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Changing Sovereignty Games and International Migration

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In this article, Professor Zolberg argues that today's immigration issues should be analyzed within their historical bases. He follows the formation of the modern State, with particular focus on the legal and political meaning of "sovereignty" as understood in pre-colonial times down to the World War II period. He next identifies several late twentieth century phenomena in Europe and elsewhere, many of which pose serious challenges to long-standing notions of nationhood and citizenship. The author concludes that despite the recent development of borderless markets and communication infrastructures, much remains to be done to build a truly global community.

I. INTRODUCTION

The demographic perspective leaves no doubt as to the importance of migration as a social process: the outward and inward movement of individuals is one of the three constitutive processes of any population, the others being birth and death. But this perspective does not help us to elucidate how movement from one country to another differs from all other kinds of movement. Rather, it is the political organization of world space into mutually exclusive sovereignties that delineates the specificity of international migration. Viewed from this angle, international migration is a historically-bound phenomenon, arising from the advent of territorial sovereignty as the dominant form of political organization—in short, with modernity. International migration is distinct from the process whereby individuals constantly redistribute themselves across space by moving short or long distances within the confines of the State to which they belong. The distinctive feature of international migration arises not from the nature of the movement, but rather from the fact that it entails a transfer from the jurisdiction of one sovereign to another. If the transfer becomes permanent,

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it constitutes a deviation from the norm in terms of which the world is politically organized. That norm is reflected not only in the popular conception of a world consisting of countries considered as natural entities, but also in the conceptual apparatus of the social sciences—except for anthropology—which is predicated on the notion of "society" as a territorially-based, self-reproducing cultural and social system whose human population is assumed to renew itself endogenously over an indefinite period.

Concomitantly, given the motility of the human species from its earliest origins and its adaptability to life in the broadest range of environments, the capacity to control movement is a requisite for the effective exercise of any sort of authority. This is especially crucial when authority is defined in territorial terms, as in the case of the modern State. This article tracks the historical backdrop against which modern immigration policy must be viewed, beginning with a discussion of pre-monarchist Europe and the early United States, then moving to the dramatic developments of the twentieth century, including decolonization. Next, several contemporary phenomena are examined which, taken together, lead to the conclusion that though many nations may seek to achieve closure of their borders, new immigration is likely to persist.

II. FORMATION OF THE MODERN MIGRATION REGIME

As suggested by Perry Anderson, the transition from the manorial economy to the modern State (a label I prefer to "absolutist") entailed a recasting of the carapace of control at the level of the larger territory, one more appropriate to the new scale of economic activity.[1] However, John Ruggie has pointed out that the transformation was not determined by economic processes alone: there was a change in what he terms the "social episteme," the establishment of a single subjectivity to which all others are subordinate, represented, for example, in the development of single-point perspective in art and its rapid rise to hegemony in representation.[2]

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1. PERRY ANDERSON, LINEAGES OF THE ABSOLUTIST STATE (1974).
2. John G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 157 (1993); *see also* J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107 (1994).

Internal movement within most European States became generally free (in contrast to the situation in States where serfdom persisted, such as the Tsarist empire, or in slave colonies)—but with controls on vagrancy and the like. Concomitantly, with the drastic reduction of overlapping networks of authority to a single hierarchy, the distinction between mutually exclusive subjects was sharpened.

Modern notions of sovereignty, in Bodin as well as in Hobbes, very much reflect these notions. For Bodin there is no strength but of men. For the mercantilist-bellicist State, human capital was of the essence; thus, from this perspective the most important form of control pertained to the outward movement of its populace. The State sought to retain its human capital for economic production and war. Accordingly, in the first centuries of the modern State's existence unauthorized emigration was tantamount to treason and was punishable by death or enslavement. The resilience of this concept is confirmed by its persistence, in more recent times, as the hallmark of the "totalitarian" States.

These mechanisms are historically bound. Seventeenth-century Europe was clearly divided into mutually exclusive State-like territories, ranging from large kingdoms to small principalities. Much of the overseas world was organized in this manner as well, where territory was either part of established non-European empires (e.g., the Ottoman Empire or China) or under the colonial control of Europeans. The "frontier" was Africa. Movement from Europe to the colonies was by and large regulated by the controlling sovereign in accordance with changing assessments of the interests and relative strength of the contending parties. However, an exception was Britain's North American colonies, which did receive, or rather import, foreign servants, particularly from some of the poorer German states.

Under   prevailing   socio-technological   conditions,   reinforced   by regulations,   there   was   in   fact   relatively   little   emigration   and   hence immigration did not constitute a major problem. Indeed, mercantilist States were acquisitive of human capital. Facing conditions of limited population growth and general scarcity, in addition to promoting population growth, States tended to prey on each other with regard to population and to take advantage of opportunities to acquire valuable persons. This was one reason for welcoming "refugees" persecuted by enemy States. Statesmanship and humanitarianism went hand in hand. Nevertheless, theorists insisted that the sovereign's security required the exercise of control over inward movement

lest a potential invader be able to enter unchecked. This was clearly spelled out in the earliest elaborations of international law.[3]

Yet, there were stirrings in the North American colonies regarding who might be let in. Before the Revolution, grievances arose between the colonials and the Crown over two crucial aspects of immigration: on the negative side, the colonies claimed the right to exclude undesirables—notably Catholics, paupers, and felons; on the positive side, they claimed the right to naturalize desirable settlers who were not British subjects. It is noteworthy that some of these grievances were spelled out in the Declaration of Independence as arguments in support of the quest for sovereignty.

Already incipient in the Colonial period, this situation was fundamentally altered by the formation of the United States—an independent overseas republic controlled by people of European descent which, on the whole, welcomed substantial immigration of putative settlers and workers from Great Britain and select Protestant countries on the continent. Despite some setbacks, the new country acted as a magnet, particularly for members of the "middling classes" of society, because it afforded the possibility of acquiring land at a much lower price than anywhere in Europe. In Europe this precipitated an emigration crisis to which all sovereigns (including the Swiss cantons and German principalities) responded by reinforcing sanctions against unauthorized departure.

Yet, around the same time, the characteristic Enlightenment emphasis on the individual undermined the sovereigns' attempts to prevent exit. The early documents of the French Revolution (possibly early versions of the Declaration of the Rights of Man and of the Citizen) proclaimed the right to stay, to leave, and to return to France. From the documents it is unclear how extensively the drafters intended to apply what came to be known in nineteenth-century legal lexicon as the "right of expatriation." This right turns out to be subversive to sovereignty, as demonstrated by a simple query: what sort of "sovereignty" remains if individuals exercise an unlimited right to move out? The obvious result would be "sovereignty" over an empty land—as indeed nearly came to pass in the German Democratic Republic (GDR) in the late summer of 1989, when Hungary

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3. RICHARD PLENDER, INTERNATIONAL MIGRATION LAW (1972).

opened its border to Austria and citizens of the GDR drove their sputtering Trabants to freedom.

It has often been pointed out that there is no concomitant "right to enter." The vital importance of this asymmetry is brought home now, when, for the first time in the history of the State system, the right to leave has become nearly unfettered.

In recent years a number of theorists have explored this theme from the perspective of liberal theory.[4] Although much of the contemporary debate is cast in terms of "communitarian" versus "individual" perspectives, Nardin points out the importance of the "realist" perspective.[5] This is in keeping with my own understanding, derived from the century-old insight of Henry Sidgwick, that the single most important source of difference among positions arose from the "national" versus the "cosmopolitan" perspective.[6] Briefly, to the extent liberalism is embedded in the modern State system there is a fundamental ground for limiting incoming movement: the security of the sovereign's territory. This is genuinely irreducible.

This proposition is supported by the historical unfolding of U.S. doctrine regarding immigration control. To begin with, the U.S. Constitution established what has been termed a "negative pregnant" regarding the importation of slaves—that is, by specifying that Congress could make no law prohibiting such importation prior to 1808, it in effect affirmed its authority to regulate importation after 1808.[7] It is now understood that this was designed not only to limit slavery, but also to restrict the expansion of the country's non-white population and, in effect, to decidedly shift the balance to the white side.[8] Although this would not prevent voluntary movement from Africa, the possibility was ruled out by prevailing circumstances. In any case the conception of the U.S. body politic as white-only was clearly indicated by the enactment of a naturalization law by the very first Congress restricting candidates to the "free and white."

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4. A useful summary of the range of positions is provided by Terry Nardin, *Alternative Ethical Perspectives on Transnational Migration, in* FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 267 (Brian Barry & Robert E. Goodin eds., 1992).

5. *Id.* at 271-72, 277-78.

6. HENRY SIDGWICK, THE ELEMENTS OF POLITICS 309 (4th ed. Macmillan 1919).

7. Don E. Fehrenbacher, *Slavery, The Framers and The Living Constitution, in* SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 1, 10-11 (Robert A. Goldwin and Art Kaufman eds., 1988).

8. *See, e.g.*, DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823 (1975).

Although the fact that the Constitution vests the authority to enact naturalization laws in Congress suggests that sovereignty lay at the congressional level, the concept of "sovereignty" in the United States was made ambiguous by the existence of states and the insistence on the states' right to exercise "police powers" over slavery issues. This, in turn, very much affected the way in which immigration law and policy was carried out in the antebellum period. Contrary to the usual view that the absence of federal legislation prior to the act of March 3, 1875,[9] which among other things prohibited the importation of Chinese women for "lewd or immoral purposes," reflected a consensus among law-makers on "laissez-faire," I suggest the following: (1) there was no consensus, but rather a protracted conflict marked by periods of more explicit confrontation in which the forces of nascent capitalism were triumphant; (2) the balance of forces made for "managed" or "qualified" laissez-faire, but for reasons arising from the slavery issue this was reflected in legislation at the state and local level rather than at the federal level; and (3) despite constitutional obstacles, some non-laissez-faire legislation, designed to indirectly limit immigration, was enacted at the national level.[10]

For present purposes, the most significant development arose during the first third of the nineteenth century. During this period U.S. leaders emphasized two related objectives: (1) to promote the freedom of movement of individuals living in other countries so they could emigrate to the United States; and (2) to regulate entry so as to exclude those deemed undesirable.

However, because of constitutional constraints on the exercise of "police powers" by the federal government, the landing of persons was regulated exclusively by state laws. Anticipating contemporary debates, these were designed mostly to prevent the immigration of criminals and paupers who, Americans believed, were being dumped on their shores by malicious European schemers.

The most explicit justification of immigration restriction in U.S. constitutional doctrine appears in *Mayor of New York v. Miln*,[11] which was

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9. Act of March 3, 1875, ch. 141, 18 Stat. 477 (1875) (repealed 1974).

10. This is the theme of my forthcoming book, tentatively entitled, THE MAIN GATE AND THE BACK DOOR.

11. Mayor of New York v. Miln, 36 U.S. 102 (1837). The background and context are discussed in Edward F. Tuerk, The Supreme Court and Public Policy: The Regulation of Immigration, 1820-32, at 4-22 (1951) (unpublished M.A. thesis, University of Chicago).

decided by the Supreme Court in 1837, a time when the arrival of a mass of destitute Irish immigrants in the midst of a U.S. depression provoked considerable agitation and triggered efforts to reduce the flow. The case involved an 1824 New York law, designed to prevent the landing of foreigners deemed incapable of maintaining themselves, which required shippers to post bond on behalf of their passengers. The law was challenged by one of the shipping companies on grounds that the state lacked the right to regulate interstate and international commerce. However, the Court, under the leadership of Justice Taney, bypassed the commerce issue altogether and upheld the law on the basis of the state's police powers, an outcome which, incidentally, signaled a reversal of the Court's steadfast support of the growth of national power and a turn toward states' rights more generally.

It is especially noteworthy that the Court went out of its way to specify that the power of any state to regulate entry was a concomitant of its sovereignty, which originated in the law of nations, and hence pre-existed any written constitution or statute.[12] Invoking the authority of Emmerich de Vattel, the eighteenth-century theorist who founded the law of nations on "natural law," Justice Barbour stated that "[t]he Sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, to certain persons, or for certain particular purposes, according as he may think it advantageous to the state . . . ."[13] He quoted further, "[s]ince the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases, to the permission to enter."[14] The several American states therefore possessed this authority before the adoption of the Constitution; and, lying in the realm of police power, it was not taken away from them in 1787.

The "advantage of the state" is to be construed broadly to mean more than security in the narrow sense. Commenting on the substantive problems that prompted New York to enact the measure under consideration, Justice Barbour pointed out that the act was "obviously passed with a view to prevent [New York's] citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves," and concluded that "[t]here

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12. *Miln*, 36 U.S. at 132.
13. *Id.*
14. *Id.*

can be no mode in which the power to regulate internal police could be more appropriately exercised."[15]   In his peroration, he moved beyond a discussion of economic costs toward broader cultural and political concerns, suggesting that restriction of entry was the moral equivalent of medical quarantine:

> We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease.[16]

It was not the first time immigration was thus related to "infection."
In a concurring opinion, Justice Thompson was even more emphatic:

> Can anything fall more directly within the police power and internal regulation of state, than that which concerns the care and management of paupers or convicts or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance? . . . [I]f all power to guard against these mischiefs is taken away, the safety and welfare of the community may be very much endangered.[17]

Anticipating the economic and political arguments formulated by today's advocates of the "national principles" such as Sidgwick and communitarians such as Walzer, the Supreme Court's justification for restricting entry included the issue of security. Barbour's reference to the law of nations is crucial in this respect: control over immigration is a concomitant of the exercise of sovereignty because there is no way for States to prevent any potential invader from marching in posing as an immigrant unless they can restrain the movement of persons across their borders. Although this might be thought of as a pre-liberal principle, it cannot be ignored by liberal theory so long as liberal States exist in a world that is organized into a system of States.

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15. *Id.* at 141.
16. *Id.* at 142-43.
17. *Id.* at 148 (Thompson, J., concurring).

The nationalization of the State—its transformation into a community whose members share a common origin and a common fate, coupled with the idea of sovereignty residing in the "peoples" into which the world is divided—further enhanced the character of immigration as a disturbance. In relation to a self-representation, in which exists considerable and growing differentiation based on occupation, residence, class, and the like, fictive kinship is perceived as the major determinant of identity. Those coming in from outside are "others." The official U.S. designation, "aliens," indicated this as well. This is further confirmed by the distinction that has arisen in the laws of many countries between such "others" and outsiders who are members of the national tribe by reason of their ancestral origin—ironically, a distinction most explicitly espoused in recent times by Germany and Israel, but also acknowledged by the United Kingdom ("partials") as well as Italy and Spain.[18] Despite contentions that U.S. nationality is conceptualized on a political rather than ethnic basis, this sort of concern underlies not only the racist conception of citizenship noted earlier, which prevailed until the mid-twentieth century, but also the "national origins" system established to regulate immigration in the 1920s. Somewhat similar policies prevailed in Canada and Australia. Today, these policies persist in Canada, where within the "point" system positive weight is given to language competence in one of the two languages of the "founding" nationalities, British and French.[19]

This too has to do with sovereignty, and particularly with the distinction emphasized by Barkin and Cronin between "State" sovereignty and "national" sovereignty.[20] But contrary to their contention that the period since the rise of the State has been marked by cyclical movement from one type of sovereignty to the other in a reactive way, I would suggest that at all times sovereignty is founded on a mix of the two.

States' aspirations to achieve control of population movement were substantially achieved only in the wake of World War I, with the establishment of a worldwide system of border controls based on "zero immigration." It is a reflection of this that Hannah Arendt observed in *The*

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18. DANIEL KUBAT, THE POLITICS OF MIGRATION POLICIES (2nd ed. 1993).

19. David Reimers and Harold Troper, *Canadian and American Immigration Policy Since 1945*, in IMMIGRATION, LANGUAGE, AND ETHNICITY: CANADA AND THE UNITED STATES 37 (Barry R. Chiswick ed., 1992).

20. Barkin and Cronin, *supra* note 2, at 108.

Origins of Totalitarianism that "theoretically sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality and expulsion.'"[21]

III. EMERGING "SOVEREIGNTY GAMES" IN THE LATE TWENTIETH CENTURY

Paradoxically, in the last third of the twentieth century, when the statist utopia was finally actualized with the disintegration of the remaining empires, the reorganization of amalgams of earlier settlements, and the accession of their fragments to the status of "sovereign States," the normative principles on which the statist system rests were themselves subject to unprecedented challenges. Reflecting the dynamics of markets, economic actors worldwide are challenging boundaries and have already achieved significant successes in bringing into being transnational regimes and institutions such as "common markets" or quasi-extraterritorial "development zones" which, by their very existence, impose constraints on statist absolutism. From a perspective reflecting the globalization of liberal norms, humanitarians have also achieved significant successes in enhancing individual rights on a transnational level by institutionalizing a variety of humanitarian regimes as well as transnational institutions that impose constraints on States. In light of these developments, while there is no reason to expect the disappearance of the State form, there is every reason to expect it will be increasingly relativized. That is to say, it will share normative and institutional space with other formations. But the statist system also leaves us with a burdensome legacy of a proliferation of entities that are sovereign States in name, but which lack the capacity to provide their citizens with protection from violence, a function that legitimizes the very existence of a sovereign.

A. The Right to Leave

The right to leave a country reduces sovereign authority over territory, but only conditionally over individuals. As mentioned earlier, this right to

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21. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 278 (1973). For an elaboration of her insight, see Aristide R. Zolberg, *The Formation of New States as a Refugee-Generating Process,* 467 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (1983).

leave creates a crisis on the immigration side. Since the end of World War II, the right to leave has been forcefully asserted, most notably in article 13(2) of the Universal Declaration of Human Rights,[22] and more recently in the Helsinki Declaration.[23]   Furthermore, decolonization has also entailed its extension to many millions of former colonial subjects whose movement was previously limited.   Moreover, preliminary investigation suggests that this right to leave has also been broadened steadily to mean not only physical departure, but the right to relinquish one's obligations to the State of origin—that is, the right of expatriation. If the above analysis is correct, this amounts to a very extensive and unprecedented qualification of sovereignty, which is by now close to universal. Of course, the point has been made regarding human rights more generally, but this particular one is especially relevant.

Related to this is the vast expansion of the authorization to travel with only minimal regulation. As those concerned with controlling unauthorized immigration are well aware, a large proportion of it is attributable not so much to surreptitious entry as to legal entry followed by overstaying. Thus, by extending tourist facilities, States in effect acquiesce to some reduction in their policing capacity. An extreme form of this is the right of "First World" citizens to travel just about anywhere on the authority of their passports alone, without any special permission in the form of an advance visa from the States they enter.   This constitutes a form of hyper-individualism.

B. Resurgence of Multiple Membership

It is no surprise that there is talk about "the new Middle Ages."[24] Among the industrial democracies as well as in the ex-Communist countries and the developing world, the monopolistic claims of the sovereign States over their subjects-citizens are increasingly questioned. The most dramatic instances involve direct challenges to the State in the name of alternative national identities, as in the case of the Catalans in Spain, the Flemish in Belgium, or the Ukrainians in the former Soviet Union. Indeed, more new

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22. Universal Declaration of Human Rights, G.A. Res. 217(III), Dec. 10, 1948.
23. Conference on Security and Co-operation in Europe: Concluding Document form the Vienna Meeting, Jan. 17, 1989, 28 I.L.M. 527 (1989).
24. See, e.g., ALAIN MINC, LE NOUVEAU MOYEN ÂGE (1993).

States have been admitted to the United Nations General Assembly in the past five years than at any time since the great wave of African decolonization in the early 1960s. However, as one would expect of *parvenus*, the newcomers tend to be particularly vigilant regarding their sovereignty claims so that, in keeping with Arendt's insight noted earlier, the multiplication of units could result in more restrictive conditions for individual rights than before.

Over the longer term, two other processes might erode the sovereignty of both old and new States. One is the growing importance of vocational and occupational affiliations that transcend national borders, especially professional and artistic networks, which provide the making of incipient cosmopolitan communities. The other is the emergence of transnational communities as the result of international migration. In contrast with the older "zero-sum" vision of migrants who reduce their commitment to the country of origin as they increase their stake in the host country, today, it is quite literally possible for individuals to live in more than one place at once. Mexicans, Central Americans, and Caribbean islanders in the United States, Turks in Germany, and Algerians in France all manage to do this quite well on an everyday basis, sometimes over several generations.[25] These modern diasporas are obviously facilitated by technological and economic conditions, but their development goes hand-in-hand with changes in the "social episteme," which no longer views nationality, or even citizenship, as necessarily exclusive of membership in para-State groups.

The proliferation of de facto multiple memberships, including also the considerable increase in marriages among nationals of different countries, has resulted in a growing number of formal holders of dual nationality. Moreover, many recent immigrants who would like to become citizens of the host country are reluctant to give up their nationality of origin, not only for reasons of identity, but often also on practical grounds, such as the desire to maintain eligibility for land ownership and inheritance. This is reportedly the case for both Turks in Germany and Dominicans in the United States. Despite their traditional insistence on the mutually exclusive nature of citizenship, many States—including the United States—appear willing to quietly accommodate the changing needs of their citizens or

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25. For a suggestive conceptualization of this phenomenon, as well as a set of interesting case studies, see TOWARDS A TRANSNATIONAL PERSPECTIVE ON MIGRATION: RACE, CLASS, ETHNICITY, AND NATIONALISM RECONSIDERED (Nina Glick Schiller et al. eds., 1992).

prospective citizens, so long as it does not involve problems of security. The facilitation of multiple citizenship is currently under active discussion in the Council of Europe, and it might be anticipated that the subject will receive increasing attention in coming years on this side of the Atlantic as well.[26]

C. *Emergence of Non-State Complexes, Especially the European Union*

From the perspective of sovereignty, the evolving European Union (EU) is an unambiguous entity; in relation to the world that States have constructed over the past four centuries, it constitutes, as Ruggie has suggested, a truly "post-modern" innovation.[27] Although formal citizenship remains vested at the level of the States, there has been considerable movement toward the formation of a European "quasi-citizenship," denoted symbolically and practically by the adoption of uniform passports by all the Member States and the institution of European Union entry gates at airports. Despite some delay, attributable to the States' residual reluctance to give up control of national boundaries and to the fear of illegal entry by persons from outside the EU, citizens of the Member States circulate freely throughout the region and can virtually work in any country without special permits. To this has now been added the right to vote in municipal elections of their country of residence. Although the experience of the EU is so far unique, it prefigures possible developments in other regional common markets, including NAFTA. Canadian citizens and U.S. citizens are already admitted as visitors in each other's country on the basis of ordinary identification, without visas or passports, and it is not far-fetched to suggest that special arrangements will be made in the foreseeable future for Mexicans as well.

D. *Human Rights*

In her classic analysis of totalitarianism, Hannah Arendt traced its roots to the nationalization of human rights. Implied in the working system of

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26. For an overview of recent development in this sphere, see THOMAS HAMAR, DEMOCRACY AND THE NATION STATES: ALIENS, DENIZENS AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION 106-24 (1990).

27. Ruggie, *supra* note 2, at 152.

nation-states from the very outset, she argues, was "that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origins."[28] However, since the emergence of nation-states coincided historically with the development of constitutional government, the inherent dangers of linking rights with nationality remained hidden from view until World War I and its consequences "sufficiently shattered the facade of Europe's political system to lay bare its hidden frame."[29] Out of this "two victim groups emerged whose sufferings were different from those of all others in the era between the wars," the national minorities in the "successor States" and the Stateless.[30]

It was precisely the experience of these sufferings that provided the impetus to reverse the previous historical trend in the wake of World War II by developing a doctrine of "human rights," which was successfully operationalized by way of a multitude of legal instruments at the national and international levels. More recently, however, what began as a mere internationalization of human rights, whereby States undertake to respect the rights of individuals within their jurisdiction as a condition for membership in the international community, has evolved further into a globalization of these rights, in the sense that they are seen to arise in the membership of all individuals in the human species. This amounts to a rudimentary form of citizenship in a Kantian cosmopolitan polity in the making, a notion that entails the concomitant imposition of significant limits on State sovereignty.[31]

Although the operational effects of cosmopolitan citizenship fall far short of the right of anyone to enter and settle in any country, in the post-World War II period the international community began to recognize a limited form of such a right for those whose rights had been violated in their country of origin. Instituted for Europe by way of the Geneva Convention in 1951 and expanded to encompass the whole world in 1967, the international refugee regime was originally grounded in a narrow construction of the notion of refugee as a person outside his or her country

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28. ARENDT, *supra* note 21, at 275.
29. *Id.* at 267.
30. *Id.* at 268.
31. Nardin, *supra* note 4, at 268-69.

and deprived of protection from the State of origin because of reasonable fear of persecution.[32] Among the western liberal democracies, in practice refugee status was attributed mostly to persons originating in Communist countries.[33] Although "persecution" is still the prevailing core of the refugee regime at both the national and international levels, in recent years a number of international lawyers, notably James Hathaway, have argued that the status of "refugee" should be grounded in the more expansive concept of "deprivation of human rights," as operationalized in existing legal instruments.[34] While this innovative approach has not yet been widely accepted, its career might be bolstered by the doctrinal deficit that has arisen in the refugee sphere since the end of the Cold War.

E. Challenges to Sovereignty from Below

Federal States inherently tolerate a certain degree of ambiguity with regard to sovereignty. That is, State authority is seen from within as frangible, with the possibility that authority will become allocated at different societal levels along functional lines; viewed from the outside, however, States normally function as unitary formations in relation to other States and are surely expected by other States to do so. How this ambiguity affects the regulation of immigration and access to citizenship was noted in the United States in the nineteenth century. However, the general trend toward nationalization of U.S. politics in the post-Civil War epoch dispelled most of the ambiguities in this sphere, and immigration-nationality matters became clearly national as well.[35]

Elsewhere, however, there seems to be an emerging trend in the other direction, particularly in countries where federalism is based on the persistence of identifiable cultural or national characteristics. The most indicative case is that of Canada, where Québec's special status is indicated by its establishment of what amounts to unofficial diplomatic representation

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32. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 12-13 (1983).

33. *See, e.g.,* Aristide R. Zolberg, *Responses to Crisis-Refugee Policy in the United States and Canada, in* IMMIGRATION, LANGUAGE, AND ETHNICITY: CANADA AND THE UNITED STATES 55 (Barry R. Chiswick ed., 1992).

34. James Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law,* 31 HARV. INT'L L.J. 129 (1990).

35. EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 45, 47-84 (1981).

abroad, and also the incorporation of provincial considerations into Canadian immigration policy. Immigration is of special importance because the province seeks to avoid the settlement of immigrants who are more likely to become English-speaking rather than French-speaking. Although this might seem theoretically unenforceable, since once newcomers have settled in any Canadian state they are free to change their residence at will, the process of initial screening has apparently been largely effective in bringing about the desired result.

Although California or Florida might well envy Québec's privileged status with regard to immigration, it is unlikely that constitutional jurisprudence would allow such a development in the United States. However, it should be noted that those two states, as well as a number of others, have undertaken to shape their cultural identity by asserting the exclusivity of English as their official language.

With location emerging as the dialectical counterpoint to globalism, there are good reasons to expect that localism, and with it the imposition by sub-national groups of restrictions on immigration or settlement or of qualifications on incorporation, will emerge as a general trend (e.g., in France and Italy). At a minimum, the preferences of impacted communities are likely to carry increasing weight in national immigration policies.

F. The Formation of Quasi-States

Many of the countries that achieved formal sovereignty through decolonization in the post-World War II period emerged as extremely weak States. That is, they emerged with a level of institutional capacity—of "infrastructural power," in Michael Mann's useful conceptualization[36]—well below the minimum level one usually associates with the notion of "sovereign State." Looking at the phenomenon from the perspective of the international system, Robert Jackson has suggested that decolonization brought with it an unprecedented disjunction between "negative" and "positive" sovereignty—that is, between sovereignty in the traditional sense and empirical Statehood, producing "quasi-States."[37]

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36. Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 EUR. ARCHIVES SOC. 185 (1984).

37. ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990).

Whereas in the past, States gained sovereignty only if they mustered the internal capacity to withstand the challenges of other States at the international level, in the contemporary world the situation is partially reversed, in that some of the new States are able to maintain their sovereignty only with the support of the international system.[38]

While decolonization has certainly resulted in the proliferation of "weak States," Jackson exaggerates the newness of the phenomenon; indeed he himself acknowledges that the "new sovereignty game" originated under the League of Nations, when the application of the principle of national self-determination produced a plethora of countries in the Balkans and northern Europe whose capacity for "empirical" Statehood was open to question.[39] In any case, it is quite evident that the resumption of imperial disintegration within eastern Europe following the collapse of Communism is producing additional "quasi-States."

Weak States are prone to protracted internal conflicts, and due to the widespread availability of cheap, rapid-fire weapons, such conflicts are likely to involve high levels of violence. Already a reality in a number of African States—notably Liberia, Somalia, and Rwanda—the specter of anarchy also looms in Afghanistan, Bosnia, and Haiti.[40]

IV. CONCLUSION

From the vantage point of international population movements, the most important consequence of these profound changes in the structure of the international system is the generation of large flows of internally and externally displaced persons who lack the sort of protection States normally accord their citizens, but who on the whole do not fit the statutory definition of "refugee" embedded in international law and in the laws of most States since their predicaments do not clearly result from "persecution." Without the benefit of sovereign protection displaced persons must rely on the

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38. *Id.* For an early exploration of the "weak State," see ARISTIDE R. ZOLBERG, CREATING POLITICAL ORDER: THE PARTY-STATES OF WEST AFRICA (Myron Weiner ed., 1966); for their relationship to the international system, see Aristide R. Zolberg, *A View from the Congo*, 19 WORLD POL. 136 (1967).

39. JACKSON, *supra* note 37, at 40-47.

40. For a more elaborate discussion of some aspects and implications of this phenomenon, see ARISTIDE R. ZOLBERG ET AL., ESCAPE FROM VIOLENCE (1989), and Aristide R. Zolberg, *The Specter of Anarchy*, 39 DISSENT 303 (1992).

international community. At the same time, the international community, as presently constituted, appears unable or unwilling to meet their needs.

Although "globalism" is a term often used to describe a coming golden age of economic and cultural borderlessness, persistent economic disparities as well as recent ethnic conflicts and other examples of extreme parochialism such as widespread anti-immigration rhetoric and legislation, all of which evince an astonishing resistance to changes in the traditional methods of societal organization, suggest that the modern world may face great upheaval and loss on its way to globalism. Nevertheless, other developments such as the movement toward the "Open Republic" are more encouraging.[41] As people, businesses, and ideas become increasingly dispersed, the world's nations may come to better understand one another, and therefore be better able to coexist. At a minimum this commingling will profoundly affect the character of modern nations.

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41. Jost Delbrück, *Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State*, 2 IND. J. GLOBAL LEGAL STUD. 45, 57-64 (1994).