearly have passed those limits; or similarly if [it] should attempt to naturalize all persons in the world holding a particular political or religious faith or belonging to a particular race”); Ian Brownlie, *The Relations of Nationality in Public International Law*, 1963 BRIT. Y.B. INT’L L. 284, 295 (“If the United Kingdom were to declare that all French nationals living in Brittany were henceforth

Naturalization in such a case, according to Hall, would have been “inconsistent with a due recognition of the independence of the state to which he belongs.”¹⁵ A universally respected corollary prohibited states from imposing nationality on children born in their territory to envoys from other states.¹⁶ The principle was contested in cases where states attributed nationality on foreigners by operation of law—on the basis, for instance, of owning property, residing in the state, or holding certain professional appointments (such as a faculty position at a national university).¹⁷ The weight of opinion in these cases held against the validity of extending nationality to such individuals when they had not formally undertaken to naturalize.¹⁸

States could not, in other words, draw the lines of human community in an arbitrary, over-inclusive fashion, in much the same way that they could not redraw territorial maps to include lands to which they had no rightful claim. But the constraint was a minor one, an exception that effectively proved the rule. Although states coveted individuals as much as they coveted territory (for manpower was an important determinant of state power),¹⁹ they had little incentive to claim those clearly beyond their reach. In the overwhelming majority of cases, nationality was extended on either a *jus soli* or *jus sanguinis* basis—that is, in cases in which a person had either been born in the territory of a state or born of a parent who was a national. There was no effort to limit state prerogatives to determine nationality on those criteria. As Hall put it, “where a difference of legal theory can exist international law has made no choice, and it is left open to states to act as they like.”²⁰

Not that nationality practices were otherwise off the international radar screen. On the contrary, nationality practice was an important source of serious interstate difficulties. Nationality produced little contention in times of relatively sedentary populations; indeed, the concept of nationality emerged only in the nineteenth century (thus explaining its absence from earlier legal treatises).²¹ So long as people largely lived and died where they were born, states had little

to be United Kingdom nationals, . . . then *prima facie* certain general principles of international law would have been violated.”).

¹⁵ HALL, *supra* note 12, at 195.

¹⁶ Brownlie, *supra* note 14, at 304–05; *see also* Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art. 12, Apr. 12, 1930, 179 LNTS 89, at <http://www.unhcr.org/refworld/docid/3ae6b3b00.html> [hereinafter Hague Convention on Nationality] (“Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.”).

¹⁷ International Law Commission, Report on Nationality, Including Statelessness, 1952 Y.B. INT’L L. COMM’N 3, 8, UN Doc. A/CN.4/50/1952 (1952) (prepared by Special Rapporteur Manley O. Hudson) [hereinafter *Hudson Report on Nationality*].

¹⁸ *See* 3 MOORE, *supra* note 6, at 302–03 (describing 1840 U.S. protest of Peruvian law extending citizenship on the basis of property ownership); *id.* at 308 (in response to 1890 Brazilian law, U.S. secretary of state asserted that “[t]o hold that the mere residence of an individual in a foreign country was conclusive evidence of his desire and intention to become one of its citizens would . . . involve an assumption of the most violent character”); *see also* EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 43 (1919) (a state “cannot confer citizenship upon [an individual] against his will, or without his manifesting an intention to change nationality”). *But see* Brownlie, *supra* note 14, at 306–07 (questioning rule against “involuntary” naturalization).

¹⁹ *See, e.g.*, JOHN C. TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE 72 (2000).

²⁰ HALL, *supra* note 12, at 233; *see also* Kay Hailbronner, *Nationality in Public International Law and European Law*, in 1 ACQUISITION AND LOSS OF NATIONALITY, *supra* note 5, at 35, 54 (“[s]carcely any dispute exists that the two criteria are sanctioned by customary international law”).

²¹ *See, e.g.*, PATRICK WEIL, HOW TO BE FRENCH: NATIONALITY IN THE MAKING SINCE 1789, at 258–259 (2008) (explaining origins of term); DONNER, *supra* note 3, at 21 (noting that Grotius did not address the concept of nationality as such).

reason to find fault in the nationality determinations of other states. The stability was reinforced by a natural-law superstructure that tied individuals to the perpetual allegiance of the sovereigns into whose protection they were born.²² “[O]nce a subject, always a subject.”²³ Migration put substantial stresses on that order, however, as individuals sought to transfer membership from the state of origin to the state of new residence. Nationality status became the plane on which states of origin and of naturalization contested their claims. During the nineteenth century many European states refused to recognize the validity of naturalization before other sovereigns, leading to serious diplomatic disputes and, in at least one case, armed conflict.²⁴

An understanding that international law only marginally constrained state nationality practice thus did not translate into an equilibrium. In the early years of the twentieth century, the drawbacks of state discretion in this area were broadly recognized. After decades of nationality-based disputes between states, international law elites considered the subject to be a priority for top-down legal reform. In the late nineteenth century and early twentieth, nationality was the subject of discussion in various international law associations.²⁵ As early as 1925, one commentator could observe that the “the desirability of international agreement, with a view to securing uniformity of legislation and practice, has long occupied the attention of international jurists.”²⁶ The French Institute of International Law had considered problems of nationality from 1880 forward,²⁷ issuing a resolution at its 1896 Venice session.²⁸ In 1924, the International Law Association proposed a model statute with the aim of reducing both dual nationality and statelessness.²⁹

The focus reached a new level of intensity as the League of Nations considered possible candidates for codification efforts in the mid-1920s.³⁰ Nationality was one of only three issues (the others relating to territorial waters and state responsibility) selected in 1927 for systematic consideration at the 1930 Hague Conference on the Codification of International Law (Codification Conference).³¹ The exercise was understood to be one of “progressive” codification, to make law rather than merely to restate it.³² The eminent international law authority James

²² See, e.g., *Calvin's Case*, (1608) 77 Eng. Rep. 377 (K.B.).

²³ Koessler, *supra* note 6, at 67.

²⁴ See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1422–23 (1997) (describing how conflicts over U.S. naturalization contributed to War of 1812).

²⁵ See Harvard Research, *supra* note 9, at 39; see also *id.* at 118–26 (reproducing bar association resolutions).

²⁶ J. W. Garner, *Uniformity of Law in Respect to Nationality*, 19 AJIL 547, 550 (1925) (noting “regrettable situation” resulting from conflicting nationality laws).

²⁷ *Id.* at 550.

²⁸ See Institut de droit international, *Résolutions relatives aux conflits de lois en matière de nationalité* (1896), at http://www.idi-iil.org/idiF/resolutionsF/1896_ven_02_fr.pdf.

²⁹ See Report of the Nationality and Naturalisation Committee, in REPORT OF THE THIRTY-THIRD CONFERENCE, *supra* note 13, at 25; see also *id.* at 46 (statement of Arthur Kuhn: “It seems to me that we are confronted with a very acute situation internationally.”).

³⁰ For background, see Historical Survey of Development of International Law and Its Codification by International Conferences, UN Doc. A/AC.10/5 (1947), reprinted in 41 AJIL 32, 66 (Special Supp. 1947).

³¹ See *id.*, 41 AJIL at 105–07 (reproducing League of Nations Resolution approving codification conference).

³² See *id.* at 107 (stating that the “spirit of the codification . . . should not confine itself to the mere registration of existing rules, but should aim at adapting them as far as possible to contemporary conditions of international life”).

Brown Scott³³ observed that the “confusion” in this area was “so great, so universal, and so embarrassing, not to say exasperating,” that it could be remedied only through an international treaty.³⁴ As part of the lead-up to the Hague meeting, the three subjects were taken up by a committee of highly prominent academics, practitioners, and policymakers³⁵ under the sponsorship of Harvard Law School and with funding from John D. Rockefeller Jr. Billed as “a Research in International Law,” the project set out to devise draft conventions for the Hague topics.³⁶

As noted by the Harvard Research, an “international code on nationality limited to a statement of existing law would be meager and of little practical value,”³⁷ reinforcing the widely held view that international law had theretofore had little to say to the subject. In April 1929, the Harvard project issued an ambitious draft convention, together with explanatory materials, that would have resulted in a significant, though hardly complete, harmonization of nationality practice. The draft sought to bar nationality through descent beyond the second generation of persons born and resident abroad.³⁸ While accepting the fact of dual nationality,³⁹ the Harvard proposal would have imposed an election requirement under which dual nationals would have retained the nationality only of their countries of habitual residence as of the age of 23.⁴⁰ To address a central source of bilateral disputes, the draft convention would have provided for the termination of original nationality upon naturalization in another country, thus eliminating the competing claims to individuals that resulted from the combination of migration and the

³³ Scott served for many years as the editor in chief of the *American Journal of International Law* and then as president of the American Society of International Law. See FREDERIC L. KIRGIS, *THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY 1906–2006*, at 16, 37 (2006).

³⁴ JAMES BROWN SCOTT, *OBSERVATIONS ON NATIONALITY* 6 (1931). Scott's short book on nationality is evidence of how loaded the subject of nationality was in the years surrounding the Hague Conference. It is a highly charged, openly emotional consideration of the subject, expressly denominated as “a plea” and reading as such. See also Garner, *supra* note 26, at 552 (concluding that “there ought to be no dissent as to the desirability of agreement” among states regarding nationality).

³⁵ Among those included on the project's advisory committee were Benjamin Cardozo, former secretary of state Elihu Root, and American Law Institute President George Wickersham. Among the academics were Edwin Borchard (Yale Law School), Charles Cheney Hyde (Columbia Law School), Philip Jessup (Columbia Law School), Francis Sayre (Harvard Law School), Quincy Wright (University of Chicago), and Manley O. Hudson (Harvard Law School), who directed the project (and would more than twenty years later himself undertake an important study of nationality practices). See Harvard Research, *supra* note 9, at 4–8. The effort was thus equivalent to a modern-day blue-ribbon commission. Hudson, Hyde, Jessup, and Wickersham were included on the subcommittee on nationality, of which Richard Flournoy Jr. served as reporter. Flournoy, an assistant to the solicitor of the Department of State, was a prolific writer on nationality issues. See, e.g., *A COLLECTION OF NATIONALITY LAWS OF VARIOUS COUNTRIES* (Richard W. Flournoy Jr. & Manley O. Hudson eds., 1929); Richard W. Flournoy Jr., *Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law*, 24 AJIL 467 (1930) [hereinafter Flournoy, *Nationality Convention*]; Richard W. Flournoy Jr., *Suggestions Concerning an International Code on the Law of Nationality*, 35 YALE L.J. 939 (1926); Richard W. Flournoy Jr., *Dual Nationality and Election*, 30 YALE L.J. 693 (1921).

³⁶ See John P. Grant & J. Craig Barker, *The Harvard Research: Genesis to Exodus and Beyond*, in *THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL* 1 (John P. Grant & J. Craig Barker eds., 2007).

³⁷ Harvard Research, *supra* note 9, at 21; see also Flournoy, *Nationality Convention*, *supra* note 35, at 468.

³⁸ Harvard Research, *supra* note 9, Art. 4.

³⁹ *Id.*, Art. 10 cmt. (“it is necessary to realize the fact that dual nationality does exist and will continue to exist unless all states will agree to adopt a single rule for nationality at birth”).

⁴⁰ *Id.*, Art. 12 cmt. at 41 (stating that the “object of the article is to afford a means by which dual nationality may be ended”).

persistence of the regime of perpetual allegiance.⁴¹ The committee acknowledged that this proposal was not supported in existing practice.⁴² Ambitious as it was, and straining to hold that “under international law the power of a state to confer its nationality is not unlimited,” the Harvard group worked from the premise that “each state may determine by its law who are its nationals.”⁴³

The League of Nations, meanwhile, had been working on its own track. In 1926, a committee of experts drew up a more modest draft convention on nationality.⁴⁴ Although the committee’s rapporteur acknowledged that it “would certainly be an advantage” if states were to permit expatriation, require election, and forebear from extending citizenship by descent beyond the first externally resident generation, he concluded that prospects for such an agreement were “premature.”⁴⁵ The draft agreement addressed problems of nationality relating to women and children. As for dual nationality, in contrast to the Harvard product, the League experts did not aim to reduce incidence of the status; instead, they looked to manage associated conflicts through constraints on the exercise of diplomatic protection.⁴⁶

At the Hague Codification Conference, the resulting Convention on Certain Questions Relating to the Conflict of Nationality Laws (Hague Convention) fell well short of eliminating nationality practices as a source of international conflict. While recognizing the virtue of an international agreement to settle nationality issues, the convention’s preamble acknowledged the prematurity of reaching a uniform solution to problems of dual nationality and statelessness. The instrument worked from a clear premise of state discretion: “It is for each State to determine under its own law who are its nationals Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.”⁴⁷ Falling well short of the Harvard proposal, the treaty contained no provision for mandatory election for dual nationals at an age in majority, and it did not limit extending nationality by descent.⁴⁸ The treaty did not require states to permit expatriation except when an individual possessed two nationalities “without any voluntary act on his part,” and then only upon the satisfaction of conditions imposed by the state whose nationality the individual

⁴¹ *Id.*, Art. 13.

⁴² *See id.* at 46 (“[a]t present it cannot be said that there is any general agreement upon the ‘right of expatriation’”).

⁴³ *Id.*, Art. 2.

⁴⁴ *See* League of Nations Experts Committee, *supra* note 13, at 59–60. The experts committee was chaired by former Swedish prime minister Hjalmar Hammarskjöld (father of the future UN secretary-general Dag Hammarskjöld) and was dominated by European jurists. *See* Letter from the Director of the Legal Section of the League of Nations to the President of the International Society of International Law (Apr. 1, 1925), *reprinted in* 20 AJIL 1 n.1 (Special Supp. 1926) (listing members of the League of Nations committee). The United States was represented by George Wickersham, who also participated in the Harvard project. The committee’s report on nationality was drafted by Szymon Rundstein, a distinguished Polish lawyer. *See id.*; *see also* Anna Maria Szczepan Wojnarska, *Szymon Rundstein*, MUSEUM OF THE HISTORY OF POLISH JEWS, at <http://www.sztef.org.pl/en/person/45,szymon-rundstein/>.

⁴⁵ *See* League of Nations Experts Committee, *supra* note 13, at 32; Flournoy, *Nationality Convention*, *supra* note 35, at 471 (“agreement upon a single rule will be difficult to accomplish”).

⁴⁶ *See* League of Nations Experts Committee, *supra* note 13, at 59–60. Article 1 of the draft would have required parties to refrain from exercising protection against a state of which an individual was considered a national from “the moment of [his] birth.” Article 6 provided that a state of naturalization could not exercise protection against “the State whose subject he originally was,” if still considered a national of that state. *See id.*

⁴⁷ Hague Convention on Nationality, *supra* note 16, Arts. 1, 2.

⁴⁸ *See* Ruth Donner, *Nationality*, in *HARVARD RESEARCH: CONTEMPORARY ANALYSIS*, *supra* note 36, at 62–65 (systematically comparing Harvard recommendations with results of Hague Convention).

desired to renounce;⁴⁹ in other words, expatriation would be available to those who acquired dual nationality at birth but not to those coming to that status through naturalization. The treaty did address the more extreme consequences of sex discrimination, so that a woman would not end up stateless by marrying a foreigner,⁵⁰ and it also remedied situations giving rise to the statelessness of children.⁵¹ But the core of sovereign discretion was undisturbed. Scott lamented that “the caption” itself was “illuminating”; the convention considered the problem as one of conflicts and not of international law.⁵² Even in the face of this light touch, the convention was not widely adopted, garnering only twelve ratifications.⁵³

Nonetheless, the treaty lay the groundwork for some constraint on nationality practice. “While the direct and immediate effect of these Agreements was not great,” observed one subsequent commentator on nationality law, “their indirect significance is considerable.”⁵⁴ The exercise had focused attention on state practice and aired possible solutions to difficulties created by the diversity of approaches to nationality. Although the Hague conference highlighted the formidable “political obstacles” to securing state agreement to legal limitation on their nationality practices and reaffirmed the premise of sovereign state discretion,⁵⁵ it opened the door to the emergence of international norms on nationality.

Middle-Era Feints

From the Hague Conference, one can trace the development of four discrete international regimes relating to nationality: diplomatic protection, expatriation, statelessness, and discrimination against women. Practices relating to diplomatic protection and expatriation helped to reduce bilateral frictions arising from nationality practice, but they governed nationality only to the extent that its attribution infringed on the rights of other states (in other words, as a matter of conflict of laws). Although a priority issue in the wake of World War II and for the first time framing citizenship as a right, the regime against statelessness constrained the practice of particular states in only minor respects. The establishment of international norms against sex discrimination also presented a rights frame for citizenship practice, one more practically

⁴⁹ Hague Convention on Nationality, *supra* note 16, Art. 6; *see also* Flournoy, *Nationality Convention*, *supra* note 35, at 472 (“Since the article places no limitation upon these ‘conditions,’ presumably the state in question may make them as drastic, difficult and unreasonable as it may choose.”).

⁵⁰ Hague Convention on Nationality, *supra* note 16, Arts. 8–9.

⁵¹ *Id.*, Arts. 13–16. As Rundstein noted, these mechanisms addressed cases “so rare that [a solution] would not be likely to encounter political obstacles.” League of Nations Experts Committee, *supra* note 13, at 30.

⁵² SCOTT, *supra* note 34, at 65–66; *see also* Donner, *supra* note 48, at 67 (noting that “[c]riticism of the Convention and characterization of it as a failure was widespread”).

⁵³ *See* Hague Convention on Nationality, *supra* note 16; *see also* Hudson Report on Nationality, *supra* note 17, at 7 (results of the Hague Conference “were relatively modest”).

⁵⁴ WEIS, *supra* note 13, at 31; *see also* Flournoy, *Nationality Convention*, *supra* note 35, at 484 (discussions surrounding the Convention “served to bring out in sharp relief the position of the various states with regard to important problems”).

⁵⁵ Rundstein repeatedly used the phrase in discounting the possibilities for broad agreement. *See* League of Nations Experts Committee, *supra* note 13, at 25 (highlighting political aspects of nationality questions; “[n]o solution can be hoped for where there is the slightest suspicion that the problem is of a political nature”), 30, 34; *see also* WEIS, *supra* note 13, at 90 (noting as obstacle to development of international law in the area “the frequently noticeable tendency of States to uphold, for political reasons, their own law even if it is at variance with that of the majority of States”); Flournoy, *Nationality Convention*, *supra* note 35, at 467 (“There is one point which has been stressed by nearly every one who has discussed the inclusion of nationality in the codification of international law, . . . that is, that this subject is especially difficult because of the fact that it is to a great extent ‘political.’”).

enforceable against states. However, this form of constraint said more about changing conceptions of women, family, and the state than it did about state capacity for self-definition. None of the four areas of international regulation meaningfully constrained states in their use of nationality law to set the terms of national identity.

Diplomatic protection. A practice with deep roots in international law, diplomatic protection enables states to intercede with other governments on behalf of their nationals.⁵⁶ Before the advent of human rights, diplomatic protection stood as the only constraint on the exercise of state power against individuals on sovereign territory. It was an important feature of the interstate dynamic, a sensitive limitation on sovereignty.⁵⁷ The doctrine worked from the theory that an injury to a state's national is an injury to the state itself.⁵⁸ It was not a matter of solicitude for individuals, but of the vindication of state interests.⁵⁹ So conceived, the tie between the individual and the state, formalized in the institution of nationality, represented a crucial element in the practice of diplomatic protection.⁶⁰

Diplomatic protection was tested at two points of intersection with nationality practice. First, there was the question of whether a state's determination of nationality was definitive for purposes of exercising protection, or whether the formal tie of nationality needed to be supported by other indicia of actual membership in the national community. This was the issue in the *Nottebohm* case, which involved a claim by Liechtenstein against Guatemala for the wrongful seizure without compensation of the property of a Liechtenstein national.⁶¹ Nottebohm had been a German national from his birth in 1881 until his naturalization in Liechtenstein in 1939.⁶² A longtime resident of Guatemala, Nottebohm had few ties to Liechtenstein before acquiring its nationality; his qualifications for naturalization appear to have consisted of the payment of a substantial sum to a subnational division of the principality,⁶³ a promise to pay taxes going forward, and a visit of less than two weeks to undertake the naturalization formalities.⁶⁴ Guatemala challenged the admissibility of Liechtenstein's claim on

⁵⁶ See generally, e.g., BORCHARD, *supra* note 18.

⁵⁷ See, e.g., J. L. BRIERLY, *THE LAW OF NATIONS* 204 (4th ed. 1949) ("a large part of the time of the legal department of every foreign office is taken up with" controversies relating to diplomatic protection).

⁵⁸ Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT'L L. 37, 38 (2007).

⁵⁹ Thus, states have (at least under traditional doctrine on the question) no duty to exercise the right of diplomatic protection on behalf of a national who has been harmed. See BORCHARD, *supra* note 18, at 18; Vermeer-Künzli, *supra* note 58, at 63 (noting that state's exercise of its right to diplomatic protection is discretionary).

⁶⁰ "[I]t is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection." *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1939 PCIJ (ser. A/B) No. 76, at 16 (Feb. 28); see also Brownlie, *supra* note 14, at 290 (source of the "high significance which the concept of nationality has in the law"); Guy I. F. Leigh, *Nationality and Diplomatic Protection*, 20 INT'L & COMP. L.Q. 453, 453 (1971) ("Without this connecting factor of nationality there can normally be no diplomatic protection.").

⁶¹ *Nottebohm (Liech. v. Guat.)*, 1955 ICJ REP. 4 (Apr. 6).

⁶² *Id.* at 13; see also Josef L. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AJIL 536 (1960); Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L.J. 1 (2009).

⁶³ The facts as presented thus appeared to qualify as an early example of the contemporary phenomenon of "citizenship for sale." See, e.g., *Citizenship for Sale: Pledge of Allegiance*, ECONOMIST, Feb. 1, 2007, at 45 (discussing states which offer citizenship or related benefits in exchange for money). Nottebohm subsequently developed what would clearly have qualified as a "real and effective" link to Liechtenstein, in the form of nine years' residence prior to the issuance of the judgment. *Nottebohm*, 1955 ICJ REP. at 44–45 (Read, J., dissenting) (taking Court to task for ignoring evidence of genuine connection).

⁶⁴ 1955 ICJ REP. at 15–16.

Nottebohm's behalf before the International Court of Justice on the ground that his naturalization was defective.

The Court found Nottebohm's naturalization not to have international effect, at least not for purposes of exercising protection against Guatemala. The Court necessarily peered behind the veil of the naturalization decision to consider whether Nottebohm's acquisition of Liechtenstein citizenship was "real and effective." "[N]ationality is a legal bond having as its basis a social fact of attachment," the Court observed, "a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."⁶⁵ Nottebohm failed the test, "his actual connections with Liechtenstein [being] extremely tenuous." His naturalization had "the sole aim of . . . coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, [or] its way of life."⁶⁶ The Court thus evinced an identity-based conception of nationality as something more than a formal legal classification, as coinciding with some fact of organic community.

But the Court was careful to limit its inquiry to the international effect of Nottebohm's nationality and to preserve the state's discretion over nationality determinations for purposes of municipal law. The Court refrained from confronting the validity *vel non* of Nottebohm's naturalization. "It is for Liechtenstein," the Court observed, "as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality." Noting that "for most people" nationality has "its only effects within the legal system of the State conferring it," the Court affirmed "the wider concept that nationality is within the domestic jurisdiction of the State."⁶⁷ The decision had nothing to say about Nottebohm's status in Liechtenstein, only that his nationality could not be used as a weapon against another state.⁶⁸

In this respect, one can frame the decision as sovereignty reinforcing. Liechtenstein's claim, as with all claims of diplomatic protection, sought to constrain Guatemala's discretion. If not for *Nottebohm*, diplomatic protection would have been only as limited as a state's willingness to extend nationality. That prospect was more of a threat to sovereignty than was the refusal to recognize the international effect of nationality determinations on the margins. Nor did the decision significantly impair state capacities to draw the contours of their membership, other than to police their doing so in an unreasonable, attenuated manner (and then for international purposes only).⁶⁹ In this respect, *Nottebohm* was merely an extension of the accepted rule that states could not reach out to claim those to whom they had no real connection.⁷⁰

⁶⁵ *Id.* at 23–24.

⁶⁶ *Id.* at 25–26.

⁶⁷ *Id.* at 20.

⁶⁸ See Kunz, *supra* note 62, at 550 ("The judgment does not adjudicate upon the validity of the acquisition of Liechtenstein nationality by Nottebohm."); J. Mervyn Jones, *The Nottebohm Case*, 5 INT'L & COMP. L.Q. 230, 234 (1956) ("In the result it seems clear that [Nottebohm] did in fact become a Liechtenstein national, and the Court in its judgment did not question this fact."). There is some tension internal to the opinion on this point. The Court at one point, for example, describes Liechtenstein as Nottebohm's "nominal country." *Nottebohm*, 1955 ICJ REP. at 22.

⁶⁹ To the extent that the decision was perceived by contemporary observers not to reflect positive law, it was highly controversial. See Kunz, *supra* note 62, at 537–39 (describing critical attacks and controversy surrounding the decision); see also Sloane, *supra* note 62, at 17–24 (dismissing genuine-link theory as dictum not reflecting positive law at time of decision).

⁷⁰ See *supra* text accompanying notes 14–18; see also H. F. VAN PANHUYS, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW* 156 (1959) (characterizing decision as continuous with existing approaches to nationality); Brownlie, *supra* note 14, at 349 (same). The decision repeatedly framed the question as whether Liechtenstein had

Notwithstanding the conventional understanding to the contrary, *Nottebohm* was not a case about dual nationality, for under no version of the facts did he hold that status.⁷¹ But the decision had much to say about international law's posture toward the status.⁷² Dual nationality (or "double nationality," as it was more commonly known before the middle of the twentieth century)⁷³ posed a great threat to international stability in a world in which states could do as they pleased to their own nationals at the same time that the doctrine of diplomatic protection constrained what they could do to the nationals of other sovereigns.⁷⁴ The status was universally decried.⁷⁵ So serious were its destabilizing tendencies that the issue assumed a thick moral overlay. Dual nationality wasn't just a problem; it was an abomination, an offense to nature, a sin on the order of bigamy.⁷⁶

The status could be eliminated only by harmonizing nationality practices; so long as states variably maintained regimes of *jus soli* and *jus sanguinis* in the face of migration, dual nationality would inevitably result. The Hague codification process was in its most ambitious conception aimed at achieving such harmonization. Short of that unattainable goal, the effort aimed to vitiate the frictions that arose when one state of nationality sought to exercise diplomatic protection against the other state of nationality—which had given rise to frequent bilateral disputes. As a sort of fallback position short of eliminating the status altogether, some asserted a rule precluding protection in those circumstances. The Hague Convention adopted that position.⁷⁷

This approach gained little traction. States—and particularly the United States in the context of mass migration from Europe—were unwilling to surrender sovereign rights of protection insofar as they perceived an individual to be theirs exclusively. With perpetual allegiance and expansive regimes of citizenship, some states persisted in claiming individuals who otherwise maintained no continuing effective or affective ties to their or their parents' homelands. States of naturalization or birth, meanwhile, often considered it important to preserve diplomatic protection in relation to the individual's other state of nationality since that state was most likely to harm that individual's interests. A typical scenario in the late nineteenth century involved an American born to immigrant parents or a long-ago naturalized citizen returning

sufficient "title" to exercise protection, as if its national were a kind of property. See *Nottebohm*, 1955 ICJ REP. at 17–20. This vocabulary reinforces the comparison between sovereign claims to territory and to people.

⁷¹ *Nottebohm* held nationality only in Liechtenstein. His German nationality was terminated upon naturalization there; under section 25 of the 1913 German law on citizenship, a German not resident in Germany lost his citizenship on acquiring a foreign citizenship. See 8 AJIL SUPP. 217 (1914) (reproducing 1913 German law). Nor did he hold Guatemalan nationality. See 1955 ICJ REP. at 41–42 (Read, J., dissenting) (asserting inapplicability of practice relating to dual nationality to *Nottebohm*'s case); see also Sloane, *supra* note 62, at 15.

⁷² The Court itself clearly saw the case as salient to dual nationality, drawing on the approach of arbitral tribunals to cases involving dual nationals. See *Nottebohm*, 1955 ICJ REP. at 21–23.

⁷³ See Spiro, *supra* note 24, at 1431 n.84.

⁷⁴ This problem was a far more pressing one than that resulting from the unusual fact pattern in *Nottebohm*.

⁷⁵ See Spiro, *supra* note 24; see also League of Nations Experts Committee, *supra* note 13, at 32 ("double nationality . . . represents an absolutely abnormal phase in international life").

⁷⁶ As one prominent U.S. official observed in 1849, states should "as soon tolerate a man with two wives as a man with two countries; as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it." George Bancroft, Letter to Lord Palmerston (Jan. 26, 1849), reprinted in S. EXEC. DOC. 36–38, at 164 (1850); see also Spiro, *supra* note 24, at 1430–31 (citing other examples). The analogy lingers even today. See, e.g., GEORGIE ANNE GEYER, AMERICANS NO MORE 68 (1996) (asserting that dual citizenship is "akin to bigamy").

⁷⁷ Article 4 provided that a "State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." Hague Convention on Nationality, *supra* note 16, Art. 4.

for short-term visits to the homeland, only to face military conscription.⁷⁸ The United States aggressively intervened on behalf of its nationals in such cases, resulting in serious bilateral disputes.⁷⁹

A *Nottebohm*-like approach was one of the two legal mechanisms that came to be accepted in practice as addressing these recurrent bilateral conflicts over dual nationals—which were a continuing source of instability. For purposes of diplomatic protection, a dual national's dominant and effective nationality alone counted.⁸⁰ This approach was taken by the United States even in the nineteenth century; the country would exercise protection on behalf of its citizens returning to Europe for short-term visits, but not those who returned permanently to their homelands.⁸¹ This approach was also adopted by bilateral arbitral commissions in considering claims by nationals of both states to the settlement process.⁸² As with *Nottebohm*, state nationality practices were not constrained as a matter of municipal law, and it remained a state's prerogative to decide who would or would not be granted nationality. For international purposes, however, some nationality determinations would be given precedence over others.⁸³

Expatriation. Expatriation presented the other solution to conflicting state claims. The possibility of terminating nationality supplied an obvious antidote to dual nationality. Once again it was the United States that championed the position.⁸⁴ European states resisted; expatriation was inherently inconsistent with the concept of perpetual allegiance, a theory deeply rooted in feudal origins of the modern European state.⁸⁵ Although no such right came to be generally recognized until well into the twentieth century, most important European states, over time, came to accept the availability of expatriation.⁸⁶ The possibility was also sometimes adopted

⁷⁸ WEIS, *supra* note 13, at 135; *see also* Spiro, *supra* note 24, at 1424–30.

⁷⁹ *See* Spiro, *supra* note 24, at 1424–30.

⁸⁰ *See Nottebohm*, 1955 ICJ REP. at 22 (noting approach of arbitral bodies to claims of dual nationals to give “their preference to the real and effective nationality . . . that based on stronger factual ties between the person concerned and one of the States whose nationality is involved”); *see also* DONNER, *supra* note 3, at 389 (dual nationality can be “controlled by an application of the concept of dominant and effective nationality”).

⁸¹ *See* Kunz, *supra* note 62, at 547 (noting that *Nottebohm* reflected “functional approach” favored by United States); *see also* Right of Expatriation, 9 Op. Att’y Gen. 356, 360–61 (1859) (recognizing that naturalized citizen should be protected even in his country of birth by rejecting argument that other nation could conscript naturalized U.S. citizen); Spiro, *supra* note 24, at 1427–28 (noting position of many U.S. officials that United States should defend interests of naturalized citizens against claims of other states).

⁸² *See, e.g.,* Iran v. United States, Case A/18, 5 Iran-U.S. Cl. Trib. Rep. 428 (1984), *reprinted in* 23 ILM 489 (1984); Monroe Leigh, *Nationality and Diplomatic Protection*, 20 INT’L & COMP. L.Q. 453 (1971).

⁸³ *See* Sloane, *supra* note 62, at 10–11. As the Iran-U.S. Claims Tribunal observed in Case A/18, 23 ILM at 497, international law “does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States.”

⁸⁴ Expatriation Act of 1868, ch. 249, sec. 3, 15 Stat. 223, 224 (codified at 22 U.S.C. §1732 (2010)); *see also* Abner J. Mikva & Gerald L. Neuman, *The Hostage Crisis and the “Hostage Act,”* 49 U. CHI. L. REV. 292 (1982) (discussing the Expatriation Act in the context of the Iran hostage crisis); Spiro, *supra* note 24, at 1426–28 (describing nineteenth-century U.S. position on right of expatriation).

⁸⁵ *See* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case* (1608), 9 YALE J. L. & HUMAN. 73 (1997).

⁸⁶ One survey found that, as of 1935, forty-three of seventy-seven states—including Canada, Germany, Italy, Japan, Mexico, and the United Kingdom—provided for automatic loss of nationality upon naturalization in another state. Other states consented to expatriation in certain cases, often conditioned on the satisfaction of military service obligations. Duward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AJIL 248, 272 (1935). The Hague Convention provided only that expatriation could not be refused when an individual had fulfilled conditions for expatriation as laid down by law. Hague Convention on Nationality, *supra* note 16, Art. 6(2). The provision did not mandate the substantive conditions for expatriation. The 1933 Montevideo Convention, by contrast, did provide for automatic loss of nationality upon naturalization

on a bilateral basis, in which case loss of nationality in one party would be recognized upon naturalization in the other—a mechanism first introduced by the so-called Bancroft treaties between the United States and several German principalities that were concluded in 1868.⁸⁷ Whether by law or treaty, this approach prefigured the dominant and effective test; expatriation would be effected where an individual shifted his identity to another state. Under the Bancroft agreements⁸⁸ and at least some statutory regimes,⁸⁹ individuals returning to reside permanently in their countries of origin would revert to their original nationalities, reflecting the restored primacy of the homeland tie.

Expatriation did not, in fact, constitute a right, at least in the sense of an individual entitlement exercisable against a state. Rather, the “right” was being asserted by one state against another; in effect, one state was claiming to have exclusive sovereign power over an individual who was also claimed by another state.⁹⁰ Through the late nineteenth century, the United States sought an international legal requirement that states provide for the possibility of expatriation. Assuming that possibility, expatriation was conceived not as an individual right but as an individual duty; the naturalizing American was expected to shed the former nationality.⁹¹ That was typically mandated by sending states, whose expatriation regimes provided for the termination of nationality upon naturalization before another sovereign.⁹² As a practical matter, naturalizing citizens had a significant interest in canceling their original nationalities and the often substantial, duplicative burdens that came with them.⁹³ Even so, expatriation was conceived as a matter of state interest—or at least in the interest of immigration-receiving states. Expatriation allowed the state of naturalization to perfect its claim to its new citizen, eliminating the risk of bilateral disputes in the process. Expatriation presented a mechanism for more clearly demarcating the boundaries of human community represented by states.

In contrast to the *Nottebohm* approach, an international requirement on states to provide for expatriation posed the prospect of a constraint on nationality determinations and not merely their international effect. That is, if perfected, the “right” to expatriation would have constrained states in their municipal determinations of national membership. That may further explain why the assertion of such a norm was vigorously contested.⁹⁴ It challenged not only the principle of perpetual allegiance, but also the core international law notion that the terms of nationality were for states alone to determine.

before another state party. Montevideo Convention on the Rights and Duties of States, Art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19.

⁸⁷ See 3 MOORE, *supra* note 6, §§390–400; Spiro, *supra* note 24, at 1428.

⁸⁸ See BORCHARD, *supra* note 18, at 550–52.

⁸⁹ See, e.g., Expatriation Act of 1907, Pub. L. No. 59-193, 34 Stat. 1228 (repealed 1940) (creating presumption that naturalized citizens who reestablished residence in original country renounced citizenship). “In foreign countries a subject who has lost his status through naturalization elsewhere can usually resume his national character as soon as he returns with the intention of residing.” Edward Louis de Hart, *The English Law of Nationality and Naturalization*, 2 J. SOC’Y COMP. LEGIS. 11, 19 (1900).

⁹⁰ See Brownlie, *supra* note 14, at 343 (“it is not the case, in the light of existing practice, that the *individual* has such a right [of expatriation]”).

⁹¹ See Spiro, *supra* note 24, at 1423–24.

⁹² See WEIS, *supra* note 13, at 132–33.

⁹³ See BAR-YAACOV, *supra* note 4, at 266.

⁹⁴ *Hudson Report on Nationality*, *supra* note 17, at 11 (“In the present stage of development of international law it cannot, in view of the divergences of State practice, be said that there is, under international law, a duty of States to withdraw their nationality upon foreign naturalization.”).

But even if the norm had been established (which, arguably, it was, after World War II),⁹⁵ it did not significantly limit nationality practices as a tool of self-definition. In a sense, an expatriation requirement was yet another extension of the accepted rule that states could not reach out to claim those with whom they had no connection⁹⁶—or, in the case of expatriation, no continuing connection. The rule, even as extended to expatriation, purported only to tell states whom they could not deem nationals; it neither mandated inclusion nor threatened to dilute state identity. So conceived, the rule was oriented to state perspectives. To the extent the expatriation requirement limited self-definition, it was only with respect to a marginal class of non-residents, and then only to the extent that those individuals voluntarily secured the nationality of other states. Requiring that expatriation be available was consistent with the conflicts approach to nationality rules. True, the likes of Italy could no longer impose nationality on emigrant descendants “to the seventh generation,” as Mussolini once trumpeted.⁹⁷ But such a claim necessarily stepped on other sovereign toes in a pre-human rights era. Any benefit to the individual was incidental.

That perspective shifted as international norms regarding statelessness and sex discrimination came to be considered in the mid-twentieth century. Here, finally, rights became salient to nationality practices. But once again, efforts to address neither statelessness nor sex discrimination threatened to shackle state capacity for self-definition, in theory or practice, and the impact of such efforts on nationality practices was negligible.

Statelessness and denationalization. International efforts to reduce statelessness were themselves initially rooted in state-oriented concerns, insofar as statelessness created “friction between States.”⁹⁸ Although a less constant irritant to interstate relations than dual nationality, statelessness sometimes posed a threat to state interests—for example, when a state found large numbers of aliens in its midst who had been denationalized by, and were thus not returnable to, another country.⁹⁹ Statelessness also challenged the international legal system by creating a class of individuals for whose conduct no state would stand responsible, thereby presenting, in theory at least, a gap in the enforceability of international law. But the disadvantages of statelessness from the individual’s perspective were apparent. Interwar commentators deplored the consequences of statelessness for individuals. Those without nationality, it was lamented, were at the mercy of their hosts. “As far as the law of nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals.”¹⁰⁰ In an effort to reduce the incidence of statelessness, the Hague Convention provided that states be permitted to deprive a woman of her nationality upon marrying a

⁹⁵ Universal Declaration of Human Rights, G.A. Res. 217(III)A, Art. 15 (Dec. 12, 1948) (“[n]o one shall be . . . denied the right to change his nationality”); see also, e.g., WEIS, *supra* note 13, at 137 (practice has “restricted the right of States to refuse release from their nationality on acquisition of a new nationality”).

⁹⁶ See *supra* text accompanying notes 14–18.

⁹⁷ John H. Wigmore, *Domicile, Double Allegiance, and World Citizenship*, 21 U. ILL. L. REV. 761, 764 (1927).

⁹⁸ WEIS, *supra* note 13, at 162. For contemporary articulations along the same lines, see COMMISSION ON HUMAN SECURITY, HUMAN SECURITY NOW 30–33 (2003), at <http://ochaonline.un.org/Reports/tabid/2186/language/en-US/Default.aspx>, and Jelena Pejic, *The International Legal Aspects of Citizenship*, 3 CROAT. CRITICAL L.R. 303, 313 (1998).

⁹⁹ CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 251 (1934); see also BOLL, *supra* note 4, at 102 (noting “incentive for states to promote the development of international norms that prevent states from rejecting or abandoning their nationals in a way that has negative repercussions on other states”).

¹⁰⁰ 1 L. OPPENHEIM, INTERNATIONAL LAW 522 (4th ed. 1928).

foreigner only when she acquired the nationality of her husband.¹⁰¹ When children did not acquire the new nationality of naturalizing parents, the Convention provided that they would retain their original nationality, and a protocol to the Convention extended nationality to the child born in the territory of a state to a mother possessing the nationality of that state and a father not possessing such nationality.¹⁰² Not merely serving the bidding of states, these provisions accounted for individual interests in nationality.

The rights perspective was made explicit in the wake of World War II, when statelessness became an acute issue. (It was in this context that Hannah Arendt delivered her dictum that all rights are national rights.)¹⁰³ The 1948 Universal Declaration of Human Rights provided that “[e]veryone has a right to nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”¹⁰⁴ With these strokes, the discourse shifted away from a order-centered orientation and recognized, instead, the individual’s interest in nationality to be a matter of international law.¹⁰⁵

The discursive shift did not result in broadly actionable international norms. The Universal Declaration’s right to nationality was not designated as the obligation of any particular state to satisfy,¹⁰⁶ and the declaration itself did not take the form of a binding legal instrument.¹⁰⁷ When many of its protections were adopted in the 1966 International Covenant on Civil and Political Rights, the right to nationality, again without reference to any particular state, was scaled back to apply to children only.¹⁰⁸ Prior to the Covenant, the 1961 Convention on the Reduction of Statelessness (Statelessness Convention) required contracting states to extend nationality to children born on their territory who would otherwise be stateless, as well as to children born to nationals outside the state’s territory who would otherwise be stateless.¹⁰⁹ The absolute numbers here would have been small, except in the face of large, persistent refugee populations. Even so, the Convention attracted only twenty-five states parties, none of whose

¹⁰¹ Hague Convention on Nationality, *supra* note 16, Art. 8.

¹⁰² *Id.*, Art. 13.

¹⁰³ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 267 (2d ed. 1973).

¹⁰⁴ Universal Declaration of Human Rights, *supra* note 95, Art. 15.

¹⁰⁵ See NEHEMIAH ROBINSON, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION* 123 (1958) (characterizing Article 15 as “a total innovation in the history of international law”).

¹⁰⁶ See, e.g., LAURA VAN WAAS, *NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW* 41 (2008) (noting that these instruments “left vital questions such as ‘which nationality’ unanswered”); Ruth Rubio-Marín, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, 81 N.Y.U. L. REV. 117, 135 (2006); see also Johannes M. M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. L.J. 1, 3 (1991) (“As long as no State could be compelled to grant its nationality to the individual, the right to nationality is largely meaningless.”). Although Article 15 of the Universal Declaration had nowhere near the run-up as did the 1930 Hague Convention on Nationality, see *supra* notes 25–46 and accompanying text, at least one prominent international law jurist had called for the pronouncement of a more concrete right to nationality. Much as James Brown Scott had done twenty years before, Hersch Lauterpacht advocated the adoption of *jus soli* as a rule of international law. See H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 315 (2d ed. 1950) (proposing language under which “[e]very person shall be entitled to the nationality of the State where he is born unless and until at majority he declares for the nationality open to him by virtue of descent”).

¹⁰⁷ Hailbronner, *supra* note 20, at 37 (Universal Declaration did not “replace[] the traditional understanding of nationality as a sovereign prerogative of the state”).

¹⁰⁸ International Covenant on Civil and Political Rights, Art. 24, Mar. 23, 1976, 999 UNTS 171 (“Every child has the right to acquire a nationality.”).

¹⁰⁹ Convention on the Reduction of Statelessness, Art. 1, Aug. 30, 1961, 989 UNTS 175.

practice appears to have been significantly affected by these provisions.¹¹⁰ Thus, although statelessness had emerged as a target of international lawmaking efforts, the resulting regime was thin and did not substantially constrain state nationality practice.¹¹¹

The Statelessness Convention also prohibited the deprivation of nationality on the grounds of race, ethnicity, and religious or political orientation, and required that deprivation for other causes be made contingent on having acquired nationality in another state.¹¹² This provision was in line with the Universal Declaration's aspiration that no one be arbitrarily deprived of nationality—itsself conceived as a mechanism for addressing statelessness.¹¹³ The approach was meant, in particular, to address mass denationalizations of the sort undertaken by the Nazi regime against German Jews.¹¹⁴ Nevertheless, although some advocated an international norm against the arbitrary deprivation of nationality, its status remained contested.¹¹⁵ One leading commentator argued that, insofar as such denationalization did not affect the interests of other states, it could not be framed as inconsistent with international law.¹¹⁶ Even to the extent that some forms of denationalization were deemed inconsistent with international law,¹¹⁷ the norm did not, except in aberrant cases, significantly diminish state discretion to use nationality practice as a tool for shaping national identity. The norm would have constrained state capacity only to terminate nationality and would be applicable only when nationality had been extended in the first place. Because international law had nothing to say about the extension of nationality, the norm would come into play only in cases of attempted redefinition of national identity (for example, redefining German to exclude Jewish). Such uses of nationality practice are likely to be pathological in the sense that the redefinition does not comport with organic community on the ground, at least insofar as states retain complete discretion over the

¹¹⁰ See 1 Multilateral Treaties Deposited with the Secretary-General, ch. V.4, UN Doc. ST/LEG/SER.E/25 (2009), at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf>.

¹¹¹ Nor did the post–World War II regime relating to refugees materially constrain citizenship practices. The 1951 Convention Relating to the Status of Refugees provides only that parties “shall as far as possible facilitate the assimilation and naturalization of refugees”—in particular, by minimizing naturalization fees. Convention Relating to the Status of Refugees, Art. 34, G.A. Res. 429(V) (July 28, 1951).

¹¹² Convention on the Reduction of Statelessness, *supra* note 109, Art. 9.

¹¹³ JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 80–83 (1999); Pejic, *supra* note 98, at 312.

¹¹⁴ MORSINK, *supra* note 113, at 80.

¹¹⁵ See *Hudson Report on Nationality*, *supra* note 17, at 10 (“The extent to which mass denationalization is prohibited by international law is not clear.”)

¹¹⁶ See WEIS, *supra* note 13, at 128 (rule against denationalization, although “certainly. . . a sound and desirable rule for the future, find[s] no justification in the present state of international law. . . as distinct from the conferment of nationality, withdrawal of nationality does not involve a direct infraction of the rights of other states”); see also VAN PANHUYS, *supra* note 70, at 163 (“it remains to be seen whether, from the point of view of positive international law, this type of denationalisation must be regarded as illegal and void”).

¹¹⁷ As arguably they came to be. See, e.g., Hailbronner, *supra* note 20, at 70 (“There is substantial authority for a general recognition of the principle of prohibition of arbitrary deprivation of nationality as a part of customary international law.”); European Convention on Nationality, Art. 4, Nov. 6, 1997, 37 ILM 44 (setting forth principle that “no one shall be arbitrarily deprived of his or her nationality”); *id.*, Art. 7 (limiting grounds for loss of nationality); Committee on the Elimination of Racial Discrimination [hereinafter CERD], General Recommendation No. 30, Discrimination Against Non-citizens, para. 14, UN Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005) (recognizing “that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties’ obligation to ensure non-discriminatory enjoyment of the right to nationality”); Open Society Justice Initiative, *More Primitive Than Torture: Statelessness and Arbitrary Denial of Citizenship in Africa* (2007), at <http://www.citizenshiprightsinafrica.org/Publications/2007/MorePrimitiveThanTorture.02.07.pdf> (condemning discriminatory mass denationalizations in Africa as arbitrary denials of citizenship inconsistent with human rights).

initial decision to extend membership. In other words, this norm implicated redefinition only, and in situations where redefinition was unlikely to coincide with actual identity.

At the same time that ongoing concern for human rights motivated efforts to establish a norm against mass denationalizations, states remained largely free to terminate the nationality of individuals against their will.¹¹⁸ State discretion was contested at the margins (most notably, with respect to the punitive or political use of denationalization, where statelessness might result),¹¹⁹ but international law put no obstacles in the way of terminating nationality when individuals participated in other polities, acquired other nationalities, enlisted in foreign militaries, or undertook other service for foreign governments. States were thus permitted to bar the acquisition of multiple citizenship—an important mechanism for maintaining the distinctiveness of national community as reinforced through nationality practice.¹²⁰

Sex equality. Sex equality presented the single area in which midcentury international law edged toward constraining nationality practices. Majority state practice had provided for a woman's nationality to follow that of her husband, both upon marriage to a foreigner (forfeiting her original nationality for that of her husband) or upon naturalization of the husband (in which case many states also provided for automatic naturalization of the wife).¹²¹ In cases where loss, but not acquisition, of nationality upon marriage was automatic, statelessness resulted; correcting this phenomenon was a central aim of those supporting the codification efforts of the 1920s.¹²² The 1930 Hague Convention attempted to address the problem by making automatic loss contingent on automatic acquisition.¹²³ Beyond the statelessness concern, however, the Hague Convention confronted the nationality of women as a matter of sex equality, by providing that a husband's naturalization should not result in the woman's change

¹¹⁸ See Hailbronner, *supra* note 20, at 71.

¹¹⁹ See *Trop v. Dulles*, 356 U.S. 86, 92–93 (1958) (plurality opinion) (stating that “deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be”); *id.* at 102–03 (citing international practice); *Hudson Report on Nationality*, *supra* note 17, at 18 (noting statelessness resulting from denationalization on ground of disloyalty); see also James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT’L AFF. 321, 326–27 (2006); MANBY, CITIZENSHIP LAWS IN AFRICA, *supra* note 5, at 25–27 (describing cases in Africa in which denationalization has been used as a political weapon).

¹²⁰ Peter J. Spiro, *Dual Citizenship: A Postnational View*, in DUAL CITIZENSHIP IN GLOBAL PERSPECTIVE, *supra* note 4, at 189, 197–98; see also Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT’L L. 979, 982–83 (2002) (examining the effect of multiple citizenship on national ties).

¹²¹ See, e.g., BORCHARD, *supra* note 18, at 605, 685; CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 15–17 (1998); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 37 (1998); Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440, 1455–58 (1998); see also MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA, *supra* note 5, at 5 (noting common “gender bias” among African citizenship laws at time of independence, reflecting European practice).

¹²² See SCOTT, *supra* note 34 (lamenting sex inequality of nationality practices); Garner, *supra* note 26, at 551 (noting desirability of international agreement, “especially as to the effect of marriage upon the nationality of women”).

¹²³ See Hague Convention on Nationality, *supra* note 16, Art. 8; see also Manley O. Hudson, *The Hague Convention of 1930 and the Nationality of Women*, 27 AJIL 117 (1933). The women’s suffrage movement vigorously lobbied the Hague gathering for the provision. See LEILA J. RUPP, WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN’S MOVEMENT 146–48 (1997); William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, 45 AJIL 476, 490 (1951) (“Not unheard were the various women’s organizations crusading for the ‘equality’ of the sexes.”).

of nationality without her consent.¹²⁴ The 1933 Montevideo Convention on Nationality adopted full sex equality with respect to nationality practice, and many states (in the Americas and elsewhere) implemented the principle.¹²⁵ The 1957 Convention on the Nationality of Married Women eliminated automatic changes in a woman's nationality by cause of marriage or a change in a husband's nationality.¹²⁶ Relative to other nationality conventions, the 1957 accord was widely adopted, with seventy-four parties and twenty-nine additional signatory states.¹²⁷ It has been superseded by the Convention on the Elimination of All Forms of Discrimination Against Women, Article 9 of which mandates that men and women have equal rights to acquire, change, and retain their nationalities, with specific preclusion of automatic changes in nationality triggered by the nationality of the husband.¹²⁸ The Convention also curtails the formerly wide practice of discriminating against women for purposes of *jus sanguinis*, under which citizenship would descend on a patrilineal basis only.¹²⁹

Even so, sex-discriminatory nationality practices have remained sticky into the twenty-first century, with many states reserving from Article 9¹³⁰ or otherwise disadvantaging women.¹³¹ To the extent that norms against such discrimination began to suggest an effective constraint on state practice, the regime was clearly situated in a women's rights frame. The driver was an

¹²⁴ Hague Convention on Nationality, *supra* note 16, Art. 10; *see also* INTERNATIONAL LAW ASSOCIATION COMMITTEE ON FEMINISM AND INTERNATIONAL LAW, FINAL REPORT ON WOMEN'S EQUALITY AND NATIONALITY IN INTERNATIONAL LAW 29 (2000) [hereinafter ILA REPORT].

¹²⁵ Organization of American States, Convention on the Nationality of Women, Art. 1, Dec. 26, 1933, OASTS No. 4, 49 Stat. 2957, 2960 (1936) ("There shall be no distinction based on sex as regards nationality, in their legislation or in their practice.").

¹²⁶ Convention on the Nationality of Married Women, Art. 1, Feb. 20, 1957, 309 UNTS 65.

¹²⁷ *See* 2 Multilateral Treaties Deposited with the Secretary-General, ch. XVI, UN Doc. ST/LEG/SER.E/25, at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVI/XVI-2.en.pdf>.

¹²⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Art. 9, Dec. 18, 1979, 1249 UNTS 13, 19 ILM 33 (1980). Article 9 provides:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

¹²⁹ *See id.*; *see also* SHACHAR, *supra* note 2, at 153–54.

¹³⁰ *See* ILA REPORT, *supra* note 124, at 8, 39–40. At least twenty states have attached reservations to Article 9, including France, Singapore, the United Kingdom, and a number of Middle Eastern states. *See* 1 Multilateral Treaties Deposited with the Secretary-General, ch. IV.8, UN Doc. ST/LEG/SER.E/25, at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>; *see also* Karen Knop & Christine Chinkin, *Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 573 (2001) ("The progress represented by article 9 of the Women's Convention is hampered by the large number of reservations, made by a range of states, to all or part of that article."). In recent years, some states, including Egypt, South Korea, and Thailand, have withdrawn reservations to Article 9. *See id.*

¹³¹ Reports of the human rights treaty bodies are replete with examples. *See, e.g.*, CERD, Concluding Observations: Egypt, para. 288, UN Doc. A/56/18 (2001) (expressing concern over gender discriminatory *jus sanguinis* regime); Human Rights Committee, Concluding Observations: Monaco, para. 84(10), UN Doc. A/56/40 (2001) (same); Committee on the Elimination of Discrimination Against Women, Concluding Observations: Venezuela, para. 239, UN Doc. A/52/38/Rev. 1 (1997) (expressing concern that Venezuelan men have the right to confer nationality on foreign wives, a right not afforded to Venezuelan women and their foreign husbands); *see also*, MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA, *supra* note 5, at 23 (noting that "a majority of African countries still do not allow women to pass citizenship to both their husbands and children on an equal basis with men"). In a much more limited number of cases, citizenship laws discriminate against men. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding nationality provision discriminating against child born out of wedlock to citizen fathers relative to citizen mothers).

equality norm, not a conception of a human right to acquire nationality in specific circumstances. It dictated no particular substantive rule for acquiring or losing nationality—only that women could not be disadvantaged in the formulation of those rules.¹³² So long as men and women are subject to the same rules, both can be excluded. In this sense, international law rules on women and nationality did not directly affect national self-definition as executed in nationality practices.¹³³

Modern-Era Limitations

Although international law thus became more salient to nationality practice during the mid-twentieth century than previously, it remained a marginal constraint on state practice. The lack of a robust international regime governing nationality practice is reflected in near-universal commentary framing nationality as a matter of sovereign discretion. Through most of the late twentieth century (with the end of the Cold War presenting a useful, not completely artificial periodization), the conventional wisdom among legal scholars held nationality practice to be largely unconstrained by international law,¹³⁴ a view echoed by social scientists.¹³⁵ No major scholar appears to have suggested that practices concerning naturalization¹³⁶ or birthright

¹³² Cf. Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, in CITIZENSHIP TODAY, *supra* note 5, at 89, 103 (“while a state must provide [special] treatment to foreign wives and foreign husbands equally if it provides it to either, the state is under no obligation to provide special treatment in the first place”). As Patrick Weil documents, nationality reforms in some states were driven by factors other than sex equality. In the United States the Cable Act of 1922, Pub. L. No. 67-346, 42 Stat. 1021, was congruent with the restrictionist agenda insofar as it eliminated automatic citizenship for foreign women marrying U.S. citizen men. In France, demographic policy (“populationism”) coincided with the feminist agenda to end expatriation of French women marrying foreign husbands. See WEIL, *supra* note 21, at 197–204.

¹³³ Of course, they may reflect national self-definition with respect to questions of sex equality. They may also reflect how community lines are dictated at the family level (whether, most notably, spouses can maintain a transnational divide). But they do not implicate first-level community boundaries, as do, for instance, eligibility requirements relating to ethnicity, language, or residence.

¹³⁴ See, e.g., GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 141 (5th ed. 1967) (“in principle, international law leaves each territorial sovereign to decide which of his inhabitants he wishes to grant nationality”); WEIS, *supra* note 13, at 65–66 (“[t]he right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty”); Otto Kimminich, *The Conventions for the Prevention of Double Nationality and Their Meaning for Germany and Europe in an Era of Migration*, 1996 GER. Y.B. INT’L L. 224, 240 (affirming contemporary force of Hague Convention’s provision that “[i]t is for each State to determine under its own law who are its nationals”).

¹³⁵ See, e.g., ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 180 (1998) (characterizing nationality practice as the “last bastion of sovereignty”); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 281–82 (2006) (“International law affirms that each state may determine who will be considered a citizen of that state.”).

¹³⁶ See, e.g., WEIS, *supra* note 13, at 102 (“There is, in truth, no rule of international law restricting the qualifying conditions for naturalisation so long as the naturalisation is based on a voluntary act of the individual.”); Asbjørn Eide, *Citizenship and International Human Rights Law*, in CITIZENSHIP AND THE STATE IN THE MIDDLE EAST, *supra* note 5, at 88, 118 (naturalization an area in which “states have so far considered themselves entirely free to make their own rules”). At the same time that he passionately advocated a harmonized regime of birth nationality, James Brown Scott conceded state discretion concerning naturalization criteria. See SCOTT, *supra* note 34, at 17 (“The process of naturalization being an internal matter might, and probably should, be left to the domestic legislation of each and every State which is a party to the treaty or convention.”); see also League of Nations Experts Committee, *supra* note 13, at 34 (with respect to naturalization, “it is obvious that each State must be free to enact whatever rules it may think fit. . . . Naturalisation is an act of sovereignty, and any limitation of the powers of a State in such a matter is not to be thought of.”). While lamenting barriers to naturalization, Manley Hudson thought it “unlikely that Governments would be prepared to undertake obligations by international agreement regarding naturalization.” *Hudson Report on Nationality*, *supra* note 17, at 22.

citizenship¹³⁷ were constrained in any respect, much less that states were obligated in any context to accept the maintenance of multiple nationality.¹³⁸ To the extent that nationality practice did implicate international law, moreover, it was primarily as a matter of resolving conflicts among state claims.¹³⁹ Even Brownlie, who attacked the “orthodox view on the autonomy of States in the matter of nationality,” cautioned against “too ambitious prescriptions.”¹⁴⁰

The interests of the state system may have dictated some limitation on the projection of nationality by individual states. But that did not significantly detract from state capacity to use nationality law as a tool for delineating the boundaries of national community. The traditional approach to nationality law can be conceived as a matter of human geography, confronted on the same terms as territorial geography.¹⁴¹ Both regimes have been forms of boundary maintenance. International law refused to draw territorial lines in any particular way, relying instead on history and control. It did evince a strong priority on allocating all territory to one state and one state only, in much the same way that international law found an objective in ensuring that all individuals had one nationality and only one nationality, working against the twin difficulties of statelessness and dual nationality. Sovereignty over space and over people were both predicates to the maintenance of international order. Although sovereignty over people obviously implicated individual interests, those interests were secondary.

That international law has not, at least not until recently, trammled on such self-definition is evidenced by the treatment of nationality in the 1966 Convention on the Elimination of All Forms of Racial Discrimination (Racial Discrimination Convention).¹⁴² Even at the time of the Convention’s negotiation, the prohibition of racial discrimination was emerging as an important norm of international human rights (the treaty has since been accepted by more than 170 states).¹⁴³ International law has highly circumscribed the use of racial classifications as a

¹³⁷ See SHACHAR, *supra* note 2, at 136 (noting that “international law has traditionally refrained from intervening in the sovereign prerogative of states to define their citizenship laws, including their decision to rely upon particular birthright principles in the transmission of membership”). It was generally understood through the modern commentary that as a matter of positive law, *jus soli* and *jus sanguinis* were equally acceptable by way of determining citizenship at birth. See, e.g., WEIS, *supra* note 13, at 97–98.

¹³⁸ Quite the contrary, of course: through the middle of the twentieth century, states were encouraged to eliminate the incidence of dual nationality, with no consideration of the possible individual interest in maintaining the status. See generally BAR-YAACOV, *supra* note 4.

¹³⁹ See, e.g., DONNER, *supra* note 3, at 17; INETA ZIEMELE, STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA: PAST, PRESENT AND FUTURE AS DEFINED BY INTERNATIONAL LAW 195 (2005). That nationality in international law has been conceived as a matter of resolving conflicts is distinct from the role it has played—or not played—in choice-of-law issues (often denominated as “conflicts of laws”). Nationality has figured in choice-of-law issues, especially in civil law jurisdictions. In the common law, the concept of domicile has figured more prominently. See Karen Knop, *Citizenship, Public and Private*, 71 LAW & CONTEMP. PROBS. 309, 319–21 (2008) (explaining use of domicile in private international law); see also *infra* note 271 and accompanying text (describing significance of residence and domicile in determining obligations to states).

¹⁴⁰ Brownlie, *supra* note 14, at 300, 364; see also Chan, *supra* note 106, at 6 (commending “cautious approach” of Inter-American Court of Human Rights on the issue, “since probably no area is more sensitive to State sovereignty than the conferment or withdrawal of nationality”).

¹⁴¹ See Brownlie, *supra* note 14, at 290 (“Nationality is a problem, inter alia, of attribution, and regarded in this way resembles the law relating to territorial sovereignty.”); see also VAN PANHUYS, *supra* note 70, at 155.

¹⁴² International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 UNTS 195 [hereinafter Racial Discrimination Convention].

¹⁴³ UN General Assembly, Status of the International Convention on the Elimination of All Forms of Racial Discrimination, Aug. 15, 2006, A/61/260, at <http://www.unhcr.org/refworld/docid/453780f40.html>; 1 Multilateral Treaties Deposited with the Secretary-General, ch. IV.2, UN Doc. ST/LEG/SER.E/25, UN Sales No. E.07.V.3 (2007), at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf>.

general matter.¹⁴⁴ Yet in its first article the Racial Discrimination Convention brackets the use of race as a criterion for citizenship, providing that “[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”¹⁴⁵ The Convention governs citizenship distinctions made within an existing community, precluding, for instance, apartheid-type situations in which native-born residents are denied nationality on the basis of their race.¹⁴⁶ But in its original conception, at least, the Convention was not intended to constrain criteria for admission from outside the existing community.¹⁴⁷ International law had nothing to say about a citizenship regime that had the clear effect of excluding outsiders on the basis of race. As Joanne Mariner observes, “Practices that would . . . merit the sternest reproach in nearly every other area of government policy are considered permissible in the area of citizenship.”¹⁴⁸

II. AN INTERNATIONAL LAW OF CITIZENSHIP?

Even today, most leading commentators on citizenship theory—both legal scholars and social scientists—continue to characterize nationality practice as largely outside the ambit of international law.¹⁴⁹ But that view is sometimes now subject to nontrivial qualification.

¹⁴⁴ The prohibition on race discrimination has since arguably evolved into a *jus cogens* norm—that is, a norm from which no derogation is permitted. See, e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, para. 101 (Sept. 17, 2003) (finding nondiscrimination to qualify as a *jus cogens* norm); Goldston, *supra* note 119, at 328.

¹⁴⁵ Racial Discrimination Convention, *supra* note 142, Art. 1(3). As one commentary on the Convention observes, the clause was intended as

a limitation provision designed to assure states parties that due respect is given to state sovereignty in areas concerning naturalization. . . .

....

Naturalization laws have always been considered a principle prerogative of state sovereignty. The Committee has accorded due respect to this principle in its discussions of state reports. Consequently, the limitation provisions articulated in Article 1(3) have generated little controversy and merited only minor attention.

Drew Mahalic & Joan Gambee Mahalic, *The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, 9 HUM. RTS. Q. 74, 79, 82 (1987).

¹⁴⁶ At the same time that the Racial Discrimination Convention brackets citizenship practices in Article 1(3), it also provides the guarantee of “a right to nationality” without distinction as to race. See Racial Discrimination Convention, *supra* note 142, Art. 5(d)(iii). This provision was interpreted contemporaneously to prohibit discrimination in the deprivation of nationality only. See Egon Schwelb, *The International Convention on the Elimination of All Forms of Discrimination*, 15 INT’L & COMP. L.Q. 996, 1008 (1966).

¹⁴⁷ NATÁN LÉRNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 28–32 (1980) (noting that paragraphs 2 and 3 of Article 1 were added to limit the scope of “national origin” and to make clear that the Convention was not meant to “affect substantive or procedural norms on citizenship or naturalization”).

¹⁴⁸ Joanne Mariner, *Racism, Citizenship, and National Identity*, DEVELOPMENT (Society for International Development), Sept. 2003, at 64, 65 (noting that it is consistent with the Racial Discrimination Convention for countries “to impose highly discriminatory citizenship rules”).

¹⁴⁹ BOLL, *supra* note 4, at 97–98 (“It is a generally accepted principle of international law that it is up to each state to determine who its nationals are, subject to obligations due to other states. . . . [S]tates have basically unfettered freedom in determining whom they consider a national.”); Goldston, *supra* note 119, at 323 (“determining membership in a territorially circumscribed political community remains one of the core attributes of state sovereignty”); Hailbronner, *supra* note 20, at 35 (“public international law has very little to say about the scope and limits of a state’s determination of nationality”); Rubenstein, *supra* note 10, at 164 (“International law affirms that it is

In both practice and scholarship, the evidence suggests a shift away from the traditional, sovereignty-oriented perspective on nationality practice. This development is exemplified by the shifting vocabulary of membership in the state. “Nationality” and “citizenship” used to be clearly distinguishable; only the former was salient in the international context. Today, many commentators consider them interchangeable.¹⁵⁰ “Citizenship” may emerge the more dominant descriptor, with all of its implications of equality and rights.¹⁵¹

The emergence of an international law of citizenship is also suggested by an emerging discourse that frames the “denial of citizenship” as violating a right of “access to citizenship.”¹⁵² This vocabulary, which would have been unimaginable in the traditional international legal conception of nationality and sovereign discretion, points to nondiscrimination norms in the allocation of citizenship status. Racial, ethnic, and gender classifications in the context of birthright citizenship, naturalization, denationalization, and state succession are under stress. This new discourse also supports arguments that habitual territorial residents should enjoy access to citizenship.¹⁵³ With respect to these practices, it is becoming increasingly clear that state discretion is no longer unfettered and that citizenship practice must account for the interests of individuals as well as those of states.¹⁵⁴ Scholars are coming to recognize the new relevance of international law to citizenship practice,¹⁵⁵ albeit in many cases

for each state to determine who are its nationals.”); Sloane, *supra* note 62, at 7 (“international law still does not, with few and vague exceptions, seek to regulate the sovereign competence of states to designate national or juridical persons as their nationals”).

¹⁵⁰ See, e.g., YAFFA ZILBERSHATS, *THE HUMAN RIGHT TO CITIZENSHIP* 5 (2002) (noting that the “instances in which a difference still exists between nationality and citizenship are rare”); see also *supra* text accompanying note 6.

¹⁵¹ See Rubenstein, *supra* note 10, at 161 (highlighting “confident, even triumphalist discourse of citizenship as emancipation”).

¹⁵² See, e.g., CERD, General Recommendation No. 30, *supra* note 117, pt. 4; CHRISTIAN JOPPKE, *CITIZENSHIP AND IMMIGRATION* 36 (2010); CONSTANTIN SOKOLOFF, *ADVISORY BOARD ON HUMAN SECURITY, DENIAL OF CITIZENSHIP: A CHALLENGE TO HUMAN SECURITY* (2005); VAN WAAS, *supra* note 106, at 96 (highlighting “the development of the newest catchphrase relating to nationality matters to emerge in the international arena, namely ‘denial of citizenship’”); Goldston, *supra* note 119, at 321; *More Primitive Than Torture*, *supra* note 117 (2007).

¹⁵³ See, e.g., HUMAN SECURITY NOW, *supra* note 98, at 51.

¹⁵⁴ European Convention on Nationality, *supra* note 117, pmbl.; *Girls Yean v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R., para. 140 (Sept. 8, 2005), at <http://www.unhcr.org/refworld/docid/44e497d94.html> (“The determination of who has a right to be a national continues to fall within a State’s domestic jurisdiction. However, its discretionary authority in this regard is gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States.”); International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, cmt. 5, UN Doc. A/54/10, at 20, 24 (Apr. 3, 1999) (“As a result of th[e] evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided.”).

¹⁵⁵ See, e.g., VAN WAAS, *supra* note 106, at 39 (“there is absolutely no doubt that . . . nationality matters no longer fall within the exclusive jurisdiction of states”); Chan, *supra* note 106, at 10 (“It is perhaps high time to recognize that nationality necessarily involves a human dimension, is inherent in the respect for human dignity, and is no longer within the sole purview of State sovereignty.”); Eide, *supra* note 136, at 122 (noting that “human rights considerations are becoming increasingly prominent in nationality matters”); Diane F. Orentlicher, *Citizenship and National Identity*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 299 (David Wippman ed., 1998) (noting consequence for nationality practice of the rise of “postwar law of human rights, which has progressively, indeed radically, diminished even this last great preserve of state privilege”); Pejic, *supra* note 98, at 333 (“advances in international human rights law have placed fairly clear limits on states’ freedom of action in the area of citizenship”).

with caution,¹⁵⁶ and political theorists are framing citizenship acquisition as a right in some contexts.¹⁵⁷

These developments depart from historical understandings of nationality practice. In contrast to earlier, minimal constraints on state practice, these prospective norms would mandate inclusive citizenship practices. That is, whereas earlier international law constrained states only by telling them whom they *could not* include as nationals (for example, barring them from extending citizenship to those with whom they have no connection), more recently evolving norms tell states whom they *must* include as citizens. The difference is radical. The old law of nationality, such as it existed, in no case dictated the adulteration of national community by directing the inclusion of individuals who would otherwise (as a matter of endogenous processes) be excluded. The old law of citizenship had almost nothing to say about birthright citizenship and naturalization. The new law of citizenship, by contrast, may dictate citizenship eligibility for habitual residents and their children, with implications for the character of national community. Norms establishing a right to retain multiple nationality may similarly affect the contours of community.

Before describing recent developments suggesting the emergence of an international law of citizenship, two qualifications are necessary. First, these developments are only suggestive of the ultimate crystallization of an international regime regarding citizenship practices. For now, the prospective norms are provisional, fragile, and unstable. The subject nonetheless warrants scholarly exploration.¹⁵⁸ As demonstrated below, recent developments suggest the parameters of a new regime. These developments are found in conventions, most notably the 1997 European Convention on Nationality;¹⁵⁹ in the work of international tribunals¹⁶⁰ and the human

¹⁵⁶ See, e.g., Hailbronner, *supra* note 20, at 38, 45 (while deeming nationality practices as remaining largely within state discretion, noting human rights “implications” and “aspects” with respect to some issues); Chan, *supra* note 106, at 10 (“It is probably true that there is no rule of international law imposing a duty on States to confer their nationality.”).

¹⁵⁷ BENHABIB, *supra* note 7, at 134–43 (framing “right to membership”); JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 18 (2010); see also JOPPKE, *supra* note 152, at 27 (citizenship has become “infused with a human rights logic”).

¹⁵⁸ Cf. SOKOLOFF, *supra* note 152, at 36 (“Denial of citizenship worldwide bears further investigation.”); Brownlie, *supra* note 14, at 312 (discerning “general principles” of nationality law notwithstanding “possible points of conflict in legislation on a subject-matter so mobile and complex”); Flournoy, *Nationality Convention*, *supra* note 35, at 467 (detecting emerging salience of international law to nationality practice: “Wherever international relationships arise international law must follow, in one form or another, although its development and crystallization into definable rules may be a slow process.”).

¹⁵⁹ The Convention, *supra* note 117, Art. 27, is open for accession not only by members of the Council of Europe, but also those states who “participated” in the Convention’s “elaboration,” including Bosnia and Herzegovina, Canada, Kyrgyzstan, and the United States. ZIEMELE, *supra* note 139, at 8. As Norman Sabourin observes, the European Convention on Nationality “could well play a significant role beyond European borders. It can encourage other regional or international organizations to take similar initiative in developing declarations or conventions, introduce new principles into international law, or influence the development of nationality laws in countries around the world.” Norman Sabourin, *The Relevance of the European Convention on Nationality for Non-European States*, in COUNCIL OF EUROPE, TRENDS AND DEVELOPMENTS IN NATIONAL AND INTERNATIONAL LAW ON NATIONALITY: PROCEEDINGS OF THE 1ST EUROPEAN CONFERENCE ON NATIONALITY 113, 114 (1999) (describing how European Convention has affected lawmaking in Canada).

¹⁶⁰ See, e.g., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4, para. 32 (Jan. 19, 1984):

It is generally accepted today that nationality is an inherent right of all human beings. . . .

. . . [D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain

rights treaty committees;¹⁶¹ and in state practice and its framing by international actors (multilateral,¹⁶² state, and nonstate).¹⁶³ Assuming that human rights premises continue to pervade international law, these prospective norms are likely, and perhaps inevitably, to be advanced¹⁶⁴ through both formal and discursive mechanisms.¹⁶⁵ The trends are consistent with recent work on citizenship by leading political theorists—work that lends further credibility to the identification of emerging norms in the area. This section attempts to situate these developments in a coherent account.¹⁶⁶

Second, the analysis is intended mostly as a positive account. To the extent that it is normative and itself works from human rights premises, the message is a cautionary one. An international law of citizenship will be rights reinforcing in the short and medium term. Citizenship status will continue to carry protective benefits, even if it no longer marks the dividing line between all rights and none.¹⁶⁷ To the extent that international law requires the extension of

limits on the broad powers enjoyed by states in that area, and that the manners in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction . . .

¹⁶¹ See, e.g., *supra* text accompanying notes 237–46 (describing treaty committee critiques of discriminatory birthright citizenship practices); see also Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee*, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING 16 (Philip Alston & James Crawford eds., 2000) (noting importance of the Human Rights Committee).

¹⁶² See generally ZIEMELE, *supra* note 139, at 63–72 (describing work of United Nations, Council of Europe, and Organization for Security and Co-operation in Europe regarding nationality practices of Latvia and Estonia); Goldston, *supra* note 119, at 342–43 (suggesting that issues of citizenship access be mainstreamed into human rights reporting of UN human rights bodies).

¹⁶³ Most notably among them, the Open Society Institute has focused on equality and justice in the context of naturalization and citizenship as part of an international migration initiative. See Open Society International Migration Initiative, at http://www.soros.org/initiatives/migration/focus_areas/equality-justice; see also MANBY, CITIZENSHIP LAW IN AFRICA, *supra* note 5 (Open Society Institute–sponsored study calling for citizenship law reforms); Goldston, *supra* note 119, at 322 (analysis calling for “clarification and articulation of new legal norms that narrow boundaries of state prerogative” over citizenship access by executive director of Open Society Institute Justice Initiative).

¹⁶⁴ See, e.g., Eide, *supra* note 136, at 122 (“The regulation of citizenship in international law is therefore very much in the making, but the direction is clear.”).

¹⁶⁵ For two recent works by political scientists arguing from case studies that international norms have been effectively deployed as a “political resource” by citizenship reformers in Germany and Japan, see Amy Gurowitz, *International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POL. 413 (1999), and James D. Ingram & Triadafilos Triadafilopoulos, *Rights, Norms, and Politics: The Case of German Citizenship Reform*, 77 SOC. RES. 353 (2010). Cf. Tara Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT’L L. 390 (2009) (describing disaggregated mechanisms for incorporation of human rights norms into U.S. law).

¹⁶⁶ Cf. Goldston, *supra* note 119, at 338 (noting that “a great deal remains to be clarified” regarding application of human rights to citizenship practice); Orentlicher, *supra* note 155, at 299 (noting that nationality-related issues surrounding independence of Baltic states “have laid bare a profound but heretofore largely subterranean shift in international legal doctrine governing matters of citizenship”).

¹⁶⁷ See, e.g., *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (“Citizenship is man’s basic right for it is nothing less than the right to have rights.”); see also SOKOLOFF, *supra* note 152, at 19–22 (describing threat to basic rights of noncitizens); *infra* notes 317–21 and accompanying text. That said, the gap between citizen and noncitizen rights has narrowed considerably with the maturation of human rights regimes based on personhood rather than nationality. See generally DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS (2008); see also SPIRO, *supra* note 2, ch. 4 (describing near identity of rights and obligations for citizens and permanent resident aliens in the U.S. context); Rubenstein, *supra* note 10, at 171–72 (“The value of citizenship for political governance has been drastically reduced Citizenship is no longer legitimately the major foundation upon which rights are restricted and determined, even within the nation state.”). Parallel to efforts to improve access to citizenship are those aimed at enhancing the rights of noncitizens. See, e.g., Goldston, *supra* note 119 (linking the two). For one example of a minority group preferring the latter track, see Chikako Kashiwazaki, *Citizenship in Japan: Legal Practice and Contemporary Development*, in FROM MIGRANTS TO CITIZENS, *supra* note 5, at 434, 458 (recounting that the

citizenship status to some who would otherwise be denied it, the result will be the enhanced protection of rights. In the longer run, however, mandated inclusion may undermine the protective elements of citizenship. Insofar as the international law of citizenship would require the extension of citizenship without any correlation to community on the ground, it may contribute to the migration of governance functions away from the state. An international law of citizenship may undermine the state itself and its many liberal virtues.

This prospect may supply a progressive basis for opposing the establishment of a right of access to citizenship. It may also have contributed to a recent countertrend among some European states away from expanded access. From a liberal perspective, however, concretely advancing the human rights of individuals should trump efforts only speculatively aimed at maintaining the institutional health of the liberal state. To the extent that mandated citizenship (along with other forces) threatens the state, the more appropriate response would be to advance the turn to international institutions as the ultimate guarantor of human rights.¹⁶⁸

The new international law of citizenship is evidenced by recent developments concerning dual citizenship and the acquisition of citizenship. International law has, until recently, been unwilling to impose standards of conduct regarding either question. With respect to dual citizenship, international law—reversing past disfavor—may come to recognize an individual right to maintain the status. With respect to the acquisition of citizenship, emerging norms point to limitations on threshold naturalization requirements for long-term residents, and the trajectory suggests a move toward the required adoption, at least in some contexts, of a *jus soli* basis for birthright citizenship. Both developments suggest that the balance is tipping toward a rights metric in how international law understands nationality questions. If so, international norms regarding nationality determinations are likely to harden in the medium to long term.

Acquisition of Citizenship

In the context of stable territorial boundaries, citizenship is acquired either at birth or through naturalization. Citizenship after birth can also be acquired in the face of state transformation. These channels of citizenship acquisition are coming into the ambit of international law under the moniker of “access to citizenship.” The prospective norm holds that habitual residents and their progeny should not be relegated to noncitizen status indefinitely and that at some point in time, territorial presence should give rise to baseline eligibility for citizenship acquisition. Although states retain broad discretion to impose requirements beyond residency for purposes of citizenship eligibility, to the extent that such requirements are unreasonable or bar individuals on the basis of group status, they are being challenged by human rights actors. The trajectory here points toward the greater constraint of citizenship practices as they relate to the extension of citizenship status.

longtime Korean minority in Japan “retained a negative evaluation on acquiring Japanese nationality,” focusing instead on expanding rights of denizenship).

¹⁶⁸ See, e.g., Rubenstein, *supra* note 10, at 184 (arguing that the diminishing importance of nationality will result in a “movement away from the centrality of the state in international law”). On the declining valence of the state, see generally, for example, MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* (1999), JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* (1995), SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996), and Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT’L. L. 7 (1997).

The issue of citizenship acquisition arises in the contexts of state succession and migration. The boundary instabilities of the post–Cold War era, with its multitude of new states in central and eastern Europe, gave rise to significant controversies relating to citizenship practice. Regional institutions launched vigorous human rights critiques of the citizenship regimes of these states, which resulted in reformed policies.¹⁶⁹ Not merely an extension of norms against statelessness,¹⁷⁰ this activity broke from previous practice by imposing upon particular states (namely, states of residence) a duty to grant access to citizenship.¹⁷¹ The International Law Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States works from human rights premises.¹⁷² The draft articles would establish a presumption in favor of nationality on the basis of habitual residence. The articles would also provide that states shall not deny persons "the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground."¹⁷³ A norm so framed seems consistent with recent state practice.¹⁷⁴ In the context of state succession perhaps more than any other, international human rights norms are being incorporated into state practices relating to citizenship. But this human rights framework has also been applied in the context of migrant populations, suggesting a norm that habitual residents, from birth or not, may not be arbitrarily denied access to citizenship.¹⁷⁵

In the context of both state succession and migration, antidiscrimination norms supply an important baseline. As noted above, the fact that citizenship practices are bracketed in the Racial Discrimination Convention demonstrated citizenship's exceptional modern insulation from international law. More recent practice under the Convention, however, suggests an evolving approach. Although the Committee on the Elimination of Racial Discrimination

¹⁶⁹ See, e.g., Orentlicher, *supra* note 155, at 299 ("these assessments capture in microcosm the evolution across decades of legal paradigms governing citizenship determinations by states"); see also Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 630–33 (2000) (describing interaction of Organization for Security and Co-operation in Europe high commissioner on national minorities and Latvia regarding citizenship acquisition by Russian minority).

¹⁷⁰ See VAN WAAS, *supra* note 106, ch. 6.

¹⁷¹ In this respect, "access to citizenship" differs from a "right to nationality" in the sense that the latter is satisfied by the holding of any nationality. See, e.g., Chan, *supra* note 106, at 13 (characterizing the "negative form" of "right to have a nationality" as "the right to be protected from statelessness").

¹⁷² Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, *supra* note 154; see ZIEMELE, *supra* note 139, at 210–16; see also Convention on the Avoidance of Statelessness in Relation to State Succession, May 19, 2006, ETS No. 200, at <http://conventions.coe.int/Treaty/EN/Treaties/Html/200.htm>.

¹⁷³ Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, *supra* note 154, pmbl., Art. 15; see also European Commission for Democracy Through Law (Venice Commission), Declaration on the Consequences of State Succession for the Nationality of Natural Persons, COE Doc. CDL-INF(1997)001 (Feb. 10, 1997), at <http://www.venice.coe.int/docs/1997/CDL-INF%281997%29001-e.asp>; European Convention on the Avoidance of Statelessness in Relation to State Succession, *supra* note 172.

¹⁷⁴ See Orentlicher, *supra* note 155, at 300. Decades ago, Brownlie asserted a norm under which habitual residents would, under international law, acquire nationality in a successor state. See Brownlie, *supra* note 14, at 320–24. But see 1 DANIEL P. O'CONNELL, 1 STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 503 (1967) ("it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality"); WEIS, *supra* note 13, at 149 ("it may be said that there is no rule under which nationals of the predecessor State acquire the nationality of the successor State").

¹⁷⁵ See, e.g., Michael Autem, *The European Convention on Nationality: Is a European Code of Nationality Possible?*, in TRENDS AND DEVELOPMENTS IN NATIONAL AND INTERNATIONAL LAW ON NATIONALITY, *supra* note 159, at 19, 32 ("lawful and habitual residence is no longer considered as one of the conditions that has to be fulfilled for acquiring the nationality of a State Party, but almost as a ground for becoming entitled to the right to acquire that nationality").

(CERD) had historically taken a hands-off approach to nationality practices—in line with the limitation of Article 1(3)—it has more aggressively scrutinized state conduct in the area in recent years.¹⁷⁶ In a 2004 general comment, CERD called on states parties to “[e]nsure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents.”¹⁷⁷ The evolution of CERD’s views, coupled with other international organizations’ recognition of the human rights implications of citizenship practices, points to a growing antidiscrimination metric for practices relating to the acquisition of citizenship.¹⁷⁸ As evidence of this change, and in contrast to the Racial Discrimination Convention, the European Convention on Nationality bars discrimination in nationality rules on the basis of race.¹⁷⁹

The other driver here is a democracy norm. To the extent that self-governance constitutes a right, citizenship is centrally important. When citizenship—and with it, full equality—is denied to habitual residents, especially from birth or early childhood, democratic values are compromised.¹⁸⁰ As Diane Orentlicher observes, “a democratic principles paradigm . . . presents an especially potent challenge to the discretion that states have classically enjoyed in respect of citizenship policies.”¹⁸¹ On this score, *Nottebohm* may supply a sort of inverse conceptual guide to the future international law of citizenship. The decision itself denied a state’s

¹⁷⁶ See ZIEMELE, *supra* note 139, at 294 (“The view has emerged that the prohibition of discrimination [under the Racial Discrimination Convention] applies fully to nationality legislation, including naturalization.”).

¹⁷⁷ CERD, General Recommendation No. 30, *supra* note 117, para. 13; see also CERD, General Recommendation No. 27, Discrimination Against Roma, UN Doc. A/55/18, Annex V (Aug. 16, 2000) (calling on parties to ensure that legislation relating to citizenship and naturalization does not discriminate against the Roma).

¹⁷⁸ See, e.g., MANDBY, STRUGGLES FOR CITIZENSHIP IN AFRICA, *supra* note 5, at 29 (international human rights treaties “prohibit[] discrimination in granting citizenship”); VAN WAAS, *supra* note 106, at 97, 98 (asserting that discrimination is the “one uniting element” in denial of citizenship cases; “denial of citizenship is the discriminatory deprivation of citizenship”); Eide, *supra* note 136, at 121 (“international law is increasingly making its demands felt: there should be no discrimination in the nationality legislation, including the part that deals with naturalization”); Goldston, *supra* note 119, at 332 (calling for application of nondiscrimination norms to citizenship policies).

¹⁷⁹ See European Convention on Nationality, *supra* note 117, Art. 5(1) (“The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.”).

¹⁸⁰ See, e.g., Rainer Bauböck & Bernhard Perchinig, *Evaluation and Recommendations*, in 1 ACQUISITION AND LOSS OF NATIONALITY, *supra* note 5, at 434 (the status of resident aliens blocked from naturalization “becomes almost like that of women, unpropertied citizens or disenfranchised racial and indigenous groups before the introduction of universal suffrage”); Cornelia Sonntag-Wolgast, *Opening Speech*, in TRENDS AND DEVELOPMENTS IN NATIONAL AND INTERNATIONAL LAW ON NATIONALITY, *supra* note 159, at 15 (statement of German interior ministry official applauding conclusion of European Convention on Nationality and reform of German nationality law because “[i]t is not tolerable for any state if a large number of citizens stay outside the public community over generations and are excluded from full democratic participation”).

¹⁸¹ See Orentlicher, *supra* note 155, at 299; see also SHACHAR, *supra* note 2, at 136 (“contemporary understanding of self-government . . . creates a strong presumption in favor of including all long-term residents in the innermost circle of membership”). This liberal orientation is also found among policymakers. See, e.g., Raimo Pekkanen & Hans Danielus, *Human Rights in the Republic of Estonia*, 13 HUM. RTS. L.J. 236, para. 36 (1991) (report to the Parliamentary Assembly of the Council of Europe) (“if substantial parts of the population of a country are denied the right to become citizens, . . . this could affect the character of the democratic system in that country”); Commission on Security and Cooperation in Europe, Letter from the CSCE High Commissioner Max van der Stoep to Latvian Foreign Minister Georgs Andrejevs, CSCE Communication No. 8, Ref. No. 1463/93/L (Dec. 10, 1993), at <http://www.minelres.lv/count/latvia/931210r.htm> (“If the overwhelming majority of non-Latvians in your country is denied the right to become citizens, and consequently the right to be involved in key decisions concerning their own interests, the character of the democratic system in Latvia might even be put into question.”). The democracy objection can alternatively be resolved, in large part, through the mechanism of noncitizen voting—another

capacity to extend nationality (at least for international purposes) in the absence of a genuine link.¹⁸² The genuine-link test could be turned around to require the extension of citizenship to individuals in the presence of such a link.¹⁸³ The thresholds would differ. The link required to validate the extension of nationality is low, even under *Nottebohm* itself. When a state has refused nationality, the link required to compel its extension would be high. Underlying both is an assumption that nationality should comport with the social facts of community on the ground.

Practice and commentary have tended to be narrowly focused, with a particularistic orientation.¹⁸⁴ It is now possible, however, to break out various components of citizenship acquisition regimes and assess their conformity with emerging international norms. These components are increasingly filtered through a human rights optic.

Eligibility to naturalize and durational residency requirements. As a matter of practice, all states provide for the possibility of naturalization (that is, the acquisition of citizenship after birth). Availability of naturalization may now be required as a matter of international law. The 1997 European Convention on Nationality requires that states parties provide for “the possibility of naturalisation of persons lawfully and habitually resident on its territory.”¹⁸⁵ Naturalization has become “more of a right than a favour.”¹⁸⁶ As the political theorist Seyla Benhabib concludes in sketching a “human right to membership,” it “would be objectionable from a moral point of view [not to provide] any procedure or possibility for foreigners and resident aliens to become citizens at all; that is, if naturalization were not permitted at all.”¹⁸⁷

Most states require some period of residence as a qualification for naturalization.¹⁸⁸ Such requirements are clearly consistent with international human rights norms. Even the more radical among theorists on immigration and citizenship accept their legitimacy by way of establishing the social membership of prospective citizens.¹⁸⁹

respect in which the citizen/noncitizen gap is closing. See DAVID C. EARNST, *OLD NATIONS, NEW VOTERS* (2008) (describing political incorporation of resident aliens); *supra* text accompanying note 167.

¹⁸² See *supra* notes 61–70 and accompanying text.

¹⁸³ See Orentlicher, *supra* note 155, at 306, 308, 320 (deploying “effective link” premise to assert claim to citizenship in Baltic context); see also UN HIGH COMMISSIONER FOR REFUGEES, *NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS* 9 (2008) (asserting that the “right to a nationality” set forth in the Universal Declaration of Human Rights “is founded on the existence of a genuine and effective link between an individual and a State”).

¹⁸⁴ With a notable focus on the Baltic states. See, e.g., ZIEMELE, *supra* note 139; Orentlicher, *supra* note 155.

¹⁸⁵ European Convention on Nationality, *supra* note 117, Art. 6(3).

¹⁸⁶ Betty de Hart & Ricky van Oers, *European Trends in Nationality Law*, in 1 *ACQUISITION AND LOSS OF NATIONALITY*, *supra* note 5, at 317, 323; see also JOPPKE, *supra* note 152, at 46 (highlighting “as of right” component in European naturalization regimes).

¹⁸⁷ BENHABIB, *supra* note 7, at 141.

¹⁸⁸ Exceptions include Israel, in which an individual who qualifies under the Law of Return acquires citizenship upon entry, and the former law of Germany, under which certain ethnic Germans long resident in eastern Europe and central Asia were considered as “repatriates” who had a kind of inchoate citizenship activated upon immigration to Germany. See Kay Hailbronner, *Germany*, in 2 *ACQUISITION AND LOSS OF NATIONALITY*, *supra* note 5, at 213, 234–36. The laws of many states include discretionary provisions for waiving residency requirements altogether in exceptional cases or for service to the state; it was pursuant to such a provision that Nottebohm was himself naturalized in Liechtenstein. See Jones, *supra* note 65, at 236–37 (cataloguing states with exceptional naturalization provisions as of 1956). In the United States, noncitizen members of the armed forces are eligible to naturalize without any requirement of residence during periods of military hostilities. See 8 U.S.C. §1440 (2010); Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002) (designating period after September 11, 2001, as period of military hostilities for this purpose).

¹⁸⁹ See, e.g., CARENS, *supra* note 157, at 20–24.

But there may be limits to the acceptable length of durational residency requirements. The European Convention on Nationality provides that the period of residence required as a condition for naturalization not exceed ten years.¹⁹⁰ This requirement reflects prevailing practice among states, under which naturalization is possible (usually subject to additional qualifications) after a residency period of ten years or less (in most states closer to five years).¹⁹¹ States with longer residency requirements have been pressed to shorten them. In the context of a major international controversy regarding its post-Soviet citizenship regime, Latvia's sixteen-year residency requirement proved "particularly controversial";¹⁹² it was later reduced to five.¹⁹³ CERD denounced Liechtenstein's thirty-year residency requirement as "excessively lengthy."¹⁹⁴ Under major 1999 citizenship reform legislation, Germany reduced its residency requirement from fifteen years to eight.¹⁹⁵ With the European Convention standard as a possible focal point, ten years may come to mark the outer limit of residency required for naturalization.

Integration requirements (language and civics tests). Most states condition naturalization on the satisfaction of cultural and political knowledge requirements. The United States, for instance, requires naturalization applicants in most cases to demonstrate a facility in the English language and a knowledge of national history and governmental institutions.¹⁹⁶ It is clear that in some form such thresholds to citizenship are consistent with existing international human rights norms, even though in practice they will restrict access to citizenship.¹⁹⁷ As with

¹⁹⁰ European Convention on Nationality, *supra* note 117, Art. 6(3).

¹⁹¹ See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-five Nationality Laws*, in CITIZENSHIP TODAY, *supra* note 5, at 17, 22–23 (setting forth naturalization requirements of various states, none of which include a residency requirement longer than ten years); see also JOPPKE, *supra* note 152, at 175 n.14 ("there is an emergent sense in Europe that five years' legal residence time as prerequisite to naturalization is 'best practice'"); MANBY, CITIZENSHIP LAW IN AFRICA, *supra* note 5, at 14 (calling for right to acquire naturalization after habitual residence of five years among African states, some of which have residency requirements as long as thirty-five years); Goldston, *supra* note 119, at 344 (calling for entitlement to citizenship after continuous residence "for a reasonable period of time—perhaps five years").

¹⁹² Orentlicher, *supra* note 155, at 301.

¹⁹³ See CITIZENSHIP POLICIES IN THE NEW EUROPE, *supra* note 5, at 52–53 (Estonia), 66–67 (Latvia). In the face of the European pressure, both Estonia and Latvia have implemented laws and other administrative practices to facilitate the naturalization of Russian residents. Reform in the Baltics was motivated by entry barriers to the Council of Europe and the European Union. See ZIEMELE, *supra* note 139, at 321 (delay in Latvia's admission to Council of Europe "primarily dependent" on issues relating to naturalization practices). The subsequent admission eliminated a major leverage point, however, see HOWARD, *supra* note 5, at 183, and concerns continue to be voiced regarding citizenship policies in the Baltics. See, e.g., CERD, Annual Report: Latvia, UN Doc. A/58/18 (Nov. 1, 2003); see also Office of the High Commissioner on Human Rights, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum: Mission to Latvia, UN Doc. A/HRC/7/19/Add.3 (Mar. 5, 2008).

¹⁹⁴ CERD, Concluding Observations: Liechtenstein, para. 17, UN Doc. CERD/C/LIE/CO/3 (May 7, 2007).

¹⁹⁵ See Hailbronner, *supra* note 188, at 215–224. Even so, implementation of the naturalization reforms in Germany have been questioned to the extent that they have not sufficiently raised naturalization rates, implying an affirmative duty to facilitate the acquisition of citizenship. See CERD, Concluding Observations: Germany, para. 20, UN Doc. CERD/C/DEU/CO/18 (Sept. 22, 2008) ("While taking note of the amendments to the Nationality Law simplifying the acquisition of German citizenship by long-term residents, the Committee regrets that a considerable proportion of non-citizens who may fulfil the requirements to obtain naturalization still live in the State party without citizenship, in particular persons of Turkish origin."); see also Office of the High Commissioner on Human Rights, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum: Mission to Italy, UN Doc. A/HRC/4/19/Add.4, at 15, 27 (Feb. 15, 2007) (welcoming draft citizenship law under which residency period would be reduced from ten years to five).

¹⁹⁶ See 8 U.S.C. §1423 (2010).

¹⁹⁷ See Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 509 (1999).

durational residency requirements, language and civics tests are accepted by liberal theorists, although in this context the question is at least contested.¹⁹⁸ Moreover, unlike other citizenship qualifications, backsliding has occurred in recent years away from the relaxation of naturalization thresholds.¹⁹⁹

Unreasonably exacting requirements for integration into a society raise human rights concerns, especially where they have a discriminatory impact.²⁰⁰ Post-Soviet citizenship regimes in Latvia and Estonia were condemned for their onerous language requirements.²⁰¹ When such thresholds require cultural assimilation on top of knowledge they may be suspect; at the same time that more states have moved to adopt naturalization tests,²⁰² there appears a trend away from assimilation criteria.²⁰³ States increasingly exempt some classes of applicants, including the elderly and the disabled, from language and civics requirements.²⁰⁴ Failure to provide such exemptions has been criticized by international actors.²⁰⁵

Disqualifying naturalization criteria. Many states disqualify individuals who have a criminal history or who lack good moral character or other indicia of personal integrity from eligibility to naturalize.²⁰⁶ Such barriers may come to implicate human rights norms, especially if they are applied on a discriminatory or arbitrary basis.

¹⁹⁸ Compare Joseph Carens, *Why Naturalization Should Be Easy: A Response to Noah Pickus*, in IMMIGRATION AND CITIZENSHIP IN THE 21ST CENTURY 141 (Noah M. J. Pickus ed., 1998) (no requirements justified beyond durational residency) with BENHABIB, *supra* note 7, at 139 (language competency and proof of civil literacy do not violate “self-understanding of liberal democracies as associations”); see also Bauböck & Perchinig, *supra* note 180, at 451–52 (accepting legitimacy of language, but not civics, tests). For a range of views, see Rainer Bauböck & Christian Joppke, *How Liberal Are Citizenship Tests?* (Robert Schuman Centre for Advanced Studies, European Union Institute, Working Paper No. RSCAS 2010/41, 2010) (with contributions from Christian Joppke, Joseph Carens, Randall Hansen, and Dora Kostakopoulou, among others); see also Ines Michalowski, *Citizenship Tests in Five Countries—An Expression of Political Liberalism?* (Wissenschaftszentrum Berlin für Sozialforschung Discussion Paper, Oct. 2009), at <http://bibliothek.wzb.eu/pdf/2009/iv09-702.pdf>.

¹⁹⁹ See *infra* notes 257–60 and accompanying text.

²⁰⁰ See, e.g., MANDBY, STRUGGLES FOR CITIZENSHIP IN AFRICA, *supra* note 5, at 142–43 (noting that language and cultural requirements for naturalization in African states “may be used in practice to restrict citizenship on an ethnic basis”); SOKOLOFF, *supra* note 152, at 28 (“Language proficiency in the main national language is a condition widely used to reject citizenship claims from non-mainstream ethnic groups.”).

²⁰¹ See, e.g., Human Rights Committee, Consideration of Reports: Estonia, para. 110, UN Doc. A/51/40, vol. I (Sept. 16, 1996) (expressing concern at the “stringency of the language criterion” for naturalization); Report of the Secretary-General, The Situation of Human Rights in Estonia and Latvia, UN Doc. A/47/748, Annex, at 8 (Oct. 26, 1993) (calling on Latvia to exempt residents over fifty from satisfaction of language requirement); Report of the Secretary-General, The Situation of Human Rights in Estonia and Latvia, UN Doc. A/48/511, Annex, at 16–17 (Oct. 26, 1993) (recommending exemption for those over sixty and for invalids).

²⁰² See *infra* text accompanying note 259.

²⁰³ See, e.g., MANBY, CITIZENSHIP LAW IN AFRICA, *supra* note 5, at 65 (noting amendment of Ethiopian naturalization law to eliminate requirement that applicants “know [the] Amharic language perfectly, speaking and writing it fluently” and to require only ability “to communicate in any one of the languages spoken” in Ethiopia).

²⁰⁴ Bauböck & Perchinig, *supra* note 180, at 452; see also 8 U.S.C. §1423(b)(1) (2011) (U.S. law exempting those with “physical or developmental disability or mental impairment” from language and civics tests).

²⁰⁵ See Office of the High Commissioner for Human Rights, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum: Mission to Latvia, *supra* note 193, para. 88 (recommending that Latvia relax naturalization requirements, in particular language proficiency exams, for elderly persons); see also CERD, Concluding Observations: Norway para. 19, UN Doc. CERD/C/NOR/CO/18 (Oct. 19, 2006) (“While noting the importance of adequate command of the State language as a vehicle of social integration, the Committee is concerned about the strictness of the language requirements for acquiring Norwegian citizenship”).

²⁰⁶ See Bauböck & Perchinig, *supra* note 180, at 450.

The citizenship law of the new Czech Republic supplies an instructive example. Under the original, 1993 Czech nationality legislation, those with designated Czech nationality under Czechoslovakian law and resident in Czech territory automatically acquired citizenship in the new state; those resident but not designated as Czech nationals were barred from citizenship if they had a criminal record. The condition rendered thousands of Roma residents ineligible for citizenship, attracting criticism from the Council of Europe and the Organization for Security and Co-operation in Europe.²⁰⁷ A Council of Europe report concluded: "Admittedly, a State may decide who are its citizens but it is doubtful whether, in a case of State succession, under international law, citizens that have lived for decades on the territory, perhaps are even born there, can be excluded from citizenship just because they have a criminal record."²⁰⁸ The Czechs retreated in 1996, softening the clean-record requirement with respect to residents as of the breakup of the former Czechoslovakia.²⁰⁹ Estonia bars those who have been sentenced to more than a year's imprisonment and not been rehabilitated—a condition that "could raise serious human rights considerations."²¹⁰

Discriminatory naturalization criteria. CERD, the Human Rights Committee, and Committee on the Rights of the Child have repeatedly expressed concern about discriminatory naturalization practices. States that have been the target of such concern include Japan (which has required ethnic Koreans to change their names),²¹¹ Korea (concerning bars on the naturalization of ethnic Chinese),²¹² Panama (concerning bars on the naturalization of those with physical or mental incapacities),²¹³ and Kuwait (concerning the ineligibility of non-Muslims).²¹⁴ Nongovernmental organizations (NGOs) have highlighted discriminatory naturalization regimes.²¹⁵ One commentator suggests that "[r]ace-based distinctions that expressly bar access to citizenship for some racial or ethnic groups should be considered

²⁰⁷ See Andrea Baršová, *Czech Citizenship Legislation Between Past and Future*, in CITIZENSHIP POLICIES IN THE NEW EUROPE, *supra* note 5, at 163, 167; Jirina Siklova & Marta Mikluskova, *Denying Citizenship to the Czech Roma*, 7 E. EUR. CONST. REV. 58, 62 (1998).

²⁰⁸ Directorate of Legal Affairs, COUNCIL OF EUROPE, REPORT OF THE EXPERTS OF THE COUNCIL OF EUROPE ON THE CITIZENSHIP LAWS OF THE CZECH REPUBLIC AND SLOVAKIA AND THEIR IMPLEMENTATION, para. 76, COE Doc. DIR/JUR(96)4 (1996).

²⁰⁹ Baršová, *supra* note 207, at 167 & n.24.

²¹⁰ ZIEMELE, *supra* note 139, at 318.

²¹¹ CERD, Annual Report: Japan, para. 176, UN Doc. A/56/18 (Oct. 30, 2001); YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW 138–40 (1998); *see also* Human Rights Committee, Concluding Observations: Iceland, para. 78, UN Doc. A/49/40, vol. I (Sept. 21, 1994) (also relating to required name change).

²¹² CERD, Annual Report: Republic of Korea, para. 328, UN Doc. A/51/18 (Sept. 30, 1996).

²¹³ Human Rights Committee, Concluding Observations: Panama, para. 8, UN Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008).

²¹⁴ Human Rights Committee, Concluding Observations: Kuwait, paras. 479–84, UN Doc. A/55/40, vol. I (Oct. 18, 2000); Committee on Economic, Social & Cultural Rights, Report on the Thirty-second and Thirty-third Sessions, Apr. 26–May 14, Nov. 8–Nov. 26, 2004, para. 185, UN Doc. E/2005/22 (2005); *see also* CERD, Annual Report: Yemen, para. 464, UN Doc. A/57/18 (Jan. 11, 2002). For further background on the relationship of citizenship and religion in the context of Kuwait and the Islamic world more generally, *see* Anh Nga Longva, *Citizenship in the Gulf States*, in CITIZENSHIP AND THE STATE IN THE MIDDLE EAST, *supra* note 136, at 179.

²¹⁵ *See* Human Rights Watch, *Statement by Human Rights Watch to the Inter-session Working Group for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) [hereinafter Human Rights Watch Statement], at <http://www.hrw.org/campaigns/race/intersessional.htm> ("Naturalization policies, too, may be wholly or largely founded on discriminatory grounds. Denial of citizenship on racial or national grounds may be a norm even for people who have established deep roots in a country and have retained no connections with any other.").

presumptively invalid, absent particular evidence showing that they are both necessary and proportional.”²¹⁶

Affinity-based naturalization preferences. Some states maintain preferential regimes for nationals of states of historical affinity and for those of particular religious or ethnic identities. This phenomenon is pronounced among Iberian states.²¹⁷ Under Israel’s Law of Return, qualifying Jews are entitled to citizenship upon settlement in Israel; they are considered as “already belonging to the constitutive community,” whereas other immigrants must satisfy residency and other naturalization requirements.²¹⁸ The Inter-American Court of Human Rights upheld an affinity preference under Costa Rican law.²¹⁹ The official explanatory report to the European Convention on Nationality notes that “States Parties can give more favorable treatment to nationals of certain other States.”²²⁰

Their pedigree notwithstanding, naturalization preferences are coming under increased scrutiny. Leading scholars have characterized the preferences as “suspicious”²²¹ and “worrisome,”²²² especially when they appear to reflect bias against a group disadvantaged by the regime. In Spain, for example, the preference for nationals of Iberian countries, who are eligible for citizenship after only two years of residence, severely disadvantages large numbers of immigrants from Morocco, who face a ten-year requirement.²²³ Germany has largely abandoned, with a series of laws starting in 1999, its long-standing *Ausslieder* policy, under which ethnic Germans from central and eastern Europe were extended citizenship upon arrival despite temporally remote attachment to Germany; the “striking contrast” with the status of German-born Turks became “more and more difficult to justify, either morally or economically.”²²⁴ The Committee on Economic, Social and Cultural Rights has expressed concern about the Israeli Law of Return as a form of discrimination against

²¹⁶ Goldston, *supra* note 119, at 334. The test would track the strict scrutiny applied to racial classifications under U.S. constitutional jurisprudence.

²¹⁷ See, e.g., Ruth Rubio-Marín, *Spain*, in 2 ACQUISITION AND LOSS OF CITIZENSHIP, *supra* note 5, at 477. These preferences are undertaken on a bilateral basis, reducing the naturalization period for nationals of each state and recognizing dual nationality between the two.

²¹⁸ Ayelet Shachar, *Citizenship and Membership in the Israeli Polity*, in FROM MIGRANTS TO CITIZENS, *supra* note 5, at 386, 390.

²¹⁹ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4 (Jan. 19, 1984).

²²⁰ COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE EUROPEAN CONVENTION ON NATIONALITY, ETS NO. 166, para. 41 (1997), at <http://conventions.coe.int/Treaty/en/reports/html/166.htm>.

²²¹ Bauböck & Perchinig, *supra* note 180, at 459.

²²² Rubio-Marín, *supra* note 217, at 510; see also Mariner, *supra* note 148, at 66 (noting “surprising latitude” that states enjoy with respect to such affinity regimes); Orentlicher, *supra* note 155, at 324 (questioning whether “democratic values might be offended by naturalization policies that favor particular ethnic groups”). Seyla Benhabib finds such policies acceptable “[a]s long as a state does not deny those of different ethnicity and religion equivalent rights to seek entry and admission to a country,” but finds them to violate human rights when they “are combined with the goals of preserving ethnic majorities and ethnic purity.” BENHABIB, *supra* note 7, at 138 n.2. On that basis, she finds Israeli citizenship practices to violate the human rights of Palestinian refugees. See *id.*; see also Goldston, *supra* note 119, at 335 (“there may well be strong justifications for these preferential policies, but their ultimate legitimacy depends on the specificities of time, place, and circumstance”; questioning Israeli regime on that basis). But cf. Schwelb, *supra* note 146, at 1009 (observing in 1966 that prohibition of affinity preferences in extension of nationality “can hardly have been intended” by the Racial Discrimination Convention).

²²³ Rubio-Marín, *supra* note 217, at 506.

²²⁴ HOWARD, *supra* note 5, at 123; see also Hailbronner, *supra* note 188, at 234–36 (describing legislative implementation of restrictive policies regarding “repatriation” of ethnic Germans from central and eastern Europe).

non-Jews,²²⁵ as has CERD about a Qatari naturalization measure favoring nationals of Arab states.²²⁶ Since affinity preferences are discriminatory in the sense that they favor nationals of some states over others, they may be headed for a collision with nondiscrimination norms.

Administrative discretion, processing issues, and application fees. States are being challenged for procedural irregularities in their naturalization regimes, especially when they raise issues of potential discrimination. CERD has taken Switzerland to task for its naturalization policies as being “too protracted and selective,”²²⁷ and Croatia for “excessive delays” in processing the citizenship applications of non-Croat ethnics.²²⁸ The Human Rights Committee condemned the Latvia naturalization regime as “calculated to delay the naturalization process for many years.”²²⁹ The Dominican Republic has been condemned for a birth registration scheme that, in practice, deprives residents of Haitian origin from securing citizenship due them under Dominican law.²³⁰ Other countries cited for administrative barriers to citizenship have included Macedonia²³¹ and the United States.²³² Among African states, naturalization, while available in principle, may “in practice . . . be almost impossible to obtain.”²³³

As two leading legal scholars on citizenship recommend, human rights standards should

guarantee procedural minimum standards, which include reasonably low fees that do not create financial deterrents for applicants, clearly stated requirements that do not allow for

²²⁵ Committee on Economic, Social & Cultural Rights, Report on the Thirtieth and Thirty-first Sessions, May 5–23, Nov. 10–28, 2003, Concluding Observations: Israel, para. 261, UN Doc. E/2004/22 (Mar. 8, 2004).

²²⁶ CERD, Concluding Observations: Qatar, para. 11, UN Doc. CERD/C/60/CO/11 (May 21, 2002).

²²⁷ CERD, Annual Report: Czech Republic, para. 124, UN Doc. A/53/18, (Sept. 10, 1998); *see also* CERD, Concluding Observations: Croatia, para. 316, UN Doc. A/53/18 (Sept. 10, 1998) (highlighting “delays in processing of applications for citizenship”).

²²⁸ CERD, Concluding Observations: Croatia, para. 497, UN Doc. A/48/18 (Sept. 15, 1993); CERD, Concluding Observations: Croatia, para. 316, UN Doc. A/53/18 (Sept. 10, 1998); *see also* CERD, Concluding Observations: Croatia, para. 17, UN Doc. CERD/C/HRV/CO/8 (Mar. 24, 2009) (calling for Croatia to “remove any administrative and other obstacles and assist persons whose access to obligatory documentation is limited, such as persons of Roma, Serb and Bosniak origin”).

²²⁹ Human Rights Committee, Concluding Observations: Latvia, para. 350, UN Doc. A/50/40, vol. I (Oct. 3, 1995). CERD likewise called on Latvia to “streamline the process of naturalization.” CERD, Concluding Observations: Latvia, para. 404, UN Doc. A/54/18 (Sept. 29, 1999).

²³⁰ *See Girls Yean v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R., para. 171 (Sept. 8, 2005). The practice was found discriminatory, inconsistent with Article 20 of the American Convention of Human Rights, Nov. 22, 1969, 1144 UNTS 123, which provides that individuals should not be arbitrarily deprived of nationality. *See Girls Yean*, para. 174; *see also* Gerald L. Neuman, *The Resilience of Nationality*, 101 ASIL PROC. 97, 98 (2007) (“a remarkable example of international constraint on a state’s power to determine who its nationals are”); Committee on the Rights of the Child, Concluding Observations: Nepal, paras. 42–44, UN Doc. CRC/C/15/Add.261 (Sept. 21, 2005) (criticizing birth registration system having the effect of discriminating against individuals born to single mothers).

²³¹ Committee on Economic, Social & Cultural Rights, Concluding Observations: Macedonia, para. 32, UN Doc. E/C.12/MKD/CO/1 (Jan. 15, 2008) (calling for removal of “administrative obstacles” to securing of citizenship by Roma).

²³² Office of the High Commissioner on Human Rights, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum: Mission to the United States of America, para. 70, UN Doc. A/HRC/11/36/Add.3 (Apr. 28, 2009) (expressing “serious concern” regarding “long delay in the processing of citizenship applications” following the September 11 attacks).

²³³ MANDBY, STRUGGLES FOR CITIZENSHIP IN AFRICA, *supra* note 5, at 141.

arbitrarily dismissing applications and that limit administrative discretion in judging substantive questions, written justifications for rejections[,] and judicial review of decisions with individual rights of appeal.²³⁴

The European Convention on Nationality requires parties to ensure that nationality-related applications “be processed within a reasonable time” and that fees be “reasonable.”²³⁵ Broad-based increases in naturalization rates can be attributed to relaxed naturalization thresholds and more regularized naturalization procedures.²³⁶

Discriminatory birthright citizenship practices. The treaty committees have expressed concern regarding birthright citizenship classifications in Cambodia,²³⁷ the Central African Republic,²³⁸ the Congo,²³⁹ the Dominican Republic,²⁴⁰ Kuwait,²⁴¹ Sri Lanka,²⁴² Syria,²⁴³ and Zaire.²⁴⁴ The committees have also highlighted discriminatory elements of citizenship acquisition practices in several country reports.²⁴⁵ The Committee on the Rights of the Child noted that it was “very concerned” about Liberia’s citizenship regime, under which birthright citizenship is restricted on the basis of racial origin.²⁴⁶

Jus soli for intergenerational migrants. It is increasing common for states to extend citizenship at birth to the children of habitual lawful residents, especially to children of individuals themselves born in state territory (so-called double *jus soli*). The European Convention on Nationality calls on parties to “facilitate” the acquisition of nationality of persons born in, and lawfully

²³⁴ Bauböck & Perchinig, *supra* note 180, at 439; *see also* MANBY, CITIZENSHIP LAWS IN AFRICA, *supra* note 5, at 14 (calling for provision of written reasons for rejection of naturalization application and for right to judicial review); SOKOLOFF, *supra* note 152, at 29 (“[r]ed tape is an effective means of discouraging people from regularizing their situation”).

²³⁵ *Supra* note 117, Arts. 10–13.

²³⁶ *See* HOWARD, *supra* note 5, at 217 (table showing increased naturalization rates in eleven of fifteen core European Union states); Gurowitz, *supra* note 165, at 439.

²³⁷ CERD, Concluding Observations: Cambodia, para. 290, UN Doc. A/53/18 (Sept. 10, 1998).

²³⁸ Committee on the Rights of the Child, Concluding Observations: Central African Republic, paras. 435–36, UN Doc. CRC/C/100 (Nov. 14, 2000).

²³⁹ Committee on the Rights of the Child, Concluding Observations: Democratic Republic of the Congo, paras. 177–78, UN Doc. CRC/C/108 (July 23, 2001).

²⁴⁰ Human Rights Committee, Annual Report: Dominican Republic, para. 78, UN Doc. A/56/40, vol. I (Oct. 26, 2001).

²⁴¹ *See* CERD, Concluding Observations: Kuwait, para. 376, UN Doc. A/48/18 (Sept. 15, 1993); *see also* HUMAN RIGHTS WATCH, THE BEDOONS OF KUWAIT: “CITIZENS WITHOUT CITIZENSHIP” (1995).

²⁴² CERD, Concluding Observations: Sri Lanka, para. 334, UN Doc. CERD/A/56/18 (Aug. 15, 2001) (discrimination against Tamils).

²⁴³ CERD, Concluding Observations: Syria, para. 176, UN Doc. A/54/18 (Sept. 29, 1999) (Syrian-born Kurds).

²⁴⁴ CERD, Concluding Observations: Zaire, para. 525, UN Doc. A/51/18 (Sept. 30, 1996).

²⁴⁵ *See, e.g.*, Human Rights Committee, Concluding Observations: San Marino, para. 9, UN Doc. CCPR/C/SMR/CO/2 (July 31, 2008) (noting a particular concern about a law that discriminated against children, one of whose parents was a naturalized citizen: “The State party should amend the law so as to ensure that children are not discriminated against on the ground of the nationality of any one parent and in particular ensure equal right to acquisition of citizenship, irrespective of whether both or only one of the parents are naturalized San Marino citizens.”).

²⁴⁶ Committee on the Rights of the Child, Concluding Observations: Liberia, paras. 334–35, UN Doc. CRC/C/140 (Sept. 27, 2004); *see also* MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA, *supra* note 5, at 56–66 (describing racially discriminatory citizenship regime in Sierra Leone); AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, ANALYSIS OF THE ALIENS AND NATIONALITY LAW OF THE REPUBLIC OF LIBERIA 13–14 (May 2009), at http://apps.americanbar.org/rol/publications/liberia_analysis_of_the_aliases_and_nationality_law.pdf (finding Liberian measure inconsistent with international norms).

and habitually resident in, their territory.²⁴⁷ Major human rights NGOs,²⁴⁸ as well as important political theorists,²⁴⁹ have highlighted the inherently discriminatory aspects of citizenship regimes based wholly on *jus sanguinis*.

Most countries have come to accept some form of *jus soli* in the acquisition of citizenship.²⁵⁰ Germany presents the most notable example. Notwithstanding its transformation, along with many other European states, to a country of immigration, Germany had been a holdout in maintaining a strict *jus sanguinis* regime of birthright citizenship.²⁵¹ Citizenship was not extended at birth even to those children whose noncitizen parents had been born in Germany.²⁵² The difficulty of naturalization and the lack of any *jus soli* citizenship gave rise to a significant population of second- and third-generation residents (most of them of Turkish nationality) who lacked German citizenship. Consistent with international trends, the 1999 reforms relaxed the hurdles to German citizenship: the new law provided for *jus soli* birthright citizenship of non-ethnic Germans who were the offspring of persons born in, or long-time residents of, Germany.²⁵³ The significant controversy surrounding the nationality reforms was not framed in international law terms. However, “international pressures” were an important motivating factor.²⁵⁴ Major human rights groups, including Human Rights

²⁴⁷ European Convention on Nationality, *supra* note 117, Art. 6(4)(e).

²⁴⁸ As the Open Society Institute Justice Initiative notes:

Jus sanguinis is the principle most subject to abuse. Rather than treating descent as a predictor of the state to which an individual will be tied, and the citizenship that individual will logically need, the worst citizenship policies elevate descent to the sole qualification for state protection—as if having a parent born in another country (which might not even have been a separate country at the time) were proof of fundamental unfitness for belonging to a society. *Jus sanguinis* is also often a proxy for some other immutable characteristic such as ethnicity, language or religion. If citizenship is based on these, then no amount of loyalty to the state, no number of years lived or social ties or great deeds done will make an individual qualify for citizenship. The greater the individual's ties to a country, the crueler is denationalization.

Open Society Justice Initiative, *The Face of Statelessness: A Call for African Norms on the Right to Citizenship* 4 (2007), at <http://www.citizenshiprightsinafrica.org/Publications/2007/TheFaceofStatelessness.02.07.pdf>; see also MANBY, CITIZENSHIP LAWS IN AFRICA, *supra* note 5, at 11–12 (calling for recognition of right to nationality to include territorial birthright citizenship for children of habitual residents); Human Rights Watch Statement, *supra* note 215 (“The racially discriminatory aspects of policies to acknowledge nationality on the grounds of blood ties alone (*jus sanguinis*), with no provision for nationality to be conferred on the basis of place of birth (*jus soli*) or on other grounds, require particular scrutiny. The rigid and exclusive implementation of *jus sanguinis*, if in practice implemented along racial lines, can serve to deny whole populations of rights in what is often the only country they have ever known.”)

²⁴⁹ See, e.g., BAUBÖCK, *supra* note 2, at 44–45.

²⁵⁰ See de Hart & van Oers, *supra* note 186, at 320.

²⁵¹ See also JOPPKE, *supra* note 152, at 40 (characterizing pre-1999 German regime as “extreme”).

²⁵² On the Germany nationality law before the reforms of 1999, see generally Gerald L. Neuman, *Nationality Law in the United States and the Federal Republic of Germany*, in PATHS TO INCLUSION: THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY 263–85 (Peter H. Schuck & Rainer Münz eds., 1998).

²⁵³ The reform has been characterized as “represent[ing] nothing short of a revolution, ending Germany’s ‘exceptionalism’ by entrenching the principle of *jus soli* in German law.” Ingram & Triadafilopoulos, *supra* note 165, at 356.

²⁵⁴ HOWARD, *supra* note 5, at 124. As political scientist Marc Howard reports on the basis of an interview with a German Interior Ministry official:

As international bodies such as the Council of Europe, the European Court of Justice, and the European Court of Human Rights began to play an increasingly important political, moral, and judicial role in Europe, there was a sense that Germany’s law stood out as antiquated, inhumane, and in need of modernization, all of which had a steady, if subtle, impact on key decision makers.

Watch,²⁵⁵ had condemned the previous regime as overly restrictive of citizenship access; the reforms were welcomed by the international human rights community.²⁵⁶ Other European states have also adopted *jus soli* components in their citizenship regimes.²⁵⁷

More recently, countertrends have emerged under which states, particularly in Europe, have raised thresholds to acquiring citizenship. Some states have made *jus soli* citizenship contingent on the legal residence of a parent.²⁵⁸ Others have lengthened residency periods.²⁵⁹ Yet others have adopted or deepened integration measures—for instance, in the form of citizenship examinations testing applicant knowledge of history, governance, and culture.²⁶⁰ Germany itself has retrenched since the 1999 reform measures, adopting a citizenship examination in 2008.²⁶¹

These countertrends cut against the identification of international norms mandating access to citizenship. If they continue, they may reinforce the traditional doctrine under which state sovereignty has afforded states broad discretion over citizenship practice. The countertrends may nonetheless be consistent with the emergence of norms on access to citizenship. Recent reversals in liberalization of citizenship practices have not eliminated earlier advances.²⁶² It may be a matter of two steps forward, one step back. Developments in an area long marked by autonomous decision making are unlikely to evolve in a linear or synchronized manner. In Germany, for instance, the current citizenship regime remains more liberal than that antedating the 1999 overhaul; a proposal to eliminate its *jus soli* innovation was rejected in 2004; and the more recently adopted citizenship test has not proved much of a barrier to naturalization.²⁶³ Some bunching around the mean has also occurred. Some states have scaled back generous *jus soli* policies, whereas others have expanded or added *jus soli* elements to regimes formerly

Id.; see also Ingram & Triadafilopoulos, *supra* note 165, at 359 (“transnational norms played an important role in the process leading to German citizenship reform”).

²⁵⁵ “GERMANY FOR GERMANS”: XENOPHOBIA AND RACIST VIOLENCE IN GERMANY (1995).

²⁵⁶ *E.g.*, CERD, Concluding Observations: Germany, para. 109, UN Doc. A/56/18 (Oct. 30, 2001) (“[t]he committee notes with satisfaction the improvements brought by the recent reform of the nationality law”).

²⁵⁷ See, *e.g.*, HOWARD, *supra* note 5, at 89 (Portugal). Greece recently adopted double *jus soli*, under which the child of a person born and residing in Greece automatically acquires citizenship at birth. See Dimitris Christopoulos, *Greece: Comprehensive Citizenship Reform Passed in Parliament on 11 March*, EUROPEAN UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP (Mar. 13, 2010), at <http://eudo-citizenship.eu/citizenship-news/>.

²⁵⁸ Portugal and the United Kingdom scaled back *jus soli* in this respect in the 1980s. In the wake of a referendum amendment to its constitution, so, too, did Ireland in 2004. See Irish Nationality and Citizenship Act of 2004 (Act No. 38); HOWARD, *supra* note 5, at 164.

²⁵⁹ Luxemburg has increased its residency requirement from five to seven years, and Denmark from seven to nine. See HOWARD, *supra* note 5, at 82, 101.

²⁶⁰ Those adopting a citizenship test include Australia, Austria, Denmark, France, and the United Kingdom. The Netherlands has introduced tests for admission and for obtaining long-term residence status. See Michalowski, *supra* note 198; Harald Waldrauch, *Acquisition of Nationality*, in 1 ACQUISITION AND LOSS OF NATIONALITY, *supra* note 5, at 121, 156.

²⁶¹ See Ingram & Triadafilopoulos, *supra* note 165, at 353.

²⁶² See HOWARD, *supra* note 5, at 30 (even taking account of countertrends, “the recent liberalization of citizenship policies is undeniable”); Weil, *supra* note 191, at 34 (“[a]ll stable, democratic nation-states with immigrant populations have moved in the same legislative direction” with respect to citizenship acquisition practices).

²⁶³ See *Who Wants a Passport? Minuscule Fail Rate for German Citizenship Test*, SPIEGEL ONLINE INT’L (Jan. 2, 2009) (reporting 99.4 percent pass rate), at <http://www.spiegel.de/international/germany/0,1518,599131,00.html>; see also HOWARD, *supra* note 5, at 83 (on a liberalization scale of 1 to 5, Dutch citizenship policy has increased from 2.72 to 4.22 in the period 1980–2008, notwithstanding adoption of recent restrictionist policies); JOPPKE, *supra* note 152, at 127–28 (describing watered-down nature of test).

oriented to *jus sanguinis* criteria.²⁶⁴ Under this account, recent activity will not reverse the longer-term trend.

Moreover, pushback against moves to restrict citizenship policies has been framed in human rights terms. That more restrictive citizenship policies have provoked opposition is unsurprising. But opposition appears to be premised, in part, on an assumption that human rights constrain the denial of citizenship. If so, moves toward more restrictive citizenship acquisition policies could activate an expanded human rights consciousness in citizenship practice. Restrictive policies in Europe and elsewhere are being described as discriminatory.²⁶⁵ If these critiques gain traction, they are likely to find an audience in institutional infrastructures.

These developments can be characterized as evolutionary, rooted in existing international law constraints on nationality practice. Many of the developments implicate the norm against statelessness—a particular concern in the context of state succession. But it is also possible to paint the changes as a departure from past premises.²⁶⁶ Diane Orentlicher argues that the international response to these measures evidences a shift to a “territorial/civic” model of citizenship enforced through international norms, in which the availability of citizenship to residents is considered necessary to the full realization of human rights.²⁶⁷ This conception represents a departure from past approaches to statelessness in two respects. First, as an operative matter, it devolves an obligation onto a particular state; the right to nationality becomes a right to a particular nationality. Second, as a normative matter, it recognizes core self-governance values; the point now is to guarantee political participation in a person’s place of residence. By contrast, the right to some nationality—the object of efforts to combat statelessness—reflects an international protection norm, working from the premise that individuals should have some state to turn to protect them against mistreatment by other states. An emerging international regime regarding the acquisition of citizenship suggests the emergence of an international norm requiring the adoption of *jus soli* in certain cases (most notably, those involving second-generation residents),²⁶⁸ even where statelessness is not a concern.

²⁶⁴ See JOPPKE, *supra* note 152, at 44–45, 147 (noting convergence of citizenship regimes).

²⁶⁵ See, e.g., EQUAL OPPORTUNITY COMMISSION VICTORIA, CITIZENSHIP TESTING: A HUMAN RIGHTS ISSUE (2006) (critiquing Australian citizenship test); EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, ECRI REPORT ON GERMANY 12 (2009) (critiquing discriminatory tendencies of German citizenship test); *More Primitive Than Torture*, *supra* note 117.

²⁶⁶ Constantin Sokoloff explains in distinguishing statelessness from “non-citizenship” as follows:

Statelessness focuses on the inability of some individuals to avail themselves of the protection of a State, be it the State they reside or were born in. From a human security perspective, the concern with the non-citizen lies primarily on an individual’s inability to obtain participative membership in a given State despite that individual’s meeting the citizenship requirements generally identified under international standards.

Sokoloff, *supra* note 152, at 6 n.8. The Baltic episodes illustrate the point. Many ethnic Russians resident in Latvia and Estonia were eligible for citizenship in Russia. Thus, they were not threatened with statelessness. The issue was whether they should be entitled to citizenship in their states of residence notwithstanding eligibility for citizenship in another state.

²⁶⁷ See Orentlicher, *supra* note 155, at 296.

²⁶⁸ See Weil, *supra* note 191, at 25–26, for a survey of state practices concerning second-generation immigrants. Of twenty-five major democratic nations, only five (Austria, Greece, Israel, Luxembourg, and Russia) do not entitle second-generation residents to citizenship in at least some cases (the variable being the period of residence required of the first-generation immigrant parent).

At this time, these trends qualify as no more than the softest kind of law, representing aspirational norms that are not yet amenable to direct enforcement against states. The emerging norms in this context will be contested, and some states are attempting to reinscribe restrictive citizenship policies. The prospective regime could sputter before it takes hold. But the fact that the regime is being contested evidences potentialities in international law that were historically absent.²⁶⁹ Soft law norms often harden. It is now possible to envision international law standards governing core nationality determinations.

Maintenance of Dual Citizenship

Evidence suggests that international norms are emerging to protect an individual right to maintain dual citizenship. Both practice and theory have become dramatically more receptive to that status. Although states retain clear discretion concerning dual citizenship as a formal matter, pressure is growing on holdout states to liberalize their practices. As with norms concerning the acquisition of citizenship, norms against discrimination are being effectively deployed to expand state acceptance of dual citizenship. Although a formal human right to maintain dual citizenship remains a distant prospect, developments pointing to the possibility warrant attention.

As described above,²⁷⁰ dual nationality was the bane of an order-based norms system to the extent that it sparked the human equivalent of turf battles among states with competing claims to individuals. Although international law was ultimately incapable of resolving the problem at its roots (failing to establish a harmonization of nationality laws), the status was universally deplored. That was, in part, because dual nationality may itself have infringed individual rights. In the nineteenth-century context of the expatriation controversy, dual nationality often translated into multiple and conflicting obligations, including mandatory military service.²⁷¹ But the prospect of burdensome obligations dissipated from the middle of the twentieth century onward, as states either abandoned conscription or made it contingent on residence (also the case with taxation).²⁷² Dual nationality became a status that an individual might seek to maintain either for material or associational reasons. And yet into the late twentieth century, it was never addressed from the perspective of individual interests, even in a suggestive manner.²⁷³

²⁶⁹ See Ingram & Triadafilopoulos, *supra* note 165, at 375 (describing how international norms were “omnipresent” in German citizenship reform debates). As Lesley Wexler demonstrates in the parallel context of immigration law, international human rights norms can perform a “non-legal function” and insinuate themselves into national practice by “producing and codifying a human rights discourse,” even in the absence of binding obligation. Lesley Wexler, *The Non-legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359, 360.

²⁷⁰ See *supra* notes 71–76 and accompanying text.

²⁷¹ See BAR-YAACOV, *supra* note 4, at 265 (highlighting “the physical impossibility of performing simultaneously the rights and duties of citizenship in different geographical locations”).

²⁷² See Stephen H. Legomsky, *Dual Nationality and Military Service: Strategy Number Two*, in RIGHTS AND DUTIES OF DUAL NATIONALS, *supra* note 4, at 79. Domicile, rather than citizenship, is thus increasingly important as a determinant of obligations owed to states. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 reporters’ note 1 (1987) (noting that domicile, rather than nationality, has typically governed family and estate law in common law tradition).

²⁷³ Nissim Bar-Yaacov’s major, 1961 study of dual nationality, for instance, continued to attribute serious “psychological conflicts” to the status, making it “detrimental to . . . the well-being of the individuals concerned.” BAR-YAACOV, *supra* note 4, at 266.

That appears to be changing. Scholars are increasingly situating dual citizenship in a rights frame,²⁷⁴ and NGOs have begun to formulate a right to maintain the status.²⁷⁵ The 1997 European Convention on Nationality adopts a rights optic. In contrast to its 1963 predecessor,²⁷⁶ the Convention refrains from condemning multiple nationality as a problem, and instead notes “the desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals.”²⁷⁷ In its operative provisions, the Convention requires states to permit multiple nationality for children born with the status and for persons acquiring nationality automatically by marriage.²⁷⁸ This latter protection advances sex equality in nationality practice²⁷⁹ but can be further conceived as recognizing and validating the fact of concurrent national identities more generally.²⁸⁰ The Convention also provides that states may not make termination of original nationality a condition to naturalization when such termination is not possible or cannot be reasonably required.²⁸¹

The Convention represents a watershed as the first multilateral undertaking that protects dual nationality. It lays a foundation on which to build more expansive protections.²⁸² This new, partial protection of dual citizenship has shifted the discourse to one that accounts for the interests of individuals, not just of states.²⁸³ States are also beginning to recognize dual citizenship through bilateral treaty arrangements.²⁸⁴

The terms of the 1997 European Convention are consistent with global trends. Recent state practice concerning multiple nationality points to increased acceptance of that

²⁷⁴ See Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT’L J. CONST. L. 111 (2010); see also Thomas Faist, *Dual Citizenship: Change, Prospects, and Limits*, in DUAL CITIZENSHIP IN EUROPE, *supra* note 4, at 171, 174 (“If pressed to single out one key factor influencing the increase in tolerance of dual citizenship, it is perhaps the growing importance of human rights in international and national law.”); Knop, *supra* note 132, at 118 (dual nationality “is one possible solution to the problem of equality and nationality”); Rubenstein, *supra* note 10, at 174 (arguing that “principles against dual or multiple nationality are no longer valid in the current framework and that multiple citizenships are in fact the norm and will be embraced in the future”); Rubio-Marín, *supra* note 106, at 142–43 (arguing that emigrants should have a right to retain their original nationality upon naturalization in another state); see also Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism*, 37 INT’L MIGRATION REV. 700, 711 (2003) (“after some time of legal residence immigrants acquire a right to naturalization that should not depend on renouncing their previous citizenship”). Dual nationality has been the subject of substantial scholarly interest in recent years. See *supra* note 4 and accompanying text.

²⁷⁵ See, e.g., MANBY, CITIZENSHIP LAWS IN AFRICA, *supra* note 5, at 15–16 (Open Society Institute–sponsored study calling for acceptance of dual citizenship by African states).

²⁷⁶ See Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, pmbl., May 6, 1963, ETS No. 43, 634 UNTS 221 (“Considering that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe[.]”).

²⁷⁷ European Convention on Nationality, *supra* note 117, pmbl.

²⁷⁸ See *id.*, Art. 14.

²⁷⁹ See, e.g., BOLL, *supra* note 4, at 242–48; Faist, *supra* note 274, at 174; Knop, *supra* note 132, at 109–10.

²⁸⁰ See Spiro, *supra* note 274, at 124.

²⁸¹ European Convention on Nationality, *supra* note 117, Art. 16.

²⁸² See Sabourin, *supra* note 159, at 114 (describing the Convention’s significance beyond Europe).

²⁸³ See Rubenstein, *supra* note 10, at 184 (predicting “increasing willingness in international treaty law to acknowledge and encourage dual and multiple nationality”).

²⁸⁴ Spain is notable in undertaking such arrangements with Latin American states. See BOLL, *supra* note 4, at 51–57; see also *supra* notes 217–20 and accompanying text (describing preferential naturalization regimes); cf. Giovanni Kojanec, *Multiple Nationality*, in TRENDS AND DEVELOPMENTS IN NATIONAL AND INTERNATIONAL LAW ON NATIONALITY, *supra* note 159, at 37 (suggesting that in the absence of customary norms, regulation of multiple nationality should be addressed by treaty).

status.²⁸⁵ At a time when global mobility has produced a surge in the number of birth dual nationals, few states persist in requiring those born with dual nationality to elect one at majority.²⁸⁶ Although the laws of many states (heavily represented among major Asian countries) provide for the termination of citizenship upon naturalization in another country, the number of such states has decreased to the point that it is the minority practice (whereas in the mid-twentieth century it was nearly universal), and pressure from immigrant diasporas appears to be further reducing the number of states refusing to recognize multiple nationality.²⁸⁷ Important “sending” states such as the Dominican Republic, Korea, Mexico, the Philippines, and Turkey have undertaken recent nationality law reforms to allow for the retention of nationality upon naturalization elsewhere. Retreating from post-independence bars on multiple nationality, many African states have also moved to accept that status.²⁸⁸ These changes have served state interests (in terms of maintaining ties with emigrant populations that are an important source of foreign exchange and political influence). Dual nationality reforms have also been welcomed by emigrant communities, who otherwise face both a choice between sentimental loyalties and the prospect of losing certain rights in their homelands.²⁸⁹

The closely studied, 1999 German citizenship reforms are again instructive.²⁹⁰ Although an initial proposal to accept dual nationality in most cases was shelved after conservative politicians successfully converted it into a domestic election issue, the amended regime nonetheless relaxed what were high hurdles to maintaining dual nationality. German citizens may now retain their German nationality upon naturalization in another state so long as they can demonstrate continuing ties with Germany—for instance, the existence of family members there. The 1999 law required those naturalizing as German to terminate their original nationalities; subsequent legislation, however, has eliminated that requirement for citizens of other European Union states and Switzerland.²⁹¹ Under what has been labeled the “option model,” those enjoying birthright citizenship by virtue of noncitizen parental residence in Germany will be required to elect between their German and alternate nationalities at majority. That mechanism will not come into play for years (when those born under the new regime reach the age of eighteen); query whether the mechanism will remain in force at that time.²⁹² Even in the case of naturalizing citizens, the law provides for liberal exceptions for retaining multiple nationality, including when the other state of nationality would impose substantial economic penalties upon the loss of its citizenship. The result in Germany has been the acceptance of dual

²⁸⁵ See, e.g., STANLEY A. RENSHON, *THE 50% AMERICAN: IMMIGRATION AND NATIONAL IDENTITY IN AN AGE OF TERROR*, ch. 1 (2005).

²⁸⁶ Japan is a notable exception. See Kashiwazaki, *supra* note 167, at 450–51.

²⁸⁷ See, e.g., BOLL, *supra* note 4, at 274. On Japan, see Kashiwazaki, *supra* note 167, at 451 (“Insisting on the desirability of ‘only one’ nationality, the official stance of the Japanese government therefore deviates from the current international legal norm.”).

²⁸⁸ See MANBY, *CITIZENSHIP LAW IN AFRICA*, *supra* note 5, at 58. A clear majority now accepts the status. See *id.* at 63 (table with state practice showing that thirty of fifty-three African states now permit dual citizenship).

²⁸⁹ See, e.g., Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001).

²⁹⁰ On the German reforms as relating to dual citizenship, see, for example, Enikő Horváth & Ruth Rubio-Marín, “*Alles Oder Nichts?*” *The Outer Boundaries of the German Citizenship Debate*, 8 INT’L J. CONST. LAW 72 (2010), and Jürgen Gerdes, Thomas Faist, & Beate Rieple, “*We Are All ‘Republican’ Now*”: *The Politics of Dual Citizenship in Germany*, in DUAL CITIZENSHIP IN EUROPE, *supra* note 4, at 45.

²⁹¹ See Horváth & Rubio-Marín, *supra* note 290, at 79.

²⁹² *Id.* at 80–82 (noting that option model remains contested).

nationality in almost half of approved applications for naturalization.²⁹³ Once visibly and staunchly opposed to dual nationality,²⁹⁴ Germany has withdrawn from its previous, principled stance against the status.²⁹⁵

Antidiscrimination norms have been deployed to expand the availability of multiple citizenship. In this context equality issues are implicated whenever dual citizenship is accepted for some classes of citizens but not others. When dual citizenship has been accepted in one context, it has been pressed in others. In Germany, the fact that emigrant Germans are increasingly able to retain their citizenship may explain the high proportion of waivers from a renunciation condition for immigrant naturalization applicants and the growing tolerance of the status there.²⁹⁶ It has been suggested that German acceptance of dual citizenship with the European Union and Switzerland refutes any argument that dual citizenship is unacceptable in principle; some have argued that the current scheme intolerably discriminates against nationals of other states.²⁹⁷ The High Court of Namibia struck down as discriminatory a prohibition against dual nationality on the part of naturalized citizens but not native-born ones.²⁹⁸ In Australia, the fact that immigrants were allowed to keep their original citizenship upon naturalization in Australia was an important factor in allowing native-born Australians to keep their original citizenship after naturalizing elsewhere.²⁹⁹

These challenges to prohibitions on dual citizenship have been launched under domestic constitutional law. They suggest, however, a rights-based foundation. As part of what political scientist Christian Joppke labels the “re-ethnicization of citizenship,” many states have moved

²⁹³ See de Hart & van Oers, *supra* note 186, at 356 n.37 (45 percent of naturalizing Germans permitted to retain original citizenship).

²⁹⁴ In a 1974 decision, for instance, the German Constitutional Court denounced the status “as an evil that should be avoided or eliminated in the interest of states as well as the interests of the affected citizen,” giving rise to the so-called *Ubel doktrin* (“evil doctrine”). See Spiro, *supra* note 24, at 1448 & n.161.

²⁹⁵ See HOWARD, *supra* note 5, at 139 (arguing that 1999 law “includes movement in a liberalizing direction on dual citizenship”); Yvonne Schröter, Christoph Mengelkamp, & Reinhold Jäger, *Key Concept Multiculturalism: Survey of Elites on Dual Citizenship in Germany*, in AN EMERGING INSTITUTION? MULTIPLE CITIZENSHIP IN EUROPE—VIEWS OF OFFICIALS 91, 113 (Devorah Kalekin-Fishman & Pirkko Pitkänen eds., 2008) (on basis of survey data, concluding that “change is taking place” in attitudes of Germans to dual citizenship); Horváth & Rubio-Marín, *supra* note 291, at 83 (“the general principle of avoidance has clearly weakened”).

²⁹⁶ See Gerdes, *supra* note 290, at 69.

²⁹⁷ ECRI REPORT ON GERMANY, *supra* note 265, at 12; Horváth & Rubio-Marín, *supra* note 291, at 80–82; see also Nicole Goebel, *German NGOs Urge Government to Allow Full Dual Citizenship*, DEUTSCHE WELLE (Aug. 23, 2010), at <http://www.dw-world.de/dw/article/0,,5936606,00.html>.

²⁹⁸ *Tihoro v. Minister of Home Affairs*, Case No. (P)A159/2000 [2008] NAHC 65 (July 8, 2008) (Namib.). Six other African states allow dual citizenship for native-born citizens only. See MANBY, CITIZENSHIP LAW IN AFRICA, *supra* note 5, at 63.

²⁹⁹ As the leading authority on Australian citizenship observed, “there was a basic inequality in the former system . . . some people were able to be dual citizens and others were not entitled to this privilege; it depended upon the order of obtaining the citizenship.” KIM RUBENSTEIN, AUSTRALIAN CITIZENSHIP LAW IN CONTEXT, para. 4.6.1.1 (2002). The dual-citizenship fix in Australia was also motivated by the fact that “[t]he law and practice of most countries with which Australia likes to compare itself permits Citizens of those countries to obtain another Citizenship without losing their original Citizenship.” AUSTRALIAN CITIZENSHIP COUNCIL, AUSTRALIAN CITIZENSHIP FOR A NEW CENTURY 65 (2000). This suggests a constructivist explanation for the acceptance of dual citizenship and that such acceptance will become integral to state identity as such. See ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999) (explaining state behavior in terms of the construction of state identity); see also Matthew Gibney, *Citizens into Aliens: Denationalization in Ethical Perspective*, in CITIZENSHIP IN A GLOBALISED WORLD: PERSPECTIVES FROM THE IMMIGRANT DEMOCRACIES (Geoffrey Levey & Ayelet Shachar eds., forthcoming 2012) (arguing that British denationalization law is normatively problematic insofar as it discriminates against dual citizens).

to allow dual citizenship for emigrant populations but have been slow to permit it for immigrants.³⁰⁰ The differential treatment may not be able to withstand antidiscrimination critiques, with the end result that dual citizenship will be broadly accepted however acquired.³⁰¹ Recognition of dual citizenship for immigrants is also reinforced by a territorial/civic conception of access to citizenship. Insofar as a bar on dual citizenship acts as a deterrent to naturalization among immigrants,³⁰² it increases the number of habitual residents present without citizenship. Rules against dual citizenship thus burden the exercise of political rights and the achievement of equal status in the place of residence.³⁰³ CERD has connected these dots in the context of Germany's continuing reluctance to accept the status.³⁰⁴

States are also obliquely confronting a prospective right to dual nationality in the context of officeholding. Several countries constitutionally bar dual citizens from selected government positions, usually including elective office. Among them are Australia,³⁰⁵ Bangladesh,³⁰⁶ Ghana,³⁰⁷ Jamaica,³⁰⁸ Latvia,³⁰⁹ and Malawi.³¹⁰ Several of these regimes have come under attack.³¹¹ In the United States, the federal government recently eliminated adverse presumptions associated with dual citizenship in relation to security clearances for federal and

³⁰⁰ JOPPKE, *supra* note 2, at 63–64.

³⁰¹ See Faist, *supra* note 274, at 176 (noting that proliferation of “exception groups” from bars on dual citizenship could broaden acceptance of the status).

³⁰² See, e.g., Michael Jones Correa, *Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States*, in RIGHTS AND DUTIES OF DUAL NATIONALS, *supra* note 4, at 303 (establishing empirically that dual citizenship rules affect naturalization rates).

³⁰³ Spiro, *supra* note 274, at 124–26; see also Gerdes, *supra* note 290, at 63–64 (noting prominence of equality argument among proponents of dual citizenship in Germany); Schröter, *supra* note 295, at 113, 115 (reporting German perception that dual citizenship will ease integration and advance equality).

³⁰⁴ CERD, Concluding Observations: Germany, para. 20, UN Doc. CERD/C/DEU/CO/18 (2008) (“The Committee recommends that the State party facilitate acquisition of German citizenship by long-term residents and persons born in Germany in order to promote the integration of such residents as may wish to acquire German citizenship without relinquishing their own.”)

³⁰⁵ AUSTRALIAN CONSTITUTION s 44 (disqualifying any person who “is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power”); AUSTRALIAN ELECTORAL COMMISSION, ELECTORAL BACKGROUND: CONSTITUTIONAL DISQUALIFICATIONS AND INTENDING CANDIDATES 3 (2010), at http://www.aec.gov.au/About_AEC/Publications/backgrounders/files/2010-eb-constitutional-disqual-intending-candidates.pdf (dual citizens barred from running for parliament).

³⁰⁶ CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH Art. 66.

³⁰⁷ CONSTITUTION OF THE REPUBLIC OF GHANA Art. 94 (person who “owes allegiance to a country other than Ghana” disqualified from running for parliament).

³⁰⁸ JAMAICA ORDER IN COUNCIL, 1962 [Constitution] sec. 40.

³⁰⁹ CONSTITUTION OF THE REPUBLIC OF LATVIA Art. 37 (“A person with dual citizenship may not be elected President.”).

³¹⁰ CONSTITUTION OF THE REPUBLIC OF MALAWI Arts. 51, 80.

³¹¹ See, e.g., MANBY, CITIZENSHIP LAWS IN AFRICA, *supra* note 5, at 74–75 (describing controversy in Egypt over court-imposed bar on dual nationals in parliament); Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, in FROM MIGRANTS TO CITIZENS, *supra* note 5, at 32, 58–62 (describing debate in Australia); *Referendum Necessary to Change Dual-Citizenship Laws*, GLEANER (Apr. 9, 2009), at <http://www.jamaica-gleaner.com/gleaner/20090409/lead/lead6.html> (Jam.) (characterizing ban on dual citizen officeholders as “absurd”); Agyenim Boateng, *Ghana Dual Citizens Demand for Equal Rights: A Human Rights Issue*, MOD. GHANA (Oct. 23, 2008), at <http://www.modernghana.com/news/187757/1/ghana-dual-citizens-demand-for-equal-rights-a-huma.html>; George Graham, *Banning Dual Citizens from Public Service May Be Cutting Off Jamaica's Nose to Spite Its Face*, JAMAICANS.COM (Aug. 31, 2009), at <http://www.jamaicans.com/articles/primecomments/banning-dual-citizens-from-public-service-may-be-c.shtml>; Charles N. Nkansah, *Ghana's Dual Citizenship Law: A Case for Re-examination?*, GHANAWEB.COM (Nov. 30, 2007), at <http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=134856>.

contractor employment—the only context in which the status was disadvantaged.³¹² These debates do not directly reference a right to maintain dual citizenship. But the fact that restrictions on officeholding are being contested at all could help to establish a norm under which those with multiple citizenship are protected not only in their status, but from discrimination.³¹³

In contrast to citizenship acquisition practices, the trends on dual citizenship are, in effect, unidirectional.³¹⁴ Practices indicating acceptance of dual nationality have not achieved the sort of prevalence that would qualify them as establishing a customary norm of international law, and a refusal to recognize the status remains permissible.³¹⁵ But given the recent trends, acceptance of multiple nationality could ripen into a customary norm or could support treaty provisions that recognize a right to maintain the status in some cases. In particular, as already reflected in the 1997 European Convention on Nationality, a right to maintain birthright dual nationality may be established, especially when derived from mixed parental nationality. The pathway here follows that of the right to expatriate (that is, to voluntarily renounce one's nationality),³¹⁶ which was rooted in changed state practice and subsequently buttressed by such instruments as the Universal Declaration of Human Rights.

III. RIGHTS AND IDENTITY

The international legalization of nationality has important implications for the definition of community and the strength of state-defined identity. In the short term, mandating access to citizenship on a territorial basis and accepting dual nationality will enhance the rights of those who would otherwise be excluded. In the longer term, however, such mandated inclusion may diminish state-based solidarities, as a legal definition of community replaces an organic one. The rights-reinforcing consequence of mandated inclusion may thus be counterbalanced by the declining importance of the state as a locus for protecting rights and distributing resources. This possibility supplies a liberal basis for maintaining sovereign discretion and resisting the imposition of international norms, to the end of shoring up the liberal state. Even

³¹² See Office of the Director of National Intelligence, Intelligence Community Policy Guidance No. 704.2: Personnel Security Adjudicative Guidelines for Determining Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information, at A-5 (Oct. 2, 2008), available at http://www.dni.gov/electronic_reading_room/ICPG_704_2.pdf (“[T]he fact that a U.S. citizen is or has become a citizen of another country does not establish preference for a foreign country. Being a U.S. citizen and a citizen of another country is not prohibited or disqualifying absent a showing of heightened risks to national security.”).

³¹³ For an argument that dual citizenship and high elective office “cannot be easily reconciled with the idea of democratic representation and accountability,” see Bauböck, *supra* note 274, at 717.

³¹⁴ Among the few examples of retrenchment are the reinstatement of a renunciation requirement for naturalization applicants in the Netherlands. See Betty de Hart, *The End of Multiculturalism: The End of Dual Citizenship? Political and Public Debates on Dual Citizenship in the Netherlands (1980–2004)*, in DUAL CITIZENSHIP IN EUROPE, *supra* note 4, at 77 (describing 2003 amendment of Dutch nationality law).

³¹⁵ See, e.g., EXPLANATORY REPORT TO EUROPEAN CONVENTION ON NATIONALITY, *supra* note 220, paras. 9–10 (“9. The question of allowing persons, who voluntarily acquire another nationality, to retain their previous nationality will depend upon the individual situation in States. . . . 10. Consequently, States should remain free to take into account their own particular circumstances in determining the extent to which multiple nationality is allowed by them”); see also Hailbronner, *supra* note 20, at 84 (“[n]o customary international law can be drawn from the state practice”); Kojanec, *supra* note 284, at 40 (“It is clear, in this situation, that no general international rule can be said to exist with regard to multiple nationality.”). But see Faist, *supra* note 274, at 176 (identifying human rights as major driver in “the increase in tolerance of dual citizenship”).

³¹⁶ See *supra* note 95 and accompanying text.

assuming that liberal opposition emerges, however, it is unlikely to reverse the trend toward rights of access to citizenship. The emerging regime described in this article may pose a threat to the integrity of the liberal state. If so, the situation presents another strong rationale for cementing rights protection at the supranational level.

To the extent that emerging international norms pull states to extend citizenship to some that would otherwise be refused the status, the result will be rights advancing. Although increasingly robust protection of human rights has diminished the differential protections afforded citizens and noncitizens,³¹⁷ states remain free to deny equal rights to noncitizen residents, especially in the realm of political rights.³¹⁸ Noncitizens may also lack residency and social welfare rights,³¹⁹ and those lacking citizenship may face general insecurity, especially in less stable political contexts. The postnational vision of rights based entirely on personhood has not yet been realized.³²⁰ These deficits constitute the motivating premise for the “access to citizenship” agenda; the extension of citizenship is a means of securing rights contingent on citizenship status and of insuring, or at least promoting, compliance with other human rights norms. A right to maintain dual citizenship would also be rights enhancing insofar as it insulates identity choices and allows individuals to maintain equal rights in the multiple polities in which they may have interests implicating governance values.³²¹ The new international law of citizenship is thus oriented to rights.

The territorial/civic model also represents the dominant instantiation of liberal theory on citizenship. The persistent territorial presence of individuals who are subordinate in status is anathema to liberal theorists. As Joppke observes, “The legitimacy of the modern state hinges on the congruence between the subjects and objects of rule.”³²² The self-governance imperative also implicates the meta-norm of equality. As noted above,³²³ liberals have long argued the normative basis for maintaining low barriers to naturalization.³²⁴ These theories assert a moral

³¹⁷ See *supra* text accompanying note 167; see also, e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18 (Sept. 17, 2003) (finding undocumented immigrants entitled as matter of human rights to full protection of employment laws); *A (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56 (finding discriminatory treatment of noncitizens for purposes of antiterror laws to violate European human rights standards).

³¹⁸ See, e.g., International Covenant on Civil and Political Rights, *supra* note 108, Art. 25 (guaranteeing political rights to citizens only); see also, e.g., Walter Kälin, *Human Rights and the Integration of Migrants*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 271, 276–78 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (describing permissible discrimination against noncitizens).

³¹⁹ See, e.g., Rubenstein, *supra* note 10, at 164.

³²⁰ See, e.g., CHRISTIAN JOPPKE, *IMMIGRATION AND THE NATION-STATE* 187 (1999); ILA REPORT, *supra* note 124, at 10–14. Indeed, among social scientists there has been a turn away from postnationalism. See, e.g., BENHABIB, *supra* note 7, at 6 (noting “exaggerated claims about the ‘end’ of the state system”); Randall Hansen, *The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe*, 38 *THEORY & SOC’Y* 1 (2008). The “postnational” model posits the declining salience of citizenship status in the wake of perfected human rights protections based on personhood. See YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1995).

³²¹ See Spiro, *supra* note 274.

³²² JOPPKE, *supra* note 152, at 36; see also BENHABIB, *supra* note 7, at 181 (democratic people shows itself “to be not only the *subject* but also the *author of the laws*”).

³²³ BENHABIB, *supra* note 7, at 141.

³²⁴ Michael Walzer most notably among them. See WALZER, *supra* note 7, at 52–61. Some theorists would go so far as to make citizenship automatic after a certain period of residence, even for those who would prefer noncitizen status. See RUBIO-MARÍN, *supra* note 2. This proposal is in tension with basic liberal premises of autonomy insofar as it would impose identity. The proposal may also be symptomatic of emerging postnational conditions in some states. Assuming that naturalization barriers are already low, the need to resort to automatic naturalization evidences

right to citizenship.³²⁵ As such (and to the extent that international human rights has been flirting with natural law),³²⁶ theory is likely to facilitate the recognition—as law—of emerging norms relating to naturalization and birthright citizenship.³²⁷

The legal recognition of these rights could have unintended consequences. Emerging constraints on nationality practices are more determinative of identity than previous constraints, such as they existed. Earlier international norms in the area policed state discretion to define community, thereby ensuring that states did not overreach actual community lines.³²⁸ With respect to expatriation, for example, recognition of a right to transfer attachment from one state to another validated a change in community affiliation.³²⁹ In the absence of such a norm, states could persist in defining their communities in ways that did not reflect actual community boundaries. Likewise with respect to international norms on the nationality of women.³³⁰ As the construction of marriage and family changed during the mid-twentieth century, measures providing for the automatic transfer of a woman's nationality upon marriage to a foreigner may not have accurately reflected the national identities or attachments of women.³³¹

The more recent prospective norms, by contrast, impose constraints that are not correlated with identity or that blur identity boundaries. The emerging territorial citizenship norm mandates membership for those who have no tie to the citizenry other than place of residence. That tie may be insubstantial and subordinate to other attachments. In the past, territorial presence has in most contexts presented a reliable surrogate for other, sometimes unmanageable tests of membership. Under an assimilationist model of immigration, presence over time correlated with actual membership. One could assume that a resident of several years would be, on average, committed to permanent residence³³² and would have attained some level of community membership. As a general matter, the territorial/civic approach to membership expects that “a particular bounded territorial space within which people obey the same political and legal authorities . . . also demarcates the boundaries of their shared political

diminished perceived benefits in acquiring citizenship status. See SPIRO, *supra* note 2. In any case, the proposal would probably also violate long-standing international norms that prohibit states from overreaching in ascribing nationality. See *supra* note 18 and accompanying text (noting accepted international norm against nonvolitional naturalization). Ayelet Shachar avoids this difficulty by devising a *jus nexi* in which citizenship turns on the social fact of membership. See SHACHAR, *supra* note 2, ch. 6. Territorial presence would be a primary, though not exclusive, metric of eligibility; the scheme would seek to bring noncitizen “resident stakeholders” into the citizenship fold by way of achieving a better fit between “democratic voice, factual membership, and citizenship entitlement.” *Id.* at 181.

³²⁵ See BENHABIB, *supra* note 7; CARENS, *supra* note 157.

³²⁶ See, e.g., MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 132–44 (2008).

³²⁷ Cf. JOPPKE, *supra* note 152, at 36 (“In a liberal-democratic context, the presence of sizeable, long-settled immigrant populations cannot but exert pressure toward making citizenship more accessible to and inclusive of immigrants.”).

³²⁸ See *supra* notes 14–18 and accompanying text.

³²⁹ See *supra* notes 95–97 and accompanying text.

³³⁰ See *supra* notes 123–29 and accompanying text.

³³¹ See, e.g., Knop, *supra* note 132, at 111–16.

³³² To the extent that such a period of residence did not reflect a longer-term commitment to permanent residence in the country of immigration, practice through the mid-twentieth century provided for the forfeiture of naturalized citizenship upon return as a resident to the immigrant's country of origin. See Spiro, *supra* note 24, at 1442. Such enforcement of adopted community attachment is no longer undertaken today. A naturalized citizen retains his citizenship even if she abandons all ties to her country of naturalization and revives those of her country of origin.

loyalty.”³³³ There is a further understanding that extending citizenship will itself enhance solidarity by facilitating full political integration.³³⁴ If this correspondence of territorial presence, citizenship, and social membership persisted today, mandating access to citizenship for long-term residents would be identity reinforcing (or at least not identity diluting) while also advancing other rights.

These assumptions are becoming less stable.³³⁵ Globalization enables communities both to persist over distance and to isolate in proximity. It has also been associated with increased migration flows.³³⁶ Individuals can be geographically present over long periods of time without developing community ties or at least not ties to a state-defined community. Human existence has an inevitable spatial component; some community connections will arise from presence over time. But those ties can be restricted to the local level,³³⁷ and they may not come to represent an individual’s primary identity, especially in the face of sustained contact with home-country communities eased by improved communications and mobility.³³⁸ Nor will citizenship acquisition itself necessarily enhance community solidarity.³³⁹

To the extent that territory no longer correlates with community, and to the extent that (as Charles Maier puts it) the sense of territory becomes “plural and fugitive,”³⁴⁰ governance defined on a territorial basis may lose authority. Individuals who do not share a sense of identity with other individuals may be unwilling to commit to common structures that will decide the distribution of resources, whether in the form of rights or material goods.³⁴¹ Governance

³³³ Orentlicher, *supra* note 155, at 317; *see also* BENHABIB, *supra* note 7, at 219 (noting “crucial link between democratic self-governance and territorial representation”; conceiving the “scope of democratic legitimacy” to be contingent on “the *demos* which has circumscribed itself as a people upon a given territory”).

³³⁴ *See, e.g.*, PICKUS, *supra* note 2, at 175–78.

³³⁵ *See* BENHABIB, *supra* note 7, at 178 (“We are at a point in political evolution when the unitary model of citizenship, which bundled together residency upon a single territory with the subjection to a single administration of a people perceived to be more or less cohesive entity, is at an end.”).

³³⁶ *See* United Nations Population Division, Trends in International Migrant Stock: The 2008 Revision 1–3 (report with summary of UN Database POP/DB/MIG/Stock/Rev.2008 (2009)), at http://www.un.org/esa/population/migration/UN_MigStock_2008.pdf (describing increase in global migration, especially to developed countries).

³³⁷ *See, e.g.*, Rainer Bauböck, *Reinventing Urban Citizenship*, 7 CITIZENSHIP STUD. 139, 149–50 (2003); Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411, 426 (2007) (both noting possibility of local identity detached from national one).

³³⁸ *See, e.g.*, Kim Barry, *The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006); Maier, *supra* note 1, at 83–84 (suggesting that “a sense of diaspora identity, or at least a sense of multiple homelands, will become increasingly generalized”); *cf.* ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 171 (1996) (concluding that United States has been transformed from “a land of immigrants” to “being one node in a postnational network of diasporas”).

³³⁹ Anecdotal evidence suggests that, in the U.S. context, some people secure naturalization as a form of protected exit strategy, allowing return to homeland while insuring continued access to the United States. *See* Greta Gilbertson & Audrey Singer, *The Emergence of Protective Citizenship in the USA: Naturalization Among Dominican Immigrants in the Post-1996 Welfare Reform Era*, 26 ETHNIC & RACIAL STUD. 25, 37–39 (2003) (describing cases in which naturalization was undertaken at time that applicants contemplated leaving country of naturalization and returning to country of origin).

³⁴⁰ Maier, *supra* note 1, at 84.

³⁴¹ The dependence of democratic governance capacity on solidarity is a defining feature of liberal nationalism. *See, e.g.*, DAVID MILLER, ON NATIONALITY 90–99 (1995); SHACHAR, *supra* note 2, at 47 (noting “social bonds and mutual responsibilities that, through joint action and decision making, help bind a people together and motivate them to redistribute internally the benefits of membership in a relatively stable and self-ruling political community”); David Abraham, *The Boundaries and Bonds of Citizenship: Recognition and Redistribution in the United*

in the absence of community may be thin. An international law norm that requires citizenship to be afforded on the basis of presence could thus diminish state power. In the long run, internationally mandated access to citizenship may dilute its importance and facilitate a post-national destination in which citizenship status becomes marginalized as a vehicle for protecting rights.

A norm protective of dual citizenship could also undermine the strength of communities represented by the citizenship tie. On the one hand, dual citizenship reinforces the institution of the state to the extent that it facilitates expressions of national identity that were precluded in the old order, in which multiple attachments were disfavored.³⁴² A person who has ties to more than one national community can formalize those ties through dual citizenship.³⁴³ On the other hand, protecting that dual status will tend to dilute the categorical importance of identity defined in citizenship terms. The old regime of mutual exclusivity reinforced the primacy of national identities, with the distinctions among national communities clearly drawn. Dual citizenship blurs those boundaries; identity boundaries become less clear and, as a result, less defining.³⁴⁴

Dual citizenship also lowers the cost of citizenship acquired or maintained for non-affective, instrumental reasons by eliminating the need to abandon citizenship representing primary community attachment. The cost of adding or maintaining citizenships is relatively low; few obligations are now contingent on the status.³⁴⁵ Dual citizenship facilitates the acquisition or maintenance of citizenship for such instrumental purposes as securing absolute entry rights and other immigration benefits (including protection against deportation and exclusion), insuring eligibility for social benefits, and overcoming restrictions on property rights—for which no actual attachment to the national community may be necessary. These instrumental motivations may be more pronounced in the context of naturalization, where the affective ties to the state of immigration may be thin. Acceptance of dual citizenship lowers the cost of naturalization by allowing new citizens to maintain their homeland tie (which they might otherwise be reluctant to relinquish), thereby removing an obstacle to instrumental naturalization. Contrary to the suggestion of some commentators,³⁴⁶ the problem of divided loyalties is a less serious concern in a world in which dual citizens are not often called to play favorites between their states of citizenship. Nevertheless, with its lower threshold for national membership, dual citizenship may render that membership less meaningful, weaken the communal bond, and diminish the state as a locus of authority.

States, Germany, and Israel, in *MIGRATION IN HISTORY: HUMAN MIGRATION IN COMPARATIVE PERSPECTIVE* 201 (Marc S. Rodriguez & Anthony Grafton eds., 2007).

³⁴² See Bosniak, *supra* note 120, at 979.

³⁴³ Not that all or even most of them do, at least when the individual eligible for additional citizenship is required to undertake an affirmative act. When Mexico in 1998 made possible the restoration of citizenship for the hundreds of thousands who had previously lost it by naturalizing in the United States, only sixty-seven thousand availed themselves of the offer in the initial five-year window. See DAVID FITZGERALD, *A NATION OF EMIGRANTS: HOW MEXICO MANAGES ITS MIGRATION* 161 (2009). Now, however, dual citizenship is the default position of naturalizing immigrants, who retain their original citizenship while acquiring a new one.

³⁴⁴ See Peter J. Spiro, *Dual Citizenship: A Postnational View*, in *DUAL CITIZENSHIP IN GLOBAL PERSPECTIVE*, *supra* note 4, at 189.

³⁴⁵ See *supra* text accompanying note 272.

³⁴⁶ See GEYER, *supra* note 74; RENSHON, *supra* note 285.

The dialectic through which mandated membership may undermine its ultimate value is reflected in a parallel track of liberal theory. Community cohesion and identity may be contingent on a group's ability to discriminate, to demand singular membership, and to set the terms for admission and expulsion. Michael Walzer finds it difficult to contemplate the alternative. "Membership as a social good is constituted by our understanding," he observes. "[I]ts value is fixed by our work and conversation; and then we are in charge (who else could be in charge?) of its distribution."³⁴⁷ Insofar as a community loses these powers, whether to international law or otherwise, it loses the ability to police its boundaries. That is, insofar as somebody else is in charge of membership decisions, the understanding and mutual trust that makes for "communities of character" (to deploy another Walzerian formulation)³⁴⁸ is undermined—and with it, the special bonds that support democratic citizenship.

In the past, community boundaries were sustained through immigration control, in both practice and theory, and through the political assimilation of those admitted. Liberal theory required equal status for those present, but allowed for the territorial exclusion of others, even though such exclusion was itself inherently illiberal. This approach worked, more or less, so long as immigration measures were enforced and the number of migrants (legal and not) was proportionally low. Leaving aside questions of continuing state capacity to police immigration, these numbers have grown significantly in recent years. Many states now host large populations of undocumented noncitizens³⁴⁹—which challenges the key liberal premise of immigration control.

To the extent that immigration control has been degraded, citizenship could present a more defensible perimeter. Liberal support for integrative citizenship requirements is growing.³⁵⁰ To the extent that language and civics requirements are aimed at ensuring responsible political participation and civic solidarity, they are congruent with liberal conceptions of citizenship. This congruence may explain why such requirements, when reasonably applied, pass muster under emerging norms relating to access to citizenship.³⁵¹ It also may explain why some liberals appear uncomfortable with the emerging prevalence of dual citizenship.³⁵² At a more general level, the prospective threat to the state could supply a liberal argument against norms mandating access to citizenship. Could one argue, on a liberal basis, that state discretion to set citizenship requirements should remain unconstrained by international law, even when such practices would otherwise be considered discriminatory or deny citizenship to habitual residents? Any barrier to citizenship implies exclusion, which at some level is illiberal. But threats to the very project of liberalism justify illiberal responses. If mandated membership is plausibly

³⁴⁷ WALZER, *supra* note 7, at 32. Benhabib similarly frames membership rules as "an ongoing process of constitutional self-creation." BENHABIB, *supra* note 7, at 177 (asserting that "admittance does not imply automatic membership" and that "[d]emocratic peoples will still have to devise rules of membership at the national, subnational, regional, and municipal levels").

³⁴⁸ WALZER, *supra* note 7, at 62.

³⁴⁹ See, e.g., Demetrios G. Papademetriou, *The Global Struggle with Illegal Migration: No End in Sight*, MIGRATION POLICY INSTITUTE (Sept. 2005), at <http://www.migrationinformation.org/feature/display.cfm?ID=336>.

³⁵⁰ See, e.g., Christian Joppke, *The Retreat of Multiculturalism in the Liberal State: Theory and Policy*, 55 BRIT. J. SOC. 237 (2004) (describing growing liberal opposition to multicultural policies, including those implicating citizenship, in Australia, the Netherlands, and the United Kingdom).

³⁵¹ See *supra* 197 and accompanying text.

³⁵² See, e.g., David A. Martin, *New Rules on Dual Citizenship for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 1 (1999).

understood to undermine the liberal state, might that argue for rejecting a norm that would otherwise be rights advancing and for abandoning efforts to establish a right of access to citizenship?

This question poses a formidable challenge to liberalism. After decades of bracketing the boundaries of membership in the state,³⁵³ liberal theorists are only beginning to engage these issues. Some are now framing citizenship as a right, but are doing so only at the highest level of generality. Because they are still working from the premise that presence will result in social solidarities, the right appears to be largely an extension of earlier understandings. To the extent that that premise no longer holds, however, liberal theorists will have to confront the difficulty of territorial governance that no longer coincides with community boundaries.

In the wake of that decoupling, the international right to self-determination supplies a possible liberal counter-value to a putative right to citizenship.³⁵⁴ Unconstrained capacity to draw the boundaries of membership echoes in the logic of self-determination. The connection between self-determination and international norms respecting citizenship practices has yet to be fully explored, perhaps because the emergence of the right to self-determination was historically integrated with the end of colonialism and the self-determination of subordinated groups. Norms defining access to citizenship, by contrast, largely target powerful states. There might thus be a dissonance if self-determination values were invoked to the benefit of developed states. And yet the logic of self-determination seems no less applicable to, say, Germany than to former colonial possessions. International norms mandating access to citizenship in Germany compromise Germany's capacity to define its people as they might collectively prefer, at least insofar as the German state remains the institutional agent of the "German" people.

But other values may weigh more heavily. Unlike immigration control—the elimination of which would not only dilute communal solidarity but also potentially undermine public order and governmental functions³⁵⁵—the prospective threat posed by citizenship access is incremental, long term, and compounded by other forces. The risk to the state is at this point difficult to isolate and resistant to empirical testing. For liberal theorists, that may tip the normative balance in favor of access to citizenship, the rights-advancing consequences of which are immediate and individual. Self-governance and equality norms may also be considered incommensurable, even if their validation undermines the coherence of liberal governance. It is also possible, however, that some liberal theorists will begin to draw back from an international law of citizenship, at least to the extent that mandated citizenship is seen as undermining the state. Such a stance would surely be strongly contested and could draw substantial fire.³⁵⁶

³⁵³ Walzer was alone in confronting issues posed by immigration and citizenship. By contrast, John Rawls avoided questions relating to immigration and citizenship by assuming a society into which everyone was born. See JOHN RAWLS, *POLITICAL LIBERALISM* 12 (1993).

³⁵⁴ See Goldston, *supra* note 119, at 338; see also Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 *ETHICS* 109 (2008).

³⁵⁵ See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 95 (1980) ("the only reason for restricting immigration is to protect the ongoing process of liberal conversation itself").

³⁵⁶ Such was the case when two respected academics made the liberal constitutional case against birthright citizenship in the United States. See ROGERS SMITH & PETER SCHUCK, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985). For critical responses, see, for example, Gerald L. Neuman, *Back to Dred Scott*, 24 *SAN DIEGO L. REV.* 485 (1987), Joseph Carens, *Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States*, 37 *U. TORONTO L.J.* 413 (1987), and David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 *YALE J. INT'L L.* 278 (1985).

Resolving these liberal dilemmas is beyond the scope of this article. I am skeptical that reinforcing exclusionary citizenship practices will reinforce or resurrect strong national communities. Other forces of globalization are also tending to undermine state solidarities. Even restrictive citizenship requirements will be leaky in the sense that they imperfectly reflect social membership, especially when acceptance of dual citizenship allows for maintenance of secondary affiliations. In other words, resisting the exogenous imposition of citizenship standards may not be effective in propping up the liberal state. That possibility seems material to the normative balance.

Theory aside, access to citizenship is likely to gain traction on the ground. Among advocates and decision makers in international institutions, rights of access are likely to overcome objections aimed at bolstering the state. Neither group is accustomed to defending state prerogatives in the absence of specific exigencies. To give a continuing pass to citizenship practices will seem increasingly incongruous to those operating the machinery of international human rights, especially as global mobility puts the vulnerabilities of noncitizens into greater relief. Even state actors, now fully invested in the human rights complex, are unlikely vigorously to resist the imposition of international norms on citizenship practices. States also have incentives not to raise barriers to citizenship too high, lest they lose those who add value to the national community.³⁵⁷ Although restrictionist political forces will continue to press for heightened citizenship barriers, they have focused more on immigration than citizenship. Although emerging citizenship norms remain provisional and could be reversed, the intellectual and institutional momentum points to an entrenching of the new international law of citizenship.

At the same time, human rights proponents should be sensitized to the potential for state decay and to the effect that such decay could have on the protection of rights. Securing access to citizenship as a matter of international law may undermine state capacity. This prospect adds further incentive to advance the effective protection of rights through international and other nonstate agents. The note here is cautionary. At the same time that access to citizenship would significantly advance human rights today, it may accelerate instability and change in the global order.

IV. CONCLUSION: THE DEEPENING SWATHE OF INTERNATIONAL LAW

That international norms are becoming consequential to national self-definition evidences the changing nature and expanding scope of international law. In the old world, international rules relating to nationality were designed and applied to minimize friction among states; although these rules may have constrained states in their attribution of nationality, they were ultimately to the benefit of states, not individuals. That was consistent with the orienting principle of international law: the management of order among states. Individuals were no more than incidental beneficiaries of that principle, and their interests were of no direct account under international law. To the extent that states desisted from conduct that destabilized international order, international law protected state autonomy in the name of sovereignty. And at the core of sovereignty was the unfettered discretion to set the terms of membership.

³⁵⁷ This problem supplies an important explanation not only for the embrace of dual citizenship by sending states from the South, but also for the ethnizenship model adopted by European states in allowing citizenship to be retained by emigrants and their descendants. See JOPPKE, *supra* note 2; see also *supra* text accompanying note 324.

In this sense, emerging international norms regarding national membership show how far international law has come. Community self-definition is constitutive and foundational in the sense that it is prior to any act of the community; what states do is determined by the individuals who compose them. If citizenship practices are not immune to international legal constraint, then nothing is. Nationality law is the last bastion in the citadel of sovereignty. That is not to say that international law now delivers a comprehensive regulatory regime. States will retain important discretionary powers into the future. But no function of governance will be shielded from international law as a categorical matter, membership decisions included.