VOLUME 66, NUMBER 1, WINTER 2025

The Dilemmas of Schrödinger's Citizenship

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Erwin Schrödinger held Austrian, German, and Irish nationalities, at different times in his life. This Article, however, is not about the famed physicist's nationalities, but a paradox along the lines of "Schrödinger's cat:" Can a person both be a citizen of one or even several states, and stateless at the same time? Perhaps it is possible: refugees, alleged terrorists, and stateless persons sometimes find themselves in this situation, where two states both claim that the other state is responsible for them. Determining foreign nationality is harder than it seems, because nationality is determined by a slew of contradictory legal norms. Some of these are based on birth, others on desert, others on pure discretion. Some international law stresses the freedom of each state to determine its nationals, while other norms accent the limits based on human rights, public policy, national security, or simply what is considered usual and acceptable in most states. This Article[1] argues that the contradictory norms for creating and determining nationality are the results of two fundamentally opposed visions of nationality. The constitutive vision of nationality considers it purely a matter of state will and positive law. The declarative vision connects it to the "natural facts" of inheritance, lifestyle, and lived experience. The opposition between declarative and constitutive visions of nationality create three citizenship gaps from which Schrödinger's Citizenship emerges: the time gap (whether nationality exists from the time of determination or retroactively to birth); the foreign interpretation gap (whether the establishment of nationality is exclusively up to the state in question, or whether it can be established by foreign legal actors as well); and the administrative gap (whether statutory rights to citizenship are in fact easy to access, or made hard or even impossible through administrative (in)action). Neither the constitutive nor the declarative vision can be eliminated from the law, at least not without grotesque results for some states and persons. However, the application of a foreign state's nationality laws without that state's approval and acceptance cannot be legal.

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1. The title of this article bears a strong similarity to Bronwen Manby, *Schrödinger's Citizenship: Framing Perspectives for the Resolution of Statelessness*, 6 STATELESSNESS & CITIZENSHIP REV. 1 (2024). Professor Manby and I worked independently, and we were only made aware of each other's work at the publication stage.

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Introduction: When Do You Have Multiple Citizenships?

Undoubtedly, Dear Reader, you know your own nationality, or perhaps nationali*ties*. But do you know your *potential* nationalities? Perhaps you have a Jewish, Italian, Irish, Indian, or Pakistani grandparent, and you *could be* the citizen of another country, if you just took the time to confirm and apply for the "old country's" citizenship? Or perhaps you already *are* the citizen of another state as well, and all you need to do is apply for a passport to complement your pre-existing citizenship status?

For many middle-class Americans with somewhat cosmopolitan family backgrounds, the guessing game of potential nationalities is a conversational pastime, and nothing more. A few well-traveled Americans with sufficient transnational legal and administrative know-how (or access thereto) will in fact take the necessary steps to secure their second passports. Their reasons generally range from the emotional results of a genealogical hobby to a vague international political risk insurance policy for one's children. Peter Spiro, the Charles R. Weiner Professor of Law at Temple University, and one of the global experts in immigration and citizenship law, writes thus about his own experience:

> In March 2013, my two children and I walked into the German consulate on the East Side of Manhattan without an appointment. We were there to collect our German citizenship . . . . My kids have never been to Germany and don't speak a word of German . . . . All three of us are native-born U.S. citizens. We were eligible for German citizenship through my father, who had fled his hometown, Hamburg, as a boy in November 1939. He had lost his German citizenship in 1941 pursuant to [Nazi policies], which stripped all Jews of their German nationality. Decades later, Germany made it possible for those targeted by the law—and their immediate descendants—to have their German citizenship "restored."[2]

2. Peter J. Spiro, At Home in Two Countries: The Past and Future of Dual Citizenship 1 (2016) [hereinafter Spiro, At Home].

Note that Professor Spiro himself puts the "restored" in scare quotes. He also writes that although "[t]he process was simple," it nevertheless took him "a couple of years to complete the file and submit" the required forms and supporting documents.[3] Notarizing English-language copies of historical German documents was a particular challenge: "three notaries refused flat-out to have anything to do with them."[4]

The foundation for Professor Spiro's and his children's newfound German citizenship is Article 116(2) of the German Basic Law, according to which:

> Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial or religious grounds and their descendants shall, on application, have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.[5]

Was Peter Spiro a German citizen all along, or a new one starting in 2013? Did he have a right to become a citizen, or just the possibility of being declared one? The text of the Basic Law is clear on the second account: Former German citizens *shall have* their citizenship restored, without leaving any scope of judgment or discretion to German officials. On the first count, though, the text is somewhat ambiguous. The semi-official translation on the website of the German Federal Ministry of Justice states that citizenship will be "restored"—even for the descendants of the Germans who were persecuted between 1933 and 1945, who were never German nationals.[6] The German original uses the term "*wieder einzubürgern,*"[7] wherein "*wieder*" clearly means "again," but "*Einbürgerung*" is translated by dictionaries as "naturalization."[8] If that is correct, then "*wieder einzubürgern*" is best translated as "shall be naturalized again"—which makes little sense, because "naturalization" in

3. *Id.*
4. *Id.*
5. Grundgesetz [GG] [German Basic Law], art. 116(2), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/5XKD-LBPH].
6. *Id.*
7. *Id.*
8. *Einbürgerung*, LEO.ORG, https://dict.leo.org/german-english/Einb%C3%BCrgerung [https://perma.cc/A6MZ-L65Y].

English applies only to foreigners who became citizens after their birth.[9] Yet, the overwhelming majority of Germans who were rendered stateless between 1933 and 1945 were natural-born citizens, and in practice, Art. 116(2) has been applied without distinguishing between naturalized and natural-born Germans.[10] Even if the "renaturalization" or restored citizenship is not retroactive, it is framed in English as the recognition of a continuously existing status. In Felix Würkert's description, even the German Constitutional Court has recognized "the nonsensical phrasing of descendants—who had never had the citizenship—having the right to regain it."[11]

In this case—and in many others, as we shall see below—nationality functions a bit like Schrödinger's cat, the legendary being in Erwin Schrödinger's thought experiment, who is both dead and alive as long as there is nobody to inspect the cat within the box.[12] Arguably, Professor Spiro's (and his father's, and his children's) German nationality both existed and did not exist at the same time, until—like the decayed radioactive atom triggering the breaking of the poison vial in the imaginary steel box containing the cat—Professor Spiro applied for the "restoration" of his family's German nationality.

"Schrödinger's Citizenship" is the legal situation where, while a person "appear[s] in law to be entitled to the citizenship of a particular country, [they] are not in practice recognised as citizens of that country."[13] It is not just the misapplication of citizenship law or a simple denial of justice, because the claim of entitlement comes from outside of the authorities of the state in question. It is therefore not entirely clear if the state is trying to get rid of one of its citizens through dubious legal means, or if

9. *See, e.g.*, *Naturalize*, Black's Law Dictionary (12th ed. 2024) ("[t]o grant the rights, privileges, and duties of citizenship to (one previously a noncitizen); to make (a noncitizen) a citizen under statutory authority"); *Naturalized Citizen*, Black's Law Dictionary (12th ed. 2024) ("[a] foreign-born person who attains citizenship by law").

10. *See* Entscheidungen des Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 2 BvR 2628/18, May 20, 2020 (Ger.), http://www.bverfg.de/e/rk20200520_2bvr262818.html [https://perma.cc/T6TQ-WJ3P]; Felix Würkert, *(Re-) gaining Citizenship via Constitutional Law, European Human Rights and Transitional Justice: The Federal Constitutional Court on Article 116 (2) BL*, 63 Ger. Y.B. Int'l L. 773, 776–80 (2020).

11. 2 BvR 2628/18, para. 49 (Ger.); Würkert, *supra* note 10, at 779.

12. John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox" Paper*, 124 Proc. Am. Phil. Soc'y 323, 328 (1980).

13. Manby, *supra* note 1, at 5.

external actors are trying to foist a foreigner onto the state in question. Usually, "Schrödinger's Citizenship" is reciprocal: State A claims that the person concerned is a citizen of state B, based on the laws of state B, while state B claims they are a citizen of state A, based on the laws of state A.

"Schrödinger's Citizenship" therefore arises when the internal and external assessments of two states' nationality laws do not align. This is unfortunately more common than one would think;[14] and it presents a little-considered danger for holders of dual nationality. Yossi Harpaz, a renowned sociologist of citizenship and migration, has shown the lengths to which people will go to secure a second nationality for themselves or for their children, even in a country where they do not plan to relocate.[15] Indeed, the existence of a relatively robust market for "golden passports," or citizenship-for-sale policies, shows that a second or third nationality can be exceedingly valuable as both a luxury good and an "insurance policy" of sorts.[16] In all of these cases, including Professor Spiro's, the logic of multiple citizenship is simple: "[M]ore is better." However, "Schrödinger's Citizenship" shows that in many cases, "less is better," and second nationality options work *against* an increasing number of refugees, de facto stateless persons and other vulnerable individuals. "Schrödinger's Citizenship" is more than just legal uncertainty: It is a tool that can be used to render stateless unwanted persons, usually criminals or asylum seekers, by assigning or attributing to them the nationality of another state.

The most famous such case is undoubtedly that of Shamima Begum, the infamous "jihadi bride" who left her family and the United Kingdom at age 15, in 2015, to join ISIS/Daesh as a propagandist and marry an

14. See *infra* Part I for the types of situations where this arises.

15. *See* Yossi Harpaz, Citizenship 2.0: Dual Nationality as a Global Asset 1–38 (2019).

16. Kristin Surak, *Millionaire Mobility and the Sale of Citizenship*, 47 J. Ethnic & Migration Stud. 166, 175–76 (2021) [hereinafter Surak, *Millionaire Mobility*]; *see also* Allison Christians, *Buying In: Residence and Citizenship by Investment*, 62 St. Louis U. L.J. 51, 55–63 (2017); Kristin Surak, The Golden Passport: Global Mobility for Millionaires 4, 36–37, 218–23 (2023) [hereinafter Surak, The Golden Passport]; Christian Joppke, *Citizenship by Investment: A Case of Instrumental Citizenship*, *in* Citizenship and Residence Sales: Rethinking the Boundaries of Belonging 240, 255–56 (Dimitry Kochenov & Kristin Surak eds., 2023).

Islamist fighter.[17] Despite only ever having lived in the United Kingdom before being smuggled to Syria, and being a British national from birth, according to the British courts she could possibly have acquired Bangladeshi nationality before her twenty-first birthday, if she renounced her British nationality at the same time.[18]

According to section 40(2) of the 1981 British Nationality Act, "the Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."[19] The only legal limit to the Secretary of State's power under the Act is that she may not order the revocation of citizenship "if [s]he is satisfied that the order would make a person stateless."[20] The reason for this prohibition is the U.K.'s international legal obligations, notably the 1961 U.N. Convention on the Reduction of Statelessness.[21] The Convention does not bar states from revoking its citizens' nationality rights altogether, but Article 8(1) declares that "[a] Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."[22] Begum's denaturalization was made possible by the British statutory interpretation of this requirement: The Secretary of State may deprive a person of a citizenship status if "the Secretary of State has *reasonable grounds for believing* that the person is *able*, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory."[23] The British government could therefore,

17. Jamie Grierson, *Shamima Begum: How the Case Developed*, The Guardian (July 16, 2020), https://www.theguardian.com/uk-news/2020/jul/16/shamima-begum-how-the-case-developed [https://perma.cc/2WJJ-PTWZ].

18. Begum v. Secretary of State for the Home Department [2020] UKSIAC SC/163/2019, [121]–[128] (building on the analysis of Bangladeshi law in G3 v. Secretary of State for the Home Department [2017] UKSIAC SC/140/2017, [9]–[93] and E3 & N3 v. Secretary of State for the Home Department [2018] UKSIAC SC/138/2017 & SC/146/2017, [10]–[89]) (affirmed on appeal in Begum v. Secretary of State for the Home Department [2023] UKSIAC SC/163/2019, [297]–[306]).

19. British Nationality Act 1981 c. 61, § 40(2) (UK).

20. *Id.* § 40(4).

21. Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175 (the United Kingdom has been a party to this Convention since 1966).

22. *Id.* art. 8(1).

23. British Nationality Act § 40(4A)(c) (emphasis added); *see also Begum* [2023] UKSIAC SC/163/2019 at [297], [303]–[304]; Audrey Macklin, *Citizenship Revocation, The Privilege to Have Rights and the Production of the Alien*, 40 Queen's L.J. 1, 16–17 (2014).

possibly, decide to revoke Begum's British nationality because she could still at that point apply to (re)gain her Bangladeshi nationality. This has proven to be impossible: Begum is now (in 2024) well past twenty-one years of age, and stateless and homeless in a refugee camp in Syria.[24]

Even at the time, Bangladeshi diplomatic officials stated openly that they do not recognize Shamima Begum as a citizen, regardless of the conclusions that British courts arrive at regarding Bangladeshi legislation on nationality.[25] Yet, for the British courts, this was irrelevant.[26] The Court of Appeal ruled in a different case that:

> If the Government of the foreign state chooses to act contrary to its own law, it may render the individual de facto stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as de jure stateless. If this outcome is regarded as unsatisfactory, the remedy is to expand the definition of stateless persons in the 1954 Convention or in the 1981 Act, as some have urged. The remedy is not to subvert the rule of law. The rule of law is now a universal concept. It is the essence of the judicial function to uphold it.[27]

Therefore, both the Court of Appeals of England and Wales and the Special Immigrations Appeals Court have openly stated that their interpretations of foreign law are superior to national governments' interpretations, and that in fact those interpretations are the only correct ones that are consistent with the rule of law.

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24. Dan Sabbagh, *Shamima Begum A Victim of Trafficking When She Left Britain for Syria, Court Told*, The Guardian, (Oct. 24, 2023), https://www.theguardian.com/uk-news/2023/oct/24/shamima-begum-victim-of-trafficking-when-she-left-uk-for-syria-court-told [https://perma.cc/F3HG-KP4Q] ("Begum remains in Kurdish custody in north-east Syria, and she has said more recently she regrets her decision . . . .").

25. Press Release, Ministry of Foreign Affairs of Bangladesh, Bangladesh's Position on the Report of Revoking Ms Shamima Begum's Citizenship by the British Government in Connection With Her Involvement in ISIS in Syria (Feb. 20, 2019), https://mofa.gov.bd/site/press_release/a5530623-ad80-4996-b0b4-f60f39927005 [https://perma.cc/DM9H-GPL7]; *see also* B2 v. Secretary of State for the Home Department [2013] EWCA (Civ) 616 [70], [81]–[82] (Eng.); Rayner Thwaites, *Proof of Foreign Nationality and Citizenship Deprivation: Pham and Competing Approaches to Proof in the British Courts*, 85 Mod. L. Rev. 1301, 1315–16 (2022).

26. *See Begum*, [2020] UKSIAC SC/163/2019 at [124]–[128].

27. *B2*, [2013] EWCA (Civ) 616 at [92] (cited with approval in *Begum*, [2020] UKSIAC SC/163/2019 at [127]).

The hypocrisy of this position is astounding. First of all, the British decision is itself arguably contrary to international law, which holds that every state has exclusive jurisdiction over the determination of who its citizens are.[28] As Rayner Thwaites notes, "it evidences a lack of self-reflection on the British statutory regime that had generated the dispute. An assessment of Lord Jackson's talk of the Vietnamese [and Bangladeshi[29]] executive riding roughshod over its own laws needs to keep in mind that the British deprivation decision is made pursuant to a sweeping executive discretion, namely the Secretary of State's power to deprive a British citizen of that status where satisfied that this is 'conducive to the public good'."[30] More generally, the British courts have created a Frankensteinian (mis)construction of foreign laws: "The Court of Appeal's reasoning generated a body of law, namely Vietnamese law for the purpose of English law, that overlaps with, but is autonomous from, Vietnamese nationality law as practiced and enforceable in Vietnam."[31]

Despite its hypocrisy and fragility, the imputation of non-existent or only vaguely possible nationalities to unwanted persons has become a common policy, leading to the recreation and proliferation of statelessness.[32] This article aims to be a part of a greater ongoing discussion on comparative nationality law and the creation of statelessness. In addition to Bronwen Manby's article on Schrödinger 's Citizenship as an aspect of statelessness in particular,[33] other similar concepts are "citizenship overreach," as coined by Peter Spiro;[34] "sticky citizenship," as contemplated by Audrey Macklin;[35] "zombie citizenship," as used by Neha Jain;[36]

28. *See infra* Part II.a.i.

29. The SIAC ruling that British courts may impose their interpretation of foreign nationality laws onto other countries was first set forth in *B2* [2013] EWCA (Civ) 616, regarding Minh Quang Pham, a British terrorist suspect of Vietnamese ancestry, and only subsequently adopted in Shamima Begum's case.

30. Thwaites, *supra* note 25, at 1318.

31. *Id.* at 1319.

32. Jamie Chai Yun Liew, Ghost Citizens: Decolonial Apparitions of Stateless, Foreign and Wayward Figures in Law 4–7 (2024); *see also* Manby, *supra* note 1, at 10–12.

33. *See* Manby, *supra* note 1, at 6–8.

34. Peter J. Spiro, *Citizenship Overreach*, 38 Mich. J. Int'l L. 167, 168–72 (2017).

35. Audrey Macklin, *Sticky Citizenship, in* The Human Right to Citizenship: A Slippery Concept 223, 223–24 (Rhoda E. Howard-Hassmann & Margaret Walton-Roberts eds., 2015).

36. Neha Jain, *Weaponized Citizenship: Should International Law Restrict Oppressive Nationality Attribution?* 6 (Robert Schuman Centre for Advanced Studies, Working

"passportization," widely used in discussions of Russian foreign policy vis-à-vis Russian minorities in neighbouring countries;[37] and "inchoate nationality," widely used in refugee law.[38] Other inspirations include Mira Siegelberg's book on the birth of statelessness as a concept in the 1920s,[39] and the fact that before then, foreign nationality was clearly recognized as a question of perspective in each national legal system. Neha Jain has also described how statelessness generally does not result from oversight or accident—badly drafted incompatible nationality laws, or the mistakes or malice of individual bureaucrats—but is manufactured intentionally, as one of the ways to restrict state membership to certain ethnicities.[40] Nevertheless, in all of this very important work, there is a fundamental uneasiness or uncertainty about when the attribution of foreign citizenship is legal, and when it is a thinly veiled tool in the (re) creation of statelessness. Schrödinger's Citizenship aims to clarify this fundamental uncertainty.

Including this Introduction, the Article is composed of seven Parts. Part I sketches the scope of Schrödinger's Citizenship. I argue that Schrödinger's Citizenship arises in three principal contexts: refugee determinations; recognitions of foreign nationality and foreign denaturalizations (particularly with reference to nationals of hostile states, states that have split up or have been absorbed by other states, or denaturalizations by existing states that violate human rights standards); and domestic

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Paper, Paper No. RSC 2023/54, 2023) ("What is striking about these forms of zombie citizenship is that the state that is engaged in engineering the attribution is not the same as the state whose nationality is being ascribed.").

37. *See, e.g.*, Vincent M. Artman, *Documenting Territory: Passportisation, Territory and Exception in Abkhazia and South Ossetia*, 18 GEOPOLITICS 682 (2013); Thomas Hoffmann & Archil Chochia, *The Institution of Citizenship and Practices of Passportization in Russia's European Neighbourhood Policies*, *in* RUSSIA AND THE EU: SPACES OF INTERACTION 223–38 (Thomas Hoffmann & Andrey Makarychev eds., 2018); Elia Bescotti et al., *Passportization: Russia's "Humanitarian" Tool for Foreign Policy, Extra-Territorial Governance, and Military Intervention*, VERFASSUNGSBLOG (Mar. 23, 2022), https://verfassungsblog.de/passportization/ [https://perma.cc/UZX9-N3AH].

38. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 57–64 (2d ed. 2014); ERIC FRIPP, NATIONALITY AND STATELESSNESS IN THE INTERNATIONAL LAW OF REFUGEE STATUS 196–97 (2016).

39. MIRA L. SIEGELBERG, STATELESSNESS: A MODERN HISTORY 12–25 (2020).

40. Neha Jain, *Manufacturing Statelessness*, 116 AM. J. INT'L L. 237, 238–39 (2022) [hereinafter Jain, *Manufacturing Statelessness*]; *see also* Michelle Foster & Jade Roberts, *Manufacturing Foreigners: The Law and Politics of Transforming Citizens into Migrants*, *in* RESEARCH HANDBOOK ON THE LAW AND POLITICS OF MIGRATION 218, 219 (Catherine Dauvergne ed., 2021).

denaturalizations that attempt to circumvent the international legal prohibition on the creation of statelessness.

In Part II, I shall outline the basic international legal doctrines on the attribution of nationality. The doctrines exist separately in public international law, private international law, and domestic laws, and they are contradictory either within or between these groupings. The fundamental rule in public international law (and of course, the domestic laws that create customary international law) is that each state has exclusive jurisdiction to decide who its citizens are and based on what grounds.[41] Nevertheless, foreign recognition of that nationality depends on the conferring state's compliance with international law[42]—which immediately contradicts *exclusive* national jurisdiction. Human rights law also states that everyone has a right to a nationality (thereby diminishing states' freedom to refuse to grant nationality to some people)—but human rights instruments do not state any specific grounds for requiring a grant of nationality, thereby making the human right to nationality somewhat lacking in substance.[43] Private international law doctrines, such as the "public law taboo" and the act of state doctrine, seemingly reinforce the public international law on the exclusivity of domestic jurisdiction.[44] But here too, other rules of private international law, such as public policy doctrines, give the right to accept or withhold the recognition of foreign nationality to the forum state. Domestic citizenship laws also contain many contradictions. Many states categorize naturalization in particular as an exceptional, discretionary, and extralegal act that is basically unconstrained by legal rules.[45] Yet, other states have started offering citizenship as a commodity,[46] for sale to any law-abiding buyers. Immaterial commodities, in particular, must be clearly defined and guaranteed

41. Convention on Certain Questions Relating to the Conflict of Nationality Law art. 1, Apr. 13, 1930, 179 L.N.T.S. 89, [hereinafter Hague Convention on Nationality]; European Convention on Nationality art. 3(1), Nov. 6, 1997, E.T.S. 166; Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

42. Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. 4, 23 (Apr. 6).

43. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 15, (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200A (XXI) art. 24, ¶ 3 (Dec. 16, 1966) [hereinafter ICCPR]; U.N. Convention on the Rights of the Child art. 7(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

44. *See infra* Part II.b.i.

45. *See infra* Part II.c.ii.

46. *See* HARPAZ, *supra* note 15.

by law, otherwise the buyer is not actually getting anything for their money.[47]

Is there an overarching principle or distinction that can bring order into this explosion of contradictions? In Part III, I attempt to find one by separating laws about nationality into two fundamental groups: laws that view nationality as declarative of an underlying social reality, and laws that view nationality as constitutive, created entirely by the positive laws of states. Both declarative and constitutive aspects of nationality are valid and necessary, so any (partial) resolutions of the opposition between them cannot mean eliminating one in favor of the other. Instead, in Part IV, I identify three quite specific "citizenship gaps" that create Schrödinger's Citizenship. These citizenship gaps are the sites of the most specific clashes between the declarative and constitutive approaches. The "time gap" arises due to opposition between the declarative view that nationality exists from birth, and often transcends generations, and the constitutive view that nationality only exists from the moment of recognition by the relevant state. The "foreign interpretation gap" exists due to the opposition between the declarative view that nationality is a social fact that can be established by any impartial onlooker, and the constitutive view that the state of nationality has exclusive competence to pronounce on who are its nationals. The "administrative gap" arises from the more general phenomenon that broadly worded and concise legislative statements can be restricted or expanded by administrative decisions, and therefore declarations of rights may not in fact be available to applicants. The administrative gap exists independently of the opposition between constitutive and declarative approaches, or rather can exist in both.

Because both declarative and constitutive approaches are fundamental to our understanding of how citizenship should work, the citizenship gaps cannot be overcome once and for all by simple interpretive guidelines. However, certain types of interpretation, where authorities attempt to know foreign citizenship law better than the foreign state in question, or where authorities equate access to foreign citizenship with actually having foreign citizenship, are definitely beyond the pale. In Part V, I offer an evaluation of the legality and morality of Schrödinger's Citizenship based on these lines.

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47. *See* Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality 2–4, 13–18 (2019).

Finally, a note on terminology is in order: Throughout this article, I use the terms "citizenship" and "nationality" interchangeably. Strictly speaking, "citizenship" is a status under domestic constitutional law; "nationality," by contrast, is the link between the state and the individual on the international plane.[48] In certain, exceptional circumstances, a person can be a national of a state (meaning they are given diplomatic protection by the state in question if they are abroad), but they are not citizens (that is, they do not have the right to vote, or hold office, or other fundamental rights of citizens). Nevertheless, it is also common practice to use the terms interchangeably,[49] and "[f]rom a rights perspective, the label is less important than the ability to exercise rights."[50] I therefore see no reason to depart from interchangeable usage. Likewise, there are many terms for the cancellation of citizenship/nationality: removal of citizenship, citizenship revocation, denationalization, denaturalization. I have chosen to use "denaturalization" as the most distinctive term.

I. When Does Schrödinger's Citizenship Arise?

In a sense, the determination of a person's nationality by a foreign state is an everyday event, even a necessity: Every time that a border guard inspects a foreign passport, they are making a judgment about whether the passport is real, and thereby about the nationality of the person holding the passport. In a less banal sense, it is questionable whether foreigners, or foreign states, can ever apply a state's nationality laws, given that nationality is within the exclusive jurisdiction of each state.[51] Nevertheless, in certain situations, foreign applications of nationality laws are inescapable, and these are the situations where Schrödinger's Citizenship can appear. The three principal situations are refugee determinations; recognition of foreign nationalities; and denaturalizations with the avoidance of creating statelessness.

48. *E.g.*, Fripp, *supra* note 38, at 6–7, 9–21, 93–95.

49. *E.g.*, Alice Edwards, *The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects*, *in* Nationality and Statelessness Under International Law 11, 14 (Alice Edwards & Laura Van Waas eds., 2014).

50. *Id.*

51. *See infra* Part II.A.1.

A. Refugee Determinations and Possible Multiple Nationalities

Hostility to refugees is an important part of contemporary politics, and legislatures have responded to anti-refugee sentiment with a slew of often inhumane policies to keep refugees out.[52] Some states, however—predominantly Canada, but to some extent also Australia and the United Kingdom—have been using Schrödinger's Citizenship to deny refugee status based on the asylum-seeker's *possible* foreign nationality.

According to Article 1A(2) of the 1951 Refugee Convention, a person with multiple citizenships shall only be deemed a refugee if they are persecuted in *all* of their countries of nationality and cannot receive protection from any of them.[53] In every case where a refugee claimant may have a second nationality, this has to be verified. But what if the claimant *could become* the citizen of another country, but is not yet a citizen?

Canadian refugee law has made it standard practice to refuse protection to possible dual citizens. The policy has been used since the early 1990s and has been confirmed by the Federal Court of Appeals in 2006. The practice first arose in December 1991, after Tatiana Bouianova came to Canada to claim refugee status, following the dissolution of her home country, the Soviet Union.[54] She came to Canada from the reviving Republic of Latvia, which was increasingly unfriendly to ethnic Russians living there, denying them citizenship in addition to other rights.[55] Ms. Bouianova viewed herself as stateless, but the Canadian authorities and courts rather identified her as Russian.[56] The Canadian Department of Employment and Immigration asked the Embassy of Russia whether Ms. Bouianova was

52. *See* Daniel Ghezelbash, Refuge Lost: Asylum Law in an Interdependent World 1–3 (2018); David Scott FitzGerald, Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers 3–10 (2019).

53. U.N. Convention Relating to the Status of Refugees art. 1(A)(2), 28 July 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; *see also* Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R 689, 691 [*Ward*] ("[t]he international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged").

54. Bouianova v. Canada (Minister of Employment and Immigr.), [1993] 67 F.T.R. 74, para. 2 (TD).

55. *See, e.g.*, John Dobson, *Ethnic Discrimination in Latvia*, *in* Language, Ethnicity and the State, Vol. 2: Minority Languages in Eastern Europe post-1989 155, 161–67 (Camille C. O'Reilly ed., 2001); Diane F. Orentlicher, *Citizenship and National Identity*, *in* International Law and Ethnic Conflict 296, 296–99, 301–2 (David Wippman ed., 1998).

56. *Bouianova*, [1993] 67 F.T.R. at 75–76.

already a Russian citizen, and if yes, what practical steps she would have to take to claim her citizenship; the Embassy replied that anybody born within the Russian SSR, within the Soviet Union was already a "Russian citizen unless he wants to become a citizen of another state," and that "the person has to send us his passport with a letter requesting the Russian citizenship and we shall put the necessary stamp in his passport."[57]

With a view to the testimony provided by the Embassy of Russia, Judge Marshall Rothstein (as he was then) ruled that Ms. Bouianova was already a Russian citizen: Skimping on the "mere formality" of having to send her passport to the appropriate embassy to be stamped was not enough to render her stateless.[58] Because she was in no danger of being persecuted in Russia, she could simply claim her pre-existing Russian nationality and move to Russia from Latvia.[59] As such, she could not be a refugee under Article 1A(2) of the Refugee Convention.[60]

Further cases from the 1990s and 2000s started expanding the holdings of *Bouianova v. Canada (Minister of Employment and Immigration)*. *Desai v. Canada* involved a stateless refugee claimant born in Kuwait to parents of Indian citizens.[61] The court held that he was not truly stateless because he allegedly had the right to apply for Indian citizenship.[62] In *De Barros v. Canada*, the court instructed a Brazilian refugee applicant to go to Portugal instead, as he would be able to acquire Portuguese citizenship through his father.[63] *Gil Roncagliolo v. Canada* concerned a Peruvian citizen and his French-Peruvian dual-citizen wife.[64] They had fled Peru because they faced threats to their lives after the husband, a Peruvian Navy officer, spoke up against corruption that he witnessed in the ranks.[65] The court denied his refugee application

57. *Id.* para. 6.
58. *Id.*
59. *See id.*; *see also* Zdanov v. Minister for Employment and Immigr., [1994] 81 F.T.R. 246, paras. 1–6 (Can.) (TD) (similar case concerning an ethnic Russian, originally born in the Russian USSR who faced persecution in the newly independent state of Estonia).
60. *See* sources cited *supra* note 53.
61. Desai v. Canada (Minister of Citizenship and Immigr.), [1994] F.C.J. No. 2032, para. 3.
62. *Id.* at paras. 16–20.
63. De Barros v. Canada (Minister of Citizenship and Immigr.), [2005] F.C. 283, paras. 5–7, 9–12.
64. Gil Roncagliolo v. Canada (Minister of Citizenship and Immigr.), [2005] F.C. 1024, para. 3 [*Gil Roncagliolo*].
65. *Id.* para. 4.

because he could have applied for French nationality through his marriage to his dual-citizen wife.[66] *Alvarez v. Canada*, likewise, involved a Colombian woman and her Colombian-Venezuelan husband, who faced threats from the rebel Fuerzas Armadas Revolucionarias de Colombia ("FARC") militias in Colombia.[67] There, too, the court ruled that she could access Venezuelan citizenship and protection through her dual-citizen husband.[68]

The greatest expansion, and even reframing of the doctrine of possible second nationalities, came in the case of *Williams v. Canada*.[69] Manzi Williams was a Rwandan citizen persecuted in Rwanda because of his "imputed political opinions."[70] In 2002, he fled Rwanda to Kenya, and then through the United States to Canada, where he applied for refugee status.[71] In 2003, his application was denied by the Immigration and Refugee Board because he was born a Rwandan-Ugandan dual citizen as a result of his mother's Ugandan nationality.[72] Although he had lost his Ugandan citizenship at age eighteen (by choosing to confirm his Rwandan citizenship when Uganda does not accept double nationality[73]), the Canadian Federal Court of Appeal determined that he had the *possibility* to regain his Ugandan citizenship by renouncing his Rwandan citizenship.[74]

Based on this information, Judge Robert Décary decided that "[a]lthough . . . the applicant had a reasonable and well-founded fear of persecution in Rwanda, . . . the respondent [nevertheless] had the option

66. *Id.* paras. 20–22.

67. Alvarez v. Canada (Minister of Citizenship and Immigr.), [2007] F.C. 296, paras. 2–7.

68. *Id.* paras. 6–17.

69. *See* Williams v. Canada (Minister of Citizenship and Immigr.), [2005] F.C.A. 126 [*Williams*].

70. *Id.* para. 2.

71. *Id.* para. 6.

72. *Id.* para. 3.

73. *Id.* para. 4 ("[a] citizen of Uganda shall cease forthwith to be a citizen of Uganda if, on attaining the age of eighteen years he or she, by voluntary act other than marriage acquires or retains the citizenship of a country other than Uganda." (citing THE CONSTITUTION OF THE REPUBLIC OF UGANDA (1995), art. 15(2))) (cleaned up).

74. *See id.* para. 5 ("[a] Uganda citizen who loses his or her Uganda citizenship as a result of the acquisition or possession of the citizenship of another country shall, on the renunciation of his or her citizenship of that other country, become a citizen of Uganda." (citing THE CONSTITUTION OF THE REPUBLIC OF UGANDA (1995), art. 15(4))) (cleaned up).

of seeking protection in Uganda. This was the case because . . . the respondent could renounce his Rwandan citizenship, obtain Ugandan citizenship as a matter of course and seek the protection of that country."[75] In terms of general principles, the court declared that:

> The condition of not having a country of nationality must be one that is *beyond the power of the applicant to control* . . . if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied.[76]

The Canadian court interpreted not only Mr. Manzi's current situation as a refugee and a national of Rwanda, but also as a past and possible future citizen of Uganda, and possibly of other countries as well, as long as citizenship in those countries is "within the power of the applicant to control."[77] By establishing this rather broad standard, the Canadian Federal Court of Appeals moved well beyond the original standard in *Bouianova*, which only required refugee applicants to seek another state's citizenship if acquiring it was a matter of "mere formalities."[78]

The application (or creation) of Schrödinger's Citizenship within refugee law is primarily a Canadian phenomenon, but some other states have taken note. Courts in the United Kingdom have similarly referenced refugee applicants' duties to apply for citizenship wherever they can.[79] Australia enacted similar provisions through its very broadly worded provisions on safe third countries: "[N]on-[Australian] citizens . . . in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa . . . ."[80] The Australian definition of a safe third country includes visa access to foreign states, but also Schrödinger's Citizenship: "A country is a safe third

75. *Id.* para. 8.
76. *Id.* para. 22 (emphasis added).
77. *Id.*
78. *Bouianova*, [1993] 67 F.T.R. at 76; *see also* HATHAWAY & FOSTER, *supra* note 38, at 59–62.
79. *E.g.*, R. v. Secretary of State for the Home Department ex parte Bradshaw [1994] Imm AR 359, 366–67 (Scot.); MA (Ethiopia) v. Secretary of State for the Home Department [2009] EWCA (Civ) 289 [50] (Eng.); Tecle v. Secretary of State for the Home Department [2002] EWCA (Civ) 1358 [16]–[21] (Eng.).
80. *Migration Act 1958* (Cth) s 91 sub-div A (Austl.); *see also id.* s 36(3).

country in relation to the non-citizen if: . . . the person has a right to enter and reside in the country (however that right arose or is expressed)."[81]

Because any legal possibility to enter another country is found to negate Australia's obligations, there is very little mention of a complicated option, such as acquiring a third-country nationality in Australian case law. Nevertheless, obiter dicta in a judgment by the High Court of Australia mentioned a Sri Lankan refugee applicant's "eligib[ility] to apply for French citizenship"[82] as one of the reasons to deny his application (as well as the applicant having already been recognized as a refugee in France).

It is troubling that Canada, a country with a long history of welcoming refugees, the only state that received the Nansen Refugee Award for outstanding service to the cause of refugees and displaced people, has adopted such a legal practice.[83] In theory, using Schrödinger's Citizenship to push away refugees has the capacity to destroy refugee law completely, since almost every person has the theoretical option to apply for, and potentially receive, another state's citizenship through citizenship-for-sale programs. One major facet of Schrödinger's Citizenship is therefore the erosion and denial of refugee rights.

B. Recognition and Non-Recognition of Changes to Citizenship

Another way in which Schrödinger's Citizenship is used is the selective recognition and non-recognition of changes to foreigners' citizenships. Changing one's nationality has generally been controversial historically, and often unacceptable or illegal. Perpetual allegiance was a keystone of English common law on nationality: According to this doctrine, everyone who is born on English or later British territory owes allegiance to the monarch for the sheer fact of being protected by the monarch. This allegiance is "a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance . . . . An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as

81. *Id.* s 91 sub-div D(1), (2)(b).

82. *Minister for Immigration and Multicultural Affairs v Thiyagarajah* [2002] HCA 9, para. 10 (Austl.).

83. *E.g.*, *U.N. Awards Medal to Canada for Its Contribution to Cause of Refugees*, Los Angeles Times (Oct. 7, 1986), https://www.latimes.com/archives/la-xpm-1986-10-07-mn-5066-story.html [https://perma.cc/WAW9-LEEA].

now."[84] Perpetual allegiance means that emigration and naturalization elsewhere cannot change a person's status as a British subject: "For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former . . . ."[85]

Perpetual allegiance had deleterious consequences for naturalized Americans born in the British Empire for most of the 19th century. Before the War of 1812, the British Navy often abducted and impressed British-born American seamen from American ships.[86] In 1867, Irish-born American supporters of the Fenian Revolt in Ireland were charged with treason in Britain, instead of the much less severe charge of smuggling weapons.[87] Similarly, European states with *ius sanguinis* rules could exert political pressure on the descendants of their emigrant citizens for generations upon generations, regardless of whether the emigrants had naturalized in the Americas, or whether their children had ever seen the "old country."[88]

The question of whether the naturalization of immigrants to the United States is acceptable for the European states was only resolved through the so-called "Bancroft treaties," negotiated by the American diplomat George Bancroft after 1868.[89] In these treaties, the United Kingdom and other countries of emigration agreed to accept the renunciation of nationality as valid and binding upon them, and to recognize American naturalization as an implied act of renunciation of citizenship. Nevertheless, the acceptance and recognition of a foreign naturalization is not universal. The European Commission is currently arguing in front of the Court of Justice of the European Union that member states, particularly

84. 1 William Blackstone, Commentaries on the Laws of England 357–58 (1765); *see also* Calvin's Case [1608] 77 Eng. Rep. 377, 391–94 (Eng. & Wales); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Hum. 73, 117–19 (1997) (on the origins of immutable or perpetual allegiance).

85. Blackstone, *supra* note 84, at 358.

86. Spiro, At Home, *supra* note 2, at 15–16.

87. *Id.* at 11–13; Lucy E. Salyer, Under the Starry Flag: How a Band of Irish Americans Joined the Fenian Revolt and Sparked a Crisis over Citizenship 1–3, 46, 61 (2018).

88. Spiro, At Home, *supra* note 2, at 16–18; *see also* David Cook-Martin, The Scramble for Citizens: Dual Nationality and State Competition for Immigrants 24–61 (2013) (on conflicts between Argentina, Spain, and Italy with regard to Spanish and Italian immigrants to Argentina).

89. Spiro, At Home, *supra* note 2, at 19–20, 28–29.

Malta, should not have the power to create citizenship-for-sale policies;[90] and Chinese authorities at times imply that Chinese minorities around the world still have obligations towards China.[91]

The recognition of naturalizations abroad has become much less controversial since the 1970s, as the obligations of citizenship have become much lighter (that is, fewer states impose compulsory military service on all of their male citizens) and dual nationality has become acceptable.[92] There is, however, a flip side to the recognition of foreign naturalizations: the recognition of foreign denaturalizations, or citizenship revocations, which has stayed controversial and convoluted.

The controversial nature of denaturalization is tied to 20th century totalitarian dictatorships, which introduced mass denaturalization policies with effects lasting to this day. In December 1921, the Soviet Union denaturalized all theretofore Russian nationals who fought against Soviet power, or who left Russia without Soviet authorization after the Great October Revolution.[93] "No denationalization on any such scale as this ha[d] hitherto been known to history. It affect[ed] some 2,000,000 people."[94] Starting in 1926, fascist Italy revoked "the nationality of Italians, resident abroad, who commit acts which may cause the disturbance of public order in Italy."[95] They included anti-fascist emigres and refugees who took any sort of action against the fascist state.[96] In July 1933, the new Nazi government passed the Law on the Revocation of Naturalization and the Deprivation of German Citizenship: "According to it, naturalizations that took place between November 9, 1918, and January 30, 1933, could be revoked 'if the naturalization [was] not deemed to be desirable.'"[97] The act allowed for the denaturalization of natural-born

90. Case C-181/23, Comm'n v. Malta, ECLI:EU:C:2023:173, 38 (May 15, 2023).

91. *See* Maria Adele Carrai, China Boundless: The State and Its Diaspora (unpublished manuscript) (on file with author).

92. Christian Joppke, *The Inevitable Lightening of Citizenship*, 51 Eur. J. Sociology 9, 15–18 (2010) [hereinafter Joppke, *Inevitable Lightening*]; Patrick Weil, The Sovereign Citizen: Denaturalization and the Origins of the American Republic 166–75 (2013); Spiro, At Home, *supra* note 2, at 73–110.

93. Sir John Fisher Williams, *Denationalization*, 8 Brit. Y. B. Int'l L. 45, 45 (1927).

94. *Id.* at 46.

95. *Id.* at 47.

96. Michael Marrus, The Unwanted: European Refugees in the Twentieth Century 124–28 (1985).

97. Diemut Majer, "Non-Germans" under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe,

German citizens if they were living abroad and violated their "obligation to show allegiance to Reich and Volk."[98]

Mass denaturalization presents a challenge to liberal states: whether or not they should recognize the denaturalization. Recognizing denaturalization could be viewed as the simple recognition of a fact: The persecuted German Jew and Italian anti-fascist did not in fact enjoy the protection of their erstwhile country. However, it also acquiesces to an odious foreign procedure and accepts that one's nationality may be stripped at any point. Non-recognition makes a stand for the persecuted person's national identity, that goes deeper than the dictatorial regime that decided to remove the person's nationality. On the other hand, it installs a fiction, because the denaturalized person does not in fact enjoy any rights or protection from a foreign state.

The dilemma becomes particularly sharp in wartime, when the rights of the resident citizens of an enemy nation have to be restricted in the interests of national security. The law of enemy aliens is notoriously harsh: In essence, it removes all rights from the impugned foreigners, crucially including the right to sue in court.[99]

Who exactly, though, is an enemy alien? Is the denaturalized foreigner still an enemy alien, or is he no longer an enemy alien? Put another way, is the denaturalized Italian anti-fascist primarily an Italian (regardless of the denaturalization, and therefore subject to the restriction of her rights), or is she primarily an anti-fascist (accepting her denaturalization, and making the restriction of rights unnecessary)? Taking denaturalizations at face value risks taking them too seriously, and aiding the enemy in introducing spies. Not accepting denaturalizations risks punishing refugees doubly, and not taking their political beliefs seriously enough. Hannah Arendt wrote scathingly about the double standards that German Jewish refugees were required to face in France and in the United States, after having escaped from Germany.

> We were expelled from Germany because we were Jews. But having hardly crossed the French borderline, we were changed into "boches" [a derogatory French term for Germans]. We were even

WITH SPECIAL REGARD TO OCCUPIED POLAND, 1939–1945 108 (Peter Thomas Hill, Edward Vance Humphrey & Brian Levin trans., Texas Tech Press 2014).

98. *Id.* at 109.

99. *See* Karen Knop, *Citizenship, Public and Private*, 71 L. & CONTEMP. PROBS. 309, 321 (2008) ("For the duration of a war, they can be wronged without remedy. Enemy aliens are outlaws—not metaphorical but actual.").

> told that we had to accept this designation if we really were against Hitler's racial theories. During seven years we played the ridiculous role of trying to be Frenchmen—at least, prospective citizens; but at the beginning of the war we were interned as "boches" all the same.[100]

U.S. law on enemy aliens errs on the side of caution, so as to gather, survey, and potentially immobilize everybody who may have good reasons to sympathize with the enemy state, regardless of citizenship. The U.S. Alien Enemies Act authorizes the "apprehen[sion], restrain[t] . . . and remov[al]"[101] of not only the citizens of enemy nations (as long as they are not naturalized U.S. citizens as well), but also all "*natives*, . . . denizens and subjects."[102] This formulation therefore included those who were no longer citizens of an enemy country but were nevertheless born there.[103] "A man may be a native of one country and a citizen of another, and if he be a native of a hostile country his citizenship in a friendly country, does not change or efface the fact of his nativity."[104]

However, even this certainty is called into question by wars of conquest and annexation, such as Germany's actions before and during World War II.[105] By 1941, Germany included territories that were formerly entire independent states (Luxembourg and Austria), as well as territories that less than five years before belonged to France, Poland, Belgium, and Czechoslovakia. Were immigrants in the United States who were born in these places "natives, citizens, denizens [or] subjects"

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100. Hannah Arendt, *We Refugees*, *in* ALTOGETHER ELSEWHERE: WRITERS ON EXILE 110, 115 (Marc Robinson ed., 1994) [hereinafter Arendt, *We Refugees*]; *see also* ANNE C. SCHENDERLEIN, GERMANY ON THEIR MINDS: GERMAN JEWISH REFUGEES IN THE UNITED STATES AND THEIR RELATIONSHIPS WITH GERMANY, 1938–1988 53–70 (2020).

101. Alien Enemies Act, an act respecting alien enemies of July 6, 1798, 1 Stat. 577, R.S. § 4067 (codified as amended at 50 U.S.C. § 21 (1918)).

102. *Id.* (emphasis added).

103. Minotto v. Bradley, 252 F. 600, 602–03 (N.D. Ill. 1918); *Ex parte* Risse (*In re* Stallforth), 257 F. 102, 109–10 (S.D.N.Y. 1919); United States *ex rel.* Umecker v. McCoy, 54 F. Supp. 679, 681 (D.N.D. 1944); United States *ex rel.* D'Esquiva v. Uhl, 137 F.2d 903, 904–06 (2d Cir. 1943).

104. *Ex parte* Gregoire, 61 F. Supp. 92, 93 (N.D. Cal. 1945).

105. *See* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 970–75 (2007); J. Gregory Sidak, *War, Liberty and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1423–24 (1992).

of Germany, following these annexations? D'Esquiva was born in 1891 in Vienna, then the capital of the Austro-Hungarian Empire: Did the annexation of Austria by Germany in 1938 (and the half-hearted recognition of this annexation by the United States) make D'Esquiva a German national?[106] The question became especially convoluted regarding Alsace, which changed hands between Germany and France four times between 1871 and 1945. George Umecker was born in Alsace in 1893, when it belonged to Germany; but did the cession of Alsace back to France in 1918 (and then to Germany again in 1940) make Umecker a French or German national, for the purposes of the Enemy Aliens Act in 1943?[107] These cases foreshadow similar dilemmas arising again with regard to Russian citizens born in occupied or annexed parts of Ukraine, for example.

These examples from World War II show that Schrödinger's Citizenship arises with every change in state territory. The situations include the voluntary exchange of territories, the dissolution of one state into several, the uniting of several states into one, the splitting off of territory, and the forcible annexation of territory.[108] The principle of assigning nationality in these cases is that the citizenship of the new sovereign has to be granted to every ordinary resident of the territory that changed hands or that changes its sovereignty; residents who do not want to assume the citizenship of their new sovereign often have a number of years to freely emigrate and retain their prior nationality.[109] The binding nature of this rule is questionable, however. James Crawford, the late Whewell Professor of International Law at the University of Cambridge, has suggested that the principle has binding force.[110]

106. *D'Esquiva*, 137 F.2d at 907 (remanding proceedings to district court for taking of further evidence on the issue).

107. *Umecker*, 54 F. Supp. at 682 ("If we *now* recognize the *place* as being a part of France we must, then, in order to give proper meaning to the word native, recognize him as being a native of France.") (emphasis added).

108. *See, e.g.*, Malcolm Shaw, International Law 736–43 (8th ed. 2017).

109. James Crawford, Brownlie's Principles of Public International Law 419–20 (9th ed. 2017) (citing the 1919 Treaties of Versailles, St. Germain, Trianon and Paris, as well as the 1947 Italian Peace Treaty and general U.K. practice regarding changes to the territory of the United Kingdom); G.A. Res. 55/153 arts. 1, 5, 9–11, 20–26 (Dec. 12, 2000); Eur. Comm'n for Democracy through Law (Venice Commission), *Declaration on the Consequences of State Succession for the Nationality of Natural Persons*, art. 8, Doc. CDL-STD(1997)023 (Feb. 10, 1997).

110. Crawford, *supra* note 109, at 420.

The International Law Commission and the European Commission for Democracy Through Law (i.e., the Venice Commission) have both created draft articles and declarations affirming this position. However, none of these drafts and declarations has been turned into an international treaty.[111] Paul Weis, one of the negotiators of the 1953 Refugee Convention and an outstanding 20th century scholar of nationality law, was also skeptical about this principle. Weis stated, "there is no rule of international law under which the nationals of the predecessor State acquire the nationality of the successor State . . . . The practice of States does not bear out the contention that this is inevitably the result of the change of sovereignty."[112] Arguably, there are no universal legal rules that could preclude Schrödinger's Citizenship from arising upon changes to territory. This is visible in the case of *Zadvydas v. Davis*,[113] a case involving the potential deportation of a stateless U.S. permanent resident. "Kesutis Zadvydas . . . was born, apparently of Lithuanian parents, in a displaced persons camp in Germany in 1948."[114] Despite knowing when and where he was born and the nationality of his parents, Zadvydas happened to be born soon after major territorial changes in Europe, which then resulted in him having neither German, nor Soviet, nor later Lithuanian citizenship.

Zadvydas and numerous other cases show that questions of recognition can emerge decades after the end of a situation that caused the denaturalization or the non-recognition.[115] The famous case of *Oppenheimer v. Cattermole* concerned the tax liability of Meier Oppenheimer, a German Jew who escaped from Nazi Germany to the United Kingdom in 1939 and became a British subject in 1948.[116] Oppenheimer was subsequently awarded a pension for his pre-war work in Germany by the Federal Republic of Germany in 1953.[117] Questions about his nationality arose due to his possible dual citizenship: If he was a national of both Germany and the United Kingdom, then he would only be taxed once regarding his German income due to the terms of the UK-German tax treaty in

111. *See, e.g.*, G.A. Res. 55/153, *supra* note 109.
112. Paul Weis, Nationality and Statelessness in International Law 143–44 (2d ed. 1979).
113. Zadvydas v. Davis, 533 U.S. 678 (2001).
114. *Id.* at 684.
115. *See id.*
116. *Oppenheimer* [1976] AC at 252.
117. *Id.*

force at the time; however, if he was only a British subject, then he may be taxed by both states.[118]

Oppenheimer could have lost his German citizenship in 1941 due to the infamous Nazi decree of November 25, 1941, that provided that "[a] Jew whose usual place of abode is abroad may not be a German citizen. . . . A Jew loses German citizenship if, at the date of entry into force of this regulation, he has his usual place of abode abroad."[119] Or he could have lost his German citizenship when he naturalized as a British subject in 1948, under the terms of the 1913 German Nationality Act,[120] which held that naturalization in a foreign country *ipso iure* results in the loss of German nationality. Alternatively, he could have retained it all along, either because the 1941 Decree should not be granted any recognition in the United Kingdom;[121] or under Article 116(2) of the post-1949 German Basic Law;[122] or under a 1968 German Constitutional Court judgment, which held that the 1941 decree was void *ab initio*.[123]

The House of Lords held that the 1941 Decree could not be recognized, neither under British public policy nor under German constitutional law, as a result of which Oppenheimer remained a German citizen until the entry into force of the new German Basic Law in 1949, when he lost his nationality through failing to "re-apply" for it until the 1970s.[124] Therefore, curiously enough, the instrument that reestablished rights for those rendered stateless was the very same instrument that caused Mr. Oppenheimer's loss of rights. According to this interpretation, then, Oppenheimer was a German citizen between 1941 and 1948 according to Britain, while not a German citizen according to Germany. Furthermore, he retroactively became a German national for the years between

118. *Id.*

119. Reichsbürgergesetz 11. Verordnung [Eleventh Decree to the Law of Citizenship], Nov. 25, 1941, RGBl I at 722, no. 133 (Ger.), *as translated* and cited in *Oppenheimer* [1976] AC at 269; *see also* Lester N. Salwin, *Uncertain Nationality Status of German Refugees*, 30 Minn. L. Rev. 372, 374 n.7 (1946) (providing an alternate translation).

120. Staatsangehörigkeitsgesetz [StAG] [German Nationality Act], July 22, 1913, RGBl I at 583, § 17(2) & § 25 (Ger.) (as in force between 1913 and 1949); *see also Verfassungen Deutschlands*, Verfassungen der Welt, https://www.verfassungen.de/de67-18/rustag13.htm [https://perma.cc/6SNL-BVWN] (last visited Nov. 12, 2024) (providing a historical comparison of different German nationality laws between 1913 and 2017).

121. *See Oppenheimer* [1976] AC at 265–66.

122. *Id.* at 269–70.

123. *See* F. A. Mann, *The Present Validity of Nazi Nationality Laws*, 89 Law Q. Rev. 198–200 (1973).

124. *See Oppenheimer* [1976] AC at 269–75.

1941–1949, in 1949, or at the latest in 1968, after the relevant judgment of the German Constitutional Court.[125] *Oppenheimer v. Cattermole* showcases both the dilemmas of recognition versus non-recognition of denaturalization, as well as the long-term effects of each decision.

C. Attribution of Foreign Nationality as a Tool of Ethnic Cleansing and as Anti-Terrorism

The third way in which Schrödinger's Citizenship operates is to invoke and interpret another state's citizenship laws to determine that a person *already is* the citizen of another state, thereby pushing all obligations of recognition and protection onto the other state in question. This is a favored technique of regimes that wish to get rid of certain minorities by alleging that "in fact" they are the nationals of a neighboring state. Schrödinger's Citizenship thereby becomes a tool for creating or maintaining disempowered minorities and sometimes a precursor of ethnic cleansing via mass expulsion.[126]

Dominicans of Haitian origin have been denied birth certificates and expelled *en masse* from the Dominican Republic: They are held by the state to be Haitian aliens "in transit," even if they have resided in the Dominican Republic for generations.[127] The Dominican position, in essence, is a legalization of Dominican racist attitudes which hold that any Dominicans who are dark-skinned and poor must be Haitians because Dominicans are uniformly light-skinned. In response, the Inter-American Court of Human Rights has affirmed that these people are Dominican citizens under both Dominican law and Article 20 of the American Convention of Human Rights.[128]

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125. Entscheidungen des Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 2 BvR 557/62, Feb. 14, 1968 (Ger.), https://opinioiuris.de/entscheidung/1553 [https://perma.cc/4G5C-TBLV].

126. *Cf.* Meghan M. Garrity, *"Ethnic Cleansing": An Analysis of Conceptual and Empirical Ambiguity*, 138 POL. SCI. Q., 469–70, 486 (2023).

127. Jain, *Manufacturing Statelessness*, *supra* note 40, at 255–58; Tribunal Constitucional [Constitutional Tribunal], Sept. 23, 2013, Judgment No. TC/0168/13 (Dom. Rep.), https://www.tribunalconstitucional.gob.do/consultas/secretar%C3%ADa/sentencias-relevantes/?topic=DERECHO%20A%20LA%20NACIONALIDAD&subtopic=HIJOS%20DE%20EXTRANJEROS%20EN%20TRANSITO%20O%20%20ILEGALES [https://perma.cc/6Q2Z-37FK].

128. *See* LIEW, *supra* note 32, at 32–42; Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 140–41, 152–56 (Sept. 8, 2005); Expelled Dominicans

Jamie Liew, a leading Canadian scholar of immigration law and statelessness, calls this technique, where "[s]tates deem persons citizens (notably of other states) even where there is no legal conferral of such citizenship,"[129] the creation of "ghost citizens." This technique is not only used by states wishing to deport minorities to neighboring states (e.g. Haitian-Dominicans being removed to Haiti, or Rohingyas being forced into Bangladesh[130]), but also by the United Kingdom to get rid of suspected terrorists. The case of Shamima Begum, discussed above,[131] is a prime example. In the *Shamima Begum* case,[132] but also in other cases including Hilal Abdul-Razzaq Ali Al-Jeddah[133] and Minh Quang Pham[134]—all of them suspected terrorists or supporters of terrorism—Schrödinger's Citizenship was a way to denaturalize these people without violating the Convention on the Reduction of Statelessness.

The way to avoid violating the Convention on the Reduction of Statelessness was to invoke their alleged Bangladeshi, Iraqi, and Vietnamese citizenship. In the case of Vietnam and Bangladesh, this also meant directly contravening the declarations on nationality of the governments in question.[135] In this way, the United Kingdom has achieved the dubious distinction of becoming the country that has revoked the greatest number of citizenship rights over the last few years.[136]

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and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 253–61 (Aug. 28, 2014).

129. Liew, *supra* note 32, at 46.

130. *E.g.*, Manby, *supra* note 1, at 21–22.

131. *See supra* notes 17–30 and accompanying text.

132. Grierson, *supra* note 17.

133. Al-Jedda v. Secretary of State for the Home Department [2012] EWCA (Civ) 358, [125]–[129] (Eng.); *see also* Macklin, *supra* note 35, at 235.

134. *G3*, [2017] UKSIAC SC/140/2017, [9]–[93].

135. *Supra* notes 24–30 and accompanying text.

136. Luuk van der Baaren et al., Instrumentalizing Citizenship in the Fight Against Terrorism 10 (2022) ("The United Kingdom: a global leader in the race to the bottom . . . . Since [2006], it is estimated that 175 citizens have been stripped of their nationality on national security grounds."). Lepoutre discusses the increasing trend towards denationalization:

> Data show that there were only a few cases [of denationalization] every year . . . (six in 2011; five in 2012; eight in 2013; four in 2014; four in 2015) until the figures exploded from 14 in 2016 to 104 in 2017. The last figures recently disclosed by the Home Office indicate that 21 individuals were deprived of British citizenship in 2018. Following a Freedom of Information Request that I have lodged, the Home Office has specified that it refuses for now to communicate more recent data . . . .

Schrödinger's Citizenship is therefore a tool for declining protection and responsibility, both for one's own nationals and for foreigners and refugees, in the context of refugee law, enemy aliens law, anti-terrorism, or the creation of statelessness. But why is it so easy to use, and hard to abolish? The next Part will show how nationality law is full of cracks and contradictions, which make the abolishing of Schrödinger's Citizenship very hard.

II. "Then It's All a Reflection of a Reflection?"[137] International and Domestic Laws on Determining Nationality

What is the legal background to Schrödinger's Citizenship? There is an astounding range of national and international laws on the determination and conferral of nationality, and many of them are contradictory. This Part will introduce the international principles and some major types of national laws governing the recognition—and non-recognition—of citizenship.

Schrödinger's Citizenship arises not only from specific, contradictory rules, but also the interplay of analytical principles in public international law, private international law, and domestic constitutional laws on nationality. Public international law has a subtle circularity with regard to domestic law: On the one hand, public international law is created by the practices of states, including their legislative actions, and this is doubly so where the principal rule is the exclusive right of each state to create its own laws on citizenship.[138] On the other hand, public international law is *law* with independent normative force, and conformity with domestic laws can never excuse a violation of international law.[139] Consequently, many disputes in international law hinge on whether a certain domestic law or practice contravenes an international norm or whether

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Jules Lepoutre, *Citizenship Loss and Deprivation in the European Union (27 + 1)* 10 (Eur. U. Inst., Working Paper No. 29, 2020), https://cadmus.eui.eu/bitstream/handle/1814/66958/RSCAS_2020_29.pdf?sequence=4andisAllowed=y#:~:text=The%20six%20main%20categories%20that,acts%3B%20loss%20linked%20to%20family [https://perma.cc/E6S5-TMMW].

137. Michael Ende, The Neverending Story 172 (1979).

138. *See infra* notes 142–47 and accompanying text.

139. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 32, *in* Int'l L. Comm'n, Rep. on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001) ("[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under [international law].").

the alleged international norm is not widespread or binding enough to actually constitute international law.[140]

Private international law also has an important methodological role in these questions. Private international lawyers deal almost entirely with the validity and applicability of foreign laws and have thereby developed numerous doctrines dealing with clashes between different states' domestic laws. Because public international law gives so much latitude to states to determine their own laws regarding nationality, conflicts between different states' nationality laws often arise for, and are solved by, private international lawyers. Furthermore, public international lawyers may also reach for private international legal methods when thinking about conflicts between legal systems, including conflicts between public international law and domestic constitutional laws.

A. Public International Legal Rules on Nationality

1. States' Exclusive Jurisdiction over Nationality

The most fundamental rule of public international law with respect to the recognition of nationality is that it is within the exclusive jurisdiction of each independent state. As early as 1923, the Permanent Court of International Justice's ("PCIJ") advisory opinion held that questions of nationality are solely within the domestic jurisdiction of states.[141] The International Court of Justice ("ICJ") followed this opinion in the *Nottebohm* case in 1955:

> [I]t is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality . . . . Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.[142]

These judicial pronouncements are strengthened by various international treaties, such as the Hague Convention on Nationality, which affirms that "[i]t is for each State to determine under its own law who

140. *See, e.g.*, Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7); North Sea Continental Shelf Case (Ger. v. Neth. & Den.), 1969 I.C.J. 3, at 38–41 (Feb. 20).

141. Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

142. Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6).

are its nationals"[143] and "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State."[144] The fundamental principle of exclusive jurisdiction has also been recognized by the common law, arguably even before it became a rule of international law.[145] Even when judges have held that there are limitations to a state's freedom in certain cases (such as the requirement of a genuine connection between the individual and the state of nationality, articulated in the *Nottebohm* case[146]), these holdings are always prefaced by the principle of exclusive jurisdiction.[147] It is therefore always the starting point, for all international legal analyses of nationality: It is a creation of municipal law, and states have thoroughgoing freedom in allocating and defining their nationalities. A state's exclusive jurisdiction over nationality is therefore fundamental.

2. Limits to Naturalization under International Law

Nevertheless, there are exceptions to the principle of exclusive jurisdiction, and states have rights to refuse to recognize certain naturalizations. The Hague Convention on Nationality includes the caveat that each state's nationality laws "shall be recognised by other states *in so far as it is consistent with* international conventions, international custom, and the principles of law generally recognised with regard to nationality."[148] Similarly, the U.N. International Law Commission ("ILC") has emphasized that "nationality is essentially governed by internal law *within the limits set by international law*."[149]

What are these limits under international law? The oldest such limit is the lack of power by a state to confer nationality on persons who do not wish to be naturalized. The rule that states cannot naturalize foreign residents en masse (without individually considering each case) and

143. Hague Convention on Nationality, *supra* note 41, art. 1; European Convention on Nationality, *supra* note 41, art. 3(1).

144. Hague Convention on Nationality, *supra* note 41, art. 2.

145. Stoeck v. Public Trustee [1920] Ch 67 at 81 (Eng.) ("[w]hether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed.").

146. *See Nottebohm*, 1955 I.C.J. at 23.

147. *See, e.g.*, *id.* at 28; Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 140 (Sept. 8, 2005).

148. Hague Convention on Nationality, *supra* note 41, art. 1 (emphasis added).

149. G.A. Res. 55/153, *supra* note 109, pmbl. (emphasis added).

ex lege (without requiring applications, simply through the automatic application of legislation), stemmed from the desire of Latin American states to incorporate foreign capitalists present on their territory.[150] These foreigners relied on American and European diplomatic protection and the attendant gunboat diplomacy to prevent higher taxes on capital, the expropriation of their assets, and other policies that mixed welfarism with xenophobia.[151] As a result of such protests by European states and the United States, grants of automatic nationality without individual consent became invalid under international law regarding the following classes of persons: those who are not connected to either the territory of the state or to its nationals through family ties; those whose only connection to the state is a shared religion, political opinion, race, or native language; or those whose only connection is having bought real estate on the territory of the state.[152]

Another exception applies to the imposition of nationality by an invading party on the inhabitants of a formerly independent territory following the annexation of such territory.[153] In such cases, the decision by those residents to stay in or leave their homeland can be taken as a decision to accept or decline the nationality of the annexing state.[154]

More broadly, it may be the case that exclusive jurisdiction is limited by the requirement that there be a genuine connection between the individual and the state. The ICJ in the *Nottebohm* case held that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties,"[155] and "the juridical expression of the fact that the individual . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State."[156] If these restrictions are observed, then naturalization may only be "a *translation into juridical terms* of the individual's connection

150. Spiro, *Citizenship Overreach*, *supra* note 33, at 174–76; Alfred M. Boll, Multiple Nationality and International Law, 100–01 (2006).

151. Spiro, *Citizenship Overreach*, *supra* note 33, at 174–76; Christopher A. Casey, Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law 37–40 (2020).

152. Boll, *supra* note 150, at 109.

153. United States *ex rel.* Schwarzkopf v. Uhl, 137 F.2d 898, 900–02 (2d Cir. 1943); United States *ex rel.* D'Esquiva v. Uhl, 137 F.2d 903, 904–06 (2d Cir. 1943).

154. *Schwarzkopf*, 137 F.2d at 900–02; *D'Esquiva*, 137 F.2d at 904–06.

155. *Nottebohm*, 1955 I.C.J. at 23.

156. *Id.*

with the State which has made him its national."[157] There are many types of attachment—place of birth, nationality of parents, long residence, political allegiance, extraordinary services, perhaps even just money—but some attachment must exist.

However, stated in such expansive terms, the requirement of a genuine connection may be overbroad. *Nottebohm*'s holdings have been widely criticized,[158] and the arbitral tribunal in the *Flegenheimer* case opined that "it is doubtful that the International Court of Justice intended to establish a rule of general international law."[159] Certainly, as the ILC considered,

> If the genuine link requirement proposed by Nottebohm was strictly applied, it would exclude millions of persons from the benefit of diplomatic protection. Indeed, in today's world of economic globalization and migration, there are millions of persons who have moved away from their State of nationality . . . or have acquired nationality by birth or descent from States with which they have a tenuous connection.[160]

Even though the breadth and applicability of the genuine link requirement are debatable, the existence of limits to states' freedom to grant or withhold nationality is unquestioned. The principle of exclusive jurisdiction is not without its limits.

3. Human Rights and Obligations to Grant Nationality

Nowadays, most of the limits to states' exclusive jurisdiction are articulated through human rights claims. Certain human rights instruments provide a right to a nationality: a general right according to the Universal

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157. *Id.* (emphasis added).

158. Audrey Macklin, *Is It Time to Retire Nottebohm?*, 111 AJIL UNBOUND 492, 492 (2018); Peter J. Spiro, *Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion* 9–16 (Investment Migration Council, Working Paper No. 2019/1, 2019), https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf [https://perma.cc/WX9U-PNFF] ("Among legal scholars who take *Nottebohm* seriously as jurisprudence, there is strong consensus that Nottebohm was wrong then, and may be even more wrong now."); Rayner Thwaites, *The Life and Times of the Genuine Link*, 49 VIC. U. WELLINGTON L. REV. 645, 661–64 (2018). SHAW, *supra* note 108, at 616.

159. Flegenheimer Claim (It. v. U.S.), 14 R.I.A.A. 327, 376 (It.–U.S. Conciliation Comm'n 1958); *see also* Case C-369/90, Mario Vicente Micheletti v. Delegación del Gobierno en Cantabria, ¶10–12, 1992 E.C.R. I-4239, I-4242, I-4255, I-4263.

160. *ILC Commentary on the Draft Articles on Diplomatic Protection*, *in* Int'l L. Comm'n, Rep. on the Work of Its Fifty-Eight Session, U.N. Doc. A/61/10 (2013) ¶ 5 (2006).

Declaration of Human Rights ("UDHR")[161] and the American Convention on Human Rights ("ACHR")[162] as well as a right limited to newborn children according to the Covenant on Civil and Political Rights[163] and the Convention on the Rights of the Child.[164] The UDHR and certain regional human rights treaties add the right not to be deprived of one's nationality arbitrarily,[165] and a number of conventions add the right to acquire the nationality of one's place of birth if no other nationalities are available.[166]

If having a nationality is a human right, then denaturalization is ostensibly a violation of human rights, particularly if it results in statelessness or is done in an arbitrary, discriminative, disproportionate, or otherwise unjust manner.[167]

But not all denaturalization seems to be contrary to international law. The Convention on the Reduction of Statelessness (itself aiming for a *reduction* of, not an end to or outlawing of statelessness) generally prohibits denaturalization if it results in statelessness.[168] However, it allows for exceptions in the case of nationality acquired by misrepresentation or fraud,[169] long residence abroad,[170] or declarations of allegiance made to other states.[171] Additionally, denaturalization is unfortunately widely practiced by a significant number of states,[172] which makes the lack of acceptability of denaturalization under customary international law hard to argue for.

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161. *See* UDHR, *supra* note 43, art. 15(1) ("[e]veryone has the right to a nationality").

162. American Convention on Human Rights: Pact of San Jose, Costa Rica art. 20(1), Nov. 22, 1969, 1144 U.N.T.S. 17955 [hereinafter ACHR].

163. ICCPR, *supra* note 43, art. 24(3) ("[e]very child has the right to acquire a nationality").

164. U.N. Convention on the Rights of the Child, *supra* note 43, art. 7(1) ("[t]he child shall be registered immediately after birth and shall have . . . the right to acquire a nationality").

165. UDHR, *supra* note 43, art. 15(2); ACHR, *supra* note 162, art. 20(3); European Convention on Nationality, *supra* note 41, arts. 4(c), 7.

166. ACHR, *supra* note 162, art. 20(2); European Convention on Nationality, *supra* note 41, art. 6(2); Convention on the Reduction of Stateless, *supra* note 21, arts. 1–2.

167. Human Rights Council Res. 7/10, U.N. Doc. A/7/10, ¶ 1–3, (Mar. 27, 2008).

168. Convention on the Reduction of Statelessness, *supra* note 21, art. 8(1).

169. *Id.* art. 8(2)(b).

170. *Id.* arts. 7(4), 8(2)(a).

171. *Id.* art. 8(3)(a)–(b).

172. *See* VAN DER BAAREN, *supra* note 136, at 9 (regional comparisons).

Human rights law has also attempted to grant rights that are comparable to citizenship, even in the absence of citizenship. In other words, it has attempted to expand the scope of rights that are due to all humans everywhere regardless of nationality or even statelessness, and ensure that fewer rights are tied to any sort of formal status. This is particularly evident in the scope that the U.N. Human Rights Committee has given to the phrase, "the right to . . . return to his country," used in Article 13(2) of the UDHR and Article 12(4) of the ICCPR. The Committee has stated, both in General Comment no. 27 on the freedom of movement[173] and in individual communications,[174] that "one's own country" is a broader concept than nationality, and it includes persons who are de jure aliens but have special ties to the country in question, including stateless persons and other long-term residents of a country without the possibility to naturalize. Rights, including those traditionally only granted to nationals, can therefore attach to the mere fact of being present in a territory. The practice of the U.N. Human Rights Committee shows with particular force how strongly human rights lawyers resist acquiescing to the exclusive jurisdiction of states, if that would result in a weakening of rights protections for vulnerable persons.

B. The Relevance of Private International Law for the International Law of Nationality

1. The "Public Law Taboo" and the Act of State Doctrine

As discussed above,[175] private international law is not directly relevant to determinations of nationality under international law or domestic law, but it does provide maxims and rules that are relevant to the force and applicability of foreign laws in general. Some of the relevant private international legal doctrines are the ones that aim to keep private international law *private*. Judges should not use their powers to pass judgments over foreign sovereigns and their laws, while adjudicating private law cases. These doctrines, notably the "public law taboo" and the act of state doctrine, thereby

173. Human Rts. Commn., General Comment no. 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9, ¶ 20 (1999).

174. *E.g.*, Elmi v. Canada, No. CCPR/C/136/D/3649/2019, Decision, U.N. Human Rts. Comm., at 11, ¶ 8.3 (Nov. 1, 2021); Warsame v. Canada, No. CCPR/C/102/D/1959/2010, Decision, U.N. Human Rts. Comm., ¶¶ 8.4, 8.5 (July 21, 2011); Nystrom v. Australia, No. CCPR/C/102/D/1557/2007, Decision, U.N. Human Rts. Comm., ¶¶ 7.4, 7.5 (July 18, 2011).

175. See *supra* Part II.

reinforce the exclusivity of domestic jurisdiction. However, there are limits to these doctrines as well, including human rights and public policy.

The public law taboo, as some scholars have put it,[176] states that "there exists a 'class of actions which, by the law of nations, are exclusively assigned to their domestic forum' and which therefore cannot be brought in another state without infringing on the other state's sovereign rights."[177] The historical core of the public law taboo are foreign criminal laws ("The Courts of no country execute the penal laws of another . . . ."[178]) and foreign revenue laws ("For no country ever takes notice of the revenue laws of another"[179]). The principle of disregarding foreign public laws has nevertheless been applied "not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary violations of statutes . . . ."[180] A range of cases has also applied the public law taboo to "compulsory contributions to national health insurance schemes, export prohibitions, currency exchange controls, and securities regulations."[181]

This has led to a view that penal and revenue laws are part of a wider "category of laws which will not be enforced because they involve the exercise or assertion of a sovereign right, or seek to enforce governmental interests,"[182] beyond its territory.[183] Currently this seems to be a minority view.[184] Nevertheless, if the reason for the public law taboo is truly that "a class of actions . . . are exclusively assigned to their domestic forum,"[185] then questions of nationality must surely be included in that class of actions.

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176. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction, in* 163 Recueil des Cours 311, 322–26 (1979-II); *see also* Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Law*, 35 Stan. J. Int'l L. 255 (1999); William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161 (2002).

177. Friedrich A. Mann, *The International Enforcement of Public Right*, 19 N.Y.U. J. Int'l L. & Pol. 603, 608 (1987) (quoting Huntington v. Attrill [1893] AC 150, 156 (PC) (appeal taken from Ont.)).

178. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

179. Holman v. Johnson (1775) 98 Eng. Rep. 1120, 1121.

180. Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 290 (1888).

181. Mann, *supra* note 177, at 605.

182. Islamic Republic of Iran v. The Barakat Galleries Ltd [2007] EWCA (Civ) 1374 [126] (Eng.); *see also* Pippa Rogerson, Collier's Conflicts of Laws 429–31 (4th ed. 2013).

183. *See also* Mann, *supra* note 177, at 603.

184. *E.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413–14 (1964).

185. *Huntington*, [1893] AC at 156.

The public law taboo's sister doctrine, the act of state doctrine, holds in a similar way that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[186] The traditional rule was quite absolute: "[W]hether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, affected by virtue of his Sovereign authority abroad."[187]

This stance has eroded somewhat in recent decades. The Supreme Court of Canada has even stated that the act of state doctrine is not part of the common law (in Canada), and courts must deal "with the enforcement of foreign laws according to ordinary private international law principles."[188] Similarly, the Supreme Court of the United States has also held that "[public] international law does not require application of the [act of state] doctrine,"[189] and the Supreme Court of the United Kingdom agreed that "the foreign act of state doctrine is at best permitted by [public] international law."[190]

The hesitancy to acknowledge foreign laws in domestic courts stems from situations where those foreign laws are clearly contrary to international human rights. As the English Court of Appeals for England and Wales has written, "the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights."[191] Courts have also reserved the right to deny acknowledgement to judicial acts[192] and to state actions of a commercial nature.[193]

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186. Underhill v. Hernandez, 168 U.S. 250, 252 (1897); R. v. Bow Street Metropolitan Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No. 3) [2000] 1 AC (HL) 147, 269 (appeal taken from Eng.).

187. Duke of Brunswick v. King of Hanover [1848] 9 Eng. Rep. 993 (HL) 998–99 (appeal taken from Eng.).

188. Nevsun Resources Ltd. v. Araya, [2020] 1 S.C.R. 5, para. 45 (Can.).

189. *Banco Nacional de Cuba*, 376 U.S. at 421.

190. Belhaj v. Straw [2017] UKSC 3, [200].

191. Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2) [2012] EWCA (Civ) 855 [69] (Eng.).

192. *Id.* at [87], [90].

193. *Id.* at [92]–[94]; *see also* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 248–51 (2d Cir. 1947); *Oppenheimer*, [1976] AC at 278; Kuwait Airways

However, even in Canada, the Supreme Court still affirmed that Canadian courts must act with deference and "[only] decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law."[194] Most if not all foreign legislation on nationality is therefore entitled to respect. Here too, we encounter a strongly constitutive, sovereignty-affirming stance.

2. *Foreign Law as Fact and Public Policy*

The principal contribution that private international law makes to the question of validity and acceptability of foreign laws is in answering the fundamental methodological question of how one ascertains what the foreign laws on nationality actually hold. "The general rule of English private international law, that foreign law is in our Courts a question of fact, is fundamental . . . ."[195] This means that:

> [T]he material proposition of foreign law must be proved by a duly qualified expert in the law of the foreign country . . . . The translation [must] convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it if it applied correctly the law of that country to the questions under investigation by the English Court.[196]

The limits to this doctrine (as well as to the act of state doctrine) is public policy: States can deny recognition to foreign nationality laws if such laws are "manifestly incompatible with the public policy ('ordre public') of the forum."[197] The public policy exception "is not only ubiquitous, but also a fundamentally important element of modern private international law. [It is] a 'safety net' to choice-of-law rules and rules governing the recognition and enforcement of foreign judgments . . . ."[198]

Corp. v. Iraqi Airways Co. (Nos. 4 and 5) [2002] UKHL 19, [2002] 2 AC 883, para. 18 (appeal taken from Eng.).

194. *See Kuwait Airways Corp.*, [2002] AC at 883.

195. A/S Tallinna Laevauhisus and Others v. Estonian Estate Steamship Line and Another [1946] 80 Lloyd's List LR 99 at 107 (Eng.).

196. *Id.* at 107–08.

197. Consolidated Version of the Convention on the Law Applicable to Contractual Obligations 98/C, art. 16, 1998 O.J. (C 27) 40.

198. Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. Priv. Int'l L. 201, 201–02 (2008).

The applicability of public policy rules to foreign nationality law is nevertheless limited. We have mentioned its application in *Oppenheimer v. Cattermole*,[199] wherein Lord Chelsea argued that "[t]o my mind a law of this sort[200] constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."[201] However, the U.S. Court of Appeals for the Second Circuit, in a similar case involving a German Jewish refugee, disagreed: "There is no public policy of this country to preclude an American court from recognizing the power of Germany to disclaim Schwarzkopf as a German citizen."[202] Interestingly enough, the Israeli Supreme Court in 1954 also decided to give legal effect to the Nazi Decree of 1941, because the alternative—to establish that an Israeli citizen was also the citizen of Nazi Germany—seemed even more odious to the court.[203]

C. The Range of Domestic Laws on Nationality

International law states that each country has exclusive jurisdiction over nationality, "in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."[204] However, the international customary rules and generally recognized principles are themselves set by states, usually through their domestic laws. To understand how far exclusive jurisdiction extends, it is imperative to look at some of the accepted ways in which states actually confer nationality. It is here that the contradictions between different principles are visible most clearly.

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199. *Oppenheimer*, [1976] AC at 269–75.

200. *See, e.g.*, Eleventh Decree to the Law of Citizenship, *supra* note 119 (footnote added by author).

201. *Oppenheimer*, [1976] AC at 278.

202. United States *ex rel.* Schwarzkopf v. Uhl, 137 F.2d 898, 903 (2d Cir. 1943). Lord Pearson in *Oppenheimer* also dissented:

> When… some legislative or executive act of [a wicked] government, however unjust and discriminatory and unfair, has changed the status of an individual by depriving him of his nationality of that country, he does in my opinion effectively cease to be a national of that country and becomes a stateless person . . . I do not see that the courts of this country would have had any jurisdiction to restore to the person concerned his lost nationality of the foreign country.

Oppenheimer, [1976] AC at 278.

203. Casperius v. Casperius, 28 I.L.R. 197–98 (Sup. Ct. 1954) (Isr.).

204. Hague Convention on Nationality, *supra* note 41, art. 1.

1. "Ordinary" Naturalization Through Immigration

Liberal democratic states, especially those that welcome large numbers of immigrants, usually have orderly and predictable laws on naturalizing them, and they grant or withhold citizenship in ways that conform to the rule of law. Liav Orgad has observed that "[l]iberal democracies are citizen makers . . . . [T]he ultimate goal of the naturalization process is to 'liberate' the illiberal and channel immigrants into the dominant customs, beliefs, and values of the dominant majority . . . ."[205] If Orgad is correct about the importance of creating new liberal identities to liberal democracies,[206] then immigrants have to experience its reliability and stability during the course of naturalization, in order to believe in and uphold the rule of law. Generally, these include having lawful immigrant status for a number of years; the lack of criminal convictions; the ability to financially maintain themselves; knowledge of the national language and key aspects of its culture; and an oath of allegiance.[207]

2. Naturalization as an Extralegal Act

Liberal democracies that have clear laws on naturalization are not that common, however. At the opposite end of the spectrum lie citizenship regimes which eschew any enforceable legal rules on how to acquire nationality. Through the lack of precise, intelligible, and enforceable regulations, these states avoid all obligations to the grant or removal of nationality.

For example, while researching naturalization policies in the United Arab Emirates ("UAE"), Noora Lori was repeatedly told that "there are no lawyers in the UAE working in the area of citizenship acquisition as the Department of Immigration and Naturalization has the sole discretion regarding this issue . . . . [They can accept or reject] applications

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205. Liav Orgad, The Cultural Defense of Nations: A Liberal Theory of Majority Rights 1 (2015).

206. There is reason to be more precise here: Many liberal democracies, especially in East Asia, reject immigration and naturalization in general. It is the American and Australasian settler states in particular that are "citizen makers" and have long-standing traditions of integrating newcomers. *See* Péter D. Szigeti, *No Country for Old Men: Restrictions on the Immigration of Elderly Family Members*, 68 McGill L.J. 1, 6–12 (2023) [hereinafter Szigeti, *No Country for Old Men*]; Catherine Dauvergne, The New Politics of Immigration and the End of Settler Societies 10–28 (2016).

207. *E.g.*, Immigration and Nationality Act, 8 U.S.C. §§ 1423–1424, 1427, 1448; Canadian Citizenship Act, R.S.C. 1985, c C-29; British Nationality Act 1981, c. 61, § 42(1), sch. 1, sch. 5; *Australian Citizenship Act 2007*, s 21.

without explanations as the criteria are only known to them."[208] A "prominent Emirati lawyer and activist"[209] argued that "[e]ach individual has to be individually assessed for their loyalty, patriotism, and benefit or threat to the society [and] that the criteria for selection and evaluation had to be secretive because naturalization was essentially an issue of 'national security.'"[210]

As a result, naturalization in the UAE is more of a theoretical possibility,[211] or perhaps not even that: Naturalized citizens have very few rights compared to Emirati citizens by birth. They "can never be appointed to office, and they may also have their status revoked if they are considered to be a security threat."[212] What's more, "the children of a naturalized citizen are naturalized citizens (*mutajannasīn*) in turn, and so on, presumably through the generations. They never become fully Emirati."[213] And even this pseudo-naturalization is close to impossible:

> The written law states that this process takes seven years, meanwhile in interviews civil servants acknowledge that the minimum is actually thirty years of residency in the same emirate, and yet interviews with those undergoing the process make it clear that many have transgressed this thirty-year threshold and continued to wait for citizenship.[214]

In other states, the laws are so general to the point of making actual criteria for acquiring nationality impossible to know. Article 7 of the Nationality Law of the People's Republic of China states that "foreign nationals or stateless persons who are willing to abide by China's Constitution and laws . . . may be naturalized upon approval of their applications," if they fulfill one of three general criteria: They are close relatives of Chinese nationals, they have settled in China, or "they have other legitimate reasons."[215] The broad wording and vague criteria may be

208. Noora Lori, Offshore Citizens: Permanent Temporary Status in the Gulf 129 (2019).

209. *Id.*

210. *Id.* at 130.

211. Federal Law Concerning Nationality, Passports and Amendments Thereof, 1972, art. 7–13 (Act No. 17/1972) (UAE).

212. Lori, *supra* note 208, at 8.

213. *Id.* at 8 (quoting Paul Dresch et al., Monarchies and Nations: Globalization and Identity in the Arab States of the Gulf 143 (2005)).

214. Lori, *supra* note 208, at 27.

215. Zhonghua Renming Guoji Fa (中华人民共和国国籍法) [Nationality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l

taken as showing legislative intent for quick and simple naturalizations for settled foreigners, but in fact, the opposite is true.[216] According to The Economist's survey of the 2010 census data, at that time there were a total of 1448 naturalized citizens living in China—out of one million legal foreign residents and a total population of 1.4 billion.[217]

The wholly discretionary aspect of naturalization exists in Western, ostensibly democratic states as well. The Hungarian Citizenship Act pointedly says that "foreign nationals *may* be naturalized after submitting a request"[218] and fulfilling numerous criteria, including three to eight years of lawful residence in Hungary, knowledge of constitutional principles and the Hungarian language, financial security, lack of criminal convictions, ongoing criminal procedures, and so on.[219] Consequently, the same Act states that "the President of the Republic decides on requests of naturalization, based on the Minister's proposal"[220] without mentioning any criteria or standards. This is in marked contrast with those persons whose citizenship was stripped under the Communist regime, between 1948 and 1990, who "*shall* acquire citizenship through a declaration addressed to the President of the Republic, on the date of the declaration."[221]

Similar unlimited and discretionary powers exist in settler-immigrant states as well, alongside the regular naturalization process of settlement, test-taking, and oath-giving. Most democratic states' citizenship acts include provisions for the immediate grant of citizenship for either

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People's Cong., Sept. 10, 1980), art. 7, http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384056.htm [https://perma.cc/4XYA-77GH] (China); *see also* George Ginsburgs, *The 1980 Nationality Law of the People's Republic of China*, 30 Am. J. Comp. L. 459, 479–80 (1982).

216. Hyun Choe, National Identity and Citizenship in China and Korea 118 (2003) (Ph.D. dissertation, University of California Irvine) (on file with the University of California Irvine).

217. *The Upper Han*, The Economist (Nov. 19, 2016), https://www.economist.com/briefing/2016/11/19/the-upper-han [https://perma.cc/VRN4-KX8Q]; Frank Bickenbach & Wan-Hsin Liu, *Goodbye China: What Do Fewer Foreigners Mean for Multinationals and the Chinese Economy?*, 57 Intereconomics Rev. Eur. Econ. Pol'y 306, 306 (2022); *see also* Eric Liu, *Why I Just Can't Become Chinese*, Wall St. J., Aug. 29, 2014, https://www.wsj.com/articles/why-i-just-cant-become-chinese-1409333549 [https://perma.cc/8LBH-N6HT].

218. 1993. évi LV. törvény a magyar állampolgárságról (Act LV of 1993 on Hungarian Citizenship) § 4(1) (Hung.) (emphasis added).

219. *Id.*

220. *Id.* § 6(1) (author's translation).

221. *Id.* § 5/A(1)(a) (author's translation, emphasis added).

exceptional hardship,[222] exceptional services to the country in question,[223] or both.[224]

3. Citizenship as a Commodity

While many states only offer naturalization as an exceptional and discretionary gift, many others have turned citizenship into a commodity. The commoditization of citizenship not only means that it can be bought for money, with minimal or even no residency requirements,[225] or that such citizenship is shorn of its emotional attachments and traditional obligations,[226] but also that it is advertised at trade shows and events,[227] it is compared in its value to other similar "products,"[228] and of course that it must be available as of right, upon fulfillment of the advertised conditions.

As Allison Christians has established, there are more than fifty states worldwide which offer some kind of residence or citizenship for sale option.[229] These national policies are quite heterogeneous: Some of them offer only permanent resident status, while others grant citizenship outright, with very short waiting periods. Some of them ask for cash paid straight into the state budget, others ask for a low-interest loan of sorts, by requiring the purchase of government bonds, and others still demand the investment of a high sum (often in real estate) or the creation of a certain number of jobs.[230] Prices range from rock-bottom (around $5000 in Panama or Paraguay) through affordable for the global middle class

222. *See* British Nationality Act 1981, c. 61, § 4L.

223. 8 U.S.C. § 1427(f)(1).

224. Canadian Citizenship Act, R.S.C. 1985, c C-29, § 5(4).

225. Christians, *supra* note 16, at 58–61.

226. Joppke, *Inevitable Lightening*, *supra* note 92, at 15–19.

227. SURAK, GOLDEN PASSPORT, *supra* note 16, at 1–4; CBC/Radio-Canada, *Enquête – Operation Mr. Chen: The Hidden Face of Quebec Golden Visas*, YOUTUBE (Sept. 20, 2018), https://www.youtube.com/watch?v=j_4da81VH1U [https://perma.cc/V6QJ-V3NU].

228. *See generally* DIMITRY KOCHENOV & JUSTIN LINDEBOOM, KÄLIN AND KOCHENOV'S QUALITY OF NATIONALITY INDEX: AN OBJECTIVE RANKING OF THE NATIONALITIES OF THE WORLD (2020); JELENA DŽANKIĆ, THE GLOBAL MARKET FOR INVESTOR CITIZENSHIP 91–135 (2019).

229. *See* Naomi Fowler, *The Price of Entry: Residence and Citizenship By Investment Around the World*, TAX JUST. NETWORK (May 23, 2017), https://taxjustice.net/2017/05/23/price-entry-residence-citizenship-investment-around-world/ [https://perma.cc/C4ZC-3G7Y].

230. Christians, *supra* note 16, at 58.

(around $100,000 in Cyprus) to obtainable only for the super-rich (above $1 million in Malta or Germany).[231]

Many of these programs are at heart classic immigration policies, which expect applicants to settle in the destination country for good, and the price of investment serves only to fast-track the immigration application. This is the case, for example, with the U.S. and (former) Canadian immigrant investor programs.[232] Some of them offer tax shielding of assets, with residency thrown into the program as a plus.[233] These programs can be qualified not as the offer of citizenship as a product, but the offer to establish a "genuine connection" and thereby become a citizen in the long run.

But a certain number of these national programs are "true" citizenship-for-sale policies, which do not require any period of residence in the offering state. The purpose of the transaction is only to gain the passport of the offering state, which will then facilitate travel for the purchasers.[234] Acquiring a second passport is especially useful for wealthy nationals of anti-Western regimes (particularly Iran, China, and Russia) who face serious difficulties in acquiring travel visas to North American and EU states, even for short-term business purposes. These people can travel more easily using Caribbean passports and can use their second passport as a last-ditch "insurance policy" in case they are targeted by their home states.[235]

The different packages of rights being offered and the range of states offering residency and/or citizenship for sale make the "price of entry" quite variable globally. Immigrating to Panama or Paraguay can be done for as little as $5,000 and Thailand's "Elite Easy Access" program is still quite affordable at $15,000.[236] By contrast, the United States' EB-5 investor immigrant visa requires the investment of at least $800,000 within

231. *See supra* notes 224–26 and accompanying text.

232. Trevor Harrison, *Class, Citizenship, and Global Migration: The Case of the Canadian Business Immigration Program, 1978–1992*, 22 CAN. PUB. POL'Y 7, 11–12 (1996) (providing overview of Canada's Business Immigration Program); David Ley, *Seeking* Homo Economicus: *The Canadian State and the Strange Story of the Business Immigration Program*, 93 ANNALS ASS'N AM. GEOGRAPHERS 426, 428–29 (2003) (discussing goals and execution of Canada's Business Immigration Program).

233. Christians, *supra* note 16, at 61–62.

234. Surak, *Millionaire Mobility*, *supra* note 16, at 174–80.

235. *Id.* at 174–78.

236. Christians, *supra* note 16, at 56–57. Prices and programs offered are, of course, subject to change since the publishing of Allison Christians's research in 2017.

the United States,[237] and immigration to the Netherlands, Singapore, New Zealand, or Malta costs more than a million U.S. dollars.[238] Nevertheless, because a set of rights and entitlements is what they offer—travel benefits and the possibility of diplomatic protection above all—reliability and acceptance by all is crucial for the existence of these policies.[239]

To summarize, the fundamental rule that states have exclusive jurisdiction over nationality is often repeated, but not quite true. Human rights considerations limit states' powers to denaturalize their citizens, and to naturalize persons without their consent and initiative. However, the boundaries between acceptable and unlawful citizenship practices are uncertain, and the uncertainty is carried over into private international law doctrines on the lawfulness of recognizing questionable foreign nationality practices. Furthermore, the variety of domestic citizenship policies reflect the breadth of the almost-exclusive jurisdiction that international law grants in this area. As a result, contradictory citizenship policies are almost inevitable, and states can decide strategically whose citizenship they recognize or not recognize. There is a deeper question here, the subject of our next Section: Why are citizenship policies so heterogeneous and contradictory?

III. Citizenship as Declarative and Constitutive

As a result of the dizzying range of norms on citizenship acquisition, it is difficult to see any overarching principle on when or how states should apply each other's nationality laws. Yet, I propose a relatively simple and venerable distinction within legal thought that helps organize such norms: the distinction between declarative and constitutive acts. This Section will outline the distinction, and discuss the merits and drawbacks of both constitutive and declarative citizenship policies.

A. What Are Declarative and Constitutive Acts?

The distinction between declarative and constitutive acts stems from the recognition that some acts of categorization are also *creative*: Not only

237. 8 U.S.C. § 1153(b)(5).

238. Christians, *supra* note 16, at 56–57.

239. Džankić, *supra* note 228, at 117; *see* Luuk van der Baaren, *Investor Citizenship and State Sovereignty in International Law*, *in* Citizenship and Residence Sales: Rethinking the Boundaries of Belonging 109, 115 (Kristin Surak & Dimitry Kochenov eds., 2023).

do they organize actions or norms into pre-existing categories, but they also create new concepts and categories.[240] Declarative acts proclaim the existence of a natural fact whereas constitutive acts create new rules and categories.[241]

Alf Ross's example of a declarative act is that of parking a car:

> Parking a car is a 'natural' activity; by this I mean an activity whose performance is logically independent of any rules governing it. Cars were parked before parking regulations existed, and it would be an obvious absurdity if I said that I could not park my car because of the absence of parking regulations in this town.[242]

More paradigmatic examples of declarative acts may be birth certificates and determinations of death. The law cannot *create* births or deaths; it can only *recognize* them.

By contrast, constitutive rules in the more restrictive sense reflect the "ontological role of rules . . . [that is] the recognition that with rules we can not only command, permit or prohibit but also 'do things'—inspired by the spirit of Austin's work."[243] Constitutive rules demonstrate the power of rules to create institutions and procedures. One of the most common examples is that of games, such as chess. Chess is not only regulated, but *created by* its rules: "The actions of the game [of chess] consist [of] 'moves' which have no meaning or purpose except that they are rules

240. Corrado Roversi, *Constitutive Power*, *in* Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories 163, 164 (Gonzalo Villa-Rosas & Torben Spaak eds., 2023) ("[C]onstitutive rules are not simply stipulative definitions . . . their point is not that of defining a meaning but rather that of creating an artifact's interaction plan.").

241. *See also* Tecla Mazzarese, *Towards the Semantics of "Constitutive" in Judicial Reasoning*, 12 Ratio Juris 252, 254–56 (1996); Carlos E. Alchourrón & Eugenio Bulygin, Normative Systems 148 (1971); Roversi *supra* note 240, at 163 (Corrado Roversi traces the distinction to the work of "the Polish legal philosopher Czeslaw Znamieroswki and later independently by John Rawls"); *see generally* Herbert L. A. Hart, The Concept of Law 33 (2d ed. 1994) (Hart's concept of "power-conferring rules").

242. Alf Ross, Directives and Norms 53 (1968).

243. Gonzalo Villa-Rosas & Torben Spaak, *Introduction* to Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories 1, 10 (Gonzalo Villa-Rosas & Torben Spaak eds., 2023). This is a reference to ideas introduced in John L. Austin, How to Do Things with Words (J. O. Urmson & Marina Sbisà eds., 2d ed. 1975).

of chess."[244] This also means that strictly speaking, they cannot be violated: "A player may of course cheat by making an irregular move. But in that case what is going on is not, strictly speaking, chess. Cheating in chess requires passing off, undetected, an action as chess that is not really so."[245]

The distinction between declarative and constitutive acts is important when thinking about the power of the law to change social organization, but it is not always clear-cut. Firstly, the law can refuse to recognize certain facts, or command people to recognize statements that are patently false: These are called legal fictions, and are exceedingly common in every legal system.[246] Secondly, our best (scientific) understanding of many everyday phenomena is contested and uncertain. As a consequence, declaratory judgments must choose between several types of factual understandings, which necessarily empowers one scientific theory over others. Questions of whether life begins at birth or at conception; whether parenthood is a question of genetic inheritance or social conventions around caretaking; or whether death happens with the cessation of brain functions, cardiopulmonary activity, or the decomposition of the body, are all typical of the uncertainties of declarative acts.[247] Thirdly, many complex institutions, such as the nation-state, are the result of both constitutive acts and the declarative reflections of inhabitants' beliefs about the kind of community that they live in. As a result, the feeling of naturalness attaches not only to declarative acts that proclaim and recognize true natural facts, but also to constitutive acts that have become so entrenched and fundamental to our everyday life, that we start to see it as "natural." Therefore, the answer to the important question, whether the recognition of statehood in international law is declarative or constitutive, can only be "both" or "it depends."[248]

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244. Josep Joan Moreso, *Institutions and Constitutive Rules*, *in* LEGAL POWER AND LEGAL COMPETENCE: MEANING, NORMATIVITY, OFFICIALS AND THEORIES 143, 145 (Gonzalo Villa-Rosas & Torben Spaak eds., 2023); ROSS, *supra* note 242, at 53.

245. ROSS, *supra* note 242, at 54.

246. *See generally, e.g.*, LEGAL FICTIONS IN THEORY AND PRACTICE (Maksymilian Del Mar & William Twining eds., 2015).

247. On the definitions of death, *see, e.g.*, RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 34–39 (Yale University Press, 2010).

248. *E.g.*, Michael Rossi, *The Durability of Parastates: Declarative Statehood in the Absence of Constitutive Sovereignty*, 48 NAT'YS PAPERS 24, 25–29 (2020).

B. Citizenship as Declarative and/or Constitutive

In most cases, the question of whether nationality is declarative or constitutive need not be decided, because the declarative and constitutive aspects build upon each other. Just as fatherhood and motherhood are typically declarative relationships, but the constitutive alternative of adoption also exists, the "natural" options of birthright citizenship and the constitutive alternative of naturalization also coexist.[249] Nationality can be both constitutive and declarative, and in most cases the result is the same.

To understand why the difference between declarative and constitutive acts is negligible in most cases, consider the example of an "all-American" family of legal philosophers. In our imaginary family, neither of the parents' ancestors are immigrants to at least the third generation, and in fact both of them can trace at least some of their ancestors to the Mayflower. The parents have visited other states, but not since the pregnancy and birth of their child. Let us also imagine that one of the parents is a firm believer in citizenship as a constitutive concept. They like to cite Justice Hugo Black's dictum: "The United States is entirely a creature of the Constitution. Its power and authority have no other source."[250] This parent argues that their child is American because of the operation of American laws and the Constitution, and if the laws were modified, the child could easily lose their Americanness. The other parent believes in citizenship as a declarative act: Their child is American because of her birth and typically American upbringing, and any changes to the laws or even the Constitution would not change her Americanness. Just as apple pie does not need laws to be perceived as all-American, nor can children growing up in the United States be deprived of their natural nationality.

The crucial aspect of this discussion is that with regard to this specific imaginary family, it is completely pointless. The child is American regardless of our position as a constitutivist or a declarativist. An opposite conclusion between the two viewpoints could only arise if the child were to be denaturalized by U.S. authorities, which would almost certainly be

249. *Cf.* Sharryn J. Aiken et al., Immigration and Refugee Law: Cases, Materials and Commentary 685 (2d ed. 2015) ("The relationship between family and nation is rich in complementarity and contradiction. The family is often invoked as the foundation of the nation, and also as a metaphor for the nation itself.").

250. Reid v. Covert, 354 U.S. 1, 5–6 (1957).

unconstitutional.[251] The opposition between constitutive and declarative approaches only has weight in unusual cases, such as the Dreamers (that is, undocumented immigrants who were brought to the United States as small children, but raised as Americans), where the legal facts of birthright citizenship and the social understanding of belonging through the place of upbringing and community diverge.

The latency of the divergence between declarative and constitutive aspects is not unique to citizenship. As Duncan Kennedy has argued, it is a fundamental aspect of rights discourse, and indeed one of the reasons why rights discourse is so attractive to so many political causes:

> Constitutional rights *straddle.* They are both legal rights embedded and formed by legal argumentative practice (legal rules) and entities that "exist" prior to and outside the Constitution . . . . The advocates and judges doing constitutional rights argument exploit *both* the notion that adjudication proceeds according to a highly determinate, specifically legal method of interpretive fidelity, and the notion that the outside right is a universal, factoid entity from whose existence we can make powerful inferences. Their goal is to make the apparent objectivity of rights theory dovetail perfectly with the apparent objectivity of judicial method.[252]

The legal and political practice of "dovetailing" rights claims as both created by positive law *and* reflective of an eternal social, moral or biological truth can break down, however. Let us look at the declarative side first: What would happen if we try to view citizenship as *only* declarative? The declarative aspect of citizenship is especially strong in and for ethnonationalist states, where the state is supposed to reflect and give legal form to a pre-existing ethno-cultural community, instead of conferring an identity of its own making.[253] Birthright citizenship is after all a

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251. *See* Weil, *supra* note 92, at 166–70; Peter J. Spiro, *Expatriating Terrorists*, 82 Fordham L. Rev. 2169, 2171–76 (2014).

252. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies, in* Left Legalism/Left Critique 180, 187 (Wendy Brown et al. eds., 2002) (emphases in the original).

253. *Cf.* Rogers Brubaker, Citizenship and Nationhood in France and Germany 1 (1992) ("Since national feeling developed before the nation-state, the German idea of the nation was not originally political, nor was it linked to the abstract idea of citizenship. This prepolitical German nation, this nation in search of a state, was conceived not as the bearer of universal political values, but as an organic cultural, linguistic, or racial community—as an irreducibly particular *Volksgemeinschaft.*").

universal norm—one of the only ones, in fact—where variation only exists in whether nationality is acquired through birth within the territory of the state in question (*ius soli*), birth to existing citizens (*ius sanguinis*), or both.[254] The "naturalness" of birthright citizenship is reflected in legal expressions, such as *natural allegiance*, the *natural born citizen,* and *naturalization*.[255] Non-recognition of this entitlement to citizenship is not only unfair, but factually *wrong*. Additionally, a declarative-only view of citizenship would make denaturalization not only unlawful, but fundamentally impossible: an immoral legal fiction, a negation of a person's being that has to be rectified at some point (perhaps even posthumously). This makes declarative-only citizenship attractive for human rights activists as well, where "one's own country" is determined by the same natural phenomena of birth and upbringing; or in the cosmopolitan conception of "ius nexi," which aims to allocate status based on lived experiences in a specific social setting.[256]

Curiously enough, therefore, viewing citizenship as a declarative act brings together ethnonationalists with human rights activists. As noted above, the U.N. Human Rights Committee has used the term "his own country" as a way of granting rights that are usually reserved for citizens, to aliens who have been born and raised in the country in question:[257] the ultimate naturalistic link to a state. Ethnonationalists have long stressed the connections of "blood and soil" to argue for national allegiance and identity as paramount to any other type of human connection. Human rights activists use the same type of connection to insist on citizenship rights to people who have always and only lived in one state. As Jamie Liew articulates the classic human rights claim: "There is an urgency to understanding how persons are rendered stateless, especially *in their own country,*"[258] and "[t]here is an inherent belief that states will be assumed to

254. Scott Titshaw, *Inheriting Citizenship*, 58 STAN. J. INT'L L. 1, 3 (2022) ("In fact, citizens of virtually every nation on earth can transmit citizenship status to their children."); *see also id*. at 17–37.

255. *Cf.* GEORGE MIKES, HOW TO BE AN ALIEN 37 (2000) (highlighting George Mikes's sarcasm: "The verb to naturalize shows that you must become British to be a natural Person. Look at the word 'natural' in a dictionary. It means 'real.' So if you are not naturalized, you are not a real person."); *see also* BLACKSTONE, *supra* note 84.

256. AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 164–70 (2009) [hereinafter SHACHAR, BIRTHRIGHT LOTTERY].

257. See *supra* notes 161–62 and accompanying text.

258. LIEW, *supra* note 32, at 11 (emphasis added).

act in bona fide ways to ensure *its members* will be conferred citizenship."[259] Clearly the members of a state here does not mean its citizens, but its inhabitants who should be citizens.

However, viewing citizenship as a purely natural fact has consequences which make it unattractive and even impossible to sustain in today's world. To begin with, this view makes emigration and naturalization elsewhere immoral, and perhaps similarly impossible: also a negation of one's self, and a betrayal of one's birth community. Arguably, a purely declarative view would revive the doctrine of perpetual allegiance.[260] The non-acceptance of naturalization would make nations based on a history of immigration (including the United States, Canada, Australia, or New Zealand) impossible. Secondly, the naturalistic view of birthright citizenship breaks down at the margins, precisely because it is based on the "natural" fact of birth. In which country's territory is a person born, if she is born on an aircraft in flight?[261] Who is the parent of a child born using assisted reproduction technologies (if the child is not genetically related to the parent)?[262] In these cases, the concepts of "territory," "birth," and "parentage" have to be re-examined and redefined, leading to somewhat constitutive and metaphysical decisions, by necessity. Finally, citizenship as a natural status fails when a person is born in an unrecognized state or territory, such as Palestine or Western Sahara.[263]

On the other hand, citizenship as a constitutive concept better aligns citizenship as a legal concept, as a status, with the basic rule that citizenship can only exist under the almost unlimited exclusive jurisdiction of specific sovereign states. In addition to the sale of citizenship, other unusual but accepted citizenship policies include naturalizing foreigners who enlist in the armed forces of a country, after a number of years of

259. *Id.* at 16 (emphasis added).

260. *See supra* notes 76–80 and accompanying text.

261. *See, e.g.*, Marina Pitofsky, *At Least Three Babies Have Been Born During U.S. Evacuation Efforts From Afghanistan*, USA TODAY (Aug. 24, 2021), https://www.usatoday.com/story/news/world/2021/08/24/afghanistan-three-babies-born-flee-taliban/5574842001/ [https://perma.cc/7A53-RXZW]; U.S. DEP'T OF STATE, 8 FOREIGN AFFAIRS MANUAL § 101.1–3(b). *But see* Convention on the Reduction of Statelessness, *supra* note 21, art. 3; Canadian Citizenship Act, R.S.C. 1985, c C-29, § 2(2)(a).

262. *See, e.g.*, Titshaw, *supra* note 254, at 12–14; Kandola (Guardian at Law) v. Canada (Minister of Citizenship and Immigr.), [2014] F.C.A. 85; Caron v. Canada (Att'y Gen.), 2020 CanLII 5166 (Can. F.C.).

263. Jain, *Manufacturing Statelessness*, *supra* note 40, at 249, n.75.

service;[264] granting citizenship to foreign athletes so they can represent the naturalizing state in the Olympic Games;[265] or granting citizenship to "heroes" for exceptional acts of service.[266] We must also recognize that citizenship is necessarily a link between an individual and a *state* (not just a community or form of ethnic identity).[267] The holder of the "passport" of an unrecognized entity, such as Sealand,[268] or a self-declared "citizen of the world"[269] with his own homemade passport, has no legally recognized nationality. The absolutely constitutive aspects of citizenship are reflected in the "public law taboo" and the act of state doctrine, in unfettered rights to naturalize persons, and in sales of citizenship.

In the end, both the declarative and the constitutive aspects of citizenship are necessary to understand citizenship as a complex legal institution

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264. Citizenship as a reward for military service has been a U.S. policy since the Revolutionary Wars. *See* Cara Wong & Grace Cho, *Jus Meritum: Citizenship for Service, in* Transforming Politics, Transforming America: The Political and Civic Incorporation of Immigrants in the United States 80–88; (Taeku Lee et al. eds., 2006). France is well-known for having a special branch of its military, the French Foreign Legion, which is only open to foreigners, where three years of meritorious service grant the right to soldiers to naturalize. *See FAQ - Frequently Asked Questions*, Légion Étrangère, https://www.legion-recrute.com/en/faq-frequently-asked-questions [https://perma.cc/UW3U-KNWE].

265. Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 Yale L.J. 2088, 2090–94 (2011).

266. *See, e.g.*, Kim Willsher, *'Spider-man' of Paris to Get French Citizenship After Child Rescue*, The Guardian, (May 29, 2018), https://www.theguardian.com/world/2018/may/28/spider-man-of-paris-to-get-french-citizenship-after-rescuing-child [https://perma.cc/J8TJ-B74Y] (discussing the immediate grant of French citizenship to Mamoudou Gassama, an undocumented Malian immigrant to France who climbed four stories of an apartment building in Paris to rescue a child dangling from one of the balconies).

267. *See also* Hannah Arendt, The Origins of Totalitarianism 290–302 (1973) (discussing how nationality as a link to a particular state cannot be replaced by the protection that human rights purportedly grant to every person by nature of being human) [hereinafter Arendt, Origins of Totalitarianism].

268. James Grimmelmann, *Sealand, HavenCo and the Rule of Law*, 2012 U. Ill. L. Rev. 405, 425, 438, 442–44, 472–73; Dylan Taylor-Lehman, Sealand: The True Story of the World's Most Stubborn Micronation and Its Eccentric Royal Family 136–47 (2020).

269. *See, e.g.*, Atossa Araxa Abrahamian, The Cosmopolites: The Coming of the Global Citizen 126 (2015); Garry Davis, My Country is the World: The Adventures of a World Citizen 1 (1962); Peter D. Szigeti, *The Kosmos of Cosmopolitanism: Geography and Grounding, in* Re-Grounding Cosmopolitanism: Towards a Post-Foundational Cosmopolitanism 123, 124–25 (Tamara Caraus & Elena Paris eds., 2015).

that connects a state with the ethnic and national identities of its inhabitants. The declarative, naturalistic, straddling, and identitarian aspects of nationality may be more important. To quote Duncan Kennedy:

> [T]he factoid character of rights allows the group to make its claims as claims of reason, rather than of mere preference. Since you do or at least ought to agree that everyone has this universal right, and that reasoning from it leads ineluctably to these particular rules, it follows that you are a knave or a fool if you don't go along. To deny the validity of these particular rules makes you *wrong*, rather than just selfish and powerful.[270]

Certainly, declarative and naturalistic theories of nationality do better at explaining the *substance* of many citizenship policies. Even if states are free to grant citizenship to or withhold citizenship from anybody, why do they overwhelmingly grant citizenship from birth, to the children of its current citizens? Purely constitutive examples (naturalizations for money, for exceptional services, for long lawful residence) are much more exceptions than rules.

IV. The Citizenship Gaps: Schrödinger's Citizenship as a Result of Declarative and Constitutive Clashes

Schrödinger's Citizenship is the result of the gap between citizenship determinations as constitutive and declarative. To be precise, there are three citizenship gaps resulting from this uncertainty[271]: the time gap, the perspective gap, and the bureaucratic gap.

A. The Time Gap: Nationality from Birth vs. Nationality from State Acceptance

The first gap relates to the time between the birth of the applicant and the moment of making an application. If citizenship is declarative, then the person has been a citizen all along, since birth, and the rights and obligations pertaining to citizenship have to be applied retroactively from birth. If citizenship is constitutive, then the rights and obligations

270. Kennedy, *supra* note 252, at 188 (emphasis in the original).

271. The inspiration and terminology for the "citizenship gap" comes from Michael Albertus, Property Without Rights: Causes and Consequences of the Property Rights Gap 4–8 (2021).

pertaining to citizenship are only active from the time of the state's acceptance of the application, because that is the act that creates the person's nationality.

The time gap emerges when there is an opportunity to gain citizenship, but the citizenship in question is described and imagined in naturalistic, declarative terms. The gap is between the person's birth and the moment that the person is registered as a citizen: Because citizenship is (in these cases) declarative, it should exist from birth—but it is proven or acknowledged much later. At that point, citizenship is ostensibly retroactive, extending back to the "new" citizen's date of birth. It is also quasi-retroactive in the sense of being transmittable "backwards": At the time of the recognition of citizenship, the newly recognized citizen's children also acquire citizenship, also retroactively to the time of their birth. The time gap may be abused if it is combined with the authority gap (described below), when state A applies state B's citizenship laws to claim that a person is and has always been a citizen of state B without state B's acknowledgement.

The prototypical case here is undoubtedly Israel. Under the terms of the famous Israeli Law of Return,[272] any and all Jews are allowed to immigrate to Israel, without requiring immigration papers or naturalization beyond proof of their Jewish status according to Halakhic (Jewish religious) law.[273] Furthermore, conversion can take place under any of the major Jewish religious traditions: "[T]here is no difference whether the community is Orthodox, Conservative or Reform";[274] and it can equally take place within Israel or anywhere abroad.[275] The formulation used by the Law of Return is that "[e]very Jew has a right to come to this country as an *oleh*."[276] The word *oleh* (עולה) refers explicitly to a Jew who has "ascended" spiritually by coming to Israel, and is different from *mehager* (מהגר), the word for an "ordinary" non-Jewish immigrant.[277]

272. Law of Return, SH 51 (1950) 159 (Isr.).

273. *Id.* § 1, 4B.

274. HCJ 264/87 Shas v. Director of Population Registration, 43(2) IsrSC 723, 731 (1989) (Isr.).

275. *See* HCJ 2859/99 Tais Rodriguez-Tushbeim v. Minister of Interior (2005) (Isr.), English translation available at https://larc.cardozo.yu.edu/iscp-opinions/314/ [https://perma.cc/5T8H-W5FD].

276. Law of Return, *supra* note 272, § 1.

277. Yossi Harpaz & Ben Herzog, Report on Citizenship Law: Israel 2 (2018), https://cadmus.eui.eu/bitstream/handle/1814/56024/RSCAS_GLOBALCIT_CR_2018_02.pdf [https://perma.cc/92LB-HUVQ].

As a result, "Jews who move to the country from abroad are not treated as immigrants but rather as repatriates . . . . [T]he legal construction of citizenship in Israel reflects a self-understanding as a country of (returning) emigrants rather than a country of immigrants . . . . The 'right to return' is automatic and non-selective."[278] Israeli citizenship through the right of return is not retroactive—but it is quasi-retroactive to the *oleh*'s family, encompassing "a child and grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew."[279] These rights may also be claimed by non-Jewish family members, regardless of whether the (potential) *oleh* "is still alive and whether or not he has immigrated to Israel."[280] The only exception is "a person who has been a Jew and has voluntarily changed his religion."[281] Under Israeli law, therefore, every Jew is an Israeli-citizen-in-waiting throughout their lives.

Israel is not the only state with such automatic, quasi-retroactive citizenship laws. The German Basic Law, as we have seen, also acknowledges quasi-retroactive citizenship: Not only for persons who were denaturalized by the Nazi regime, but also for every "refugee or expellee of German ethnic origin or . . . the spouse or descendant of such person."[282] Germany thereby effectively recreated the same always-available citizenship regime for the German diaspora in Eastern Europe that Israel created for Jews living in the global diaspora.[283] As Peter Spiro's example in the introduction demonstrated, the time gap here meant that Professor Spiro and his children were only U.S. citizens until they received their German passports in New York—at which point they were German citizens due to, and all the way back to, the dates of their birth.

The same structure is true where two independent regimes lay claim to representing an undivided *demos* split between the two regimes. The two most notable examples are North Korea and South Korea, who both lay claim over the entirety of the Korean people and the Korean peninsula; and the People's Republic of China and Taiwan, who both claim to represent the entirety of the Chinese people. As such, a Mainland Chinese

278. *Id.* at 2–3.
279. Law of Return, *supra* note 272, § 4A(a).
280. *Id.* § 4A(b).
281. *Id.* § 4A(a).
282. German Basic Law, *supra* note 5, art. 116(1).
283. Rainer Münz, *Ethnos or Demos? Migration and Citizenship in Germany*, *in* GERMAN AND ISRAELI PERSPECTIVES ON IMMIGRATION 15, 19, 29–30 (Daniel Levy & Yfaat Weiss eds., 2002).

person traveling to Taiwan may need travel documents, but never their passport, as they are not traveling abroad.[284] Likewise, a North Korean managing to enter South Korea need not claim asylum or naturalize, as they have always been Korean.[285] The ever-existing (South) Korean citizenship of a (North) Korean refugee should mean that they are entitled to the rights of Korean citizens dating back to their births, even though they have never been to South Korea and the South Korean state never knew about them.

Is the Israeli right of return a perpetual, automatic, and unsolicited grant of Israeli nationality to all Jews across the globe, including those who have never set foot in Israel and have no relatives living there? Certainly not. Jews who do not hold Israeli nationality cannot vote or run for elections in Israel, and will not be entitled to Israeli diplomatic protection. In certain ways, however, the "open invitation from the state of Israel [to all Jews] to establish his or her life in that country as a citizen"[286] is so continuous and unconditional that the possibility of acquiring citizenship amounts to already having it. The time gap is particularly apparent in refugee cases, where some courts have treated Jewish refugees as always-already Israeli citizens. For example, *Grygorian* concerned a Jewish asylum-seeker from Azerbaijan who was persecuted for his religion and his ethnic origin in the 1990s, right after the collapse of the Soviet Union.[287] He was refused refugee status in Canada because he was able to apply for citizenship in Israel through the Law of Return (as well as in Russia, because his family moved from the Russian SSR to the Azeri

284. Sara L. Friedman, *Reproducing Uncertainty: Documenting Contested Sovereignty and Citizenship Across the Taiwan Strait, in* Citizenship in Question: Evidentiary Birthright and Statelessness 81, 83–88 (Benjamin N. Lawrence & Jacqueline Stevens eds., 2017).

285. *See* Daehanminkuk Hunbeob [Hunbeob] [Constitution], amended by Constitution no. 1, July 7, 1952, art. 3 (S. Kor.) ("The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.") [hereinafter Constitution of the Republic of Korea]; Gukjeokbeop [Korean Nationality Act], art. 2 para. 1 subpara. 1 (S. Kor.) ("A person whose father or mother is a national of the Republic of Korea at the time of the person's birth [shall be a national of the Republic of Korea at birth]."); *see also* Seunghwan Kim, *Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada*, 28 Int'l J. Ref. L. 85, 87–88 (2016) [hereinafter Kim, *Lack of State Protection*].

286. Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 Geo. Immigr. L.J. 233, 234 (1999).

287. Grygorian v. Canada (Minister of Citizenship and Immigr.), 1995 CarswellNat 1551, para. 2 [*Grygorian*] (Can. F.C.T.D.) (WL).

SSR during the time of the Soviet Union).[288] In *Katkova v. Canada*,[289] the Canadian court recoiled from strictly following *Grygorian v. Canada*,[290] which would have meant that no Jews would ever be granted refugee status in Canada. Instead, the court held that "the desire to live in Israel" (mentioned in Section 2(b) of the Law of Return[291]) is a separate precondition to accessing Israeli citizenship, which renders the application for Israeli citizenship more than a "mere formality."[292]

Australian courts have gone through a similar progression. In *NAEN v Minister for Immigration*, the federal court held that a Jewish refugee "had access to effective protection in Israel. That she may not desire at present to go there is not a matter relevant to Australia's obligations under Art. 33 [of the Refugee Convention]."[293] In *NAGV and NAGW of 2002*,[294] the court reversed course with an oblique reference to the Holocaust. According to the court, an interpretation that Jewish refugee applicants need never be given protection by Australia because they can always go to Israel "would have significant and curious consequences for the operation of the [Refugee] Convention, given the events in Europe which preceded its adoption."[295] In *MZXLT v Minister for Immigration*,[296] the court pointed to the requirement that Jews seeking Israeli citizenship must have a "desire to settle in Israel," and that such a desire must be genuine and unconstrained by the law, just like the reasoning in *Katkova v. Canada*.[297]

The time gap has brought harsher results for North Koreans claiming asylum in Canada or Australia. For North Koreans, neither country has

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288. *Id.*

289. Katkova v. Canada, 1997 CanLII 5166 [*Katkova*] (Can. F.C.T.D.).

290. *Grygorian*, *supra* note 287, para. 2.

291. Law of Return, *supra* note 260, § 2(b).

292. *Katkova*, *supra* note 289. On the "mere formality" test, see *supra* notes 54–56 and accompanying text.

293. *NAEN v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 6 (13 Feb. 2004), ¶ 48 (Austl.).

294. *NAGV & NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (Austl.).

295. *Id.* ¶ 30.

296. *MZXLT v Minister for Immigration & Citizenship* [2007] FMCA 799 (29 May 2007) ¶¶ 97–102 (Austl.); Andrew Wolman, *North Korean Asylum Seekers and Dual Nationality*, 24 INT'L J. REFUGEE L. 793, 803–04 (2012); Kim, *Lack of State Protection*, *supra* note 285, at 96, n.71–72.

297. *Katkova*, *supra* note 289.

granted refugee status, instead redirecting them to South Korea,[298] in accordance with Article 1A(2) of the Refugee Convention that excludes claimants with dual nationality.[299]

B. The Foreign Interpretation Gap: Nationality Under Private International Law vs. Public International Law

The second gap, the foreign interpretation gap, emerges when a state applies another state's nationality laws. If citizenship is declarative, then it doesn't matter who is doing the declaration: The United Kingdom's declarations on Shamima Begum's Bangladeshi nationality is no different than the United Kingdom's declaration that Shamima Begum was born in London in 1999. If citizenship is constitutive, then it depends on the state and the laws in question. If state A's nationality laws are unambiguous, justiciable, and smoothly implemented by state A's government, then state B's courts and government can easily apply them and rely on them. States that attract immigrants and self-identify as "nations of immigrants" (that is, American and Australian settler colonial states)[300] have clear and justiciable immigration laws, and standard private international law and comparative law methodologies also assume the existence of these types of laws.[301] However, if state A's laws are self-contradictory, overbroad, ambiguous, or non-existent on certain points, then state B's courts and government are abusing their own powers and misstating foreign law by "relying" on what they think are state A's nationality laws. This is the case with most countries' nationality laws that do not have the rule of law, or where naturalization is discretionary by design.[302]

Some lawyers from state A may of course be convinced. Farhaan Uddin, a professor of law from Bangladesh, mentioned in his note on the Shamima Begum case that there is such a lack of clarity and such "a dearth of litigation on citizenship laws and regulations in Bangladesh" that "one is forced to turn to the decisions of the SIAC of the United Kingdom to extract the meaning and interpretations given to the

298. *NBLC & NBLB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCFC 272, ¶ 60 (Austl.).

299. Refugee Convention, *supra* note 53, art. 1(A)(2).

300. For a typology of countries according to their immigration laws, see Szigeti, *No Country for Old Men*, *supra* note 194, at 6–12.

301. *Supra* notes 25–27, 183–86 and accompanying text.

302. *Supra* notes 196–212 and accompanying text.

relevant Bangladeshi laws and regulations on citizenship."[303] But this is a curious statement: a Bangladeshi scholar working at a Bangladeshi law school, claiming that the best authority for the interpretation of Bangladeshi law is a British tribunal. If this were the official Bangladeshi position, it would be a partial renunciation of sovereignty.

It is more common for international legal sources and doctrines to assume that foreign laws can be inscrutable and inapplicable by foreign states. The act of state doctrine, the "public law taboo," the public policy doctrine, and the general public international law rule of respecting a foreign state's exclusive jurisdiction all rather assume arbitrary and unenforceable foreign (nationality) laws.[304] Regarding foreign nationality laws specifically, the distinction between states which "generally respect the rule of law"[305] and states "where the executive is able to ignore the positions of judicial or other review bodies (even though these are binding as a matter of law) with impunity"[306] has been recognized by the UNHCR.[307]

Indeed, the interpretation and application of foreign nationality laws should be a separate matter from ordinary private international law. The application of foreign private law is generally done in order to render a just outcome to a party, by recognizing that foreign laws may have an impact on the person's status and interests within the territory of the forum state.[308] Nationality is different. Not only is nationality fundamental to all other legal statuses—"the right to have rights"[309] in Hannah Arendt's memorable phrase—but it is also a right that in the final analysis is only truly applicable *within and with regard to the state of nationality*. The Law Lords in

303. Farhaad Uddin, *Shamima Begum May Be a Bangladeshi Citizen After All*, EJIL:Talk! (Mar. 14, 2019), https://www.ejiltalk.org/shamima-begum-may-be-a-bangladeshi-citizen-after-all/ [https://perma.cc/257S-LPA7].

304. *Supra* notes 196–212 and accompanying text.

305. United Nations High Comm'r for Refugees, Handbook on Protection of Stateless Persons: Under the 1954 Convention on the Protection of Stateless Persons ¶ 47 (2014), https://www.refworld.org/docid/53b676aa4.html [https://perma.cc/TT2N-KBB9].

306. *Id.* ¶ 48.

307. *See also* Abu Hamza v. Secretary of State for the Home Department [2010] UKSIAC 23/2003; B2 v. Secretary of State for the Home Department [2012] UKSIAC 114/2012, para. 6; Thwaites, *supra* note 25, at 1313–14.

308. *See, e.g.*, Loucks et al. v. Standard Oil Co. of New York, 224 N.Y. 99, 110 (1918).

309. Arendt, Origins of Totalitarianism, *supra* note 267, at 296; *see also* James D. Ingram, *What is a "Right to Have Rights"? Three Images of the Politics of Human Rights*, 102 Am. Pol. Sci. Rev. 401 (2008); Stephanie DeGooyer et al., The Right to Have Rights (2018).

Oppenheimer v. Cattermole may have congratulated themselves for refusing to recognize an abhorrent piece of Nazi legislation,[310] but the continued British recognition of Mr. Oppenheimer's German nationality was a fiction that had no effect on his utter rightlessness in Germany and only served to uphold his status as a suspect enemy alien in the United Kingdom. It is important to remember that statelessness as a legal status was invented to shield individuals from the harshness of enemy alien status, in cases where they were so far removed from their official state of nationality that labeling them as enemy aliens was an injustice in and of itself.[311] Indeed, as Hannah Arendt wrote, "recognizing" foreign nationality in the case of persecuted minorities may lead to the situation that she and other German Jews found themselves in, where their "recognition" as German nationals by France and the United States meant that they were "put in concentration camps by their foes and in internment camps by their friends."[312]

Refugee status, where a person "is unable or, owing to [the fear of persecution], is unwilling to avail himself of the protection of [their] country"[313] was created precisely to avoid these situations. Refugee status creates a form of de facto and potentially temporary statelessness, where the host state assumes the protection of the persecuted foreigner,[314] offering them a path to naturalization in the host state,[315] but also allowing them to return to their state of origin when it is willing and able to protect the erstwhile refugee once again.[316]

The foreign interpretation gap is the easiest way in which states evade their responsibilities towards refugees and stateless persons, while pretending that another state is at fault. This is equally true of the British courts' practice in denaturalization cases,[317] as well as some other cases like that of Deepan Budlakoti in Canada[318] and Denny Zhao in the Netherlands.[319]

310. *See Oppenheimer*, [1976] AC at 269–75.
311. *See Stoeck*, [1920] Ch. 67 at 81; SIEGELBERG, *supra* note 39, at 12–25.
312. Hannah Arendt, *We Refugees*, *supra* note 100, at 111.
313. Refugee Convention, *supra* note 53, art. 1A(2).
314. *Id.* arts. 27–28.
315. *Id.* art. 34.
316. *Id.* art. 1C(1), (4).
317. *Supra* notes 17, 122–23 and accompanying text.
318. Budlakoti v. Canada (Minister of Citizenship and Immigr.), [2014] F.C. 855 (Can.); Adnan Khan, *Citizen of Nowhere: The Complicated Limbo of Deepan Budlakoti*, THE WALRUS (Oct. 19, 2021), https://thewalrus.ca/deepan-budlakoti-citizenship/ [https://perma.cc/B5KH-LWUE].
319. Zhao v. The Netherlands, CCPR/C/130/D/2918/2016, Decision, U.N. Human Rts. Comm. (Sept. 23, 2020) [hereinafter Zhao v. The Netherlands].

C. The Administrative Gap: Beyond Legislative Rights

The third gap, the administrative gap, is arguably a form of the application gap. It is the possibility, or even likelihood, that foreign states will apply *their own* legislative provisions in ways that lessen the effectiveness of those provisions, or even make them practically inapplicable. The foreign application gap treats foreign laws as declarative laws, in cases when they are in fact constitutive; the administrative gap concerns states applying their own laws in such a way as to turn declarative statements in high-level legislation into constitutive bureaucratic (in)action.

The administrative gap creates the difference between cases of acquiring a foreign nationality as a "mere formality"[320]; and recognitions of nationality becoming an onerous administrative task that in the end borders on the impossible. As every lawyer knows, administrative difficulties can be steeply increased, while the underlying legislative provisions remain the same. This is particularly true if the legislation on access to nationality is succinctly and generally worded, such as in constitutional provisions, and therefore a lot depends on the content of lower-level norms which determine the reality of acquiring the rights in question.[321] Further, even if the acquisition of foreign citizenship is not impossible—only time- and resource-demanding—there is still the question of interim status and interim protections while the applicant's claims are being investigated (in effect, a combination of the time gap and the administrative gap).

The example of Germany is instructive in this regard as well. As mentioned above,[322] the German Basic Law allows all ethnic Germans to claim German citizenship. To quote the exact text of article 116(1), "a German within the meaning of this Basic Law is a person . . . who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin."[323] In other words, persons of "German ethnic origins" automatically became German citizens when they entered Germany (including

320. *See, e.g.*, Bouianova v. Canada (Minister of Employment and Immigr.), [1993] 67 F.T.R. 74, para. 2 (Can.) (TD).

321. It is a well-known phenomenon that extensive catalogues of protected rights in constitutions seldom translate into actual respect for or active protections for the rights listed. *See, e.g.*, Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference*, 60 Am. J. Pol. Sci. 541, 577 (2016).

322. German Basic Law, *supra* note 5, art. 116(1).

323. *Id.*

East Germany and the parts of Germany that became Polish and Russian territories after World War II). Or perhaps not so automatically. As Rainer Münz recounts, "[f]or decades [during the Cold War], those belonging to German diasporas in Central and Eastern Europe had not been allowed to leave their countries legally,"[324] but if they made it across the West German border, they could "stay in the country right away even if they had not entered as regular immigrants,"[325] and had access to a "fast and nonbureaucratic process of acquiring citizenship."[326] Following 1990, when citizens of the former Soviet Bloc could easily and lawfully leave their countries, Germany reacted "by instating a number of restrictions. [After] 1 July 1990, ethnic Germans [had to] apply for an entry permit for Germany *before* they [left] their home countries. Additionally, application decisions [were] no longer made quickly or without red tape."[327] Among other measures, members of the German diaspora had to "demonstrate their knowledge of the German language *before* they [left] their country of origin,"[328] leading to a sharp drop in naturalizations by *Aussiedleren* (diasporic Germans) despite the rise of interested applicants.

The constitutional right of all Koreans to claim (South) Korean citizenship has also been subject to varying levels of simple or difficult implementation.[329] In *Kim v. Canada*,[330] the Canadian court refused to accept that all North Koreans are automatically South Koreans, despite the wording of South Korean statutes and the South Korean Constitution.[331] Instead, it found that South Korea evaluates North Korean refugees' claims of citizenship on a case-by-case basis, based in part on whether the North Koreans in question have the "will and desire" to live in South Korea and how much time they have spent in other countries.[332] However, this judicial decision was later overturned in essence by the Canadian Refugee Appeals Division based on "very recent information [on the

324. Münz, *supra* note 283, at 29.
325. *Id.*
326. *Id.* (emphasis added).
327. *Id.* at 29–30 (emphasis added).
328. *Id.* at 30.
329. Wolman, *supra* note 296.
330. Kim v. Canada (Minister of Citizenship and Immigr.), [2010] F.C. 149, paras. 11–12, 15–19 [Kim] (Can.).
331. Constitution of the Republic of Korea, *supra* note 285; Korean Nationality Act, *supra* note 285.
332. *Kim*, *supra* note 330, paras. 16–19.

implementation of Korean constitutional law] which comes directly from South Korean officials."[333]

It is hard to determine what is the correct or acceptable degree of onerousness and delay when applying for a foreign nationality. However, many courts do not even seem to contemplate the question. As mentioned above, Carlos Gonzalo Gil Roncagliolo was an officer in the Peruvian Navy who fled Peru under threat after whistleblowing on corruption in the Navy.[334] His refugee application in Canada was refused.[335] The Refugee Application Board found that he could become a French citizen "without undue difficulty" through his wife's nationality.[336] A cursory look at the French Civil Service website shows that the process of applying for French citizenship by marriage requires both spouses' passports and birth certificates, and the foreign spouse's marriage certificates (including for all previous marriages), proof of residence and cohabitation, children's birth certificates, criminal record checks or police certificates for the last ten years, and a language exam proving proficiency in French. Additionally, an in-person interview at the consulate is required, with both spouses present, following which the entire file will be sent to the Ministry of the Interior in Paris.[337] Nevertheless, according to the Federal Court of Canada, all this is but "an application which in the circumstances requires a few administrative formalities."[338]

By contrast, when courts do contemplate the difficulty of applying for foreign nationality, administrative complexities can be decisive. In *Fabiano v. Canada*, the applicant, an Argentinian of Italian descent, argued that he would probably qualify for Italian citizenship based on his ancestry, but the process would take years.[339] In the meantime, he would be in grave danger in Argentina, from where he escaped; he would not be allowed to stay in Italy without a pre-existing long-term visa during the application period; and applying from Canada would be fraught

333. Refugee Appeals Division (RAD) File No. TB3-03406 [2013] RADD No 1, para. 59 (Can.), cited in Kim, *Lack of State Protection*, *supra* note 285, at 96 n.72–73.

334. *Gil Roncagliolo*, *supra* note 64.

335. *Id.* para. 5.

336. *Id.* paras. 17, 22.

337. Code civil [C. civ.] [Civil Code] art. 21-2 (Fr.).

338. *Gil Roncagliolo*, *supra* note 64, para. 22.

339. Fabiano v. Canada (Minister of Citizenship and Immigr.), [2005] F.C. 1260, paras. 2–10, 30 (Can.).

with uncertainties.[340] The judge agreed that there was no evidence for the Refugee Protection Division of the Immigration and Refugee Board to conclude that acquiring Italian citizenship could be easily and rapidly done from Italy.[341] At the same time, puzzlingly, he called the acquisition of Italian citizenship a "mere formality," even while conceding that the process is "long and fraught with complex, administrative difficulties that will take considerable time and effort to resolve."[342]

V. Evaluating Schrödinger's Citizenship

How should we evaluate Schrödinger's Citizenship? This final Part will consider Schrödinger's Citizenship through two normative questions: Is it legal or illegal, and is it moral or illegitimate? Throughout our evaluations, we must keep in sight that Schrödinger's Citizenship encompasses a wide range of situations, some of them purely academic (such as whether Professor Spiro was always a German citizen or not), and some of them matters of life and death (such as whether Manzi Williams can receive adequate protection in Uganda, a state not known for respecting the rights of its nationals or refugees).[343] In general, the more citizenship gaps that are involved in a case, the more likely Schrödinger's Citizenship will encompass some illegal, immoral, or unnecessary elements in its reasoning.

A. Is Schrödinger's Citizenship Legal or Illegal?

I have argued in the previous Sections that both declarative and constitutive aspects of citizenship are required to sustain our understanding of citizenship law as tied both to natural events such as birth, and individual choices such as emigration. Therefore, one cannot solve the question of legality by declaring that either the constitutive or the declarative aspects of nationality have to be erased. The multitude of norms involved in evaluating citizenship is here to stay, and the ways in which these are open to conflict as well.

340. *Id.* paras. 7, 34–42.
341. *Id.* paras. 37–43.
342. *Id.* paras. 28, 30–31.
343. *E.g.*, Amnesty Int'l, *Report 2022/23: The State of the World's Human Rights*, POL 10/5670/2023, at 375–77 (Mar. 27, 2023).

However, I would argue that two types of situations are clearly illegal under international law. First and foremost, international law prohibits the consultation of foreign nationality laws hastily, in bad faith, or not at all. In the manufacture of statelessness, foreign nationality is often presumed based on foreign last names, skin colour, religious difference, or other cultural differences.[344] This creates racist assumptions that a person without clear citizenship status "must be" a foreigner. Examples of this racist assumption of non-citizenship, including the persecution of Rohingyas in Myanmar (under an assumption that because they are Muslims, they must be Bengalis),[345] persons of Haitian origin in the Dominican Republic (under an assumption that because they have dark skin or French last names, they must be Haitian),[346] and Highlanders in Thailand (under an assumption that because they do not speak Thai, they must be foreign),[347] have been widely documented.[348] When the "determination" of foreign nationality is done based purely on stereotypes, in clear bad faith, or the authorities refuse to determine nationality altogether,[349] these must be

344. *See, e.g.*, Amanda Flaim, *Problems of Evidence, Evidence of Problems: Expanding Citizenship and Reproducing Statelessness Among Highlanders in Northern Thailand*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 156 (Benjamin N. Lawrence & Jacqueline Stevens eds., 2017) (on a Thai official only accepting DNA evidence of descent from a citizen from the applicant's mother's side, not from the father's side); Polly J. Price, *Jus Soli and Statelessness: A Comparative Perspective from the Americas*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 31 (Benjamin N. Lawrence & Jacqueline Stevens eds., 2017) (on refusals to register Dominicans with Haitian last names as citizens).

345. Jain, *Manufacturing Statelessness*, *supra* note 40, at 254.

346. Eve Hayes de Kalaf, *Making Foreign: Legal Identity, Social Policy and the Contours of Belonging in the Contemporary Dominican Republic*, *in* WELFARE AND SOCIAL PROTECTION IN CONTEMPORARY LATIN AMERICA 101, 104 (Gibran Cruz-Martinez ed., 2019).

347. Flaim, *supra* note 344, at 147, 149–52.

348. *See also* Rachel E. Rosenbloom, *From the Outside Looking In: U.S. Passports in the Borderlands*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 132, 133–38 (Benjamin N. Lawrence & Jacqueline Stevens eds., 2017); Stipulation & Agreement of Settlement and Release, *Castelano v. Clinton,* No. CA M-08057 (S.D. Tex., June 26, 2009) ECF No. 89-2 https://travel.state.gov/content/dam/travel/Legal%20Considerations/Castelano_Final_Agreement.pdf [https://perma.cc/D3EV-XXJ2] (on the practice of the U.S. State Department to ignore evidence of birth within the United States when deciding to withhold passports from U.S. citizens of Mexican parents who were born outside of hospitals in the proximity of the U.S.-Mexico border).

349. *E.g.*, Zhao v. The Netherlands, *supra* note 319, paras. 2.1, 2.2, 2.4, 8.3, 8.5 (describing the Dutch practice of ascribing "nationality unknown" to stateless children born in the Netherlands, unless they can prove their statelessness by proving that they don't have access to nationality under the laws of any country); Laura Bingham & Jelle

violations of the right to a nationality and the right to due process or a fair trial.[350] It is also bad faith for a court to insist that it can interpret a foreign law better than a foreign state can apply its own law.[351] This is not only a violation of due process, but also a violation of the act of state doctrine[352] and the sovereignty and exclusive jurisdiction of the foreign state in question.[353]

Second, when *access to* a foreign nationality is used to deny refugee rights to a person, as in Canada,[354] it is a violation of the Refugee Convention. The Convention clearly uses the present tense when excluding from refugee protection "a person who has more than one nationality"[355] and "has not availed himself of the protection of one of the countries of which he *is* a national."[356] Eric Fripp has argued strongly that the use of Schrödinger's Citizenship in a way to deny refugee protections is contrary both to the letter and the spirit of the Refugee Convention.[357] By contrast, James Hathaway and Michelle Foster accept that the distinction is not always clear-cut, and endorse the Federal Court of Canada's distinction in *Bouianova*:[358] "At least when a country's nationality is available for the asking and could be acquired by means of a non-discretionary formality, [and] with which an applicant has a 'genuine link', [that country] is, in substance, a country of nationality for refugee law purposes."[359]

Klass, *A Victory for Human Rights in Zhao v. the Netherlands (the 'Denny Case'): Nationality From Birth, Without Exceptions*, EUI Glob. Citizenship Observatory (Jan. 19, 2021), https://globalcit.eu/a-victory-for-human-rights-in-zhao-v-the-netherlands-the-denny-case-nationality-from-birth-without-exceptions [https://perma.cc/5G3E-KGHR].

350. Chattin v. United Mexican States, 4 R.I.A.A. 282, 295 (U.S.A.-Mex. Gen. Claims Comm'n 1927) ("Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations . . . and a continued absence of seriousness on the part of the Court."); *see also* Jan Paulsson, Denial of Justice in International Law 176–206 (2005); Charles T. Kotuby Jr. & Luke A. Sobota, General Principles of Law and International Due Process 69–86 (2017).

351. *See Begum,* [2023] UKSIAC SC/163/2019; *B2* [2013] EWCA (Civ) 616; Thwaites, *supra* note 25.

352. *Supra* notes 174–82 and accompanying text.

353. *Supra* notes 13–37 and accompanying text.

354. *Supra* notes 54–58 and accompanying text.

355. Refugee Convention, *supra* note 53, art. 1A(2) (emphasis added).

356. *Id.* (emphasis added).

357. Fripp, *supra* note 38, at 198–205.

358. Bouianova v. Canada (Minister of Employment and Immigr.), [1993] 67 F.T.R. 74, para. 2 (Can.) (TD).

359. Hathaway & Foster, *supra* note 38, at 58.

Notwithstanding, Hathaway and Foster draw a red line when a state requires a refugee applicant to renounce their original citizenship, and when states expect applicants to apply for any available citizenship.[360] These cases often rely on completely ignoring the administrative gap (i.e., whether foreign nationality is reasonably accessible in practice). Whenever questions about administrative difficulties were discussed in the judgements—the question of the time necessary for a citizenship application in *Fabiano v. Canada*,[361] and the question of administrative discretion in *Kim v. Canada*[362] or *Canada v. Hua Ma*[363]—the refugee claimants always won their cases.[364]

Regarding the obligation to look for alternative nationalities that has been pushed onto the refugee applicant, it is important to distinguish between two standards which Canada has used to potentially deny protection. The "mere formality" standard, first used in *Bouianova*,[365] may be legal under the Refugee Convention. However, the newer and broader "within the control of the applicant" standard used in *Williams*[366] effectively means that any type of access to citizenship will result in a denial of refugee protections. As we have seen, a significant number of states offer their nationality for sale, with few or no questions asked, for sums that range from moderate to very high.[367] Indeed, as long as the "within the control of the applicant" test is taken seriously, citizenship as a commodity will always be available and within the control of the applicant.

Citizenship for sale as a de facto alternative to refugee protection is not a fantasy, but a reality. Pavel Durov, the founder and CEO of the Russian social media network VKontakte, was forced to resign from his position in 2014, after refusing to share information about VKontakte users with Russian state security, and for supporting politicians opposed to Vladimir Putin online.[368] It was then reported that he left Russia for Dubai, and

360. *Id.* at 58–62.

361. Fabiano v. Canada (Minister of Citizenship and Immigr.), [2005] FC 1260 (Can.).

362. See *Kim*, *supra* note 330; *See also supra* notes 316–19 and accompanying text.

363. Canada (Citizenship and Immigr.) v. Hua Ma, [2009] F.C. 779, paras. 107–22.

364. FRIPP, *supra* note 38, at 176–77.

365. See *supra* notes 54–58, 71, 341–43 and accompanying text.

366. *Williams*, *supra* note 69, para. 22.

367. See *supra* notes 213–27 and accompanying text.

368. Ingrid Lunden, *Pavel Durov Resigns as Head of Russian Social Network VK.com, Ukraine Conflict Was the Tipping Point*, TECHCRUNCH (Apr. 1, 2014), https://techcrunch.

later acquired St. Kitts and Nevis citizenship.[369] Pavel Durov certainly had a credible fear of persecution from a brutal and odious regime, and he did in fact leave Russia very soon after his ouster from VKontakte. He would probably have qualified as a refugee, having a well-founded fear of persecution because of his political opinions.[370] However, he never had to apply for refugee status anywhere, as he was able to purchase his security from the United Arab Emirates and St. Kitts and Nevis.[371] Most recently, in 2024, following Russia's aggression and genocide against Ukraine, Russian men trying to escape mobilization and political persecution in Russia face similar difficulties. The popular Russian YouTube commentator Roman_NFKRZ escaped from Russia to Georgia, but did not have access to long-term immigration status and protections in Georgia. In order to have access to more durable protections and eventual citizenship in another country, he purchased a digital entrepreneur visa in Portugal.[372] Schrödinger's Citizenship arguably creates a legal obligation to purchase citizenship.

Because of the number of rules involved, and the lack of specific methodological rules about the application and interpretation of foreign nationality laws, we can expect further variations of Schrödinger's Citizenship to appear in the future. Nevertheless, it is clear that bad faith in the application of foreign laws, and merging existing and possible foreign nationalities, are two clear ways in which illegality creeps into comparative nationality determinations.

B. Is Schrödinger's Citizenship Moral or Immoral?

There are other cases in which the use of Schrödinger's Citizenship is arguably lawful, but still undesirable on moral or other grounds. The

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com/2014/04/01/founder-pavel-durov-says-hes-stepped-down-as-head-of-russias-top-social-network-vk-com/ [https://perma.cc/W92H-L93B].

369. *Vkontakte Founder Pavel Durov Becomes Citizen of St. Kitts and Nevis*, Moscow Times (Apr. 28, 2014) [hereinafter *Pavel Durov Becomes Citizen*], https://www.themoscowtimes.com/2014/04/28/vkontakte-founder-pavel-durov-becomes-citizen-of-st-kitts-and-nevis-a34733 [https://perma.cc/LH7L-7XZ5].

370. Refugee Convention, *supra* note 53, art. 1A(2).

371. *Pavel Durov Becomes Citizen*, *supra* note 369.

372. *Cf.* NFKRZ, *The Existential Dread of Being Russian in 2022*, YouTube (Oct. 25, 2022), https://www.youtube.com/watch?v=vEtL9DvOPkU [https://perma.cc/68ZR-TSFU], at 2:04–2:14; NFKRZ, *From Russia to EU! Where I'm moving and why*, YouTube (Feb. 14, 2024), https://www.youtube.com/watch?v=5GMEtKwirYk [https://perma.cc/S5FS-QASK].

situation that I would like to highlight here is the impossibility for certain national or ethnic groups to receive refugee protection.

The unavailability of refugee protection for Jewish or Korean persons, given their ever-present or ever-available Israeli or South Korean citizenship, arguably does not amount to unlawful discrimination under international law. It nevertheless harms these specific ethnic groups in tangible and unfair ways. Although the Refugee Convention stipulates that state parties "shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin,"[373] this only applies to refugees, and those with effective dual nationalities are only deemed refugees if they are persecuted in all their countries of nationality.[374] Article 1(3) of the Convention for the Elimination of All Forms of Racial Discrimination also states that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, *provided that such provisions do not discriminate against any particular nationality*."[375] The unavailability of refugee protections outside of South Korea and Israel would or does make life more difficult for North Korean and Jewish refugees, compared to other refugees who have greater choice in where they seek protection.[376] This probably does not rise to the level of discrimination, as long as Jews and Koreans do have access to citizenship and a reasonable amount of safety in Israel and South Korea.

For example, Justice Sackville of the Federal Court of Australia found that there was no discrimination against Jews in Australia, despite their inability to access refugee protection, in the case of *NAEN v Minister for Immigration*.[377] Nevertheless, Justice Sackville did note the "exquisite irony" of disallowing Jewish refugees from entering Australia, given that the Refugee Convention was concluded in large part as a reaction to the Holocaust.[378] He also noted a number of "not pleasant" implications,

373. Refugee Convention, *supra* note 53, art. 3.

374. *Id.* art. 1A(2); *see also Ward*, *supra* note 53.

375. International Convention on the Elimination of All Forms of Racial Discrimination art. 1(3), Dec. 21, 1965, 660 U.N.T.S. 195.

376. On the difficulties that North Korean refugees face in South Korea, *see, e.g.*, Andrei Lankov, *Bitter Taste of Paradise: North Korean Refugees in South Korea*, 6 J. E. Asian Stud. 105 (2006); Jih-Un Kim & Dong-Jin Jang, *Aliens Among Brothers? The Status and Perception of North Koreans in South Korea*, 31 Asian Persps. 5 (2007).

377. *NAEN v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 216, paras. 49–50 (Austl.).

378. *Id.* para. 74(1).

which included refugee officers trying to guess Jewish origins from last names and other stereotypes.[379]

In addition, Ayelet Shachar and Dimitry Kochenov, two prominent scholars of nationality, have separately argued that citizenship is fundamentally unfair: It creates opportunities and rights for those lucky enough to have been born into a wealthy and flourishing state, and acts as a prison for those unlucky enough to have been born into poor and violent states.[380] Schrödinger's Citizenship extends the prison aspect of nationality to Jewish and Korean refugees by removing their choice in seeking a state of refuge. Perhaps this is only another aspect of citizenship's global unfairness. Jews and Koreans may nevertheless have divergent identities and political opinions, and it is at least questionable to expect all of them to support and identify with Israel and South Korea, especially if they have never set foot in these countries before. This tightening of rights does not contravene international law, but it is morally dubious.

Conclusion

Most of the—truly excellent—literature on both statelessness and multiple nationalities regard their subject as clear-cut: One either is a national of a specific state, or one is not. Schrödinger's Citizenship aims to focus the discussion of statelessness on uncertain cases, where one may or may not be a citizen of a state, with the question often a matter of perspective. Echoing Neha Jain's "Manufacturing Statelessness"[381] and Bronwen Manby's "Schrödinger's Citizenship,"[382] this Article has argued that Schrödinger's Citizenship is often strategically utilized, even weaponized, to render certain people de facto stateless, while offering a release from the legal responsibility of having rendered that person stateless.

The uncertainty at the core of Schrödinger's Citizenship is engendered by the contradictions within the international law on nationality (across public international law, private international law and domestic constitutional arrangements). The contradictions stem from a deeper uncertainty, present whenever the law engages with fundamental social institutions:

379. *Id.* para. 74(2). Nevertheless, Sackville J. did not find the Australian law to be invalid on the ground of discriminatory nature. *Id.* paras. 67–73.

380. Shachar, Birthright Lottery, *supra* note 256, at 23–27; Dimitry Kochenov, Citizenship 3–9 (2019).

381. Jain, *Manufacturing Statelessness*, *supra* note 40, at 248–50.

382. Manby, *supra* note 1, at 10–11.

Are such institutions natural or organic to society, such that the law merely has to recognize and utilize them or are they created and fundamentally shaped by the legal system itself? Such uncertainty has been noted by legal philosophers since the 1930s—including from schools as divergent as Continental positivism, Scandinavian realism, and British analytical jurisprudence. The dichotomy is especially relevant when dealing with questions of status and recognition: life, death, marriage, nationality, statehood, and so on.

The usefulness of the declarative/constitutive dichotomy does not lie in allowing us to come to a "correct," coherent view of nationality. Indeed, the dichotomy has been an abiding feature of status questions, and it is beyond the scope of this Article to analyze or deconstruct the entire dichotomy. Instead, recognizing the opposition of declarative and constitutive aspects of the same legal institution allows us to locate collision points, where declarative logic breaks, and only constitutive logic can explain the way nationality is supposed to function (or vice versa). I identify three specific "gaps" created by the duality of nationality laws. First, the time gap is the uncertainty about the beginning of nationality. If and when nationality is declarative, then it can only begin at birth. If and when it is constitutive, then nationality can only begin at the time of state conferral and recognition. Second, the foreign interpretation gap is about the objective and universal nature of nationality rules. If and when nationality is declarative, then the identity of the recognizing authority is beside the point. If and when nationality is constitutive, then interpretation and application are forms of constitution, and the identity of the authority doing it is crucial. Third, the administrative gap concerns the constitutive aspects found *within* what might be declarative conception: Even when nationality is "recognized" from birth by a state, the recognition is subject to so many bureaucratic steps that it ends up more constructive than declarative in its effects and structure.

Most importantly, the constitutive/declarative dichotomy allows us to see where, how, and why comparative nationality law can be applied strategically. By exploiting the three gaps—by deciding to view nationality as declarative in spite of its constitutive aspects—states can pretend that they are not responsible for the foreseeable outcomes of statelessness and rightlessness. Although Schrödinger's Citizenship is unavoidable in a number of situations (mostly those where the annexation, disappearance, or territorial transformation of foreign states is involved),

there are also situations where Schrödinger's Citizenship is invented or adhered to only to dissolve the investigating state of any obligation to grant protection to purportedly foreign individuals. Now that we know the legal mechanism for creating this type of confusion, we are hopefully two steps closer to ending statelessness.