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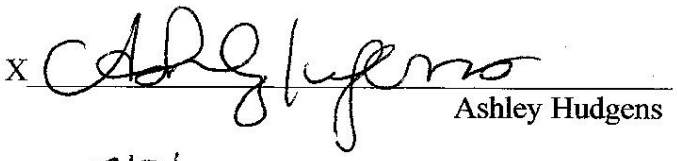
Distinctions between citizens and non-citizens: a study of citizenship with an emphasis on the United States and South Africa

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2011-08-29
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Introduction

The courts in South Africa and the United States are a significant force in informing the public of the official state response to non-citizens, legal and illegal. Immigration and naturalisation processes are significant forces in controlling territorial boundaries and circumscribing collective identity. In this work I will analyse the role of constitutional order in the conception of citizenship and nationality in democratic states with a comparative case study of South Africa and the United States. The purpose of this research will be to add to the body of knowledge around the constitutional bounds of citizenship. It is important in the current globalised system to understand national identity and citizenship. Constitutions in both South Africa and the United States define the bounds of citizenship, but in different ways. Both authorities on constitutional order interact with society in a distinct manner. The role of judicial interpretation in formulating the conceptions of citizenship and in influencing societal perception of citizenship is important to future definitions and understandings of citizenship and membership. Understanding the differences in how the United States and South Africa conceptualise the requirements for and rights of citizens is important to understanding the larger theoretical questions surrounding citizenship, international law and human rights. Membership within democratic states has evolved over time, thus the citizen has not been a static figure, nor will it continue to be. In researching the changes citizenship has undertaken and the contemporary literature on new academic conceptions of citizenship, I hope to come to an understanding of the likely future of citizenship globally and more specifically in South Africa and the United States.

I will determine the extent of the influence of constitutional order upon citizenship and non-citizenship as experienced. In order to assess the amount of influence that the courts have I must also look into the inclusiveness of the courts, the material they use in coming to a conception of citizenship and the reasons for the disparity between court rulings and conceptualisations and recent periods of increased amounts of xenophobia and exclusion. Nation building and nationality can give insight to other forces that shape society's conception of citizenship and membership. I will juxtapose discussions of historical and contemporary citizenship cases and issues with theoretical understandings of citizenship and how they have changed throughout recent history. The

new South African Constitution and the United States Constitution are influential to other democratic states that are creating or recreating constitutions. Understanding the differences between these documents and grasping how the citizenry and populace of these states are influenced by the documents and their guardians is important in the drafting of new constitutions and the interpretations of constitutional rights globally.

In the first chapter of this work I will introduce relevant works and describe the basic constitutional provisions defining citizenship. I will cover literature relating to the enumeration of rights and those expressly provided to citizens. I will discuss contemporary understandings of citizenship, nation building, nationality and its relationship to xenophobia and nativism in South Africa and the United States. In my second chapter, "Constitutions and Citizenship" I will discuss the ways in which the constitution empowers the judiciary to interpret citizenship, as well as the decision-making models employed by both court systems. I will look at the relationship to society each of the systems has as well as specific constitutional clauses and judgments relating to citizenship. In my third chapter, "Dynamic Citizenship", I will discuss the changes of citizenship and membership throughout time theoretically, socially and constitutionally. Here I will discuss apartheid court structures and the mode of citizenship engrained in the South African state pre-1994. I will also discuss the conferral of and entitlement to citizenship in the United States and South Africa. I will look at evolving case law and the change in society in an attempt to understand the courts influence upon societal conceptions of citizenship. In chapter four, "Rights and Duties of Non-citizens", I will establish typologies of non-citizens and discuss the disparity in their entitlements and protections in both states. In this chapter I will examine U.S. and South African immigration laws and policies as they have affected the different classes of non-citizens. I also hope to uncover the states motivation for its changes in immigration policy over time as well as its classification of non-citizens. Chapter five, "Citizen v. Non-citizen: citizens' conception of self and other" I will discuss how laws have influenced civic society's definition of citizenship, I will examine parallels and dissonance in specific regard to the xenophobic outbreaks of May 2008 and the 2010 nativist immigration reform in Arizona. "Citizenship for the Future", chapter six will discuss theoretical models of citizenship that seem appropriately contemporary for today's globally

interdependent political and economic systems. I will address new nation-building models for modern conceptions of citizenship. I will look at old models of citizenship and evaluate how and why they have changed. Trends for both South African and United States citizenship will be hypothesized along with a description of the global trends for citizenship. Lastly will be my conclusion, in which I will assess the influence of the court upon citizenship and the rights and entitlements of non-citizens. I will discuss the influences with my analysis of which factors have the greatest societal force. In my conclusion I will point to possible new modes of defining citizenship, creating national identities and regulating immigration and naturalisation. The juxtaposition of the constitutional order of the United States and South Africa will lead to a deeper understanding of citizenship, membership, identity and rights. Citizenship, like constitutions, is time and context bound. Finding a balance of rights for all and specific entitlements reserved for citizens is significant in mitigating fear and resentment of 'other'. Understanding the causes and exacerbating factors of xenophobia can and should lead to its demise. We must urge for identities created at no one's expense.

Chapter I. Literature Review

The body of literature surrounding citizenship and nationality is quite extensive. For my research I have examined the literature surrounding the manner in which constitutions define and shape citizenship and citizen's rights, with special attention to cases in the United States and in South Africa. Defining citizenship must necessarily entail defining the non-citizen and his/her rights, because citizens and non-citizens only exist in contrast to one another. A simple or contemporary definition of citizenship is not easily attainable and varies throughout the literature. The ambiguity in defining what citizenship means beyond a legal status is overwhelming. Coming to an understanding of what citizenship grants to those who have achieved the status is significant in appraising the role of the constitutions in shaping the notion of citizenship. The legal aspects of citizenship which lead to the self-identification that the status forms is central to understanding how society assesses membership and what the consequences are for those who are not members. Looking at context specific literature as well as the literature on the theoretical bases of citizenship will help me highlight areas that are in need of further discussion and explanation. While each constitutional system may have ample research there is little to tie them together and much less within analysis of judicial interpretations of citizenship. In giving insight to the literature upon which my research is based, I hope to explain the context of my research and clearly define it.

Contemporary Conceptions and Definitions of Citizenship

Seyla Benhabib (2004, p 673) describes citizenship, "first and foremost as the subject of state administration, or more positively, as the subject of rights and entitlements". Benhabib argues that citizenship and control of immigration policy are the modern means of the nation-states territorial control. In accordance with this view of territorial control Shearing and Wood (2003, p. 402) describe the negative aspect of the citizen as a subject of state. They describe citizenship as liability to the threat of use and use of state force. Eisgruber (1997, p. 58) notes that, "a resident of a polity is a citizen if and only if the resident is not subject to deportation and is entitled to vote after reaching adulthood". This basic conception assumed the legitimacy and existence of territorial boundaries and use of citizenship as a control mechanism. A more modern conception

citizenship, still tied to territorial boundaries, envisaged by some (Aleinikoff, 2000; Von Lieres, 2005; David Miller, 2000) is the status of full membership in a state with the benefit of political rights and socioeconomic entitlements to be protected by the state. The desire for inclusion within the citizenry is partially due to the tangible benefits that accompany citizenship, although the benefits may not be realised by all, or even most, citizens. Boundary-focused citizenship employed within liberal democratic states denotes closure and exclusiveness (Linda Bosniak, 2006, ch 2). Michael Walzer (1983, ch 13) discusses citizenship as membership and notes the implications for immigration policy as a result of territorially bound communities. It is this closure and exclusivity in membership that allows nation-states to manufacture a cohesive national identity. There is a divide in the literature between those who have the territorially based conceptions of citizenship and those who envisage a citizenship based upon realisation of rights. Hickey and Mohan (2005) uses the frame of participatory schemes of development in order to define citizenship as participation. Citizenship has also been interpreted with a fuller meaning due to various political reforms. Citizenship as the people of a community has been the most widely used and understood application to those scholars who are still tied to territorially constrained notions of citizenship. The distinction could be made that the citizen Hickey and Mohan envisage is an active citizen, and passive citizens have less entitlement to claims upon citizenship. So the emphasis is upon the level of engagement rather than legal membership. The notion of citizenship as something more than a few rights and documentation is largely seen in the participatory and deliberative movements. A quite contrary notion of citizenship has also formed under the conception of cosmopolitan democracy (Beck, 2001; Bohman, 2001; Bobbio, 1995; Habermas, 1996; Held, 1999; Linklater, 1998). Andrew Linklater (1998) describes the notion of cosmopolitan citizenship as universal or human citizenship. The conception that he elicits is one, common within cosmopolitan citizenship literature, which urges the utmost egalitarianism, without regard to location. James Bohman (2001) presents a more active version of citizenship along with a universal citizenship under cosmopolitan republicanism. Although this notion of citizenship is that of a world citizen, the cosmopolitan republican conception allows for considerable participation at the global level; most academics describing citizenship in a cosmopolitan democratic world scheme do not anticipate a high level of individual participation aside from voting. The

conceptions of citizenship and their relationship to contemporary politics are significant in understanding the desire of the U.S. and South Africa, the demos and the state, to shape citizenship.

Nation building and Nationality

Nation building is the creation of common political identity of diverse units (Gagiano 1990, p. 32). Ian Liebenberg (1994, ch. 1) argued that the focus of the government should be to ensure longevity and stability, while nation building assumes a secondary role. Sustainability is a factor that both nations have considered in their undertaking to create a common political identity, but the forces are polarizing. Mark Simpson (1994, p. 463-466) describes artificially created state borders as a significantly limiting factor for South African nation building, which has lead to the inability to build a nationality within an ethnically heterogeneous and religiously diverse population. Simpson notes that this dilemma is not exclusive to South Africa, or even Africa. In South Africa there are competing ethnic cores, many of which extend beyond the state boundaries, which makes nation building a daunting task compared with more homogenous populations. The scenario in which the nation precedes the state is more ideal for creating a national identity than the creation of a nation within a state. There is an increased level of difficulty in nation building in heterogeneous communities without a common thread. The United States and South Africa both have diverse populations so examining their techniques in comparison should allow an assessment of the policies effectiveness. The United States has used the 'American dream' and pride in its constitutionally protected rights as a means to create and American identity. South Africa has used its oppressive past to create a common thread of recovering from apartheid for creating a national identity. Understanding nationality in states that are ethnically, religiously, culturally and politically heterogeneous can be extremely difficult. This problem complicates nationality and nation building in both South Africa and the United States. Nation building is not a once off effort; there is continuous strategy that goes into states citizenship and immigration policy. Exclusiveness has been used by South Africa and the United States. The implementation of exclusivity centred nation building creates angst against non-citizens. Xenophobia in the context of nation building can be incidentally incurred or even provoked by government policy. Bronwyn Harris (2002, p.

171-175) discusses how xenophobia is a result of South Africa's nation building policy efforts. I hope to determine the extent to which policy in the U.S. and South Africa plays a role in xenophobia.

Nationality in most states can be viewed as a construct. Michael Jones-Correa (2001, p. 998) defines nationality, like a previously discussed conception of citizenship, as the formal legal status of state membership. The concept of dual nationality is important when assessing the effects of immigration and citizenship policy. Jones-Correa discusses dual nationality in the United States and its impact upon American citizenship and identity (p. 1006-1018). Understanding identities that are not exclusive to one nation allows insight as to what factors have the greatest impact upon creating national identity. David Miller (2000, p. 28) denotes that a national identity is strengthened by the use of a single official language, as in the case of the US, but he notes that the use of other languages in non-state affairs allows for resistance against homogenisation. In South Africa a sort of multilingualism and multiculturalism has been endorsed, I want to understand the extent to which this has influenced nation building. Nikolas Rose (2001, p.1403) argues that the United States has attempted to use shared morality as a means of nation building and creation of nationality, the same can be said about South Africa's Rainbow Nation approach. Richard Wilson (2001, ch. 4) discusses the Truth and Reconciliation Commission (TRC) and the constitutionally embodied human rights as purposeful attempts at nation building and potential sources for nationality in South Africa. Wilson discusses the TRC as enabling collective memory to form a shared national past, which fosters nation building and a collective national future. Wilson describes the South African nationality as both arising from past endurances of wrongs under apartheid and the ability to hope for progressive change for all. The new South African identity revolves around hope and forgiveness. I hope to analyze success of the attempts by the United States and South Africa to form a nationality through constitutional order.

Definition of Citizenship in the South African and United States Constitutions

Citizenship is a component of the state, which itself is a social construct. Because citizenship is not naturally occurring, but manufactured, it is significant that we understand how it has been shaped in the past and the potential sources of change for the

future. Citizenship in the United States was defined in 1868 the 14th Amendment to the United States constitution: "All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and the State in which they reside."[1] Before this time there was no definition of citizenship within the U.S. Constitution, the only references as to the meaning of citizenship was in the Article I power of Congress to determine the rule of naturalization and the ability of a natural born citizen to hold presidential office.[2] Even the definition within the 14th Amendment allows the legislature a degree of flexibility in determining citizenship of those who are not born in the United States. Because citizenship in the United States is determined foremost by birthright, we can begin to shape an understanding of the confines of citizenship in the US. Christopher L. Eisgruber (1997, p. 61) discusses the vague and arbitrary nature of the 14th Amendment to the United States Constitution that gives weight to birth within the territorial boarders of the United States, regardless of parentage (except in the case of foreign diplomats). In the South African constitution citizenship is left entirely to national legislation.[3] The South African constitution mandates that "no citizen may be denied citizenship."[4] This seems to infer that the legislation on citizenship should provide a consistent rule by which citizenship is determinable. Sally Peberdy (2001, p. 17-24) discusses the increased restrictiveness of post-apartheid legislation regarding citizenship and immigration. Understanding the logic behind the construction of citizenship is important in assessing how the meaning of citizenship has changed over time. It is also significant to understanding the discrepancies between the rights of citizens and non-citizens. The literature surrounding citizenship in both South Africa and the United States deals primarily with the rights of citizens versus non-citizens, rather than the merits of basis for determining citizenship.

Constitutional Enumeration of the Rights of Citizens

Jonathan Crush (2000, ch 1) points out the minimal differences between citizens and non-citizens according to the South African constitution. The only differences that the constitution suggests are that citizens have two exclusive rights. The constitution

[1] United States Constitution: Amendment XIV
[2] United States Constitution: Article I, section 8 an Article II section 1
[3] South African Constitution: Chapter 1, section 3, subsection 3
[4] South African Constitution: Chapter 2, section 20

grants the political rights and the right to freedom of occupation, trade and profession solely to South African citizens. Jonathan Klaaren (2010, p. 98-105) discusses the rights denied from non-citizens; the right to remain as a resident and the right to a passport as exclusive to citizens. The Bill of Rights of the South African constitution uses language to imply that all other rights are conferred to people, rather than citizens. The use of the term people is expansive and allows non-citizens of all types to enjoy these rights. Kevin Johnson (1997, p.1112) describes the disparity of right between citizens and non-citizens in the United States as great, however T. Alexander Aleinikoff (2000, p.125-128) notes that the rights of citizens and non-citizens are not starkly different and differences are diminishing over time. The original Bill of Rights of, or the first ten Amendments to, the United States constitution contain negative rights, or preclusions for government action. These preclusions indicate that citizens and non-citizens alike are entitled to these protections, because the government has been prohibited from doing these specific things. However rights that are not expressly enumerated in the constitution have been constructed by the interpretation of the Supreme Court. The Court is able to interpret the Constitution to allow rights that may not be expressly written in the Constitution, but implied. Within these implied rights lays discretion for the Court to interpret to whom the rights are granted. Looking at judicial decision-making in both countries is significant in understanding how they have understood citizenship.

It is in the 14th and 15th Amendment to the United States Constitution that citizenship is explicitly expressed by birthright or naturalization and includes the right to vote. In the South African Constitution the rights of citizens enumerated or expressly defined in contrast to those rights of non-citizens is clearer. In the U.S. Constitution the language used is much less distinct in describing what rights the government endorses, much less to whom they are entitled. The differences in the rights of citizens and non-citizens are within legislation to be interpreted by the courts. There is not an extensive body of literature surrounding a comparison of the rights of citizens and non-citizens in the United States and South Africa. I will examine case law from the high courts in both countries to get a better grasp of the interpretations of the rights guaranteed to non-citizens. As long as there are meaningful differences in the rights of citizens and non-citizens the legislature's power to define citizenship has wider and greater implications in the lives of both citizens and non-citizens. The fewer rights that are exclusive to citizens

the less significant the classification becomes. I will examine statutory distinctions between citizens and non-citizens and legislation surrounding the immigration and citizenship processes in both countries, including comparison of dated legislation and the South African Citizenship Act of 1995. Understanding a contemporary conception of citizenship is important to understanding the relationship between the courts interpretations and the consensus the in the academic world.

Nativism and Immigration Policy

Michael Walzer (1983, ch. 2) urges that guest workers, temporary residents and permanent residents in any community should be treated as potential citizens, sharing the same benefits while in the state. The benefits enjoyed by non-citizens are not evenly distributed. There is a discrepancy between the treatment of white immigrants and black African immigrants both by the state and society as depicted by Francis Nyamnjoh (2006), who pays special attention to the relationships between domestic workers and their employers in South Africa and Botswana (ch. 4-5). Nyamnjoh describes the social benefits that white immigrants enjoy merely because of their skin colour and their ease of assimilation into higher paying workforce (ch. 3). The discrepancies are not exclusive to South Africa, but show a larger pattern of abuse and victimisation as a result of the vulnerability of non-citizens. Bronwyn Harris (2002, p.182-185) also discusses xenophobia in South Africa and its increasing tendency to present mostly in South African blacks against black foreigners from other African countries. Harris attempts to look at the rationale for such biases against foreigners. Harris distinguishes competition and scarcity as motivating factors that are exacerbated by the transitional state of the society. Understanding the economic implications of migration is necessary to explaining xenophobia (Solomon, 2003; Nyamnjoh 2006). It is confounding that despite the new South African Constitution, which expresses greater human rights than many other contemporary constitutions, there has been an increase in xenophobia. Xenophobia is not just a South African problem. Kevin Johnson (1997, p.1132-1139) argues that the US immigration laws reinforce nativism. Sally Peberdy (2001, p. 24-25) and Kevin Johnson evaluate the use of both states' terminology regarding immigrants and the nativism that it reinforces. Despite the claimed race-neutrality of immigration laws, Johnson argues that race influences the drive for legal restriction in the US. Johnson focuses on the force that

language gives the term alien. The dehumanisation of immigrants may not necessarily be the goal, but is a result, Johnson contends. Once they are dehumanised the disparity in the rights they hold is seen as more justifiable. Not only are there differences due to race but to the typology of non-citizens. Refugees enjoy different benefits than other documented or undocumented residents. The classification of refugee also is motivated by state interest in creating solidarity between citizens.

Sally Peberdy discusses the increased restrictiveness of post-apartheid legislation regarding citizenship and immigration that has been a result of nation building. Not only does she highlight the legislative changes but she also notes that the borders have become more heavily policed. New legislation and the manner in which it is enforced have increased the difficulty of lawful entry to the state. Peberdy attributes these post-apartheid changes to the government's desire to maintain strong territorial boundaries in order to construct a firm national identity and to manage the rights of the growing citizenry constitutionally. The same issues have propelled increased boarder security in the United States. Jonathan Crush (2002, p.106-110) discusses South Africans' willingness to support increased deportation processes. Crush notes that the antagonists of non-citizens rights are both the government and the media, who hyperbolise the problem of "illegal immigration". The terminology "illegal immigrants" is used fragrantly in the United States in the media and by government officials who seek to make the boarders more impermeable. Crush attributes the public opinion on the immigration and naturalization processes tainted by the use of negative language and media surrounding these groups. The public opinion makes difficult the implementation of an interpretation of constitutions as applicable to non-citizens in South Africa and the United States. Kevin Johnson (1997, p. 1148-1150) discusses that the threat of deportation prevents immigrants in the United States from involvement in urging immigration reform. The same is true in South Africa; the vulnerability of those who reside within these nations without the proper documentation prohibits they from making any sort of protest about unfair treatment.

Gaps in the Literature

There is a gap in knowledge pertaining to judicial rationale behind conceptualisation of non-citizen rights in both South Africa and the United States. In

understanding and comparing the use of judicial rationale in these two countries one can better understand the conceptions of citizens and non-citizens under two constitutions separated not only by conception and time period but also made different by format and style. In examining the rights of non-citizens in these two documents and the jurisprudence that exudes from them, there is a necessary evaluation of the mode of constitutional order in both states. A mere content analysis of the constitutions and jurisprudence would be insufficient to understanding the atmosphere in which judges are called to interpret the constitutions with regard to citizenship. Most of the literature around these topics did not discuss high court cases or legislation from the past decade. The xenophobic outbreaks in 2008 and the new immigration bill passed into law in April, 2010 Arizona adds new dimensions to the citizenship debate. Seeing how the courts react(ed) to these events will allow for a meaningful and modern analysis, which will contribute to and modify the existing literature. This contribution will also parallel the literature on contemporary citizenship and globalisation. Without including the contemporary literature on citizenship and contrasting it to the most current pertinent events, no theoretical generalisations can be made. There is also little research in assessing the ability of the judicial process to protect the rights of non-citizens in practical and meaningful ways. Understanding the states' relationship to non-citizens strengthens understanding of the relationship between states and citizens, and the attributes unique to citizens.

Chapter II. Constitutions and citizenship

Beginnings

The constitutions of South Africa and the United States are very different, but it is a difference among a multitude of similarities that the states and governments share. In understanding the role that constitutional order affects citizenship in both the United States and South Africa the historical conception and role of the constitutions must be discussed. The United States Constitution was the first practicable constitution and it was very brief and vague, in over 200 years there have only been 27 constitutional amendments. The U.S. Constitution was the successor of one failed attempt at post-colonial rule, the Articles of Confederation, which proved too weak to regulate both inter and intrastate activity. The Constitution was drafted by the elites of colonial America. The drafting of the Constitution was divided between those who sought a large federal government, the Federalists, and those who believed that the states should retain their sovereignty, the anti-Federalists. The Constitution was ratified along with the Bill of Rights, which was a concession to the anti-Federalists, which ensured their endorsement of the Constitution. South Africa's current constitution was ratified in 1996 and there have already been 16 amendments. The South African Constitution of 1996 replaced the interim Constitution of 1993, which was drafted amid negotiations of the National Party and opposition parties, and the previous constitution of 1909, which was drafted at the end of the Anglo-Boer war (Ebrahim 1998, p.5-8). The South African constitution is much more contemporary and was manufactured with the use of experiences derived from other older and tried constitutions. The 1996 constitution was a product of the Constitutional Assembly. The Assembly not only included major political actors, but it also included civil society and citizens (Ebrahim, p. 179). The increased amount of transparency and inclusiveness along with its newness would lead one to believe that the South African Constitution or the courts that interpret it have a greater impact upon citizens conception of self and other. The Constitutional Assembly went to great lengths to include citizens' input and feedback: television, radio and print ads were distributed, telephone hotlines received input, surveys were conducted in person in disadvantaged communities and the information derived from these efforts were implemented in the constitution-drafting process (Barnes and De Klerk, 2002). The drafting of a constitution

in the 20th century entailed some obvious differences allowed by technological advancement, but the extent of public inclusion and newness of the Constitution would lead one to believe that the document that should have a genuine role in the lives of South Africans and residents of South Africa.

Understanding the Courts

In order to understand the role that the judiciary plays in relation to citizenship, with attention to South Africa and the United States, we must understand the constitutionally defined and functional role of the courts as a body of the states. The ability of the judicial system to interpret and define citizenship is derived from the constitutions' construction of the court system. The South African Constitutional Court has 11 members; the United States Supreme Court has 9. The odd number is a barrier against deadlocks. The constitutions of South Africa and the United States both enable a judiciary that is independent. The United States Constitution provide terms of "good behavior" (Article 3 (1)) meaning that the justices of the Supreme Court and all lower courts are able to serve life terms. Life terms free the justices from the restraints of the political parties who appointed them and of public opinion. In essence the South African Constitution allows for the same provision by allowing 12-year terms not extendable, but with a retirement age of 70 (8:176(1)). The term limitation, in the case of South Africa, and life appointment, in the case for the United States, both clauses enable judges to interpret citizenship matters without fear of reprisal from the executive of legislative branches, nor must they fear being voted out of office by the people. The judiciary in both states have a unique position in regards to its interpretation and definition of citizenship and its entitlements due to the lack of public accountability. The judicial authority of the U.S. and South Africa is accountable only to the constitutions and the laws, the constitution being the supreme law in both cases. In the case of South Africa the Constitutional Court is bound to an expansive set of rights. In the United States because the constitution is less precise in the enumeration of rights, the Supreme Court of the United States has greater flexibility in its interpretation of the rights that are allowed to citizens and non-citizens. Another important and common aspect of the judiciary in both South Africa and the United States is the ability for the highest court to reject the decisions of lower courts, thus the ability to set precedent for the lower courts. Both the

Constitutional Court of South Africa and the U.S. Supreme Court are primarily courts of appeal. These courts both have very small bodies of original jurisdiction, however appellants are able to appeal directly to these courts. The ability to appeal directly to these courts is significant because it can substantially decrease the time and resources necessary to receive the final adjudication. The significance that this bears to citizenship is namely uniformity and concentration of decision making to the highest courts. The Supreme Court or Constitutional Court, respectively, can decide how to interpret citizenship issues that arise from the constitution and the decision that they reach bears upon the rest of the country. This is more significant in the United States in which there is more variation from state to state in laws and policies regarding citizenship. In South Africa, although there are provincial governments, the system is more uniform and less power is reserved to the provinces. The definition of citizenship as centralised within the hands of the highest court of appeal can prevent areas in which immigration is more controversial from denying rights disproportionately.

Judicial Decision-Making

Judicial decision-making in these two nations is significant in analyzing the decisions that help construe citizenship. The decision-making employed by Supreme Court justices in the U.S. is claimed to be based upon the "rule of law". This conception of judicial decision-making, referred to as the legal model, only values interpretation of constitutional text and precedent while it discredits global and societal influence, personal preferences, strategic decision-making and partisanship (George and Epstein 1992, p. 324). There is little esteem for international or foreign jurisprudence within the legal community. The academic culture in the United States has refuted the legal community's claimed objectivity in the legal model. Academics refute that the legal model is being used exclusively. The South African judicial decision-making process is much less controversial because it openly accepts a wider range of influences for the justices to evaluate. It also enjoys much more consensus by the justices in decision-making, often even with unanimity (Gibson and Caldeira 2003, p. 6-8). This is significant because it describes a pattern of decision-making that accounts little for strategical voting, in which justices vote as a means of garnering support for future decisions. The South African Constitution specifically states that when rendering a decision pertaining to the Bill of

Rights the court must consider the Constitution itself, as well as foreign and/or international law. The South African Constitution has the unique privilege of being expressly permitted to consider foreign law and even required to integrate international law (Dugard 1995). Despite the fact that the use of foreign and international law is limited to the Bill of Rights, this is a significant factor in judicial decision-making in South Africa and additionally as an example for other judicial bodies internationally. Judicial decision-making, whether permitted to or not includes idiosyncrasies, societal forces and partisanship. These contributing influences cannot be measured, however when examining the courts' stances on citizenship and immigration issues over time extra-legal factors can been seen as to contribute to the variance.

The Courts, Society and Access

The role of the court within society is significant to the people's reception of the courts interpretation of citizenship. The relationship that the courts have with the people may not impact judicial decision-making, but it does impact the perceived legitimacy of the decisions, their practical implications and the ease with which they can be implemented. The Constitutional Court was designed with the power to become a mechanism for social reconstruction and distributive justice (Gutto 2001, p. 236). The people of South Africa have a low level of trust in the court system. Surveys from 1998-2007 conducted by the Human Sciences Research Council indicated that the amount of confidence that South African citizens trust in, churches, big business, the SABC and most other institutions more than they trust the courts. A Gallup Poll conducted in July of 2010 in the United States found that many of the same institutions also come before the courts in citizens' trust. In 2008 49% of South Africa citizens surveyed indicate that they have high or moderate trust for the courts (HSRC, 2008). In 2010 79% of Americans surveyed indicate that they have very high, high, or some trust in the Supreme Court. The results of these surveys cannot be directly compared for three reasons. Most significantly the quantifying terms high and moderate are not directly comparable to very high, high and some. Secondly the South African citizens were asked about their trust in courts in general whereas U.S. citizens were asked specifically about the Supreme Court. The last difference is not as significant but the data from South Africa is from 2008, whereas the U.S. data is from 2010. The two responses have observable similarities in being behind a

number of other institutions in trust, however it is noted that the United States Supreme Court enjoys a higher overall level of perceived legitimacy by citizens than does the South African Constitutional Court (Gibson and Caldeira, p. 12).

The relationship that the court systems in each country have with society is significant in assessing the role of the courts in influencing individual conceptions of citizenship. The court systems in both countries have barriers to entry that usually discriminate against the poor. In the words of Nelson Mandela "In order for the rights and freedoms embodied in constitutions to be realised, they must become part of the everyday realities of citizen's lives, and the institutions protecting them must be deeply entrenched" (Hames, 2006, p. 1316). The time costs, transportation costs and cost of litigation can be great, which deters the most marginalised people access to the court system. Even in cases in which there are non-profit advocacy groups the input is still relatively high. The percentage of people with the resources to voluntarily access courts, due to costs, is lower in South Africa that in the United States because there is a higher rate of poverty in South Africa. The poverty for South Africa recorded at 50% living below the poverty line estimated in 2000 and in the United States at 12% below the poverty line in 2004 (Central Intelligence Agency, 2010). South Africa is significantly poorer that the United States and the percentage living below the poverty line does not significantly reflect the nations' wealth gap because the two countries use different standards to determine what is below the poverty line. Awareness and knowledge of rights are necessary for those possible claimants to seek judicial intervention. The most marginalised in South Africa are highly unaware of their rights and as Mary Hames (2006, p. 1314) describes, 'paper rights' have not been made into 'substantive rights'. The ignorance of rights of citizens and non-citizens alike leads one to ask if rights exist that are not realised by those to whom they are endowed. A good deal of the South African population is highly unlikely to have the means to use the court as a body of redress. This inability to access the court may influence the amount of influence court decisions and interpretations have to this segment of the population.

Constitutional Provisions Regarding Citizenship

The South African Constitution of 1996 discusses the rights of citizens and non-citizens with a high level of clarity. The Preamble to the Constitution states that, "South

Africa belongs to all who live in it". It also states that, "the government is based upon the will of the people". The Bill of Rights is the portion of the Constitution that, "enshrines the rights of all people in our country" (section 7.1). The use of terms like, "all people" and "everyone" is consistent throughout the Bill of Rights. It seems that most of the rights provided to the citizens of South Africa are also reserved for non-citizens. Several exceptions apply. Although the preamble indicated that the will of people, not citizens, will determine government it is citizens alone who retain the right to vote or hold political office (section 19). All of the political rights enumerated in section 19 of the Bill of Rights are reserved for South African citizens exclusively. This clause indicates that only citizens can form, recruit or campaign for political parties or causes. This could be a significant barrier for non-citizen congregation or protestation. The two subsequent sections of the Bill of Rights, section 21 and 22 both also hold certain rights exclusive to citizens. In section 21 the right to, "enter, remain and reside anywhere in the Republic" and the right to a passport are both exclusive to citizens. The first right mentioned has greater impact upon the lives non-citizens. The time limits imposed and the restrictions to residence affect the daily lives of non-citizens in South Africa. Section 22 also has practicable consequences for non-citizens, only South African citizens, "have the right to choose their trade, occupation or profession freely". These constitutionally defined restrictions are few but do play a significant role in the legal conceptualisation of citizens. Although nationality is a right for children upon their birth, there is no constitutional provision providing birthright citizenship in South Africa as there is in the United States. In South Africa you are entitled to a nationality upon birth, but not necessarily South African nationality. The US Constitution guarantees citizenship to all who are born within the jurisdiction of the United States in the 14th Amendment. The entitlement to citizenship in South Africa is not as clear as that in the United States. That being said, the rights of citizens in the United States are much more vaguely defined within the US Constitution or Bill of Rights. Because of the explicit nature of the South African constitution all rights but a defined few are reserved for citizens and non-citizens alike. In the United States, the Bill of Rights is not as specific as to what rights citizens enjoy or those that are guaranteed to residents and citizens. The judiciary of the United States thus has more flexibility in determining the applicability of rights to citizens and non-citizens. The United States Bill of Rights does entitle certain rights to all by limiting

the action of government, thus forming negative liberties. The Bill of Rights does provide for more expansive political rights for non-citizens by prohibiting the government to interfere with petition and peaceful assembly. The Bill of Rights has phrases like "the people" and employs passive language, which fails to define to whom rights are reserved. The right to hold certain offices: House of Representatives, Senate and President are clearly reserved to citizens. The right to vote is ambiguous as to citizenship. The Congress is given the means to determine the nationality procedures, which allows for infinite changes to be made over time.

Significant Court Cases Involving Citizenship

When examining the effect of the court upon citizenship the means for assessment is the description and evaluation of decisions that the courts have made. In an effort to understand the extent to which the court plays a role in the conception of citizenship and the entitlements of citizens and non-citizens one must look at pertinent case law. For the purposes of this comparison I will look at United States Supreme Court and lower court decisions as well as South African Constitutional Court and lower court rulings. I will examine the most significant cases relating to the rights of non-citizens as interpreted by the courts. At this point I also confine myself to South African rulings under the new Constitution. I will save my discussion of the role of apartheid courts upon citizenship to a later chapter for the purposes of evaluating the role of the current judicial authority in both countries.

The first set of cases to discuss deal with the applicability of right to non-citizens. In the U.S. the case came in 1886, *Yick Wo v. Hopkins*, which opened the door for immigrants to be entitled to Equal Protection of the law and Due Process. This case was the first to establish that the Bill of Rights of the U.S. Constitution should be construed to apply to non-citizens. In *Lawyers for Human Rights v. Minister of Home Affairs*, in 2004 the Constitutional Court declared that the rights of non-citizens were protected by international law and the Bill of Rights of the South African Constitution. These cases are probably the most significant in the construction of non-citizen rights. The courts in both of these cases extended the protection and privilege of the Bill of Rights beyond members of the citizenry. These rulings prevent much antagonism by the state towards foreigners. The courts in the U.S. and South Africa have gone further than providing the most basic

protection but both high courts have established that legal residents can enjoy welfare benefits. In the case of South Africa it was decided in the consolidated cases *Khosa and others v. Minister of Social Development* and *Mahlaule and another v. Minister of Social Development* in 2004. The Constitutional Court established that permanent residents are entitled to welfare grants and social security benefits. In the United States the Supreme Court decided *Graham v. Richardson,* 1970, which gave legal residents access to state welfare programs, regardless of the length of their residency. The courts in these instances allowed for the allocation of state welfare resources to be distributed to residents, rather than just to citizens.

There are significant discrepancies between the courts, one of the most significant being the ability to discriminate employment upon the basis of citizenship. The U.S. Supreme Court decided in, *Espinoza v. Farah Mfg. Co.* (1973), that employers are not prohibited from using alienage as a basis for discrimination in hiring practices. In 1997 the Constitutional Court heard the case *Larbi-Odam v. MEC in the Department of Education in the North-West Province*, in which they decided that unless the position requires citizenship due to sensitive information, then employees could not be terminated on the basis of citizenship. While these cases are distinct in that one discusses hiring practices and the other termination practices they do represent contrary stances. The Constitutional Court determined that equality of employment was enshrined in the Constitution and applied to all citizens and legal residents alike. The United States Supreme Court interpreted the legislation surrounding equal employment, *Civil Rights Act of 1965*, to extend only to citizens. The South African Constitutional Court has reserved some protections exclusively to citizens. In *Kaunda and others v. President of RSA and others* (2004) the Court determined that the protection of foreign nationals abroad is not constitutionally mandated and is an issue for the executive. While citizens have certain protections by South African government if being detained in a foreign country foreign nationals are not privy to these protections. Also, more recently, in *Mamba and others v. Minister of Social Development and others* (2008) the Court determined that the government in providing temporary housing for foreigners, during and after the May, 2008 xenophobic violence, under the *Disaster Management Act* had no obligation in formulating a plan for the reintroduction of the foreigners into society. The Constitutional Court has limited the entitlements of non-citizens while

simultaneously reserving certain rights exclusively to citizens. In the United States the Supreme Court has also limited the protections of foreigners, especially those of foreigners residing in the United States without legal documentation. The Court in, *Hoffman Plastic Compounds v. N.L.R.B. (2002)* determined that illegal immigrants are not entitled to claiming back pay if wrongfully terminated. All other classes of persons, citizens and documented non-citizens alike are entitled to this benefit. The Court also has restricted the entitlements of legal residents. In, *Alexander v. Sandoval (2001)* the Court determined that a legally documented resident was not entitled to take a driver's license test in her native language of Spanish. Not only was the English-only test, implemented in the state of Alabama, acceptable, but this ruling also set the standard of discrimination higher for immigrants to prove in future court cases. While these court cases are only a few they are the most significant in providing a background for the courts' conceptions of the distinctions between citizens and non-citizens. They are landmark cases that describe specific rights and distinctions which are significant in analyzing the disparity between citizens and non-citizens. The courts' decisions are significant in that they allow for change over time; they are the means by which the constitutions remain contemporary. There have been shifts in jurisprudence that both expand and contract the rights of both citizens and non-citizens.

Conclusion

The constitutional framework and how it was established are significant in understanding the role of constitutional order for the definition of citizenship. The differences in conception of the two constitutions are great. Despite the gap in time, the processes and content are also disparate. Using this background I will assess the extent to which nation-building efforts of South Africa and the United States draw upon constitutions and courts in forming a national identity. I will also drawn upon interpretations of judicial decisions by academics to help understand the decisions and their implications in order to assess the perceived legitimacy of the courts to citizens and non-citizens. In understanding the court structures in the United State and South Africa and the respective constitutional obligations and limitations we can better understand the courts' roles in the conception of citizenship. The structure of the court system has direct implications for the ability of justices to become detached from the desires and needs

society in both countries. Court rulings and the perceived legitimacy of the court directly influence the significance of the courts rulings upon life as a non-citizen and citizens conceptions of self and other. The more legitimacy the court is able to garner from society, the greater influence it will have upon societal conceptions of citizenship. In later chapters I will examine the extent of disparity between the court rulings and the constitutions and the societal conception of citizenship in both states. The courts' rulings do not serve merely to resolve issues for individuals or even groups, but also to form a conception of what the entitlements of citizenship are and what non-citizens are allowed within these states. The courts' influence cannot be viewed as limited to the policies that they allow or prohibit, but to the extent and diversity of inclusiveness or exclusiveness in regards to membership of the states.

Chapter III. Dynamic citizenship

Processes of obtaining citizenship in the United States and South Africa

The current process of obtaining citizenship is binary. If you are born within the United States, regardless of parentage, you are a United States citizen, with the exception of the children of foreign diplomats. Even the children of those who are illegally present in the United States obtain citizenship upon birth. If you are not a citizen by birth, then you must go through the process of naturalisation. The United States as described by the United States Citizenship and Immigration Services describes the process one must undergo for naturalisation. In the United States naturalisation can occur automatically through parentage if you are born abroad to a US citizen or with reduced requirements for spouses of US citizens. General requirements for naturalisation include having reached adulthood, having good moral character, reading, writing and speaking English, as well as passing an exam of US history and civics. Residency requirements include legal status as a permanent resident for the five years preceding the application, presence in the US for 30 months during the past five years and living in the same state for three months prior to the application. Once you apply for naturalisation you must reside continuously in the United States until citizenship is granted. Both native born and naturalized citizens retain all of the same rights, aside from the ability to become President of the United States. This office is exclusive to native-born citizens.

In South Africa more restrictions are placed upon citizenship at the time of birth. The amended South African Citizenship Act of 1995 explains the nuances of citizenship requirements and processes. In South Africa citizenship is conferred at birth only when one parent is already a South African citizen and the birth takes place in South Africa, or if a South African citizen adopts a child. Citizenship by birth can also be offered if a child is born to a person lawfully admitted for permanent residence in the Republic of South Africa and who does not have any entitlement to citizenship of nationality of another country. South Africa also allows for citizenship by descent to those born outside of the Republic to one or both South African citizen parents. Citizenship via naturalisation in South Africa is a long process with several prerequisites. In order to be naturalised in South Africa one must be a legal adult, one must have been lawfully admitted into the country for the purpose of permanent residence, one must have lived freely in South

Africa for the one year immediately preceding the application and for four of the past eight years preceding the application. Good character and intention to remain in the Republic or in its service are also prerequisites for naturalisation. The ability to speak one of the 11 official languages is required, as is a moderate level of understanding of the duties and privileges of South African citizenship, although no routine examination is required. The naturalisation process includes an oath of allegiance to the Republic of South Africa.

The processes for naturalisation in the United State and South Africa have some similarities. Both countries immigration law is determined by a national legislature and carried out by a specialised executive department. The actual steps towards naturalisation are similar. The test for citizenship that the US requires is a significant difference. This test may be a deterrent for those residents who may otherwise apply for US citizenship. It also implies that citizenship includes knowledge of the county's history and government. Citizenship by birth in the United States also presents an interesting situation for examination. Both countries have high levels of undocumented immigration, which the media and most government figures depict as undesirable. In the United States there is the unique situation of foreign nationals entering the country illegally and having children. Because the children are granted citizenship upon birth the parents are far less likely to be deported, despite their lack of immigration documentation. There are pragmatic problems surrounding this issue because foreign residents in the United States lose the incentive to go through the naturalisation process. Birthright citizenship given to children born to non-citizen parents, even more so undocumented parents, is controversial in the US. Several politicians have even proposed to alter the 14th Amendment to the US Constitution in order to refuse birthright citizenship to those with parents who are not lawfully present within the United States. No concrete movements in this direction have been made in the US, the focus of the media and the government in both the US and South Africa on restricting "illegal immigration" has led towards incidents of xenophobia towards undocumented migrants, documented migrants and even citizens of foreign descent. Both countries have attempted to assess why there has been an influx of undocumented immigration and have acted accordingly. The process of obtaining citizenship is time consuming and demanding in both states, which gives some foreigners an incentive to avoid the process altogether. The presence of residents that are

not on the path to citizenship is an indicator of the benefits of citizenship versus those of residence. Most of the people that come to the United States and South Africa come for economic opportunities. While there are refugees who come to the US and South Africa seeking haven from political hardships most migration, in these countries and worldwide, is fuelled by job opportunities (Solomon, p. 54-72). This indicates that citizenship, or the political realm, does not exclusively hold the most sought after benefits to foreigners. Chang (1997, p. 1158-1161) recognises that restricted movement of labour resulting from immigration laws in the neoliberal world economy has lead to gross disparity of wages from country to country. The mere ability to live within a healthy economic climate with better economic opportunity is what lures more migrants from countries of origin with comparatively weak economies.

Changes in conceptions of citizenship over time

Citizenship in South Africa and the United States have established themselves as independent states. Both lineages depict devastation and injustice. In the infancy of both states citizenship was reserved for white males, in the case of the United States land ownership was also a qualification. Later in the Cape colony land-owning blacks were given limited citizenship, however they were not permitted to vote (Mamdani, 1996, p. 52). The restrictiveness of the citizenry of these two self-proclaimed democratic states for much of their history is reminiscent of the first democracy, Greece. Although states proclaim rule by the people, throughout the world's recent history democracy began as a racialised and gendered oligarchy of the elite ruling over the majority. In the United States the nexus between state and citizen was envisaged and replaced that between ruler and subject, thus the birth of the modern citizen (Kerber, 1997, p. 834). Modern citizenship was not without its flaws. Early American leaders struggled over census figures including slaves, as fractional personhood figures, for purposes of determining the amount of representatives that each state would receive (Cobb, 1999, p. ccxv). The modern state, a political community, is defined through rights that apply to members, rather than liberties that apply to all regardless of membership (Birtek, 2007, p. 34). Prior to the 1868 states determined their state citizenship regulations, however the 14th Amendment was groundbreaking in asserting that all born on U.S. soil were U.S. citizens regardless of parentage and that they were all equally entitled to the entitlements of

citizenship by the state. The distinction was significant in granting African-Americans, descendants of slaves, the "privileges and immunities"[5] of citizenship. At this time women were still disenfranchised, but black men were, by law, permitted to vote throughout the nation. Despite the legal bestowal of rights the actual lived experience of blacks did not improve significantly until much later. The legally inscribed equality of citizens was untrue; there were a new group of second-class citizens who were discriminated against by some states, even to the extent of legally manipulating their right to vote. The 19th Amendment to the U.S. Constitution enabled women to vote in 1920 and the Voting Rights Act of 1965 stopped states from preventing African-Americans to vote. Immigrants, documented and undocumented, have been largely ignored by the political sphere in the United States due to the lack of effort to incorporate foreign-born residents into the political arena (Bloemraad, 2006a, p. 669-670). In 1950 four-fifths of foreign-born residents were US citizens, in 2005 less than two-fifths of foreign-born residents were citizens (Bloemraad, 2006a, p. 699).

In South Africa the story of discrimination is familiar. As disputed colonial territories nationality was regulated by the Dutch and the British in different ways. Neither the Dutch nor the British gave native black South African residents the opportunity to achieve either Dutch or British nationality. Legally established racial distinctions were propagated by the quest for power by the colonists. Citizenship under colonial powers of he Netherlands and Britain was different than citizenship under the Union of South Africa. Colonists, even those who had never left South Africa, were loyal to the colonial powers. Once South Africa achieved independence in 1961 citizenship meant that political allegiance was on the African continent. Citizenship became local. Blacks, coloureds and Indians were still not allowed the full privileges of citizenship until 1994 (Keegan, 1996, p. 231). While one cannot equate the legal and societal discrimination lived for so long by so many non-whites in South Africa and slavery and post-slavery discrimination in the United States, both countries have shameful histories of neglect and mistreatment of domestically and foreign-born non-white residents. In both countries citizenship was not truly realized by a great deal of residents until well into the 20th century. Kerber (1997, p. 836-837) describes that early American citizenship through acts of Congress excluded blacks and females, citizens were entitled to rights but the

[5] Article IV section 2, United States Constitution

exclusivity of citizenship allowed for the widespread denial of rights. Native-born residents in the United States were affected by these policies, however foreign-born residents were also discriminated against. To understand the pathway to citizenship in the United States one must analyze the way that changes in immigration have occurred along with changes in citizenship. When discussing the naturalisation process, understanding immigration is central. In the 1824 *Gibbons v. Ogden* United States Supreme Court case set a precedent that the states had police power, which enabled them to regulate the movement of people (Motomura, 2006, p. 22). While the right to vote is a significant and fundamental right in democratic societies, it is not the only entitlement of citizenship, nor is it the greatest enticement for residents in the United States or South Africa. This case had a great influence on the way that immigrants were treated in early America. It was not until 1875 that the federal US government began to regulate immigration. Pass laws in apartheid South Africa enabled the government to regulate how people moved. Distinctions in respect of where you could live, work and travel depended upon skin colour. Because of this privileges commonly associated with citizenship and whiteness were synonymous in apartheid South Africa. There was no means by which those who were not white were enabled to attain citizenship rights or the privilege to move without restriction. The apartheid government attempted to create the façade of ethnic citizenships when people of colour were relocated (Lalloo, 1998, p. 441-444). Great societal and legal changes have been made to citizenship in the past 15 years in South Africa.

Popular and theoretical conceptions of citizenship

To properly understand citizenship and how citizens and non-citizens differ in the US and South Africa one must take theoretical conceptions into consideration. In this section I will look at theories of past and present modes of citizenship, and in my last chapter I will address theories that look at future modes of citizenship. What citizens understand citizenship to be is significant in citizens' perceptions of what role they should play. The role that citizens play along with how non-citizens perceive citizenship influences their decisions regarding residence and naturalisation. The common understanding of what citizenship is or should be even influences the laws surrounding citizenship and the lived experience of citizenship. Theoretical conceptions of citizenship

have changed in response to changes in people's behaviour and movement. Academics envisage citizenship as it was, as should be or as they believe it will be. They look at the influential factors that motivate behaviour of individuals and of states in order to assess a model of what was, is or should be.

The United States was founded as a country of immigrants. It was a refuge for those who wanted to start anew. The concept of citizenship in the US entailed the rights of freedom of religion and expression and to some extent opportunity. Each wave of immigration was followed by the onset of xenophobia. Once the Fourteenth Amendment was passed, which gave citizenship to blacks, citizenship was no longer white according to the law. Despite this change the popular conception of an average American was, and may to this day be, a white person. From early America to this day newcomers represent competition for jobs and resources. Immigrants were often only able to hold jobs with poor working conditions and pay. Immigrants built much of America's infrastructure and continue to do so. Many jobs that immigrants hold are nearly entirely held by immigrants. Certain types of work, mainly menial labour are not viewed as desirable by citizens, but allow for immigrants to earn more money than they would be able to in their country. Migrant labourers are associated with low-income work with few benefits and protections. Citizenship allows for increased protection in the workplace and more economic entitlements from state and federal governments. Citizenship in the United States has also been associated with the ability to vote and protection from deportation (Motomura, 2006, p. 66-68). What makes someone an American today is intangible. An American is someone who happened to be born in the territory or someone that has gone through the process of naturalising. Because population is very heterogeneous and America is viewed as diverse, there is not a distinguished image of what an American is likely to look like. America is said to be a 'melting pot', but increasingly looks more multicultural (Bloemraad 2006a, p. 680).

In South Africa receiving citizenship entitlements, the ability to vote or hold office, was being a white man until 1930 and it was being white until 1994 (Frederickson, 1995, p.18-22). Whites were first class citizens, coloureds and Indians were second-class citizens and blacks were third-class citizens until 1994 (Frederickson, p. 99). Being British or an Afrikaner also made a difference as to nationality. Ethnicity was significant in non-whites, primarily because of the entitlements that it denied through hierarchical

apartheid legislation. South Africa, like the United States, also has a large population of immigrants that came to work in jobs that were not desirable to citizens. Mining in South Africa brought an influx of male migrants from all over the continent, migration continues today even in fields with harsh work conditions due to the comparably higher pay and more favourable economic climate (Nyamnjoh, 2006, ch. 3). Being South African today is something not entirely tangible, South Africans are those who have naturalised or have generational citizenship. Being a modern South African citizen can be being black, coloured, Indian or white. South Africa has become a nation of diversity (deGruchy, 2000, p. 169). South Africa has proclaimed to be the "Rainbow Nation", but many citizens are focused upon the economic and political stratifications within the society and are not convinced of the depth of its diversity (Villa-Vicencio, 2006). After apartheid the state was focused on creating a commonality on which South Africans could unite. The Truth and Reconciliation Commission was a body that attempted to create a unified story of what atrocities occurred under apartheid and in doing so they depicted South Africa as a nation of victims (Valji, 2004). The TRC created a vignette of en evil covert government that perpetrated acts in isolation of the support of the white community. They painted all South Africans as being abused by apartheid and failed to address the routine benefits that whites enjoyed and the racism that many of them helped perpetuate. South Africans were all affected by the recent past of apartheid, scholars argue that hope for the future and collective action towards achieving and maintaining non-racial equality would be better basis for unity and identity than is the victimisation of all (Valji, 2004: Fullard, 2004: Nullis, 2006)

The global shift from feudalism to democracy changed everyday people from subjects to citizens. Just as the subject had, citizens in newly democratic states were understood to have rights and responsibilities. Subjects' principle right was that of protection, citizens also enjoyed this right along with the ability to vote. Voting, as a right of citizens, was the pivotal factor that led to many states' transitions to democracy. Conceptions of citizenship were based upon the Westphalian understanding of states (Shearing and Wood, 2003, p. 401). Over time the Westphalian conception of states has become increasingly outdated. In today's era of globalisation and interdependence nations can no longer be viewed as completely autonomous and independent actors. This shift carries significant implications for citizenship as well. While the legal framework

for citizenship remains in place in most democratic countries, it is less relevant in people's daily lives. While citizenship is still significant, citizenship as reflected by the legal systems of the United States and South Africa do not accurately reflect the modernity of being a component of a global system. The current conception of citizenship rather depicts individuals as actors entirely within a single state. The legal systems that currently define citizenship are lagging behind the lived practices and in order for this incongruence to be remedied Shearing and Wood (2003, p. 404-405) argue that states must strive to implement changes that reflect those society has already made. In the last chapter I will discuss the potential shifts in the manner in which states may begin to address citizenship in an increasingly globalised world.

Conclusion

The birth of citizenship and its evolution presents a significant background for analysing the significance of the entitlements of citizenship. The role of constitutional order upon the meaning of citizenship is significant. Understanding the technical details of how citizenship is conferred is significant in assessing the privileges associated with citizenship and the evolving meaning of citizenship. Historical changes in the application of citizenship are helpful because they are the result of theoretical, popular and constitutional changes in citizenship. The theoretical conceptions and popular conceptions of citizenship are dynamic and both coexist with the actions of constitutional orders. The theoretical conceptions will be significant in the last chapter of this work because I will examine current theoretical frameworks for citizenship and look at how they are being incorporated and the potential they have to predict or influence shifts in citizenship. Popular conceptions of citizenship are significant to the lived experience of citizens and non-citizens. The conceptions can be examined as results of other influential factors and they can be seen to shape the contemporary meanings of citizenship. Concurrent trends in constitutional, popular and theoretical conceptions of citizenship lead to change in citizenship in one unilateral direction. I will later explain the tension that arises from the dissonance between different conceptions of citizenship and what it means for the direction of changes in citizenship. In my next chapter I will look at the

categorisation of non-citizens and also how immigration and naturalisation processes and laws in the US and South Africa influence the meaning of citizenship.

Chapter IV. Understanding non-citizens

Typology of non-citizens

Understanding the types of non-citizens is significant to analysing the qualifications for citizenship and the motivations for different categories of people who are en route to citizenship or are merely present within the country. There are many types of non-citizens that are classified based upon a multitude of factors including, most significantly, permissibility of presence and duration and purpose of stay. The first basic type of categorisation that can be made is whether or not a non-citizen is permissibly residing within the country. Those who are present in accordance with the legal procedure and intend to reside are legal residents. Those who enter in accordance with legal procedure and do not intend to reside are legal non-immigrants, or put simply migrants. Entry at an official border post with appropriate documentation is the first step towards maintaining legal residence. There are non-citizens who enter a country legally but outstay the duration of their visa; these residents are not any longer categorised legal residents or legal migrants. Those who break the terms and conditions of their visas are also no longer legal residents or legal migrants. Legal residents can enter a country for purposes of becoming permanent residents. Legal migrants enter a country with the intention of temporarily working, studying, researching or travel. The length of the allowed stay depends upon the type of the visa and the country of entry. In many cases visas can be renewed for the same purpose or a different purpose. In both the United States and South Africa if a visa is expired it must be renewed from the country of origin (Fragomen, 1997, p. 439 and Department of Home Affairs). Despite the technical characterisations of non-citizens the most prevalent idiosyncratic distinctions rely upon responsibility and identity (Bosniak, 2006, p. 12). Individually and socially conceived notions of citizenship influence public opinion and lived experience as a citizen or non-citizen. The ways in which people categorise and conceptualise themselves and others is important, but state categorisation is paramount to the receipt of social benefits. The technical distinctions are significant in coming to a better understanding of how the governments of South Africa and the United States categorise and organise the people coming through their borders. Both countries rely upon technical distinctions in order to determine the way in which foreign nationals are treated in the country and their ability to

naturalise. These immigration control systems influence experience as a non-citizen and also help explain trends in migrant documentation and naturalisation.

Legal migrants are those individuals who come to a country through a legal mode of entry with the proper documentation, but do not intend to reside. This category contains visitors, tourists, students and contract migrant labourers. Temporary residence permits in South Africa for purposes of travel require no visa application prior to entry and last for 30-90 days for nationals from most other countries (Department of Home Affairs). Visitor visas in the US allow foreign nationals to remain in the United States for 90 days or less, a visa waiver program allows nationals from 36 countries, primarily European nations, to circumvent the visa process when coming for personal or business travel (U.S. Department of State). Countries that are not eligible for visa waivers must go through an interview and application process in order to receive a visa. Students studying at any academic institution in South Africa must apply for a study permit prior to entry in to South Africa, or after documented entry for another purpose, but may renew the permit from within the country. The same is true for students studying in the United States. The routine process for visa application is significantly different for the US and South Africa. In the United States a photograph, fingerprints and interview as well as completion of a written application. In South Africa for a visa application photographs are required, as is a physician's review of a lung x-ray for proof of negative Tuberculosis results, as well as a physician's signed declaration that the applicant is free of communicable diseases. Students applying for South African study permits must also have proof of funds, proof of onward travel and a criminal clearance from the authorities in the region from which this person is coming. In both countries there is also an application with proof of intended address while residing in the country. In both countries study and work permits require processing fees. The permits vary in length and require proof of continuance of study or work if they are to be reviewed for renewal. The visa process for foreign nationals to study or temporarily work in South Africa seems to be much more time consuming and thorough than that of the United States. Contract labour migrants, or temporary workers, need to apply for a work permit in the US and South Africa; work permits are typically valid for 12 to 18 months in South Africa, and have a thorough application process (Solomon, 2003, p.17). Work or study permits can be applied for after a valid visa and

documented entry into the country have been established. The United States sets quotas of how many foreign migrants will be allowed to work in certain fields.

Permanent residency in both countries entails all of the documents for a visa with additional documentation. In the United States for one to become a permanent resident he/she must have a sponsor who is a US citizen or legal permanent resident (United States Department of State). Permanent residents are allowed enhanced protections in South Africa and the US. In both countries they are allowed welfare benefits and deportation is only the result of an extreme criminal act. Refugees, or asylum seekers, comprise two more groups of non-citizen that if documented properly classify as legal residents or legal migrants. Refugees, as defined by the United Nations, are "persons who are living outside their country because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion" (UN Convention Relating to the Status of Refugees, 1967***).*** There is a slight difference between refugees and asylum seekers. Refugees have legally been granted refuge in the country in which they are currently residing. Asylum seekers are those who have applied for status as a refugee but have yet to receive that distinction (Jacobsen, 2006, p274). In the 1965 Immigration Act of the United States refugees were given preference for admission. Refugees were defined by the United States Congress as anyone fleeing Communism, those leaving the Middle East and those fleeing areas fraught by a natural disaster. The 1980 Refugee Act further solidified the aforementioned groups' status of political asylum in the United States (Kanstroom, 2007, p. 226). In South Africa the Refugee Act of 1998 provides for enhancement and protects enforcement of the constitutionally recognised rights of refugees (Palmary, 2002, p. 22-23).

Residents or migrants that are present without documentation or permission are typically referred to as "illegal aliens" or "illegal immigrants" in vernacular of both the United States and South Africa. The government and media in both countries propagate these terms and in doing so perpetuate negative stereotypes of undocumented migrants. Undocumented migrants usually leave their country of origin and families to pursue greater economic opportunity in a nearby country. They often retain strong ties to their home country, often supporting their families (McDonald, et. al., 2000, p. 177). These groups of non-citizens in both the US and South Africa are presented with difficulties due

to their undocumented status. If undocumented migrants are left without a means to report unjust treatment they will remain a subclass in society.

Distinctions between types of non-citizens: Legal and social constructs

Citizenship is membership or, more directly, inclusion and exclusion. Citizenship allows certain benefits, thus being a non-citizen means being excluded from the benefits that citizenship provides. Many of the benefits that are exclusive to citizenship are legally defined. To better understand the way in which constitutional order affects citizenship one must examine the legal distinctions between citizens and non-citizens. In evaluating the differences and comparative disadvantages of the different categories of non-citizens we can better understand the relationships amongst non-citizens and between non-citizens and citizens (Bosniak, 2006, p. 5). In the United States and South Africa all who are within the borders must obey criminal and civil law regardless of citizenship or nationality (Kerber, 1997, p. 837). Foreign nationals who do not obey the law are placed in a situation different to that of citizens in violation of the law. Deportation is a threat for an array of crimes and there is a great deal of discretion in the way in which it is prosecuted (Fragomen, 1997, p. 446). Criminal non-citizens who are undocumented are at a greater risk of deportation than those who have proper documentation. Additionally, those migrants who come to South Africa and the United States without proper documentation are in violation of the law solely by being present in the country. Since 1994 over 600,000 foreigners have been deported from South Africa, a vast majority being deported back to Southern African Development Community (SADC) countries (McDonald et al., 2000, p.175). If the United States intends to deport a non-citizens the intended deportee must be allowed a deportation hearing. In 1995 and 1996 minor adjustments to South Africa's 1991 Aliens Control Act were made and the in 2002 the Immigrant Act was enforced. These new pieces of legislation resulted in the barriers to entry being strengthened and agencies being equipped with more resources to curb undocumented migration. New requirements for entry have even been introduced in order to give the government control over what types of people are allowed entry (Peberdy, 2001, p. 17). The United States Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was one of the most complete enhancements of

border control and increased punishment measures for undocumented migrants put forth by the United States government (Fragomen, 1997, 438-445). In contrast with the amnesty policy of the 1980's IIRIRA was a bold act that worked to restrict the entry of migrants into the United States. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 enforced stricter border control. The increased funding to border control coincided with a decrease in deportations of undocumented migrants (Balisteri and Van Hook, 2004, p. 118).

"In certain states the ability to hold employment, to receive public benefits, to operate a business and even the right to own land are restricted to citizens only" (Plascencia, Freeman and Setzler, 2001, p. 6). State restrictions upon non-citizens have become more rare in recent history because of the Supreme Court's interpretation of the 14th Amendment as requiring states to honour the federally protected rights of non-citizens and citizens alike (Plascencia, Freeman and Setzler, 2001, p. 13). Because the employment of undocumented migrants must be clandestine the employers are often able to pay the undocumented migrants poorly and treat them badly, sometimes using threats of deportation. Undocumented migrants are reluctant to seek protection from local, state or provincial or national government because they fear being deported due to their status (Nyamnjoh, 2006, p. 106). Not only are undocumented migrants treated poorly by those for whom they work, but they are also often treated poorly by many community members and even often by government officials. They may be fearful even of protesting the immigration or naturalisation process. Those who employ undocumented migrants are even liable for punishment in the US (Kanstroom, 2007, p. 226) as well as those who smuggle aliens across the border or help them forge documentation (Fragomen, 1997, p. 446). In South Africa many undocumented migrants seek informal employment because most registered businesses require documentation (Maphosa, 2010, p. 347).

All resident non-citizens in the United States are allowed certain privileges. Those non-citizens under 18 are allowed to attend US public schools at no cost, just as citizens. Undocumented immigrants are even allowed to receive in-state tuition at the universities in the state in which they can establish that they have lived for over a year. In 2003 the Inter-American Court of Human Rights also issued an advisory opinion in which they suggested that according to international human rights law undocumented migrant worker status is not a valid

justification for discrimination in workplace conditions or terms of work (Cleveland, 2005, p. 460-465). In 1986 the Immigration Reform and Control Act gave amnesty to 2,3 million undocumented farm workers; the government allowed for naturalisation as long as English language and civics courses were completed (Balisteri and Van Hook, 2004, p. 118). After this blanket amnesty act undocumented migrants who entered after the prescribed date were not authorized to naturalise without going through the legal immigration and visa processes; this accounts for a large amount of the recent decline in naturalisation (Bloemraad, 2006a, p. 668). Despite the decline in naturalisation the amnesty induced further undocumented migration due to the anticipation of future amnesty. The decline in attainment of citizenship on the global stage can be attributed to the increasing significance of human rights and the comparative lack of significance of citizenship status (Bloemraad, 2006a, p. 685). Because more people are being granted rights without citizenship there is less of an incentive to seek citizenship.

The ability to obtain government benefits in South Africa under apartheid was linked directly to race (Nattrass and Seekings, 1997, p.453-456). After apartheid ended citizenship and its full benefits were obtainable for non-whites that were previously a subclass of citizens that had restricted rights. In 1996 permanent residency was offered for SADC citizens that met certain conditions (Solomon, 2003, p. 133). An extremely low level of applications led to a limited effect of the 1996 policy. As was the case in the United States, it is believed that amnesty was not the most effective tool to combat the influx or documentation of those coming to South Africa without the proper documentation (Crush, 2000, p. 16). Because of its expansive constitution South African immigrants have been privy to many of the rights that citizens enjoy. Refugees especially are entitled to the same local government provisions as citizens. Refugees are supposed to be provided with housing, water and sanitation (Palmary, 2002, p. 2). Most scholars agree that immigration into South Africa from other African countries is driven by economic opportunity (Solomon, 2003: Nyamnjoh, 2006). Despite public assumptions about why immigrants come to the US or South Africa, little effort is made to understand the roles that non-citizens play in their adopted societies.

As noted previously there are several ways by which to make distinctions between non-citizens. The most basic distinction is whether or not the non-citizen is documented

and has entered the country through a legally permissible means. The second significant distinction is whether or not the non-citizen is seeking to immigrate or is merely short-term visitor. The third basis for classification is the purpose of the stay or immigration. Non-citizens are everything from short-term visitors like visitors, students and short-term migrant labourers to permanent residents and those going through the naturalisation process to acquire citizenship. The status of a non-citizen is an indicator of the type of role that they may play within their local and national community. Foreigners migrating to the US are typically young, employed with low levels of education (Balisteri and Van Hook, 2004, p. 122). According to a survey in which semi-random sampling was used in areas with high levels of immigrant populations it was determined that South Africa immigrants are also typically young, but have higher reported levels of education, most of which had some form of documentation and strong links back to their country of origin. (McDonald et al., 2000, p. 171-173). The difficulty with verifying the generalisability of this information lies in the inability to rely upon any figure for the number of total migrants into South Africa. Despite who the migrants are upon crossing the border, the role they play as non-citizens after their inception is significant in understanding public opinion and national interests regarding immigration and naturalisation laws and policies.

Public opinion regarding immigration policies and laws

The constitutions of South Africa and the United States play roles in influencing the way in which people perceive immigration policies and laws. While the Constitution of the United States does not expressly regulate immigration, birthright citizenship is guaranteed by the Fourteenth Amendment. The issue of state regulation of border control has recently become a controversial issue. The United States Constitution puts the power to regulate immigration into the hands of the federal government. Some states that border Mexico have started to use state resources and even legislation to control the flow of immigrants into their state. The state authorities argue that their actions in regulating immigration into their state are constitutional because they are merely enforcing federal laws, which are under-enforced. There are pending lawsuits that are being filed due to the discrepancy between state and federal power on the immigration issue. Arizona has done more than any other state to regulate the ways in which immigration policies are

enforced. The state and local government authorities have interpreted their role in enforcing the federal immigration law as constitutional. Because the United States Constitution is ambiguous to immigration and much else the interpretation of the Constitution is central to popular opinion in regards to the legality of federal and state immigration law and policy. Courts that have the power to interpret the constitutionality of states' actions are strong bodies with high levels of perceived legitimacy, thus their decisions are generally respected at 'true' or 'just'. South African public opinion concerning immigration has been affected by its constitution. Because the Constitution of South Africa is so progressive and expansive the people of South Africa initially had high expectations as to how their rights would be guaranteed by the state. The large discrepancy between the expectations for and the reality of the post-apartheid state has lead to an increasingly negative attitude towards 'outsiders' or non-citizens (Nieftagodien, 2008, p. 69). Because the government has failed to meet the expectations of its citizens and has continued to provoke heightened expectations the people feel as if they are not receiving something to which they are entitled. The resources provided by the government are scarce and South Africans feel a greater ownership of these resources; despite their feelings of ownership they are threatened by the consumption of these resources by those that they perceive to be 'outsiders' (Glaser, 2008, p. 56-57). The foreigners' use of state goods leads to resentment, frustration and even violence. Similar forces are behind negative images of immigrants in the United States. Competition for resources that citizens believe to be scarce drives them to act competitively towards foreigners rather than cooperatively.

The negative image of non-citizens and the myths surrounding migrants of African descent is perpetuated by the South African media, which portrays non-citizens as a considerable percentage of the population comprised of uneducated persons crowding the job market without bringing skills that are intent upon staying in South Africa permanently and unlawfully (McDonald et al, 2000, p. 172). The Southern Africa Migration Project (SAMP) conducted surveys across a wide range of non-citizens of African descent primarily in urban settings; their surveys indicate that the assumptions that many South Africans hold about this group of non-citizens are false. The number of non-citizens present within South Africa is indeterminable; according to the SAMP survey results non-citizens tend to be educated and are creating jobs in the South African

economy rather than simply ‘stealing’ jobs. Many undocumented migrants work in the informal sector bringing curios or trades from their home country to South Africa (Maphosa, 2010, p. 347). The migrants from their sample group were overwhelmingly legally present within South Africa; however a reluctance of those who are in the country illegally to respond to a survey about migrants gives rise to scepticism about the sample group. SAMP’s survey results indicated that the number of migrants with significant financial and/or familial ties to their home countries is great and in the analysis of the survey results, McDonald et al. (2000) points to the disparity between the stereotype of the migrant and the data. The survey also found that the treatment by black South Africans towards migrants was overwhelmingly and excessively poor. This survey carries a great amount of significance in describing the role of non-citizens in South Africa, and the gap between the perceived image of non-citizens and reality. South African construction of self appears to be partly linked to ethnicity. Zuluness has been used by many xenophobic rioters as and indication of South African belonging and entitlement (Glaser, 2008, p. 58). White non-citizens have not been burdened by the same negative stereotypes as black non-citizens.

In the United States there is a distinction, the discriminatory attitude regarding non-citizens is today focused most heavily upon those coming from Mexico and Central American states (Félix, 2008, p. 620). While there has been discrimination in this population and others, a 2005 survey of American public opinion indicated that restrictive immigration policies directed towards undocumented migrants were unpopular (Okeke and Nafziger, 2006, p. 545-546). There are greater legal restrictions upon immigrants coming from Mexico and most Central American countries (McBride, 1999). In the US some citizens harbour resentment towards non-citizens because there is a conception that since immigration reform acts of the 90’s immigrants are naturalising for the purpose of obtaining welfare benefits, however this is generalisation which has lead to the false imputation of this behaviour to many immigrants. After the restrictive legislation of the 1990’s benefits of citizenship in the United States far outweigh the benefits of permanent residency (Bloemraad, 2006b, ch. 5). Many states denied welfare benefits to immigrants, legal and illegal alike (McBride, 1999, p. 298). However, counterintuitivly, most of the increases in naturalisation have occurred in states that have not restricted the benefits of non-citizens significantly (Balisteri and Van Hook, 2004, p.

114). Despite the increased incentives for non-citizens to naturalise the rate of naturalisation to the rate of immigration has not increased. Félix (2008) examines the motivations behind Mexican nationals decisions to naturalise in the United States and the tension between loyalty to their country of birth, Mexico, and to their newly adopted country, the US. Félix (2008, p. 604) argues that naturalisation is often forsaken for fear of severing ties with the country of origin. However greater needs of improving legal status of family members, basic health benefits and job opportunities are strong counteractive motivating factors for Mexican nationals. When immigrants are motivated to play a role in the political sphere, either due to issues, government policies or candidates, they are more likely to naturalise. Citizenship is again becoming correlated with the political realm because economic benefits are being accessed increasingly by non-citizens (Bloemraad: 2006a, b).

Popular conceptions of non-citizens tend to contradict the little evidence that social scientists have been able to collect from surveys and official immigration data. The public opinion regarding immigrants in the United States and South Africa is somewhat negative, it seems that it is slightly more negative in the South African context. Non-citizens of all types have been subject to being labelled 'outsiders', as well as some black citizens in South Africa and Latinos in the United States (Félix, 2008, p. 602). In both the United States and South Africa some foreign nationals are plagued by discrimination much more seriously than others. In South Africa blacks from other African nations carry the burden of xenophobia much more heavily. In the United States Hispanics or Latinos are much more readily prejudiced than immigrants coming from other areas. In both countries white migrants enjoy expedited social assimilation and the ability to be seen as part of their adopted society. In the US and South Africa undocumented migrants are more harshly depicted by the government, media and public opinion. Some of the xenophobic tendencies that result from the tensions that we explored in this chapter will be discussed in my next chapter. I will also discuss the movement away from Westphalian conceptions of citizenship towards less territorially-bound forms of citizenship that rely less upon the existence independent nation-states.

Conclusion

Understanding the conceptions and entitlements of citizenship helps one better formulate an understanding of the significance of the distinctions between citizens and non-citizens. To understand the differences between these groups I have explored the distinctions among non-citizens and between citizens and non-citizens. The different types of non-citizens display the array of circumstances surrounding human migration. In analysing the disparities between citizens and non-citizens in South Africa and the US one must examine immigration policies as they relate to citizenship. Examining the entitlements of citizenship and the process of obtaining it are key to understanding migration patterns. The reasons for which people move across borders is an indicator of the cost-benefit analysis people undergo when leaving their country of origin, renouncing their citizenship, to become an 'outsider' or non-citizen in a foreign land. Cross border migration for work is a relatively new phenomenon of human behaviour in a world with increasing mobility and technology. Cross-border migration for purposes of economic wellbeing is only going to increase. The reasons behind decisions to naturalise in new lands are significant to assessing the contemporary importance of citizenship and the value of its benefits in a global market. The difference between countries that continue to have relatively high rates of naturalisation and those that have declining rates appears to be political mobilisation (Bloemraad: 2006a, b). In my next, and last, chapter I will discuss how nation-building works to influence the conception of national identities and I will examine the unintended consequences of nation-building. I will also examine the consequences of dissonance between the way in which constitutional order and public opinion conceptualises citizenship. Lastly, will be an examination of the contemporary models of citizenship and an assessment of how they could be applied in the US and South Africa.

Chapter V. Citizenship of the past and for the future

Nation building, patriotism and nationalism

> The goal of national building should not be to impose common identities on deeply divided peoples but to organise states that can administer their territories and allow people to live together despite their differences.
> - Marina Ottaway, 2002, p. 17

Throughout history non-citizens have been instrumental in the government's implementation of nation-building policies. Membership is intrinsically a contrast between 'us' and 'them'. Establishing an'other' to contrast with the collective national is significant in individuals conceptualisation of themselves as citizens or nationals. Nation building historically has been attempted in conjunction with realignments of borders, but after the Cold War concrete borders had been established and borders were no longer seen as variable (Ottaway, 2002, p. 22). Due to the static nature of borders after this point in history nation building became an attempt to forge a national identity of a people caught within the pre-existing borders. Often the benefits that the state offered exclusively to citizens were a means of nation building. Many of today's major intrastate conflicts are attributed to the salience of borders that were somewhat arbitrarily configured. This is true in Africa and other areas that were colonised for foreign powers. When national identity is manufactured it is usually at the expense of people that are determined by the government to be non-citizens. While citizens of a state can contrast themselves with citizens of other states, they often are given impetus to create a notion of what a citizen of their state should be. Sometimes this notion includes ethnicity or culture, however many areas that are confined by borders do not have homogenous cultures or ethnic groups. Presence in the state is not enough. Rules determining belonging must be established. In most cases national identity is forged from years of "common ancestry, experiences, ethnic background, language, culture and religion" (Huntington 1981, p. 23). South Africa and the United States are examples of states that are striving to become successful exceptions to the rule.

The United States government has been engaged in nation-building efforts since its establishment. The United States began as a confederation of states with variant

populations, religions, origins, moral codes and goals. Some argue that in the United States the common ground for formulating a national identity has become the shared appreciation of the civic values and responsibilities upon which the United States was founded (Huntington, 1981). In the United States, while there is no 'official language' English proficiency is required for naturalisation and is the primary mode of instruction in public schools. Historic citizenship, immigration and naturalisation laws and policies indicate that the impetuses for national identity were in actuality things like ethnicity, birthplace and skills (Smith, 1988, p. 231). Despite the diversity in its populace the society and government held preferences for certain types of individuals to incorporate. Migrants of some professions and from some regions receive preferential treatment in visa and naturalisation processes. The post-apartheid South African government's quest to create a national identity has included the TRC, reconciliation policies, immigration and naturalisation laws and policies and language used in speeches by officials.

Nation building efforts in heterogeneous communities often lead to insider-outsider tension due to the lack of natural national identity. When a government creates, reinforces and strengthens identities in a national community they foster patriotism and more significantly nationalism. A prideful and unified populace almost always guarantees commitment and a reluctance to engage in rebellious activity. Although patriotism and nationalism are what the governments seek, there are negative side effects that are generated simultaneously. Feelings of nationalism lead to a greater chance of xenophobic outcomes than feelings of patriotism (Peña and Sidanius, 2002, p. 784-788). The basic distinction between patriotism and nationalism is the view and treatment of out-groups. Nationalism also assumes a greater connection with a physical model of a typical citizen; this often leads to ethnic favouritism. The physical prototype can lead to a nationalist's view of those who do not conform to the prototype as 'outsiders'. This is where the threat of xenophobia becomes eminent. In South Africa citizens have a notion of fellow citizens as the Apartheid era entrenched ethnicities of white, Indian, coloured or black. The category which impacts xenophobia has become the latter. The prototype of a South African black entails a range of physical traits: skin colour and facial features and also cultural cues: languages, accents and tribal associations. These indicators have led to discrimination and violence against undocumented migrants and immigrants, legal non-

citizens and citizens alike. Facial features and darker skin have led xenophobic rioters to assume the absence of entitlement or belonging of those whom they attack. The physical traits and cultural cues are not strong indicators of citizenship in South Africa, an extremely heterogeneous community with a legacy of immigration. In the United States the same holds true. Physiological traits tend to lead citizens towards xenophobic actions. Because most undocumented migrants are Latinos, those documented non-citizens and citizens who are Latino, or appear to be so, are often treated as 'illegal immigrants'. Examining xenophobia and xenophobic trends in South Africa and the United States is significant to understanding the ways in which citizens perceive and treat each other and the way in which they perceive and treat outsiders.

Xenophobia: causes, presentation and resolution

"Xenophobia is not new" (Nieftagodien, 2008, p. 74). It is something of a timeless trend. It is driven by competition and arguably by human nature. Xenophobia presents itself in daily life through acts perpetrated by groups, governments, individuals upon individuals and groups. Xenophobic 'outbreaks' are times at which attention is paid to the more concentrated, visible forms of xenophobia. The fear of foreigners is something that can be attributed to various motivating factors, depending upon the context. Xenophobia often presents in settings in which membership can be attained and many benefits are not exclusive to membership. Insider-outsider conflict has always beset humanity. Because human beings have always competed for limited resources they are quick to protect these resources. The protection of these resources is necessarily competitive, rather than inclusive, if the resources are seen as limited. Xenophobia in the South Africa case is seen climaxing in violent epidemic, notably the May 2008 outbreaks. There have been several waves of xenophobia in post-apartheid South Africa. I will examine the 2008 case as a part of a continuing trend, rather than an isolated incident. In the United States the current xenophobic surge has not presented in the same way. When discussing xenophobia in the United States the most pertinent and current example is the passage of Arizona law SB1070 targeting undocumented persons. This law, and others like it, incited huge protests from opposition and also rallied supporters of the legislation. I will examine, in regards to both cases, the causes behind the sentiment, the ways in

which the sentiment was presented or expressed, and the recommendations to avoid problems in the future.

In South Africa the most notable recent xenophobic outbreak was that of May 2008 that began in the Alexandra township near Sandton. There were also previous peaks of xenophobic activity in late 1994 and 2000 (Nieftagoden, 2008, p. 73). These xenophobic sentiments are indications of membership conflicts. In a time of great transition for South Africa membership and the allocation of government resources have been especially sensitive issues. Nieftagodien (2008) and Glaser (2008) argue that the people of South Africa had heightened expectations for government action. Glaser (2008, p. 58) also notes that the disparity between the high expectations that the government continues to create and their lacking results lead to part of the frustration which causes xenophobic sentiments, especially among the poor. The Consortium for Refugees and Migrants in South Africa held a conference on June 18 of 2008 discussing the, "drastic increases in xenophobic violence". In their report they note that by the time that the conference was held 62 people had died (including 21 South African citizens) and 670 were wounded. CoRMSA identified several other contributing factors for the surge in violence. They indicated the perception of competition for jobs from non-citizens led to the violence, as did the government's tacit approval of violence and acts against non-citizens. New ANC leadership with perceived anti-foreigner sentiment was also noted by the Consortium as a motivating force. Policy problems were highlighted and CoRMSA also made several recommendations to various state bodies. They noted the incapacity and ineptitude of the Department of Home Affairs (DHA) leaving many asylum seekers and refugees void of proper documentation. The resulting overwhelming quantity of foreigners with undocumented status has lead to perpetuation of the term 'illegal immigrant' and has caused South African citizens to believe that these foreigners are stealing South African jobs. The tendency of South African citizens to use foreigners as the scapegoat in venting frustration for joblessness or inadequate quality or quantity of government resources was not seriously addressed by the government. Because the initial bouts of violence and protest were ignored by the government, South Africans felt that there was solidarity between the government and the will of the people on the issue of foreigners. Local and national government forces failed to respond appropriately. The South African Police Service (SAPS) also failed to plan response strategies for incidents

like these. The DHA and SAPS both also showed tacit and explicit approval of acts perpetrated against foreigners. Due to all of the apparent failures of the state to halt these acts and dissuade the people from using foreigners as scapegoats, CoRMSA made many recommendations.

The CoRMSA recommendations included a suggestion to the president that any organisation responding to xenophobic violence must include civil society representation. They recommended that SAPS investigate the May 2008 and previous attacks, set up a program to eliminate tendencies of xenophobic speech or action in police force members and pursue a campaign to bring witnesses of the attacks forward to collect evidence. CoRMSA suggested that DHA should freeze all deportations, address xenophobia from within the department and review the immigration policies for better management of migration. The recommendation to the ANC was to investigate local officials accused of xenophobic speech or acts and discipline all of those determined to be guilty. Provincial and local governments were even recommended to coordinate their responses to migration and immigration; also to include foreigners in community meetings and planning. These recommendations are significant to understanding xenophobic violence because they highlight the current weaknesses that have allowed the anti-foreigner sentiment to grow, spread and translate into violence.

The United States has a shameful history fraught with xenophobic speech, behaviour and violence. US history holds many examples of violent outbreaks against different groups of foreigners. While there have not been recent incidents in which physical violence has been perpetrated against foreigners, there have been high levels of dissatisfaction with the way in which the federal government has addressed immigration issues in states with high levels of immigrants. In the United States the recent xenophobic sentiment has been seen most clearly in the way in which communities express their support of legislation intending to curb 'illegal immigration'. US legislators tend to scapegoat illegal immigrants due to the fact that they have little political power, significantly they do not have the ability to vote (Short and Magaña, 2002, p. 708-709). Instead of targeting a group that has the power to change the outcome of elections, legislators rally against blaming those who cannot for the purpose of remaining in office or obtaining high approval ratings. Legislation, although introduced by lawmakers, is drafted with the design to garner popular support. Arizona has been the most aggressive

in passing state laws that supplement the federal immigration legislation. SB1070 was the most controversial piece of legislation in early 2010. SB1070 is reported to have a 70% approval rating amongst Arizona voters (Camarota, 2010). The bill made breaking federal immigration law also an Arizona state offence. If immigration violations are punishable by state authorities the state of Arizona will have more control over the entry and deportation of undocumented migrants and immigrants. The law allows police officers to question individuals' immigration status based upon 'reasonable suspicion'. The controversy of this portion of the law is its opponents' arguments that it will lead to racial profiling. Because a large percentage of undocumented migrants and immigrants are from Mexico and other Central American countries, opponents fear that Hispanics and Latinos will be stopped in order for police officers to verify their documentation. SB 1070 was reviewed by the 9th Circuit Court of Appeals on November 1st of 2010 in the case *USA v. State of Arizona.* No opinion or judgement has yet been rendered by the court. The US Supreme Court has heard oral arguments in the challenge of a similar Arizona statute. The Supreme Court ruling could set a standard for states' abilities to make laws that regulate immigration thus potentially invalidating SB 1070. The United States Department of Justice filed suit against the Arizona law. In addition to the legal contestations individuals and rights groups have also protested the law throughout the United States. Despite much of the outrage over the law there is also a large support base for the law, especially in southern border-states.

The difficulty with politicians and political groups supporting measures against illegal immigration becomes an issue of covert racism (Short and Magaña, 2002, p. 710). Because an overwhelming majority of undocumented migrants and immigrants hail from Mexico and other Central American countries, there has been a tendency in the US to associate Latinos directly with illegal immigrants. When US politicians, political groups and even citizens begin to rally against 'illegal immigrants' they are uniting against a specific ethnic group. The other difficulty is in the fact that the xenophobia is masked as a public policy issue. SB1070 is just the most renowned recent example of xenophobic legislation. The recent failure of Congress to pass the DREAM Act, which provides expedited citizenship for undocumented youth who attend university or are in the military, is another indication of xenophobic sentiments. Because proponents of immigration restriction and regulation use the argument that they are working to change

immigration rather than to keep out a specific population of immigrants the xenophobia is not as widely recognised or discussed (Short and Magaña, 2002, p. 710-711). The problem of the xenophobic tendencies as specifically geared towards those coming from America's southernmost borders is that the problem does not receive the notoriety that it deserves. Because there are no striking examples of xenophobic violence, xenophobia has been underemphasised. The issue of immigration policy has lead to rifts in the United States based upon geographical location, composition of population and partisanship. Xenophobia in the United States is a significant and underestimated problem; although it has not led to violent outbursts, as in South Africa, it has gained legitimacy through the lens of policy. In both the United States and South Africa citizens have become accustomed to using phenotypical characteristics to identify 'outsiders'. The problem with doing so in such a heterogenous community is that no accurate phenotypical characteristics of citizens exist. Xenophobia is a result of the way in which the public conceives citizenship and its benefits. In order to limit xenophobia, we must re-evaluate current conceptualisations of citizenship. Examining theoretical conceptions of citizenship is an important way to look towards the future in citizenship trends. Theorists have influenced modern citizenship since its birth. Looking at contemporary theories will allow us to examine citizenship devoid of some of the motivating factors of xenophobia. It is important to enhance the depth of our reflection upon modern theoretical conceptions of citizenship with nationalism and xenophobia and their contributing factors in mind.

Contemporary theories of citizenship and implementation

Contemporary approaches to citizenship theory have a great significance upon the ways in which citizenship is actualised. The modern notion of what citizenship is or what it should be impacts international and national citizenship and naturalisation laws and societal construction of citizenship and membership. Discussing contemporary theories in this work will allow for meaningful reflections upon the state of citizenship currently and in the future. Modern citizenship theories include traditional citizenship, transnational citizenship and cosmopolitan citizenship. The trend away from and a return to traditional theories of citizenship in contemporary theory represent a strong contrast to both transnationalism and cosmopolitanism. Traditional theories of citizenship adhere to

the importance of the nexus between a single state and citizen. Traditional citizenship theories can include actors in participatory direct democratic experiments. Traditional citizenship theorists advocate experiments that involve re-localisation of an active, direct form of citizenship (Holden, 2000, p. 2-7). Small-scale direct democracies allow for increased participation and theorists depict citizenship as something intangible that is only realised through participatory action. Direct citizenship, or republican citizenship, would not be exclusive. Citizens of small communities could also partake in large scales of governance, however governance on the national and global scale would play a supporting role to local authorities. Traditional citizenship, distinct from republican citizenship, emphasises the same actions but contends that the relationship between nation and citizen is foremost. Brubaker (1989, p. 4) argues that traditional citizenship is, "democratic, egalitarian and even sacred". Because traditional citizenship holds the connection between state and citizen in such reverence, the idea of transnational, or multiple citizenships, is self-defeating. Citizenship is a choice for immigrants to accept the new and reject the old or to remain 'outsiders' in the place of their residence by retaining their former citizenship (Bloemraad, 2004, p. 392-393). Traditional citizenship theorists argue that citizenship is a unique allegiance. This conception is not new, but has been somewhat dated by the current mobilisation and relocation trends. Transnational citizenship is another contemporary theory that entails a close nexus between states and an individual.

Transnational theories describe individuals' citizenship as increasingly shared between multiple states, this includes dual and multiple citizenship. These theorists (Bloemraad, 2004; Jones-Correa, 2001; Delanty, 2000; Fox, 2000; Bauböck, 2003; Mostov, 2008) do not suppose that nation states have or (in the near future) will be made significantly less important by global governance. These theorists embrace dual or multiple belonging or identity and respect for modern nation-states, as they are the bodies that grant citizenship. Dual citizenship is incredibly significant in immigration trends, which indicate that cross border migration for employment opportunities is increasing. Many who leave their country of origin for work still send money and return to their country of origin regularly. Their ability to have citizenship entitlements in both countries is important to the way in which they live and operate in both societies. Transnational citizenship is a slightly different concept; it is a form of citizenship theory that reflects

those individuals whose lives cross borders (Bloemraad, 2004, p. 394). These transnational citizens may live in one state and work in another or they may live and work in a state other than that of their origin, but they retain strong social ties and networks within their country of origin. Transnational citizens are significantly and simultaneously impacted by state action in both states. Because they have vested interest and belonging in more than one state, transnational theorists argue that transnationals should have the entitlement to social benefits and civic duties and responsibilities in multiple states.

Citizenship has been theorized in the context of the nation-state, until recently. Postnational theories of citizenship envisage citizenship to increasingly reject the salience of the Westphalian nation-state. These theorists adhere to the increasing importance of global governance and belonging divorced from territory. Most citizenship scholarship has focused upon democracy, equality and social context, but has largely ignored the global context of citizenship (Bosniak, 2006, p. 102-103). Cosmopolitan citizenship is a theorized conception of citizenship in a globalised context, in which nationality is disregarded (Beck, 2001, p. 83). Cosmopolitan democracy is a response to globalisation that posits global issues in the hands of international problem solving and decision-making (Archibugi and Held, 1995, Introduction). In the global neoliberal marketplace there has been an increase in interdependence between states. This interdependence means that state decisions significantly affect other states; this being so, theorists suggest global governance as the solution. A postnational citizenship under a cosmopolitan democracy can entail a pride in one's country, but from the state perspective origin or nationality is not a factor in residency or job requirements, distribution of social goods or the ability to vote. Postnational citizenship is similar to universal citizenship in that it emphasises human rights and disregards place of origin. Other forms of postnational citizenship include organisational and corporate citizenship, however these theories do not suggest that these forms of citizenship supersede the relationship between individual and community. Some theorists contend that in the complete revolution of citizenship to a global citizenship model that the essentials of citizenship become meaningless or are lost entirely (Kivisto and Faist, 2007, p. 3-5). If citizenship is membership and it is open to all then it cannot carry the significance or meaning that state citizenship does. This reversion to traditional citizenship is another contemporary conceptualisation of citizenship.

The difficulty with adhering to theoretical conception of contemporary citizenship is tendency to prognosticate about future shifts in political paradigms. Postnational citizenship in a world of nation-states is somewhat difficult to understand. To have an open border policy for all states at this time would be problematic. Tan (2004, ch. 6) argues that humanitarian aid focused upon community institutions rather than individual nationals is important in attaining a greater level of global socioeconomic equality, which would be an optimal setting for cosmopolitanism. Cosmopolitanism does not necessarily require completely open borders, but it its most quintessential form it rejects regulation of movement. Archibugi (1995) describes a restructured United Nations as the platform for cosmopolitan democracies. He argues that states would retain significance because political action and thinking, "requires citizenship to a state" (Archibugi, 1995, p. 156). Citizenship would carry new meaning as citizens would fill the roles of interstate political actors and more uniquely, representatives of their fellow citizens at the global level. All votes would require equal weight in a cosmopolitan system. A transnational, dual or multiple citizenship models allows for allegiance, albeit shared allegiance, to be a part of citizenship. These models also account for the continued salience of nation-states. These models are reflective of the need for individual rights in states of origin and of residence. The benefits for citizens and non-citizens in each country could remain distinct. Multinational citizenry has value in today's globalised society as employment and economic opportunities increasingly lead to cross-border relocation. Traditional citizenship models indicate that in order for citizenship to be realised people must participate in a relationship to a community, local or national. The increased participation in the political realm seems difficult to imagine when low voter turn-out is a global epidemic. If the proper incentives are put in place, traditional citizenship theorists posit that citizens will make political action a priority. Although each conception of citizenship seems intangible at the moment, citizenship and immigration laws will flow with the movements of society. A contemporary theory, or a blend of them, will become a more accurate depiction of membership and identity in a global context. Theories of citizenship are significant to the ways in which states, lawmakers and interpreters of the law view the entitlements and exclusive benefits of citizenship.

Conclusion

In shaping an understanding of what creates the intricacies in the relationship between citizen and state one must look to nation building. What states do in order to give their citizenry cohesion is to manufacture a national identity. The United States and South Africa have both relied upon factors atypical to traditional nation building. Because both countries have a culturally, historically and ethnically heterogeneous composition they must rely upon non-traditional factors. In the United States liberal ideals embraced within the civics of the United States Constitution are a strong basis for nation building. While America's history is indicative of the lapses in its progressive ideals, Americans are proud of the foundations upon which their nation was established. This pride has been harnessed to create a national identity revolving around the love of American civics. This national identity fosters camaraderie in the incredibly diverse populace because it is inclusive; newcomers from all backgrounds have the ability to harness this American sentiment. In South Africa the unifying identity seems to be based upon a recovery from Apartheid. Because the Apartheid regime was so oppressive and dictated the way in which citizenship could be experienced based upon skin colour, citizenship and national identity have a unique nexus with the past. It seems that the new South African is an escape from the humiliation, shame or guilt of the past. South African national identity could also be depicted as hopeful and reconciliatory. South African national identity has been argued as being bound tightly with its new progressive ideals. Citizenship is affected by the ways in which a state and civil society shapes national identity. The pride of being a citizen, or member, can however lead to conflict with 'outsiders'.

Xenophobia, fear of foreigners, is a unique complex that is a potential result of membership of a state. Membership of a state, or citizenship, brings with it benefits and entitlements provided or protected by the state. With the expansion of universal human rights, there are fewer benefits and entitlements that are exclusive to citizens. As the distinctions between citizens and non-citizens dwindle, membership criteria and social benefits come under greater scrutiny. Tension in membership sometimes leads citizens to xenophobic feelings and expressions. Xenophobia has many contributing factors. The traditional conceptualisation of citizenship leads to the notion that a state's relationship with its citizens is unique and exclusive. Restrictive citizenship policies in conjunction

with nationalism can lead citizens to treat foreigners in an inferior manner. The xenophobic outbreaks in post-Apartheid South Africa have indicated the sensitivity of new South African citizens. Xenophobia depicts the insecurity over newly obtained rights and the fear of having them reduced because of the influx of foreign nationals. In the United States recent waves of xenophobia have come alongside one of the nation's deepest recessions. The frustration with foreigners working in America has led to citizens' desire to strengthen border control and enforcement of immigration law. Xenophobia in both of these nations denies the progressive principles upon which the constitutional principles, and in part, national identities are established. It is a counterintuitive situation for citizens to feel proud of their values while they ignore those values in seeking to punish 'outsiders'. Because xenophobia is partially a result of these states' construction of citizenship I also examined contemporary theoretical conceptions of citizenship. These conceptions play an integral role in shaping the future of citizenship. Because these theories are discussed in pragmatic terms they leave states and the global community feasible alternatives to the present system and choices. Examining the possible effects of these theories is also important. There are significant ways in which citizenship can change. What citizenship becomes also affects the experience as a non-citizen. Non-citizens have increasingly enjoyed many benefits that states have to offer. The different theories of citizenship value non-citizens differently. The nuances between the legal and social distinctions of these individuals can lead to drastically different lived experiences.

Citizenship as most of the world has come to understand it is a membership that is reified by territorial boundaries and reinforced by government nation building policies. The construction of national identity in conjunction with the receipt basic benefits of citizenship in liberal democracies (voting, representation, certain exclusive social benefits) has led to entitlement arbitrarily conflated with land of birth or parentage. The benefits that have traditionally been excluded from non-citizens are increasingly accessible to non-citizens. The distinctions between citizens and non-citizens are increasingly minimal. In my conclusion I will assess the factors that have most influence upon these distinctions. I will reflect upon the role of constitutional order in defining citizenship, along with comparing the immigration and naturalisation policies of both counties. Finally, I will discuss the contemporary models of citizenship and how they

may influence, and reflect, the lives of citizens and non-citizens in South Africa and the US.

Conclusion

Citizenship is a status that gives individuals a distinction. The distinction denotes a unique relationship between individual and state. Despite the distinctive status of citizen, non-citizens in all states have been privy to increasing benefits due to the increasing salience of internationally recognised human rights. In this work I determined the entitlements exclusive to citizens according to law. In both South Africa and the United States citizenship exclusively entails the right to vote and the protection from deportation. Despite the significance of these entitlements, courts, pubic opinion and theoretical conceptions of citizenship have made other distinctions in how citizenship is experienced. Through the literature I assessed the areas of examination needed to meaningfully contribute to the scholarship on citizenship. The focus of my research was placed in these areas. This work examined at constitutional clauses, recent court cases and legislation to evaluate the role of constitutional order in citizenship. In evaluating the influence of constitutional order on citizenship I analyzed the relationship between the courts and civil society. In this, my conclusion, I will reflect upon the extent to which the various components of constitutional order in South Africa and the United States influence the experience citizen and non-citizen and their perspectives of self and other. I reflect upon the ways in which US and South African public opinion constructs citizenship and differentiates among non-citizens. I have compared and contrasted the immigration and naturalisation laws of the US and South Africa with an intent to juxtapose the legislation and the public opinion regarding non-citizens. I will consider the possible policy global changes or changes for US and South Africa to adopt in order to incorporate new models of citizenship. In examining the possible changes to models of citizenship I will address their suitability in both countries.

The relationship between constitutional order and public opinion is difficult to measure but through the analysis of public opinion surveys I was able to determine that in the United States there is a significantly greater level of trust in state institutions, notably courts (Gallup Poll July 2010, HSRC 2008). In the United States and in South Africa there has been a legacy of court-protected rights for non-citizens. The decisions that have established and broadened rights for non-citizens in both countries have been given more legitimacy in the United States. The courts in both countries are at odds on matters of

non-citizen rights with some segments of the population. The xenophobic outbreaks in South Africa and the passage and support of xenophobic laws in the United States support the argument that there is a tension between the public and courts' stance on the conferral of non-citizen rights. The position of legislative and executive bodies against that of the courts is indicative that the courts, which are most divorced from public opinion, are producing counter-majoritarian policies. Legislative bodies in the southern border-states of the United States are producing laws that attempt to restrict undocumented immigration and impose additional requirements upon non-citizens. In South Africa the post-Apartheid legislative bodies have produced increasingly strict border control and have neglected to sufficiently protect non-citizens during the surges of xenophobic violence. The South African Department of Home Affairs has created an atmosphere of danger for non-citizens. Due to the state's inability to regulate immigration and naturalisation in a uniform, proficient and professional manner many non-citizens who otherwise would have documented status have fallen in to the undocumented category. The citizens of South Africa have grown increasingly xenophobic because of the notion that most of the incoming foreigners are 'illegal' and stealing jobs that would otherwise employ citizens. Findings have indicated that in both the United States and South Africa most assumptions that citizens hold about non-citizens are false. The government reinforcement of the false assumptions is stronger in South Africa. The South African government has given its tacit approval of violence against foreigners by its lack of a stance against it. The elective officials have been much more reserved in protecting the constitutionally guaranteed rights of non-citizens in both South Africa and the US. The courts have been the most consistent supporter of non-citizen rights, and there have even been lapses in the protections offered by the courts. It appears that constitutional order has an effect upon how citizens perceive that they can treat non-citizens. Courts play a large role in ensuring that the rights of non-citizens are legally intact. However if there is limited protection of these rights then to what extent are they actually experienced? Because the South African Police force has showed a reluctance to investigate attacks upon foreigners South Africans have less inhibition to become violent with non-nationals.

In both South Africa and the United States the public opinion regarding national identity, non-citizens and immigration and naturalisation policies have real effects for the

way non-nationals live. The difficulty with public opinion about 'outsiders' is the tendency in both South Africa and the United States to identify non-citizens using physical characteristics. In the United States the appearance of being Hispanic has been a cue for the identification of non-citizens although many Hispanics are citizens. In South Africa certain facial features, language and cultural cues and darkness have been used by some to determine membership or suspect a lack of citizenship. In both countries citizens have heightened anger towards undocumented migrants and immigrants. The government vernacular of 'illegal immigrants' in both states only increases the frustration towards these groups. The problem with the use of physical characteristics in identification of foreigners, and more specifically undocumented migrants, is that it often leads to discrimination of documented non-citizens and citizens. In the United States and South Africa certain groups have been targets of discrimination, xenophobia has become racist. In the United States individuals of Latino decent or those who appear to be Latino that become the target of discrimination. In post-Apartheid South Africa it is darker skinned Africans who have typically been targets of discrimination. Cultural characteristics like the inability to speak Zulu have also become bases for discrimination. The anti-foreigner sentiment has been more visible in South Africa because of the lack of enforcement allowed the sentiment to translate into violence. In the southern border states of the United States the xenophobic sentiment has been reinforced by lawmakers willingness to translate the will of the voting population into discriminatory laws.

Contemporary theoretical conceptions reflect the globally increasing trends of cross border migration. The traditional form of citizenship in which a single state has the complete allegiance of each of its citizens is reflective of the Westphalian conception of independent nation states. Republican citizenship, which is a traditional model of citizenship, is an active participatory citizenship with high levels of involvement at the local level. Although there are theorists who see traditional citizenship as pertinent in today's globalised world, others have come up with contemporary theories which are more embracing of cross-border movement. Transnational citizenship theories propose citizens with shared allegiance between two or more states. Transnational citizens are generally those who leave their country of origin to live or work in a new country. South Africa and the United States both have large populations of foreign nationals living within their borders in order to have better employment opportunities. There are many

citizens in both the US and South Africa who have nationalised and have dual citizenship. Dual citizenship is a relatively new phenomenon in the US and South Africa. Transnational citizens each have different motivations for naturalising in a new state, understanding the motivations is significant in assessing the importance of granting citizenship to foreign nationals. Permanent residents in the US and South Africa are granted most of the benefits of citizens, the primary distinction is the ability to vote. The difficulty, cost and time that the naturalisation processes in South Africa and the United States takes deter many non-citizens from pursuing citizenship. Countries with high levels of political mobilisation in non-citizens tend to have higher rates of naturalisation. South Africa and the United States do not give non-citizens enough motivation to naturalise in high numbers. Because there is little distinction between citizen and non-citizen in both of the countries that I am examining, postnational models of citizenship are pertinent to this discourse. Postnational citizenship exists in a global community in which there is ambivalence regarding nationality. Rights depend upon residency and are given to all in a community. The expansion of international human rights and the advocacy for universal citizenship have been strong indicators of a movement towards postnational citizenship. While states may still exist in order for representation at the global level and for distribution of resources, all individuals would have the same political power in these schemes. The UN and EU have been steps towards postnationalism, however postnational theorists argue that even these international institutions need transformation before they can be recognised as postnational. States in the postnational global community would require an open border policy. The difficulty in assessing the applicability of postnational citizenship in the United States and South Africa is the complete reliance upon a global accord necessary. NAFTA and SADC have both shown the difficulties in relaxing immigration even on a regional scale. South Africa and the United States would be inundated with foreigners from poorer neighbouring countries. In time and with great effort there may be a more equal setting in which postnationalism could be successful. Postnational citizenship would allow for a condition in which there are fewest distinctions between members of states and outsiders.

In both countries the immediate adoption of a well-regulated system of immigration with fewer restrictions upon naturalisation would be optimal. In both countries non-citizens are marginalised due to their incapacity to partake in decision-

making. Even permanent residency puts individuals at a perpetual disadvantage because of the inability to vote. If non-citizens are to be integrated into the community in a uniform manner with fewer hurdles and are able to vote upon conferral of permanent residency then those who are invested in the community will be able to partake in it fully. Those who are just in the country to work and then return home should still be treated with more dignity. Currently, labour forces in the United States and South Africa rely heavily upon migrants. They are a significant part of the markets and should be given the opportunity to expedite naturalisation. Government officials and the media play a large role in perpetuating frustration against migrants by the use of terms like 'illegal immigrants' and 'aliens'. The use of these terms exacerbates xenophobia and confers upon foreigners criminal or subhuman classification. In South Africa the government has also perpetuated xenophobia through its inability to execute the rights guaranteed in the constitution. The government's failure is two-fold; they made grandiose promises in the constitution and have continued to heighten expectations since its adoption. The people of South Africa had expectations as to what life post-Apartheid would be like. The progressive constitution promised adequate housing, health care, food and drinking water in the form of rights for all. These rights, while noble, have not been fulfilled. The constitution did not restrict these rights to citizens. Citizens are frustrated that over a decade after the Constitution was adopted they are still in want the realisation of these rights. Citizens see foreigners as impediments to the state's delivery of these goods. The state has defended itself through arguments that the budget restricts their ability to protect these rights. Citizens have used foreigners as scapegoats because the government focuses on the 'illegal' problem. Awareness about the rights of South Africans and the budgetary restrictions need to be made known through awareness campaigns. Anti-xenophobia campaigns should take place simultaneously. The South African government has a responsibility to let citizens know why they have been deficient in ensuring the rights guaranteed by the Constitution in order for the xenophobia and racism to desist. In the United States xenophobia in southern border-states has been exacerbated by the presence of federal law that is under enforced. The United States federal government must change the immigration and naturalisation laws or reasonably enforce them. The state governments are frustrated that their communities, which bear disproportional brunt of the undocumented immigration, have no means by which to control the influx into their

state. The revolution of immigration laws and naturalisation policies at the federal level could reduce the frustration of border states by making documented migration and immigration easier and undocumented immigration and migration more difficult. Because Mexico has become increasingly dangerous and drug cartels are controlling several of the Mexican states the United States should evaluate the possibility of granting some Mexican nationals asylum. Despite state action on behalf of the US or South Africa people will go where the money is, even if they must do so clandestinely. Having immigration and naturalisation laws that reflect contemporary migration trends is important to maintaining the integrity of the state and citizenry.

In the United States and South Africa there are few remaining entitlements exclusive to citizens. Citizens and non-citizens share most legal protections. This is a global phenomenon. Increasingly, people are coming to the conclusion that rights should not be dependant upon ancestry or place of birth, but upon personhood. This notion of equality exists in a system wrought with inequality was established. The border of South Africa was drawn by her colonial masters. The United States expanded her power through the annihilation of the indigenous populace. Nation-states have used borders as a means to keep others out and assert domestic superiority. Only of late has the enlightenment that each human being holds equal worth come to the global stage. The notion hasn't fully been accepted because nationality matters, even race matters. When residing in a foreign country you are seen in a harsh light depending upon where you came from or what you look like. While the human race is still struggling to make equality real restrictive border policies and economic inequities are making it difficult. The merging of citizen and non-citizen is an indication of increased levels of equality. While these equalities are legally recognised governments must ensure that they are realised in the daily lives of non-citizens and they must certainly non perpetuate notions of inequality. While postnationalism seems impossible, it is a more ideal setting for equality of humanity. The classification of citizens and non-citizen will become increasingly insignificant in a global community founded upon equality. Although there is currently a need for border control once a greater level of economic equality is reached the need for such control will become obsolete.

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