The Making and Unmaking of Citizenship in Settler Colonial States: Canada

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I. Introduction

Citizenship in settler colonial states is different. During the age of modern colonialism, most states in the world were either colonisers or colonised. The colonisers were the European imperial powers, while the colonised comprised the rest of the world. These states – both colonisers and colonised – were part of the web of classical colonialism in which the colonisers exploited their colonies for labour and economic gain.[1] In the 20th century, nascent international institutions administered the process of decolonisation, and scholars conceived postcolonial theory to specify the legacies of the colonial model.

Settler colonial states do not follow this narrative. They are neither classically colonial nor decolonised, and postcolonial theory does not describe their present condition. Although settler colonialism shares with other forms of colonialism the means of exogenous domination, it is directed toward a different end: the normalization of settler occupation.[2] It seeks to eliminate the original Indigenous population and to replace them with settlers, creating 'new polities atop preexisting societies.[3] In this way, settler colonial states are both a product and a source of colonialism: simultaneously colonised and coloniser.

The paradigmatic settler colonial states are Australia, Canada, New Zealand, South Africa, and the United States.[4] Citizenship in settler colonial states, specifically Canada, is illuminated through a paradox. In these states, citizenship has a dual character, both emancipatory and repressive. The passage of the *Citizenship Act* in 1947 marked the formal end of British subjecthood, expressing Canadian independence through Canadian citizenship. And yet, it unleashed the full force of the settler state against Indigenous peoples. The construct of citizenship legitimated new modes of subjection; ones that aligned Indigenous peoples with immigrants, discounting their prior existence as political orders tied to the land. Externally, citizenship conveyed sovereignty and international personality, but internally, this outward-facing unity was haunted by inequality and colonialism.

This chapter examines how the history and laws of settler colonial states such as Canada inform their citizenship, connecting the colonisers and the colonised over time. Part I establishes the relevant dimensions of citizenship from the multiple taxonomies in the citizenship studies literature. It contends that political subjectivity is the most productive lens on citizenship in settler colonial states. Part II follows Canada along the historical path from subject to citizen, establishing some of the enduring sources of subjecthood. This part focuses on the legal construction of Indigenous identities and British subjecthood as mutually exclusive as well as on Britain's conquest and rule of New France, which would become the Province of Quebec. Part III examines the creation of independent Canadian citizenship in

[1] Lorenzo Veracini, "Introducing: Settler Colonial Studies," *Settler Colonial Studies* 1, no. 1 (January 1, 2011): 1–12; Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010); Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (December 1, 2006): 387–409; Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London; Cassell, 1999).
[2] Veracini, "Introducing: Settler Colonial Studies."
[3] Mahmood Mamdani, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2020); Wolfe, "Elimination of the Native."
[4] Canada, Australia, New Zealand are sometimes called CANZ states for their combination of: robust immigration, multiculturalism, and 'nominally postcolonial' status (Augie Fleras, "Rethinking Citizenship Through Transnational Lenses: Canada, New Zealand, and Australia," in *Citizenship in Transnational Perspective* (Cham: Springer International Publishing, 2017), 15–47)

1947, exploring its prior existence in the immigration realm. This part also examines the state of contemporary citizenship law in Canada, including its relationship to the constitution. Part IV complicates the linear progression described in Part II, suggesting that what endures for Indigenous peoples as well as for the Province of Quebec is best described by Balibar as 'citizen subject'. It queries whether and how citizenship is a productive category under conditions of inequality inside the sovereign settler colonial state. The chapter concludes with some thoughts about how the various dimensions of citizenship map onto settler colonial states and their limits.

II. Taxonomies of Citizenship

Citizenship is a word that 'overflows with meaning'.[5] As the field of citizenship studies continues to grow, so too does its lexicon. Over time some of these taxonomies have become foundational, serving as the starting point for future iterations. Heralding 'the 'return of the citizen' in the mid-1990s, Kymlicka and Norman suggested three dimensions of the concept of citizenship: legal status, which relies on and encompasses rights; political agency; and identity.[6] Bauböck modified these terms, stating 'citizenship in its broad political meaning refers to individual membership, rights, and participation in a polity'.[7] In Bosniak's canonical formulation, citizenship falls into four types: status, rights, political engagement, and identity.[8] In 2007, Joppke put forward an equally classical formulation of citizenship: status, identity, and rights.[9] In 2019, Harpaz added a fourth dimension to Joppke's formulation. Drawing from recent work on the outward facing functions of citizenship—its external role on the international plane—he described citizenship as a global population-sorting mechanism: 'the way that the possession of a particular citizenship defines an individual's relation to the entire global system'.[10] Isin and Nyers, on the other hand, steadily reject the definitions of citizenship as 'membership, status, practice, or even performance' for their 'already assumed conceptions of politics, culture, spatiality, temporality, and sociality', preferring a definition that emphasizes political subjectivity.[11]

For the purposes of examining citizenship in settler colonial contexts, three of these dimensions are helpful: citizenship as *legal status*; citizenship as *rights*; and citizenship as *membership*. Both political agency and engagement at the national level and global sorting and allocation at the international level are less relevant to this analysis. Rather, it is the aspects of citizenship that determine membership that are most important. To begin with *legal status* is to begin with the nucleus of citizenship and its clearest embodiment. For legal scholars, status is formal in nature and national in scope, a precursor or

[5] Audrey Macklin, "From Settler Society to Warrior Nation and Back Again," in *Citizenship in Transnational Perspective* (Cham: Springer International Publishing, 2017), 289, citing Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006).
[6] W. Kymlicka and W. Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory," *Ethics* 104, no. 2 (1994): 352–81.
[7] Rainer Baubock, *Migration and Citizenship: Legal Status, Rights and Political Participation*, 1st ed., (Amsterdam: Amsterdam University Press, 2006), 5.
[8] Bosniak, *The Citizen and the Alien*, 19-20; Linda Bosniak, "Citizenship," in *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005), 185-86 ('Broadly speaking, questions about citizenship can be divided into three categories: those that concern the substance of citizenship (what citizenship is), those that concern its domain or location (where citizenship takes place), and those that concern the subjects of citizenship (who is a citizen)).
[9] Christian Joppke, "Transformation of Citizenship: Status, Rights, Identity," *Citizenship Studies* 11, no. 1 (2007): 37–48.
[10] Yossi Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset*, (Princeton, NJ: Princeton University Press, 2019), 7.
[11] Engin F. Isin and Peter Nyers, "Introduction: Globalizing Citizenship Studies," in *Routledge Handbook of Global Citizenship Studies*, Book, Section vols., 2014, 1.

precondition for citizenship's other dimensions.[12] This legal status functions as a kind of 'meta-right' or 'master status'.[13] These terms capture Arendt's famous description of citizenship as 'the right to have rights', which explains citizenship in terms of what follows from it. Citizenship's second dimension—citizenship as *rights* (and privileges) —specifies the substance of citizenship that follows from status. The rights that accompany citizenship look different in different states and some find expression in international human rights instruments, but it is nonetheless helpful to use Marshall's description of the citizen as someone who enjoys civil, political, and social rights.[14] Although this description is showing signs of age, it is still shorthand for the legal e*x post facto* substance of citizenship as status.[15] Citizenship as *membership* is the final relevant aspect. It captures the affective aspects of citizenship such as belonging, identity, and solidarity. This has been called its psychological dimension, referring to the 'felt aspects of community membership'.[16]

These categories are distinct and overlapping.[17] Whether and how they relate to one another or to a larger unitary phenomenon remain points of contention among citizenship scholars. Despite such contestation, there is nonetheless a centre to the concept—there is a 'there there'—that emerges from its historical role. Citizenship is irreducibly political. At least since Aristotle, citizenship has expressed and encapsulated political relations.[18] Bosniak contends that arguments about citizenship are 'less about the scope and meaning of the term itself than they are about the value and legitimacy of the political practices and ideals the word is used to represent'.[19] Citizenship debates are properly conceived as debates over other substantive questions in political and legal thought, specifically: 'the proper domains of political life; the future of the nation-state; and the scope of solidarity'.[20] This political core is essential to understanding citizenship in settler colonial contexts.

In Canada, the final dimension of citizenship, identity and belonging, is the ground of reckoning. Citizenship in its first dimension, legal status, is generally clear and, by some accounts, generous. Citizenship as rights is the busiest dimension: rights claims are still the primary expression of citizenship in Canada, namely Aboriginal rights, language rights, identity rights, constitutional rights. The third dimension is the one that raises questions about the shape and limits of the political. When theorists refer to citizenship's affective aspects, they mean *political* identity and belonging. These are not ascriptive or social or cultural group identities (although they may be that, too).

When citizenship is understood as political subjecthood or political subjectivity, it complicates the terms of the inside/outside divide. It is not only or even necessarily a matter of being inside with legal status; it is about the circle of subjection. Balibar conceived the term 'citizen subject', asking: 'who comes after the

[12] From other disciplinary perspectives, the significance of status lies in its role as an instrument of closure, as famously evaluated by Rogers Brubaker (Rogers Brubaker, *Citizenship and Nationhood in France and Germany:* (Cambridge, Mass: Harvard University Press, 1992).
[13] Audrey Macklin and Rainer Baubock, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?" (Cadmus, EUI Research Repository, 2015), http://hdl.handle.net/1814/34617; Joppke, "Status, Rights, Identities," 37.
[14] T. H. Marshall and T. B. Bottomore, *Citizenship and Social Class*, Book, Whole (London [England];Concord, Mass; Pluto Press, 1992).
[15] Isin and Nyers, "Globalizing Citizenship Studies." (observing that Marshall's typology of citizenship rights was put forward in 1949, and critiqued for neglecting deep inequalities outside of those rights).
[16] Bosniak, "Citizenship," (pinpoint); Kymlicka and Norman, "Return of the Citizen," pinpoint (on the psychological dimension of citizenship).
[17] Bosniak, "Citizenship," (pinpoint).
[18] Ayelet Shachar, "Citizenship," in *The Oxford Handbook of Comparative Constitutional Law*, ed. András Sajó and Michel Rosenfeld, 1st ed. (Oxford, U.K: Oxford University Press, 2012), 1003–18.
[19] Bosniak, "Citizenship," 184.
[20] Bosniak, "Citizenship," 184.

subject?'.[21] The answer is that the citizen and the subject are not bounded categories. The citizen subject describes a kind of ambiguity or paradox in citizenship: the link between subjectivity and subjection. The individual is a free subject *so that* they may submit freely to their subjection. Subject and citizen are a set of continuous relations, not a progression through subject to citizen. This insight shifts the inquiry from the individual endowed with rights to the collective: the source of political subjectivity. It also begs the question of the identity of the subjection or subjector: to what or to whom is the citizen subjected?

In short, the political core of citizenship retrains the eye on collective life, and specifically on citizenship as an expression of 'the people' and their 'peopling powers'.[22] What emerges is a picture of Indigenous peoples, Quebec, and Canada that exceeds the frame of Canadian citizenship. In the settler colonial context, for both Indigenous peoples and Quebec, there is an emergent and incomplete aspect to citizenship that is not fully captured by their political subjectivity in the Canadian state. These groups are not seeking to 'complete' their Canadian citizenship—to fill in the gaps—they are seeking their own politics with and without the state. Both contest the citizen subject, taking issue with the terms of their subjection as well as the limits of their subjectivity. For Quebec, the unrealised or emergent aspect derives from legal history: the treaty that placed New France under British rule, the compromises of Confederation, and the stipulations of the Canadian constitution. As a result, national identity and citizenship discourse in Quebec is developed and sometimes floats into the sphere of sovereign statehood. For Indigenous peoples, there is ambivalence about citizenship, a status that has eluded them by settler colonial design.[23] Such ambivalence is readily traceable to legal history: the *Indian Act*, primarily, but also the *Citizenship Act*. There are now many self-government agreements in place and a handful of them include limited citizenship power. For Quebec and Indigenous peoples, the question becomes whether citizenship provides a political identity that self-government cannot.

III. From Subject to Citizen

The expression 'from subject to citizen' so fittingly captures the transition from colonialism to independence, from monarch to parliament, and from external rulers to local ones, that it is the title of several books and articles.[24] In these works, the phrase connotes progress and enlightenment: the citizen is typically opposed to the subject; the former fully actualized by 'an original freedom and equality'.[25] Allegiance to the monarch is replaced with a 'set of common bonds with other citizens' who together constitute the sovereign.[26] But this progression is only a partial accounting of the citizen in settler colonial

[21] Balibar and Miller, *Citizen Subject*, (pinpoint)
[22] Amar Bhatia, "Re-Peopling in a Settler-Colonial Context: The Intersection of Indigenous Laws of Adoption with Canadian Immigration Law," *AlterNative: An International Journal of Indigenous Peoples* 14, no. 4 (December 1, 2018): 343–53.
[23] Darlene Johnston, "First Nations and Canadian Citizenship," in *Belonging*, ed. William Kaplan (Montréal: McGill-Queen's University Press, 1993), 349-67.
[24] Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge; Cambridge University Press, 1997); Pierre Boyer et al., *From Subjects to Citizens: A Hundred Years of Citizenship in Australia and Canada* (Ottawa: University of Ottawa Press, 2004); Sudhir Hazareesingh, *From Subject to Citizen: The Second Empire and the Emergence of Modern French Democracy* (Princeton: Princeton University Press, 1998); Étienne Balibar and Steven Miller, *Citizen Subject: Foundations for Philosophical Anthropology*, (New York: Fordham University Press, 2016); Luc Borot, "Subject and Citizen: The Ambiguities of the Political Self in Early Modern England," *Revue Française de Civilisation Britannique* 11, no. 1 (2016); James M. Banner, "From Subject to Citizen," ed. James H. Kettner, *Reviews in American History* 8, no. 1 (1980): 21–24.
[25] Warren Montag, "Between Subject and Citizen: On Étienne Balibar's Foundations for Philosophical Anthropology," *Radical Philosophy* 2, no. 2 (2018): 39–46.
[26] J. Donald Galloway, "The Dilemmas of Canadian Citizenship Law," *Georgetown Immigration Law Journal* 13, no. 2 (1999): 214.

societies. Citizenship plays a key role in the structure of settler colonialism: as Wolfe explains, it is a means by which the state erects the new society, one founded on 'native citizenship'.[27]

The term 'settler colonial' captures the mode of colonisation: dispossession and elimination combined with settlement. In order to 'settle' the land, European colonisers had to legally construct it as empty and unoccupied. Settler colonial states relied on *terra nullius* and the doctrine of discovery to erase Indigenous life and sanction nation building. This set the stage for immigration in order to literally 'make the nation'. The creation of the new polity required settlers to reconstruct themselves in relation to the new political community.[28] In Canada, the settler became the immigrant, effacing the violence of settlement.

This part examines pre-Confederation and thus pre-Dominion of Canada history in relation to two loose and diverse collectives in the Canadian state: Indigenous peoples and the Province of Quebec. Both were the subjects of British power and the power of its successors (the United States and Canada). Quebec is a Province named in the *Constitution Act, 1867* and granted provincial jurisdiction; Indigenous peoples are absent from the power sharing arrangements of division of powers, administered instead primarily by the federal government under the *Indian Act*.

A. The 'Abandoned' Colony

The classical colonial side of the duality is provided by New France, which would later become the Province of Quebec. Starting in the 16th century, French settlers sought to establish a colonial outpost. Though it only existed between 1608 and 1763, it more or less embodied France's objective of 'one religion, one language, and loyalty to one monarch'.[29] New France faced many challenges, including conflict between the colonists and the Haudenosaunee (Iroquois) Confederacy, and, although its relations with the Haudenosaunee were not the same as Britain's relations with other Indigenous peoples, it nonetheless ravaged the population in the name of settlement.[30] The French government ultimately decided that its investment in New France was 'yielding little in way of returns', and abandoned the colonists to the spiral of epidemics and 'mourning wars'.[31]

In 1756, the Seven Years' War pitted the French colonists against British-held America. The war ended with France's defeat and its holdings were handed over to the British in the Treaty of Paris in 1763. The French settlers, even under British rule, refused assimilation. By the time of Confederation, New France would henceforth be called 'Quebec' and join three other provinces in British North America, two-thirds of which was of British origin.[32] The historical narrative of French Canada, as Juteau explains, focuses 'almost exclusively on French-English relations, where *les Canadiens* were seen as a conquered people fighting against British domination'. [33] These French settlers, who would come to self-identify as Québécois, continue the struggle for their own political subjectivity in the Canadian state. The non- Québécois populations of the Province, English speaking Quebeckers and Indigenous peoples, the coloniser and the colonised, struggle to find their place in this struggle.

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[27] Wolfe, "Elimination of the Native," 388.
[28] Mamdani, *Neither Settler nor Native*, 340.
[29] Valerie Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540-1997*, Rev., (Toronto: Dundurn Press, 1997), 6.
[30] Knowles, *Strangers at Our Gates*, 5 (discussing the better relationship between New France and Indigenous peoples).
[31] Daniel K. Richter, *Trade, Land, Power: The Struggle for Eastern North America*, 1st ed. (Philadelphia: University of Pennsylvania Press, 2013), 79.
[32] Knowles, *Strangers at Our Gates*, at 30
[33] Danielle Juteau, "The Citizen Makes an Entrée: Redefining the National Community in Quebec," *Citizenship Studies* 6, no. 4 (2002): 441-458, 442-43.

B. Either Subjects or 'Indians':

The origins of the other side of the duality are found in initial period of contact between Indigenous peoples and early settlers, before the existence of Canadian citizenship. Its antecedent concept – British subjecthood – structured the relationship between them, as well as the relationship between settlers and immigrants, intertwining 'narratives of arrival and narratives of contact'.[34] This early period rendered legal recognition of Indigeneity and British subjecthood mutually exclusive at law. The Royal Proclamation was concluded the same year as the Treaty of Paris, acknowledging 'great frauds and abuses' in purchasing lands from 'Indians'.[35] Premised on the sovereign independence of Indigenous peoples, the Proclamation held that 'while the First Nations were under the protection of the British crown, their citizens were not among the monarch's subjects'.[36]

As the military influence of the First Nations waned and 'colonial security became a less pressing concern', British colonists began to encroach on the separate spheres of Indigenous life.[37] In 1857, the then-United Province of Canada passed legislation to encourage Indigenous males to be 'enfranchised', a process which terminated 'Indian' status at law.[38] This self-alienation was 'the price to pay for the 'privilege' of British colonial citizenship'.[39] The purpose of the statute providing for enfranchisement was 'the gradual removal of all legal distinctions between [Indigenous peoples] and Her Majesty's other Canadian subjects'.[40] Over time, the terms of this enfranchisement, which was not well-taken up, would evolve, shifting from deculturation to taking land allotments to lifting 'Indian' status to something akin to dual citizenship.[41] Describing the consequences of enfranchisement, Johnston explains:

> [It] also involved denial of community autonomy and rejection of the values community membership represented. It meant standing outside the circle that contained one's ancestors, language, traditions, and spirituality.[42]

The Proclamation recognized that Indigenous identity exists inside the circle of Indigenous membership; it did not purport to replace it. Indigenous people never submitted to the authority of the Canadian state. As the state settled the 'natives', first with voluntary enfranchisement and then with the full force of the Indian Act, the potential value of British subjecthood and later Canadian citizenship for Indigenous peoples evaporated altogether.

IV. The Law of Citizenship

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[34] Audrey Macklin, "Historicizing Narratives of Arrival: The Other Indian Other," in *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, ed. Jeremy H. A. Webber, Rebecca Johnson, and Hester Lessard (Vancouver: UBC Press, 2011), 41.
[35] See "*Royal Proclamation,* October 7, 1763," in *Canadian Indians and the Law: Selected Documents, 1663-1972*, ed. Derek G Smith (Toronto: McClelland and Stewart, 1975).
[36] Johnston, "First Nations and Canadian Citizenship," 352 (also observing that the Royal Proclamation endures and is recognised in s. 25 of the Charter).
[37] Johnston, "First Nations and Canadian Citizenship," (pinpoint).
[38] *An Act to Encourage the Gradual Civilization of Indian Tribes in This Province and to Amend the Laws Respecting Indians*, S Prov C 1857 (20 Vict), c 26, s 3 (*Gradual Civilization Act*).
[39] Johnston, "First Nations and Canadian Citizenship," 354.
[40] *Gradual Civilization Act.*
[41] Johnston, "First Nations and Canadian Citizenship," 362-3; enfranchisement became legally compulsory with the Indian Act of 1876; this was dual citizenship on highly unequal terms given colonial intrusion into Indigenous life.
[42] Johnston, "First Nations and Canadian Citizenship," 362. The circle to which Johnston refers is the Convenant Circle Wampum, which she uses to demonstrate that Indigenous identity only exists inside the circle.

C. Early Citizenship: 'A Certain Evanescence'

Prior to passage of the *Citizenship Act* in 1947, the federal constitutional provision about 'naturalization' meant 'naturalization as a British subject', according to British criteria.[43] British subjecthood extended to other colonies, including Australia, New Zealand, and India.[44] During the post-Confederation period, citizenship was employed as an instrument of immigration, a way to distinguish aliens from British subjects. The first *Immigration Act,* in 1869, permitted aliens to naturalise as 'local British subjects' after a period of residence in Canada.[45] There was brief but undefined mention of citizen in the *Immigration Act* of 1906. The *Immigration Act* of 1910 'invented the Canadian citizen in law', dividing British subjects into two categories: Canadian citizens, who have the right to enter and remain, and others.[46] This is citizenship for immigration purposes, a way to separate those whose entry and residence are regulated from those who enjoy an unfettered right to enter and reside. Following membership in the League of Nations, the *Canadian Nationals Act* of 1921 borrowed this definition of Canadian citizen in order to distinguish Canadian nationals from other British subjects of the Commonwealth and to publicize citizenship's outward facing form.[47] In this way, immigration law acted as a 'surrogate' for citizenship law encompassing 'a subset of British subjects'.[48]

This pre-1947 version of Canadian citizenship was very much 'a term of art among immigration officials', which Macklin describes as exhibiting 'a certain evanescence':

> It materialized at the border, was visible only to Canadian border officials, and evaporated upon entry. On either side of the border, there were no Canadian citizens, only British subjects and aliens.[49]

This is citizenship as formal, albeit ephemeral, legal status, but not one enforceable at law. Once materialised, it extended the most basic rights to enter and remain; other rights depended on British subjecthood. Although there was not yet an identity aspect to this citizenship (there being no independent nation), Galloway contends that these iterations of 'citizenship for immigration purposes' were seen as a 'vital toehold' in the quest for independence.[50] Following legislative independence in 1931, a citizenship bill was among the early orders of business, even if it was withdrawn.[51] Citizenship was a key aspect of independence—'to be a citizen was not to be a colonial'—both internally to address one another as citizens and externally to accede to international status.[52]

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[43] Macklin, "Historicizing Narratives," 45.
[44] Macklin, "Historicizing Narratives," 45.
[45] *An Act Respecting Immigration and Immigrants, 1869* (UK), 32 & 33 Vict, c 10 (*Immigration Act,* 1869).
[46] Macklin, "Historicizing Narratives," 45.
[47] Galloway, "The Dilemmas of Canadian Citizenship Law," 211; "The Canadian Citizenship Act," *Canadian Bar Review* 25, no. 4 (1947): 365–72.
[48] Macklin, "Historicizing Narratives," 45, citing J. Mervyn Jones, *British Nationality Law and Practice*, 2nd ed. (Oxford: Clarendon Press, 1956), 87.
[49] Macklin, "Historicizing Narratives," 46; on citizenship as a 'term of art' see Moffat Hancock, "Naturalization in Canada," in *The Legal Status of Aliens in Pacific Countries*, ed. Norman MacKenzie et al. (London: Oxford University Press, 1937), 99, cited by Galloway, "The Dilemmas of Canadian Citizenship Law," fn 43.
[50] Galloway, "The Dilemmas of Canadian Citizenship Law," 210-12; See also Macklin "Historicizing Narratives," 57 (recounting the story of the Komagata Maru, a ship from India refused landing or arrival in April 1914, demonstrating how the 'spectacle' of excluding the aliens on board the ship marked a decisive moment in the transition from self-governing colony to independent sovereign state. Those on board the Komagata Maru shared the legal status of British subject with most of those on Canadian shores, but the state would go to great lengths to distinguish a subset of British subjects connected to Canada by birth or domicile in order to exclude the rest).
[51] Galloway, "The Dilemmas of Canadian Citizenship Law," 213.
[52] Galloway, "The Dilemmas of Canadian Citizenship Law," 213.

D. Constitutional Citizens, Provinces, and 'Indians'

The development of the citizen and the Indian in Canadian law are marked by historical and political parallels. Both 'citizen' and 'Indian' were originally included in the Constitution, but only as subjects of the federal division of powers. In 1867, the federal government was granted jurisdiction over both 'Naturalization and Aliens' and 'Indians, and Lands reserved for the Indians'.[53] With these words, Indigenous peoples were erased as founding peoples or partners in Confederation and relegated to subjects of the settler colonial state. Although implicit in the term 'naturalization', citizenship itself was not expressly included in the Constitution. The federal and provincial governments were granted concurrent jurisdiction over with the caveat that, in cases of conflict, the federal law would be paramount.[54] Quebec, meanwhile, was one province among four, granted the same authority as the others with special dispensation for its civil law system, education, and language.[55]

Although distinct in form and function, the legal regimes governing citizens and Indigenous peoples share several features. Both turn on a statute-defined concept of 'citizen' or 'Indian'. The *Citizenship Act* defines citizen, while the *Indian Act* defines 'Indian', each creating the status through the statute.[56] However, the *Citizenship Act* does not set out the rights and responsibilities of citizenship, while the *Indian Act* while the *Indian Act* is the 'principal instrument through which federal jurisdiction over 'Indians'' has been exercised.[57] It establishes a regime of reserves, band councils, residential schools, and other legal instruments which remove and deny rights to Indigenous peoples.[58] This means both citizenship and 'Indian' status can be gained and lost through legislative discretion.

With the advent of the *Canadian Charter of Rights and Freedoms* in 1982, each would receive further mention. The *Charter* established mobility rights gradated by status, providing only citizens with 'the right to enter and remain'. It also recognized and affirmed existing 'Aboriginal and treaty rights'.[59] While the Charter recognizes citizenship and permanent residence as statuses and guarantees certain rights to the holders of each, it does not define these statuses or identify the requirements for obtaining them, creating a sort of 'constitutional vacuum' with respect to the rights and responsibilities of citizenship.[60]

Apart from the mobility rights afforded to citizens, the only other rights reserved for them are those common to liberal democracies: the right to vote and the right to run for office. Then there is the uniquely Canadian right, a product of historical compromise, for citizens to have their children educated in one of the two official languages.[61] In Canada, then, the citizen receives the political rights common to Global

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[53] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (*Constitution Act 1867*), ss 91(24), 91(25)
[54] *Constitution Act 1867*, s 95.
[55] *Constitution Act 1867*, s 93A, 94, 133.
[56] The word "citizen" does not have a broader meaning than that given to it by citizenship legislation (*Solis v Canada (Minister of Citizenship and Immigration)*, 86 DLR (4th) 512 (FCA), leave to appeal refused, [2000] SCCA No 249).
[57] Richard H Bartlett, "The Indian Act of Canada" (1978) 27 Buff L Rev 581, 581.
[58] Galloway, "The Dilemmas of Canadian Citizenship Law," 205.
[59] Aboriginal rights appear twice in the 1982 constituting documents – s. 35 and s. 25, where s. 25 is either a shield to protect s. 25 rights from *Charter* review (*R v Kapp*, 2008 SCC 41, Bastarache J, concurring in result) or an interpretative provision informing the construction of potentially conflicting Charter rights" (*R v Kapp*, supra, Joint Reasons at 64).
[60] Galloway, "The Dilemmas of Canadian Citizenship Law," 202, fn 4.
[61] These are: the right to vote (s. 3), the right to run for office (s. 3), the right to enter, remain in, and leave Canada (s. 6), and the right to have children educated in one of the two official languages (s. 23). Donald Galloway, "Citizenship Rights and Non-Citizens: A Canadian Perspective," in *Citizenship in a Global World: Comparing*

North countries, including mobility rights, and language minority rights. The status of being a citizen therefore makes little difference when it comes to exercising legal rights. Sharpe observes the gap between citizenship as a metaphor for fundamental rights and privileges, on the one hand, and its limited weight in constitutional law, on the other: 'the *Charter* embodies a rich vision of the relationship between the individual and the state, but that vision is not linked to the status of citizenship'.[62]

E. Contemporary Legal Citizenship

The Citizenship Act provisions setting out how Canadian citizenship may be acquired and lost are 'deceptively simple'.[63] This precision, however, is belied by the 'tangle of principles, values, and political perspectives' that underwrite the statute.[64] Canada's passed its first *Citizenship Act* in 1946 (coming into force in 1947). The architect of the first act, Paul Martin Sr, emphasized Canadian citizenship as a common set of values (democracy, freedom, liberalism) to which diverse people could subscribe.[65]

The law of citizenship raises questions of status acquisition, transfer, and loss. The 1947 Act maintained that 'a Canadian citizen is a British subject' and established the same three bases for citizenship that are in place today—*jus soli, jus sanguinis,* and naturalisation—albeit configured for a population of British subjects. 'Natural-born Canadians' included those born in Canada or on a ship (birth on territory) and those born outside Canada whose father or out-of-wedlock mother was born in Canada or was a British subject with Canadian domicile (birth by blood).[66] Section 6 contained the seeds of the requirement to register one's loyalty, requiring a minor born outside Canada to 'assert his Canadian citizenship by declaration of retention'. Section 10 permitted immigrants to apply for citizenship (naturalisation) provided they met the residency, age, language, knowledge, character, and intention to reside requirements. Citizenship loss occurred if an individual acquired the citizenship of another state, renounced their citizenship, or served in enemy armed forces. A person's citizenship could be revoked for disloyalty, lack of residence in Canada, or fraud.[67]

In the 1947 Act, new citizens were not required to renounce prior existing citizenships, but they could lose their newfound Canadian citizenship if they subsequently acquired another. Dual nationality was permitted without exception in the 1977 Act.[68] Although statelessness was not yet a subject with international significance, the first Act nonetheless provided that 'a foundling … found as a deserted infant in Canada' would be deemed to be born in Canada and that a child born after the death of their

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Citizenship Rights for Aliens, ed. Atsushi Kondō (London; Palgrave Macmillan, 2001), 176–95 (observing that some of these are complicated by their statutory foundation, so that the *Public Service Employment Act* does not prevent noncitizens from holding government jobs, but it does discriminate with respect to promotion). The right to enter, remain in, and leave, is partly contained in the IRPA, which guarantees only the right to enter and remain to citizens.

[62] Robert J Sharpe, "Citizenship, The Constitution Act, 1867 and the Charter," in *Belonging: Essays on the Meaning and Future of Canadian Citizenship*, ed. William Kaplan (Montreal: McGill-Queen's University Press, 1993), 221–44. This is not to say that it cannot be: in the era before the *Charter*, the Supreme Court of Canada dabbled with the idea that citizenship entailed and included fundamental rights; see Galloway, "The Dilemmas of Canadian Citizenship Law," 221, regarding the view that 'federal authority over citizenship included authority over those rights which define the meaning of citizenship'.

[63] Galloway, "The Dilemmas of Canadian Citizenship Law," 201.

[64] Galloway, "The Dilemmas of Canadian Citizenship Law," 201.

[65] Canada, *House of Commons Debates.* 22 October 1945 (Hon. Mr. Paul Martin Sr, LPC), https://parl.canadiana.ca/view/oop.debates_HOC2001_02/1, 1335-7, cited in Heidi Bohaker and Franca Iacovetta, "Making Aboriginal People 'Immigrants Too,'" *The Canadian Historical Review* 90, no. 3 (2009): 427–62, fn 10.

[66] *The Canadian Citizenship Act*, SC 1946, c 15, s 4 (*Citizenship Act*, 1947).

[67] *Citizenship Act*, 1947, Part III, ss 16-25.

[68] *Citizenship Act*, 1974-75-76, c 108, s 1 (Citizenship Act, 1977). Although this issue occasionally resurfaces for parliamentary scrutiny, it has not resulted in any legislative changes.

father would be deemed to be born prior to his death.[69] It remains true that statelessness is not a significant issue in Canada, and the current *Citizenship Act* contains provisions aimed at preventing statelessness, in keeping with Canada's international obligations under the *Convention on the Reduction of Statelessness*.[70] These provisions primarily come into play when the first-generation limit or citizenship revocation is at issue. In those cases, if there is no dual nationality, the Act directs the grant of Canadian citizenship.

The 1947 Act left many people outside the circle of citizenship, including 'war brides', children adopted abroad, and children born on overseas military bases. Called 'lost Canadians', these included those whose responsible parent took the citizenship of another state, those born abroad who failed to register as a citizen, war brides, children of war brides who failed to register as a citizen, those born abroad to a married Canadian mother and foreign father, and those born abroad to an unmarried Canadian father and foreign mother.[71] The *Citizenship Act* is part of the continuing effort to correct for the various forms of inequality baked into early citizenship, but the result is *'*a cumbersome patchwork of technically drafted provisions, many of which refer to other provisions in now-repealed legislation'.[72]

It remains the case that citizenship is obtained by birth, either on Canadian soil or to a Canadian parent. Birth on Canadian soil results in automatic citizenship; the only exception is for the children of foreign diplomats.[73] Similarly, birth to a Canadian citizen outside of Canada also results in automatic citizenship within the first generation. In 2009, the government replaced the 28-year rule, which required children born outside of Canada to parents born outside of Canada to apply to retain their citizenship and to substantively demonstrate their ties to Canada through residence or by 'substantial connection' by age 28.[74] In its place was the first-generation limit, a bright-line rule that precludes the transmission of generational citizenship after one generation abroad. For example, if Sunita, who is a Canadian citizen born in Canada, gives birth to a child in India, her child will be a Canadian citizen but will be unable to pass on Canadian citizenship abroad. In other words, her child must give birth in Canada in order to pass on their Canadian citizenship. Although the first generation limit remains in place, the courts struck down the *Canada Elections Act* provision which removed the right to vote from non-resident Canadians who lived abroad for five years or more, suggesting that limits on the rights of citizenship will be closely scrutinized.[75] Naturalisation, which is the subject of scrutiny under the rubric of 'integration' in several other Global North states, remains relatively straightforward. All permanent residents are eligible to apply for citizenship provided they meet the age, residency, language, and knowledge requirements in section 5

[69] *Citizenship Act*, 1947, ss 7-8.
[70] Galloway, "A Canadian Perspective," 183; *Convention on Reduction of Statelessness (*1961) 989 UNTS 175.
[71] A 'responsible parent' is the father of a child born in marriage or the mother of a child born outside of marriage. The list of Lost Canadians is longer. Most but not all of these omissions have been corrected.
[72] Canada, Parliament. Senate. Standing Committee on Social Affairs, Science and Technology. *Report on Bill C-37, An Act to amend the Citizenship Act.* 2nd sess., 39th Parliament, April 16 2008, Committee Report 11. https://sencanada.ca/en/content/sen/committee/392/soci/rep/rep11apr08-e
[73] *Citizenship Act*, RSC 1985, c C-29, Part I s 3(2).
[74] *Citizenship Act*, 1977, s 8: A person who was born outside Canada after February 14, 1977 and who derived Canadian citizenship from a parent, who was also born outside of Canada and derived Canadian citizenship from their parent, ceases to be a citizen on their 28th birthday unless the person has (a) applied to retain citizenship; and (b) either resided in Canada for a year before applying **or** established a substantial connection with Canada. A substantial connection could be demonstrated by employment in public service or residence in Canada for one year (*Citizenship Regulations*, s. 16). Critics charged that the government failed to adequately communicate these requirements to those affected, who often did know of them.
[75] *Frank v Canada (Attorney General)*, 2019 SCC 1, 1 SCR 3. The first generation limit is itself the subject of a constitutional challenge in *Sara Ann Bjorkquist et al v Attorney General of Canada*, Court File No. CV-21-00673419-0000 (Ontario Superior Court of Justice).

of the Citizenship Act. They must not be subject to a removal order, and they must undertake the oath and ceremony.[76]

Modes of citizenship acquisition and transmission receive occasional scrutiny by government committees, but citizenship is not the flashpoint in Canada that it is in other states. This made the tumultuous decade of Conservative rule in the early 2000s all the more bewildering. As Macklin explains, a series of dramatic revisions made citizenship 'harder to get and easier to lose'.[77] The government raised the threshold requirements for naturalisation, instituted the first generation limit on generational transmission, created new grounds for revocation and loss, and politicked around rhetorical pressure points such as marriage fraud and head coverings such as hijab in citizenship ceremonies.[78] Some of these citizenship initiatives made existing provisions stricter: for example, the government shifted from the 28 year rule to the first generation limit. Other changes tracked citizenship debates happening elsewhere, including the *Strengthening Canadian Citizenship Act*.[79] These included: the ability to revoke or 'strip' citizenship on national security grounds; the prohibition of face coverings in citizenship ceremonies; and the overhaul of the naturalisation guide, *Discover Canada*, to increase its length and emphasise Canada's military history and the monarchy.[80] These changes – many of which achieved traction in some European countries and the United Kingdom – were mostly removed after the Conservative left office, either amended out of the legislation or overturned by the courts. Citizenship loss has returned to the ground of revocation for citizenship obtained 'by false representation or fraud or by knowingly concealing material circumstances'.[81] These changes marked an interruption in an otherwise general bent toward liberalisation in citizenship and immigration matters.[82] Some, however, remain: the heavy-handed naturalisation guide and the first generation limit are the most striking.

V. The Citizen Subject

Balibar's citizen subject describes the link between subjectivity and subjection. This circle of subjection only works, or works best, under conditions of equality.[83] The individual in this scenario is not subject to the will of another, but rather to laws that they helped to make. This creates a kind of symmetry or 'immanence' where the citizen's act of making the law as subject is the same as the citizen's obedience to the law as subjection. 'The immanence of this relation vanishes as soon as inequality appears'.[84] The citizen and the subject are always in the shadow of the other, the citizen as the bearer of legal equality

[76] The citizenship ceremony was politicized in the events leading up to the Ishaq case (2015 FC 156; 2015 FCA 151), while various conscientious objectors have challenged the oath's requirement to swear allegiance to the Queen. See *McAteer v Canada (Attorney General)*, 2014 ONCA 578.
[77] Macklin, "From Settler Society to Warrior Nation and Back Again," 285.
[78] Macklin, "From Settler Society to Warrior Nation and Back Again."
[79] SC 2014, c 22.
[80] Macklin, "From Settler Society to Warrior Nation and Back Again," referring to these changes as part the 're-branding of Canada as a Warrior Nation' at 286, 289. For a critique of citizenship revocation, see Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," *Queen's Law Journal* 40, no. 1 (2014): 1; *Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156 and *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 (on wearing a niqab during citizenship ceremony)
[81] *Citizenship Act*, s 10.
[82] Macklin, "From Settler Society to Warrior Nation and Back Again," 286 (referring to these as 'normative immigration countries') and 290 (describes several administrative measures that made the process 'more expensive and less accessible').
[83] Warren Montag and Hanan Elsayed, "Introduction: Balibar and the Citizen Subject," in *Balibar and the Citizen Subject*, ed. Hanan Elsayed and Warren Montag (Edinburgh University Press, 2017), 1–34.
[84] Montag and Elsayed, "Introduction: Balibar and the Citizen Subject," 7.

producing its partial citizens and non-citizens.[85] Under conditions of settler colonialism, the immanence of the relation between citizen and subject disappears.

This section examines the distinct approaches of Quebec and Indigenous peoples to contemporary citizenship. While the Quebec government seeks control over citizenship and its precursors, Indigenous peoples are ambiguous about the value of the citizenship for the project of decolonisation. First and foremost, Quebec seeks control over who gets to be a Quebecker, while Indigenous people seek control over themselves and their land. Quebec's claim is prospective and other-oriented, focused on its 're-peopling' powers.[86] Indigenous peoples' claims are historical, contemporary, and self-oriented; less concerned with others and more concerned with those present now.

Each draws on the political core of citizenship but for different ends. Quebec is concerned with membership and identity as well as rights, and only occasionally preoccupied with making a larger sovereignty claim. The goal is to secure more a robust and distinct political subjectivity. Meanwhile, Indigenous peoples largely reject the taxonomic dimensions of Canadian citizenship except to the extent that 'membership' is related to belonging and invokes their own political subjectivity.

F. Indigenous Citizenship: 'From Ally to Subject to Ward to Citizen'

Canadian mythology tells of a transition 'from ally to subject to ward to citizen', a myth which Johnston disputes, calling the transition 'a study in colonialism'.[87] The settler state deployed a raft of legal instruments, including legislation, to pursue the separate but related objectives of 'eliminating the native' and 'assimilating the Indian'.[88] These colonial modalities ranged from subject status to the physical reserve system of territorial separation to assimilationist naturalisation; each stage aimed at cauterizing the political subjectivity of Indigenous peoples. At each turn, citizenship has been the source of violence and suppression, first coercively exclusive then aggressively inclusive.[89]

During the subject phase, the state sought to remove distinctions between Indigenous peoples and other Canadian colonial subjects in order to align them on the same plane of British subjecthood. Indigenous peoples were no longer independent collective entities who could be granted jurisdiction but rather individualised subjects like the settlers. It is through this kind of subjection that the political subjectivity contained in the *Royal Proclamation (1763)* was erased. Then, ward status arrived with the *Indian Act* and its 'civilizing' mission effected through the Indian status regime, reserves, residential schools, enfranchisement, ceremony bans, and prohibitions on organizing.[90] Such sweeping administrative and quotidian control refused Indigenous peoples as competent or equal subjects and removed them from public citizen spaces.

During this period, the government continued the project of enfranchising 'Indians', removing their legal status as 'Indians' in exchange for enfranchisement and evolving sums of property. Such enfranchisement

[85] Montag and Elsayed, "Introduction: Balibar and the Citizen Subject," 8.
[86] Bhatia, "Re-Peopling in a Settler-Colonial Context."
[87] Johnston, "First Nations and Canadian Citizenship," 349.
[88] Wolfe, "Elimination of the Native."
[89] Fleras, "Rethinking Citizenship," 20; See also James Sákéj and Youngblood Henderson, "Sui Generis and Treaty Citizenship," *Citizenship Studies* 6, no. 4 (December 1, 2002): 415–40; Sheryl Lightfoot, "Multilevel Citizenship," ed. Willem Maas (University of Pennsylvania Press, 2013), 127–46;
[90] Richard H. Bartlett, "The Indian Act of Canada," *Buffalo Law Review* 27, no. 4 (1978): 581–615. Some scholars have described these approaches as 'citizen minus' in Australia, 'citizen plus' in New Zealand, and Augie Fleras suggests 'Indigeneity plus' in Canada.

aligned their status with other British subjects did not bring them any closer to the civil and political rights of Canadian citizenship.[91]

The *Citizenship Act* of 1947 did not mention 'Indians' registered under the *Indian Act* or Indigenous peoples.[92] As Aiken et al confirm, 'despite being born in Canada, they were not Canadian citizens'.[93] The *Citizenship Act* therefore continued the fiction that citizenship and Indigeneity were mutually exclusive legal categories. Only with an amendment to the *Citizenship Act* in 1956 were Indigenous peoples explicitly recognized as Canadian citizens; the amended section provided that:

> 9(4) An Indian as defined in the *Indian Act*..., other than a natural-born Canadian citizen, is a Canadian citizen if that person,
>
> (a) had a place of domicile in Canada on the 1st day of January, 1947, and
> (b) on the 1st day of January, 1956, had resided in Canada for more than ten years,
>
> and such a person is deemed, for the purpose of section 19, to have become a Canadian citizen on the 1st day of January, 1947.[94]

During this window, from 1947 to 1956, Indigenous peoples, if they were registered under the *Indian Act*, held Indian status but not Canadian citizenship. For those Indigenous peoples not registered under the *Indian Act*, neither status was available to them. Regardless of Indian status, however, for this period of time, Indigenous peoples were effectively without citizenship and yet, as Macklin points out, neither were considered stateless. This lacunae—the space between citizenship and statelessness—rests on the same theoretical foundations as 'ward' status; an individual without capacity for citizenship necessarily lacked the capacity to be stateless.

The period following the 1956 amendment is even more murky. Even if a person with Indian status met the residency and domicile requirements of the *Citizenship Act*, the rights of citizenship remained out of reach. The *Indian Act* denied 'Indians' the right to vote for the first seventy-five years of Confederation; Indigenous peoples would not obtain this right until 1960.[95] Meanwhile, however, the enfranchisement provisions of the *Indian Act* remained intact until 1985, which meant that despite now being citizens, Indigenous peoples 'continued to be denied some of the rights of citizens unless they were enfranchised and stopped being an 'Indian' in law.'[96] In effect, barring enfranchisement, Indigenous people were denied their political subjectivity in the Canadian state, unable to subject to themselves to its authority because the state did not recognize them as citizen subjects. Theirs was a hollow citizenship, emptied of subjectivity.

The state successively withheld legal status, rights, and identity from Indigenous peoples by continually producing new ways in which citizenship and Indigenous life were incompatible. Then, in the postwar

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[91] Carole Blackburn, "Differentiating Indigenous Citizenship: Seeking Multiplicity in Rights, Identity, and Sovereignty in Canada," *American Ethnologist* 36, no. 1 (2009): 66–78.
[92] *Citizenship Act*
[93] Sharryn J. Aiken et al., *Immigration and Refugee Law: Cases, Materials, and Commentary*, 3rd ed. (Toronto, Canada: Emond, 2020), 1106; Bohaker and Iacovetta, "Making Aboriginal People 'Immigrants Too,'" 434.
[94] See also *An Act to Amend the Canadian Citizenship Act*, SC 1956, c 6, s 2.
[95] John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court," *Canadian Bar Review* 80, no. 1–2 (2001): 15-41, fn 12 (the provinces extended the franchise to 'Indians' on different dates; then the *Canada Elections Act*, SC 1960, c 7, was amended to bring it in line with the *Canadian Bill of Rights*, SC 1960, c 44).
[96] Sharryn Aiken et al, *Immigration and Refugee Law: Cases, Materials and Commentary*, 3rd ed (Toronto: Emond Publishing, 2020), at 1106; Borrows, "Uncertain Citizens,"; For an Indigenous perspective on this issue, see D'Arcy Vermette, "Colonialism and the Process of Defining Aboriginal People," *Dalhousie Law Journal* 31, no. 1 (2008): 211.

period, on the heels of the *Citizenship Act*, the Canadian state shifted gears and brought Indigenous peoples and citizenship closer together.[97] The national narrative shifted to the still-current 'immigration as nation-building', and Indigenous people were aligned with immigrants, both in need of an education.[98] The objective became 'enrolling them [Indigenous peoples] into citizenship'.[99] The government departments were combined and officials sought to 'Canadianize' and assimilate both 'Indians' and immigrants. Bohaker and Iacovetta demonstrate how citizenship programs aimed at 'status Indians' formed part of the state's larger agenda to eliminate status Indians as a legal category.[100]

G. Superfluous Citizenship: Indigenous Mobility Across International Borders

The right of mobility, one of the only citizenship rights identified in the *Charter*, is also one of the few articulated in international conventions.[101] It is significant, therefore, that since 1985, the focus of Indigenous resistance to citizenship has shifted to mobility. Canada's immigration statute joins citizens and 'Indians' in providing for mobility, stating that 'only citizens and registered Indians have the right to enter Canada'.[102] This right of entry, extended to citizens and Indigenous peoples who are registered under the *Indian Act*, renders them as equivalents in relation to the border. In a handful of court cases, Indigenous peoples whose communities and ancestral homelands are located along the US-Canada border claim rights derived from and including the right to cross the international boundary: pre-existing rights that are not anchored in Canadian citizenship. These claimants are not contesting the boundaries of political membership; they are rejecting its relevance for their Indigenous life.

This mobility right has included several derivations with limited success for Indigenous peoples. The 'sovereign incompatibility doctrine', which concerns the compatibility of Aboriginal rights with Canadian sovereignty, is generally invoked to negate Indigenous expressions of their citizenship rights. These are citizenship rights articulated through mobility across the international border or hunting or other Indigenous rights, some even derived from the *Indian Act*. So, for example, Chief Kanentakeron Mitchell's self-identification as a citizen of the Haudenosaunee (Iroquois) Confederacy expressed through his international trading/mobility right, which implicated his right to cross the international border to trade, was determined to be 'incompatible with the historical attributes of Canadian sovereignty'.[103]

The Supreme Court of Canada recently revisited the issue of whether 'persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by [the constitution].'[104] Desautel, a US citizen, killed an elk without a hunting license in a region that traversed

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[97] Bohaker and Iacovetta, "Making Aboriginal People 'Immigrants Too".
[98] Bohaker and Iacovetta, "Making Aboriginal People 'Immigrants Too,'" 435 (describing various forms of this conflation: Indigenous peoples migrating from reserves to urban centres; portraying Indigenous peoples as ancient migrants themselves (the Bering Strait theory)).
[99] Macklin, "Historicizing Narratives of Arrival: The Other Indian Other," 43; Bohaker and Iacovetta, "Making Aboriginal People 'Immigrants Too,'" 443.
[100] Bohaker and Iacovetta, "Making Aboriginal People 'Immigrants Too,'" 431.
[101] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 | art 12 (entered into force 23 March 1976) [*ICCPR*].
[102] IRPA s 19; The *Citizenship Act*, meanwhile, does not mention Indigenous peoples.
[103] *Mitchell v MNR*, 2001 SCC 33, 1 SCR 911, at para 163.
[104] See *Desautel, supra* note 35, at para 1. Iterations of the issue had arisen in between – see *R v Shenandoah,* 2015 ONCJ 541 at paras 13, 32-40. For an interesting application of the issues raised in *Mitchell* to the domestic federalism/jurisdiction issue of whether the superior courts of one province may recognize Aboriginal rights in land in another province, see *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4. For a scholarly view on the similarities in the SCC's treatment of sovereignty in *Uashaunnuat* and *Desautel,* see Ryan Beaton, "Performing Sovereignty in a Time of Ideological Instability: BC's Bill 41 and the Reception of UNDRIP into Canadian Law.," *UBC Law Review* 53, no. 4 (2021): 1017.

the US-Canada border. He argued he was exercising his right to hunt in the traditional territory of his Sinixt ancestors under the Canadian constitution. The majority upheld Desautel's right to hunt as a successor of the Sinixt peoples, but did not consider his claim in terms of membership or self-identification as a citizen of the Arrow Lakes people, nor did it rule on whether Desautel's right to hunt in Canada carried with it an incidental right to cross the border to do so.[105] The right at issue was not a mobility right, but rather a right to hunt—and Desautel was not denied entry to Canada, leaving for another day 'the question of whether the appropriate framework is sovereign incompatibility'.[106]

In these cases, Indigenous peoples outside of Canada refuse the legal status of citizenship as a relevant determinant of their ability to exercise the rights of citizenship (namely, crossing the border, exercising rights over land, and the right to return). They are asserting their Indigenous political subjectivity as a land-based mobility right that is prior to and different from Canadian citizenship. Sometimes, they seek to claim an Aboriginal right under the Canadian constitution on the basis of this prior membership.

a. The Idea of Indigenous Citizenship

The question that underwrites Indigenous resistance to citizenship concerns the value of citizenship *writ large* for Indigenous peoples. Indigenous communities share the interests of building and sustaining collective identities, maintaining group boundaries, and constructing webs of entitlements and obligations, which constitute the key features of citizenship.[107] But the concept of citizenship is not neutral ground. Indigenous peoples articulate their political subjectivity in terms of citizenship only because self-rule and identity must be described in terms cognizable to the settler colonial state. Speaking in 'an inherited language of constitutionalism' the speakers may be 'imagining, or struggling to imagine, a meaning different from what that language has historically articulated.[108] While the *Nisga'a Citizenship Act* has assumed the vernacular of citizenship, many other self-government agreements have not. And, for some Indigenous scholars, citizenship is simply too wedded to its European Westphalian roots to provide a way into sovereignty.

Prior to the *Truth and Reconciliation Report* (*TRC Report*) and the *United Nations Declaration the Rights of Indigenous Peoples* (*UNDRIP*), scholars and commissions put forward various prescriptions for 'the postcolonial normative integration' of Indigenous and non-Indigenous peoples in Canada.[109] The schools of thought that have survived these texts may be described as reconciliation and resurgence. At the root of the reconciliation paradigm is the concept of mutual recognition, which connotes the equal legitimacy of Indigenous and non-Indigenous peoples.[110] Sometimes referred to as a 'nation-to-nation' relationship, this approach is part of the governmental approach to reconciliation.[111] The term 'nation-to-nation' implies two equal parties and, while its contemporary articulation accepts the premise of self-government for

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[105] *Desautels,* paras 3-9.
[106] *Desautel* at para 66.
[107] Gordon Christie, "Aboriginal Citizenship: Sections 35, 25 and 15 of Canada's Constitution Act, 1982," *Citizenship Studies* 7, no. 4 (2003): 481–95; Borrows, "Uncertain Citizens."
[108] Heidi Libesman, "In Search of a Postcolonial Theory of Normative Integration: Reflections on A.C. Cairns' Theory of Citizens Plus," *Canadian Journal of Political Science* 38, no. 4 (2005): 955–76.
[109] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000),
[110] See James Tully, *Public Philosophy in a New Key Volume I: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008), at 226, 228.
[111] Canada. Royal Commission on Aboriginal People. *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, 1991. Ottawa, ON, 1996. https://publications.gc.ca/collections/collection_2017/bcp-pco/Z1-1991-1-6-eng.pdf.

Indigenous peoples[112], it nonetheless fails to recognize that one party is a nation-state while the others are lesser nations, ones without states. Reconciliation, in this view, rests upon the legal assumption that,

> The Aboriginal peoples agreed to recognise the settlers as coexisting, self-governing nations, equal in status to themselves, with the right to acquire land from them, over which the settler governments could then exercise jurisdiction and sovereignty, by means of nation-to-nation treaties based on mutual agreement.[113]

This approach is thus criticized for privileging settler colonial institutions over and above Indigenous traditions and communities.[114]

This is where the resurgence paradigm comes into play. As the prominent resurgence scholar Betasamosake Simpson argues, resurgence is based not upon a Western conception of justice, but rather upon a conception of justice that means 'the return of land, the regeneration of Indigenous political, educational, and knowledge systems, the rehabilitation of the natural world, and the destruction of white supremacy, capitalism, and heteropatriarchy.'[115] In Simpson's view,

> Indigenous resurgence, in its most radical form, is nation building, not nation-state building, but nation building, again, in the context of grounded normativity by centring, amplifying, animating, and actualizing the processes of grounded normativity as flight paths or fugitive escapes from the violences of settler colonialism.[116]

These spaces within resurgence discourse invoke the image of nested sovereignties developed by Simpson: 'like Indigenous bodies, Indigenous sovereignties and Indigenous political orders prevail within and apart from settler governance. This [constitutes a] form of "nested sovereignty"…'[117] The resurgence paradigm articulates Indigenous political subjectivities that are subjected to Indigenous orders; it draws the circle of subjection under conditions of equality outside and beyond the state.

There is an existing model of Indigenous citizenship, albeit one within the boundaries of the settler colonial state. As part of a tripartite treaty settlement, the Nisga'a people have the right to citizenship in the Nisga'a nation. The settlement included self-government and land rights, which provided the foundation for a kind of 'landed citizenship' linking rights and territory.[118] The Nisga'a people determine their own citizenship criteria, which is based on ancestry, and through their Nisga'a citizenship they are citizens of Canada.[119] The settlement specifies that its citizenship provisions do not impact Canadian

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[112] Canada. Department of Justice Canada. *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, 2018. Ottawa, ON, 2018: https://www.justice.gc.ca/eng/csj-sjc/principles.pdf.
[113] Tully, *Public Philosophy in a New Key*, 233-34.
[114] See Glen Sean Coulthard et al., *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014), 25.
[115] See Leanne Betasamosake Simpson, "Indigenous Resurgence and Co-Resistance," *Critical Ethnic Studies* 2, no. 2 (2016): 19–34, 21; See also John Borrows, "Landed Citizenship," in *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives* (Montreal: McGill-Queen's University Press, 1999), 72–86.
[116] Leanne Betasamosake Simpson, "Indigenous Resurgence and Co-Resistance," 22.
[117] See Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States*, Book, Whole (Durham: Duke University Press, 2014), 10.
[118] Borrows, "Landed Citizenship" (on the importance of land to Indigenous understandings of rights and identity); Blackburn, "Differentiating Indigenous Citizenship," 70. The Nisga'a people are not the only group to have citizenship in their self-government agreement: the Métis have a citizenship regime, while others refer to a 'membership' (see, e.g., Tsawwassen First Nation).
[119] Blackburn, "Differentiating Indigenous Citizenship," 69.

immigration law or Indian Act status.[120] The result is a form of nested citizenship that, on its own terms, exceeds the jurisdiction of the provinces (which do not have citizenship powers); but that, in the context of the self-government rights granted to the Nisga'a, fall short of provincial jurisdiction over other matters. As Blackburn explains, this is 'a novel kind of political space', neither sovereign nor independent nor constitutional, but still nation-based and political.[121] In many ways, Nisga'a citizenship demonstrates the limits of citizenship for Indigenous peoples. What the term 'citizenship' captures that 'self-government' or 'jurisdiction' does not is the power to ensure that the 'people' in the political sense of the word correspond to the 'people' in the sociological sense of the word; that sovereignty, jurisdiction, and citizenship are all connected.

H. Intercultural Lay Citizenship: Quebec

Quebec's presence as the only region in Canada with a majority French-speaking population makes it a unique laboratory for studying the relationship between language, nation, and citizenship.[122] As Juteau observes, 'in Quebec, the politics of citizenship are acted out in a most unusual setting, where statehood is a goal and not a fact'.[123] Following a tumultuous postwar period marked by the Quiet Revolution, which brought the demise of the Church and its replacement by the secular state, Quebec sought to establish a territorially based community.[124] The idea of Quebec citizenship and indeed identity is marked by the interplay of population, immigration, language, and integration. Precipitated by population concerns—the declining birthrates of French settlers and the out-migration of British settlers to other provinces—this struggle was fuelled by underlying anxiety about Quebec's 'people' and its 'peopling powers', in every sense of these terms: demographic, social, cultural, linguistic, political, and legal.[125] In short, this 'political nation' and 'founding member state' entered the process of boundary definition.[126]

In the 1960s and 70s, population and language concerns would converge on the planes of immigration and integration. Language is a recognized vector for culture and a mode of cultural preservation and reproduction.[127] In Quebec, language has been at the forefront of its efforts to establish a distinct citizenship, implicating the two dimensions of rights and identity.[128] Alongside several language laws, the provincial government took control of the immigration portfolio. The government introduced an immigration service, then an immigration department, and then an immigration act to preserve the uniquely "Quebecois" character of the province and promote the integration of immigrants into Quebec's

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[120] "Nisga'a Final Agreement" initialed final agreement August 4, 1998, *Nisga'a Lisims Government, Treaty Documents.* 39-40 https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF (pinpoint section).

[121] See Thomas Biolsi, "Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle," *American Ethnologist* 32, no. 2 (2005): 239–59, in Blackburn, "Differentiating Indigenous Citizenship," 71.

[122] Leigh Oakes and Jane Warren, *Language, Citizenship and Identity in Quebec*, (London ; Palgrave Macmillan, 2007), 2.

[123] Juteau, "The Citizen Makes an Entrée," 442 (drawing this observation from the language in governmental reports and texts as well as the creation of the Ministry of Relations with Citizens and Immigration in 1996).

[124] Juteau, "The Citizen Makes an Entrée," 443.

[125] Ninette Kelley and Michael J. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd ed. (Toronto: University of Toronto Press, 2010), 364; None of this is to dismiss the plural nature of Quebec society or the large presence of Anglophones and other groups; rather, it is to acknowledge the governmental consensus on certain constitutional (existential and institutional) positions to the extent it takes legal and institutional forms.

[126] Alain Gagnon and Raffaele Iacovino, "Historical Foundations and Evolving Constitutional Orders: The Politics of Contestation in Quebec," in *Federalism, Citizenship, and Quebec: Debating Multinationalism* (Toronto: University of Toronto Press, 2007).

[127] Clifford Geertz, "Common Sense as a Cultural System," *The Antioch Review* 33, no. 1 (1975): 5–26.

[128] Juteau, "The Citizen Makes an Entrée," 442.

francophone community.[129] Subsequent agreements would provide Quebec with increasing control over selection, integration, and settlement. The objectives of these agreements over the years include preserving Quebec's demographic weight in the state and integrating immigrants in a way that respects Quebec's distinct identity.[130]

The close and literally productive relationship between immigration and citizenship means that constitutional powers over immigration function as downstream powers over citizenship: today's immigrant is tomorrow's citizen. As Galloway describes, Canada's own historical efforts to employ immigration legislation as a surrogate for citizenship legislation served as a model for Quebec.[131] Quebec seeks to promulgate a distinct identity through its immigration and integration requirements, using intergovernmental agreements under its shared constitutional jurisdiction over immigration and provincial legislation about language and religion to select and discipline future citizens.[132]

After protracted and ultimately unsuccessful constitutional negotiations, the fires of sovereignty and secession were stoked and Quebec's political identity took on nation-state ambitions. A provincial referendum on secession from Canada in 1995, lost by a very narrow margin. This close call with secession triggered a constitutional reference case to the Supreme Court, which endures as a landmark judgment about sovereignty, secession, federalism, and diversity in a constitutional state.[133] For a moment, Quebec citizenship was a real possibility, the circle of subjectivity nearly complete. Although citizenship in this statal form has since faded, the referendum marked the rapid progression of the 'move toward a Quebecois citizenship', culminating in the 'entrance of the citizen'.[134] As articulated within the Province of Quebec, citizenship was 'a heritage and … a set of political rights, the fundamental one being the right to self-determination'.[135] Citizenship as political subjectivity within existing limits—as a vehicle for expressing rights and identity—remains very much alive in Quebec. Indeed, debates over immigrant integration have played a central role in creating this identity.[136]

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[129] Knowles, *Strangers at Our Gates*, 175-76.

[130] *British North America (Quebec) Act 1774*, 14 Geo. III c. (retaining French civil law in the province); *Immigration Act, 1976-77*, c 52, s 109 (allowing the province to select immigrants outside of the procedure carried out by the federal Department of Manpower and Immigration); *Charter of the French Language*, CQLR c C-11; Cullen-Couture Agreement (declaring "immigration to the province must contribute to its cultural and social development"); Meech Accord (failed resolution to ease tensions regarding Constitutional amendements); Quebec Accord of 1990 (Quebec "gained sole responsibility for the selection of independent immigrants destined for that province, as well as full responsibility for linguistic, cultural, and integration services for PRs of Quebec"); *Québec Immigration Act*, CQLR c I-021; Bill C-13, *An Act for the Substantive Equality of Canada's Official Languages*, 1st Sess, 44th Parl, 2022 (set to bolster French language protections federally); Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 42nd Leg, Québec, 2022 (assented to 1 June 2022), SQ 2022, c 14 bill overhauling the previous Quebec Charter of the French Language).

[131] Galloway, "The Dilemmas of Canadian Citizenship Law," 212 fn 40.

[132] Galloway, "Canadian Perspective" fn 69 (noting that Quebec lacks the ability of states to control its borders and thus mobility across them, which is an important limit on its powers).

[133] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

[134] Juteau, "The Citizen Makes an Entrée," 446.

[135] Juteau, "The Citizen Makes an Entrée," 450.

[136] Jean-François Dupré, "Intercultural Citizenship, Civic Nationalism, and Nation Building in Québec: From Common Public Language to Laïcité," *Studies in Ethnicity and Nationalism* 12, no. 2 (October 1, 2012): 227–48; Juteau, "The Citizen Makes an Entrée," 448 (discussing *Bill 18* (1996) which recommended immigration integration into the institutions of the Francophone majority, rather than creating institutions of their own or joining Anglophone ones).

On the plane of integration, Quebec has been active, tabling legislation related to its stated principles of laicité (loosely translated as secularism) and interculturalism.[137] These bills and statutes closely resemble various European responses to cultural and religious diversity. In 2019, *An Act respecting the laicity of the State* (Bill C-21) prohibited certain public sector employees from wearing religious symbols, including hijabs, turbans, yarmulkes, and crosses.[138] In 2022, the National Assembly of Québec tabled Bill 96, which transformed and enhanced prior language laws, requiring francization of businesses, but also requiring newcomers to access public services in French after six months, following which they may no longer receive those services in another language.[139] Where previous citizenship initiatives focused on territory and language in service of equality, these more recent integrationist ones implicate culture and language in service of identity. These principles of laicité, interculturalism, and language provide both a foundation of socio-political principles and a limit on difference and disunity.

VI. Conclusion

Citizenship, the word of many meanings, captures something specific about the politics of the settler colonial state. Because settler states were late to citizenship, formerly colonies of Britain or other European powers, early citizenship abbreviated history and assimilated difference so that 'we are all citizens now'. It was a rocky road to here. The project of settlement shifted between the elimination and assimilation of Indigenous peoples, first withholding citizenship and then deploying it against them as 'newcomers' in a totalizing manner. Former fellow colonies were folded into the state as provinces, with Quebec increasingly pressing for control over the identity of its future citizens. The current *Citizenship Act* does not address these inequalities and tensions in a meaningful way, functioning instead as a guide to acquisition and loss and a laundry list of cross-references correcting for historical exclusions.

The center of citizenship in Canada holds stable; it is the resistance on the peripheries that requires closer scrutiny. The center distributes status, rights, and identity to those born on Canadian soil, those born to a Canadian parent in the first generation, and those who naturalise into citizenship. These citizen subjects exist in a circle of citizenship where they are granted full political subjectivity in exchange for subjection to the Canadian state. On the peripheries, Quebec leans on citizenship as legal status with the possibility of secession in the background, but primarily focuses on citizenship as identity and belonging and, through that, on citizenship as rights. This is a controversial struggle, one that expresses identity through laws which often curtails the rights and lives of other citizens and non-citizens. Meanwhile, Indigenous peoples are engaged in a project of reconciliation that rests on a shared Canadian citizenship that contemplates partial forms of self-government and jurisdiction. And yet, there are calls for resurgence, which entails decoupling citizenship from the state.

This is the question of the future for Canada and other settler colonial states: what does citizenship illuminate about identity and belonging in these states? Is citizenship a productive and worthwhile pursuit for nations without states, for nations with self-government but not sovereignty? In the center of citizenship, the politics are pure in the sense that they are at least formally equal. This makes the subjection acceptable. For Indigenous peoples, and to a lesser extent, Quebec, the equality of this relation is disrupted and the political subjectivity at the heart of the citizen subject remains partially unrealised.

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[137] On laicite, see Gérard Bouchard, *Building the Future - A Time for Reconciliation - Report Commission de Consultation Sur Les Pratiques d'accommodement Reliées Aux Différences Culturelles;* Commission de consultation sur les pratiques d'accomodement reliées aux différences culturelles (Québec, 2008); on interculturalism, see the same; Interculturalism is a rejection of multiculturalism, preferring the idea that Quebec is the dominant culture to which other cultures may add and must integrate.

[138] *An Act respecting the Laicity of the State*, SQ 2019, c 12.

[139] Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 42nd Leg, Québec, 2022 (assented to 1 June 2022), SQ 2022, c 14

The extent to which it is realisable turns on whether segmenting citizenship or conceiving of its political core creates openings for decoupling, or whether, as Arendt said, a citizen 'is *by definition* a citizen among citizens of a country among countries. His rights and duties must be defined and limited, not only by those of his fellow citizens, but also by the boundaries of a territory'.[140] A form of citizenship that truly reckons with the duality presented by settler colonialism requires us to ask: which boundaries? Whose territory? And: who are my fellow citizens?

[140] Hannah Arendt, *Men in Dark Times*, 1st ed. (New York: Harcourt, Brace & World, 1968), 81.