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**Citizenship Solidarity and Rights Individualism: On  
the Decline of National Citizenship in the U.S.,  
Germany, and Israel**

**By David Abraham**  
University of Miami

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# **Citizenship Solidarity and Rights Individualism: On the Decline of National Citizenship in the U.S., Germany, and Israel**

David Abraham  
University of Miami

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*Abstract.* This paper analyzes changes in the nature of citizenship in the United States, Germany, and Israel over the past three decades. Abraham argues that the gap between "citizen" and "resident alien" has been shrinking. Overall, there has been a decline in the content of citizenship and easier access to it. Despite some recent hostility toward aliens in many countries, the tendency over the longer term has been to grant aliens greater rights. In part, this is because courts have come to focus on equal protection rights for individuals. However, the development also points to a reduction in solidarity within these societies because of neo-liberalism and the weakening of citizenship as a political and socio-economic category. The decline of the Keynesian welfare state, the breakup of the Soviet Union, and the rise of international human rights discourses have also played a role. The result in Germany and the United States has been increased recognition of immigrant rights and non-discrimination toward immigrant residents, but at the expense of redistribution. The presentation also examines whether neo-liberal developments in Israeli law and society might have a similar impact.

Societies vary greatly, from each other and over time, in both the amount and nature of the solidarity they demand of, offer to, and inculcate in their members --old and new, full and partial. Such solidarity or reciprocity may encompass or be measured by many different things: the redistribution of wealth, the taking up of arms, the reproduction of members, the universality and enforceability of relatively homogenous cultural norms, and boundedness vis-a-vis others being among them. Sometimes the bonds of association, membership, or citizenship are thick with many rights and obligations; sometimes they are thin with only few. Entry from the outside may be difficult and discouraged or easy and encouraged, even solicited.

Boundaries may be more or less porous; hybridity and syncretism, both ethno-cultural and normative, welcomed or not. *Boundaries* and *bonds* stand in some determinate relationship to each other, though the exclusivity of citizenship status and the richness of social membership are contested, both separately and together. In other words, the criteria for membership and the rules governing relations among members --bounded, bonded, and committed-- are, as Michael Walzer suggested, related, but in uncertain ways.<sup>1</sup> Immigration into a society may be easy or it may be difficult; the

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<sup>1</sup>Michael Walzer stated what might be called a boundary condition:

assimilation of immigrants may be weak or it may be thorough; the rights enjoyed by members, by citizens, may be few or may be many-- yet some connection between belonging and rights will be established.

Individual rights and differences have certainly proven compatible with collective solidarity, but within some limits, often demarcated, particularly in "liberal" societies, by a public/ private distinction that allows private differences to coexist with public commonalities. At the same time, individual rights and the struggles for their expansion, particularly that of positive social and, to a lesser extent, political rights, have in fact enriched collective solidarity.<sup>2</sup> On the other hand, the social and political recognition of solidarities that transcend the core identity commitment (supra-) or focus beneath it (sub-) or beyond it (trans-) or across it (dia-) risks disrupting solidarity and what it offers.

*E pluribus unum*-- but only sometimes. The coincidence of bounded space or territory with community and with polity seems today not so secure. Perhaps seeking to update Walzer's conception of a "community of character," destiny and purpose, one recent commentator has observed that we now "live in a patchwork of communal identities which can occupy the same geographic space and in which the public realm may bring together people who have no common felt identities."<sup>3</sup> The pluribus dominates; membership may no longer assure a singular loyalty; the social contract becomes formalistic and governs a federation rather than a community.

Life in this world, as Arjun Appadurai and others see it, is no longer national, no longer based on soil and place; it is more likely diasporic or cosmopolitan. America (at least) is no longer a land of

The idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging, and sharing social goods, first of all *among themselves*. *Spheres of Justice* (New York 1983), p. 31 (emphasis added).

The U.S. Supreme Court seemed to echo Walzer's formulation:

Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well .

*Cabell v. Chavez-Salido* 454 U.S. 432, 440 (1982)

Of course, Walzer's seemingly undeniable observation does not instruct us as to how many immigrants to permit (or from where) or how far or forcefully to assimilate them. Walzer does not mince words, however, in contending that

The restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people *committed to one another and to their common life*.

*Ibid.*, p. 39.

<sup>2</sup>See, for American examples, Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton 2002), Elizabeth Cohen, *Making a New Deal* (New York 1990). Almost the entire European social democratic tradition is predicated on the belief that rights *can* build solidarity. Marx, or at least the communitarian Marx, was more suspicious, even of radical individual rights like equality, liberty, security, and property; see, "On the Jewish Question," in Tom Bottomore, ed. *Karl Marx: Early Writings* (New York, 1964), pp. 24-26. More on this below.

<sup>3</sup>David Jacobson, *Rights Across Borders* (Baltimore 1997), p. viii.

immigrants, but rather "one node in a post-national network of diasporas."<sup>4</sup> In this posited transnational world, belonging is multiple and variously institutionalized. Kastoryano claims, for example, that "the country of origin becomes a source of identity, the country of residence a source of rights, and the emerging transnational space, a space of political action combining the two or more countries."<sup>5</sup> Social affiliations are as much transnational as border crossings.

Especially if this is true, it becomes essential to ask what or which solidarity it is that might dare claim legitimately to demand the sacrifice of some individual and most competing collective identities. Christendom, the *Volk*, subjects of His Majesty, the proletariat, the *polis*, France, people of color, le peuple, the Constitution, the West are today not all equally appealing organizing principles, though each of them has been successful in the past. Needless to say, these and all other collective identities are socially and politically constructed--whether they proudly insist upon it or claim instead to be primordial or biological.<sup>6</sup>

It may be argued that the very notion of collective identity based on and reenforcing solidarity is itself a fraud, the fruit of successful power and governance claims by self-interested but hegemonic power blocs. Though associated with parts of the Right, the claim has also come from parts of the Left that there is no such thing as society, only individuals who (sometimes) choose to subject themselves to a nexus of contracts that regulate but do not frame their lives.<sup>7</sup> Not much fellow feeling or solidarity or sacrifice can be expected from mere cohabitation for individual instrumental purposes, even if that cohabitation takes place under shared rules.

Transnational ties, for example, cut across the vertical solidarity of the nation state and weaken

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<sup>4</sup>Appadurai, self-described repentant nationalist, avers that, "Where soil and place were once the key to the linkage of territorial affiliation... key identities and affiliations now only partially revolve around the realities and images of space." Now "diaspora runs with, not against, the grain of identity, movement, and reproduction." "The Heart of Whiteness," *Callaloo* 16:4(1993), pp. 796, 798, 803.

"Diaspora" seems to be construed now not as an exile from which one will eventually return but rather as a kind of post-national, multicultural hybridity, one is tempted to say a cosmopolitanism for Everyman. It is important to be dubious. The world may look more like this when seen from the platinum elite frequent-flyer lounge than when seen from the polyglot streets.

<sup>5</sup>Riva Kastoryano, "Settlement, Transnational Communities and Citizenship," *International Social Science Journal* 52:165 (2000), p. 311. Kastoryano sees transnational activity in several forms, including a focus on the "home" country, Europe, and even Islam.

<sup>6</sup> Of late a new permutation has been added: whereas most past constructed identities have claimed to be biological, now we have biological categories claiming social construction.

<sup>7</sup>The modern version of the classical view that human social interdependency and solidarity, facilitated by a state, were prerequisites for self-fulfillment or *Entfaltung* was laid out by Wilhelm v. Humboldt in his *Versuch die Grenzen der Wirksamkeit des Staates zu bestimmen* (1792). John Rawls, *A Theory of Justice* (Cambridge 1971), p. 524 restates this view.

state-society relations. The ascription or conquest of rights and the assumption of duties require some measure of *fraternité*, belonging, fellow-feeling. Rights are related to belonging. Certainly each ascending step in the stairway of rights laid out in T.H. Marshall's classic formulation<sup>8</sup>-- civil rights to political rights to social rights-- assumes a greater measure of solidarity than the step below: civil rights may be granted by even an undemocratic and unrepresentative sovereign to citizens and subjects alike; political rights mostly presume some measure of self-governance as well as membership; and social rights, in addition, a willingness to be the keeper of others as a matter of shared minimum expectation.

If "the centripetal pull of Americanness" (or Frenchness or Germanness) loses out to "the centrifugal pull of diasporic diversity," then the heralded multicultural quilt falls apart into rags whose pieces have no substantive claim on each other. If indeed the liberal nation-state is, as Appadurai says, no longer a closed space for the melting pot to work its magic but yet another diasporic switching point to which people come to seek their fortunes though no longer content to leave their homelands behind

then who would be whose keeper? A "federation of diasporas," a society constructed around diasporic diversity, leaves no one accountable for anyone.<sup>9</sup>

What this suggests is that some sense of historical community and shared destiny, of citizenship, is a prerequisite for social rights. Those who value social justice must have a place. This sentiment can be designated in the Mazzinian tradition as "patriotism" (Viroli) or as being a "cosmopolitan patriot" (Appiah) or, in an older vocabulary, even an "internationalist."<sup>10</sup> Perhaps this is merely an "imagined community," a collective imaginary fit for the era of print capitalism (B. Anderson). Perhaps not. Paul Robeson captured a good bit of this in his popular-front ballad, "The House I Live In":

What is America to me?

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<sup>8</sup>*Citizenship and Social Class* (Cambridge 1950). Though endlessly criticized from nearly every possible perspective, Marshall's paradigm remains at the center of the discussion.

<sup>9</sup>Appadurai, pp. 803, 806. He proposes a reversal of hyphens: American-Italian, American-African, American-Indian, American-Haitian, etc.

Isn't taking this seriously ("American Jew"-- if it were true) a recipe for hatred and disaster? See Yosef Yerushalmi, "Exile and Expulsion in Jewish History," in Benjamin Gampel ed., *Crisis and Creativity in the Sephardic World* (New York date), pp. 3, 11. Exile and diaspora make good ideology in a pre-democratic world, but domicile and home are the real existential reality.

<sup>10</sup>Maurizio Viroli, *For Love of Country: An Essay on patriotism and Nationalism* (New York 1995); K. Anthony Appiah, "Cosmopolitan Patriots," in Pheng Cheah and Bruce Robbins eds., *Cosmopolitics: Thinking and Feeling Beyond the Nation* (Minneapolis 1998). Appiah seeks to connect species-wide community to the actual politics and restraints found on the ground locally. But "think globally, act locally" is also what Robeson was saying. It was also the message of the socialist Second International: Workers of the World, Unite: Go Home and Organize; James Joll, *The Second International* (New York 1955).

A name, a map, a flag I see  
 A certain word, 'Democracy.'  
 The words of old Abe Lincoln,  
 of Jefferson and Paine  
 of Washington and Douglass  
 and the tasks that still remain.

....

The house I live in,  
 My neighbors white and black,  
 The people who just came here  
 and from generations back

....

A house that we call 'freedom'  
 the home of liberty,  
 But especially the people  
 That's America to me.<sup>11</sup>

Robeson's words point clearly to a regime of universal (but necessarily revisable) principles specified through democratic procedures by a particular political community, one that has a history, which newcomers can and should join and shape. The particular culture and tradition that makes "our" constitution ours must be constructed on a foundation of equal liberal rights for all (liberty), democracy, and a capacious sense of identity. Together these make and are made by "the people."

Who is the citizen, the resident of "the house I live in" of the commonality made up of plurality transcending particularity (as Robeson could have put it)? The collective, legally-recognized identity of "citizen" is and always has been unstable, problematic, and contested.<sup>12</sup> Still, as Max Weber noted already in 1921, just as the Weimar Republic was constructing social citizenship in lieu of socialism, citizenship is a *status* position that interacts with and mitigates other positions, such as class and power.

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<sup>11</sup>"The House I Live In," lyrics by Lewis Allan (*Songs of Free Men* 1947, 1956). Robeson also sings of Lexington and Concord and Bataan as well as of farmers, workers, and neighbors.

Viroli and even Appiah may be construed as saying much the same thing.

<sup>12</sup>There, now that I've said it, you might not need to. For the U.S., see, most recently, Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven 1997); for the earlier period, James Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill 1978). For advocacy of a new universal nationalist citizenship, see Michael Lind, *The Next American Nation* (New York 1996); for a powerful rejection of such a conception, see Iris Marion Young, "Polity and Group Difference; A Critique of the Ideal of Universal Citizenship," *Ethics* 99 (1989).

For an overview of the concept in Israel, see Ayelet Shachar, "Citizenship and Membership in the Israeli Polity," in T. Alexander Aleinikoff and Douglas Klusmeyer eds., *From Migrants to Citizens: Membership in a Changing World* (Washington 2000). For Germany, see Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge 1992); R. Grawert and Bernard Schlink eds., *Festschrift für E.W. Böckenförde* (Berlin 1995); Kai Hailbronner and Günther Renner, *Staatsangehörigkeitsrecht* (München 1999).

This is why elites with much power generally attempt to weaken this status position, and subversive forces interested in organizing and acting on the basis of class often consider citizenship a false consciousness, bourgeois-nationalist patriotism turned against class interest.<sup>13</sup> Citizenship, active social membership and solidarity, generates rights, and these rights often provide the basis for an assortment of claims.

The Marshallian tradition has thus seen citizenship as mitigating the negative impact of the capitalist market by compelling a redistribution of resources.<sup>14</sup> But beyond requiring social citizenship to make civil and political citizenship meaningful for the mass of ordinary people, full citizenship also integrates the lower orders of society into the national community. Capitalism confronts citizenship as scarcity confronts solidarity. The contours of citizenship have unsurprisingly been shaped in large part by class conflict. The citizenship promise and the free market have been two sides of liberalism virtually since its inception. The permanent tension between the principle of equality that underpins democracy and citizenship and the real inequality of wealth and income that liberal capitalism generates have been visible at least since the days of Babeuf (if not Rousseau) and the aborted revolutionary Constitution of 1793<sup>15</sup>.

Citizenship and economy, solidarity and scarcity, participation and property are difficult to reconcile. As C.B. Macpherson has put it:

The central problem of liberal-democratic theory may be stated as the difficulty of reconciling the liberal property right with that equal effective right of all individuals to use and develop their capacities which is the essential ethical principle of liberal democracy. ... If...an individual property right is required by the very necessities of man's nature and condition, it ought not to be infringed or denied. But unless it is seriously infringed or denied, it leads to an effective denial of the equal possibility of individual human fulfillment<sup>16</sup>

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<sup>13</sup>In Europe and America this sentiment peaked around World War I and conflicts over what to do split and destroyed international socialism. The *union sacrée*, the *Burgfrieden* and their flag-waving repressive analogue in the U.S. "worked" in this way.

<sup>14</sup>See Bryan Turner, "The Erosion of Citizenship," *British Journal of Sociology* 52:2 (2001), pp. 190-92.

<sup>15</sup>Rousseau's *Discours sur les origines de l'Inégalité* (1754) asks "si elle [l'inégalité] est autorisée par la loi naturelle." Marx in *Class Struggles in France* (1850) and *The Eighteenth Brumaire of Louis Napoleon* (1852) offers a still-unparalleled account of the instability of capitalism and democracy together. Adam Przeworski's *Capitalism and Social Democracy* (New York 1985), pp. 7-46 offers the best account of how social democracy crafted an equilibrium of sorts.

<sup>16</sup>C.B. Macpherson, *Property: Mainstream and Critical Positions* (Toronto 1978), p. 200. Attempts to universalize property come to naught. Following Napoleon's relative success with peasants, the French left at times, such as 1848-49, claimed to uphold and even expand the rights of property and family so cherished on the right. Thus, Ledru-Rollin speaking to peasants and small shopkeepers maintained that:

Property is liberty...we will therefore respect property, but on condition that it will be infinitely multiplied...we do not want it for some; we want it for all....

Cited in Roger Price, *The French Second Republic* (Ithaca 1972), p. 202.

What has made or enabled citizenship to perform in an inclusionary and entitlement-generating way?<sup>17</sup> How does one move from a *legal* status that is uniform, egalitarian, universalizing, and inclusive to the redistribution of resources. How does an imagined or common solidarity reallocate resources and build bounded, exclusionary identities? The consensus established in a broad literature is that work, war, and reproduction have been the primary avenues for the construction of citizenship, its bounds and rights.

Most of the dignitary and social rights associated with citizenship (particularly for males) in the countries discussed here seem to emanate from the sphere of work: minimum wage/ maximum hours standards, the right to organize, pensions and old-age insurance, health care, education and training, social security and a number of others. It is no wonder that concepts like worker-citizen, economic democracy, industrial democracy, and the like have dotted the landscape of the left.

"Patriotism" has already been mentioned here. Can nationalism, and with it inevitably war, be far behind?<sup>18</sup> As far back as Athens, citizens' rights derived from soldiers' duties and accomplishments --not only directly, in the form of special pensions, benefits, loans, subsidies, etc. but society-wide. It has been argued that the American welfare state began with Civil War pensions and assistance to widows; veteran status provided important benefits in Germany until fairly recently; and it remains extremely important and exclusionary in Israel. No one has captured the ideology of democratic patriotism --war, law, equality, participation, love-- better than Thucydides in the Funeral Oration of Pericles:

...if our more remote ancestors deserve praise, much more do our own fathers, who added to their inheritance the empire which we now possess.... But what was the road by which we reached our position...? The administration [constitution] favours the many instead of the few... [The laws] afford equal justice to all in their private differences... class considerations not being allowed to interfere with merit... if a man is able to serve the state he is not hindered by the obscurity of his condition....But all this ease in our private relations does not make us lawless as citizens.

Further, we provide plenty of means for the mind to refresh itself from business. We celebrate

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<sup>17</sup>As socialism became social democracy and social democracy became the welfare state and the welfare state became democracy and democracy became citizenship, the ever-thinner gruel met with less opposition. This piquant tale can be read in many places; see, Michael Mann, "Ruling Class Strategies and Citizenship," *States, War, and Capitalism* (Oxford 1992), pp. 188-210.

<sup>18</sup>In many if not all textbooks, right after Herder and Mazzini come Fichte and Treitschke. "Brother sing your country's anthem/Build a road of peace before us/ Help the weak and curb the strong/Stand beside me all my brothers/Brother lift your flag with mine/All men shall be brothers/All for one and one for all" Beethoven's "All Men Are Brothers" from Schiller's "Ode to Joy" requires a very particular moment, a continent in revolution.



games and sacrifices all the year around.

We throw open our city to the world and never by alien acts exclude foreigners from any opportunity of learning or observing...

Our ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; [we] regard[] him who takes no part in these duties not as unambitious but as useless.

...instead of looking upon discussion as a stumbling block...we think it an indispensable preliminary to any wise action at all.

Athens alone of her contemporaries is found when tested to be greater than her reputation... we have not left our power without witness, but have shown it by mighty proofs. Such is the Athens for which these men, in the assertion of their resolve not to lose her, nobly fought and died.

...when all her greatness shall break upon you, you must reflect that it was by courage, sense of duty, and keen feeling of honour in action that men were enabled to win all this. ...judging happiness to be the fruit of freedom and freedom of valour, never decline the dangers of war.<sup>19</sup>

Recent decades and the technological changes they have brought (including the end of conscription) may now have altered the role of war in constructing citizenship in some places, but at the very least that role has been critical for a very long time.<sup>20</sup>

The role of women and of gender in the creation of citizenship, of the nation, and of the welfare state was long neglected. What has long been appreciated across political spectra, however, is the importance of reproduction, natality, child health, education, etc. to the health of the nation and the state.<sup>21</sup> While these goals obviously have not always advanced women (neither has dying in war advanced the interests of the dead men) the discourses of citizenship have come to require them.

## II

Recent years have witnessed a tremendous growth in concern with issues of citizenship, community membership, identity, and legal protection. The obviousness of the nation-state as it has

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<sup>19</sup>Thucydides, *The Peloponnesian War* (Crowley trans.), II:6, ? 36-46. Finley maintains that at the start of the war the Athenians had about 16,000 or over 1/3 of their adult male citizens under arms as hoplites, foot soldiers supplying their own arms and receiving a per diem payment. The navy had as many as 20,000 mostly paid professionals from the urban poor --the *demoi* drove the boats that gave the state its strength. Athens also had about 70,000 slaves, according to Finley about the same proportion as in the antebellum U.S. south. Moses Finley, *The Ancient Greeks* (New York 1963), pp. 72-74.

<sup>20</sup>The key work analyzing the first half of this century remains Richard Titmuss, *Income Distribution and Social Change* (London 1962). For a longer view, Étienne Balibar, "The Nation Form: History and Ideology," in Immanuel Wallerstein ed., *Race, Nation, Class: Ambiguous Identities* (London 1991).

<sup>21</sup>See, for example, Chantal Mouffe, "Feminism, Citizenship, and Radical Democratic Politics," in Judith Butler and Joan Scott eds., *Feminists Theorize the Political* (New York 1992), pp. 369-85; Nancy Fraser and Linda Gordon, "A Genealogy of 'Dependency,'" *Signs* 19 (1994), pp. 309-36; Linda Gordon ed., *Women, the State and Welfare* (Madison 1991); Nancy Fraser, *Justus Interruptus* (New York 1997); Nurit Yuval-Davis, *Gender and the Nation* (New York 1998). The role of war and of "maternalism" in creating social citizenship rights is central to Theda Skocpol, *Protecting Soldiers and Mothers* (Cambridge 1992), pt. III and the essays in Margaret Weir, Ann Shola Orloff, and Theda Skocpol, eds. *The Politics of Social Policy*

come down to us from the Sun King of 18th century France to Wilson's national self-determination, from Bismarckian through Soviet state-building, from colonial through post-colonial Third World construction, and from the rise of the class-based western welfare state to its crisis has become simply less obvious. As the modern and centered slid or drifted or decayed into the post-modern and decentred, much about the nation, the state, and its people has been called into question. Our "imagined communities" have begun to be deconstructed from within and unimagined.

Likewise, as the leading political democracies have deteriorated, at least in the sense that outcomes, however unpredictable, vary less and less,<sup>22</sup> the more citizenship and membership have been defined in the imperial Roman individual civil rights-holding juridical tradition and the less in the Greek polis or civic republican political tradition of rigorous and exclusivist participation. The legal rights and personal standing of the juridical tradition are transportable, perhaps universalizable and certainly not tied to a particular identity. Yet at the same time they are depoliticizing and desolidarizing; they undermine the *res publicum*.<sup>23</sup>

Democracy as a form of life based on active consent and participation has receded while citizenship is distributed on the basis of passive criteria of belonging, territorially or ethnically. For the most part, this decline in the civic republican has been accompanied by a decline in the ethno-national. The civic fades into the civil while the citizen/alien distinction fades in a way redolent of the decline of estate, rank, and order. Instead, everyone has *rights*, and individuals and groups compete on the basis of them.<sup>24</sup>

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*in the U.S.* (Princeton 1988).

<sup>22</sup>There is now a substantial literature for both Germany and the U.S. on the decline of ideological parties, the difficulties of mass mobilization, the outsized role of money, incumbency and the non-circulation of elites, etc. See Steven Schier, *By Invitation Only: The Rise of Exclusive Politics in the U.S.* (Pittsburgh 2000); Thomas Ferguson and Joel Rogers, *Right Turn: The Decline of the Democrats and the Future of American Politics* (New York 1986); Joshua Cohen and Joel Rogers, *Associations and Democracy* (London 1995); Robin Blackburn ed., *After the Fall* (London 1991). A similar literature is developing for the Israeli case.

<sup>23</sup>See David Miller, *On Nationality* (New York 1995) and J.G.A. Pocock, "The Idea of Citizenship since Classical Times," in Ronald Beiner ed., *Theorizing Citizenship* (Albany 1995), pp. 29-53.

<sup>24</sup>The individualistic and individualizing, apolitical side of rights and of the "rights revolution" in the U.S. has been the subject of analysis by conservatives and radicals alike. See for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York 1991); Stuart Scheingold, *The Politics of Rights* (New York 1974); Mark Tushnet, "An Essay on Rights," *Texas Law Review* 62 (1984), p. 1363; Morton Horowitz, "Rights," *Harvard Civil Rights-Civil Liberties Review* 393 (1988); Anthony Chase, "The Left on Rights," *Texas Law Review* 62 (1984) 1541; David Abraham, "Are Rights the Right Thing?" *Connecticut Law Review* 25 (1993), p. 947.

The situation in Germany is still quite different, notwithstanding the enlargement of individual rights there over the past 30 years. This will be addressed below. The individualizing force of right-consciousness has been very visible and important in Israel over the past decade. See Gershon Shafir and Yoav Peled eds., *The New Israel: Peacemaking and Liberalization* (Boulder 2000); Menachem Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform," *American*

This increased attention in democratic polities, including the U.S., Germany, and Israel, has been animated by the increased global mobility of people and capital, by related calls for the recognition of otherness and difference, by the crises of the social welfare state, by the demise of the Soviet Union and the alternatives it facilitated as much as by those it offered, and by the seeming erosion of nation-state level institutions in favor of both supranational values and institutions and sub- as well as trans-national identities and solidarities.

The social citizenship tradition has had little to say about ethnicity, race, or migration. For a long time the Marshallian/ social rights citizenship discourse continued (as it had since Locke) simply to assume that people were physically where they were supposed to be.<sup>25</sup> Immigration, entry into citizenship or resident alien status from outside, assumed no prominent role whatsoever.

For its part, the immigration discourse generally ignored the place of entry and membership questions in the structuration of the welfare state. This was less the case in Europe than in the U.S., largely because the expulsion of class from American legal discussion has been so much more successful than in Europe. Even fundamental liberal, social justice texts, such as Michael Walzer's *Spheres of Justice*, were more concerned to avoid metic status or classes of citizenship *inside* the welfare state than to connect immigration from the *outside* to the contents of citizenship.<sup>26</sup>

In the arena of legal scholarship, analysis of these trends has been fractured, or at least bifurcated. Some aspects of the citizenship discussion have taken place within the welfare rights and equal protection frameworks (including affirmative action, for example) while others were consigned to the once-peripheral area of immigration law. The immigration law of all countries is self-consciously about serving the "national interest," and the political branches of government are therefore afforded extreme latitude.<sup>27</sup> Just as we citizens, The People contest the "national interest" all the time, so the

*Journal of Comparative Law* 44 (1996), p. 485; Chaim Edelman, "The Judicialization of Politics in Israel," *International Political Science Review* 15 (1994), p. 177.

<sup>25</sup>See James Crowley, "The National Dimension of Citizenship in T.H. Marshall," *Citizenship Studies* 2(1998), p. 165.

<sup>26</sup>At the time (1983), Walzer's discussion of citizenship and immigration was understood primarily as a denunciation of "guest worker" second-class citizenship, as it appeared to be practiced in western Europe. Less attention was paid to his astute observation that open borders would be accompanied by closed neighborhoods (p. 38). Walzer could not at that time anticipate either the reforms forthcoming in Europe or the massive flow of legal and illegal immigrants that was about to begin entering the U.S.

<sup>27</sup>In the U.S., this is made explicit through the "plenary power" doctrine, which leaves it to the political (and not judicial, i.e. "justice") branches of government to devise rules to govern the entry, Immigration and Naturalization of aliens.

The German Foreigners Law until 1999 directed that both the right to citizenship and aliens' rights be keyed to "completing the unity and freedom of Germany." ?2(1) of the 1965 *Ausländergesetz* stipulated that: "A residence permit may be issued [to an alien] if the presence of the foreigner does not harm the interests of the Federal Republic."

And of course, immigration --of Jews-- is the *raison d'être* for Israel: "Every Jew has the right to come to this country as an immigrant." ?1, Law of Return. Citizenship by residence (birth on the territory) is the other means of acquiring citizenship,

treatment of immigration and immigrants (as well as aliens temporarily present) can be understood as a resumé for the power and standing of different interests in society. And since citizenship questions are so much about resource allocation and distribution, one would expect class relations to be central to immigration issues as well.

Indeed, some areas of law would appear to be about nothing if not about the governance of class relations. Thus, labor and employment law would seem quintessentially to be about keeping the peace between those who sell their labor power for a wage and those who appropriate it in order to gain the profits and benefits of that labor. The expulsion of class from American (but not German or Israeli) labor law has indeed been a remarkable achievement of the past half century. Yet one knows how it has happened both sociologically and doctrinally. Among other ways, by developing the "individual rights" of people who happen to be workers against the "collective coercion" of class (i.e. union) membership, the courts have undermined the place of class and solidarity. In the name of individual autonomy, the law has made class disappear from an area that we know from the historical record was written and meant precisely to regulate class relations.<sup>28</sup>

As remarkable as the disappearance of class from labor law might be, we can at least understand it as the victory of those dominant class interests most likely to benefit from the suppression or obfuscation of the category in question. Not so, perhaps, in the case of immigration law. Here, those legal forces and actors whom one would expect to represent the redistributive interests of the lower classes have been centrally responsible for the disappearance and exclusion of class and solidarity from the discourse of immigration policy and law and their replacement by concern with non-discrimination and recognition.

In the U.S. debates over immigration law and citizenship issues --in Congress, in the courts, in scholarship, and on campus-- are dominated today by what has been called a "*Wall Street Journal*-civil rights movement"<sup>29</sup> coalition of business groups, ethnic group lobbyists, and middle-class service

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but it was not until 1980 that Palestinian-Arab Israelis enjoyed secure citizenship. And, apparently, Arab immigration or return into Israel is not in the cards.

<sup>28</sup>For a thorough discussion of how individual rights undermine collective class action, David Abraham, "Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy," *New York University Law Review* 63 (1988/89), p. 1268.

<sup>29</sup>Jacobson, p. 66 characterizes it this way:

[L]ess restrictive immigration policies are intellectually and politically supported by many liberal *and* conservative groups. Liberal groups like the ACLU, certain Protestant churches, Catholic associations, and others support the free movement of people on humanitarian grounds. Conservative organizations and economists see an open immigration policy as a correlate of laissez-faire economics....

consumers. Discussion is grounded in two non-class frameworks: the free market and political ethnicity. The interests of business, of capital large and small, in maximizing immigration is simply a part of global competition, of the movement of factors of production (labor, capital, whatever) as cheaply as possible from one locale to another. If all the world's a free market and people should be able to move to where they are needed, then restrictions and solidarities such as class or state are impediments to a natural order. This is not very difficult to understand, especially in an era where capital is largely deterritorialized and increasingly free of political controls. This hollowing out of the state has certainly been met with favorably by the courts of the past generation in the U.S., Germany, and Israel and will be examined below. Here I shall argue that only a strong polity can hold out the prospect of democratic self-governance with individual liberty and social justice; only a strong state can protect against the disintegrative forces of global capitalism and the divisive forces of particularism and identity.

At the same time that individuals should be allowed to move freely, their social claims (wages, welfare) can in this framework only be as strong as their individual market position allows, be they H1B Indian computer engineers, Korean grocers, or Mexican gardeners or meatpackers.<sup>30</sup> This anti-class perspective on immigration is clearly visible in current immigration law, which is very open to immigration and quite stingy toward immigrants once here. Immigration has made the mass of residents somewhat poorer, hurt the poor especially, and contributed rather significantly to the growing income disparities of the past 20 years. This is especially true of the U.S. with its weak welfare state, but it is also true of non-Jewish immigrants in Israel, though less so in Germany.<sup>31</sup> Indeed, so atrophied is the

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See also Christian Joppke, "The Legal-Domestic Sources of Immigrant Rights: The United States, Germany, and the European Union," *Comparative Political Studies* 34:4 (2001), p. 339. Joppke stresses the influence of ethnic lobbying groups in the U.S.

<sup>30</sup>There are reasons why meat and domestic services, for example, are cheaper today than 20 years ago. Immigrants, especially illegal immigrants, of whom there are over 8 million in the U.S. today, are a response to the need to "raise wages and improve...conditions." As recently reported:

Until 15 or 20 years ago, meatpacking plants in the U.S. were staffed by highly paid unionized employees who earned \$18 an hour... Today [they] are largely staffed by low-paid non-unionized workers from places like Mexico and Guatemala. Many of them start at \$6 an hour.

In addition, of course, those who are illegal can be threatened should they complain about infringement of their legal rights. "...It's just the race to the bottom. Companies started breaking the unions, moving the plants to rural areas and hiring immigrants." "Meatpackers' Profits Hinge on Pool of Immigrant Labor," *New York Times*, Dec. 21, 2001, p. A26 (quoting William Heffeman, professor of rural sociology, University of Missouri).

<sup>31</sup>Immigrants in the U.S. today tend to stay poor (if they came that way) with ambiguous prospects for their children. As Alejandro Portes has put it, "'The low wages that make foreign workers so attractive to employers translate into poverty and inferior schooling for their children,' "Immigration's Aftermath," *The American Prospect* (Apr. 8, 2002), p. 36.

Other low-end workers, such as African-Americans, and especially other recent immigrants, find themselves in a losing competition. See George Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton 1999); John Abowd and Richard Freeman eds., *Immigration, Trade and the Labor Market* (Chicago 1991), chaps. 2, 6-8, 10; Richard

discussion of nation and so absent the discussion of class, especially in the U.S., that *criminality* sets the terms for the governance of aliens, and public concern is focussed above all on border violations and the law-breaking of non-citizen residents.<sup>32</sup>

### III

Legally, immigrants as a category, most often as a minority category, have generally fared well over the past 30 years. In both the U.S. and Germany, the disabilities they face vis-a-vis citizens have declined, as we shall see.<sup>33</sup> Often this development is attributed to something called globalism/globalization, the emergence of an international human rights order, or the success of multiculturalism.<sup>34</sup> Much more, however, it has been individual equal protection and legal proportionality doctrines that have served aliens and immigrants well --while also assisting the new free-trading globalism in eroding the social conception of citizenship.

Class protectionism has been banished from the immigration discourse of the left and labor,<sup>35</sup> disparaged and relegated to the dustbin of California racist-exclusionists (from Justice Field in the 1880s to Gov. Pete Wilson in the 1980s), Know Nothings, eugenicists, and the always-charming bogeyman of White working-class racism. "Citizenship," like class a solidaristic basis for making claims, is itself disdained as exclusionary as "protectionist", the enemy of freedom/free trade. This development, which

Clark ed., *The Fiscal Impact of Undocumented Aliens* (Washington 1994); Vernon Briggs, *Still an Open Door?* (Lanham MD 1994). James Auerbach and Richard Belous eds., *The Inequality Paradox: Growth of Income Disparity* (Washington 1998), chaps. 8, 12. Though the data are, by now, irrefutable, the topic remains semi-taboo and raising it can evoke charges of "nativism." See Juan Perea ed., *Immigrants Out! The New Nativism and the Anti-Immigrant Impulse* (New York 1997).

Even Israel, with a population of 5-6 million, now has over 250,000 (non-Arab) foreign workers, mostly illegal and outside the otherwise-dense network of the social state. David Bartram, "Foreign Workers in Israel: History and Theory," *International Migration Review* 32:2 (1998), p. 303.

<sup>32</sup>It is striking, for example, how criminal law vocabulary and personal responsibility tropes have suffused the immigration debate and even the titles of legislation. See Jonathan Simon, " *Public Culture...*

<sup>33</sup>For an encyclopedic look at what rights aliens do and do not have around the world, see Atsushi Kondo ed., *Citizenship in a Global World: Comparing Citizenship Rights for Aliens* (London 2001). The demonstrable proof that aliens have come to enjoy greater and greater rights is not to underestimate outbursts of racism, hostility toward foreigners, voter support for exclusion, and the like.

<sup>34</sup>Among the advocates of the internationalist perspective are Jacobson op.cit.; Yasemin Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago 1994); William Barbieri, *Immigration and Group Rights in Germany* (Durham 1998), Saskia Sassen, "The de facto Transnationalizing of Immigration Policy," in Christian Joppke ed., *Challenge to the Nation State* (London 1998), p. 49. More balanced on this question is Ruth Rubio-Marin, *Immigration as a Democratic Challenge* (New York 2000).

<sup>35</sup>In 2001 the AFL-CIO, not the swiftest of organizations, abandoned its historic qualms as to the impact of immigration in the hopes of perhaps being able to find recruits, especially in the service sectors, for its pathetic and diminishing ranks. The DGB (Deutsche Gewerkschafts Bund) has been very careful in the debates over the past decade not to appear exclusionary or opposed to a more multi-cultural Germany. A much stronger unionized sector makes the new approach less painful despite persistent high unemployment. The Israeli Histadrut seems not yet to have found its feet on these matters, having only recently been decoupled from the state and party apparatus.

has numerous international parallels, is, I would argue, of a piece with the liberal law reform of the past 30 years or so in which "individual rights," "choice" and other market-based categories have become so central.

The outcome of the liberal legal transformation of the post-World War II and civil-rights eras was, above all, the creation of a rights culture, one which is overwhelmingly universalist and individualist. This marks a substantial departure from the jurisprudence of the depression, New Deal and war years, which was, for the most part, internationally more collectivist and national.<sup>36</sup> The failure to radicalize or push forward the civil rights "revolution" (and '68 gains in Europe) in law has left a heavy libertarian inheritance. It has left whole areas of law focussed on concepts that are either necessarily very individualist (though not always conservative), like "choice" and "privacy" or that have come to be understood primarily in individualistic terms, like equal protection and due process.<sup>37</sup>

Owen Fiss observed that in the preferred, canonic and hegemonic reading of equal protection "rights are not only individualized, but also universalized" and "no person seems to be given more protection than another." Despite its "structural limitations" and inadequacies, the universalizing-individualizing, contract tendency appeals to courts and resonates with cultural norms,<sup>38</sup> whose origins lie in the dominance of market exchange.<sup>39</sup> This version of equal protection also resonates with that liberal

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<sup>36</sup>This is a substantial claim but, on balance, right. In addition to the Lichtenstein op.cit. and sources cited in fn. 21, see Lawrence Friedman, *A History of American Law* 2d ed. (New York 1985), pp. 665ff.; Kermit Hall, *The Magic Mirror* (New York 1989), pp. 247-332; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York 1995).

The German and Israeli law systems may well be following the same trajectory but are much behind. Weimar law and early Israeli law were certainly more like American collectivism at its peak. See Günther Frankenberg and Ulrich Rödel, *Von der Volkssouveränität zum Minderheitenschutz* (Frankfurt 1981); Menachem Hofnung, *Democracy, Law and National Security in Israel* (Aldershot 1996), Pnina Lahav, *Judgment in Jerusalem* (Berkeley 1997).

<sup>37</sup>The classical locus for this discussion has become Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy & Public Affairs* 5 (1976), pp. 107, 128.

<sup>38</sup>The preferences that Fiss records are mediated by a number of factors. These include the broad commitment to the "rule of law," especially salient to the courts, the training and professional ethos of the lawyers who argue the specific cases, and the role of the legal process itself in organizing and regulating conflicts among groups with varying power and resources. See also Ulrich K. Preuß, "Zum Strukturwandel politischen Herrschaft im bürgerlichen Verfassungsstaat," in Claudio Pozzoli ed., *Rahmenbedingungen und Schranken statlichen Handelns* (Frankfurt 1976).

<sup>39</sup>No statement of how this transpired and was naturalized has improved on Karl Polanyi, *The Great Transformation* (New York 1944, 1957), p. 163:

To separate labor from other activities of life and to subject it to the laws of the market was to annihilate all organic forms of existence and to replace them by a different type of organization, an atomistic and individualistic one. Such a scheme of destruction was best served by the application of the principle of freedom of contract. In practice this meant that the noncontractual organizations of kinship, neighborhood, profession and creed were to be liquidated since they claimed the allegiance of the individual... . To represent this principle as one of noninterference... was merely the expression...in favor of a definite kind of interference, namely such as would destroy noncontractual relations between individuals and prevent their spontaneous re-formation.

cosmopolitanism which prizes the universal rights of individuals as persons.

The rights-based struggle against "discrimination" has been a struggle overwhelmingly against race, gender, sexuality and other failures to protect individuals equally.<sup>40</sup> The result has been substantial progress in the area of *recognition* but at the expense of class-based *redistribution*. Of course race and some other qualities do very much matter in the U.S., Germany, and Israel (and other societies) as independent bases of exclusion. But multicultural recognition politics, against an overarching background of liberal individualism, may, where integration has met tough resistance or been forsaken by a weak state, be as much a dodge as a solution.<sup>41</sup>

For those whose focus is race and ethnicity based, Immigration Law has become one more theater for fighting "exclusions." The interests of once-or-still oppressed brown, black, yellow, hispanic, gay, or other people are accorded primacy with little attention paid to the class location of immigrants or their impact on the existing American class structure. Raising questions of class is seen perforce as an exclusionist defense of white privilege and an undermining of the entire multiculturalist agenda. Conveniently, this radicalism permits middle class elements to speak as *vox populi* while also overseeing immigrant enclave cultures and supplying the lower reaches of the economy with cheap labor, generally at the expense of other minorities and recent immigrants<sup>42</sup> and the pace of development "back home."

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Every cycle of neo-liberalism reinforces or reinvigorates this dynamic, which suggests that there are counter-tendencies that cannot be eliminated completely. Maybe citizenship is one of them?

<sup>40</sup>The awkward term "classism" is occasionally heard on campuses, but, again, it is not about class politics or class advocacy but about discrimination or unfairness.

<sup>41</sup>This seems the underlying tension in K. Anthony Appiah and Amy Gutmann, *Color Conscious* (Princeton 1996), pp. 104, 138ff. Recent ethnic violence in Britain has led to a reconsideration of that country's multiculturalism. As one Afro-Caribbean worker put it, "if society had shown us years ago that it wanted us, it wouldn't have driven us into this kind of protectiveness." "Britain's Nonwhites Feel Un-British Report Says," *New York Times*, April 4, 2002, p. A13. Multiculturalism produced the opposite of what it intended and left immigrants looking backward rather than forward.

The abandonment of racial integration by a weak state was clearly spelled out in *Milliken v. Bradley*, 418 U.S. 717 (1974), where it was held that since the suburbs of Detroit did not discriminate against the children of Detroit, they could not be made to share the burden of busing for integration. This case followed a longer conservative-libertarian tradition of limiting the use of schools for socialization and assimilation; see *Pierce v. Society of Sisters* 268 U.S. 510 (1925) (state cannot force all children to attend public secular schools); *Meyer v. Nebraska* 262 U.S. 390 (1923) (use of non-English languages in school instruction could not be barred). With laws like that, the French Third Republic would never have survived, let alone developed *solidarisme* as a social philosophy. Jack Hayward, "Solidarity: The Social History of an Idea in 19th Century France," *International Review of Social History*. 4(1959), p. 261; idem. "The Official Social Philosophy of the French Third Republic," *International Review of Social History* 6 (1961), p. 19.

<sup>42</sup>This is the underestimated underside of the extraordinary volume of studies produced by Alejandro Portes and his colleagues on Miami and other key cities. Portes, "Immigration's Aftermath," *op cit.* p. 37 has warned that:

If the United States wants to keep indulging its addiction to cheap foreign workers, it had better do so with full awareness of what comes next.

See also, with Alex Stepick, *City on the Edge: The Transformation of Miami* (Berkeley 1993); with Reuben Rumbaut, *Immigrant America: A Portrait* (2d ed Berkeley 1996) and *Legacies: The Story of the Immigrant Second*



Low-paid immigrant workers often displace or join the existing underclass with their citizen-children facing downward mobility to boot.

With their relentless talk about discrimination and difference, the proponents of anti-foundational and post-Marxist discourses often seem to serve the anti-solidaristic multinational capitalism they claim to reject. Despite their invocations of global capitalism, these discourses, "notwithstanding their self-conscious arrogation of a politically progressive posture, become obfuscatory languages of global capitalism itself in their insistence on the autonomy of the cultural, the deterritorialized, and the different."<sup>43</sup>

The practical result of the refusal of class and the disavowal of the state is that aliens and immigrants are viewed and judged as "assets" more or less valuable resources for an economy rather than as potential "citizens". Occasionally immigration is viewed as a form of international class redistribution, a kind of transfer policy in lieu of foreign aid. Certainly there is no doubt that remittances home often dwarf other forms of wealth transfer, even as foreign workers themselves lower domestic wages.<sup>44</sup>

#### IV

#### **A Post-Westphalian Neo-Liberal Order?**

How have we come to this pass? The following factors have caused or set in motion a range of social and legal developments that have undermined the public and national framework of life and thereby *weakened the content of citizenship, lessened the disabilities faced by resident non-citizens, reduced the level of solidarity in the respective societies, and made life less onerous for those who may be construed or constructed as minorities.*

?Notwithstanding somewhat different timing, the U.S., Germany, and Israel have all witnessed a *crisis of the Keynesian welfare state (KWS)*. Suffice it to say without going into detail here, that beginning around 1973 all three countries witnessed a process of stagflation resulting from the declining political and fiscal viability of welfare state mechanisms. The rising costs of maintaining popular

*Generation* (Berkeley 2001). David Rieff's monographs on Miami and Los Angeles are very helpful in this regard, *Going to Miami: Exiles, Tourists and Refugees in the New America* (Boston 1987) and *Los Angeles: Capital of the Third World* (New York 1991); Harris Miller, "The Right Thing to Do," in Nathan Glazer ed., *Clamor at the Gates* (San Francisco 1985), pp. 49-55.

<sup>43</sup>Kunal Parker, "Official Imaginations: Globalization, Difference and State-Sponsored Immigration Discourse," *Oregon Law Review* 79(1997), pp. 691, 697.

<sup>44</sup>Sometimes governments see it this way, too. See "U.S. Rejects Bid to Double Foreign Aid to Poor Lands," *New York Times* Jan. 29, 2002, p. A11. The UN has established a goal (right or wrong) of .7% of annual GNP to be transferred from rich to poor countries. The U.S. level is .1%; only Denmark, Holland, Norway and Sweden --all immigrant-unfriendly countries-- have met the .7%. Queried on this, an annual U.S. immigration quota of 1.2 million could be cited.

Annual remittances from the US to Mexico now total \$9.3 billion and feature cross-border ATMs (unencumbered by legality of account holder's presence). They are the third-largest source of income for Mexico, the largest of all for El Salvador. "Big Mexican Breadwinner: The Migrant Worker," *New York Times*, March 25, 2002, p. A3.

legitimation through redistribution began to impede the processes of capital accumulation.

Fiscal crises swept through all three countries as the costs of maintaining pro-welfare-state political coalitions rose disproportionately.<sup>45</sup> Private capital began investment slowdowns (at least within their own countries) while mobilizing politicians against tax-and-spend policies. Proposition 13 in California, which in 1975 put a cap on property taxes, marked the first successful uncoupling of the middle class from the tax and spend model of the social state. Later, once the safety nets were shredded in the big countries, others generally had to follow.

The U.S. in the '70s, Germany in the 80's, and Israel in the '90s all underwent similar processes.<sup>46</sup> Everywhere these crises not only undermined wealth redistribution but also the very politics of class-based compromise that had stabilized society and institutionalized solidarity. Everywhere courts and legislatures weakened the concepts of welfare rights and cut short any extension of nondiscrimination principles to economic inequalities.<sup>47</sup>

Here too the U.S. led the way. As we shall see, courts signalled legislatures that the path was clear. The process was slower and less complete in Germany, where a positive-rights Constitution provided welfarism a stronger anchorage<sup>48</sup> and where paternalistic Christian Democrats were as wedded to social security as strong trade unions. Yet in Germany, too, what was a trend is now almost a baseline. In Israel, with its strong collectivist and statist tradition and highly solidaristic citizenship ideology, change was delayed even longer. Only in the 1990s was libertarian reform marshalled to de-collectivize labor and social relations and loosen the individualization of market and society.

Nonetheless, policies of social solidarity have been abandoned nearly everywhere. The post-Fordist project or the "Schumpeterian Workfare State," as it has come to be called,<sup>49</sup> is concerned with

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<sup>45</sup>Welfare states were suddenly discovered, at least by their opponents, to be: unaffordable, self-aggrandizing, demoralizing, inefficient, demand generating, demographically unbalanced, New Class raising; highly regressive in maintaining the universalist principle rather than stigmatizing recipients ("you want Head Start? give me Berkeley!"), free-riding havens unable to prevent contracting out...

<sup>46</sup>See James O'Connor, *The Fiscal Crisis of the State* (New York 1973), Mark Tushnet, *Red, White and Blue* (Cambridge 1988); Claus Offe, *Contradictions of the Welfare State* (Cambridge 1984); Gøsta Esping-Andersen, *Politics against Markets* (Princeton 1985), idem. *Three Worlds of Welfare Capitalism* (Princeton 1990); Ran Hirschl op.cit., Michael Shalev, *Labor and the Political Economy* (Oxford 1992).

<sup>47</sup>See David Abraham, "Liberty without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime," *Law & Social Inquiry* 21:1(1996), p. 1; Rand Rosenblatt, "Social Duties and the Problem of Rights in the American Welfare State," in David Kairys ed., *The Politics of Law* (New York 1990), p. 90. The work of William H. Simon and Michael Katz is invaluable here.

<sup>48</sup>For an introduction, see Donald Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40(1991), p. 837.

<sup>49</sup>The phrase "Schumpeterian Workfare State" is from Bob Jessop, "Toward a Schumpeterian Workfare State?" *Studies in*

the promotion of production, organization, and market innovation; the enhancement of competitiveness in open, free-trading economies, mainly through supply-side intervention; the subordination of social policy to the needs of labor market flexibility; the removal of market rigidities generally-- whether they lay in the realm of production or circulation (trade); and absolute factor (capital and labor) mobility.

Factor mobility wreaked special havoc on more developed welfare states. The presence of semi-members, like guest worker denizens, could threaten social rights because history and culture (and increasingly religion) do not effectively link them to the full members. To lessen the distinction between aliens and citizens, without integrating the former into a "closed shop" where labor costs are removed from competition, risked serious deterioration of the social wage that had been so central to equality within the welfare state and national community.<sup>50</sup>

As an incipient form of social citizenship, the democratic welfare state enabled "justice and the rule of law, the democratic demand for voice and equal rights, and the communitarian concern for solidarity and collective identity" to come together.<sup>51</sup> Over the last twenty-five years, the social rights that were part of being or becoming a citizen, of enjoying a citizenship that took class warfare off the agenda, have begun to vanish. The lifeboat of citizen security turned out to be chained to the ship of capitalist insecurity.

?Whether out of defeatism or impatience, *civil rights movements in all three countries shifted from integrationist, solidaristic strategies to segmented, group rights strategies*. As the pressure for color-blindness, secularism, objectivity, and neutrality gave way to pressures for affirmative action, group rights, etc. the courts (even more than legislatures) responded by reaffirming a very universalist/ individualist conception of equal protection. Equal protection rights have not only been re-individualized, but also universalized, with no person or group seeming to be given more protection than another.

The result in all three countries, despite very different starting points, has been an enlargement of the citizenry and of the nation and a recognition of its diverse membership, but the diminution of the state's ability to redistribute. A greater diversity of life forms, identities, and life-ways has come to be

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*Political Economy* 40:7-39 (1993)

<sup>50</sup>Taking wages out of competition is, of course, one of the core tasks of labor organization. As Gary Freeman noted years back, "Migration illustrates both the logically closed character of the welfare state and the difficulty with which that closure is maintained." "Migration and the Political Economy of the Welfare State," *Annals of the American Academy of Political and Social Science* 485(1986), pp. 51, 63.

<sup>51</sup>Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos," *International Sociology* 14:3 (1999), p. 252.

recognized (gender, sexual, ethnic, religious etc.) but obligations of mutuality have been rejected. The politics of diversity and recognition have emerged from a situation where the Right will not redistribute resources and civil rights forces will not push for integration or, as regards immigrants, assimilation. Group recognition and group rights offer a tempting but costly alternative.<sup>52</sup>

In the U.S., the redistributive and restitutive arguments made, for example, by Justices Marshall and Brennan in the foundational affirmative action case of *Bakke* (1978) have nearly disappeared and been displaced by what were originally only tactical arguments about diversity. Putting a finger on the scale on behalf of correcting a specific social and historical group injustice has given way to celebrating diversity.<sup>53</sup> As the poor have become poorer than others the past thirty years, in part on account of immigration and the neo-liberal package,<sup>54</sup> some minority rights groups and intellectuals have responded with group rights/recognition strategies: in education, for example, by demanding bilingual education-- sometimes with extraordinarily telling implications.<sup>55</sup> Bringing the formerly private into the public has certainly accelerated recognition of both individuality and otherness, as even a cursory glance at not only American but also German and even Israeli schoolyards would show.

The pace and contours of this change have varied among the three countries with the U.S. being first and going furthest. But even in Germany and Israel, the heat below the melting pot has been turned down. The universalist cosmopolitan Danny "the Red" Cohn-Bendit became a Senator for Multicultural

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<sup>52</sup>On the social costs, see Claus Offe, "Group Rights and Constitutionalism," *Journal of Political Philosophy* 6:1(1998), p. 1. See the American positions assembled in Noah Pickus ed., *Immigration and Citizenship in the 21st Century* (Lanham Md. 1998).

<sup>53</sup>This is not an argument against affirmative action but a query as to for whom and why. There is a huge distance between Bowen and Bok and even Orlando Patterson, all of whom are pro.

<sup>54</sup>See the literature cited in fn. 29, supra along with recent essays by Christopher Jencks, Tom Espinshade, and David Card.

<sup>55</sup>This is a thicket with positions animated, at least sometimes, by the best of intentions. But there is a *logic* to positions. Here a very troubling recent example: José Perea is an officer of the Mexican American Legal Defense and Educational Fund (a name cloned from the NAACP-LDEF) and executive director of English Language Acquisition for the Denver Public Schools. He asserts that the banning of "native languages" in classrooms there would be comparable to "*the Soviet Union's imposing the Russian language on its satellite republics.*" It is not clear if Perea meant the non-Russian Republics of the USSR or if he meant Eastern Europe. But what is the conception of (immigration to) the U.S. that underlies his metaphor? Or will there be a reconquista liberating Colorado from the U.S. Empire and returning it to its Spanish-speaking self? *Colorado: je m'en souviens?*

Most supporters of minority group cultural rights make a distinction between separate historical cultures (Belgium, Canada) and new immigrants. See for example, the highly-influential work of Will Kymlicka, *Multicultural Citizenship* (New York 1995), *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (New York 2001), and with Wayne Norman, eds. *Citizenship in Diverse Societies* (New York 2000). Note that Appadurai considers this multicultural model already outdated and displaced by the diasporic.

Perea insists that the Spanish language and an Indianized Catholicism are central to his *public* as well as private identity, and must be protected. Why? I kid you not: Perea claims his family were Jews who left Spain for Mexico 500 years ago, and he does not want to lose his roots again. "Foes Cite Ineffective Schools, Ethnic Friction," *Denver Post*, Feb. 10, 2002 (on line).

Affairs and author of a multicultural manifesto.<sup>56</sup> After much hesitation, respectable public opinion in Germany came around, if not to celebrating as least to working with difference and diversity. Even in Jewish Israel, divergence from the labor-pioneer modal type has become much easier; Russians and Ethiopians today have opportunities to be "themselves" not enjoyed in the past by Moroccans, Yemenis, or central Europeans.<sup>57</sup>

Group particularity may be recognized through group rights, as in the soft case of Denver's educational bilingualism, or via its apparent opposite-- an individual rights discourse, as in the case of the Muslim headscarf (foulard) issue in both France and Germany. Beginning from rather different starting points, the outcomes in France and Germany proved quite similar.

Liberty of belief and secularism (laicism) are both central to French law and society. Both have repeatedly been enshrined in the Constitutions of France. Secularism has been especially important to the educational system, where it has functioned to create a common culture, one which all could (and must) enter. Freedom of belief, for its part, guarantees all, including students and teachers, the right to express their memberships and beliefs. Until the mid-1990s, resolution of the tension between separation and free exercise principles took the following form: Wearing signs of religious membership (like a foulard) at school is not incompatible with secular education, but a) a pupil could not refuse to attend a class on the grounds that it was irreligious, b) the wearing of religious symbols could not pressure, provoke, proselytize or be ostentatious, and c) religious symbols could not interfere with the objectives of public education, including gender equality. In cases of conflict, the religious symbols were required to yield.<sup>58</sup>

At the end of the decade, the French courts changed course and --following the American multiculturalist model-- concluded that "Secularism is no longer a principle that forbids any religious manifestation but a principle that tolerates every religious manifestation" that does not infringe on the

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<sup>56</sup>Daniel Cohn-Bendit and Thomas Schmid, *Heimat Babylon: Das Wagnis der multikulturellen Demokratie* (Hamburg 1992). Interestingly, Cohn-Bendit recognized the linkage between multi-culturalism and neo-liberalism in the "unintelligibility" (*Unübersichtbarkeit*) of risk society, a place where "one's life plan is no longer set out; much more than before, one has to create it for himself." Diversity, not uniformity, yet a diversity founded on the understanding of certain shared obligatory values, p. 319.

<sup>57</sup>See Tom Segev, *1949: The First Israelis* (New York 1986), *The Seventh Million: The Israelis and the Holocaust* (New York 1991) both document the intensive Israelification of Jewish immigrants from the continents in the nation building stage. Yoav Appel, "Yemenites Reject Israel Inquiry" (AP, Nov. 6, 2001) cites the President of Israel rejecting the findings of a third commission that determined yet again that Yemeni infants were not stolen and given to European couples.

<sup>58</sup>Claire Saas, "Muslim Headscarf and Secularism in France," *European Journal of Migration and Law* 3(2001), pp. 453-4.

security of pupils and school.<sup>59</sup> One must infer that individuals have the right to make themselves a separate group.

If the *objects* of the state have individual rights, what about the *agents* of the state? Germany has much less of a secular tradition than France or the U.S. (though more by far than Israel), but it has a very strong tradition of civil servant neutrality and universality. What happens when Muslim public school *teachers* wish to wear foulards?<sup>60</sup> Prior to 1998 most German state courts held that wearing a foulard was inconsistent with the principle of neutrality, itself especially binding on civil servants obligated to parents and pupils, even if it was otherwise guaranteed as an expression of freedom of religion. Since German schools do have in-house religious instruction for all faiths (something Americans might remember from the '50s: "R.I."), the teacher teaching Muslim children Muslim religion could wear a foulard, but not the teacher teaching secular subjects to a mixture of students.

The tide has turned in Germany as well. A greater recognition both of individual rights and of alterity improved the situation of minority and immigrant communities. Within the same logic, the Constitutional Court commanded the removal of Crucifixes from secondary schools and allowed the entry of the teacher en foulard. A teacher who does not attempt to indoctrinate his or her pupils cannot be deprived of his or her private human rights while the Crucifix placed on the wall compels confrontation with non-adherents and so must come down.<sup>61</sup> Old bottles; new wine.

?The *demise of the Soviet Union*, whether inevitable or the result of relentless hostility, everywhere unleashed a neo-liberal offensive. Labor and Democratic parties almost everywhere moved rightward and withdrew from social democratic redistribution projects. Clinton in the U.S., Schroeder in Germany (especially after the ejection of the last Keynesian welfarist, Lafontaine), and Barak in Israel all took the Third Way, neo-liberalism with a human face and a concern for developing human capital through education. No longer was it necessary to engage in social and economic redistribution, or even foreign aid, as an insurance policy against potential sympathy for Communism. Everywhere free-market liberalism was ascendant with no alternatives in sight: capitalism or barbarism. In some parts of the world this led to and is leading to ruin, but in other places distinct advantages were to be gained. In all three countries under consideration here, growth in GNPs succeeded the earlier stagflation, but

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<sup>59</sup>Conseil d'État, 20 octobre 1999, Epoux Aït Ahmad; Saas, p.455. Take that Émile Durkheim.

<sup>60</sup>The more decentralized German system initially produced a spate of conflicting rulings; see E.W. Böckenförde, "'Kopftuchstreit' auf dem richtigen Weg?" *Neue Juristische Wochenschrift* 2001:10, p. 723; Anne Debus, "Der Kopftuchstreit-- Gedanken zu Neutralität, Toleranz und Glaubwürdigkeit," *Kritische Justiz* 1999, p. 430; Ulf Häußler, "Muslim Dress Codes in German State Schools," *European Journal of Migration and Law* 3(2001), p. 457.

inequality worsened.<sup>62</sup>

Certainly the widespread tendency toward more open borders (as well as the growing numbers of people interested in crossing them) is a post-Soviet phenomenon. The abandonment of import-substitution, quasi-autarkic economies in much of the Third World has led to abundant immiseration and migration as well as the boundless penetration of foreign capital into dependent societies. Mexico, Eastern Europe, and Russia have been the largest feeders of surplus population to the U.S., Germany, and Israel respectively, mostly because of the freeing of surplus populations by a free market. Once "sheep ate men," now NAFTA, the IMF and post-Zionism just send them northward or abroad.

Whatever its grave defects, the existence of the Soviet Union afforded countries as far-flung as South Africa, India and Argentina development strategies less dependent on migration and proper location in the food chain of the world economy. In addition, as the deterioration of most African and Caribbean countries makes clear, the small modicum of aid that used to flow from the bipolar capitals has nearly stopped. Finally, analysts have begun to identify and delineate the Soviet role in the expansion of rights and equality in the U.S. itself.<sup>63</sup>

But it is also possible that "peace" has made for greater relaxation and domestic tolerance of difference. Whether this can be sustained remains to be seen. Still, it is certainly impossible to understand the Greens, the substantial revision of Germany's immigration and naturalization laws, and a growing cultural pluralism in Germany without the end of the Soviet Union. Likewise, the Oslo and so-called peace processes are or were coterminous with liberal constitutionalism and cultural pluralization in Israel. Both had banner years starting in 1992, and neither would have been possible were a Soviet counterhegemon still on the scene. Even in the U.S., and despite the fact that the "peace dividend" was quickly redistributed upward, openness triumphed: NAFTA, freer free trade, record immigration numbers, relaxed borders, and a new cosmopolitanism marked the decade. The airport lounge and American Express card began to seem more important than the downtown and the passport.

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<sup>61</sup>The latter ruling is not yet as definitive as the former; Häußler, p. 470.

<sup>62</sup>As Shalev puts it for Israel and generally:

liberalization measures in the context of increasing globalization have a high potential for generating distributional 'shocks.' The obvious winners are capitalists...and business executives, along with the foot soldiers of liberalization--the middlemen and women of the 'professional', 'service,' or 'new' class.

Israel in the 1990s went from one of the most egalitarian of developed societies to one of the most inegalitarian. "Liberalization and the Transformation of the Political Economy," in Shafir and Peled eds., p. 147.

<sup>63</sup>See for example Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton 2000) who reminds us how much of the domestic desegregation effort was undertaken to rebut Soviet advances in the Third World. Clearly, trying to keep the Paul Robesons at home was insufficient (and stupid).

The *advance of human rights internationalism, EU and transnational entities, NGOs and the like, have fostered a sometimes-illusory post-nationalism*. International markets and mass migration are old phenomena, but the existence of an international civil society --beyond a cosmopolitan elite stratum-- would indeed be something new.<sup>64</sup> Such an international civil society would give weight to the universalist dimension of human rights discourses.

Curiously, a growing recognition of difference and respect for "others" has been linked to a certain kind of universalism, one that comes at the expense of sovereign nation states. International Criminal Courts, human rights tribunals, refugee commissions, multilateral peacekeeping forces and the like parallel structures such as the WTO, GATT, and IMF. Claims by those outside a state's borders to intervene inside in the name of justice mirror the obligations of others to act beyond their own borders. Yet, even if valid, such claims risk depreciating and impoverishing citizenship in individual states while claiming to circumvent local cowardice and ineptitude.

Human rights and state sovereignty claims may come into conflict with each other, but the latter may also be a vehicle for such rights. This relationship has been a problem since the revolutionary *Declaration of the Rights of Man and Citizen* of 1789. Why would the universal rights of man require the particularism of citizenship? As Hannah Arendt explained it, "abstract" human beings existed "nowhere". Hence,

The whole question of human rights... was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seems to be able to insure them.<sup>65</sup>

Most nation states today justify their legitimacy on the basis of universalist human rights principles mediated through their particular history and institutions. As Benhabib has observed,

The tension between the universalistic scope of the principles that legitimize the social contract of the modern nation, and the claim of this nation to define itself as a closed community, plays itself out in the history of the reforms and revolutions of the last two centuries.<sup>66</sup>

One risk, of course, is that nation-states may equate the citizen with the member of the historic-ethnic nation, thereby collapsing a worthy political and legal category into an inegalitarian schema of

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<sup>64</sup>Not only does "globalisation seem[] to lead inexorably toward more diverse societies and multicultural citizenship," but it is doing so now for the first time for really large numbers of people; Stephen Castles and Alastair Davidson, *Globalization and the Politics of Belonging* (London 2000), p. 280. Kastoryano op cit. makes a similar argument.

<sup>65</sup>Hannah Arendt, *The Origins of Totalitarianism* (New York 1951, 1979), p. 291. On how this citizenship activates and is activated, see William Sewell, "Le Citoyen/la Citoyenne: Activity, Passivity and the Revolutionary Concept of Citizenship," in Colin Lucas ed., *The French Revolution and the Creation of Modern Political Culture* (New York 1988), p. 105.

<sup>66</sup>Seyla Benhabib, "Citizens, Residents and Aliens in a Changing World," *Social Research* 66:3 (1999), p. 735.



first-class and second-class, more-and-less citizens by nationality or ethnicity. Here Arendt's experience as a refugee, someone made stateless on account of her ethnicity, led her not to turn against states and toward human rights internationalism but rather to insist that states be civic polities with citizenship based on legal criteria. All those born into a territorial state had the human right to citizenship in it. Universalism and constitutionalism would thus temper the demos.

The development of an international human rights regime has been pushed forward and earned praise from many quarters, but ordinary citizens, who might have some voice in a democratic nation-state, are here unrepresented.<sup>67</sup> But voice may not be the basis of loyalty if what one ultimately seeks is "human rights, consumer style, anti-statism and media glitz."<sup>68</sup> No wonder Michael Jordan was the par excellence symbol of America during the 1990s. Beethoven becomes "world beat," and his league of nations becomes a free trade zone.

On the other hand, there is no disputing that international minimum standards may be higher than those prevailing in any given territory. In some settings, such as the EU, the component states enjoy sufficient democratic legitimacy that they can cover the legitimacy deficit of institutions in Brussels, Strasbourg, and Luxemburg. Whether a "European citizenship" or "rights consciousness" will emerge as a result is still an open question.<sup>69</sup> Trans- and post- projects remain less viable where the underlying legitimation is more problematic or the national differences to be bridged or encompassed broader. Alternatively, such projects, as arguably was the case in Yugoslavia, become an update of NATO-peacekeeping, an international gloss on a hegemon's project. A post-Westphalian world need not provide its inhabitants greater opportunities for citizenship and its benefits, at least not in the absence of democratic forms.<sup>70</sup>

## V

### **Law as Ideology, Terrain and Coercion**

Why put law near the center of one's concerns? In this context, the first reason is obvious: it is the law that largely determines who is a citizen (or how much of one) and who is not. The law was criti-

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<sup>67</sup>Compare the claims of Peter Spiro, "The Citizenship Dilemma," *Stanford Law Review* 51(1999), p. 597 who champions these organizations as platforms and Ruti Teitel, *Transnational Justice* (New York 2000) who claims that most polities cannot internally generate norms as effective and progressive as those imposed through international claims.

<sup>68</sup>Appadurai op.cit, p. 804.

<sup>69</sup>See Ulrich Preuß, "Antrag auf Gewährung einer Sachbeihilfe für das Forschungsvorhaben 'Concepts, Foundations, and Limits of European Citizenship'" (ms Bremen 1995); "Problems of a Concept of European Citizenship," *European Law Journal* 1:3(1995), p. 267.

<sup>70</sup>NGOs are not nations or states or peoples. They are for the most part *corporations*. Nor are post-national nations

cal, for example, in depriving most African-Americans of formal citizenship, even personhood, until 1866 and of real citizenship (as opposed to nationality) for another century thereafter. In some respects, that condition continues.<sup>71</sup> Law for a long time prevented most Asians from naturalizing as Americans while the same law guaranteed that their children would be born citizens with no further qualification needed.<sup>72</sup> Law governs the entry and residency of outsiders and the process of "naturalization" into citizenship. Rules are indisputably vital.

Nonetheless, the law is also ideology, a mediated superstructure. One might learn more about changes in migration and citizenship through the study of the rise and decline of the Fordist-Keynesian dual-hegemon material world. On the other hand, the law shapes conflicts and "switches" outcomes. As Weber put it,

Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the `world images' that have been created by `ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest.

Or, in Antonio Gramsci's version, law helps "create the terrain on which [we] move, acquire consciousness of [our] position, struggle, etc."<sup>73</sup>

Legal and ethical reconsideration of the status of "others" --among them, resident aliens, new immigrants, and those illegally present-- has been a central legislative and judicial as well as scholarly concern in many countries. The U.S., Germany, and Israel have of late seen legislative initiatives as well as broad-reaching high court opinions. On balance, receptivity and respect are more characteristic of current tendencies than are exclusionary tendencies. I think it safe to suppose that events of the past months or even past year and a half cannot reverse these deeper trends.<sup>74</sup>

By emphasizing individual rights in a social regime of diverse individuals, by recognizing a weakened public/private distinction, and by insisting that a state may only act "proportionately,"

necessarily more humane: Queer Nation at war with Aryan Nation allied with Anti-abortion Nation...

<sup>71</sup>William Julius Wilson, for example, argues that the isolation and ghettoization of the inner-city poor deprives them of citizenship, precisely its social membership aspect; "Citizenship and the Inner-City Ghetto Poor," in Bart van Steenberg ed., *The Condition of Citizenship* (London 1994).

<sup>72</sup>This may be viewed as contradictory or not, as one chooses. *Wong Kim Ark*, 169 U.S. 669 (1889) found that there was no contradiction between the permissible bar on Asian naturalization, indeed the complete exclusion of Chinese on grounds of moral and racial unfitness or any other grounds, and the citizenship birthright of their U.S.-born children.

<sup>73</sup>Max Weber, "The Social Psychology of the World Religions," in Hans Gerth and C. Wright Mills eds., *From Max Weber* (New York 1946), p. 280; Antonio Gramsci, *Selections from the Prison Notebooks* (New York 1971), p. 377.

<sup>74</sup>Indeed, one could make the case that the past months have begun a coming-out time for Muslims in the U.S. Such moments can be dangerous but also rewarding. As to Europe, Riva Kastoryano's Feb. 21, 2002 report on Muslims in France and Germany since September 11 comes too late for consideration here.

domestic courts have allowed a greater and more visible presence for aliens.<sup>75</sup> Legislatures too have preferred principles of liberal individualism over those of collective solidarity, at the expense of the welfare state, to be sure, but to the advantage of people not at the citizen core of society. Much of the putatively "anti-immigrant" legislation of the 1990s is better understood in an opportunist anti-crime, anti-welfare context-- the number and diversity of immigrants has in fact been growing steadily for over three decades.

On the German side, parliamentary resistance to accepting the fact that Germany is "a land of immigration" has now been overcome,<sup>76</sup> and acceptance of the multicultural composition of German society has been gaining ground in theory as well as in practice. Notwithstanding some setbacks and dilution, Germany in 1999 saw the passage of its first immigration and naturalization law since the Reichs- und Staatsangehörigkeitsgesetz of 1913 and the first ever embodying some jus soli principles. 2002 will see the first immigration-attracting immigration law in modern German history. Even in Israel, individual rights came to the fore in the courts after 1992 with the passage of a series of individual and market-oriented Basic Laws of constitutional civil rights standing. The democratization of Israel at the expense of its Zionist pillar could possibly resume. Almost everywhere rights and duties are lessened and discriminations among residents and between citizens and aliens narrowed --whether not enough or too much is a topic of lively debate.<sup>77</sup>

The American and German legal systems are ordinarily thought of as treating their first-time entrants, resident aliens, and would-be citizens rather differently. In the U.S. as in Israel, entrants have long been presumed to be on the road to citizenship. Indeed, in Israel, immigrants have been accorded special benefits to facilitate absorption; the *raison d'être* of the state is to gather in a diaspora. In Germany, this presumption has not guided policy: even before 1870, the German states maintained a

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<sup>75</sup>The discursive structures through which this has taken place are independently worth a look but cannot be addressed here. See David Abraham, "The Good of Banality? The Emergence of Cost-Benefit Analysis and Proportionality in the Treatment of Aliens in the U.S. and German," *Citizenship Studies* 4:3(2000), p. 237; Nicos Emiliou, *The Principle of Proportionality in European Law* (Boston 1996); Joppke, "The Legal Domestic Sources" op cit.

<sup>76</sup>More on this below. Article 8 of the *Reichs- und Staatsangehörigkeitsgesetz* of 1913, providing for naturalization, was in effect (not counting the Nazi interregnum) until 2000. The last version of the guidelines 2.3 to Art. 8 read: "...Germany is not an immigration country; it does not seek to increase the number of German citizens through naturalization."

<sup>77</sup>For the U.S., Linda Bosniak is most effective for the not-enough case, "Membership, Equality and the Difference that Alienage Makes," *New York University Law Review* 69 (1994), p. 1047, "Universal Citizenship and the Problem of Alienage," *Northwestern University Law Review* 94(2000), p. 963; for the too-much case, Peter Schuck, "The Devaluation of Citizenship," in Rogers Brubaker ed., *Immigration and the Politics of Citizenship* (Lanham 1998), p. 54, "The Reevaluation of Citizenship," in Christian Joppke ed., *Challenge to the Nation State* (New York 1998). For Europe, Zig Layton-Henry ed., *The Political Rights of Migrant Workers in Western Europe* (London 1990).

body of foreigner law, *Ausländerrecht*, that assumed the normality and even permanence of resident alien status. Whereas U.S. immigration law was long an aspect of the sovereign's plenary foreign policy power, German foreigner law was one of the core arenas of domestic policing (*Polizeimacht*).

In the view of many, the U.S. is characterized by a "thin," equal protection model of mostly negative rights citizenship. Civil rights and physical and social mobility are almost all that autonomous individuals need. Legal equality is about due process and equal protection for *persons*. The anti-discrimination model of equal protection is hegemonic and makes group rights problematic while also impeding the elaboration of social rights to education, housing, etc. The American immigration regime, in turn, "pays little attention to the thin fabric of social and political rights that US citizenship entails" and, instead, tries to "create many jobs and keep them relatively open to international labour."<sup>78</sup>

Thus, the American "system" is about large numbers of immigrants, large numbers of available jobs, easy adjustment between types of visa permissions and statuses, easy transition to citizenship through naturalization and immediate jus soli birthright citizenship, poor border control, overburdened administrative apparatuses, negligible deportation rates, paltry social benefits, and minimal benefit from obtaining citizenship.

By contrast, German citizenship, like (Jewish) Israeli, is perceived as "thick," with sharper exclusions and greater and more explicit social rights and duties. Until very recently, Germany's entry regime, in turn, was marked by strong border and internal administrative apparatuses, little likelihood of adjustment between and among categories of visa permissions, an exceedingly low naturalization rate, no jus soli birthright citizenship, highly regulated labor markets, a strong system of available social welfare benefits, and a high salience to citizenship.<sup>79</sup> Where U.S. citizenship is putatively constitutional and consensual, Germany, like Israel, has privileged ethno-cultural identity and national belonging within formal democracy.<sup>80</sup> American citizenship thus seems a lesser marker, easy to obtain; German and Israeli a greater, more difficult marker to acquire. For some, the lesser importance of the

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<sup>78</sup>Thomas Heller, "Change and Convergence: is American Immigration still Exceptional," in Kondo ed. op cit, pp. 196-7. Heller's emphasis on "exit" and mobility in the U.S. regime --as opposed to "voice" and engagement in the European is redolent of Sombart's focus on immigration as one reason there was No Socialism in the U.S. See also Robert Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago 1995).

<sup>79</sup>Heller, op cit. p. 214 argues that membership came to mean more in Europe because: population was denser, effective bureaucracies already existed, external threats required a standing military, states had to compete for loyalty from populations whose identities had been fluid or local for a long time, mercantilist and imperial traditions has established interventionist government, and political rights were slow in developing.

<sup>80</sup>For interpretations of "ethnic democracy" in Israel, see Sammy Smooha, "Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel," *Ethnic and Racial Studies* 13 (1990) p. 389; Yoav Peled, "Ethnic Democracy and the

citizenship marker in the U.S. has been a felicitous thing. "Remarkably enough... happily-- the concept of citizenship plays only the most minimal role in the American constitutional scheme," wrote Alexander Bickel, convinced that

a relationship between government and the governed that turns on citizenship can always be dissolved or denied.... It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a non-person.<sup>81</sup>

Others, on the other hand, like Peter Schuck have complained that

...the courts, by interpreting the equality and due process principles more expansively, have substantially reduced the value of citizenship to legal resident aliens. ...[the marginal benefits of citizenship] have never been smaller.

Certainly, for law-abiding aliens the risk of deportation is practically nil (a fact underscored by the lame Ashcroft witch-hunt), the employment from which they are barred marginal, and the public services and benefits withheld from them alone few (despite a temporary blip from 1996-98). It is more difficult for aliens than for citizens to bring relatives to the country. It is not surprising that naturalization rates among the eligible in the U.S. have resumed their secular decline-- 64% of the eligible foreign-born population acquired citizenship in 1970; the rate dropped to 51% in 1980, 41% in 1990, 35% in 1997, and 31% in 1998.<sup>82</sup>

In Germany a 30% naturalization rate would constitute a revolution. Despite a ten-fold increase from 1985-95 and a projected 30% current annual *rate* of increase, only about 2% of foreigners naturalize.<sup>83</sup> Integration has been too demanding and not a majority desire on either side of the citizen/alien line. It remains to be seen if a significantly revised law will change essential social dynamics.

Rights are many and come from different sources as the high courts of all three countries have declared. Where U.S. courts have expanded individual protections through the rubric of "equal protection," German courts have accomplished much the same under the banner of "free development of personality" (*Entfaltung der Persönlichkeit*). Some observers see the Israeli Court also enlarging individual and minority-identity rights from a variety of sources.

Legal Construction of Citizenship," *American Political Science Review* 86 (1992), p. 432; Shachar, *op cit.*

<sup>81</sup>Alexander Bickel, *The Morality of Consent* (New Haven 1975), pp. 33, 53. Schuck, "Devaluation" *op cit.*, p. 58.

<sup>82</sup>These figures vary a great deal by country of origin. Koreans naturalize at rates over 50%; Mexicans at barely 15% 1999 INS *Statistical Yearbook*, Table 44.

<sup>83</sup>Kai Heilbronner, "Citizenship Rights for Aliens in Germany," in Kondo ed., *op cit.*, p. 104; the projected 30% rate of increase is from ministry spokesperson Marieluise Beck, reported by Agence France Presse, 13 Feb. 2002.

Eroded in numerous ways, from above and from below, the salience of citizenship seems to be declining, even in Germany, where the process of becoming a citizen is now much easier. Citizenship is giving way, in the worried view of many nationalists, to the free market on the one hand and group recognition and calls for ethnic and religious group rights and parochialism on the other. McWorld confronts Jihad as material global integration confronts ethnic and cultural fragmentation.<sup>84</sup> We have been reminded that there are many things for which people will die or kill, the nation-state being only one and hardly the worst. The continued growth in human migration under conditions of a weak state, or states that choose to act as if they were weak, will accelerate or exacerbate these tendencies, both benign and ghastly. We might therefore worry less about the construction of the nation and more about citizens' democratic control over the state, a control that itself requires a measure of solidarity to achieve.

## VI

### **Toward a Neo-Liberal Convergence?**

#### *Germany: From Rights to Citizenship*

Jus sanguinis, citizenship by blood descent, does sit at the center of German nationality (*Staatsangehörigkeit*) and citizenship (*Bürgerschaft*). But it would be mistaken to conclude that only ethno-nationalism drives German membership. Through to the middle of the nineteenth century, German identities were state-centered. Indeed, since most German areas were overpopulated, rulers were content to shed emigrants. On the other hand, the Prussian Emancipation Edict of 1812 granted Jews citizenship without regard to ethnicity and, earlier still, Prussia had welcomed French Huguenots and Salzburg Protestants. As Hegel's 1821 *Philosophy of Right* made clear, the State was the culmination of "ethical life"; nation or folk was not up to such a task, forget the demos, and the 1842 Prussian *Untertanengesetz* (Law on Subjects of the State) reflected this view.

It was in 1848 at the Paulskirche in Frankfurt that this changed. Into the middle of that year the goal of a united and /or liberal Germany included multinational Austria. The *kleindeutsch* solution -- ethnic and spatial homogeneity-- only triumphed among the democrats and small-German radicals in response to their abandonment and defeat.<sup>85</sup> The North German Confederation and then, after 1870, the German Empire adopted the territory-based rule of citizenship. It was only after the rightward turn

<sup>84</sup>See Benjamin Barber, *Strong Democracy* (Berkeley 1984) and *Jihad versus McWorld* (New York 1995).

<sup>85</sup>The classic discussions of these developments remain, Theodor Hamerow, *Restoration, Revolution, Reaction* (Princeton 1958), pp. 95-196, Leonard Krieger, *The German Idea of Freedom* (Chicago 1957), pp. 273-397; Hans Kohn, *Prelude to*

of German Conservatives trying to catch up with right-wing populism after 1895 that "blood" became a key concept in German citizenship.<sup>86</sup> In this atmosphere, the 1913 *Reichs- und Staatsangehörigkeitsgesetz* finally went ethnic.

Nationality as a 'national bond' between the German Empire and Germans living abroad was confirmed and no longer dissolved even when the period of residence abroad was long-term. To ensure state control at all times over the naturalisation of immigrant workers, the principle of descent was reasserted against territorialism with the law confirming a basic ethnic-cultural notion of citizenship as a national community of descent...<sup>87</sup>

The loss of German territories and populations after 1919 and 1945 made revision of the 1913 principles difficult since revision would have meant renouncing rather large territorial claims and accepting large population losses. Efforts by Social democrats and others during the Weimar Republic to reintroduce *jus soli* principles into citizenship law failed, in part because efforts to democratize the country generally were stymied by reaction.<sup>88</sup> Friedrich Meinecke's widely propagated post-war view of Germans as tied together by culture was as partial and distorted as his pre-war view that Germans were made by blood and tribe.<sup>89</sup>

After 1945, with the country both divided and flooded with refugees from territories no longer under its control, the 1913 principles were reinstalled with only the Nazi exclusion and racial ejection principles stripped away. In addition, of course, the Basic Law of 1949 required Bonn to look after the interests of both halves of the country --the "two German states" view emerging only very late in the going.

As a result, and despite the rapid growth of the foreigner population, until 2000 a child acquired German citizenship by descent from a German parent (Art 4). Naturalization was contemplated in the law, but as a rarity: with ten years problem-free residence in the country, a foreigner could apply for a *discretionary* (that is, not of right) grant of naturalization. Renunciation of other loyalties was essential,

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*Nation States* (Princeton 1967). The recent baseline is provided by Rogers Brubaker, op cit.

<sup>86</sup>See P.G.J. Pulzer, *The Rise of Political Anti-Semitism in Germany and Austria* (New York 1964), pp. 118-26 and 226ff; Jack Wertheimer, *Unwelcome Strangers: East European Jews in Imperial Germany* (New York 1987).

<sup>87</sup>Dieter Gosewinkel, "Citizenship and Naturalization in modern German and Austrian History," ms. July 2001, p. 3.

<sup>88</sup>On immigration reform efforts in the Weimar years, see Klaus Baade, "Immigration, Naturalization, and Ethno-National Traditions in Germany" and Jochen Oltmer, "Migration and Public Policy in Germany, 1918-39," in Larry E. Jones ed., *Crossing Boundaries: The Exclusion and Inclusion of Minorities in Germany and America* (New York 2001), pp. -

<sup>89</sup>Meinecke's 1928 pre-war view appeared in *Cosmopolitanism and the Nation State* (Princeton 1970), p. 9; his 1955 post-war view in *The German Catastrophe* (Boston 1963). See Ralf Dahrendorf, *Society and Democracy in Germany* (New York 1967), pp. 5, 21; Harold James, *A German Identity* (New York 1989), p. 3 on the interaction of culture and economy.

but more importantly, applicants had to show a "turn to Germanness" (*Hinwendung zum Deutschtum*), including language proficiency and declared constitutional loyalty.<sup>90</sup> A mutual lack of interest led to an average of only 15,000 naturalizations annually between 1974 and 1989. With the removal of "discretion" in 1984 the number climbed to 35,000 in 1985 and by 1997 had reached 80,000.

Who would want to become a German anyway? What impetus would there be to naturalize, especially if the natives were suspicious and unwelcoming? Millions came from abroad to work in the Germany of the Economic Miracle. By the time recruitment was stopped in 1973, there were four million foreigners in West Germany. Family unification and formation could be made difficult but not stopped, so the numbers continued to grow. And life without citizenship was not life without rights or without solidarities. In 2000 there were approximately 7.5 million foreigners living in Germany or nearly 10 percent of the population --of these nearly 1.5 million were born in Germany. In fact, 1/3 of all foreigners have been in Germany for over 20 years; 40% for over 15 years, and half for over 10 years. About 30 percent of foreigners are Turkish, 15 percent Yugoslav, and 24% EU, with a third of that being Italian.

Long-term foreign residents enjoy the same labor market preferences enjoyed by Germans and the same social benefits as well. Given much higher union density than in the U.S. and a more centralized bargaining regime, as well as tougher government enforcement of labor standards, the disparities between domestic and foreign workers are less than in the U.S. though real. Indirect wages are high by American standards, just as they are for native workers: child benefits, health insurance, school and job education allotments, long vacations, pensions etc. Shopkeepers and other petit bourgeois and business people are eligible for and protected by the same programs as the famously security-obsessed *Kleinbürgertum*. As to civil and political rights, the picture resembles that of the U.S.: on non-immigration issues, foreigners enjoy the same civil liberties as Germans; with rare exceptions non-EU foreigners may not vote or occupy upper-reach civil service or political offices.

With security of residence, moderate family unification rights, social rights, civil liberties, and a high standard of living, why take the extra step of becoming German? Why risk losing benefits and

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<sup>90</sup>The term *Verfassungspatriotismus* (constitutional patriotism) has been at the center of the liberal discourse over citizenship. It is civic, voluntary, non-biological, and, in principle a matter of reciprocity. The Constitution is a democratic and social democratic commitment. *Verfassungspatriotismus* became a kind of Habermasian buzzword, but is less of one since September 11 --one now demands either more than that or less yet. Even constitutionalism can become more substantive, embedded, thicker, and exclusionary. There is a danger that civic republicanism can turn into communitarianism.

Most of the data here is drawn from the Bundesinnenministerium, "Policy and Law Concerning Foreigners," (Berlin 2000).



rights in your country of origin --as is often the case-- in order to become part of a people who seem ambivalent about having you? For one thing, Germany *is* now home to many, and the new Nationality Act finally recognizes that:

Children born in Germany to foreigners living here permanently are to be given the chance to grow up in Germany as German nationals from the outset.... *The acquisition of nationality marks the beginning of social integration.* If children born in Germany go to nursery school here and receive all their schooling and vocational training in a German environment and already grow up in the awareness of being Germans with all the rights and obligations this entails, they will develop important bonds and feelings of identification with Germany and the German way of life.<sup>91</sup>

An amended Foreigners Act (?85) also now allows for naturalization after 8 years subject only to a sufficient command of the German language and acknowledgment of the Basic Law.

Repeatedly, however, one is struck by the emphasis on foreigners "integrating," something "both sides" must "want." Less clear is whether foreigners are being invited to join an ongoing German project as it currently exists or to join Germans in charting a future course for themselves as "equal partners" in something new. The difference is important, and meeting halfway is not always the answer.

The German Basic Law (Constitution) anticipates and facilitates a strong welfare state.<sup>92</sup> Social minima and social consumption require social consensus and solidarity. The distributive logic is one of closure, not of market-style openness. Citizens and resident foreigners must be inside the same closed system. The welfare state "seeks to take care of its own"; it is "a kind of safe house in which to shelter its members from the outside world" so that they may be immune from competitive disadvantages and capital flight.<sup>93</sup> The segmentation of labor markets must be avoided. In the end, it is primarily the social wage that turns labor migrants into permanent immigrants, and this social wage is a product of *politics and community*, not the capitalist labor market as such.<sup>94</sup>

Part of what we are seeing in Germany, with surprising delay (occasioned primarily by the

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<sup>91</sup>Now, furthermore, "all those wishing to identify with... Germany as a democratic and constitutional state are welcome as citizens with equal rights." Bundesministerium op cit., p. 54.

<sup>92</sup>4,23 of the new Nationality Law stipulates that children born in Germany to a parent who has had an unlimited residence permit (*Aufenthaltsurlaubnis*) for at least three years or residence right (*-berechtigung*) for eight years will acquire German citizenship at birth. If they also acquire another nationality, they will need to choose between the two upon reaching majority.

<sup>93</sup>The ways in which this is true and in which a more communitarian and solidaristic society is mandated cannot be addressed here. See Kommers op cit., David Currie, "Positive and Negative Constitutional Rights," *University of Chicago Law Review* 53(1986), p. 864. David Abraham, "Liberty without Equality," op cit., pp. 32-38.

<sup>94</sup>Freeman op cit., p. 54.

<sup>94</sup>See Stephen Castles, *Here for Good: Western Europe's New Ethnic Minorities* (London 1984). Single young men are

strength of the trade unions), is the breakdown of the Guest Worker System. Once guest workers became families, rather than healthy single young males, their presence became a net drain on the welfare state.<sup>95</sup> Either their presence would undermine the welfare state for everyone else, or they would have to integrate and be integrated more fully into solidaristic social life. Failure to integrate would be an invitation to reaction<sup>96</sup> among both natives and foreigners.

In the German case, a much more individualized, neo-liberal "thinner" society may be in a better position to pursue integration around civic-constitutional and cultural principles. What has been called an "anthropological optimism" allows for a new social contract that "generates trust by its members and ...predictability for those who aspire to become members."<sup>97</sup> A House to live in.

#### *America: Citizenship "Without" Rights*

Like all countries, the United States is a creature of its history, but more than most countries it is a creature of its Constitution. Like France, the U.S. combines the civic with the cultural, and though certainly not yet free of its racial burdens, its laws do now presume there is but one class of citizens and that they are equal. The citizenship that all enjoy is, as repeatedly argued here, thin indeed-- so thin that even non-citizen residents may enjoy almost all of it. Since 1867

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside... nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person... the equal protection of the laws. Amend XIV.<sup>98</sup>

Pairing a definition of *citizen* with a list of (negative) rights due all *persons* is puzzling. The implications occupy legal scholars endlessly, but the consensus, and, more importantly, the view of the Supreme Court and Congress, has been that the rights of citizens, like the rights of all people, consist, above all, in not being oppressed. This is a libertarian country where freedoms rather than substantive

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followed by family reunification which then leads to permanent settlement.

<sup>95</sup>Guest worker families were, and continued to be, larger, less well educated, not as healthy, in need of housing, family-allowance oriented with stay-at-home mothers, and more frequently unemployed, as well as less well adjusted socially.

<sup>96</sup>Freeman put it this way:

...reduce the power of organized labor by dividing the working class into national and immigrant camps, by easing tight labor market[s]...and by provoking a resurgence of right-wing and nativist political movements.... By making racially diverse societies...migration has complicated social and political cleavages. [and] helped shift the ideological center of European politics to the right.

Freeman op cit., pp. 61, 62.

<sup>97</sup>Sabine von Dirke, "Multikulti: The German Debate on Multiculturalism," 1999 *German Studies Review*, pp. 513, 528. Unresolved is whether there is a lead culture (*Leitkultur*) in this new anthropology.

<sup>98</sup>The power to create nationwide uniform rules for naturalization is given to Congress in the 1789 Constitution. Congress could, and did, at various times make whole categories of people (Chinese, Asians, non-Europeans) ineligible for naturalization.

guarantees rule.

Whom to admit into or exclude from the country lies outside the ambit of the XIV Amendment. It is part of sovereignty itself, of the plenary power of the political branches.<sup>99</sup> As in Germany, nearly 10 percent of the population is today foreign, the highest percentage since the WW I era. Rather than being restricted, however, immigrations flows have been large and expanding: about 1? million people enter the U.S. each year as immigrants.<sup>100</sup> Legal permanent residents, immigrants, are eligible to naturalize after five years of residence, provided they possess some English competence, have an unremarkable criminal record, and can pass a very rudimentary civics test. Only the lack of marginal gain explains why the naturalization rate is as low as it is.

Together, the anti-discrimination and neo-liberal or libertarian meanings of American citizenship are not enough to overcome the disinclinations and disincentives discussed earlier in this paper. There may be little to lose, but apparently there is even less to gain. The Supreme Court and Congress seem unlikely to chart a new, more solidaristic course. The Court has made it clear that it would be permissible for Congress to establish a steeper gradient between what all people are entitled to and what only citizens and long-term residents may expect. At the moment almost nothing lies along that gradient<sup>101</sup> -- though it has been held to exist:<sup>102</sup>

the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens.... The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that *as the alien's tie grows stronger, so does the strength of his claim to an equal*

Since 1867, however, the children of the ineligible born here still enjoy automatic citizenship. See fn. 66 supra.

<sup>99</sup>Thus Congress could again choose in 2002, as it did over a century ago, to exclude all Chinese from entering the country without thereby depriving them of equal protection. But, *once inside the country*, they could not be discriminated against in matters of life, liberty, or property. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wong Wing v. U.S.*, 163 U.S. 228 (1896). For the complexities of the in/out distinction, see Bosniak op cit.

<sup>100</sup>*Roughly* 1 million people now come to the U.S. annually as legal immigrant permanent residents, 2/3 as relatives of non-citizen permanent residents and 1/3 as needed workers. In addition, 300,000 annually join the ranks of the 7+ million *illegally* present in the country; 2/3 of these are from Mexico and central America. Roughly 100,000 people are now granted refugee status annually, the numbers having been higher in preceding decades. About 50,000 aliens are deported annually, usually after committing serious crimes, although there is widespread concern that the law is sometimes excessively draconian in its definitions.

<sup>101</sup>The right to vote, to serve on juries, to assume federal appointment, to run for higher office or exercise certain political functions --these are withheld *legal* permanent residents. From *illegal* aliens more is withheld: the list is quite a hodgepodge. Illegal aliens are *not* eligible for: AFDC, SSI, non-emergency Medicaid, food stamps, public housing or legal services, unemployment insurance, federal job training, or higher education assistance. They *are* eligible for K-12 education, Women, and Children Supplemental Food Program, community and migrant health centers, school lunch programs, Social Security Title II services, and state emergency medicaid programs, including childbirth and related matters, and, often, in-state tuition rates.

<sup>102</sup>*Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (emphasis added). Note that the critical distinction falls not between citizens and aliens but between some aliens and other aliens. There is law to the effect that any discrimination on the basis of alienage triggers strict scrutiny.

*share* of that munificence.

In fact, and unlike Germany, illegals enjoy all personhood rights and are recognized as part of the national community.<sup>103</sup> Only a few dissenting voices in the law are unhappy with that result.<sup>104</sup> At the same time, this "equal protection" guarantee, unlike its German analogue, brings with it no substantive rights. As the Supreme Court has noted in denying the existence of an American right to an education, "the Equal Protection Clause confers no substantive rights and creates no substantive liberties. [Its] function, rather, is simply to measure the validity of classifications created by state laws." The essence of the American Constitution, as the Court declared elsewhere, is

to protect the people from the State, not to ensure that the State protect[s] them from each other.... [due process is a] limitation on the State's power to act, not...a guarantee of certain minimum levels of safety and security.

Or, as America's leading Judge-intellectual put it:

...the Constitution is a charter of negative rather than positive liberties.... The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. ...the difference between harming and failing to help is just the difference...between negative liberty --being let alone by the state-- and positive liberty --being helped by it.<sup>105</sup>

American law is no friend to social solidarity and puts no special premium on citizenship. To the extent, then, that democratic citizenship "involves the sovereign self-determination of a people, and the will to act in its name and to make sacrifices," a demos, a "we" to which members belong and "in whose deliberations they have a voice" and "feel a sense of shared fate and solidarity,"<sup>106</sup> American citizenship is indeed weak. But to the extent that the American demos is experienced in civic and political, albeit historically embedded, rather than ethno-cultural terms, it is open and egalitarian. The combination of easy entry for newcomers and weak democratic self-rule has, of late, prevented American citizenship

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<sup>103</sup>Thus Justice Brennan in *Plyler v. Doe*, 457 U.S. 202, 210 (1982) found that the child of illegals, "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term," and hence the beneficiary of the 14th Amendment's Equal Protection Clause. *Plyler* enlarged the national community to uncertain dimensions.

<sup>104</sup>Thus, Peter Schuck, "The Transformation of Immigration Law," *Columbia Law Review* 84(1984), p. 90:

If the American community's power to define its common purposes and obligations is no greater than the power of strangers to cross our borders undetected and to acquire interests here, our capacity to pursue liberal values--to decide as individuals and as a society what we wish to be--may be critically impaired.

For better or worse, equal protection jurisprudence dilutes commonality and maximizes inclusiveness at the expense of identity.

<sup>105</sup>The first quotation is from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 59 (1973). See Abraham, "Liberty without Equality," *op cit.*, pp. 29-33. The second quotation is from *Jackson v. City of Joliet*, 715 F.2d 1200, 1202, 1204 (7th Cir. 1983) (Posner, J).

<sup>106</sup>Jean Cohen, *op. cit.*, p. 246-7.

from thickening culturally. Any ascriptive, unchosen, heavily-embedded, pre-political and exclusionary elements have remained marginal compared to other times and other places.<sup>107</sup>

*Israel Joins the West:*

For 40 years Jewish Israel was a society and polity characterized by extreme levels of solidarity and high levels of equality. Combining socialist inspiration, spartan mobilization, and full-time beleaguerment and capital shortages, Israel was a centralized, homogenizing, collectivistic society. Legally and socially, since around 1992, there has been a

fundamental change which is transforming Israel from a collectivist state with a mobilized (Jewish) society and centralized economy into a more individualistic society with a free market orientation and culture.<sup>108</sup>

Deregulation, recommodification, flexibility, and a more atomistic social philosophy have all arrived. Even the Spartan/spartan side of Zionist Israeli identity is not impervious to the enticements of consumerism.<sup>109</sup>

These and other neo-liberal values have been pushed along by a significant legal transformation. "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation" were seen as and intended to advancing civil liberties while also establishing a kind of fundamental-values judicial review of statutes. Hitherto, Israel's parliamentary democracy was not subjected to counter-majoritarian judicial review. Indeed, Ben Gurion had argued throughout the pre- and early-state periods that a Constitution which, via a High Court, oversaw legislation was a conservative and anti-democratic device. The People were better served by parties and elections.<sup>110</sup>

This Constitutional Revolution has had a number of anti-collectivist ramifications. The devaluation of the status of collective labor rights, for example, has been remarkable: the roles of freedom of contract, of the relativity of rights between employer and employee, of a universal public interest set against the particularistic interests of unions, of tort liability for strikers, and of the construction of the freedom to associate in unions as an individual, not a collective right --all these have

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<sup>107</sup>In this sense, Cohen's call, *ibid.* p. 258, for a "disaggregation of the three components of citizenship" --legal standing, democratic participation, identity-- overseen at different levels of governance in the interests of a multiculturalist rejection of assimilation and the claims of permanently resident non-citizens, seems unnecessary and unwise. The 14th Amendment already recognizes this in its allocation of certain key rights, as already noted, to all "persons."

<sup>108</sup>Hirschl op cit, pp. 450-1.

<sup>109</sup>See Natan Sznajder, "Vom Wehrbürger zum Einkaufsbürger: Nationalismus und Konsum in Israel," *Soziale Welt* 49(1998), p. 43.

<sup>110</sup>See Lahav op cit., pp. It should be pointed out that the European left viewed High Courts with suspicion for precisely this reason. The contemporary image of High Courts as friends of the needs of the People is new and passing.

moved Israel from a European social democratic to a U.S. individual model.<sup>111</sup> Even "Freedom of Occupation" turns out to mean the freedom of the labor market to allocate jobs, rather than the state's guaranteeing full employment, as it had formerly been committed to doing.

"Basic Law: Human Dignity and Liberty," according to the Chief Justice means formal equality of opportunity, due process of law, freedom to pursue one's own life plan, the right to own property, freedom from state intrusion into [one's] privacy, and the perception that each individual is a moral being.... a legal right to noninterference. ...Social human rights such as the right to education, right to health care, and to social welfare are, of course, very important rights but they are not ...part of human dignity.<sup>112</sup>

In short order thereafter the High Court determined that there was no citizenship constitutional right to an education, "or even equality of opportunity in education." Constitutions simply "protect the private sphere from malevolent interventions" --just as U.S. Justices have been saying for decades.

Is there any gain to citizenship, to rights, to minorities from this turn away from Zionist collectivism? Pessimists worry that too much of Israeli society<sup>113</sup>

would be deeply threatened by a rollback of Israel's settler-society welfare state and the triumph of meritocratic individualism. ...a 'post-Zionist' vision of Israel as a politically liberal state in the service of all of its citizens is fundamentally at odds with almost the entire spectrum of Jewish opinion, both at the mass and elite levels.

Optimists argue that

...the exclusionary and universalist practices displayed by Israeli society represent two imperatives that have coexisted uneasily and vied for dominance within it: a colonial, frontier imperative and a democratic, civil imperative.... Israel has been assuming more and more the

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<sup>111</sup>Hirschl op cit., pp. 437-40. The similarities to earlier U.S. developments is uncanny; see Abraham, "Individual Autonomy," op cit. Israel is a small country, and its entire judicial elite has now done time in Manhattan, Cambridge, and New Haven, and it has begun to show.

<sup>112</sup>Hirschl, p. 444 (translation by Hirschl). Proposals for an additional Basic Law to grant constitutional status to various social rights and to guarantee minimum humane conditions to every Israeli was defeated in 1992 by a coalition of religious and neo-liberal deputies. Ibid. p. 445.

<sup>113</sup>The pessimistic view is from Shalev, "Liberalization and Transformation," op cit., p. 150-1. The more optimistic view is that of Yoav Peled and Gershon Shafir, "The Roots of Peacemaking: The Dynamics of Citizenship in Israel, 1948-93," *International Journal of Middle Eastern Studies* 28(1996), pp. 391-2.

character of a civil society.

According to these same optimists, the Zionist project required that Jewish settlement: be constituted as an ethno-republican community, committed to a common moral purpose.. its civic virtue pioneering. [Once there was a state,] under the legitimational guise of universal liberal citizenship, individuals and social groups continued to be treated by the state in accordance with their presumed contributions to the common good as defined by the Zionist project.<sup>114</sup>

Optimism is to be found in a situation where the elite has "outgrown the confines of its colonial phase... and now seeks to venture out into the world. It has thus lost much of its interest in maintaining the primacy of republican citizenship." Still, in good Athenian fashion, social rights are intimately tied in Israel to military service, in which Arab-Israeli Palestinians do not participate.

Where individual liberal rights, such as property rights, come into play --without advancing a collective vision of the common good in conflict with the Zionist vision-- there neo-liberalism has been good for individual and minority rights. Thus, in a widely publicized case, the High Court held that an Arab citizen could not be barred from buying property in a Jewish community; he has property and contract rights that a liberal legal order may not abridge.<sup>115</sup> Likewise shop owners could not be compelled by ordinance to post Hebrew language signs alongside Arabic signs.<sup>116</sup>

The party of peace and privatization turns out also to be the party of a weakened citizenship. It would not be the first time "doux commerce" was looked to to bring peace and tolerance.<sup>117</sup>

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<sup>114</sup>Ibid. p. 398, sources omitted.

<sup>115</sup>This case, *Kaddam*, was reported worldwide. See.... Rather strikingly, the opinion by C.J. Barak is full of references to U.S. civil rights cases including *Jones v. Alfred Mayer*, which links the non-discrimination equality right to the individual rights of property and contract. <more>

<sup>116</sup>*Nametocome*, . The same issue has come up in Québec, where French signs may not be trumped by signs in another language. There too *individual* property rights are used by minority citizens to combat the majority's cultural and national policy.

<sup>117</sup>Following another bitter cycle of wars, Montesquieu:

It is almost a general rule that wherever manners are gentle there is commerce; and wherever there is commerce, manners are gentle.... Commerce... polishes and softens barbaric ways....





