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# Between National and Post-National: Membership in the United States

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# BETWEEN NATIONAL AND POST-NATIONAL: MEMBERSHIP IN THE UNITED STATES

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*This essay argues that the concept of post-nationalism does not precisely explain the American concept of citizenship. This is due to the strict construction of the nation state in American constitutional theory, the ineffective role of international human rights norms in American jurisprudence, and the extension of protection to non-citizens based on territorialist rationales. For these reasons, the author suggests that* denizenship *is a more appropriate way of viewing the American citizenship model, and is one that explains how notions of personal identity can be transnational while still justifiable within traditional nation-state constructs.*

It has become fashionable to predict the decline of the nation-state at the hands of sub-national and supra-national forces. Ethnic minorities, transnational corporations, international organizations and Non-Governmental Organizations (NGOs) are rounded up as the usual destabilizing suspects. Increasingly, a new group is said to contribute to the weakening of the nation-state regime: trans-border migrants. Their movement—creates and maintains "transnational" communities that put pressure on the idea of loyalty to a single state. They may also form alliances with domestic minority groups who are demanding greater recognition—or autonomy—from the national government.

Migrants disturb national boundaries in another sense: they complicate notions of national membership. Settled immigrants (sometimes even unlawful immigrants) may make claims to some forms of "membership" rights, such as entitlements to national benefit programs and educational opportunities, protection under non-discrimination laws, and due process rights in deportation proceedings. These claims are generally put in domestic law terms; where possible, immigrants are likely to try to fit their claims within rights established by national constitutions and legislation. But increasingly, immigrants are invoking international legal norms that

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protect "persons" (not just "citizens") as they assert claims to fair treatment and basic rights.

The recognition of moral and legal rights whose source is outside the nation-state but which are applicable within (or against the nation-state) has been termed an aspect of "post-national" membership. In an important work, Yasemin Nuhoğlu Soysal has examined post-national membership in Europe.[1] That continent may be the most fruitful location for such an inquiry: Europe has witnessed large-scale immigration in recent decades, and most of the states recognize the authority of the European Court of Human Rights to render decisions binding on national governments that are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[2] In this essay, I will consider the extent to which a "post-national perspective" may be applicable to concepts of membership and sovereignty in the United States. By "post-national perspective" I mean the claim that "national citizenship is losing ground to a more universal model of membership, anchored in deterritorialized notions of persons' rights."[3] The post-national perspective centers around the following claims:

(1) rights and privileges once reserved for citizens (the "national perspective") are now recognized on the basis of personhood;

(2) migration has been a motivating factor in this reconceptualization of rights (placing non-members in a position to assert newly defined membership claims);

(3) these rights claims find their source beyond the nation-state in international human rights norms and structures;

(4) the result is "deterritorialized" membership;

(5) the basis of state legitimacy is shifting from notions of (national) popular will to its respect for international human rights norms.[4]

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1. *See* YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994); *see also* DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 2-3 (1996) (explaining the shift from state sovereignty to international human rights).

2. Sept. 3, 1953, 213 U.N.T.S. 221.

3. SOYSAL, *supra* note 1, at 3.

4. *See* JACOBSON, *supra* note 1, at 2-3:

> In the Euro-Atlantic core of the world order, in North America and Western Europe, the basis of state legitimacy is shifting from principles of sovereignty and national self-determination to international human rights. Increasingly, territorially delimited nations are not the

Together, these descriptions are understood to support a progressive narrative of the expansion of human rights to previously marginalized groups.

The post-national perspective has implications at the personal level as well. Traditionally, individuals have seen themselves primarily as members of one polity; but today, migration and the assertion of non-state-based rights are producing transnational or supra-national identities. Thus, we are said to be witnessing "the emergence of membership that is multiple in the sense of spanning local, regional, and global identities, and which accommodates intersecting complexes of rights, duties and loyalties."[5] Deterritorialized identities are usually seen as liberating—creating opportunities for new connections and communities, and establishing universal norms of just treatment.

I will argue that the post-national perspective is not an accurate depiction of U.S. models of rights and membership. To some degree there is an overlap between post-national models and the American tradition: rights and privileges have been extended to resident non-nationals in the United States. But the recognition of rights for non-nationals has not been based on norms that transcend the nation-state; rather, it is a core attribute of American constitutionalism, deeply embedded in the idea of the American state. International human rights norms play a surprisingly small role in U.S. discourse and jurisprudence. The post-national claim is correct to see migration as the wedge for the assertion of such rights, but such human rights discourses have had little traction in the United States. Finally, U.S. models of membership that extend rights to non-citizens are largely territorialized, making "denizenship"[6] a more accurate rendering of the American structure of rights than post-nationalism. I will conclude with some comments on post-nationalism at the personal level—suggesting that while personal identities are becoming more transnational, such multiplicity is

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> only carriers of "universal humanity." All residents, noncitizens as well as citizens, can claim their human rights. In this process the state is becoming less constituted by "the people" while becoming increasingly constituted by international human rights codes and institutions. The state is becoming less a sovereign agent and more an institutional forum for a larger international and constitutional order based on human rights.

5. SOYSAL, *supra* note 1, at 166.

6. *See* TOMAS HAMMAR, DEMOCRACY AND THE NATION STATE: ALIENS, DENIZENS AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION 106–124 (1990); *see also* RAINER BAUBÖCK, TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION 65 (1994) (arguing that "denizenship" derives from an implicit contract, not simply subjection to a state's laws).

articulated primarily in the context of the nation-state (giving rise to an "inter-nationality" more than a post-nationality).

## I. SOURCES OF RIGHTS AND CLASSES OF BENEFICIARIES: THE *BREARD* CASE AND BEYOND

On April 14, 1998, the State of Virginia executed by lethal injection Angel Francisco Breard, a 32 year-old citizen of Paraguay who had been residing in Virginia for 12 years. In 1992, Breard had been convicted of a brutal murder, stabbing his victim five times in the neck during a sexual assault. He testified at his trial that he had killed his victim because he had been under the influence of a satanic curse.

Imposition of the death penalty raises significant human rights issues. The United States is virtually alone among Western states in its preservation of the death penalty. A decade ago, the European Court of Human Rights held that it would be a violation of the European Convention on Human Rights for the United Kingdom to extradite a West German citizen to stand trial in Virginia in a capital case.[7] The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions called for a moratorium on the use of the death penalty in the United States following an investigative visit in 1997.[8] And Amnesty International, in a 1998 report on human rights abuses in the United States, singled out the death penalty for particularly harsh criticism.[9] But Breard's appeal of his conviction and sentence

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7. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (holding that long wait and uncertainty of punishment on death row violates European Convention on Human Rights' prohibition of inhuman or degrading treatment or punishment); *see also The Netherlands: Opinion of the Advocaat-General and Supreme Court Decision in* The Netherlands v. Short, 29 INT'L LEGAL MATERIALS 1375 (1990) (denying United States' extradition request of an American serviceman who killed his wife in the Netherlands to prevent defendant's possible exposure to death penalty). For a discussion of human rights and extradition, see John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998).

8. *See Report of the U.N. Special Rapporteur*, ¶ 148, U.D. Doc. E/CN.4/68/1998/Add.3., 22 Jan. 1998, *cited in* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA RIGHTS FOR ALL 120 (1998) [hereinafter AMNESTY INTERNATIONAL]; *see also* U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40 ¶¶ 266–304, U.N. A/50/40 (1995) (deploring the expansion of the death penalty at the federal level and its continued prevalence at the state level).

9. *See* AMNESTY INTERNATIONAL, *supra* note 8, at 99 ("International human rights standards seek to restrict the scope of the death penalty. They forbid its use against juvenile offenders, see it as an unacceptable punishment for the mentally impaired, and demand the highest legal safeguards for all capital trials. The USA fails to meet these minimum standards on all counts.").

did not assert a violation of international human rights norms. The American death penalty appears immune to such challenges.[10]

Breard did, however, eventually make a claim based on international law. In 1996, his lawyers filed a *habeas corpus* action in federal court asserting that his rights under the Vienna Convention on Consular Relations had been violated because he had not been informed of his right to contact a consular officer of Paraguay after his arrest and detention.[11] His argument was that consular officials might have urged him to accept a plea agreement, under which he could have received a life sentence, rather than go to trial and risk receiving a death sentence.

The federal courts rejected this claim, saying that he had waived his right to raise it during his appeal in state court. Meanwhile, Paraguay brought its own action against Virginia in federal court based on the Vienna Convention. It asked the court to return the situation to the *status quo ante*—that is, to nullify the conviction and the sentence. The lower courts held that the Eleventh Amendment prohibited a foreign country from suing a state in federal court.[12]

Following its loss in the lower court and receiving no help from the State Department in getting Virginia to change its decision (although the Department conceded that the treaty had been

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10. *See also* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (rejecting argument of dissenting opinion that practices of other nations and provisions in human rights treaties condemning juvenile death penalties are relevant in determining constitutionality of death penalty for a 17 year-old).

For a case in which such a claim was raised—and failed, see *State v. Steffen*, No. C-930351, 1994 WL 176906, *4, *10 (Ohio Ct. App. May 11, 1994). There the court stated:

> In his fourth claim for relief, Steffen contended that his convictions and sentences were void or voidable because the Ohio death penalty is in violation of international law. Specifically, Steffen cited Articles 1, 2, 18, 25 and 26 of the American Declaration of the Rights and Duties of Man, to which the United States is a signatory. We have reviewed the various provisions of the American Declaration to which Steffen referred and find that the record does not demonstrate their violation. We note, moreover, that Steffen has presented absolutely no evidence and made no colorable argument supported by precedent from any human rights forum that his arrest, incarceration, trial and sentence violated international human rights norms to which the United States is bound either by customary international law, i.e., rights having acquired the status of jus cogens, or treaty.
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> The trial court's dismissal of Steffen's fourth claim for relief was thus appropriate.

*Id.* at *4.

11. *See* Breard v. Greene, 528 U.S. 371 (1998); Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261.

12. *See Breard*, 523 U.S. at 373.

violated), Paraguay filed an action before the International Court of Justice on April 3, 1998. Six days later, the International Court of Justice (ICJ) issued an order stating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."[13] The Legal Adviser to the State Department brought the order to the attention of the Governor of Virginia, and in an extraordinary letter, the Secretary of State personally requested the Governor to stay the execution pending the ICJ's consideration of the case.[14]

Meanwhile, Breard and Paraguay had appealed their cases to the U.S. Supreme Court. By the time the high court considered the cases, the ICJ had issued its order and Breard had been scheduled to be executed. The U.S. government, although not a party to the actions, filed a brief urging the Supreme Court to reject the appeals. This was contemporaneous with the Secretary of State's request to the Governor of Virginia that the execution be stayed. The U.S. government began its argument in the Supreme Court by noting that it took seriously its obligations under the Vienna Convention, then asserted that the Convention did not provide a remedy of nullifying state criminal convictions, that consular notification would in all likelihood not have changed the result, that Breard had waived the claim in any event, and that the matter should be handled state-to-state without Court intervention.[15] The government further stated that the Department of State had accorded Paraguay "the traditional remedy among nations for failure of consular notification: it has investigated the facts, determined there was a breach, formally apologized on behalf of the United States, and undertaken to improve compliance."[16] This "remedy," of course, provided little solace to Mr. Breard.

The Supreme Court denied the appeals. In a brief opinion, it held that Breard had defaulted his claim (assuming he had one); and even if the claim had been timely raised, it was "extremely doubtful" that the violation should result in overturning the conviction.[17]

The Court noted that "it is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might

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13. *See id.* at 374 (quoting ICJ order of April 9, 1998).

14. *See* Letter from Madeleine K. Albright, Secretary of State, to James S. Gilmore III, Governor of Virginia (April 13, 1998) (on file with author).

15. *See* Brief for the United States as Amicus Curiae at 12–13, Breard v. Greene, 523 U.S. 371 (1998) (Nos. 97-1390 & 97-8214).

16. *Id.* at 13.

17. *Breard*, 523 U.S. at 377.

have been brought to that court earlier."[18] Nonetheless, it concluded that Breard was not entitled to a remedy from U.S. courts.

The Court duly noted Secretary Albright's letter to the Governor of Virginia and closed by saying: "If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."[19]

The Governor did not wish to wait. He told the press:

> As governor of Virginia, it is my first duty to ensure that those who reside within our borders—both American citizens and foreign nationals—may conduct their lives free from the fear of crime.... In this case Mr. Breard received all of the procedural safeguards that any American citizen would receive. [Delaying the execution] would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court.[20]

So Breard was put to death on the day the Supreme Court issued its opinion, and just five days after the ICJ's order requesting a stay.

There are different ways to read this narrative pertinent to the post-national claim. At first glance, the story is a flat denial of the claim: here a state violated international law and then ignored an order of the international court with the gravest of consequences—execution of a human being. The federal government—charged with enforcing international obligations—was left pleading with one of its own subunits (Virginia) to respect the ICJ. The Governor of Virginia stated that to respect international law would have been to violate his duties to the residents of Virginia, and would have actually given Breard *more* rights than those possessed by citizens of the United States (who cannot generally seek the assistance of a foreign sovereign in the course of a criminal proceeding). The U.S. government's inability to command fidelity to international law and the Governor's assertion that the legal claim based on international law was illegitimate and discriminatory is hardly a ringing endorsement of the post-national perspective.

But arguably there is something more here. Breard did raise a claim in the federal courts grounded in international law; and the United States government did not argue in the Supreme Court that international law did not apply or had not been violated.

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18. *Id.* at 378.

19. *Id.*

20. Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas; World Tribunal, State Department Had Urged Delay*, WASH. POST, Apr. 15, 1998, at B1.

Furthermore, the Secretary of State specifically sought to forestall the execution on the ground that proceeding with the execution in the face of the ICJ order could "be seen as a denial by the United States of the significance of international law and the Court processes."[21] These are important concessions regarding the possible trumping power of international law. On this view, Breard's execution was not a failure to recognize international norms but rather a disagreement about what remedies are available if norms are breached.

But this more sanguine narrative merits closer scrutiny. What, after all, was the basis of the U.S. government's position that the Vienna Convention must be respected? According to the Secretary of State, the government was concerned that disrespect would have endangered U.S. citizens abroad who themselves might seek the protection of the Convention. On this view, the international law norm affirmed in the government's argument was not a human rights norm (it certainly was not the claim that the death penalty as practiced in the United States violates human rights law), but rather a means by which sovereign states order their affairs and protect their citizens in the pursuit of state interests.

The *Breard* case does not "disprove" the post-national claim. But it is powerful testimony that rights remain nationally based and defined, and that even those rights whose source is a "transnational community" frequently represent national interests more than the rights of personhood.

To say this, however, is not to accept the nationalist claim that rights and privileges are extended only to full members (i.e., citizens) of the American polity. Rather, American practice has long extended rights and privileges to non-nationals residing in U.S. territory. The Bill of Rights ostentatiously fails to apply its protections solely to citizens. It uses the words "person" or "the people" or other terms not tied to citizenship, such as "the accused," to define the beneficiaries of protection.[22]

The Supreme Court has regularly affirmed that most of the Constitution's protections extend to non-citizens.[23] After a careful

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21. Letter from Madeleine K. Albright, *supra* note 14.

22. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ."); *id.* amend V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right o a speedy and public trial . . .").

23. *See* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 918–919 (1995); *see also* United States v. Brignoni-Ponce, 422 U.S.

examination of the role of citizenship in the American conception of rights and constitutionalism, Alexander Bickel concluded:

> I find it gratifying . . . that we live under a Constitution to which the concept of citizenship matters very little, that prescribes decencies and wise modalities of government quite without regard to the concept of citizenship. It subsumes important obligations and functions of the individual which have other sources—moral, political, and traditional—sources more complex than the simple contractarian notion of citizenship.[24]

While this constitutional tradition casts a long shadow on the nationalist claim, it does not lend support to the post-national claim because these rights and privileges find their source in national documents and institutions. Soysal is correct to note that "[o]riginally individual rights were defined and codified within schemes of national citizenship."[25] But her claim that "[t]oday . . . individual rights [are] expansively redefined as human rights on a universalistic basis and legitimized at the transnational level"[26] does not seem applicable to the United States. The rights of non-citizens are primarily based on direct application of the U.S. Constitution or statutory law.

I say *primarily* because international law—both treaty law and customary law—does play a role in the U.S. legal system. The Constitution declares that "all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land;"[27] and federal courts stand ready to enforce treaty rights against state and private action. But to be enforceable in court, such treaties must be "self-executing" or Congress must adopt legislation that makes the treaties applicable in U.S. courts. Human rights treaties are rarely held to be self-executing, and Congress in recent years has not chosen to make them enforceable in federal courts.[28] U.S. ratification of

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873 (1975) (Fourth Amendment protection for non-citizens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (Fifth Amendment protection for non-citizens).

24. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53–54 (1975).

25. SOYSAL, *supra* note 1, at 164; *see, e.g.* THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776) (affirming as "self evident" the proposition that "all men are . . . endowed by their Creator with certain unalienable rights.").

26. *Id.*

27. U.S. CONST. art. VI, § 2.

28. *See* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 813 (1990); *see also* United States v. Aguilar, 883 F.2d 662, 680 (9th Cir. 1989) (Protocol Relating to the Status of Refugees not self-executing); Bertrand v. Sava, 684 F.2d 204, 218–19 (2d Cir. 1982) (same); Sei Fujii v. California, 242 P.2d 617, 620–21

human rights conventions has been accompanied by express declarations stating (1) that the convention is not self-executing,[29] and (2) that the United States accepts no obligations under the convention beyond protections already afforded by U.S. constitutional and statutory law.[30] As a result, as Thomas Buergenthal has noted, "it is becoming more and more difficult in the United States fully to transform international human rights obligations into directly applicable domestic law"—a trend that runs counter to developments in other Western states.[31]

Customary international law is potentially a source of human rights protection in domestic U.S. courts. Supreme Court decisions in the past appeared to provide generous reception of international law.[32] Nearly a century ago, the Court ruled that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no

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(Cal. 1952) (U.N. Charter not self-executing, therefore not binding on the court). On the meaning of self-execution, see Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

29. *See, e.g.*, 136 Cong. Rec. S17486-01; S17491 (Oct. 27, 1990) (United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment not self-executing); 138 Cong. Rec. S4781-01, S4783 (International Covenant on Civil and Political Rights not self-executing).

30. *See, e.g.*, Resolution of Ratification Regarding International Convention on the Elimination of all forms of Racial Discrimination, 140 Cong. Rec. S7634 (June 24, 1994); Resolution of Ratification Regarding United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment, 136 Cong. Rec. S17486, S17491 (Oct. 27, 1990) ("The United States considers itself bound . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual, and inhuman or degrading treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."). A 1993 Human Rights Watch and American Civil Liberties Union report on U.S. compliance with the International Covenant on Civil and Political Rights concluded that the U.S. declarations, reservations and understandings to the Convention rendered ratification "an empty act for Americans: the endorsement of the most important treaty for the protection of civil rights yielded not a single additional enforceable right to citizens and residents of the United States." HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 2 (1993), *quoted in* Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 653 (1997).

31. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 212 (1997); *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

32. *See generally* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996).

> treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .[33]

Furthermore, the Court has applied a general interpretive norm, dating from an 1804 decision by Chief Justice Marshall, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."[34] But in modern times courts have rarely concluded that international human rights norms are applicable or binding as a formal legal matter, particularly when they conflict with statutory law.[35]

Soysal and Jacobson are correct to suggest that international human rights law claims have generally arisen in cases involving non-nationals. In the U.S. context this is so because the Supreme Court has not applied general constitutional norms to most immigration regulation.[36] Thus, from time to time, non-citizens have invoked international human rights protections in challenges to U.S. immigration policies. These cases have raised claims regarding, for example, conditions of detention,[37] forcible abduction of non-citizens outside the United States for trial in the United States,[38] and refugee protection.[39]

But such claims have generally not received sympathetic treatment by the courts. Indeed, as Jordan Paust has noted, the modern approach of denying the applicability of customary international law has received its strongest statement in cases involving aliens—a development that turns the post-national claim on its head.[40] An

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33. The Paquette Habana, 175 U.S. 677, 700 (1900).

34. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

35. *See, e.g.*, Bertrand v. Sava, 684 F.2d 204, 218–219 (2d Cir. 1982) (finding United Nations Protocol Relating to the Status of Refugees not self-executing). For some rare examples in domestic areas where international human rights norms have been held applicable, see *Jama v. United States Immigration and Naturalization Serv.*, 22 F. Supp. 2d 353 (D.N.J. 1998) (permitting suit against INS officials based on customary international law); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) (finding indeterminate detention of Cuban refugee in federal prison violates Universal Declaration of Human Rights). The most important example is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *See infra* text accompanying notes 40–44.

36. *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989).

37. *See Jama*, 22 F. Supp. 2d 353; *Fernandez*, 505 F. Supp. 787.

38. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992).

39. *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993); *see also* United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997) (claiming that the murder conviction of Mexican national violated Vienna Convention on Consular Relations, Bilateral Consular Convention, and International Convention on Civil and Political Rights).

40. *See* Jordan J. Paust, *Customary International Law in the United States: Clean and Dirty Laundry*, 40 GERMAN YRBK. OF INT'L L. 78 (1998); *see also* Joan Fitzpatrick &

example is a case involving Cuban nationals in the United States who had been convicted of criminal offenses and whom the United States sought to deport to Cuba at the end of their terms of incarceration. Cuba would not accept their return, so they spent a number of years in Immigration and Naturalization Service detention. The Cuban nationals claimed that their long-term detention by the INS violated customary international human rights law. But a federal court of appeals rejected the claim, agreeing with several other courts of appeals that had ruled in similar circumstances that "international law is not controlling because federal executive, legislative, and judicial actions supersede the application of these principles of international law."[41]

A notable exception to the argument that international human rights norms are of limited utility in U.S. courts involves claims brought under the Alien Tort Claim Act (ATCA).[42] This statute, enacted in 1789, grants federal district courts jurisdiction to hear civil cases brought by an alien for "a tort . . . committed in violation of the law of nations or a treaty of the United States."[43] The statute lay dormant for almost two centuries until the watershed case of *Filartiga v. Pena-Irala*.[44] In that case, Dr. Filartiga and his daughter (citizens of Paraguay living in the United States) brought a damage action against Pena-Irala, who had been Inspector General of Police in Asuncion, Paraguay and was then present in the United States. The Filartigas alleged that the police had kidnapped and tortured to death Filartiga's seventeen year-old son in retaliation for Filartiga's political activities. The court held that the "law of nations" includes customary international law and that official torture, under modern standards, violates customary international law. Thus the court permitted the case to proceed, concluding that "[o]ur holding

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William M. Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 627 (1995) ("It is profoundly disturbing that contemporary U.S. immigration policy, in a number of respects, falls short of international standards. Even more troubling is the absence of international law as a relevant factor in immigration policy discourse.").

41. Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1447–48, *amended*, 997 F.2d 1122 (5th Cir. 1993); *see* Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996) (finding customary international law regarding safe haven inapplicable in proceeding before U.S. immigration authorities, given comprehensive federal scheme of regulation).

For a lower court case willing to consider international law in immigration proceedings, see *Caballero v. Caplinger*, 914 F. Supp. 1374, 1379–80 (E.D. La. 1996), which interpreted constitutional norms in light of customary international law and human rights treaties, condemning arbitrary detention of aliens.

42. 28 U.S.C. § 1350.

43. *Id.*

44. 630 F.2d 876 (2d Cir. 1980).

today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[45]

*Filartiga* was viewed by many scholars as a breakthrough in the application of human rights norms in domestic cases.[46] But these extravagant hopes have gone largely unfulfilled.[47] Courts have been hesitant to declare most international human rights part of an enforceable customary international law.[48] More importantly, it is not obvious how the *Filartiga* case advances the post-national claim. The case involved a suit by a non-citizen against a non-citizen for events that happened outside the United States. The fact that a federal court permitted the lawsuit to proceed says little about the basis of legitimacy of the American state vis-a-vis its treatment of residents of its territory.

In sum, non-citizens enjoy a wide array of constitutional and statutory rights in the United States that are frequently asserted in U.S. courts. But international human rights law plays, at best, a limited role in the protection of the rights of persons—aliens or citizens—in the United States.

The controversy surrounding California's Proposition 187 nicely illustrates the point. Frustrated by years of lax federal enforcement, concerned about rising welfare and education costs, and worried about the race and ethnicity of immigrants, the people of California adopted Proposition 187 on November 9, 1994, with the intent of deterring the entry and residence of undocumented aliens

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45. *Id.* at 890.

46. *See, e.g.*, Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L.REV. 367 397–402 (1985).

47. *See* Strossen, *supra* note 28, at 822 ("Despite some predictions that *Filartiga* heralded a trend toward wholesale domestic incorporation of customary international human rights law, that development has not yet materialized.") (footnotes omitted). For a case recognizing an ATCA claim, see *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467 (9th Cir. 1994) (brought by victims and families of victims of torture, summary execution, and disappearances in the Philippines).

48. *See, e.g.*, Jean v. Nelson, 727 F.2d 957, 964 n.4 (11th Cir. 1984) (en banc), *modified*, 472 U.S. 846 (1985) (rejecting amicus argument that continued detention of Haitian plaintiffs constituted arbitrary and indefinite punishment); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795–796 (D.C. Cir. 1984) (Bork, J., concurring) (rejecting cause of action based on international common law brought by survivors of a bus attack by the PLO). In an important development, a district court has permitted a case to proceed under the ATCA brought by alien detainees against INS officials for cruel, inhuman and degrading treatment. *See* Jama v. United States Immigration and Naturalization Serv., 22 F. Supp. 2d 353 (D.N.J. 1998). The court dismissed a claim against the INS on grounds of sovereign immunity, but let the case go ahead against individual INS officers. The case is significant because it is a use of the ATCA against the federal government, not a foreign official. It remains to be seen whether it will survive on appeal.

in the state. Proposition 187 barred undocumented migrants from public schools (in direct contravention of a Supreme Court decision[49]), prohibited them from receiving most forms of social welfare, and mandated that state law enforcement officers, teachers, doctors, and other social workers notify the INS if they believed a person was in the United States illegally. Opponents strenuously objected to nativist and racist statements made in support of Proposition 187.[50] Some immigrant groups and religious organizations argued that the measure violated notions of human dignity and constituted unjust treatment of undocumented migrants. But this was not a position pressed by most of the opponents.[51] And in the ensuing litigation challenging Proposition 187, human rights talk was nowhere to be found. Rather, the lawyers appealed to traditional constitutional grounds of equal protection and federal preemption and persuaded a court to issue an injunction preventing the proposition's implementation.[52]

One answer to the argument made in this section is that by focusing on the enforceability of legal norms, I have missed the discursive power of human rights claims to spark political action and change government conduct.[53] Harold Koh[54] reports these kinds

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49. *See* Plyler v. Doe, 457 U.S. 202 (1982) (Texas statute authorizing local school districts to bar resident undocumented children from public schools violated the Equal Protection Clause).

50. *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650–58 (1995) (discussing the campaigns for and against the initiative).

51. *See* Linda Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 567–569 (1996).

52. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995); *see also* League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997) (holding Congress's Personal Responsibility and Work Opportunity Reconciliation Act preempted portions of Proposition 187).

For a counterexample consistent with Soysal's thesis, consider the recent filing of a complaint by the ACLU and the California Rural Legal Assistance Foundation before the Inter-American Commission on Human Rights, asserting that INS border enforcement activities violate the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man. *See* PETITION TO THE INTER-AMERICAN COMM'N ON HUMAN RIGHTS OF THE ORG. OF AM. STATES 4, Feb. 9. 1999 (on file with author).

53. The fact that a treaty is not self-executing means primarily that it is not enforceable in courts. Under international law, a duly ratified treaty is binding on the executive branch. Thus, before Congress enacted the Omnibus Consolidated and Emergency Supplemental Appropriations Act, § 2242, Pub. L. 105-277, 112 Stat. 2681, slip law at 822 (1999), executing the Torture Convention, the Department of Justice had recognized that it was bound by the Convention's provisions prohibiting return of a person to a country where he or she is likely to be tortured. *See* 62 Fed. Reg. 10,312, 10,316 (1997); Office of Gen. Counsel Memo, May 14, 1997, *reprinted in* 75 Interp. Rel. 375 (Mar. 16, 1998).

54. *See* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

of results in his discussion of the *Alvarez-Machain*[55] case. In that case, the Supreme Court held that Alvarez-Machain's forced abduction from Mexican territory by U.S. agents did not violate the U.S.-Mexican extradition treaty and therefore did not divest U.S. courts of jurisdiction to try him. The decision prompted severe criticism, triggering congressional hearings, a Department of Justice review of procedures, and OAS and UN opinions that the conduct violated international law. Alvarez-Machain was acquitted of the criminal charges, and thereafter filed a civil suit against the federal officers who had kidnapped him.[56] Eventually, the U.S. and Mexico reached an agreement to amend their extradition treaty to prohibit trans-border kidnapping.[57]

Other examples of NGO reports, press conferences, and public demonstrations abound. Of particular note is the release of an Amnesty International report in October 1998 on human rights abuses in the United States.[58] The Amnesty report does not simply focus on treatment of non-citizens (although it devotes more than a few pages to those issues). It condemns police brutality, prison conditions, and operation of the death penalty as violations of the human rights of American citizens.[59]

While these examples are well-known and significant in terms of shaping public perceptions and, sometimes, government conduct, they are still far from proving the post-national claim that the legitimacy of the state is now conceived of in terms of its respect for international human rights. Perhaps the *Breard* case shows that the federal government takes seriously its international law obligations, even if it was unable to persuade the governor of Virginia to take seriously an order from the International Court of Justice. But respect for international law is not the same as a shift in the basis of state legitimacy. Indeed, if anything, *Breard* appears to demonstrate the dominance of nationally-based legal norms (which, as have been described, include protections for aliens) over international standards and processes.

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55. Alvarez-Machain v. United States, 504 U.S. 655 (1992).

56. *See* Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1997) (refusing to dismiss claims under Federal Tort Claims Act and the Torture Victim Protection Act).

57. *See* Koh, *supra* note 54, at 2405–06.

58. *See* AMNESTY INTERNATIONAL, *supra* note 8 (1998).

59. *See id.*

## II. THE CLAIM OF DETERRITORIALIZED MEMBERSHIP

In the preceding section, I have suggested that non-citizens receive significant rights protections based on domestic legal sources. These protections apply to all aliens present in the United States.[60] Furthermore, permanent resident aliens ("greencard holders") are generally protected by federal and state labor and health laws and are eligible for a wide array of social programs in the United States (although they were excluded from means-tested programs by the 1996 immigration legislation, described below). Thus, the membership rights of aliens under U.S. law are largely *territorially-based*.[61] This is surely a broader conception of rights than the citizens-only view of the nationalist model, but it does not fit easily with the "deterritorialized" membership claims of the post-national perspective.

As Soysal notes, Tomas Hammar and others have referred to this territorially based membership model for settled immigrants as "denizenship."[62] But she suggests that this concept, which "remain[s] within the confines of the nation-state model," is an inadequate description:

> [T]he incorporation of guestworkers is no mere expansion of the scope of national citizenship, nor is it an irregularity. Rather, it reveals a profound transformation in the institution of citizenship, both in its institutional logic and the way it is legitimated. To locate the changes, we need to go beyond the nation-state.[63]

Again, from the national perspective, it is true that extension of rights to non-citizens represents a fundamental shift in approach. But the "incorporation" of immigrants in terms of membership rights has been and continues to be the rule—the logic, if you will—of the American membership system. At least since the adoption of

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60. *See* United States v. Balsys, 119 F.3d 122 (2d Cir. 1997) (recognizing aliens' privilege against self-incrimination); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 52–71 (1996) (discussing the rights of aliens in the United States).

61. Perhaps the high-water mark of protection of resident aliens is *Plyler v. Doe*, 457 U.S. 202 (1982). See *supra* note 49.

62. SOYSAL, *supra* note 1, at 138–39; *see* HAMMAR, *supra* note 6, at 735–47; William R. Brubaker, *Membership without Citizenship: The Economic and Social Rights of Noncitizens*, *in* IMMIGRATION AND POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 145 (William R. Brubaker ed., 1989); *see also* T. ALEXANDER ALEINIKOFF, BETWEEN PRINCIPLE AND POLITICS: THE DIRECTIONS OF U.S. CITIZENSHIP POLICY (1999) (describing "lawful-settlement-as-membership model"); Bauböck, *supra* note 6, at 65.

63. SOYSAL, *supra* note 1, at 139.

the Fourteenth Amendment in 1868, immigrants have been protected by the Constitution and federal laws against unfriendly state regulation. And the welfare state established in the twentieth century had generally been understood to benefit lawful immigrants as well as citizens.[64] (That understanding was seriously challenged by the round of anti-immigrant legislation enacted in the mid-1990s. But that legislation, disentitling lawful immigrants from most means-tested social programs, shows that if any movement is taking place in United States membership models, it is a drift more towards the nationalist model than towards the post-national model.)[65]

Soysal recognizes that politics in Western states in the 1990s seem to run counter to the post-national claim.[66] She argues that:

> [t]hese seemingly paradoxical affinities articulate an underlying dialectic of the postwar global system: While nation-states and their boundaries are reified through assertions of border controls and appeals to nationhood, a new mode of membership, anchored in the universalistic rights of personhood, transgresses the national order of things.[67]

She further notes that the "national order of things" is also destabilized by sub-national groups asserting "nationhood." Together, these "recontextualizations of 'nationness' within the universalistic discourse of human rights" are said to "blur the meanings and boundaries attached to the nation and the nation-state."[68]

There is much to this description. The boundaries of nation and nation-state are blurring to some degree, and the reassertion of aggressive nationalism may well, in part, be a response to challenges to the state from above and below, an increase in dual nationality, and diasporic politics activated by governments of "sending" countries. But it is difficult to describe developments in the United States as a reaction to the pressure of human rights discourse. Rather, the controversy in the United States plays out largely in terms of multiculturalism and assimilationism, fractionalization and unity. This is a fight that goes on primarily among native (citizen) groups, although immigration is commonly alleged to contribute

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64. *See* Graham v. Richardson, 403 U.S. 365 (1971) (holding that a state's restriction on eligibility of legal aliens for public assistance violates the Equal Protection Clause).

65. *See* Aleinikoff, *Tightening Circle of Membership*, *supra* note 23.

66. *See* SOYSAL, *supra* note 1, at 156.

67. *Id.* at 159.

68. *Id.* at 162.

to the "balkanization" of America. Thus right-wing politics stresses a revaluation of citizenship as a way to command assimilation to a common (read: Anglo/White) culture, and seeks to redefine the American model of membership from denizenship to citizenship. Notions of personhood play a role in the resistance to such a move; but it is a personhood rooted in and protected by constitutional norms and American traditions, not an international human rights regime.[69]

## III. POST-NATIONAL AMERICANS?

The blurring of borders may occur at the individual as well as the state level, producing a sort of post-modern malaise of unrootedness and "ambiguously identified" persons.[70] "In immigrant societies," Michael Walzer writes, "people have begun to experience what we might think of as a life without clear boundaries and without secure or singular identities."[71] Frequent movement across borders or the existence of communities experiencing a continuous flow of newcomers may challenge the creation of stable, rooted associations. Individuals may end up living in what is in effect a transnational community, straddling two worlds but at home in neither; or they may find no community at all, being simply the sum of their own particularistic circumstances, attachments and proclivities.

Do these bleak depictions accurately capture the (admittedly complicated) nature of modern identities? It is certainly true that many of us have multiple attachments and some of these attachments cross national borders. It is not obvious, however, that this state of affairs produces anomie or a post-modern neurosis. On the contrary, it appears that human beings are rather adept at living in more than one world, bringing the insights of one to bear on another, or compartmentalizing their lives into separate spheres. Let me give an example.

About a year ago, friends of mine traveled to Russia to adopt a Russian baby in an orphanage. They brought the baby home, and soon thereafter had a ceremony in their home. It was a double ceremony, commemorating her entry into two communities: membership in the Jewish people and citizenship in the United States.

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69. *But see* Stanford v. Kentucky, 492 U.S. 361, 389–90 (1989) (Brennan, J., dissenting) (stating that widespread prohibition of execution of juveniles in other nations shows contemporary attitudes towards capital punishment that should influence interpretation of prohibition against cruel and unusual punishment).

70. *See* MICHAEL WALZER, ON TOLERATION 87 (1997) (discussing a post-modern toleration model).

71. *Id.*

The first ceremony (*brit habat*) was presided over by a rabbi, who noted that in recent years Jewish parents of daughters felt the need for a ceremony similar to the traditional *brit milah* (ritual circumcision) accorded Jewish boys. *Brit* translates as "covenant"; the ceremony signifies entry into the Jewish community and the taking on of the responsibilities that that entails. So the baby was blessed and given a Jewish name—the name of a number of ancestors of the parents, some of whom had come to the United States from Russia several generations before.

Then a second ceremony began. The U.S. Commissioner for Immigration, a friend of the parents, performed a naturalization ceremony, making the baby a citizen of the United States. The Commissioner said to the baby: "the naturalization oath is like making a promise, a promise to be loyal to this country and obey her laws. In return, America promises to welcome you as an equal member of the whole family of American citizens who enjoy the freedoms, rights, privileges and protections of the Constitution and the laws of this great land." The baby was asked to raise her right hand and repeat the following words (she clasped a tiny American flag in her left) as her parents recited the oath for her: "I will love and be true to the United States; I will support its Constitution; obey its laws; respect its flag; and defend it against all enemies."

Here were two ceremonies, two covenants, two different kinds of extended family created at the same time. The example, I think, shows that the opposite of a single, fixed identity is not necessarily a loss of bearings or radical personal confusion. The two identities—Jew and U.S. citizen—are deeply significant to their relevant communities; but the assembled family and friends did not see a contradiction (or even a tension) between them. Rather, there was a sense of double rootedness, a sense of the strengthening of individual identity by making it "thicker."

## IV. THE FUTURE?

The future is likely to look like the present, only more so. Immigration to the United States is likely to remain at or around record levels; cross-border ties among immigrant and ethnic groups will continue to flourish; the number of dual citizens will continue to increase; foreign states will increasingly seek to influence or respond to their diasporas present in the United States. Immigration will have a significant impact on U.S. demographics, pushing Hispanics ahead of African Americans as the largest minority group in the near future and more than doubling the Asian American population over the next half century.

These trends may appear troubling to some, portending a further weakening of U.S. sovereignty and an undermining of a cohesive citizenship. But I think the nation-state (at least the American nation-state) is not at risk. Rather than witnessing the dawning of a post-national era, we are more likely to see the growth of what I will term "inter-nationalism." By this I mean a thickening of relations between domestic and foreign populations (through immigration, dual nationality, freer trade and travel, the communications revolution) that will occur *within* the regime of nation-states. States will remain the primary locus of law—including international law, which will be enforced through national legal organs.[72]

My concept of inter-nationalism is drawn from Anne-Marie Slaughter's theory of "transgovernmentalism."[73] She contrasts transgovernmentalism with the models of liberal internationalists (who see the rise of world government, with centralized rulemaking, hierarchical authority, universal membership) and, to use her term, the "new medievalists" (who see an end of the nation-state, stressing the rise of supra-, sub- and non-state actors). Slaughter's transgovernmentalism recognizes the continuing primacy of states, but sees states as "disaggregating into [their] separate, functionally distinct parts"—courts, regulatory agencies, executive departments—that "network[] with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order."[74]

Inter-nationalism points to similar cross-border relations on the personal level.[75] The resulting "dense web of [human] relations" is likely to have important implications for states, some welcome and others not. On the positive side, such ties may foster trade and commerce, may support diversity in the arts, cuisine and ideas, may reduce international tensions by increasing contact and understanding. Inter-nationalism is also likely to give strength to claims for recognizing the rights of immigrants, as insider/outsider lines

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72. As Rainer Bauböck has suggested to me, this statement should be qualified in the case of Europe where the European Court of Human Rights has some authority to enforce international human rights norms against national governments.

73. *See* Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183, 184 (criticizing traditional versions of a new world order in favor of a transgovernmental vision). I want to thank Catherine Gwin for calling my attention to Slaughter's insightful article.

74. *Id.* at 184.

75. I am not suggesting an analogy between inter-state relations and inter-nationalism as experienced on a personal level. But I am noting parallel developments here: As a state thickens ties with another state by creating bonds between constituent parts, it is not giving up sovereignty to an international regime. On the contrary, such ties may reinforce each state's "stateness." So too an individual or groups may have ties to two states that affirm membership in each and do not necessarily forge a new transnational identity or community.

become less clear and states come to recognize that they are both senders and receivers of immigrants.[76]

Less helpfully, a thickening of ties among cross-border populations can create tensions between states. For example, states may be concerned about dual citizens voting in two countries, or they may seek to act to protect the interests of their nationals residing in other states. Resolving such issues will require state-to-state negotiation and coordination, and perhaps the establishment of international norms and new supra-national arrangements.

While international human rights may play a significant role in these developments—fostering both domestic and international rights talk—there is little reason to believe that the traditional basis for state legitimacy is, or will be, shifting. Neither transgovernmentalism at the state level nor inter-nationalism at the personal level suggests the need for new models of legitimacy or membership. Governmental powers and individual rights may continue to be articulated within a national structure, even as those structures adapt to thicker cross-national relations.

Inter-nationalism is likely to produce two policy strategies in the United States. Those on the right will increase their demands that immigrants "go national"; thus, they will push an anti-multicultural, anti-bilingual education agenda and perhaps seek to stem increases in levels of dual nationality. Those on the left will urge new incorporation programs, such as English and job training, and will support stronger antidiscrimination measures. Ethnic communities in the United States are likely to push for greater rights for co-ethnic immigrant populations here. Importantly, none of these strategies represents a "national" or "post-national" model. The basis of individual rights—which will continue to extend to resident aliens—will be presence in U.S. territory, and the definition of those rights will be found in domestic legal documents.

On the personal level, individuals will not see themselves as citizens of the world or as citizens of only their own solipsistic private domains, although they may well affirm ties to several communities (including, perhaps, more than one national community). Inter-nationalism means that these relationships will be structured within the regime of states, and indeed such relationships may put pressure on that regime to be more open to plurality and movement across borders. To return to the conversion/naturalization narrative, it appears that dual, overlapping memberships are possible and can be mutually supporting. Thus, there is nothing inevitable about either the hopelessness of postmodernism or the out-of-state experience of post-nationality. Put another way, to be bilingual is neither to speak

76. *See* Bauböck, *supra* note 6, at 65.

Esparanto nor a private language that no one else can understand. The future may not be a post-national world, but it will be a rich one, full of interesting and complicated relations in which the legitimacy of the American state will be based primarily on its dedication to democratic principles and its respect for U.S. constitutional rights and values.