Introduction: Citizenship and Migration Theory Engendered

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Nations, Citizens, and Others

The permeability of national borders can be seen not only by the ease with which words and images move through an internet unfettered by geographical constraints but also by the movement of people across national borders and of transnational legal and moral precepts shaping discourses around the globe. In 1910, some thirty-three million of the 1.7 billion in the world’s population lived in countries as migrants. By 2000, estimates were that about 175 million of six billion people were at some distance from their countries of origin. During the last three decades of the twentieth century alone, seventy-five million people moved across borders to settle elsewhere. Yet, even with this volume of movement, less than 4 percent of the world’s population undertakes migrations.

Thus our interest is simultaneously in those who move and those who stay put. Whether migrant or landlocked, where a person is—literally and physically—has profound effects on that person’s life. One’s place on the planet frames the availability of food, of basic goods and broader economic opportunities, of personal security and health care, of social connections with other members of one’s family as well as of the possibility for ties to larger communities, and of legal recognition as a property owner, a worker, a recipient of social services, health care, and education, a family member, a voter, an office holder, a lawful resident, and a citizen.

The relevance of mobility, combined with the relevance of place, makes questions of immigration and citizenship both pressing and contested in countries around the world. A simplistic presumption is that citizens
residing in a given nation-state are in a reciprocal relationship with that country, recognized as members entitled to rights, protection, material support, and political loyalty. Noncitizens—lumped together into an undifferentiated whole—sit outside that circle of rights and obligations.

But the variety of migration patterns and of legal regimes governing access to residence, citizenship, and to the social and economic resources of the state undermines these propositions. While some people never move, others could be conceptualized as “commuters” going back and forth regularly between countries and building up or attenuating ties to more than one place. In contrast, some noncitizens enter for a brief period of time to supplement the income of their families, to whom they are eager to return. Yet others reside outside their families’ countries of origin for decades and are part of other vibrant communities making lasting marks on their host countries. Still others are involuntary migrants tossed out and seeking safety from states that would do them harm. Their numbers are poignantly large; as of 2006, some twenty-five million people were refugees, asylum seekers, or displaced persons.

Given the breadth of the potential questions raised by these trends, clarification of both our terminology and our central interests is in order. Migrations are related to globalization, involving the increased movement around the world of goods, services, information, and capital of all kinds, as well as of legal, political, and moral norms. Migrations are about people in transit, both as immigrants and as emigrants. Someone migrates from some place to another, rendering every migrant an emigrant from one country or locality and an immigrant in another.

While local and regional migrations (often shifting from rural to urban settings) within state-territories raise important questions related to economic and social identities, this volume is concerned with the effects of movements across state boundaries on the relationship of persons and rights. Given the nature of the current nation-state system and of the dual commitments of the international order to territorially demarcated states and to a human rights regime, cross-border movements are legal and political as well as socioeconomic and cultural matters.

Central to the discussion is the concept of citizenship, which is a legal, economic, and a cultural event, denoting official recognition of a special relationship between a person and a country. Entailed in this political contract are obligations of protection and guarantees against deportation, expatriation, and denationalization. Historically, citizenship has been transmitted or acquired through different methods, of which four—jus
soli, *jus sanguinis*, a mix thereof, and naturalization—are common around the world. *Jus soli*, or “birthright citizenship,” means that a person born on the given state’s territory has the right to citizenship without further inquiry. *Jus sanguinis* disregards territorial claims and bases the inheritance of citizenship rights on the citizenship status of one or both parents. A third form mixes these two ideas by requiring that a person be born in a given state and that either or both of the parents are also citizens or long-term legal residents of that state.\(^7\) The fourth method, naturalization, is the acquisition of citizenship by migrant foreigners. Almost all of the world’s nations permit naturalization, but the criteria for doing so vary widely and can impose hurdles, including years of residency, marriage to a national, demonstration of knowledge about language and history, and renunciation of an affiliation to another country.\(^8\) The patterns and the rules of migrations and citizenship come with histories and contexts, sometimes of voluntary association and more often of imperialism and colonialism, forceful acquisition of territories of indigenous peoples, and the consequences of trade practices, including human trafficking and slavery.

The facts raise the question of how to frame discussions: Ought one start with nation-states as givens? Or should one begin with a focus on persons living in particular areas? In many instances, one could argue that rather than people crossing borders, the border “crossed” them by ignoring that they were already members of preexisting polities—some of which are called “first nations” or “indigenous” and others of which were configured through prior boundary settlements. In terms of those people in transit, moving from one locale to another, we note that many are ex-, neo-, and postcolonials of the nations in which they reside or to which they seek admission, raising normative questions about whether shared histories, interactions, memories, and experiences impose obligations or constraints.

As the image of a border crossing a person suggests, the boundaries of nation-states are not static but drawn or redrawn in the face of conflict. Today’s realignments include disaggregations, such as those of new states from what had been Yugoslavia, as well as new aggregations, sometimes in federalist states as well as through the invention of new forms such as the European Union (EU), offering opportunities for the layering of citizenship that insist on the coherence of ties to subparts as well as to the whole.

Some would argue that a stronger dynamic is at work here and that we are watching the end of the nation-state, as global economic,
environmental, and political forces make that form of government insufficient or obsolete. But while the meaning of state sovereignty may be under revision, nation-states remain a critical form of organization. Even porous borders continue to define networks of obligations and constitute real barriers, rendering some persons aliens or intruders. Further, when countries join together to promulgate legal commitments to universal norms that transcend sovereign boundaries and that constrain sovereign prerogatives, they do so through conventions reliant on national authority for implementation. These treaties can be conceptualized either as internally contradictory or as changing the import of territorial sovereignty.

With or without these transnational conventions, sovereign states do not function as equals. The power of national sovereignty varies radically depending upon resources and political organization, such that neither countries nor their residents are all in the mobility market in the same way. As Saskia Sassen has pointed out, migrations occur under structured configurations of “pull” and “push” factors. Some migratory patterns become established through the economic interdependencies of sending and receiving countries over periods of time. Moreover, competition exists for skilled migrants. Yet some people, fully rooted in a place where they have great opportunities or to which they feel deep affiliation, are delighted to stay put. Others may be open to moving, but only to certain locales under specified conditions. Some people are so in need of work that they have little possibility of shopping opportunity sets, and others—refugees—are involuntarily displaced.

A host of reform proposals—raising or lowering barriers as well as arguing for new categories—have been proffered, accompanied by a robust political debate and literature addressing the various meanings of citizenship and sovereignty. All too often, gender is missing from these conversations, and the migrant—if imagined as a person at all—is presumed to be a man traveling alone in search of work. The burden of this volume is to alter this imaginary so as to bring squarely into focus the fact that citizens, migrants, refugees, and members of host communities are not disembodied individuals (or, by default, men) but are adults or children traveling with or leaving family members. Moreover, the mobility of some has consequences for or corresponds to the immobility of others. All of these persons are engendered in their relationships with others, with the wage workforce, and with the polities from which they came and those that they seek to enter.
Gender as a Category in Transnational Legal Regimes

Our intervention in this volume is to bring gender equality claims into the discussion of the four other major principles regularly invoked in this area—the free movement of persons; the need for protection of refugees; the jurisdictional authority of sovereign states over their borders; and the obligation to respect family ties, including through family reunification. Our argument is that the laws, policies, moralities, and theories of citizenship, as well as of sovereignty, jurisdiction, family life, and migration, must grapple with the way histories of discrimination and subordination based on gender affect the conceptualization and implementation of opportunities, rights, and burdens, as well as the nation-state’s powers. When one inflects citizenship, sovereignty, and migration theories with gender analysis, new questions emerge both about feminist conceptions of women and men and about political theories of the state. In short, once gender is in sight, “each eye sees a different picture.”

The chapters of this book are shaped by this thesis, as they also illuminate disagreements about the normative desirability of the categories of “citizen” and “state” and their implications for women and men in different parts of the globe. Because many of the essays are also framed in reference to transnational laws on nationality, migration, asylum, and equality that form the backdrop for contemporary debates, a brief review of some of the relevant legal provisions, their allocation of authority, and the mechanisms by which they are implemented is in order. Our focus is on five such laws: the 1948 Universal Declaration of Human Rights (UDHR), followed in 1951 by the Convention on Refugees (the 1951 Refugee Convention), the 1966 International Covenant on Civil and Political Rights (ICCPR) and related Comments on Family Reunification, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of the same year, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in 1981.

In 1948, shortly after World War II and the formation of the United Nations, its member states promulgated the Universal Declaration of Human Rights, which addresses all of our themes—equality, sovereignty, mobility, citizenship, and families. The declaration’s preamble states that the “peoples” of the United Nations’ Charter affirmed their faith in “the dignity and worth of the human person and in the equal rights of men and women.” All persons, “without distinction of any kind, such as
race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," are entitled to dignified treatment regardless of “the political, jurisdictional or international status of the country or territory to which a person belongs.” Furthermore, both women and men “of full age” are to enjoy “equal rights as to marriage” and to “found families”—“the natural and fundamental group unit” of society—and are entitled to protection by the state.

Moving from questions of equality and family life within a nation-state to the issue of mobility, Article 13 of the UDHR recognizes a freedom of movement across boundaries. While stating a right to emigrate from a country, the UDHR does not specify the conditions under which one could exercise a parallel right to immigrate, to enter a country. Similarly, while proclaiming in Article 15 that everyone has “the right to nationality” and, moreover, that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality,” the UDHR does not outline the qualifications that trigger that right nor the criteria that would render a deprivation arbitrary.

These provisions need to be read against a background premise of the United Nations Charter itself, which is built upon deference to the national order. “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.” Of course, the question is what issues were “essentially within the domestic jurisdiction of a state.” The history of the clause’s drafting suggests that it was shaped in response to concerns in the United States that the United Nations’s commitment to human dignity and nondiscrimination could be used (as indeed people tried to do) by opponents of racial segregation.

The 1948 UDHR also recognizes the needs of refugees. Article 14 anchors a right of asylum that was detailed soon thereafter in the 1951 Convention on Refugees. Under that convention, a person seeking asylum has to show persecution based on one of five categories—race, nationality, religion, political opinion, or membership in a particular social group. Not on that list was gender. While the 1948 UDHR was innovative in banning discrimination predicated on “sex,” attention to women’s equality did not pervade the UN approach to many issues. In the 1990s, the United Nations (as well as the European Union and the Commonwealth) became committed to what is called “gender mainstreaming,” i.e., asking questions about the effects of all policies on women and men.
Reflective of its era as well, the 1951 Convention on Refugees focused neither on the role gender played in shaping experiences of persecution nor on whether women should be understood as falling within the category of a “social group” or ought to be added as another category in the enumerated list. But, as Talia Inlender explores in her essay, that question is being pressed on many fronts now. Inlender argues that individuals seeking asylum ought to be able to make their claims to decision makers who understand the existence of what she terms “gender-specific” forms of persecution (such as forced pregnancy) as well as “gender-based” persecutions (which target women who violate a polity’s conventions about women’s roles).32

Inlender’s analysis notes that, by 1991, the United Nations had taken up some aspects of the gender question for refugees. In its *Guidelines on the Protection of Refugee Women*, the United Nations advised receiving nations to consider how women who transgress gender norms could be put at risk and ought to be seen as proper candidates for asylum.33 Inlender goes further than these guidelines by arguing that gender should both be included under the five categories already listed as the basis for asylum and also be added as an independent sixth basis to recognize the way women, qua women, are at risk of persecution. Other commentators, however, are leery of conceptualizing gender as a category akin to “race, nationality, religion, political opinion, or membership of a particular social group” because it entails essentializing women. Whichever position one espouses, engendering discussions of asylum seekers enables one to see that gender already is operating in the world of asylum adjudication. Actions that are oppositional to regimes can take diverse forms, from bearing arms to staffing safe zones for militants.34 Moreover, the methods by which dissidents or out-group members are oppressed can also vary depending on whether the targeted groups are women or men, with the use of rape illustrating a tactic imposed particularly on women.35

Invocations of international law prompt questions of implementation. Because the UDHR is “only” a declaration of principles and does not detail mechanisms for enforcement, some argue that it does not function sufficiently as law, while others see it as a different kind of law that works through mechanism other than command and control.36 As illustrated by Inlender’s discussion, through its 1991 Guidelines on Refugee Women, the High Commissioner on Refugees37 has sought to influence decision making in member states about how to evaluate claims of refugees and has had a profound impact in some jurisdictions.38
Another common method of implementation for UN provisions is the chartering of “expert bodies” or committees to elaborate the meaning of conventions. Such committees promulgate “general comments” and receive reports from member states, which are obliged to detail how they are compliant with or failing to live up to their commitments as parties to conventions. Further, in some jurisdictions (but not generally in the United States), international obligations can be a direct source of rights that are legally enforceable through litigation in national courts.  

Another of the United Nations’ basic statements relevant to citizenship—the 1966 International Convention on Civil and Political Rights (ICCPR)—elaborates various of the UDHR’s commitments to equality and mobility by putting those propositions into the structure of oversight through an expert body and public reporting. Focused on “political and civil rights” such as voting, marriage, and holding offices or owning property, the ICCPR states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”  

The ICCPR requires states to “ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”  

The ICCPR provides that both adults and children have “the right to acquire a nationality” but does not address what the predicates are for the exercise of that right. In terms of mobility, the ICCPR reiterates that persons “lawfully within the territory of a State” shall have the freedom to stay, to leave, or to return from their “own country” (consistent with “national security, public order, public health or morals or the rights and freedoms of others”). The ICCPR recognizes as well the authority of states to expel aliens upon determinations by competent authorities of grounds to do so.

Complementing the ICCPR is another convention of the same era—the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which also entered into force in 1976. As its name suggests, its focal points are associative rights, including collective labor action, and its concerns include social security, education, and health. The ICESCR underscores the place of groups in a political order.

Another landmark in the recent history of transnational covenants and one that takes up directly questions of gender-based inequality is the Convention on the Elimination of All Forms of Discrimination
against Women (CEDAW), which entered into force in 1981. As of 2007, more than 180 states (albeit not the United States) were parties. The central precept of CEDAW is set forth in Article 3, which provides that

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

CEDAW also reaffirms rights to nationality, and moreover that women have rights equal to men “to acquire, change or retain their nationality” independent of their status as married or their husbands’ citizenship status. Further, women are to have “equal rights with men with respect to the nationality of their children.”

Given the traumas of dislocation of World War II and the deliberate destruction of families and communities, it is not surprising that family reunification itself is directly addressed by the United Nations as well as under the laws of many jurisdictions, including Europe and the United States. As part of its “General Comment” on Article 23 of the ICCPR, the UN Human Rights Committee explained that member states, working in “cooperation with other States,” are required “to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.” Furthermore, Article 10(1) of the UN Convention on the Rights of the Child (to which 193 states are parties, but again not the United States) also recognizes the need of children to cross borders for family reunification.

In her contribution to this volume, Catherine Dauvergne helps us to understand through her analyses of the interaction between citizenship and immigration laws in Australia, Canada, and the United States how family reunification has been a dominant category for admissions in all three countries, and how that route has been an important one for women to use to cross borders. More generally, Dauvergne argues that economic migration and humanitarian migration, which join family reunification to form the three major legal routes for admission, have created patterns reinforcing notions of women’s dependence and men’s independence.

As the European Union is committed to the free movement of persons and goods within its boundaries, it too has stipulated provisions
for family unity. Moreover, forty-six nations subscribe to the 1950 Euro-
pean Convention on Human Rights and Fundamental Freedoms (ECHR),
which insists on the right of “everyone” to “respect for his private and
family life” and to “no interference” by public authorities with those rights
except as is “necessary in a democratic society in the interests of national
security, public safety or the economic well-being of the country.”
A 2003 EU Council directive provides, for example, that persons lawfully
living within the European Union but nationals of nonmember states are,
subject to limitations, entitled to the host nation’s granting admission to
their children for the purpose of family reunification. That directive also
recognizes that member states can condition family reunification on ex-
tant rules such as that requests on behalf of minor children be submitted
before a child is a certain age.

Four aspects of these major provisions, namely, the UDHR, the Con-
vention on Refugees, the ICCPR, the ICESCR, and CEDAW—deserve
special note. First, these transnational conventions undermine an absolut-
ist theory of sovereignty that presumes that a sovereign nation has com-
plete control over what occurs within its borders. By becoming states par-
ties, nations cede authority (a form of sovereignty)—at least in theory—as
they commit to complying with these precepts. Furthermore, in the hu-
man rights conventions, states parties agree to report on their efforts to
comply.

Second, these transnational conventions often operate in aspirational
modes. Compliance with treaty obligations is uneven. Moreover, many
conventions come with built-in escape hatches, in that states can condi-
tion their agreement through “reservations, understandings, or declara-
tions” (RUDs) that limit their commitments. While some commentators
are dismissive of these less-than-full obligations, RUDs may be vehicles
by which transnational rights can be domesticated more slowly, enabling
some forms of adaptation that open doors to considering perspectives dif-
ferent from one’s own. In Resnik’s terms, “jurisdictional seepage” occurs
through “law’s migration” even as legal boundaries continue to do signifi-
cant substantive work.

Third, in addition to constraining sovereignty, these conventions also
support sovereignty, in that all rely on the sovereign state to give meaning
to their agreements and to decide how to comply with the rights defined.
These are agreements among nation-states to be implemented by nation-
states, predicated on the baseline of the UN Charter itself, which purports
to carve out a domain of the “domestic” free from the “transnational.”
Furthermore, even in those instances when conventions include the ability of individuals to bring direct complaints to member bodies about non-compliance, remedies for noncompliance are limited. Enforcement is primarily at the national level.

Fourth, while one can find many commitments to the freedom to cross borders and to prohibitions on discrimination, one finds no shared affirmative commitments to the criteria for citizenship or for obtaining the status of lawful resident alien. The conditions under which nonnationals must be admitted to a state or to citizenship therein are not specified.

That point brings us to the chapter by Catherine Dauvergne, who argues that “liberal discourses of equality and inclusion are left to citizenship law while immigration law performs the dirty work of inequity and exclusion.” As she explains, a widely shared assumption is that sovereign nations “are morally justified in closing their borders, subject to exceptions of their choosing.” Dauvergne analyzes the implications of these propositions for women and men: “while women and men are approximately equally represented in the international population of refugees and of asylum seekers, in the United States, Canada, and Australia, men are more likely to be admitted, perhaps because they undertake the dangers of the journey or perhaps because families selectively fund transit or perhaps (as Inlender’s work suggests) because they are more able to obtain entry under these categories.

The silences and enforcement gaps in transnational conventions thus reflect the tensions between, on the one hand, an understanding of nation-states as defined by their ability to constitute their own internal rules of membership that reflect and generate shared identities supportive of democratic practices and, on the other hand, the universalist aspirations that all humanity has obligations to protect the dignity of and to provide for others. Furthermore, the statements of equality of treatment as to gender and other criteria are often left with their content underspecified, in deference to the variety of practices, laws, economic arrangements, and religious and cultural commitments that shape relationships in ongoing polities. These gaps, generalities, and silences are part of what discussions of migration, mobility, and citizenship must take into account. Further, the theme of growing barriers is also apparent in these chapters as a consequence of what Dauvergne describes as a “worldwide crack-down on illegal migration.” All the authors of this volume make plain that the burdens of these barriers are not borne evenly by persons or nations around the world.
Citizenship and Migration Embodied in Cross-National Families: Mothers, Fathers, Children, and the Nation-State

The story of one migrant—a Colombian mother named Joyce, a single parent who traveled to the Netherlands to visit her sister and explore life there while leaving her six-year-old daughter Emily in the care of other family members—illustrates the difficulties that families face. As Sarah van Walsum explains, after the expiration of a tourist visa, Joyce remained in the Netherlands illegally until she obtained a residence permit based in part on her relationship with a Dutch man, with whom she subsequently became the parent of another child.

The Dutch authorities rejected Joyce’s application for her daughter to join the family on the grounds that under Dutch law, Joyce had failed to demonstrate that during the period of separation, she had maintained an “effective family bond,” which is to say that, despite the geographic separation, she had been effectively involved in the financial support and upbringing of the child. By the time Joyce lost her appeal, she was a Dutch citizen who had given up her Colombian nationality.

Thereafter, she turned to the European Court of Human Rights (ECtHR) because, as noted above, Article 8 of the ECHR prohibits unnecessary interference with family life. By then, other immigrants—including fathers—had tested the meaning of the “effective family bond” and the ECtHR had determined that the fact that a parent left a country of origin to travel abroad was not in itself sufficient to presume that a parent had made the decision to abandon a child who remained behind. Given litigation in both the domestic and European courts, Dutch immigration policies were rewritten to clarify that “effective family bonds” would be recognized for those children legally related to parents and that, unless children were living on their own, authorities would not assume a rupture from the sole fact of a parent’s migration.

Van Walsum makes clear that, when making evaluations about the provision of “effective care,” officials had preconceived views about “good mothers” or “good fathers” that were predicated on cultural assumptions shaped by the customs in both host countries and countries of origin. Further, as she artfully illuminates, feminist efforts to obtain recognition in domestic law of the rights of those providing “substantive” care (in contrast to a focus on the status of a person as legally the parent) had influenced some decision makers to undervalue the legal status of migrants.
as parents and their needs to have other persons give care to their children when those parents traveled abroad. The challenge is to shape laws and practices that recognize a range of life choices and are respectful of the variations in family care patterns and of the “perspective of migrant mothers.”

As van Walsum and others in this volume explicate, women’s mobility is rarely a simple matter of the movement across state boundaries of a single, isolated individual. Women’s mobility is a nodal point in a network of relationships that almost always involves dependent children, dependent elderly, the men with whom women are affiliated, and other family members or other women who—as Linda Bosniak and Aihwa Ong explore—are parts of networks in which women, both givers and recipients of care, are reliant on others.65

Van Walsum has provided one paradigm: a mother in one country becoming its national while her child is in another. Jacqueline Bhabha brings another issue into sharp focus: children as citizens themselves, with rights against deportation, caught up in complex webs in which their parents may be forced out of their children’s countries. As we outlined above, citizenship rights often descend (by blood and place of birth) from parents who serve—in Bhabha’s words—as “the anchor to which children are attached.”66 In theory, citizenship rights provide permanent access to living in a country. Furthermore, in theory, rights of family unity give noncitizen family members access to residency in countries where their relatives live. But as Bhabha demonstrates, asymmetries exist, and while parents may be able to bring their children to them, citizen-children are not always able to use their status to determine that of their parents.

Bhabha’s rich analyses range from the United States to Canada to Ireland, France, and the responses of the European Court of Justice and the European Court of Human Rights. She details how issues that could be configured as “family law” can be dealt with through courts that regularly deal with family disputes or can be retitled as issues of “immigration” and then assigned for decision making to officials generally charged with policing national borders. In the United States, the treatment of citizen-children is particularly harsh in that, under current law, the United States Board of Immigration Appeals relies upon the criterion of “extreme hardship” to determine whether nondocumented migrant parents can be subject to deportation. Extreme hardship is not defined to include the disruption of child-parent relations; indeed, that is the baseline against which hardship is measured, because an applicant for a waiver of deportation
must show that the harms are “substantially different from, and beyond, that which would normally be expected” when an alien leaves behind “close family members.”

Between the September 11 attacks on the United States and 2004, “over 4.7 million people were compelled to leave . . . for immigration reasons”; some three million citizen children have parents lacking “a regular immigration status.” Thus, many of those forced out are parents. As a consequence, the citizen-child’s theoretical right to nondeportation is undermined, rendering it a “denuded status.” When their parents are expelled, these children may well follow, but having lived all their lives in the United States, they can end up in countries where they know neither the language nor the customs.

In contrast, some decisions from the European Court of Justice as well as from the European Court of Human Rights have recognized a “child-centered approach” that takes seriously a nation’s obligations to its children-citizens. The case of Zhu and Chen v. Secretary of State for the Home Department (discussed by Jacqueline Bhabha as well as Patrizia Nanz) is exemplary. In this case, the parents, Chinese nationals with economic interests in a company in the United Kingdom, sought to avoid the Chinese policy penalizing parents for the birth of a second child. They arranged to have their daughter, Catherine Zhu, born in Belfast, Northern Ireland, and thereby for her to acquire birthright citizenship as well as mobility rights to reside elsewhere in the European Union. When the child was six months old, the mother and daughter moved to Great Britain and, relying on the child’s birthright citizenship, applied for residence permits. Both the British and Irish governments objected that the choice of Belfast as a birth place was an abuse of EU law and that the child ought not to be considered a national entitled to protection under the relevant directive.

That position lost in the European Court of Justice, which held that even a “very young minor who is a Community National” who fulfills the legal insurance and resource requirements enjoyed “a right to reside for an indeterminate period” within the European Union. The Court further concluded that, if the child met the legal residency and citizenship requirements, her primary caregiver also gained residency rights in order to give effect to the child’s right. Of course, absent an understanding that the “primary caregiver” could be defined to include more than one person, that conception did not unite the entire family. Currently, in both the European Union and the United States, commentators are questioning the wisdom of birthright citizenship and using decisions that permit or deny
residency based on citizen-children's needs in arguments advocating limiting access to this form of entitlement to citizenship.  

Thus significant questions are raised about what justifications can support asymmetries between derivative rights borne from the citizenship and residency rights of children as compared to those rights passed on by those parents to their children; whether the unit of analysis for citizenship and residency rights should be individuals or families; which persons should qualify for recognition as “family” members; what relevance the physical places of those members has; and how gender analyses affect the responses.  

Even under a simplified model, focused only on the biological mother and father of a particular child, citizenship rights have varied depending on whether a citizen parent is a mother or a father and where a child is born.

Moreover, such patrilineal or matrilineal membership rules (and conflicts over them) can be found in many cultures and religions as well as in nation-states. Indeed, the contemporary human rights conventions that insist on the irrelevance of the nationality of a spouse were formulated in response to histories of discrimination based on an interaction among gender, nationality, and marriage rules. During certain periods in the United States, for example, citizen women who married men who were not U.S. citizens could lose their U.S. citizenship.

These gendered family-citizenship dramas have such power that they are regularly the stuff of art, as Linda K. Kerber discusses through her analyses of the case that inspired the Puccini opera, Madama Butterfly (which was later revived in a Broadway musical as Miss Saigon). The basic plot line is that a United States naval officer, stationed in the early part of the twentieth century in Asia, seduces a young woman who then bears his child. His promised return entails a broken promise, for he is accompanied by an American national wife, and the young Asian woman then attempts suicide.

Kerber asks, What passport should that child have? “In the Meiji period, as in the West until roughly World War I, practices of documenting individual identity were underdeveloped. . . . Was the child a Japanese subject? . . . Not until 1985 was Nationality Law in Japan revised to permit Japanese women to transmit Japanese citizenship to their children.” Under United States law at the time, the unmarried male citizen did not transmit his citizenship status, but, had his child been born on United States soil (including a navy ship, deemed United States territory), birthright citizenship would have been recognized.
Such rules left thousands of children stateless, and this problem forms the analytic centerpiece of Kerber’s commentary on the import of citizenship and the vulnerability of those who stand outside its parameters. As she recounts, gender continues not only to set the social and economic boundaries generating such configurations but also to do legal work. Under current United States law, citizen mothers and fathers who parent children abroad are not equally able to transmit citizenship. A federal statute provides that children born abroad of U.S. citizen mothers acquire citizenship at birth, while children of U.S. citizen fathers have to be acknowledged legally as their offspring before the child reaches the age of eighteen.

A challenge to this statute on the grounds that it violated equal protection under the United States Constitution lost in the United States Supreme Court in a judgment rendered five to four. Deferring to Congress, the majority concluded that the statutory distinction was related to “important governmental objectives” forwarded by the presumptively rational distinction between mothers who, under the majority’s view, were likely to have more contact with their children born abroad than would their fathers. As a practical matter, as Kerber notes, more men are stationed abroad and can father more children than their female counterparts can produce; hence the rule operates to narrow the doors to citizenship for offspring born outside the United States. As Kerber powerfully demonstrates, the risks to those without recognized forms of citizenship cannot be overstated.

Political, Economic, and Social Citizenship

Elucidating the role played by gender in migration and citizenship, van Walsum and Bhabha focus on international family movements, whereas Kerber’s eye is trained on the way gender, intersecting with rules privileging place or parentage, leaves some without a state willing to call them members. Inlender’s analysis of asylum, in turn, details distinctive means by which women engage in political action, rendering them outcasts as they try to alter a state’s policies. In general what we see as core citizenship activities are predicated on traditions that train us to look to certain indices and ignore others. It is history at which Cynthia Patterson takes aim, as she shows how a narrow understanding of the classical conception of citizenship has all too deeply colored the Western conception and has
wrongly generated as a model the privileges of free, adult, property-owning members of the Greek polis and of the Roman Empire as the paradigm of citizenship.80

Patterson argues that there are great discrepancies between theories of citizenship and the realities of its expression, which result “from making Aristotle stand for Athens on the one hand and Roman jurists for Rome on the other—and ignoring the historical context of both in which citizenship was an arena of on-going contestation with variable consequences (economic, social, religious, as well as political) for women and families and for aliens as well as the native born.”81 Because women did not vote or hold office in Athens or Rome, it has been assumed that they were excluded from citizenship. If, however, one looks beyond a formal understanding of the political as centered on the institutions of running and holding office, jury duty, and the military, and takes into account the many ways in which membership in the community is expressed, “the character of female and/or provincial citizenship becomes more interesting.”82

As Patterson explains, around the year 451/0 B.C.E., Pericles proposed to the Athenian Assembly that “anyone who was not born of two citizen parents should not have a share (metechein) in the polis.” Patterson underscores that the Athenians did not vote on who was to be a “citizen” but rather on who could “share in the city.” And this shareholding was expressed through the use of the term “astos” “to denote the parental citizen couple necessary for that shareholding.” Yet it is the word “polites” that has usually carried the weight of discussions of citizenship in the ancient world.

Through meticulous documentation, Patterson reveals that women as astoi both had legal rights and protections (for example, against rape and adultery) and participated extensively in public religion, in the celebration of civic festivities, and in the care for the dead and funeral rituals. In Rome as well, which was never a democracy like Athens and which did not extend the suffragium (right to vote) to all male citizens, women of the republican elite held certain rights and privileges, placing them above lower-class male citizens. At that time, determining whether women were citizens then required a decision about what kind of participation counted as a mark of citizenship. If citizenship was understood more broadly as “sharing in the city” and if citizenship voice was seen as including public actions related to life and death and not just as a matter of whether women partook in certain political institutions, women were indeed citizens in the ancient world, with a status that was expressed and displayed through a variety of activities.83
We need thus to take Patterson’s insight forward so as to focus on expressions of citizenship today that fall outside the parameters of conventional political citizenship. In the ancient world, propertylessness and laboring for others disqualified one from holding political citizenship. But, as modern industrial democracies universalized the condition of wage labor to all genders, races, and ethnicities, the complex interdependence between work and citizenship emerged and, with it, the nomenclature of “economic citizenship.”84 Until recently, however, the influence of the ancient model on Western political thought made some form of property ownership of land the decisive criterion for citizenship. Jean-Jacques Rousseau and Immanuel Kant, as well as Thomas Jefferson, were united in their belief that landed property was necessary to assure nondomination and to make a man “independent of the will of another.”85

With the transition from an economy based on small commodity production, in which such forms of land ownership were meaningful, to an industrial society of generalized commodity production, in which land ceased to be the main source of wealth, the citizen became increasingly the wage earner, dependent upon some form of salaried or wage-earning employment. T. H. Marshall, in his famous essay on “Citizenship and Social Class,” theorized that economic rights to form trade unions and to receive unemployment compensation, retirement pensions, and health care benefits were the culmination of the rights of citizenship in democracies.86

In their contributions to this volume, Linda Bosniak and Aihwa Ong address different aspects of this complex relationship between forms of economic dependence and independence and one’s status as a rights holder. Bosniak proceeds from a broad observation that

[t]o the extent that progressive social theorists, including feminist theorists, continue to press to redefine the *substance* of citizenship—to extend our conception to include more robust conceptions of “social citizenship” or “equal citizenship” or “democratic citizenship,” and to incorporate new domains, like the workplace and the home, as sites of citizenship practice—we ought, I think, to be particularly sensitive to the questions of exclusion and subordination implicated in this discussion. Citizenship for whom? Citizenship where?87

As large numbers of women enter into the various sectors within the labor force (for example, in the United States, about 75 percent of women with children between six and seventeen work outside their homes), some
of the household labor that they once performed is undertaken by other women, who themselves often cross borders to take such jobs. “A good deal of the care work that was conventionally performed by wives and mothers (or female extended family members) is now performed by non-family members pursuant to commercial exchange or contract.” This commodification of domestic labor is both raced and classed and, increasingly, has a transnational dimension in which the migration of foreign women enables resident women to do different kinds of wage work. While both resident women and migrant women are economic agents, only resident women are now entitled to citizenship.

Bosniak resists the idea of citizenship as a “zero sum game” in which wealthier women gain their status at the “expense” of domestic workers. Rather than insist on a “universalist conception,” Bosniak seeks to buffer against “citizenshiplessness” by arguing for the need to disaggregate aspects of citizenship so as to identify mechanisms of subordination and to provide specific protection for those without citizenship. Bosniak raises the concern that if the problems are seen only in all-or-nothing citizenship terms, then practical protections—such as protection of work hours and wages—might be forestalled because of the complexity of the larger political and legal challenges presented when transnational domestic workers seek protection.

Her intervention builds on some countries’ traditions and institutions in which certain rights and obligations have long existed independent of political citizenship. In the United States, for example, aliens both pay taxes and serve in the military. Further, even if undocumented, aliens formally enjoy expressive and associational rights as well as procedural, contract, and property rights and access to public schools, which (while under assault) thus far attach to “personhood” and not only to citizenship. Yet, since 1996 in the United States, rights of access to health care and social welfare programs have also contracted. ⁸⁸

Aihwa Ong also focuses on foreign female workers as she provides arresting accounts of the predicament of “foreign maids” in Asian metropoles, with “approximately 140,000 domestic workers . . . in Singapore, 200,000 in Malaysia, and 240,000 in Hong Kong.” ⁸⁹ An estimated ten million Asians, about half of whom are female, are “transient aliens,” and some have been held as “sex slaves” or otherwise horrifically abused; the “ frequency and ferocity of abuses against foreign maids index a brewing human rights crisis over the emergence of neo-slavery in Southeast Asia.” ⁹⁰
Ong analyzes “the interrelationships of labor markets, nationalisms and moral economies” that generate this phenomenon. Some countries (such as the Philippines and Indonesia) are senders, with workers trained by various authorities (including NGOs) under a rubric which makes a connection “between free choice in seeking overseas employment [and] the young women's sense of moral indebtedness and sacrifice for their families.” As net remitters of earnings to their families and kin, these “maids” have become a highly prized “asset” for the economies of the countries involved. But a role that empowers them as workers at home does little to alter what may be called “domestic slavery” under conditions of economic globalization. As Ong details, employers often hold their domestic workers’ passports and work papers. Foreign domestic helpers do not apply for citizenship, but instead may only hope for their contracts to be renewed. Of the countries studied, Hong Kong alone provided foreign maids with special work visas that protect minimum wages and days off. And the tenuous nature of such protections can be seen during times of economic crises; in 1997–98, close to nine hundred thousand migrant workers were expelled from Malaysia, Singapore, and Hong Kong.

What might be done? Ong is skeptical towards a language of human rights that includes a “logic of exception” that creates categories of persons outside the zone of citizenship and those within. She is also skeptical of the ability of transnational and local NGOs to intervene in light of the “competition for foreign jobs among labor-sending countries” and the complexity of having a young, female presence in the intimate domain of the household. While some NGOs have relied on the media to make plain the suffering of “racialized” women at work, these groups have pressed for the protection of the physical well-being of these women alone (“biowelfare”), rather than situating them as members of a global humanity. NGOs do not generally demand rights of citizenship for migrant workers, and not all workers want to lose or attenuate the citizenship that they have. Seeing NGOs as parties to and subject to national agendas and capitalist interests, Ong argues that NGOs are “not the actors of a ‘postnational constellation,’ in the Habermasian sense of an emerging global civil society.”

Valentine Moghadam, focused on another region of the world, provides a very different account than Ong of the effects of an international human rights regime, of transnational civil society, and of a global public sphere. Moghadam, who considers case studies from the Republic of Iran and the Kingdom of Morocco through a comparative interest in
countries like Egypt, Algeria, and Turkey, explores the way “local communities or national borders” are affected by globalized norms. She asks, “What of the migration and mobility of feminist ideas and their practitioners? How do local struggles intersect with global discourses on women’s rights? What role is played by feminists in the diaspora, and what is the impact of the state?” By analyzing the formation of women’s rights and feminist organizations both within specific countries and through transnational feminist networks, she argues that international conferences and treaties such as CEDAW have created tools that women tailor to their own contexts.95

Moghadam maps the “significant variations in women’s legal status and social positions across the Muslim world.”96 Yet in general, “similar patterns of women’s second-class citizenship”97 can be identified in terms of family life and economic opportunity. Across national boundaries, citizenship is transmitted through fathers, and marriage laws give men rights that women do not have. In both Iran and Morocco, for example, the state, the family, and economic forms of dependency create what Moghadam calls the “patriarchal gender contract.”98

Responding in the 1980s to efforts to strengthen application of gendered Muslim family law to women living in diverse national and cultural contexts, various women’s networks came into being. For example, nine women (coming from Algeria, Sudan, Morocco, Pakistan, Bangladesh, Iran, Mauritius, and Tanzania) formed an action committee that resulted in Women Living Under Muslim Laws (WLUML), an organization that serves as a clearinghouse for information about struggles and strategies. WLUML includes women with differing approaches to religion; some are antireligious while others, such as Malaysia’s Sisters in Islam, are observant. Thus, some work to abandon religious strictures while others challenge interpretations of religious laws and make arguments from within texts and traditions.

Moghadam identifies features of these efforts that distinguish the work of these groups from their counterparts in North America and Europe. For example, many Middle Eastern women’s groups display “a tendency to work with men and to engage state agencies”99 rather than adopt more radical feminist postures, as have some groups in other parts of the world who show more skepticism toward the possibility of state-based reforms.100 Moghadam posits that groups such as WLUML serve to mediate the exchange between universalist equality claims and local conditions. By reviewing conflicts in Iran and in Morocco on family rights, Moghadam
argues that WLUMIL, along with the Women Learning Project, had an impact by sparking an interaction between state-centric and transnational action. Thus, Moghadam concludes that “[t]he integration of North and South in the global circuits of capital and the construction of a transnational public sphere in opposition to the dark side of globalization has meant that feminism is not ‘Western’ but global.” 101 She notes the following irony in global struggles: just as these struggles for women’s equality require revisiting the discourse of universalistic human rights, the conditions of global migrations raise questions about whether to aspire to global citizenship, to particularized affiliations, or to combinations thereof. Further, Moghadam also suggests that the more culturally embedded a group is within a nation-state, the more effective could be its efforts to incorporate universalist norms.

Layering Citizenship, Federalist States, Multiculturalism, and Gender

Thus far, we have focused on women, men, and children moving across borders and either gaining status recognition or not. We turn now to two related ideas: groups of migrants affiliated with each other and living in somewhat distinct cultures within their host country, and federated or confederated governments in which citizens of preexisting states come together into one unit even as they insist on the continuing autonomy (sometimes termed “sovereignty”) of the subdivisions. Obvious examples today are the United States, Canada, and the European Union, in which one is simultaneously a citizen of a state or province or nation and of the larger entity as well. Further, it is worth recalling that layered affiliations are not novel in that some colonials were both subject-citizens of an empire, such as Britain, while simultaneously being Australian or Canadian. Moreover, Commonwealth status can still be relevant to obtaining citizenship in the United Kingdom.

How should we understand citizenship, gender, and borders in these contexts? How do commitments to pluralism, multiculturalism, and universal rights play out? What roles ought to be accorded to the UN conventions, to national lawmaking, and to courts? Whose voices get heard and who speaks for or is understood as representing the interests of subgroups when conflicts emerge? Are jurisdictional allocations gender-coded (such as the assignment of “matters that are essentially
within the domestic jurisdiction” to the nation-state by the UN Charter)? And what work does the division into domestic versus national jurisdiction do in inscribing gender distinctions? Intense debate surrounds issues of whether and when nation-states ought to encourage or to accede to multiple affiliations that constitute culturally differentiated forms of citizenship.

For example, from the perspective of the nation-state, one could identify advantages, such that a state may use communities of migrants as resources, providing networks, skills, and competencies to enhance a state’s own standing in a global world. Alternatively, one can worry about the degree to which such communities deviate from national norms and retain allegiances to their home countries. Migrants’ insistence on their subcultural connections are interwoven with their experiences in host countries, the degree of difference between host and home country, and the hospitality or the hostility of the host country.

In many respects, these are familiar issues in the political and legal theory of any federation, as it is often through conflicts over degrees of autonomy that one identifies which national normative commitments are so foundational as to trump subpolities’ variations. Moreover, the problems of subgroup deviance are also familiar in the historical sense, in that migrants have long joined together in a new country to insist on their own delineations so as to adhere to distinctive customs rather than to be totally immersed in the culture in which they now live. Drawing on examples from earlier centuries of Chinese, Jewish, and Indian migrations, one could model these experiences as a diaspora, in which communities insist on their distinct identity and strong connections to another place that is their “home.” Alternatively, given that globalized networks of transportation, communication, electronic media, and banking and financial services enable people living in one place to participate in and be connected to communities at a great distance, one could see these multiplying ties as representing people’s experiences of having more than one “home country” and thus as pluralizing allegiances.

Our contribution here is to put gender at the forefront of these debates and to see how the tensions between migrant cultures and those of their host nations, interlaced with gender, are sites of contestation in this volume as exemplified by the lively philosophical divergence among David Jacobson, Audrey Macklin, and Angelia Means. In Jacobson’s interest is in the “competing demands of immigrant communities, multicultural aspirations, and women’s rights.” In his view,
the evolution of international norms of justice, along with erosion in the
sovereign ambit of the nation-state, have created a tendency in the courts
to privilege individual “bodily self-possession” and free choice, including
that of women, and this is leading the courts to uphold women’s human
inghts to bodily integrity and freedom from patriarchal and communal fiat.
This development is, in practice at least, geographically bounded and, in
Western countries, socially and politically fraught vis-à-vis some immi-
grant communities.104

Jacobson’s examples include practices that impose upon women’s bod-
ies, such as requiring female genital cutting, “marriage by capture,” or
the forcible return of a woman to her family’s traditions. Jacobson then
looks to law, and particularly to the courts, in which claims or defenses
of such practices are stated in oppositional terms that put women’s rights
into conflict with “culture.” Through the “judicialization of politics,”105 ar-
gues Jacobson, courts and other branches of government use gender “as
a means of excluding certain ‘undesirable’ cultural practices.” In these
struggles (including transnational violence as represented in 9/11), “the
rights of women are a key leitmotif.”106

Jacobson’s questions have engaged many scholars, some of whom do
not share his reading that “when women’s rights clash with patriarchal
culture, in the great preponderance of cases the rights of women trumps
the claims of such cultures, legally and in public opinion.”107 For example,
a 1996 analysis, “Individualizing Justice through Multiculturalism: The
Liberal’s Dilemma,” by Doriane Lambelet Coleman, argued a different
trend, at least in the United States, in which a “cultural defense” was used
as mitigation of charges of criminal assaults such as rape, battery, and
murder against the women involved.108 (Jacobson might respond that the
criminal charges vindicate his point, in that recognition of women’s rights
puts “culture” on the defensive.)

Data collection is one difficulty; reported judgments are a thin slice of
what occurs in courts, where it is difficult to learn about all of the cases
filed, defenses made, and charges dropped. More generally, beyond spe-
cific opinions in the small number of reported cases, identifying what
to count as an instance of a government’s privileging women’s self-pos-
session is not obvious. Beyond such empirical challenges are theoretical
questions, because the juxtaposition of “culture” to “gender” is itself prob-
lematic, as is demonstrated in the debate raised by Susan Moller Okin’s
question: “Is Multiculturalism Bad for Women?”109 Mapping the many
world cultures (ancient and modern) that were patriarchal rather than emancipatory in their views of women and the defenses of “multicultural citizenship rights” by Will Kymlicka and others, Okin argued that the celebration of “different cultures” missed the harms to women. Yet many feminist theorists rejected the positioning of women in opposition to culture, as they argued that it was not emancipatory to suggest that women had to make a choice between “your culture or your rights.” In the last few years, another question—wearing a headscarf—has come to embody (pun intended) these issues. In several countries, Muslim women and girls in professional and educational settings have been told that they may not wear head coverings. Litigation and legislation has resulted, along with a good deal of feminist commentary insisting that these women’s agency has been undervalued.

Furthermore, a women versus culture approach tends to exoticize both women and culture, as if “others” have these conflicts whereas practices in the United States or the West are not themselves predicated on deeply held cultural views of gender-coded social roles and rules. The ever-present painful example is violence against women, which knows no national or cultural boundaries. Yet, when states become active in pursuit of such harms, the concern is that prosecutions will be aimed at the marginal cultures, in some contexts resulting in the criminalization of the male members of economically or racially vulnerable minorities.

Such concerns shape the contributions of Audrey Macklin and Angelia Means, who seek to deconstruct the binarisms of gender versus cultural identity. Like Jacobson, Macklin puzzles about what law is supposed to do in the face of practices that could be oppressive to women in minority subcultures. Like Jacobson, she also considers female genital mutilation (FGM), which the Canadian Criminal Code explicitly made illegal in 1997. Macklin recounts that her initial concern was that “[s]ingling out FGM for special mention [. . . ] seems to implant a marginalizing narrative into legal text.” But that insertion did not come from action by the dominant national culture alone, but from “encultured women” engaged in a campaign as they formed coalitions with mainstream feminist organizations to persuade the Canadian Parliament to take action that they believed would “unequivocally convey the message of its illegality to affected communities.” The criminal deterrent was thought to be a useful complement to education and consciousness raising.

Macklin’s other case study involves the question of what could be styled “contracts versus rights.” Many countries now promote “alternative
dispute resolution” procedures to create state-enforced private settlements of conflicts in lieu of adjudication of rights. Under the law of the Canadian Province of Ontario, women are rights holders when families dissolve and they can seek compensation for household labors that enabled their husbands to develop careers. Ontario also permits resolutions through negotiation, which results in “domestic contracts.” In addition, when disputants use arbitration, these outcomes are enforceable in court. (In contrast, in Quebec, family law arbitrations are advisory rather than binding.)

In 2003, a then-new Islamic Institute for Civil Justice offered to arbitrate family and inheritance conflicts under Muslim law, prompting an inquiry about whether faith-based arbitration ought to be given legal force. Opposition came from the Canadian Council of Muslim Women, who worked with the transnational group, Women Living Under Muslim Laws (WLUML), also discussed by Moghadam. Reliant on networks “as Canadians, as women, as immigrants, and as Muslims,” the opponents built constituencies both locally and globally, just as they argued on the basis of both national and transnational principles, including the UDHR’s commitments to dignity and equality. Proponents of faith-based resolutions were similarly domestic and international—including organizations such as “the Christian Legal Fellowship, the Salvation Army, B’nai Brith, the Sunni Masjid El Noor, and the Ismaili Muslims.” The denouement was Canadian legislation, which does not prohibit parties from turning to faith-based tribunals but gives such judgments no legally enforceable effect.

As Macklin explains, both cases rest on liberal principles concerned with the capacity of dependents to make volitional judgments. Specifically, political campaigns relied upon a shared appreciation that minors cannot knowingly consent to FGM and that immigrant women would be particularly vulnerable to their husbands. Moreover, the resistance to faith-based family dispute resolution was built on a general critique that family law ought not to be a regime permitting “parties to ‘opt-out’ of public norms and public scrutiny, leaving vulnerable women of all faiths and ethnicities with inadequate legal protection.” Yet, in Macklin’s judgment, proponents of criminalizing FGM “underestimated the coercive power of the criminal justice system, while the anti-Islamic tribunal activists overestimated the equilibrating power of the civil justice system.” Moreover, commentators on both laws will probably underappreciate how politically important encultured women, often presumed to be voiceless, were. As Macklin details, those women played central roles, expressing
“political citizenship in the public sphere of law reform” and doing so through transnational and transcultural claims of equality.119 “Claiming their entitlement as legal citizens of Canada to participate in governance, they demanded equal citizenship as Canadian women. At the same time, they pointedly refused to renounce their cultural citizenship or to confine their gender critique to the specific cultural context.”120

Such practices not only make the meaning of citizenship more complex by revealing the interaction of the language of universal rights and culturally embedded identities; they also expand the vocabulary of public claim making in democracies. It is with the transformation of democracies through such practices that Angelia Means is concerned. Means writes from the perspective of political philosophy, informed by a vision of “strong democracy,” defined as relying on participatory politics instead of solely on individualistic rights-based perspectives to shape and change democratic processes. These strong democracies are evolving into a new type of political society: “a type of society that can leave behind the ideology of national identity; . . . that has undergone the requisite socio-economic modernization, is thoroughly adapted to cultural modernity (with its characteristic differentiation between law and ethical/cultural/religious worldviews) and has well-developed (and integrated) formal and informal public spheres.”121

For Means, the challenge of integrating the claims of gender and culture into the public spheres of existing democracies, whether through legal, political, cultural, or social institutions, ought not to be conceived of in technical or strategic terms, focused on fixing a piece of legislation or tweaking a practice. Rather, the point is to push democracies towards another form of society, constantly reaching “for the inclusion of the other”122 by bringing legal-doctrinal presence and emergent social groups into encounters and conversations, thus contributing to the reflexivity of the identity of the “democratic we.” In such encounters the “others” as well as “we” are transformed through multiple democratic iterations. Even as she launches a strong defense to consider the “individual’s equal right to cultural expression to be akin to the right of religious expression,” and therefore deserving of protection, Means emphasizes how the conversation between law and minority cultures both challenges existing laws and changes the cultures themselves. For, “in the context of strong democracy, cultures (like religions) can be expected to evolve, to become complex, contrarian, and differentiated, and, ultimately, to make their peace with the idea of equal rights for all, including women’s rights.”
Unlike Jacobson, who is leery of a robust judicial role, Means has great ambitions for what courts can do. She urges constitutional courts to take an active role as meta-public spheres and to determine the boundaries of the cultural struggles of the present. Means wants courts to guarantee to all the right of equal freedom by protecting their freedom of speech and public access; by rejecting discrimination; and by reiterating private rights in the light of the multicultural, countercultural, and contrapunctual perspectives of new members. The role of the courts, in her account, is not to provide “a comprehensive conception of moral freedom that fills in the substantive content of personal liberty and moral autonomy, but rather, to pursue ‘political freedom through law.’”

We turn from questions of cultures within nation-states to questions of cultures arising within federations or unions, entities whose self-definition includes two ideas: that subnational units have some degree of autonomy to generate distinctive norms; and that individuals can simulatnaeously be members or citizens of both the subunit and the larger one. Patrizia Nanz’s interest is thinking about gender in the context of the emergence of European citizenship and the intra-European migration flows. As she reminds us, before 1992, Europeans were “market citizens” but were “considered foreigners when traveling or living outside their country of origin.” But in 1992 (under the Maastricht Treaty, which was agreed to in that year and became effective the following year), they gained the rights to move freely across borders and reside in any of the member states and to vote in and run for municipal and European Parliamentary elections where they resided. Citizenship in any of the EU member states provides EU citizenship.

As educational and professional opportunities transcend nation-states, a new political space is emerging encompassing the twenty-seven nation-states of the European Union. But is that new union a demos? How can a meta-EU-citizen identity come into being? Nanz focuses on two mechanisms interacting and generating the “disassociation of nationality (belonging) from citizenship (legal status)” through which aliens and nationals become open to exchanges of intercultural citizenship practices. One is formal law, found in treaties and elaborated through directives and courts, and the second is the practices of the peoples of Europe, moving across national borders and embracing “dual national identities and multiple allegiances.”

As Nanz lays out, some of the legal predicates to the development of a European demos are entitlements to free movement of persons and
families and the equal treatment of aliens and nationals. Nanz explains how the European Union’s initial economic principles of the 1950s of equal pay for equal work developed into a more far-reaching insistence on equality and prohibitions against discrimination.

In the early 1960s, the European Court of Justice (the ECJ, sitting in Luxembourg) ruled that EU rights took “direct effect,” operable directly at national levels and to be enforced by national courts.126 (In contrast, for example, treaties ratified by the United States are not necessarily the source of rights for individuals in either national or state courts.) In 1998, the ECJ established the principle that nations cannot discriminate against nonnational EU citizens, and the concept of equality came to be understood to enable nonnationals to have family members join them in their countries of residence and thus developed into the understanding that rights to mobility were not predicated on one’s own work status alone.

Nanz then takes up the question of entitlements to welfare through an analysis of the 1998 case of Martinez Sala127 and concludes that this ruling is mixed from a feminist perspective. This judgment “widened the conferral of social advantages and family benefits beyond the bounds of economic activity” and therefore made EU citizenry the basis for some national welfarist policies.128 But the ECJ reached the decision on the basis of the national court’s holding that Ms. Martinez Sala was not a “worker” under the governing regulations, and hence did not recognize the ways in which a single parent without wage work contributes as another kind of “worker” to the economy.129

New legal questions emerge from circumstances in which a national of one country moves to another EU nation. Nanz also moves from legal principles to practices as she examines the attitudes of intra-EU migrants toward EU citizenship. Repeatedly, migrants “with high levels of national identity are more likely to identify with Europe” than those with lower levels of political identification, leading Nanz to reject “zero-sum conceptions of national versus European identity.” Nanz sees these EU migration rights and the development of “situated postnational citizenship” as potentially of benefit to women, including non-EU nationals.

Vicki Jackson is also intrigued by the interaction among citizenship theory, federalism, and equality rights, as she looks worldwide to sort out their possible relationships. Jackson sees the advantages of a world in which national identities have meaning, in part to enable territorial connections that are based upon “rooted geography of living” rather than “based solely on ascriptive identity.” Moreover, like Nanz, Jackson
is insistent on layered relationships, in which one can be a citizen, in a meaningful sense, of more than one polity. Rather than denationalize citizenship, both Jackson and Nanz are eager to explore both expressive and legal mechanisms to pluralize citizenship and to accommodate experiences of persons as deeply related to more than one polity. Jackson is unwilling to assume that egalitarians ought to aspire to a world that is postnational and in which the meaning of citizenship is attenuated. Jackson sees nation-states as the engine for enforcement of rights and the places for participation to make or remake legal entitlements. “Undermining the civic affiliations embraced by national citizenship may have costs to maintaining the significance and viability of democratic governmental spaces.” Moreover, “equality of citizenship” has been used to “enhance women’s access to public life, education, and economic advancement.”

Jackson also takes up the issue of whether federalist models of government might actually be better equipped than unitary systems for enabling women to gain equality. By definition, federations offer more places for political participation and possibly some “closer to home.” Some empirical data—from the United States and elsewhere—find a correlation between women’s office holding and subunits, such that women are more likely to hold jobs in state legislatures and judiciaries than in the federal system. But given the many variables entailed (including whether an electoral system is proportional, how elections are financed, and the numbers of parties), causal claims should not be made. Federations could offer other advantages, including policy competition and training in sustaining a sense that policy disagreements are positive aspects of a country’s identity. Yet the content of variation is key, for federations (infamously the United States) have tolerated discrimination. Further, unitary governments may make implementation of equality norms easier to monitor.

**Citizenship, Human Rights, Jurisdictions, and Borders—Engendered**

This volume aspires to reorient the lively debate concerning globalization, borders, migration, and citizenship by bringing together law, politics, and theories that highlight the way gender categories illuminate and enrich the analyses. All contributors struggle with the meaning of community and the hopes for equality in a world racked with dissension, violence, and subordination. We join the authors of this volume and, we hope,
its readers, in aspiring to help shape intellectual and political iterative processes that refuse to ignore the injuries imposed in the name of the nation-state while acknowledging the ways in which these communities can shelter and enable their members. While we—the coeditors—are both committed to Benhabib’s formulation of a “right to have rights,”[133] we have somewhat different views of the roles to be played by transnational precepts and nation-states. Resnik sees the generativity of “affiliation by law”[134] resting importantly at local and national levels in which one can either live safely and with respect or not, while Benhabib is more skeptical of this form of social ordering and pleads for robust interaction between cosmopolitan norms and local practices.

We raise these differences only in passing and deliberately in conclusion to this introduction as a way of inviting readers to join us in our efforts to understand the implications of these positions in the fast-changing world in which some of us move, some of us stay put, and all of us are marked by the interaction between those places and our genders, races, ages, ethnic affiliations, resources, and histories.

Notes

1. Both of us have benefited from our many conversations with our editor, Deborah Gershenowitz, and with our colleagues and coteachers, Robert Post and Reva Siegel, as well as from the generous, generative, and thoughtful research and camaraderie of talented students, including Talia Inlender, Chavi Keeney Nana, Stella Burch, Angelica Bernal, Vasudha Talla, and Dane Lund. We are grateful for the generous support of Yale University’s Castle Fund in subsidizing the publication of this book and the Migrations and Mobilities Conference held in New Haven, Connecticut in 2003 and cosponsored by Yale’s Women Faculty Forum, its Law School, the Woodward Fund, the Yale Center for International and Area Studies, and the Crossing Borders Initiative. Our thanks to those entities, to the leadership of Linda Lorimer and Gus Ranis, to others of our colleagues at Yale and especially to Vilashini Cooppan, as well as to Rachel Thomas of the Women Faculty Forum, who joined us in its planning, and to the participants whose discussions inform our work. We each enjoy the pleasure of intellectual companionship and thus our thanks to Jim Sleeper and to Denny Curtis.


6. See Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 23 (Judgment of April 6, 1955). There, the International Court of Justice defined citizenship as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.” What those rights and duties are varies from country to country, and moreover, both native-born and naturalized citizens may lose their status. Expatriation is a sanction used by some countries; naturalized citizens may also be at risk of denaturalization if citizenship was obtained by fraud. This distinction is discussed in Trop v. Dulles, 356 U.S. 86, 126 (1958) (Frankfurter, J., dissenting).


22. UDHR, supra note 17, Preamble, para. 5.

23. Ibid., art. 2.

24. Ibid., art. 16. The 1958 Convention on the Nationality of Married Women, 309 U.N.T.S. 65 (Aug. 11, 1958), also recognized that marriages or divorces between aliens and nationals ought not to “automatically affect the nationality of the wife.” Ibid., art. 1. Further, a man who denounced his citizenship could not “prevent the retention of nationality by [his] wife.” Ibid., art. 3. In addition, alien wives were to have “specially privileged naturalization procedures” through their husbands. Ibid., art. 3.

25. UDHR, supra note 17, art. 13.1 (“Everyone has the right to freedom of movement and residence within the borders of each state.”); art. 13.2 (“Everyone has the right to leave any country, including his own, and to return to his country.”).

26. UDHR, supra note 17, art. 14.1 (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”); art. 14.2 (“This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”).

27. Ibid., art. 15.1 (“Everyone has the right to a nationality.”); art. 15.2 (“No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”).


29. Unsuccessful efforts to do so were undertaken in the 1940s by several organizations that petitioned the United Nations to deal with human rights violations in the United States. See, e.g., NAACP, An Appeal to the World! A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States and an Appeal to the United Nations for Redress (1947). Further, in litigation in the United States, arguments were predicated on both the UDHR and the UN Charter, invoked for the proposition that racial segregation was illegal as a matter of international law. While a few courts agreed, the United States Supreme Court reread the parameters of the equal protection guarantees in the United States Constitution to base its prohibition on segregation

30. As provided in Article 1 of the 1951 Convention, such a person must be one who has a well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. (1951 Convention, art. 1.A.2)


32. Talia Inlender, “Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims” (in this volume). When asylum is denied, the applicant may be returned to the country of origin, but under international law this “refoulement” is not to occur if threats remain, and instead that person is to be sent to a designated safe third country. See Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe v. Her Majesty the Queen, [2007] F.C. 1262 (Can.).


34. This point parallels the discussion of how in ancient times, women and men also expressed their political citizenship in different ways. See Cynthia Patterson, “Citizenship and Gender in the Ancient World: The Experience of Athens and Rome” (in this volume).

36. That critique has been made more generally about many forms of international law. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001). Yet, national jurists can conclude that, by ratifying treaties, domestic obligations change, and some courts within the United States, for example, have invoked the UDHR as well as the UN Charter as bases for their judgments. See Resnik, “Law’s Migration,” supra note 29.


38. As Inlender notes, governments in some countries—including Canada, Australia, and the United States—have used those guidelines when promulgating administrative regulations, and further, some courts have relied on them when assessing whether immigration officials have erred in not recognizing asylum claims.


40. ICCPR, supra note 19, art. 26 (prohibiting discrimination on any ground such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

41. ICCPR, supra note 19, art. 2.1 states, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

42. ICCPR, supra note 19, art. 24.3.

43. ICCPR, supra note 19, art. 12.1.

44. ICCPR, supra note 19, art. 12.3 states, “[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”


46. CEDAW, supra note 21, art. 3.

47. CEDAW, supra note 21, art. 9.

48. CEDAW, supra note 21, art. 10.


50. The UN Convention on the Rights of the Child states at art. 10(1) that “States Parties shall further ensure that the submission of such a request [to enter
or leave a State Party for the purpose of family unification] shall entail no ad-
verse consequences for the applicants and for the members of their family. G.A.
(entered into force Sept. 2, 1990) [hereinafter, “CRC”].

51. Dauvergne, “Globalizing Fragmentation” (in this volume).

52. Convention for the Protection of Human Rights and Fundamental Free-
doms, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), as amended by Protocols
Nos. 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December
1971, 1 January 1990, and 1 November 1998, respectively [hereinafter, “ECHR”],
art. 8.

L 2512/12. This provision applies to “members of the nuclear family, that is to say
the spouse and the minor children.” Ibid., Preamble para. 9. A challenge to this
provision for insufficiently respecting the fundamental right of family unification
was rejected by the European Court of Justice. See Case C-540/03, European Par-
liament v. Council, 2006/C 109/02. The ECJ held that international instruments
(the ICCPR and UN CRC) do not create individual rights to be allowed to enter
the territory of a state nor to prevent member states a certain “margin of appre-
ciation” as they evaluated applications for family reunification. See also Helene
Lambert, “The European Court of Human Rights and the Rights of Refugees and
Other Persons in Need of Protection to Family Reunion,” International Journal of

54. See generally Hanna Beate Schöpp–Schilling, ed., The Circle of Empower-
ment: Twenty-Five Years of the UN Committee on the Elimination of Discrimina-
tion against Women (New York: Feminist Press, 2007); Hanna Beate Schöpp–
Schilling, “Treaty Body Reform: The Case of the Committee on the Elimination

55. See Valentine Moghadam, “Global Feminism, Citizenship, and the State:
Negotiating Women’s Rights in the Middle East and North Africa” (in this
volume); see also Jennifer Nedelsky, “Communities of Judgment and Human

56. See Resnik, “Law’s Migration,” supra note 29, 1582–1611; Judith Resnik,
“Gendered Borders and United States’ Sovereignty,” in van Walsum and Spijker-
boer, Women and Immigration Law, supra note 14, 44–65.

57. See Optional Protocol to the Convention on the Elimination of Discrimi-
[hereinafter, “CEDAW Optional Protocol”].

58. One recent provision—the Declaration on the Rights of Indigenous
that “[i]ndigenous peoples have the collective right to determine their own citi-
zenship in accordance with their customs and traditions” as well as the right to
“obtain citizenship of the States in which they live.” As Linda Kerber discusses in this volume, some traditions, including those of nation-states, base citizenship on either patrilineal or matrilineal rules. Linda Kerber, “The Stateless as the Citizen’s Other: A View from the United States” (in this volume).


69. See Patrizia Nanz, “Mobility, Migrants, and Solidarity: Towards an Emerging European Citizenship Regime” (in this volume).

70. See Article 7 of Council Directive 2003/86/EC on the Right to Family Reunification, L 2512/12, which requires that the “sponsor” (as defined in Article 2(c), show the ability to financially support and provide health care and accommodation for uniting family members. In Case C-200/02, Zhu & Chen v. Sec’y of State for the Home Dep’t, 3 C.M.L.R. 48 (2004) (ECJ), the UK and Irish courts argued that a minor child could not fulfill these requirements and thus could not the support the application of family reunification for a parent. See also, Bhabha, “‘Mere Fortuity of Birth’?, “


75. Kerber, “The Stateless as the Citizen’s Other,” 78.

76. The Fourteenth Amendment to the U.S. Constitution, ratified in 1868, which guarantees that “all persons, born or naturalized in the United States, are citizens of the United States and of the state in which they reside.”

77. See 8 U.S.C. § 1409.


80. Patterson, “Citizenship and Gender in the Ancient World” (in this volume).
81. Ibid., 48.
82. Ibid., 49.
89. Ong, “Maids, Neoslavery, and NGOs,” 158.
90. Ibid.
91. Ibid., 160.
92. Ibid., 162.
93. Ibid., 178–179.
97. Ibid.
98. Ibid., 258.
99. Ibid., 263.
100. Ibid.
101. Ibid., 271.
102. David Jacobson, “Multiculturalism, Gender, and Rights” (in this volume); Audrey Macklin, “Particularized Citizenship: Encultured Women and the Public Sphere” (in this volume); Angelia Means, “Intercultural Political Identity: Are We There Yet?” (in this volume).
104. Ibid., 305.
107. Ibid., 310.


115. Ibid., 281.


118. Ibid., 293. For another critical analysis of these events, see Sherene H. Razack, “The ‘Sharia Law Debate’ in Ontario: The Modernity/Pre-modernity Distinction in Legal Efforts to Protect Women from Culture,” Feminist Legal Studies 15 (2007): 3–32.


123. Nanz, “Mobility, Migrants, and Solidarity.”

124. A different approach to EU citizenship is proffered by Rainer Bauböck in his essay, “Why European Citizenship? Normative Approaches to Supra-National Union,” Theoretical Inquiries in Law 8 (2007): 453. He proposes “equalization of most citizenship rights (including the franchise in local elections) for permanent residents of the Union independent of their nationality and developing common norms for the acquisition and loss of citizenship status in member states.” Ibid., 488.


128. The ECJ has, thus far, remained committed to a broad application of the principles that social benefits should be afforded to those who live on the territory of a member state. See Case C-212/05, Gertraud Hartmann v. Freistaat Bayern (18 July 2007), citing Martinez Sala for the proposition that German child-raising allowance constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and upholding the right of the nonworking spouse of an EU national working in another member state to a social benefit in the form of child care. Ibid., para. 22; see also Case C-180/99, Khalil, Chaaban, Osseili v. Bundesanwalt fuer Arbeit/Nasser v Landeshauptstadt Stuttgart/Addou v Land Nordrhein-Westfalen (11 October 2001), citing Martinez Sala for a broad personal application of rights enumerated in Article 51 of the EC Treaty and upholding the right of the self-employed in another member state to social security benefits. Ibid., para. 33.


