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An introduction

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# Citizenship and constitutional law: an introduction

Jo Shaw\*

## 1. Setting the scene: the goals of this collection

The goal of this collection is to uncover the different ways in which constitutional law and citizenship intersect. Linking citizenship and constitutional law in this way can help to elucidate many of the foundational dilemmas of the modern state, as well as offering a deeper understanding of the condition of citizenship in the modern world. However, given the breadth of the field under review, the focus needs to be made a little more precise. So five key questions have been picked out for attention in the separate parts of this volume:

- How does citizenship relate to the constitutional fundamentals of democracy and legitimacy, including the concepts of constituent power, patriotism and allegiance (Part I)?
- What role does constitutional law play in the 'making (and unmaking) of citizens' both as a matter of general principle (Part II) and also specifically in certain national contexts (Part III);
- How does the constitutional law/citizenship interface fare where there are plural sources of authority and legitimacy, and fragmented systems of governance for citizenship (Part IV)?
- How does a prism of constitutionalism contribute to understanding better the contestation of the rights and duties of citizens and of citizenship (Part V)?

The advantage of taking a constitutional approach is that it enables us to take a close look at the fundamentals of the legal status of citizenship, whilst exploring other aspects of citizenship which are not as effectively captured purely by a formal legal approach to membership, such as issues of identity and community. To put it another way, constitutions bring with them not only a rule-of-law perspective on the norms of citizenship, but also certain types of 'baggage' which help us to fill out the notion of citizenship, by providing the context and history which underpins the formal rules.<sup>1</sup> Hence a 'constitutional ethnographies'<sup>2</sup> approach to studying citizenship can be very fruitful, focusing on the lived details of citizenship regimes in constitutional settings. The point is not to highlight the

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<sup>1</sup> C. Thornhill, 'The Sociology of Constitutions', (2017) 13 *Annual Review of Law and Social Science* 493–513.

<sup>2</sup> This term was initiated by Kim Lane Scheppele, 'Constitutional ethnography: an introduction' (2004) 38 *Law and Society Review* 389–406, and it has been widely applied in constitutional studies, e.g. in relation to the study of citizenship in the former Yugoslavia: J. Shaw and I. Štiks, 'Citizenship in the new states of South Eastern Europe', (2012) 16 *Citizenship Studies* 309–321.

abstract characteristics of different systems,<sup>3</sup> and perhaps to compare them using formal or quantitative methods of analysis in order to predict or explain processes of change, or similarities and differences.<sup>4</sup> Rather it is to explore the themes that emerge when two dimensions such as ‘citizenship regimes’ and ‘constitutional law’ are put into conversation with each other by means of deeply contextual thick descriptions of many dimensions of the issue. It is this type of interdisciplinary approach that is predominant amongst the papers collected in this volume, although the various texts are rooted in many different disciplines within which scholars have explored the concept of citizenship, including law, political science, political theory, international relations and sociology.

## 2. A brief note on terminology

The topic of this collection is ‘citizenship’, but from time to time in various texts the concept of ‘nationality’ is referred to. There is considerable confusion about the relationship between these two terms, which are used sometimes synonymously and sometimes to designate quite different concepts or practices. There is also profound variation in precise usage across languages and cultures. So far as reference is made to the legal status held by individuals, recognised both within and across states by domestic law and international law, it is quite common and unproblematic to deploy the two terms as synonyms. However, in English it is clear that the two terms do have different roots (the ‘*natione*’ and the ‘*civis*’), and this is frequently the case also in other languages, including those without Latin or Greek foundations. This is clear from the EUDO Citizenship terminology glossary.<sup>5</sup>

International law scholarship generally refers to ‘nationality’, with its roots in (nation)-state-building, when referring to the legal status of individuals as recognised across the global system of states. But that term is also frequently used to denote a set of concepts more closely linked to ideas of the nation, of ethnicity and of common cultural affinities via language, territory and history. There were, for example, ‘nationalities’ recognised within the Austro-Hungarian empire, and these have been in some cases the forerunners of the citizenships of states which have emerged from that empire (e.g. Slovak or Slovenian). In other cases, these nationalities remain stateless ‘national identities’, which cut across the boundaries of modern nation states or correspond to modern ‘regions’ such as Galicia or Transylvania. Citizenship, with its connotations of shared rule and civic purpose, is the term more frequently used when discussing the full range of (civic, political and social) membership rights, duties and commonalities articulated and/or protected under a national constitution and its associated institutions. Despite these distinctions, the capacity for confusion is legion, including in circumstances

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<sup>3</sup> For a legal approach see G.-R de Groot, ‘Nationality Law’, in J. Smits (ed.) *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar, 2<sup>nd</sup> Ed. 2012, 600-619.

<sup>4</sup> M. Vink, R. Bauböck and J. Shaw, ‘A short history of comparative research on citizenship’, in O. Vonk (ed.), *Grootboek: Opstellen aangeboden aan Prof. mr. Gerard-René de Groot ter gelegenheid van zijn afscheid als hoogleraar rechtsvergelijking en internationaal privaatrecht aan de Universiteit Maastricht, Alphen aan den Rijn: Wolters Kluwer, 2016, 409-422.*

<sup>5</sup> For details see the EUDO Citizenship glossary and terminology section: <http://eudo-citizenship.eu/databases/citizenship-glossary/terminology>.

which matter, such as the recently introduced requirement in the UK criminal courts that the defendant state his or her ‘nationality’.<sup>6</sup>

### 3. The state and ‘beyond the state’: intersections of citizenship and constitutional law

In this collection, much emphasis is placed on what states do, how they do it, why they do, and how the actions of states can be justified against norms of justice, equality and legitimacy. But citizenship is not just something that is ‘given’ by states. Both the scope and extent of citizenship as a status as well as citizenship rights and duties are frequently contested within and across states by citizens’ and non-citizens’ ‘citizenship practices’. International law, alongside constitutional law and other fields of domestic law, also plays an important role<sup>7</sup> and René de Groot has gone so far as to argue that there exists a *European* nationality law, at least in the making.<sup>8</sup> In today’s world, citizenship is best understood not in unitary terms but as a set of relationships nested within multilevel and plural sources of legal authority. Accordingly, looking beyond the hegemony of the state, these collected essays also offer an insight into what Melissa Williams has termed the ‘citizenships of globalization’.<sup>9</sup>

Under that broad heading, we will look into the many different challenges that national citizenship models and regimes face from above, from below and from the side (i.e. supranational, subnational and transnational citizenship issues). Various non-state entities, such as the European Union or polities not (fully) recognised under international law, have each purported to confer a status termed ‘citizenship’ on individuals, sometimes in competition with and other times in collaboration with existing states. Is it right and proper to call these statuses ‘citizenships’? A variety of different social and geopolitical phenomena, including increased international mobility, the creation of new states pursuant to decolonialization, as well as the break up of a number of (federal) states, have each contributed to increased ‘demand’ for dual nationality. There have been widespread concessions on this point across state practice, at least in Europe and North America, although the manner and extent to which dual citizenship is permitted for different categories (those acquiring it by birth, immigrants, and emigrants) vary greatly.<sup>10</sup> Data collected by Maastricht University for the case of naturalisations indicate that around 75% of countries in the world allow dual citizenship for some groups, and only 25% have provisions restricting either immigrants or emigrants retaining or

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<sup>6</sup> For a short note on this measure, which is part of the so-called ‘hostile environment’ intended to deter illegal immigration, but which could have serious and unforeseen consequences for defendants who literally do not know which ‘citizenship/s’ or ‘nationalit/ies’ they have or do not understand the question in so far as it creates a new criminal offence, see: C. Yeo, ‘The “hostile environment” seeps into criminal trials: defendants must state nationality or face prison’, 17 November 2017, <https://www.freemovement.org.uk/defendants-nationality-criminal-trials/>.

<sup>7</sup> P. Spiro, ‘A New International Law of Citizenship’, (2011) 105 *American Journal of International Law* 694-746.

<sup>8</sup> G.-R. de Groot, ‘Towards a European nationality law’, (2004) 8 *Electronic Journal of Comparative Law*, no.3 (October).

<sup>9</sup> M. Williams, ‘Non-territorial boundaries of citizenship’, in S. Benhabib *et al* (eds), *Identities, Allegiances, Affiliations*, Cambridge: Cambridge University Press, 2007, 226-256.

<sup>10</sup> For an up to date review see P. Spiro, ‘Multiple Citizenship’, in A. Shachar *et al* (eds.), *The Oxford Handbook of Citizenship*, Oxford: OUP, 2017, 623-643.

gaining a second nationality.<sup>11</sup> This trend towards dual citizenship in turn creates additional pressures for those states that are still 'hold outs' on this point, although there remain parts of the world, especially on the African and Asian continents, where dual citizenship is more an exception than the general norm. Even where dual citizenship is not an option (e.g. India) a form of external citizenship has been created to foster relations with the diaspora. Within states, regions – whether or not pressing for secession – often seek greater powers and autonomy in relation to aspects of citizenship. This is confined, most often, to the sphere of social citizenship, but some (con)federal regions have considerable powers in relation to immigration (e.g. Québec) or, as in Switzerland, jealously guard their competences relating to citizenship acquisition through naturalisation against encroachment by the federal legislator. In sum, we see with citizenship a clear case of fragmented governance,<sup>12</sup> and the splintering of what was generally thought, after the rise of the Westphalian state, to be a sphere of exclusive national competence.

Yet despite all of these actual and potential challenges to the state, the starting point for our discussion must still be the state, as recognised in international law. It has become a standard tenet of international law, in relation to what it terms 'nationality', that it is for each state – according to its sole discretion – to determine issues of legal membership *within* that state.<sup>13</sup> Of course, there are legal and practical constraints on what states may do in relation to the distribution of citizenship (especially stemming from international law and from the laws of other states). Chief amongst these is perhaps the 'right to a nationality' and the right not to be arbitrarily deprived of his (sic) nationality, contained in the Universal Declaration of Human Rights, although that provision does not decree *which* state must confer nationality.<sup>14</sup> This provision, like various instruments on statelessness,<sup>15</sup> is intended merely to be a guarantee of the basic 'right to have rights' famously articulated by Hannah Arendt.<sup>16</sup> It is widely assumed amongst scholars that the international right to citizenship exists to mitigate the harms caused by statelessness.<sup>17</sup> But the basic principle still holds true as a starting point. It is states that confer citizenship on individuals, as a basic sorting principle, and it is states that are required to recognise the citizenship status conferred by other states, subject to what has been termed the 'genuine link' principle articulated by the International Court of Justice in the *Nottebohm* case.<sup>18</sup> Even in relation to the world's most developed form of supranational citizenship – that of the European Union – it is *national citizenship* that provides the exclusive access point to being a Citizen of the Union.

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<sup>11</sup> Personal communication from Professor Maarten Vink, on file with author, 19 November 2017; full data is available at <https://macimide.maastrichtuniversity.nl/dual-cit-database/>.

<sup>12</sup> J. Trachtman, 'Fragmentation of Citizenship Governance', A. Shachar *et al*, above n.10, 599-620.

<sup>13</sup> See Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 1930).

<sup>14</sup> Article 15, Universal Declaration of Human Rights.

<sup>15</sup> See the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

<sup>16</sup> H Arendt, *The Origins of Totalitarianism*, London: Andre Deutsch, 1986 at 291.

<sup>17</sup> M. Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 *The Journal of Politics* 646-58.

<sup>18</sup> Liechtenstein v. Guatemala [1955] ICJ 1.

When exploring how states regulate citizenship from the perspective of national law, it is logical to begin with the national constitution, whether this comprises a single document, or multiple documents and associated principles. The Oxford English Dictionary defines constitution as 'A body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed.' What is missing from this definition is any sense of agency: Who brought this constitution into being? Who is acknowledging the authority and legitimacy of the constitutional framework? Who is governing and who is being governed? Constitutions can make citizens; but citizens also make constitutions. Accordingly, this is where the intersection of concepts of citizenship, democracy and constituent power come into play, at least as regards the constitutional frameworks of states aspiring to democratic credentials. Once we go beyond the idea of citizenship as a simple sorting principle and formal legal status, and recognise that citizenship encapsulates also expressions of political autonomy and community identity, we can discern that the relationship between citizenship and constitutional law is likely to be a complex and iterative one.

From the starting point of comparative constitutional law, Rubenstein and Lenagh Maguire suggest that

Citizenship is a prime site for comparisons between different constitutional systems, for the idea of citizenship, and the ideals it is taken to represent, go to the heart of how states are constituted and defined.<sup>19</sup>

Modern constitutions and modern citizenship share a great deal of history in common; the central political power (i.e. historically the absolute monarch) has been placed under the authority of common institutions at broadly the same point in history as the human subject has emerged as a distinctive and sovereign political agent. This agent, now 'the citizen', owes more than a personal relationship of allegiance to the sovereign (i.e. as 'subject'), but rather is embedded in a network of reciprocal vertical and horizontal relationships.<sup>20</sup> That is not to say that it is impossible to trace citizenship back further than the French or American revolutions or indeed the Peace of Westphalia. Indeed, most comprehensive histories of citizenship will start in Greek and/or Roman times and also identify other important developments in the city states of the middle ages.<sup>21</sup> But the distinctive concept of modern liberal and democratic citizenship in the Westphalian state tradition is a more recent innovation, albeit one that draws quite substantially on its origins in city-scale membership models. The modern model relies heavily on a distinctive shift towards universalist thinking that owes much to the European enlightenment, even though citizenship status and citizenship rights in most present day nation states were not remotely universally

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<sup>19</sup> K. Rubenstein and N. Lenagh-Maguire, 'Citizenship and the boundaries of the constitution', in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law*, Edward Elgar: Cheltenham, 2011, 143-169 at 143.

<sup>20</sup> See S. Seubert, 'Dynamics of Modern Citizenship Democracy and Peopleness in a Global Era', (2014) 21 *Constellations* 547-559 at 548.

<sup>21</sup> See R. Balot, 'Revisiting the Classical Ideal of Citizenship', in Shachar *et al*, above n.10, 17-35 and P. Riesenberg, *Citizenship in the Western Tradition: Plato to Rousseau*, Chapel Hill: University of North Carolina Press, 1992.

allocated at least until the 20<sup>th</sup> century. Even in the face of challenges of globalization in the neo-liberal world, the model of national citizenship is remaining remarkably resilient, adjusting to allow space for new models of affinity and legal belonging, without fading away.<sup>22</sup>

One element that modern constitutionalism and modern citizenship share in common is that they attach importance to narratives of belonging, identity and loyalty as well as to the importance of shared rule by law and under the law. Small changes can make a considerable difference to core narratives as the case of Hungary shows. It was the only central and Eastern European state not to adopt a new constitution after the end of the cold war in 1989. In fact, the adoption of a formal constitution for Hungary was delayed until 2011. It was a highly politicised and controversial process when it happened, as the text sought to address not only negative dimensions of the communist era, but also Hungary's perceived unjust treatment in relation to boundaries under the Treaty of Trianon after the First World War. The name of the state was changed from the *Republic of Hungary* to 'Hungary', and the preamble refers to 'the Hungarian Nation', reinforcing links with diaspora / external Hungarians (and their descendants) in neighbouring states, who have been given increased access to Hungarian citizenship on a 'restitutionary' ethnic basis in recent years, as well as the right to participate in national elections.<sup>23</sup>

However, just as there are no two identical constitutions, so there are no two identical ways in which constitutions deal with the issue of citizenship. That much will be evident from case studies of national citizenship regimes presented in Part III.

#### **4. The nature and implications of 'constitutional' citizenship**

Rubenstein and Lenagh Maguire use four comparator states: Australia, Canada, the United States of America and Israel. Across these states, they discern such complexity and diversity of approach that even a broad thematic summary that distinguishes between 'constitutional', 'quasi-constitutional' and 'statutory' approaches to the legal structuring of citizenship regimes is hard to sustain.

Some constitutions mention citizenship, others do not; yet others focus instead on the amorphous concept of 'the people', who may, or may not, be identical to the citizenry. Many constitutions highlight only 'the alien', citizenship's 'other' and not the citizen herself. In fact, the GlobalCIT data on citizenship laws demonstrate that Latin America is somewhat of an outlier compared to other continents as regards constitutional engagement with the terms of citizenship, especially conferment of citizenship by birth in the territory (*ius soli*).<sup>24</sup>

In many cases, constitutional frameworks are limited to conferring statutory authority on the legislature to regulate the scope and character of citizenship; of course, when this is the case, it is notable how much power is placed in the hands

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<sup>22</sup> B. Hindess, 'Neo-liberal Citizenship', (2002) 6 *Citizenship Studies* 127-143.

<sup>23</sup> S. Pogonyi, *Extra-Territorial Ethnic Politics, Discourses and Identities in Hungary*, New York: Palgrave Macmillan, 2017.

<sup>24</sup> See generally <http://eudo-citizenship.eu/country-profiles>.

of the ordinary legislator to of determine the scope of the citizenry. That is, fundamental changes to citizenship law are not subject to super-majorities. On the other hand, constitutional definitions of citizenship may sometimes be too hard to amend. Yet when Ireland, for example, needed a referendum in 2004 to change the definition of *ius soli*, and to restrict access to citizenship for children born in the territory only to those whose parents were either citizens or settled migrants, the government of the day had no difficulty garnering the necessary majority. In the case of federal constitutions, this will require also the articulation of any split in relation to competences between the federal and the state levels. Such authority may well be limited: constitutions often place restrictions on what a federal legislature may do in relation to the scope of citizenship, leaving other matters to be regulated by the states.

When it comes to citizens' rights and duties, some constitutional frameworks are not specific, but refer mainly to *human* rights or to *constitutional* rights, which may extend beyond the class of resident citizens, in terms of coverage. Many such rights also protect non-citizens who are lawfully resident on the territory or even to anyone present on the territory, for whatever reason. Some rights have extraterritorial reach, as well as extended personal scope. It is insufficient, moreover, to discuss the role of rights in the constitution of citizenship without reference to the role of international law. International human rights and humanitarian laws are particularly important for the protection of those within states who are not citizens, especially those who are stateless or are otherwise in need of protection, e.g. refugees and asylum seekers.<sup>25</sup>

Scholars and political commentators often have a hard time articulating what rights in modern states are genuinely restricted to citizens alone. To put it another way, they have trouble isolating the essence of the *internal* as opposed to the *international* right to citizenship.<sup>26</sup> This is one domain where the line between citizen and alien has become blurred. This may be why some scholarship has focused instead on the 'hallmarks' of citizenship, rather than the rights.<sup>27</sup> Probably the unconditional right to return is one of the few rights given exclusively to citizens, although patterns and processes of denationalization<sup>28</sup> and deportation<sup>29</sup> have made even that story much more complex in recent years. Voting rights tend to prioritize citizens, especially in relation to national elections, but even in that field there are many cases of resident non-citizens being permitted to vote especially in local elections.<sup>30</sup> But, conversely, many more states now permit

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<sup>25</sup> See A. Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford: Oxford University Press, 2012.

<sup>26</sup> For the use of this distinction see P. Lenard, 'Democratic Citizenship and Denationalization', *American Political Science Review*, online first, doi:10.1017/S0003055417000442, 2017.

<sup>27</sup> Gardner, J. P. (ed.), *Citizenship: The White Paper*, London: Institute for Citizenship Studies/The British Institute of International and Comparative Law, 1997.

<sup>28</sup> M. Gibney, 'Denationalization', in A. Shachar *et al* above n.10, 360-382.

<sup>29</sup> K. Rubenstein and N. Lenagh-Maguire, 'More or Less Secure? Nationality Questions, Deportation and Dual Nationality' in A. Edwards and L. Van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge: Cambridge University Press, 2014, 264-291.

<sup>30</sup> See J. Shaw, 'Citizenship and the Franchise', in A. Shachar *et al* above n.10, 290-312.



external voting by non-resident citizens.<sup>31</sup> This phenomenon emphasizes the loosening of the territorial link between citizen and state. Along with the rise of dual citizenship, the spread of external voting could be said to be the second ‘new norm’ of citizenship from the later decades of the 20<sup>th</sup> century onwards.

One of the key questions, when seeking to understand any given citizenship regime, concerns the role of institutions. Reference has already been made to the legislature. In the domain of citizenship, as with immigration, executives often have a crucial role to play in the policing the boundaries of membership, e.g. through discretionary naturalization decisions, decisions on access to the asylum system or deportation processes. Executives also frequently make use of private businesses, e.g. in areas like citizenship testing. Unsurprisingly, there is an important role for judicial institutions, not least in the oversight of executive decision-making, whether taken directly by the administration or ‘delegated’ to private business. What are the roles of constitutional courts and/or the ordinary courts when adjudicating upon the scope of citizens’ rights or the processes for granting or denying membership? How have courts resolved any possible tensions between international human rights obligations prioritizing the protection of all as against the domestic prioritization of the interests of the ‘constitutional people’?

## **5. Constitutional citizenship in practice: the case of Australia**

The case of Australian citizenship illustrates many of the points made in the previous section about the interface of citizenship and constitutional law very neatly.<sup>32</sup> Australia represents a good example of a country with a constitution that acts more as a constrainer rather than an enabler in relation to citizenship matters.

The Australian constitution emerged out of Australia’s gradual process of independence, its loosening of relationships with the British Empire and the United Kingdom and its federalisation process. The constitution predates the creation of Australian citizenship as a freestanding status under national law, and in fact the formal legal status of ‘Australians’ until 1948 and the passage of the first citizenship legislation was that of ‘British subjects’. The constitution does not define or directly regulate citizenship, but it provides a power for the federal parliament to regulate the status of aliens and mandates that elected representatives in the federal parliament should owe no allegiance to a foreign power. Between 1948 and 1987, Australians had the dual status of British subjects *and* Australian citizens. Despite this duality, the new state had a rather restrictive approach to dual citizenship, as the space for a distinctive Australian citizenship was carved out in the postwar period. Modernisation processes have seen an increased toleration of dual citizenship, both for Australians acquiring another citizenship, who no longer lost their Australian citizenship (after 2002) and also for ‘new Australians’, who no longer had to renounce a previous nationality (after 1949).

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<sup>31</sup> See M. Collyer, ‘A geography of extra-territorial citizenship: Explanations of external voting’, (2014) 2 *Migration Studies* 55-72.

<sup>32</sup> See generally K. Rubenstein, *Australian Citizenship Law*, Sydney: Lawbook Company of Australia/Thomson Reuters, 2017 (2nd edition); R. Thwaites, *Report on Citizenship Law: Australia*, RSCAS/GLOBALCIT-CR 2017/11.

However, recent controversies relating to the application of the constitutional prohibition on elected representatives at federal level holding dual citizenship, have culminated with the fates of seven politicians being decided by the High Court and many others becoming embroiled in the controversy. This case has demonstrated that these modernisation processes have hit their limits when it comes to the interface between democratic inclusion and the requirement of exclusive allegiance to Australia.<sup>33</sup> The High Court judgment in *Re Canavan* confirms the stringent requirements of s44(ii) of the Australian constitution, applying a strict test whereby it was not necessary for a person to know about their second citizenship status for them to fall foul of the constitutional restriction.<sup>34</sup> Only cases where renunciation is impossible will be permitted. Yet this strict approach somehow places Australia outside the mainstream of liberal democracies in relation to the application of bars on parliamentarians holding dual citizenship (and indeed, less strict arrangements are applicable in some Australian states) and for many observers is an excessive restriction.<sup>35</sup> In a country such as Australia, where a high proportion, probably more than half, of all citizens, their parents or grandparents have been born outside the country,<sup>36</sup> it may indeed be hard to say what citizenships may have been ‘accidentally’ or unknowingly conferred by descent, or where – because of legislative measures adopted in another country – citizenship has been reconferred on a descendant on an automatic basis. Where citizenship is not known about, it cannot so easily be renounced. Moreover, this restriction is constitutionally enshrined and not amenable to simple amendment. An opportunity was missed in 1997, when a parliamentary committee recommended changing the constitution to put the disqualification provisions into legislation, which would then be amenable to change, only keeping a constitutional requirement that representatives be Australian citizens.

Now that the issue has become salient again, the dual citizenship restriction has become a tool amongst political parties seeking to gain advantages inside and outside parliament, it has reduced the perceived legitimacy of elected parliamentary representatives amongst voters, and it threatens to create a precautionary approach in which large swathes of Australia’s multicultural population are effectively excluded from federal election.<sup>37</sup> And yet, as a proposed amendment to the Australian constitution (there have been only eight since its inception), the removal of the strict ban on dual citizen federal representatives

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<sup>33</sup> See G. Orr, ‘Dual Citizen MPs in Australia’s National Parliament – the Barriers Bite’, EUDO Citizenship Blog, <http://eudo-citizenship.eu/commentaries/citizenship-blog/1884-dual-citizen-mps-in-australia-s-national-parliament-the-barriers-bite>; E. Arcioni and H. Irving, ‘Form over substance? Foreign citizenship and the Australian Parliament’, EUDO Citizenship Blog, <http://eudo-citizenship.eu/commentaries/citizenship-blog/1929-form-over-substance-foreign-citizenship-and-the-australian-parliament>.

<sup>34</sup> *In re Canavan* [2017] HCA 45.

<sup>35</sup> D. de Groot, ‘(Dual National) Politicians – between “Pure-Bloods” and “Half-Bloods”’, NCCR on the move blog, 14 November 2017, <http://blog.nccr-onthemove.ch/dual-national-politicians-between-pure-bloods-and-half-bloods/>.

<sup>36</sup> See data at <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>.

<sup>37</sup> For critical comment and a call for constitutional amendment see J. McIntyre, ‘The dual citizenship saga shows our Constitution must be changed, and now’, *The Conversation*, 16 November 2017, <https://theconversation.com/the-dual-citizenship-saga-shows-our-constitution-must-be-changed-and-now-87330>.

lacks the political salience and intellectual ‘colour’ of the other main constitutional issue actively under consideration, namely the recognition as part of ‘the people’ of Australia of the Aboriginal and Torres Strait Islander peoples.<sup>38</sup>

But this is not the only example of Australian constitutional principles, in the hands of the courts, casting a shadow in such a way as to nuance the meaning of citizenship. After the independence of the formerly Australian-administered territory of Papua New Guinea, the Australian High Court held that although Papuans had previously been statutory Australian citizens, in practice they had a constitutionally inferior form of Australian citizenship which did not confer upon them membership of the ‘constitutional people’. According to the High Court, it was thus permissible to deny them entry to Australia. A whole category of Australian citizens was thereby effectively expatriated by a reading of the constitution in conjunction with measures taken under international law (i.e. the independence of PNG and the creation of its citizenship regime).<sup>39</sup> On the other side of the coin, the constitutional distinction between citizens and aliens (the latter having no privileges) has produced some astonishing consequences. The majority of the High Court in *Al-Kateb v. Godwin*<sup>40</sup> interpreted immigration legislation to the effect that it was not unlawful for the state indefinitely to detain stateless persons who had no lawful cause to be in Australia (e.g. an asylum claim had been refused), even where there was no reasonable prospect of removal (i.e. no other state would take them and they could not return to where they had come from). Such detention could, logically, last the entirety of a person’s lifetime, with no constitutional restriction on this problematic and damaging treatment of aliens.<sup>41</sup>

## 6. The sovereignty of citizenship

Many scholars have remarked that modern citizenship is a less conditional and more sovereign status for individuals when compared both to concepts of subjecthood, as elaborated under the common law in England,<sup>42</sup> or to legal concepts of citizenship as developed and applied in the 19th and early 20th centuries. Following significant misuse of denationalization capacities in the interwar years by a number of totalitarian regimes, however, the commitment to the right to a nationality in international human rights instruments after the second world war seems to have heralded a new dawn. On that account, citizenship is not a privilege, but a right. Invoking US case law, such as *Afroyim v.*

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<sup>38</sup> E. Arcioni, ‘Tracing the ethno-cultural or racial identity of the Australian constitutional people’, (2015) 15 *Oxford University Commonwealth Law Journal* 173-195.

<sup>39</sup> See *Ex Parte Ame* (2005) 222 CLR 439, and for commentary K. Rubenstein with J. Field, ‘What is a “real” Australian citizen? Insights from Papua New Guinea and Mr. Amos Ame’, in B. Lawrance and J. Stevens (eds.), *Citizenship in Question. Evidentiary Birthright and Statelessness*, Durham/London: Duke University Press, 2017.

<sup>40</sup> (2004) 219 CLR 562.

<sup>41</sup> H. Irving, ‘Still Call Australia Home: The Constitution and the Citizen’s Right of Abode’, (2008) 30 *Sydney Law Review* 133-153.

<sup>42</sup> The *ius soli* principle can be traced back to *Calvin’s Case*, 77 Eng Rep 377 (KB, 1608).

*Rusk*,<sup>43</sup> Ayelet Shachar has referred to the ‘constitutional right to remain a citizen’.<sup>44</sup> Yet continued practices of denationalization seem to challenge that view.

For example, Australia is one of a number of states that have introduced new citizenship stripping provisions, including ones aimed at native born citizens who have a second nationality, which are said to be a response to the ‘war on terror’, allowing the state to widen the raft of measures available to restrict the threat from those deemed to be harmful for the state and its citizens.<sup>45</sup> Denationalization is hardly a new phenomenon. In fact, it was common even in what we would now describe as the ‘western democracies’, partly as a result of wars and other conflicts (creating categories of enemy aliens and making naturalised citizens from enemy states inherently ‘suspect’) and partly because of a focus on the singularity of citizenship.<sup>46</sup> This latter focus led to resistance to dual citizenship (so that acquisition of one citizenship generally required the renouncing or loss of the previous citizenship) and a widespread insistence on the idea of a single nationality for a family (which in turn led to many women in transnational marriages losing their citizenship).<sup>47</sup> The reprise of citizenship stripping in the 21<sup>st</sup> century has, however, a different optic. Many have compared it more to medieval practices of banishment than to 19<sup>th</sup> and 20<sup>th</sup> century denationalization, but returning this time as an administrative practice subject to limited judicial review, rather than an element of formal punishment imposed within criminal process.<sup>48</sup> In part, this is because the UK – which has been the leader in putting citizenship stripping into practice (as opposed to discussing such provisions in parliament without formal adoption (as in France) or instituting new provisions which have barely been used (as in Austria)) – has adopted the practice of stripping the UK citizenship of those suspected of terrorist offences or certain types of terrorist or jihadist involvement when they are outside the UK. This means that they can be refused re-entry as non-nationals and must contest any measures taken against them from outside the territory. Even so, there are still cases where citizenship has retained its constitutional sovereignty, notably the United States where the Supreme Court has continued along the pathway of recognising citizenship as an absolute status that cannot be lost without consent, as a necessary corollary of the Fourteenth Amendment and the historical denial of citizenship to slaves. For Weil, this is an important dimension of the republican tradition that enables the rollback of racially tainted historical narratives and resists pressure to water down the resulting outcomes, which currently protect the sovereignty of the citizen.<sup>49</sup>

But as Bauböck and Paskalev point out, in mapping the terrain of loss of citizenship from the perspective of normative theory, there remain many other state practices

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<sup>43</sup> *Afroyim v. Rusk* 387 US 253 (1967).

<sup>44</sup> A Shachar, ‘Citizenship’, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, 1003-1019 at 1012.

<sup>45</sup> L. Zedner, ‘Citizenship Deprivation, Security and Human Rights’, (2016) 18 *European Journal of Migration and Law* 222–242.

<sup>46</sup> See Gibney above n.28.

<sup>47</sup> H. Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History*, Cambridge: Cambridge University Press, 2016.

<sup>48</sup> Gibney above n.28.

<sup>49</sup> P. Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic*, Philadelphia: University of Pennsylvania Press, 2012.

beyond the sphere of public security and public safety under which the majority of states justify the involuntary removal of citizenship, including in cases where those losing citizenship have no other nationality to fall back on, such as cases of fraudulent acquisition.<sup>50</sup> There are few states that adopt the position of constitutional sovereignty for citizens, which currently holds sway in the United States of America.

## **7. Citizenship and constitutional law: a sketch of the collection**

Having set out some key aspects of interface between citizenship and constitutional law, we can now conclude this introduction by returning to the selection and organisation of articles. Space – and the highly dispersed nature of the topics covered – precludes me offering more than brief notes on the topics covered in each of the five Parts. It is not possible, for example, to provide an abstract for each individual chapter, or to show how these chapters might be linked together with some type of golden thread or single argument. As we have already shown, the citizenship / constitutional law interface is multi-faceted and not amenable to simple linear abstraction.

Part I digs into the fundamentals of the relationship between citizenship as a constitutional ideal and democratic constitutionalism, addressing both the theory and the practice. These essays help us to understand how constitutionalism and constitutional law can add to the meaning, the heft,<sup>51</sup> of citizenship, by ensuring that it is seen as a core status which is more than, for example, a club membership. For example, as Jean Cohen points out, restraining popular sovereignty through constitutionalism helps to reconcile the different elements of the citizenship principle.<sup>52</sup> For sure, this leaves some open questions as to the relationship between citizenship and constitutional change in an authoritarian direction, as has been seen in Poland and Hungary in recent years – that is, even within EU Member States.

The essays in this part interrogate core questions, such as the relationship between constituent power, constitutional notions of ‘the people’, allegiance to the state and citizenship itself. As the ‘scales’ of the constitutional lenses may differ from time to time, and place to place, different aspects of citizenship come into view. Increasingly pluralistic societies, including those embedded in complex multilevel governance arrangements, constantly strive to identify and ‘fix’ the glue that holds them together. Further, as Tully’s essay shows,<sup>53</sup> citizenship is not just a constitutional ‘given’. Rather, as with constitutions, there exist a multiplicity of citizenships across the axes of the civil/cosmopolitan and the civic/glocal. As the example of constitutional changes to the meaning of the state and of the ‘people’ in Hungary shows, the direction of travel may vary – towards more ‘ethnic’ and

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<sup>50</sup> R. Bauböck and V. Paskalev, ‘Cutting genuine links : a normative analysis of citizenship deprivation’, (2015) 30 *Georgetown immigration law journal* 47-104.

<sup>51</sup> A. Macklin, ‘Who Is the Citizen’s Other? Considering the Heft of Citizenship’, (2007) 8 *Theoretical Inquiries in Law* 333-366.

<sup>52</sup> J. Cohen, ‘Changing Paradigms of Citizenship and the Exclusiveness of the Demos’, (1999) 14 *International Sociology* 245-268.

<sup>53</sup> James Tully (2008), ‘Two Meanings of Global Citizenship: Modern and Diverse’, In: Michael A. Peters, Harry Blee & Alan Britton (eds.), *Global Citizenship Education: Philosophy, Theory and Pedagogy*, Rotterdam: Sense Publication, 15-39.

‘thicker’ descriptions of peoplehood, as well as towards thinner cosmopolitan or institutionally bounded conceptions.

Parts II and III together review the national, international and transnational trends in relation to acquisition and loss of citizenship. Along the way, the texts highlight some of the controls that constitutions (along with international law) may place on citizenship policy-making, e.g. in relation to gender equality requirements. As the essays show, the classic modes of acquisition at birth, namely *ius soli* (territory) and *ius sanguinis* (parentage) can be both complementary and in tension to each other. Of course, in few if any cases do states settle the details of either birthright or – in particular – citizenship acquisition *after birth* settled in the form of constitutional provisions. However, as the essays in both parts show, there are obvious interactions between the more abstract political conceptions of peopleness often articulated explicitly or implicitly in constitutional texts or constitutional interpretations and the detailed foundation stones of citizenship acquisition. This is particularly clear if we encompass in the assessment other forms of attachment given legal recognition in citizenship laws such as *ius nexi* (i.e. the imperative to give recognition to persons who have a close attachment to a particular state whether through residence or ethnic belonging), *ius tempus* (i.e. the recognition that citizenship is an attachment in space *and time*) and even *ius pecuniae* (where states recognise particular financial contributions that individuals have made and award them citizenship in recompense). Of course, investor citizenship (perhaps the purest form of *ius pecuniae*) is not the only way in which states ‘compete’ for valuable citizens. There is now a whole body of commodified modes of ‘Olympic citizenship’, which range from preferential visa access (‘the brightest and the best’) to conferment of citizenship on those liable to offer athletic prowess to a state.<sup>54</sup> That citizenship practices have economic and cultural dimensions, especially when it comes to practices of naturalisation, is plain from the examples of state practice examined.

But citizenship regimes do not exist in isolation, and it is important to see also the ‘constellations’ that arise out of different types of transnational engagement, as well as supranational commitments on the part of states. Indeed the importance of looking beyond state practice and reflecting also on the structuring effects of international law is an explicit topic of some of the essays, and implicit in many others. States regulate, but international law, including private international law, is highly relevant to thinking about these issues, not least through the backstop provided by its injunction on states to avoid statelessness. Furthermore, this is very much not just a ‘constitutional’ question. When it comes to citizenship as ‘living together’, it is clear, for example from the work of René de Groot, that the ‘toolbox’ must contain materials drawn from all fields of law, including civil law, family law and inheritance law.<sup>55</sup>

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<sup>54</sup> A. Shachar, ‘Picking Winners: Olympic Citizenship and the Global Race for Talent’, (2011) 120 *Yale Law Journal* 2088-2139.

<sup>55</sup> G.-R. de Groot, *Towards a toolbox for nationality legislation*, Text of the Valedictory Lecture as Professor of Comparative Law and Private International Law at Maastricht University delivered on 14 October 2016.

Part III develops many of these ideas in the context of national case studies focused on the United States, the United Kingdom, Ireland, Germany, Croatia and Israel. Although offering considerable variety of approach, these case studies do not, unfortunately, do much to help us counter a historic Eurocentric bias in much scholarship regarding citizenship.<sup>56</sup> But it is in North America and Western Europe that the bulk of studies have been carried out hitherto, although this is gradually changing,<sup>57</sup> in ways that has often disturbed taken for granted assumptions about what constitutes a 'liberal' citizenship regime.<sup>58</sup>

The 'citizenships of globalization' are the focus in Part IV of the collection. Citizenship scholars generally share the view that citizenship can no longer be conceived as operating solely by reference to (singular) *national* domain. Citizenship, although still dominated by the national regulator and national frameworks such as citizenship laws and constitutional provisions, now has a strong transnational dimension, with greater tolerance of dual nationality and an emerging norm allowing non-resident citizens to vote in national elections. Where authors differ, however, is in relation to their understanding of the intensity and significance of these changes. It is, however, no coincidence that the revival of interest in citizenship as a status and in developing theories of citizenship coincided in time with the creation of what has been called 'the world's first example of fully institutionalised trans, or post-national political rights going beyond the nation state',<sup>59</sup> that of the European Union, by virtue of the Treaty of Maastricht, which entered into force in 1993. Yet, as the case of the UK's decision to leave the European Union and thus to unravel the implications of EU citizenship has shown, centrifugal as well as centripetal forces can come into play in the fragmented governance of citizenship.

The final part of the collection moves to the terrain of the rights and duties of citizens, and struggles to achieve these. In Part V, the collected essays highlight the ambiguous role of the state and of state institutions, which have sometimes facilitated the enhancement and spread of citizenship rights, and sometimes resisted this. Although the *leitmotiv* of modern citizenship is equality, as struggles for citizenship rights have shown, it took many decades, for example, for the struggle for female suffrage to achieve anything like equality for women. Much legal scholarship on citizenship rights has placed the status non-citizen at the centre of the enquiry, rather than regarding the non-citizen merely as 'the other', defined by reference only to the citizen. Constitutional equality principles, such as those in the Canadian Charter of Rights, may retain untapped potential for those struggling to ensure that universal citizenship is just that, universal in effect as well as in letter. The case of Zunera Ishaq and her successful challenge to be allowed to take her Canadian citizenship oath whilst wearing the niqab illustrates the potentiality of the Charter, although the case was decided on a point of

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<sup>56</sup> E. Chung, 'Citizenship in Non-Western Contexts', in A. Shachar *et al* above n.10.

<sup>57</sup> For a compendium of material including country reports on a wide range of states beyond Europe and North America, see the GlobalCit website: <http://globalcit.eu/>.

<sup>58</sup> See also Fitzgerald and Cook-Martín *Culling the Masses*, Cambridge, Mass: Harvard University Press, 2014.

<sup>59</sup> A. Favell, 'European identity and European citizenship in three "Eurocities": a sociological approach to the European Union', (2010) 30 *Politique Européenne* 187-224 at 187.

administrative law not using the Charter.<sup>60</sup> But at the same time that such points are successfully litigated, in the name of constitutional resources, states continue to construct increasingly hard borders around the edges of the citizenship status using immigration law and criminal law in the name of principles such as public order and public security. For one of the most important aspects of this body of scholarship concerns the relationship between constitutional law, on the one hand, and other aspects of the legal order, especially immigration law and criminal law, on the other. In sum, it is clear that 'full citizenship' is not a stable end state, but rather a continuously reinstated process, involving struggles and contestations, as scholars such as Somers have shown us.

It is useful, in conclusion, to return to a point made by Tully, namely that there is no single universal 'language of citizenship', but rather a multiplicity. Constitutions, as well as citizenships, are a 'strange multiplicity'.<sup>61</sup> It is thus the deception of 'modern citizenship' that it masquerades as universal, thereby concealing from view other plausible ways of being and relating to each other.<sup>62</sup> As Part V shows us, the blending of – and where necessary the distinction between – practice and status is thus crucial to understanding the complex interrelationships between citizenship and constitutional law.

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<sup>60</sup> See *Ishaq v. Canada (Minister of Citizenship and Immigration)* 2015 FC 156. For commentary see A. Macklin, 'From Settler Society to Warrior Nation and Back Again', in J. Mann (ed.), *Citizenship in Transnational Perspective, Politics of Citizenship and Migration*, New York: Palgrave Macmillan, 2017.

<sup>61</sup> J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995.

<sup>62</sup> See Seubert, above n.20.