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Opening the Ranks of Constitutional Subjects: Immigration, Identity, and Innovation in Italy & Canada

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Abstract

The relationship between immigration and constitutional identity is simultaneously obvious and evasive. This article explores that relationship through a comparative case study of Italy and Canada. The authors begin with a conceptual analysis of the role of immigration against the backdrop of collective identity, constitutional identity, and constitutional subjectivity. The metaphor of immigration as a mirror of constitutional identity orients this analysis. Then an empirical comparison of the role of immigration in Italy and Canada demonstrates the very different place of immigration in national and constitutional narratives of 'self' and 'other'. Yet, when the lens is widened to include their recent startup visa programs, their narratives start to converge as the new metonymy of innovation makes an appearance. This convergence marks a conceptual shift in constitutional identity: from immigration as mirror to immigration as display. As a tool of attraction for innovators, immigration law has both internal and external dimensions, which reverberate with implications for constitutional identity. Ultimately, the startup visa programs enlarge the constitutional "us" and make constitutional subjectivity more fluid.

Introduction

The relationship between immigration and the constitution is obvious on its face but evasive in its details. In a world of globalized migration where states often compete for the best and brightest migrants, articulating those details is important. This is because the content of the relationship between immigration and the constitution reveals the nature and values of the collective self as well as the terms of constitutional subjectivity. Several strands of scholarship have addressed the challenge of unraveling that relationship.[1] This article contributes to that task by studying the evolution of the relationship in the cases of Italy and Canada.

The entry point for this comparison is the argument that immigration provides a mirror of constitutional identity.[2] The metaphor of a mirror reflects the extent of overlap between immigrant and constitutional subject. Immigration law expresses the identity underpinning national and constitutional narratives of collective selfhood in its requirements for 'others'. Drawing on Michel Rosenfeld's work on constitutional identity, this article adopts the conceptual notion of constitutional subject to explore how immigration law reflects collective and constitutional identity through metaphors and metonymies. It conceives this relation schematically through a comparison of Italy and Canada.

Italy and Canada offer a provocative comparison. At first sight, the two countries sit at opposite ends of the spectrum in terms of the role of immigration in their constitutional identity. The 20th century transition from country of emigration to country of immigration has left Italy wedded to the emigrant 'selves' outside its borders while it struggles to engage the immigrant 'others' within them. Halfway across the world, the exigencies of settler

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[1] For a few eminent samples between law and sociology, *see* CHRISTIAN JOPPKE, CITIZENSHIP AND IMMIGRATION (2010); GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW (1996); T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002).

[2] LIAV ORGAD, THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS 86 (2015).

statehood turned Canada into one of the original countries of immigration even while shifting flows of immigrants continuously challenge the identity of the settled 'self'. The countries yield initially divergent narratives of constitutional 'self' and 'other': immigration sits at some remove from Italy's constitutional identity, which is still preoccupied with binding emigrants, while immigration is both tool and mythology in Canada's nation-building project.

Yet when the lens is widened to include contemporary developments in business immigration, there is unexpected convergence between the countries. One year apart, both countries introduced an entrepreneur-based startup visa program. This convergence is striking because both models are highly specific programs designed to attract innovation through similar methods of selection. In each country, the startup visa reveals a new metonymy of innovation while marking a shift from past immigration policies. The innovation imperative also has repercussions for constitutional subjectivity. The lens offered by the startup visa reveals a constitutional exception: sometimes 'them' can be 'us' regardless of the narratives weaved by history and law.

This exceptionality transforms immigration from a mirror of constitutional identity to a display of it, broadcasting and amplifying selected elements of that identity as a tool of attraction. As a display, immigration law works both externally and internally. In the external direction, immigration law becomes a display of selected elements of collective identity. In the internal direction, immigration law becomes a display of constitutional, rather than collective, identity, taking on the colour of domestic interventions about citizenship. Ultimately, the article argues, the display function of immigration law makes the constitutional subject somewhat fluid.

Part A explores the role of immigration as the mirror of constitutional identity. It examines the conceptual relationships between collective identity, immigration law and constitutional subjectivity. Part B examines the pathway from immigration to constitutional subject in Italy and Canada. This section is an empirical case study of the conceptual relationships examined in Part A. Next, Part C widens the comparative lens to include contemporary business immigration initiatives. It focuses on the case study of start-up visa programs in Italy and Canada, exploring their remarkable convergence. Part D draws insights from that trajectory of convergence, suggesting the shift from immigration as mirror to immigration as display. It analyzes the implications of the role of immigration as a display of identity for the admission and fluidity of constitutional subjects. The article concludes with some thoughts about the changes that immigration law elaborates for matters of constitutional identity.

A. Immigration as the Mirror of the Constitutional Self and Other

That a relation of some sort links a country's immigration history, law, and policy with its constitutional identity is a notion that intuition easily grasps. However, theory has a hard time spelling out the origins or direction of that relation. Liav Orgad has offered a forceful description of the intuition behind this relation: "[i]mmigration policy thus echoes constitutional identity, by mirroring not only the qualities that "we" value in others, but also by reflecting what defines "us" as a nation'".[3] Immigration law and policy, in other words, are the 'gatekeepers' of national and constitutional identity.[4] By setting the requirements 'others' need to meet in order to become members of the polity, immigration law and policy give explicit expression to elements of identity underpinning national and constitutional narratives of collective selfhood.

This reflective relationship between immigration policy and constitutional identity faces two difficulties: one is theoretical and the other is factual and epistemological. The first theoretical difficulty lies in distinguishing between definitional terms – collective identity vs constitutional identity - to generate productive insights. How should we understand these terms in a conversation about immigration? Collective identity refers to the shared sense of belonging to a group, to the 'boundaries between those who are included on the basis of some fundamental

[3] *Id.* at 86.

[4] *Id.* at 131.

similarity and others who are viewed as different, as strangers or outsiders'.[5] In the immigration context, this grouping function of collective identity tends to be overshadowed by national identity. Hence the article uses the two terms interchangeably. As to constitutional identity, Michel Rosenfeld's work illustrates how there are various conceptions of the latter, ranging from "focus on the actual features and provision of a constitution … to the relation between the constitution and the culture in which it operates and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity".[6] The place or function of constitutional identity will vary with the conception of such identity that is in play.[7]

Constitutional identity is not the same as national or collective identity although there are lines of overlap. Both constitutional and national identity can be conceived as "belonging to a collective self".[8] It has been observed that constitutional identity is constructed in part consistent with national or collective identity and in part against it.[9] The two notions are thus closely related, however they remain distinct.[10] Constitutional identity is simultaneously broader and more specific than collective identity. It is broader because it encompasses a wider set of definitional features of the constitutional polity: an archetypal constitutional model embracing a vision of constituent power;[11] a model of governance and government; an expression of shared values such as arrangements on the reach of religious rights and on the balance between liberty and equality. It is more specific both because it is possible to conceive of national identity on its own and outside of the constitutional frame and because 'The we who gives itself a constitution must project beyond itself and even agree to become bound against what previously made it into a self'.[12] Hence, constitutional identity is about distilling some durable and transcendent elements from the contingent aspects of collective identity.

At first sight, immigration policy is more directly concerned with collective identity than with constitutional. It conditions the status, title to admission and rights of persons who remain 'others' in respect to the polity's collective self. So how exactly does the mirror metaphor effect work in the relation between immigration policy and constitutional identity? Solving this puzzle is one of the central challenges of this article. The article relies in this respect on the notion of constitutional subject. Discussions of constitutional identity necessarily invoke constitutional subjectivity; the reach of the constitution has obvious implications for the function and meaning of its identity. Hence the constitutional subject is one expression of constitutional identity, and mediates between collective and constitutional identity.

The notion of constitutional subject is a complex one. It encompasses the selves that are the subjects of the constitutional social contract, those who 'endow the constitution with meaning'[13] - but also those that the constitution embraces, to whom it is addressed. Michel Rosenfeld distinguishes at least three aspects within it: the constitution makers or, in other words, the 'We the people'; those who are subject to the prescriptions of the

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[5] Bernhard Giesen, *National Identity and Citizenship: The Cases of Germany and France*, *in* EUROPEAN CITIZENSHIP BETWEEN NATIONAL LEGACIES AND POSTNATIONAL PROJECTS 41 (Klaus Eder & Bernard Giesen eds., 2001).

[6] Michel Rosenfeld, *Constitutional identity*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 757 (Michel Rosenfeld & Andras Sajo eds., 2012) [hereinafter Rosenfeld, *OUP*]

[7] *Id.*

[8] *Id.*

[9] MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 26 (2010), at 12 [hereinafter Rosenfeld, THE IDENTITY].

[10] Seyla Benhabib, *On Michel Rosenfeld's The Identity of the Constitutional Subject*, 33 CARDOZO L. REV. 1889, 1890 (2012); Rosenfeld, *OUP*, *supra* note 6, at 757.

[11] Martin Loughlin, *The Concept of Constituent Power,* 13 (2) EUR. J. POL. THEORY 1 (2013). *See also* Rosenfeld, *OUP, supra* note 6, at 149-183.

[12] Rosenfeld, THE IDENTITY, *supra* note 9, at 10.

[13] *Id.* at 26.

constitution; and the interpreters or custodians of the constitution.[14] Rosenfeld emphasizes how the constitutional subject, and the constitutional identity that it expresses, are always a 'lack' in constitutional discourse. They are inherently incomplete and constantly in need of construction and reconstruction.[15] The relevant process entails, in Rosenfeld's view, a constitutional discourse mediating between identity and difference through the three tools of negation, metaphor, and metonymy.[16] Negation, for instance of parts of a socio-cultural heritage, delimits the constitutional subject.[17] Metaphor and metonymy mold it, by giving form to identity and difference through mechanisms of substitution and displacement.[18]

The argument advanced here is that immigration law and policy feed, in part, this process. Immigration law and policy negate the status of a set of 'others' whose admission and rights in the polity are conditioned and subject to negotiation. They exert this negation through sourcing in parts of the polity's socio-cultural heritage, such as its history and its collective myths, an implied definition of the collective self. This definition of the self is further specified in the metaphors and metonymies that inspire the shape of admission rights and naturalization requirements for the 'others'. Metaphors in the immigration repertoire may include, for instance, the patriot citizen who serves the country, or the good emigrant who extends the cultural reach of the polity beyond its own territorial borders. Metonymies may include social integration, standing for the notion of a well-functioning and contributing citizen; or language knowledge, standing for the idea of an active member of the national and political community. These metaphors and metonymies tend to acquire an extra-temporal fixity in the discourse of identity and difference underpinning definitions of the constitutional subject. In this sense, immigration policy mediates between the contingent, historical, 'us' and 'them' of collective identity, and the durable, a-temporal 'us' and 'them' of the constitution and its subjects. Immigration policy, in other words, contributes to the task of selecting from the socio-cultural heritage the elements that are meant to have a long-standing definitional value for the polity , and it mirrors them from the transient, ephemeral domain of collective identity onto the resilient one of constitutional identity.

This leads us to the second difficulty mentioned at the beginning of this section. The difficulty is in part factual - what can one see if one looks into the mirror that immigration law and policy provide? - and in part epistemological - how can one discern those durable elements that immigration law and policy reflect from collective onto constitutional identity? Liav Orgad's analysis of cultural defense in the immigration laws of European countries, the US, and Israel offers hints in both respects.[19] In the former respect, Orgad's overview of integration requirements and citizenship tests introduced by several of the surveyed countries in recent decades highlights the complexity of the task of expressing a national identity through immigration law and policy.[20] The effort to condense a 'national identity' into relevant tests and requirements has repeatedly proved arduous if not futile. Those requirements and tests, whether purporting to prove an entrant's cultural compatibility,[21] or testing familiarity with a country's most mundane social habits,[22] or attempting to distil the substance of a country's history and constitutional traditions,[23] align in proving that national, and constitutional, identity remain as hard to define as they are, at least from a liberal perspective,

[14] *Id.* at 41.

[15] *Id.* at 36.

[16] *Id.* at 59-60.

[17] *Id*. at 59-64.

[18] *Id.*

[19] ORGAD, *supra* note 2.

[20] ORGAD, *supra* note 2, at 85-131, and particularly at 130. *See also* JOPPKE, *supra* note 1, at 147; and in general A REDEFINITION OF BELONGING? LANGUAGE AND INTEGRATION TESTS IN EUROPE (Ricky van Oers et al. eds., 2010); RICKY VAN OERS, DESERVING CITIZENSHIP – CITIZENSHIP TESTS IN GERMANY, THE NETHERLANDS AND THE UNITED KINGDOM (2013).

[21] ORGAD, *supra* note 2, at 99-100.

[22] *Id.* at 101 and 106-108.

[23] *Id.* at 90.

impervious to 'teach'. [24] In the latter respect, Orgad suggests that immigration law offers a viewpoint on three issues: 'defining the "we", setting criteria for identifying the desired "they", and finding the core to which "they" should subscribe to become part of "us"'.[25]

Notions of us and them that immigration law reveals are central also to the methodological choice in this article, which aims to address both the factual and the epistemological difficulty. Our focus is, rather than on the specific requirements for admission or naturalization expressed in immigration law, on reconstructing the way that immigration law narrates the 'us' and 'them' of national identity through selecting - and contextually negating - parts of a country's immigration experience and history.[26] We trace this narrative by looking both at the core tenets of immigration law, and at its systemic role. As a further step we look for the metaphors and metonymies of the self and the other that emerge out of immigration law and that reflect the 'us' and 'them' of national identity onto the 'us' and 'them' of the constitutional subject. In this way, we form our answer to both the factual question posed above: in the mirror one sees a narrative of selfhood and otherness, filtered in part through identity-relevant elements of a country's experience of immigration. And to the epistemological question: to discern the durable elements that immigration law reflects from collective onto constitutional identity, one has to trace the dialectic of self and otherness that immigration law entails.

A possible objection to our methodological approach is that it is the job of citizenship policy, rather than immigration, to settle questions of membership, sorting the us from the them. Immigration policy – the objection would go - only governs admission to a status of denizenship that does not necessarily lead to membership. However, extensive literature on citizenship and immigration has demonstrated that there is continuity between the role of immigration and citizenship policy in this sense.[27] Both Linda Bosniak and Catherine Dauvergne describe how immigration establishes the pool of potential citizens, excluding immigrants for reasons that would be unacceptable bases for denying citizenship. Bosniak calls immigration decisions "threshold" citizenship ones, while Dauvergne refers to immigration as performing the "dirty work" of citizen selection.[28] Also Liav Orgad frames his work on the cultural defense of nations in terms of immigration law, although he points to processes through which liberal democracies 'define the essence of their citizenship in cultural terms'.[29] In fact his empirical analysis focuses on both requirements for admission and permanent residence, and on requirements for naturalization, thereby embracing both the domains of citizenship and of immigration law.[30]

Along the same lines, while we have referred to immigration law so far, we have used the term in a broad sense, to encompass both immigration law strictly defined and citizenship law. Our analysis focuses on both, questioning to what extent immigration law contributes to drawing the boundaries of membership that citizenship law governs. Hence, the analysis also considers the relation between immigration and citizenship law. In fact, stages of migration begin with immigrant selection but move quickly to laws which "shape the transition and integration of immigrants to degrees of membership".[31] The relation between immigration and citizenship law in a given polity illustrates the

[24] *See id.*. at 130-131; JOPPKE, *supra* note 1, at 111 and 130.

[25] *Id.*, at 87.

[26] On the narration of national identity and peoplehood, *see* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (3d ed., 2006); ROGER SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 5 (2003); JOPPKE, *supra* note 1, at 120.

[27] *See e.g.* Giovanna Zincone, *Citizenship Policy Making in Mediterranean States: Italy,* EUDO CITIZENSHIP OBSERVATORY 1, 6 (2010), http://eudo-citizenship.eu/docs/EUDOcom-Italy.pdf. *See also* Patrick Weil & Alexis Spire, *France*, *in* ACQUISITION AND LOSS OF NATIONALITY VOLUME 2: COUNTRY ANALYSIS: POLICIES AND TRENDS IN FIFTEEN EUROPEAN COUNTRIES 198 (Rainer Bauböck et al. eds., 2006).

[28] LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2008); CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 123 (2008).

[29] ORGAD, *supra* note 2, at 86.

[30] ORGAD, *supra* note 2, at 87-131.

[31] Hiroshi Motomura, *Looking for Immigration Law,* 38 (8) ETHNIC & RACIAL STUD. 1305, 1308 (2015).

nature and speed of this movement. This, in turn, offers a telling perspective on the narrative of 'us' and 'them' that immigration law distils from collective identity.

In the following section, we apply our frame to the cases of Italy and Canada.

B. From Immigration to the Constitutional Subject in Italy and Canada

We choose Italy and Canada for our case study as these are two countries where the experience of immigration occupies a profoundly different place in national history and in collective identity.

Italy has been, between the 19th century and the 1970s a country of massive emigration. This has made for a substantial number of Italians living outside the borders of the country.[32] As a result, a consistent state objective reflected in nationality and citizenship law has always been to embrace those Italians outside the borders in the narrative of the constitutional 'us'. The turn into a country of immigration in recent decades has not substantially altered that objective.

Whilst Italy is a state of emigrants, Canada is a settler society. This has several implications; the most significant is that its nation-building project is closely tied to immigration, and the negotiation of the 'us' versus 'them' boundary has always taken place in the context of shifting flows of immigration. These immigration flows brought in new classes of others, prompting the state to define the contours of the 'us' around continually evolving conceptions of the settled 'them'.

Because of these different roles of immigration and emigration in forming their collective selves, Italy and Canada offer a promising terrain to test whether the relation that we have traced conceptually between collective identity, immigration law and constitutional subjectivity holds empirically. We address for each country the following three questions. First, how do immigration and citizenship law interact in negating an 'other' and defining a 'self? Second, what metaphors and metonymies do they reflect from collective identity? And third, how does the resulting narrative of 'us' and 'them' affect the definition of the constitutional subject?

I. The Case of Italy

In the Italian case, it is mostly citizenship law that has weaved a narrative of 'us' and 'them'. That narrative is articulated, and evolves, in the context of Italy's historical transition from being a country of emigration to becoming a country of immigration.[33] Two threads may be distinguished in the narrative. A first thread tends to define the emigrants, or more generally the Italians outside the borders of Italy, as the 'self'. A second thread negates the status of immigrants, who remain the 'other' unless and until they prove their ability to be part of the 'us'.

The intent to embrace the Italians outside the borders is at the core of Italian citizenship law. Italian citizenship law has always been based on the principle of 'ius sanguinis', hence on transmission of nationality by descent, which facilitates the above objective.[34] Legislative interventions throughout the 20th century have furthered the same goal through providing for various avenues of retention or reacquisition of citizenship on the part of the 'Italians outside

[32] About 27 million Italians left between 1876 and 1988. Of these, 12-14 million never returned. *See* Antonio Golini e Flavia Amato, *Uno Sguardo a un Secolo e Mezzo di Emigrazione Italiana* in STORIA DELL'EMIGRAZIONE ITALIANA, 45, 48 (Piero Bevilacqua et al. eds., 2001). *See also* Giovanna Zincone & Marzia Basili, *Country Report: Italy,* EUDO CITIZENSHIP OBSERVATORY 1 (2013), http://eudo-citizenship.eu/docs/CountryReports/Italy.pdf, at 6.

[33] See Ferruccio Pastore, *A Community out of Balance: Nationality Law and Migration Politics in the History of Post-Unification Italy,* 9 (1) J. MOD. IT. STUD. 27, 27 (2004).

[34] See Zincone, *supra* note 32, at 10.

the borders.[35] The 1992 reform of nationality law, yielding the Citizenship Act that is in force,[36] continues this effort. It explicitly provides for the possibility of dual nationality, thereby facilitating the acquisition or retention of Italian nationality on the part of emigrants naturalizing elsewhere.[37] It also poses no temporary limit or residence requirements for the acquisition of Italian nationality by descent, so that the chain of transmission between Italians outside Italy is virtually unlimited.[38]

As a result of all these provisions, a sizable cohort of actual and potential Italians live outside the borders of the Italian Republic.[39] The extension, in 2001, of political rights to this cohort has further strengthened the narrative that citizenship policy has weaved over the decades: the Italian 'self' does not stop at the territorial borders.[40] It includes the emigrants, their descendants, and other Italians that historical contingencies have relegated outside the borders but not deprived them of their 'Italianity'.[41]

The other thread of the narrative that nationality law weaves focuses on negating the condition of the 'others'. Despite Italy's progressive turn, beginning in the 1970s, into a country of immigration,[42] Italian nationality law has remained reluctant to embrace a convinced *ius soli* rule, thereby negating a smooth route to full membership for migrants. Under the 1992 Citizenship Act, it takes ten years of uninterrupted legal residence for a foreigner to qualify for Italian nationality under a discretionary naturalization procedure. And it takes 18 years of uninterrupted legal residence for a minor born in Italy from foreign parents to qualify for nationality under a declaration procedure.[43] These rules make naturalization de facto very difficult and soon proved outdated in the context of a country confronting increasing streams of immigration, and a growing class of second generation migrants.[44] Myriad proposals for liberalizing reforms have failed to date to reach the necessary political consensus.[45] The latest one, pending in the Italian Parliament at the time of writing, has caused so much commotion as to prompt a physical fight in Parliament in June 2017.[46] Achieving Italian nationality remains, for a foreigner, an arduous escalation out of a condition of entrenched otherness.

Immigration law corroborates nationality law's narrative of the migrants' otherness by not challenging it at all. Ever since the mid 1980s, when the first regulations of immigration were introduced, immigration law has rather focused

[35] *See* L. n. 555/1912 (It.); Pastore, *supra* note 34, at 29.

[36] L. n. 91/1992 (It.).

[37] *Id.* art. 11.

[38] *Id.* art. 1. *See also* Zincone, *supra* note 32, at 10.

[39] Zincone, *supra* note 32, at 11.

[40] L. n. 459/2001 (It.). *See also* Pastore, *supra* note 34, at 35-36.

[41] The term is the author's translation of 'Italianita'', as used in SABINA DONATI, A POLITICAL HISTORY OF NATIONAL CITIZENSHIP AND IDENTITY IN ITALY 1861-1950, 70-93 (2013)

[42] The resident foreign population increased from 648,000 in 1991, to 1.3 million in 2002 to 5 million in 2016. Italian National Institute for Statistics, *Population in Italy*, ISTAT (Jun. 2, 2016), https://www.istat.it/en/files/2017/06/2.pdf. *See also* Pastore, *supra* note 34, at 28.

[43] L. n. 91/92 (It.), art. 9(1)(f) and art. 4(2); For an overview of *ius soli* rules under the 1992 Citizenship Act, *see* Bruno Nascimbene, *Proposte di Riforma delle Norme Sulla Cittadinanza,* 2 RIVISTA DI DIRITTO INTERNAZIONALE 555–564 (2004).

[44] *Id.* at 557. *See also* Zincone, *supra* note 32, at 15.

[45] Zincone, *supra* note 32, at 16-17.

[46] *See* Atto Senato, n. 2092, http://www.senato.it/leg/17/BGT/Schede/Ddliter/46079.htm-. *See also* Maura Bazzucchi, *Senato, torna lo ius soli ed è già rissa. Salvini: "Bloccheremo il Parlamento",* POLITICA (July 4, 2017), http://www.huffingtonpost.it/2017/07/04/senato-torna-lo-ius-soli-ed-e-gia-rissa-salvini-bloccheremo_a_23015890/.

on the repression of irregular migration and on the grant of rather generous rights to legally resident migrants.[47] The current Immigration Act[48] entrenches a system of tight annual quotas for the legal entry of economic migrants,[49] governs the repression of irregular migration and introduces criminal sanctions for related conduct,[50] and defines the social and family rights of resident migrants.[51] It does not treat the migrants as members in the making, but rather focuses on setting the terms of a condition of denizenship.[52] As it does not meddle with issues of escalation to membership and does not speak to or link with citizenship law in this sense,[53] immigration law thus silently subscribes to the latter's narrative of otherness.

The main metaphors that immigration law distils from Italian collective identity hence come from citizenship law. The distant Italian outside the border, whose connection to the home land must be protected at all costs, remains the metaphor of the self. Whilst the immigrant pressing at the border cannot but be an 'other', facing, even once legally admitted, a tortuous path to membership. A discourse of integration punctuates this narrative of selves and others with a further metonymy. Although the 1992 Citizenship Act does not include proper integration requirements, an assessment of integration has found its place in the practice of naturalization.[54] The Italian Council of State, in particular, has repeatedly held that the concession of citizenship is a highly discretionary process aimed at assessing the integration of the foreigner and at confirming his or her belonging in the national community.[55] By reflection, ancestry becomes a metonymy for belonging to the national self. Only in the absence of ancestral bonds that trigger all the facilitated avenues of acquisition and retention of Italian citizenship, an assessment of integration needs to take place. Not only, such assessment now takes place already at the time of first admission in Italy. Since a 2009 reform of immigration law, immigrants are required to sign, as a condition to obtain and maintain a residence permit, an integration agreement, whereby they undertake to earn a number of integration credits through activities of social, cultural and economic involvement.[56] Thus immigration law no longer just defers to the narrative of citizenship law, but has come to actively endorse some of its elements.

Relevant narratives ultimately mirror Italy's collective identity as a country of emigration and a 'nation in search of a state'[57] onto constitutional subjectivity, by blowing life into the flat definitions of 'citizen' and 'foreigner' deployed in the Constitution and in constitutional discourse. In the Italian Constitution of 1948, a number of provisions are specifically addressed just to the 'citizens'.[58] The 'foreigner' as a constitutional subject is explicitly considered in

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[47] For instance, in terms of access to education and healthcare. For an overview, *see* Giovanna Zincone, *The Making of Policies: Immigration and Immigrants in Italy,* 32 (3) J. ETHN. & MIG. STUD. 347 (2006). *See also* Ministero Dell Interno, *Primo Rapporto sugli Immigrati in Italia* 26-39 (2007), http://www1.interno.gov.it/mininterno/export/sites/default/it/assets/files/15/0673_Rapporto_immigrazione_BARBAGLI.pdf.

[48] D. Lgs. n. 286/1998 (It.).

[49] *Id.*, art. 3 par. 4.

[50] *Id.*, e.g. art. 10, art. 12.

[51] *Id.*, art. 28-30 and 34-41.

[52] *See id.*, art. 2.

[53] Art. 3, par. 3 also includes among the objectives of immigration policy the one of favoring the reintegration of migrants in the countries of origin.

[54] *See e.g.* Italian Ministry of the Interior, *Memorandum K.60.1 of 5 January 2007*, (Jan. 5, 2007), http://www.meltingpot.org/IMG/pdf/circolare_ministero_interno_citadinanza_-_linee_interpretative.pdf.

[55] Consiglio di Stato, n. 3006/2011 (It.); Consiglio di Stato, n. 4080/2009 (It.).

[56] *See* L. n. 94/2009, amending D. Lgs. n. 286/1998 (It.). *See also* D. Lgs. n. 286/1998, art. 4. *See also* Ministry of the Interior, *Integration Agreement,* (last visited Jun. 8, 5:00 PM), http://www.integrazionemigranti.gov.it/en/latest-news/highlights/Pages/Integration-agreement.aspx.

[57] Zincone, *supra* note 32, at 1.

[58] *See e.g.* Costituzione [Cost.] [Constitution] (It.), art. 3 and 4 (rights intended for 'citizens'); *Cf. supra,* arts 19, 21 and 24 (fundamental rights extended to 'everyone'). *But see* Corte Costituzionale, 15 Novembre 1967, n.120, Racc. uff. corte. cost. 1967 (It.) (principle of equality under art. 3 should apply to foreigners as it is a fundamental liberty).

article 10, which states, among others, that the status of 'foreigners' is legally regulated in conformity with international rules and treaties.[59] Despite resorting to the vocabulary of 'citizen' and 'foreigner', the Constitution does not endorse any clear-cut definition or concept of citizenship,[60] and it does not fully engage with the distinction. The Constitutional Court has partly filled the gap by elaborating, on several occasions, the notion of citizen and foreigner. 'The citizen' – according to the Court – is 'an essential element of the population', 'it represents, together with the other citizens, a constitutive element of the State'. Whilst the foreigner lacks an 'ontological bond with the national community, and thus a constitutive juridical link with the Italian State'.[61] Further, 'whilst the citizen has with the State an originary and permanent bond, the foreigner only has an acquired and temporary one'.[62] The narrative of 'us' and 'them' that comes from immigration law helps unravel the links to which the Constitutional Court refers. This narrative, which describes the emigrants and the Italians outside the borders as part of the self, clarifies that the ontological link between the citizen and the State is one of ancestry. As to the foreigner, the narrative of otherness from immigration law turns the temporariness of the link with the State into a presumption that is hard to surmount. Only compliance with exacting integration requirements, and then a long and winding path to citizenship under *ius soli* criteria can rebut the relevant presumption. The otherness of the migrants is thus reflected from collective identity onto the constitutional subject.

II. The Case of Canada

Canada is a settler society, which means that immigration is a crucial part of its national mythology.[63] Settler societies "understand themselves as being nations built through migration" and give immigration regulation a central place in their legal frameworks.[64] In these societies, there are still identifiable contours of 'us' and 'them' but a continuous stream of immigrants renders them dynamic.

The Canadian settler state was always constructed against indigenous populations; aboriginals were the first iteration of 'them' in Canada's national narrative. However, it was not until the late 1800s that Canada began to use immigration laws to articulate a vision of 'self' and 'other'. A mere two years after Confederation, Canada passed the Immigration Act. Over the next decades, immigration regulation assumed its full significance for the constitutional state, representing the clearest, harshest articulation of 'us' and 'them' in Canadian history along racial and ethnic lines. From the Chinese head tax to South Asian continuous journey requirements to Japan's voluntary emigration restrictions, immigration rules articulated the 'self' by negating these 'others'. The mostly Chinese workers who built the transcontinental railroad only to have their immigration restricted upon its completion in 1885 dramatically illustrate this discriminatory turn. The *Chinese Immigration Act* of the same year, widely known as the Chinese head tax legislation, marked the deployment of the Canadian white, European 'us' to negate the non-white, non-European immigrant 'them'.

Yet it is important to place this racist history in the context of the settler state: the country's economic and demographic growth imperative, together with the post-war shift toward non-discrimination and human rights, turned immigration regulation toward culling the masses.[65] In the late 1960s and early 1970s, Canada pioneered

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[59] Cost. (It.), art. 10. For an overview of the status of foreigners under Italian law, *see* BRUNO NASCIMBENE, LA CONDIZIONE GIURIDICA DELLO STRANIERO (2004); FRANCESCA BIONDI DAL MONTE, DAI DIRITTI SOCIALI ALLA CITTADINANZA: LA CONDIZIONE GIURIDICA DELLO STRANIERO TRA ORDINAMENTO ITALIANO E PROSPETTIVE SOVRANAZIONALI (2013); CECILIA CORSI, LO STATO E LO STRANIERO (2001).

[60] It remains 'eclectic' in this respect. *See* Mathias Koenig-Archibugi, *National and European Citizenship: The Italian Case in Historical Perspective,* 7 (1) CIT. STUD. 85, 98 (2003).

[61] Corte Costituzionale, 10 Febbraio 1994, n. 62, Racc. uff. corte. cost. 1994 (It.).

[62] Corte Costituzionale, 19 Giugno 1969, n. 104, Racc. uff. corte. cost. 1969 (It.).

[63] CATHERINE DAUVERGNE, THE NEW POLITICS OF IMMIGRATION AND THE END OF SETTLER SOCIETIES (2016).

[64] *Id.* at 11.

[65] On the growth imperative, see NINETTE KELLEY & M.J. TREBILCOCK, THE MAKING OF THE MOSAIC: A HISTORY OF CANADIAN IMMIGRATION POLICY 12 (2nd ed. 2010); TRIADAFILOS TRIADAFILOPOULOS, BECOMING MULTICULTURAL: IMMIGRATION AND THE POLITICS OF MEMBERSHIP IN CANADA AND GERMANY 2-5 (2013).;

calibrated frameworks for attracting permanent immigrants who were not kin or co-ethnics.[66] The points system for economic immigrants is probably the best example of this kind of rationalized approach. To immigrate to Canada, individuals must fit into a category or stream of admission *and* must not be inadmissible for an enumerated reason.[67] Both parts of this inquiry articulate traits of 'us' and 'them'. The categories of admission are family, economic, and humanitarian and those categories articulate the positive criteria for admission: family ties, skills, and need. But the true articulation of 'them', the deep negation of the 'other', is located in the inadmissibility criteria.[68] The bluntest inadmissibility provisions establish that there is no room in the Canadian 'us' for individuals with serious criminal records, people with contagious health conditions or conditions that will burden national social systems, and individuals who cannot self-support. More recent amendments refuse admission for 'barbaric cultural practices'.[69]

Canadian citizenship law, by contrast, is a relatively recent innovation and has had a more contained role in shaping the narrative of 'us' and 'them'.[70] Citizenship by naturalization is the critical category for these purposes. The legal requirements for naturalization are straightforward: period of residence, language, and basic knowledge testing, followed by a citizenship ceremony.[71] At 86 per cent, Canada has the highest naturalization rate among the major immigrant-receiving countries.[72] This suggests, on the one hand, that Canadian immigration law is the primary site for carving out the 'us' and 'them' since the vast majority of those admitted go on to become citizens. However, citizenship law corroborates immigration law's selection work on the terrain of principles and values. The Conservative government led by Stephen Harper drew sharp lines between 'us' and 'them', making naturalization requirements stricter and leaning into the rhetoric of values and responsibility in the citizenship study guide.[73] It also refused to allow a niqab-wearing woman to swear the citizenship oath while her face was covered,[74] and introduced the *Strengthening Canadian Citizenship Act* ("*SCCA*"), which inaugurated the ability to strip citizenship from dual citizens who committed national security crimes.[75] These practices challenged the neutrality of citizenship law and the citizenship ceremony. Although ultimately overturned or repealed, they evidence the role of citizenship law as a site for articulating 'them': those individuals who may be interrogated and tested about their values and beliefs.

The dominant metaphor that these fields suggest for Canadian collective identity is, on its face, not a metaphor at all: Canada is a nation of immigrants. This characterization is so widely accepted as a literal statement that it is easy

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DAUVERGNE, *supra* note 64. *But see* DAVID FITZGERALD & DAVID COOK-MARTIN, CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS (2014).

[66] DAUVERGNE, *supra* note 64, at 19.

[67] Immigration and Refugee Protection Act, S.C. 2001, c. 27.

[68] Last government ramped up these criteria.

[69] Note that these types of individual behaviours were already prohibited through other means – this was a rhetorical statement.

[70] *See* Eric M. Adams*, Canadian Constitutional Identities,* 38 (2) Dal. L. J. 311, 333 (2015). ("[I]n 1946, Canada enacted its first *Canadian Citizenship Act*, as an expression of its growing sense of national distinctiveness and identity").

[71] Citizenship Act*,* R.S.C 1985, c. C-29, s. 5.

[72] STATISTICS CANADA, OBTAINING CANADIAN CITIZENSHIP (2011), http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011003_1-eng.cfm.

[73] CITIZENSHIP & IMMIGRATION CANADA, DISCOVER CANADA: THE RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP (2012), http://www.cic.gc.ca/english/pdf/pub/discover.pdf. Note that the current government retained almost all of these changes.

[74] The former Minister of Citizenship & Immigration and the former Prime Minister both made public statements about upholding the Canadian values of openness and transparency. Former Minister Jason Kenney characterized citizenship as "a quintessentially public act" that must be taken openly: *see* Joanna Smith, *Muslim Women Must Show Face to Become Canadian Citizens,* (Dec. 12, 2012) TORONTO STAR, http://www.thestar.com/news/canada/2011/12/12/muslim_women_must_show_face_to_become_canadian_citizens ("[The ban was]…a matter of deep principle that goes to the heart of our identity and our values of openness and equality"); Morgan Lowrie, *Harper Says Ottawa Will Appeal Ruling Allowing Veil during Citizenship Oath*, (Feb. 12, 2015) GLOBE AND MAIL, https://beta.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/?ref=http://www.theglobeandmail.com& (Prime Minister Stephen Harper: "This is a society that is transparent, open and where people are equal").

[75] Strengthening Canadian Citizenship Act, S.C. 2014, c. 22, s. 10.

to forget that it is metaphorical. It is a conceptual metaphor, a way of thinking about the abstract concept of 'nationhood' through the more concrete concept of 'people'.[76] Here, the nation-state is understood in terms of its people even though a nation-state is not simply people; it is also territory, government, history, and sometimes culture, ethnicity, or religion. Yet the story that Canada tells itself is that it *is* a country of immigrants, that this is the central aspect of its statehood. Unlike Italy, there is no antediluvian moment or people for reference, no ancestry or ethnicity that underwrites the Canadian state. Instead, the dominant metaphor of Canada as a nation of immigrants evolved to justify a rationalized, self-interested immigrant selection process. Immigration was linked to citizenry, thereby legitimizing the emphasis on attracting productive, economic citizens and the exclusion of non-productive individuals. In short, the centrality of immigration as a nation-building project to Canada's origin story and its continual development mean that immigrants present as both the 'self' and the 'other', the 'us' *and* the 'them – and the task of immigration law is to sort them out. The vehicle for that sorting is the points system, itself a metonymy for the rationalization of immigration selection. The points system represents the primary goals and values of Canadian immigration law. It measures both economic contribution and social and political adaptability, giving Canadian economic priorities both a human and a 'rationalist-scientific' form.[77] The economic immigrant is skilled, productive, self-sufficient, and adaptable and she stands in for the desirable citizen.

How do the 'us' and 'them' that are drawn out of this metaphor and metonymy reflect onto the 'us' and 'them' of constitutional subjectivity and identity then? Part of the answer lies in the fact that in Canada, immigration and citizenship have been constitutional matters ever since the settler colonies confederated into Canada, marking the first temporal articulation of constitutional identity. The 1867 BNA Act made immigration a shared responsibility of the federal government and the provincial governments, while granting jurisdiction over naturalization and aliens to the federal government.[78] The 1867 Act does not define the citizen or the alien, leaving this task to the courts, but it does assign them.

During these early days, federalism was the primary site for articulating what we understand in contemporary terms as constitutional subjectivity, drawing the boundaries of 'us' and 'them' through the jurisdictional allocations of the court. This was most pronounced in judicial reasoning about whether naturalization included its consequences, thus falling under federal jurisdiction – with repercussions for the inclusion and condition of Chinese labourers in Canada.[79] In these cases, immigration and citizenship matters were interpreted through the federal lens. Things shifted, however, when Canada patriated its constitution in 1982, marking its independence and updating its core constitutional document. The 1982 Constitution Act included a bill of rights called the *Charter*, which reconfigured immigration and citizenship cases as individual rights claims.

Immigration and citizenship cases force the Supreme Court of Canada to reckon with the circle of membership for the apportioning of rights provided for in the *Charter*. The language of the Charter is mixed, referring to "everyone", "every citizen", "a permanent resident", "any person", "every individual", "any member of the public in Canada", and "anyone".[80] The Court has had to work out the differences between citizens, on the one hand, and prospective immigrants outside of Canadian borders and permanent residents inside of Canadian borders, on the other hand,

[76] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (2003).

[77] DAUVERGNE, *supra* note 64, at 20.

[78] Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.) *reprinted in* R.S.C. 1985, app II, no 5 (Can.), § 91 (25) and 95.

[79] *Union Colliery Company of British Columbia, Limited and others v John Bryden* [1899] UKPC 58, [1899] AC 580 (PC) (appeal taken from B.C.). *See also* Bruce Ryder, *Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909,* 29 (3) OSGOODE HALL L. J. 621 (1991). Because provincial legislation was discriminatory against Chinese labourers and thus placing them under federal jurisdiction improved their condition and this was specifically accomplished by understanding them to have the full rights of citizenship.

[80] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), §§ 2-24. In section 6(1), the Charter explicitly articulates the distinction between citizens and others, stating: "Every *citizen* of Canada has the right to enter, remain in, and leave Canada" (emphasis added).

sharpening the lines between 'us' and 'them'.[81] In these cases, the Court is working out the degrees of Canadian membership and the limits of constitutional subjectivity relying in good part on the narrative of 'us' and 'them' elaborated in immigration, and partly in citizenship law. It is reinforcing broad sovereign discretion to decide who enters and who remains, and putting those who enter on notice that their stay is conditional and governed by a different legal framework. In this, it both reinforces and broadens immigration law's take on 'us' and 'them' by linking it to constitutional subjectivity.

III. Immigration as a Mirror of Collective Identity

This comparison of Italy and Canada fills out the relationship between immigration and constitutional identity. To the notion that immigration is a mirror, these country studies add the particularities of historical experience, the animating metaphors and metonymies, and the jurisprudence on constitutional subjectivity. Despite their profound differences, the cases of Italy and Canada both illustrate how immigration law, through metaphors and metonymies that narrate the self and the other, mirrors elements of collective identity onto constitutional subjectivity.

In Italy, citizenship law reflects from collective identity a narrative according to which emigrants and Italians outside the borders have remained part of the 'us' throughout the decades, whilst immigrants that have come to alter the country's demography in the last 40 years are relegated to an entrenched status of otherness. This narrative, according to which the emigrants are a metaphor of the 'us' and ancestry is a metonymy of the self, is silently endorsed by immigration law, and ultimately thickens the flat notions of citizen and foreigner that are the subjects of the Constitution. In Canada, immigration law literally reflects collective identity by listing the 'others' who may not join 'us', while citizenship law articulates collective identity on the symbolic plane by reflecting the values and beliefs of the 'self'. Both legal frames operate based on the foundational metaphor that Canada is a country of immigrants. This self includes immigrants, but only those immigrants that the metonymy of skill cleaves from 'them' to be part of the 'us'. These reflections are woven into a judicial narrative about constitutional subjectivity that loosely tracks degrees of membership.

There is one field however that deserves closer attention as it alters the reflective work between collective and constitutional identity that immigration law performs in both Italy and Canada. This is the field of business immigration. Here, the mirror image that has been traced above appears partly distorted, as if someone had thrown a stone into the water. The next section charts this distortion in both the Italian and Canadian cases.

C. Looking Through the Mirror: The Perspective of Business Immigration

Recent decades have seen a number of countries around the world join a "race for talent" to attract certain classes of business migrants.[82] These countries adopt favorable immigration and citizenship policies, typically visas and sometimes nationality, to attract innovative entrepreneurs and wealthy investors through a fast track, simplified procedure.[83] Beneficiaries of entrepreneur policies are typically required to submit a viable plan for the establishment or takeover of an innovative business in the host country, together with evidence of having secured qualifying funding to pursue the plan. Beneficiaries of investor policies have to demonstrate availability of a threshold amount of resources to commit to a qualifying investment in the host country. Qualifying applicants may

[81] *Hilewitz v Canada (Minister of Citizenship and Immigration),* 2005 SCC 57, [2005] 2 S.C.R 706 (Can.); *Canada (Minister of Employment and Immigration) v Chiarelli,* [1992] 1 S.C.R 711, [1992] S.C.J No. 27 (Can.); *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R 350 (Can.).

[82] The United States has had for a longer time an immigrant (EB5) and non-immigrant (E) investor scheme. The US policy in this sense predates the wave of programs adopted as part of the 'race for talent'. *See e.g.* Francesca Strumia, *New Generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State,* (Investment Migration Council, Working Paper 2016/4, 2016); Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent,* 120 YALE L. J. 2088 (2011).

[83] *See e.g.* MALTA INDIVIDUAL INVESTOR PROGRAMME, LEGAL NOTICE 47/2014 (2014), http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf. *See also* Jelena Dzankic, *The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective* (EUDO Citizenship Observatory, EUI Working Paper No. 2012/14, 2012).

receive a residence permit or nationality, depending on the applicant class and country, bypassing the normal requirements of residence, language knowledge, integration, and minimum income. Countries that have joined this race include, for instance, Chile, Australia, South Korea, Spain, Ireland, the United Kingdom, and interestingly for our case, Italy and Canada.

In the context of these policies, the traditional narratives of 'us' and 'them' that immigration law reflects from collective identity are partly altered. Novel potential metaphors and metonymies of the 'self' and the 'other' surface. Italy and Canada again offer a telling example. Whilst the narratives that traditional immigration law mirrors in each country diverge, their offerings of an entrepreneur-based startup visa program show elements of remarkable convergence. The convergence is located in the specificity and sophistication of the programs. The startup visa model is designed to attract a particular kind of economic activity: innovation. Both countries employ similar methods of assessment based on a mix of industry and government representatives applying detailed criteria. Most importantly for our argument, there is convergence in the shift away from past immigration policies with different but overlapping repercussions for the relationship to constitutional subjectivity. The lens offered by the startup visa reveals a constitutional exception: the mirror image is distorted when it comes to business immigration as here sometimes the 'them' can be 'us' regardless of the narratives weaved out of history and collective identity.

In the analysis that follows, we explore in further detail how the Italian and Canadian startup visa programs challenge the narratives of us and them weaved by traditional immigration policy, as well as the metaphors and metonymies that animate those narratives. In particular, through looking at the method and criteria of selection for the startup visas, we evidence how a certain constitutional 'other' may be welcomed into the constitutional 'self' on the basis of being an innovator. As a result, a new metonymy based on innovation makes its appearance.

I. Business Immigration in Italy[84]

Italy joined the race for talent in 2014, when it introduced the 'Italia Start-up Visa'. The start-up visa scheme built on and complemented legislation introduced in 2012 to facilitate and support the incorporation of innovative start-ups.[85] The scheme provides a distinctive entry route to qualifying applicants in comparison to the standard Italian self-employment visa provided for in the Italian Immigration Act.[86] Both the criteria for selection of the applicants, and the method of selection are distinct from traditional self-employment policies. Selection criteria focus on the output that the applicant promises, rather than on his or her input.[87] That is, rather than proving professional experience or qualifications, the applicant needs to evidence a viable idea for the establishment in Italy of an innovative business, as well as the means to realize such idea. To this end, applicants must present a business plan, and certify the availability of qualifying funds to contribute to, or set up an innovative start-up.[88] As to the method of selection, this promises a stream-lined process in comparison to the regular channel and involves a branch of government, the Ministry of Economic Development,that is traditionally extraneous to the handling of immigration policy.[89] An Italia Start-Up Visa committee (ISV), convened by the Ministry of Economic Development in conjunction with the Ministry of Foreign Affairs, and composed of representatives of recognized national associations active in

[84] Francesca Strumia has been involved in advising the Italian Ministry of Economic Development on a pro bono basis on the start-up visa policy.

[85] L. n. 221/2012 (It.).

[86] *See* Immigration Act *supra* note 48, art. 26; For further implementation measures in respect of Italian self-employment visas, *see* D.P.R. n. 394/1999 (It.), art. 39.

[87] Strumia, *supra* note 83 at16.

[88] *See* Italian Ministry of Economic Development, *Italia Startup Visa Guidelines*, MISE, 13 (May 19, 2017), http://italiastartupvisa.mise.gov.it/media/documents/Guidelines%20ISV%20ENG%2019_05_2017%20fin.pdf [hereinafter *Italia Startup Visa Guidelines*].

[89] Decisions are made within 30 days of submission, compared with the self-employment visa decisions which are made within 120 days. *See* Immigration Act, *supra* note 48, art. 26.

the start-up eco-system, is in charge of screening the applications.[90] The ISV acts as a filter in comparison to the standard procedure for a self-employment visa, replacing, and fast-tracking, the assessments that are typically carried out by competent Chambers of Commerce and police offices.[91] Novel criteria, externalization of screening responsibilities, and fast-tracking of the admission process thus characterize the startup visa scheme.

Fast and preferential tracks for desirable migrants are not, per se, a novelty in Italy. The 1998 Immigration Act already codified the possibility of preferential admission for various classes of highly skilled workers.[92] However, with the startup visa scheme what changes is the reason to favor certain migrants. Reward for economic contribution is not just the generic expression of national interest. Rather, the new schemes fit into a broader agenda aimed at the 'development of a new entrepreneurial mindset, and the creation of an ecosystem more conducive to innovation'.[93]

Such an agenda requires, in the case of the start-up visa, a policy to 'attract innovative entrepreneurs from all over the world'.[94] A similarly oriented policy adds a new thread to the traditional narrative of us and them. This thread is at an embryonic stage. The 'others' that are favored in some respects under the startup visa policy remain subject to the long waiting periods for citizenship prescribed under Italian nationality law. They are also still subject to the requirement to sign an integration agreement.[95] Hence, in many respects, they remain part of the mainstream narrative of migrants' otherness. Yet they are the object of a dedicated effort at recruitment and attraction. The start-up visa policy is based indeed on the consideration that visas are 'a strategic lever to attract and retain talent and innovation'.[96] These talented and innovative 'them' potentially can be 'us' regardless of ancestry and identity.

II. Business Immigration in Canada

Canada launched the Startup Visa Program in April 2013. It marked the culmination of lobbying efforts by influential Canadian entrepreneurs who had witnessed the immigration struggles of foreign entrepreneurs trying to launch start-ups in the technology sector.[97] The crux of the startup visa is that foreign entrepreneurs may partner with Canadian investors and/or business incubators in order to immigrate to the country. They benefit from a fast track 6-month pathway to permanent residency.[98] The startup visa program marks a turn toward fostering innovation and competitive entrepreneurship through immigration law.

There are two novel aspects of the program tied to the nature of the innovation imperative and the startup form. The first of these lies in the selection criteria which require a partnership with a Canadian business or organization. Applicants must demonstrate that their business is supported and funded by a designated organization or accepted into an incubation program. Immigration, Refugees and Citizenship Canada approves these businesses as venture

[90] *Italia Startup Visa Guidelines*, *supra* note 89.

[91] *See* Immigration Act *supra* note 48, art. 26; D.P.R. n. 394/1999, art. 39.

[92] *See* Immigration Act *supra* note 48, art. 27.

[93] *Italia Startup Visa Guidelines*, *supra* note 89, at 22.

[94] *Id.* at 3.

[95] There is no exception for start-up visa holders to the requirement of art. 4bis of the Immigration Act.

[96] *Italia Startup Visa Guidelines*, *supra* note 89, at 4.

[97] Maura Rodgers, *Drawing Entrepreneurs to Canada* , BCBUSINESS, (Apr. 4, 2011) https://www.bcbusiness.ca/drawing-entrepreneurs-to-canada; Boris Wertz, *Mission Accomplished: Startup Visa Canada is Here* (Jan. 24, 2013) VERSIONONE BLOG, http://versionone.vc/startup-visa-canada-is-here/.

[98] Andre Garber & Kailin Che, *Canada's Start-Up Visa Program for Entrepreneurs,* CABI (Oct. 28, 2016) http://www.cabi.ca/articles/canadas-start-up-visa-program-for-entrepreneurs; Harjit Grewal, *Canada Start Up Visa: Get Accepted into a Canadian Business Incubator and Secure a Work Permit in 7 Days*, STERLING IMMIGRATION BLOG, http://www.sterlingimmigrationltd.com/startup-visa/canada-start-up-visa-get-accepted.

capital funds, angel investor groups, or business incubators.[99] The process of securing these partnerships marks the second novel element of the startup visa program. This is the shift in the method of selection from state-centered programs, even those closely tied to the labor market, to outsourcing. With the startup visa, the Canadian government tasks private third party companies with reviewing and vetting entrepreneurs. The prospective immigrant must contact a private sector company first, and it is that company that conducts due diligence and ultimately commits its own capital to the project. Only after their review is complete and an investment agreement is reached may the foreign entrepreneurs apply for permanent residence. Immigration, Refugees and Citizenship Canada largely functions as a supervisory arm in the process except for the grant of permanent residence.

In addition to the above, startup entrepreneurs still have to meet some points system requirements such as language proficiency and adequate settlement funds – but their metrics are different. The argument for the relaxed requirements is that business immigrants are unlikely to become a burden on the state. The program focuses instead on ensuring that they will meet the investment or management criteria over time. The startup visa program riffs on that objective by giving the Canadian partners a stake in the success of the startup venture (through their commitment of funds or other resources), while trying to maintain the spirit of entrepreneurial risk. Whereas its predecessor, the former entrepreneur stream, required immigrants to meet conditions at the time of entry and again three years later, the start-up visa program tries to create space for revision and failure. As the Department of Immigration, Refugees and Citizenship Canada stated:

> "the [Entrepreneur] Program did not require the investors to invest in innovative enterprises but enabled them to limit investment to smaller, safer ones—the antithesis of entrepreneurship."[100]

Thus, although the startup visa immigrants are tied to Canadian partner businesses, their immigration status is not conditional. The state is relying on private sector review procedures to select successful innovators and then extending unconditional permanent residence to them. This raises all kinds of questions, including whether the requirement to secure the support of private companies in order to obtain permanent residence changes the character of immigration and citizenship.[101] The grant of unconditional, fast-track permanent residence certainly confirms innovation as basis for preferred immigration status in the Canadian state. From the perspective of constitutional significance, it brings a measure of exceptionalism to the negotiation of the boundary between several classes of others and the settled constitutional 'us'. Under the imperative of innovation, the ongoing mediation of difference that marks Canadian immigration policy is silenced. The innovative 'them' can become a permanent part of the settled 'us' without being audited for adaptability by the points system or demonstrating kinship relationships.

III. The Rise of a Novel Metonymy

There are several similarities between the Italian and Canadian start-up visa programs. Introduced a year apart, they both seek innovative business ideas which are vetted in whole or in part by industry or funders and incubators. Both the criterion of innovation and the method of selection mark a break from traditional immigration policies.

This alters the narratives of 'us' and 'them' described in the previous section. Where traditional immigration policies mirrored elements of collective identity, narrating the content of 'us' and 'them', start-up policies leapfrog over those reflections. Innovation is externalized: the constitutional other may be the innovator and, on that basis, welcomed into the constitutional self. In Italy, the start-up visa program opens up a route alternative to "Italianity' and ancestry to gradually earn membership in the 'us'. In Canada, the start-up program marks a break with the government's calibrated admission controls by outsourcing the assessment of innovation and then rewarding it with

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[99] Ministerial Instructions Respecting the Start-up Business Class (May 23, 2015) C. Gaz, Part I, 149/21, http://gazette.gc.ca/rp-pr/p1/2015/2015-05-23/pdf/g1-14921.pdf, at sch. 1-3.

[100] *Id.*

[101] Renee Robinson, *The Start-up Visa Program: Wooing International Technology Entrepreneurs* (Jul. 18, 2013) CANADIAN MEDIA FUND BLOG, http://trends.cmf-fmc.ca/blog/the-start-up-visa-program-wooing-international-technology-entrepreneurs.

fast-track permanent residence. In both cases, innovators may immigrate without traditional regard for their fit or adaptability into the collective self.

Ultimately, a new metonymy emerges in both countries, one where innovation stands in for the desirable immigrant and innovators are welcomed into the constitutional 'us' regardless of their interface with collective identity.

D. From Immigration as Mirror to Immigration as Display

At the service of this new metonymy, the role of immigration law changes, and with it the relation between immigration law and constitutional identity. In its traditional form, immigration law works as a mirror, reflecting collective identity onto notions of constitutional subjectivity through metaphors and metonymies. Those metaphors and metonymies are applied to screen 'others', and to sort those who will be given a chance to become part of the 'self'. Here immigration law mediates between collective and constitutional identity through the lens of gatekeeping. In the novel business immigration policies examined in Italy and Canada, immigration law morphs from a tool of gatekeeping into a tool of positive attraction, and from a mirror of identity into a display of that identity.

As a display of identity, immigration law works both externally and internally. There is a necessary symmetry here, and displays of identity reach both external and internal audiences. In the external direction, immigration law becomes a display of selected elements of collective identity. These elements are woven together to form a national image that is advertised within the framework of the novel business immigration policies to attract innovative entrepreneurs. This is a display of collective identity as a tool of attraction. The Italia Start-Up Visa website, for instance, markets the visa to potential applicants by stating that 'Italy is celebrated throughout the world for its art, culture, creativity and manufacturing quality.' 'These are the foundations' – the relevant slide reminds - 'on which the unique supply chain for "Made in Italy" products is built.'[102] Elements that speak to the notion of Italianity relied upon by nationality law to screen citizens now become an instrument to market Italy to innovative entrepreneurs as the ideal host country. The Canadian start-up visa website strikes a similar note, albeit focusing on the economic viability of the Canadian business environment rather than on the pleasantness of its culture. Stating that 'Canada is open for business to the world's start-up entrepreneurs', the website goes on to list the ways in which it is top-ranked by Forbes (best country to do business), KPMG (most tax competitive), and the World Bank (top quality of life).[103] Canada, the website touts, "is home to a highly educated, flexible, and multicultural work force".[104] The old economic and demographic imperatives that turned Canada into 'a country of immigrants' now ground a distinctive identity trait displayed to entice the innovators. In the start-up schemes, immigration law and policy thus become a device for broadcasting collective identity. They take elements of collective identity and project them.

In the internal direction, immigration law simultaneously becomes a display of constitutional, rather than collective, identity. Immigration law reaches the internal audience of citizens as a series of prescriptions about the role of the good citizen in an innovation-focused economy. The class of start-up immigrants is displayed to citizens as a metonymy of the identity of the country as a burgeoning innovation hub. Their privileged pathway into the penumbra of the collective self signals to the collective 'us' a commitment of the polity to innovation that becomes a new shared value. That shared value of innovation informs constitutional identity as it turns into a virtue of the model constitutional subject *cum* citizen. This is the second way that the shift from mirror to display changes the relationship between immigration and constitutional identity: it extends the metonymy of innovation from desirable immigrant to desirable citizen.

The implications of this shift in the role of immigration law from a mirror to a display of identity may seem of little relevance. The figures of the start-up policies are small. As at 31 December 2016, 222 applications for an Italia Start-

[102] *See* e.g. Italian Ministry of Economic Development and Italian Ministry of Foreign Affairs, *Why Italy?* (last visited Jun. 8 2017) http://italiastartupvisa.mise.gov.it/#Why_Italy.

[103] CITIZENSHIP & IMMIGRATION CANADA, THE CANADIAN ADVANTAGE (2015), http://www.cic.gc.ca/english/pdf/pub/startup-entrepreneurs-eng.pdf; CITIZENSHIP & IMMIGRATION CANADA, CANADA WANTS ENTREPRENEURS! (2015), http://www.cic.gc.ca/english/resources/publications/entrepreneurs.asp.

[104] CITIZENSHIP & IMMIGRATION CANADA, THE CANADIAN ADVANTAGE (2015), http://www.cic.gc.ca/english/pdf/pub/startup-entrepreneurs-eng.pdf;

up visa had been submitted, of which 134 have been approved.[105] In Canada, the pilot program was designed to process up to 2,750 applications per year.[106] By May 2016, fifty-one entrepreneurs representing twenty-six businesses had gained permanent resident status through the startup visa program and fifty more applications were in the queue.[107] Yet, although their reach is limited, the shifting role of immigration law indicated by the policies is conceptually significant.

The display function of immigration law makes the constitutional subject somewhat fluid. As a mirror, immigration law fixed transient elements of collective identity onto constitutional subjectivity. As a display, it destabilizes those same elements, broadcasting the image of a class of highly regarded immigrants who inhabit a grey zone between the constitutional 'us' and 'them' regardless of the exigencies of collective identity.[108] With this blurring of the boundary between 'us' and 'them', the narrative of the 'us' that was based on the firm negation of an 'other', and on the metaphors and metonymies of that distinction, is inevitably diluted. It leaves space for developing alternative narratives of 'us' and pries open constitutional subjectivity, wresting it away from judicial interpretations and placing it on the terrain of policy and metaphor.

Ultimately immigration law's display function balances some of the effects of its mirror function. As a mirror, immigration law crystallizes collective identity and its boundary-drawing role, by reflecting it onto constitutional subjectivity. By contrast, as a display, immigration law flips collective identity's role, projecting it as a means of attraction rather than of exclusion. And, concomitantly, it bypasses collective identity altogether, broadcasting the figure of the identity-neutral migrant innovator, who deserves access to constitutional subjectivity regardless of his identity traits.

Conclusion

The journey through Italy and Canada's immigration and citizenship laws confirm the initial intuition: there is a relation between immigration law and constitutional identity. At the end of the journey, that relation appears perhaps somewhat less evasive, but also more complex and less straightforward than intuition suggested. A certain dualism characterizes it. The relation unravels, on the one hand, through the mirror metaphor, whereby immigration law reflects elements of collective identity onto the constitutional subject. On the other hand, it unravels through the display metaphor, whereby immigration law projects novel angles of constitutional subjectivity that problematize both the meaning of membership and the reach of constitutional identity.

In other words, immigration law opens the ranks of the constitutional subject. It places the 'us' and 'them' of the constitution in context, narrating their underlying distinctions. In its most recent iterations, it also challenges those same 'us' and 'them' and their boundaries, through embracing the innovation imperative.

The cases of Italy and Canada, with their traditional narratives drawing diverging boundaries between selves and others, while more recent ones embrace the innovation objective in similar terms, directly evidence these dynamics. However, the findings from the comparison of their experiences have implications beyond the contingencies of the Italian and Canadian cases. They offer hints to the several states around the world whose attitude to immigration and its regulation remains mired in ambiguity. One such hint is that immigration regulation is a double edged sword. On the one hand, it lends itself to the whims of sovereignty, accommodating exclusionary temptations as well as ambitions of renewal and innovation. On the other hand, however, this service to sovereignty comes at a cost. Immigration law continuously plays, undetected, with notions of identity, community, citizenship, molding them in

[105] 123 visas have actually been issued, as some beneficiaries have changed their plans – but the numbers have been increasing constantly in any case. *See* Italian Ministry of Economic Development, *Italia Startup Visa & Hub - 1st Quarterly Report 2017,* 4 (2017).

[106] The startup visa pilot is in its fourth year and it remains to be seen whether the government will renew it.

[107] GOVERNMENT OF CANADA, START-UP VISA CONTINUES TO GROW (May 5, 2016), https://www.canada.ca/en/immigration-refugees-citizenship/news/2016/05/start-up-visa-continues-to-grow.html.

[108] *See* Strumia, *supra* note 83, at 28.

novel shapes and ultimately bringing concrete, albeit at times imperceptible, alterations to the texture of constitutional identity.