

Morphing the Demos into the Right Shape. Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens¹

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1. Introduction

Two phenomena have recently caught the attention of political scientists and political geographers, on the one hand, and normative political theorists, on the other hand: a strong global trend among democratic states to introduce external voting rights for citizens residing abroad and a weaker, mostly European,² trend to extend the franchise in local elections to noncitizen residents. Depending on how they define the categories of non-resident and non-citizen voter, estimates for the former phenomenon count slightly more than 100 states (Collyer 2013, IDEA 2007) while those for the latter remain below 50 (Waldrauch 2005, Bauböck 2005, Song 2009: 608). A recent report for the European Parliament has documented that all EU member states have provisions for an external franchise, although with great variations of inclusiveness. It finds Cyprus, Denmark, Ireland and Malta at the most restrictive end and Estonia, Latvia, Lithuania, Slovenia and Spain at the most inclusive end of the spectrum. In addition to the EU-wide local franchise for EU citizens, 12 member states grant local voting rights to third country national residents generally, while three more (Spain, Portugal and UK) extend the franchise to special groups of noncitizens based on reciprocity or Commonwealth membership (Arrighi et al 2013). There are also European states outside the EU that have introduced a residence-based local franchise (Iceland, Norway and several Swiss cantons).

So far, the two phenomena have been considered separately in most of the empirical and normative literature. With few exceptions,³ scholars focus on either one or the other type of

expansion of the demos.⁴ Yet that there is something to be learned from analysing both phenomena within a common theoretical framework, especially for normative analysis. Principles for the composition of the demos that apply to one mode of expansion of the demos should also hold water when applied to the other one.

This paper engages critically with the normative literature and defends an alternative account that considers both phenomena as a legitimate expansion of the demos which remains, however, constrained by imperatives of boundary stability. I will argue that most normative theorists have embraced the wrong principles when answering the question of who should be included in the demos. The “all affected interests” and “all subjected to political coercion” principles are *indeterminate* with regard to boundaries and *indifferent* with regard to the nature of the polity. They focus on illegitimate exclusion without addressing problems of over-inclusion. Normative principles for membership must instead lead to boundaries that avoid both under- and over-inclusiveness, must be compatible with long-term stability of the demos and must vary with the type of polity to which they apply. I show why the franchise should be determined differently at state and local levels. My approach may seem conservative since it matches to a certain extent the empirical trends described above. However, a normative theory that supports a progressive and far from universal trend and provides a general critique of current state practices in determining citizenship and the franchise can hardly be called conservative.

In the next section I define a few basic concepts and discuss two types of democratic inclusion principles linked to requirements of output or input legitimacy. I defend stakeholderhood as an input principle that can avoid the indeterminacy and indifference problems that beset all output-derived principles. I shift subsequently from a justice-based emphasis on individual inclusion to a democracy-based emphasis on the boundaries of the demos by arguing that normative membership principles must satisfy not only individual claims but also stability requirements of

democratic polities. Section 3 argues that there is a normative fit between polity types and membership mechanisms and explores the contrast between regimes based on residence or birthright. Section 4 shows how both regimes serve to demarcate and maintain membership boundaries over time, how they mutually constrain each other and how they are connected with each other. The conclusions argue that the proposed multilevel architecture of citizenship accommodates international migration without undermining democratic self-government.

2. Output and Input Principles of Democratic Inclusion

All normative principles of inclusion need a reference unit into which individuals ought to be included. For our present concerns, this reference unit may be either the citizenry or the demos. By citizenry I mean the set of all those individuals who are recognized as members by the governing institutions of a democratic polity or who mutually recognize each other as belonging to such a polity.⁵ The citizenry can alternatively also be called the “democratic people”, as long as we do not conflate this term with the thicker concept of “nation”. The demos is defined more narrowly as those citizens who enjoy full political rights. In practical terms, it is the franchise that demarcates the boundary between the demos and the citizenry. Children under voting age can be citizens without belonging to the demos. Adult citizens are often excluded from the demos on grounds of criminal conviction, mental incapacity or residence outside the territory. Normative reasons for inclusion in the citizenry differ somewhat from those for inclusion in the demos. The former refer generally to individual identities and interests that are seen to support claims for protection of these individuals’ rights by a particular polity, whereas the latter start from the democratic process of collective decision making and ask what qualifies a person for participating in this process. Nonetheless, it is a mistake to fully separate these two questions. Every liberal democratic polity must establish universal suffrage for its citizens and exceptions need to be justified (Dahl 1989, chap.9).

I use the term 'polity' for referring to the ensemble of a territory, a citizenry and government institutions. This trinity provides a common definition of the state in constitutional legal theory (e.g. Jellinek 1929). In my interpretation, polity is the genus of which states are merely one species. The point is to include in our discussion also other types of polities, such as autonomous regions and municipalities within states or the supranational European Union. Each of these can be described as ensembles of a territorial jurisdiction, a set of individuals recognized as members, and of government institutions that exercise political powers within the territory and are, in democratic polities, accountable to their demos.

In recent decades, a whole literature on the "democratic boundary problem" has emerged that I will not attempt to summarize here.⁶ The question raised there is whether it is possible for a demos to determine its own boundaries through democratic procedures or application of democratic principles. Most authors defend either a principle of including all those whose interests are affected by political decisions or of all those who are subject to political coercion. These principles rely on different theories of democratic legitimacy (representation of interests or protection of individual autonomy) and are defended in different versions (e.g. hypothetically vs. actually affected interests; subjection to particular decisions or to political authorities with general legislative powers) but they share a common feature: in order to answer the question of who has a claim to provide an input into the democratic decision-making process they consider how the output of this process impacts on individuals. This creates a circular reasoning that makes it impossible to resolve the democratic boundary problem (Bauböck 2009). Those who defend the all-affected interests or all-subject to coercion principles do so mostly because they consider such circularity virtuous. It undermines essentialist conceptions of the demos by destabilizing its boundaries that ought to "be settled decision by decision, not people by people" (Shapiro 2002: 244) and it "make[s] the people into a site of perpetual contestation" (Näsström 2007: 664). Others

go further and argue that under either principle a legitimate demos is global in scope (Goodin 2007) or in principle unbounded (Abizadeh 2008).

However, if both currently dominant principles fail to provide legitimacy to particular boundaries, then they might simply be the wrong principles for addressing the question at hand. Instead of searching for democratic legitimacy of boundaries per se, we should start from the fact that all polities have boundaries and co-exist with each other in a world that contains a large plurality. We should regard this fact as the 'circumstances of democracy and citizenship' in a similar way as John Rawls regarded a condition of modest scarcity as part of the 'circumstances of [distributive] justice' (Rawls 1999: 126-128). It makes no sense to ask what distributive justice requires in circumstances of abundance or absolute scarcity. Similarly, it makes no sense to ask who has a right to be included in a particular polity or citizenry if we do not presuppose a world of bounded polities. Of course, the international state system is such a world and it is very much in the mind of political theorists who defend the two principles for inclusion in the demos. Yet their goal is primarily to question the legitimacy of the boundaries drawn by the state system by proposing principles that necessarily yield this conclusion. This may be a praiseworthy agenda, but it does not resolve the question.

This critique is not meant to discard the two principles altogether. It only rejects them as sufficient for determining the boundaries of the citizenry and the demos. While the autonomy of individuals subjected to coercion as well as other interests affected by political decisions must be taken into account in political decisions in order to provide these with *moral* legitimacy, these effects cannot determine who should be *politically* included by being granted the status of membership in a self-governing polity.⁷

The political science distinction between input and output legitimacy (Easton 1965, Scharpf 1999) is useful here. While the latter type of legitimacy of decisions derives from how they take interests into account, the former results from the authorization of those who take decisions. The question about legitimate boundaries of the demos is one about input legitimacy: who has the right to authorize a government and its decision-making powers? This question is logically prior to the question about the impact of government decisions.

Of course, in democracy the two types of legitimacy cannot be as neatly separated as they can be in non-democratic polities where the authorization of political power might rely on dynastic privilege or a political party monopoly. In a self-governing polity, the citizens themselves must authorize the political institutions that rule them. 'Legitimate coercion' plays therefore a role in determining membership in the demos in a way that 'affected interests' do not. A systematic discrepancy between voters and those subject to the law does create a legitimation deficit between the input and the output side of the political process. Since we cannot determine a right to citizenship by asking who is legitimately governed without becoming entrapped in circular reasoning, we need to establish first an input criterion for membership in the citizenry before invoking the 'legitimate coercion' principle in order to demand that the demos must be as inclusive of the citizenry as possible. Inclusion cannot mean, however, that there must be perfect congruence (in which case the criterion for membership in the citizenry and the demos would be identical rather than distinct). It means that there must be a rough match between the citizenry and the demos so that, on the one hand, the members of the demos, i.e. the citizens authorizing the law expect to be subject to it and, on the other hand, those who are ruled by the law of a polity have at least an option of becoming fully enfranchised citizens. The match can only be rough because membership in the demos presupposes certain capacities that are not a condition for citizenship status. Members of the demos must be able to consent to being governed by the laws

that they authorize before they can actually authorize them through their vote and other forms of political participation. In contrast with citizenship status, membership in the demos is therefore acquired only at a certain age.

If ask what the conditions are for sustainable self-government of a particular polity, the answer lead to – and justify – a certain mismatch between three categories: all those who are subjected to the laws, the citizenry, and the demos. For example, we do not think that it is illegitimate to subject minor children or tourists to the laws of states in whose making they have not been represented, because including these groups in the demos would undermine the necessary condition that its members should be familiar with the political institutions of the polity and competent to exercise political judgement. The question is then which input-based principle satisfies best both the conditions of boundary stability and of rough matching between those authorizing the law and subjected to it.

Input principles can be subdivided into pre-political and political ones. Pre-political principles aim at matching the boundaries of the demos with those of a collective that can be defined prior to and independently of political institutions and processes. Nationalism has been the historically most potent pre-political input principle and has been defended by a number of contemporary liberal and democratic theorists (Tamir 1993, Miller 1995, Kymlicka 2001). Political input principles are those that derive a criterion for membership from the constitution or goals of a democratic polity itself. One such view is a conception of the demos as a voluntary association of citizens who enjoy a collective right of self-determination. A legitimate demos is then formed by individuals who mutually agree to associate and retain a right to dissociate through individual or collective exit.⁸ This is a political input principle that starts from a view of who is entitled to take decisions on boundaries. The answer is: A voluntary association composed of those and only those who have been admitted by previous members. Nationalist and voluntary association principles can

effectively avoid becoming entrapped in the boundary paradox, but they are rather difficult to reconcile with liberal imperatives of political inclusion.

The “stakeholder principle” that I have proposed (Bauböck 2005, 2007, 2009) is an alternative political input-based principle. It relies on two assumptions. The first one is that individuals have a basic interest in such membership both for instrumental reasons (in order to gain protection of their fundamental rights) and intrinsic reasons (because such membership contributes to their self-respect and equality of respect by others even if they are not interested in active participation in political life). The second assumption is that citizens of a self-governing polity share at least a presumptive collective interest in preserving its autonomy and contributing to its flourishing. The stakeholder principle links these two assumptions by proposing that those and only those individuals have a claim to membership whose individual autonomy and wellbeing is linked to the collective autonomy and flourishing of a particular polity.

This is an input principle because it answers the question of who should be a member in a first step independently of any decisions taken by a legislator or government. In this view, the people must not only be determined prior to any political decision made in its name but even independently of the democratic or non-democratic nature of the political regime. If all human beings have an interest in membership in a self-governing polity, then the fact that large numbers are subjected to regimes that deny them the right to collectively govern themselves, does not undermine the claims of these subjects to be recognized as a distinct people with a right to become citizens and govern themselves. The principle is also a political rather than a pre-political one since it derives a criterion for inclusion from the link between basic individual interests and collective ones of a political community rather than of a nation.

How is the principle different from that of inclusion of all subjected to coercion? Being ruled by a government on a long-term basis quite obviously creates such a link, yet this is only a sufficient and not a necessary condition. First generation emigrants who retain transnational ties and intentions to return to their countries of origin are the most obvious category of “external stakeholders”. A case for inclusion of first generation emigrants can be made on the basis of an extended version of the “legitimate coercion” principle that includes also past subjection over an extended period of one’s life or the likelihood of future subjection based on an expectation of return to a country of origin.⁹ However, it is still not clear why past or future subjection would provide a compelling reason for representation in current legislation. Past and future subjection are not justifying grounds for inclusion, but empirical indicators for a genuine link that is itself the justifying reason for inclusion from a stakeholder perspective.

Another important difference between the stakeholder principle and all output-based principles is that the former suggests that individual claims cannot be determined without considering the conditions for self-government of a particular polity. The stakeholder principle must thus be interpreted in a way that is sensitive to conditions for demos stability and variation between different types of polities. This is the idea I want to explore in the rest of this essay.

The stakeholder principle postulates a structural correspondence between individual inclusion claims or legitimate exclusion, on the one hand, and, structural conditions for self-government, on the other hand. The liberal mainstream of the literature has focused on justice-based individual claims to inclusion. I want to consider now the other side of the stakeholder principle: the conditions for sustainable democratic self-government in a context of transborder migration. This shifts the focus from theories of justice towards theories of democracy and citizenship. Instead of asking only whether individuals have a claim to inclusion, we ask also how democracies can cope

with boundary instability and mismatches between their territorial jurisdictions, citizenries and demoi.

We have started from the empirical trend towards a noncitizen resident and non-resident citizen franchise. These are puzzling phenomena because they indicate a morphing of the demos into new and unfamiliar shapes. Nevertheless, they represent what we could call a 'moderate morphing' that does not eliminate the boundary or change the identity of the demos beyond recognition. The two modes of expansive citizenship stretch the demos beyond a stable core of resident citizens, a core that emerges from a broad overlap between territorial borders and membership boundaries.¹⁰ By contrast, the all affected interests and all subjected to coercion principles as well as the associative self-determination principle envisage a 'radical morphing' of the demos in which stable boundaries or recognizable core identities are at best lucky results of ongoing processes of boundary redrawing instead of providing inbuilt constraints on such processes. I will show in the next three sections how moderate morphing through an expansive franchise can be reconciled with reasonable stability requirements.

3. Residential Citizenship at Local Level

So far, I have mainly criticized the indeterminacy of dominant normative responses to the democratic boundary problem. Now I want to focus on their indifference towards various types of polities. What I have in mind here is not the need for a fully contextual analysis before moving from normative theory to policy prescription. This is what most political theorists would readily admit. I claim instead that (1) there are different types of democratic polities which can be distinguished by their general properties and specifically their membership regimes, and that (2) general normative principles for inclusion in the citizenry and demos must be specified for each type of polity and regime.

Nearly all political theories of membership have so far focused on only one kind of polity: the sovereign state. There are, however, other types of polities at sub- or suprastate levels that have their territories, citizenries and demos just as much as states do. In the case of the EU, the 1992 Maastricht Treaty has established a formal citizenship of the Union that comes with voting rights for EU citizens in EP elections. The EU is thus a polity with a clearly defined territory and formal rules for determining its citizenry and demos. Citizenship status is derived from member state nationality. The demos is determined inside the EU territory by a combination of EU and national law (which enables most “second country nationals” to choose to vote either where they reside or where they come from) and outside the EU territory exclusively by the national electoral laws of the member states – some of which allow for voting in EP elections by citizens residing in third countries while others don’t (Shaw 2007, Arrighi et al 2013). The way the EU determines its citizenry and demos is remarkably different from how this is done in current democratic states, although not without historic precedent in 19th century confederations (Schönberger 2005).

I will set aside here the special case of EU citizenship and focus on the contrast between membership regimes at state and local levels. Some readers will find the idea of a local citizenry and demos odd. They may think of municipalities or townships as nothing but administrative layers of government and of the people inside their boundaries as residents rather than citizens. However, all sufficiently large democratic states do not only subdivide their territories into municipalities but also hold elections for local councils which enjoy autonomous decision-making powers in certain local matters. So, whatever we think about how important the powers of local self-government are, it seems to be a fairly universal democratic norm that municipalities should be self-governing to a certain degree.

An imperative of local self-government is also normatively supported, since centralized democratic decision-making on all local affairs by a national legislator or government would amount to

domination of local citizens by national majorities who do not have a sufficiently strong stake in the local polity. From the perspective of the local polity, giving the power of decision-making in local matters to the representatives of the state-wide demos amounts to illegitimate over-inclusion in much the same way that a global demos would be over-inclusive from the perspective of self-governing states.

However, so the final objection goes, unlike states or the EU, municipalities do not determine who their own citizens and voters are. They do not have the power to do so since there is no formal local citizenship status and they cannot even exercise immigration control at the borders of their territory. Yet there must be electoral registers for local elections. Since there is thus a local demos, there has to be a corresponding local citizenry that is actively represented by those who enjoy the franchise. In the absence of local passports and citizenship documents, we can approach the question of who the local citizens are by asking first what the conditions are for the local franchise. As mentioned in the introduction, answers vary significantly within and beyond Europe. The dominant one is: all locally registered national citizens of voting age. In the EU member states the local demos includes additionally resident citizens of other member states and in a significant number of states also third country national residents. The local franchise generally has the same age thresholds and exclusion of special categories, such as criminal convicts, as the national one. An important difference is, however, that external local voting rights are extremely rare. Former residents in a municipality mostly cannot vote in local elections after they have taken up residence somewhere else inside the state territory or abroad.¹¹ So far, we can infer that the local demos is generally determined through residence with a few exceptions that include non-residents and significant variation with regard to the inclusion of non-national residents.

Let us now consider the question normatively: Who *should* be included in the local citizenry and demos? I am now no longer looking for general normative principles, such as affected interests or

legitimate coercion, but for what I shall call membership mechanisms. These are the most general rules for determining membership that we find in the laws of real world polities. I have proposed that the right normative answer for local polities is: all residents and residents only (Bauböck 2003). Unlike sovereign states, local governments do not have powers of immigration control. The right to free movement inside a state territory for everyone who is lawfully there is a universal human right (ICCPR, Art. 12(1)) and requires the absence of immigration control at local level. Local governments therefore have to admit and provide public services to all who take up residence in the municipality. The other side of the coin is that municipalities cannot provide public services to their former residents or grant external citizenship rights to them, such as diplomatic protection and the right to return, without encroaching on external powers vested in state governments.

Residence is for these reasons a necessary condition for local citizenship but it is also a sufficient one? I claim that it is from the perspective of local self-government. Restricting the local franchise to national citizens, or EU citizen, or to the citizens of those states that grant a reciprocal franchise introduces a conditionality for the local franchise that has nothing to do with the powers and functions of local self-government. Such imposition of national and supranational membership mechanisms on the local demos maybe a less severe form of domination compared to a takeover of all local decisions by central government, but it is still recognizably a form of domination since it excludes from the local demos a significant category of persons whose status as immigrants in the local polity is in no relevant way different from that of national or EU immigrants. The absence of a formal status of local citizenship and the general inclusion of noncitizen residents in local civil and social rights mean that they are *de facto* local citizens. If they remain excluded from the franchise, this amounts to a discrepancy between the citizenry and the demos. Since the only reason for this discrepancy is that those excluded are not members of the *national* demos, there is no

justification from the perspective of *local* democracy. The local citizenry ought to be therefore determined through residence and residence only, i.e. a mechanism of automatic *ius domicilii*. And the local demos should then include all residents of voting age.

Having stated the principle, we must acknowledge that the local democracy deficit depends also on national citizenship laws, since noncitizens may get access to the local franchise also through becoming national citizens. High naturalisation barriers and an absence of *ius soli* provisions for the second generation aggravate the local exclusion problem in terms of numbers and duration of disenfranchisement. Where immigration is high and strongly concentrated in urban areas, there is also an aggregate effect of “voteless neighbourhoods” (Eisenberg 2013) that further undermines the democratic legitimacy of urban government.

4. Birthright Citizenship at State Level

Consider now how citizenship regimes at state level differ from local ones. Nationality laws that regulate the acquisition and loss of citizenship are surprisingly complex and different across states. There is now a broad literature that studies, or aims to explain, variation between citizenship laws and policies. Yet it is still possible to identify common structural features of all citizenship laws in democratic states.

All national citizenship regimes are based on birthright in the broad sense that includes both *ius sanguinis* and *ius soli*. Their most fundamental rule is that citizenship is acquired automatically at birth so that there will always be a next generation of citizens as long as there are citizen parents or children born in the territory. All states have *ius sanguinis* provisions, whereas only some have *ius soli* provisions. The result is that in the children of first generation emigrants can normally acquire their parents’ citizenship at birth. Where states differ is with regard to conditions for retaining and passing on to subsequent generations such extraterritorial citizenship.

All democratic states provide also for ordinary naturalisation of immigrants based on time of residence. There are enormous differences with regard to the length of residence required, additional conditions that must be met, facilitated naturalisation for special categories, etc., but inclusion of first generation immigrants in the citizenry is nowhere either automatic or completely excluded. Conversely, no democratic state automatically withdraws citizenship from first generation emigrants. Emigrants lose their citizenship of origin through voluntary renunciation or through involuntary withdrawal, but non-residence is not a sufficient reason for either. Except in cases of withdrawal on grounds of fraudulent acquisition or national security, loss depends on access to, or prior acquisition of, another country's citizenship.

The combination of automatic acquisition by birth and non-automatic naturalisation can be described as a birthright regime of membership. The term birthright signals not only that membership is acquired at birth or on grounds of birth, but also that membership is presumptively a lifelong status for the individual and presumptively continuous across generations for the citizenry as a collective. Residence and consent still play a role, but mainly as subsidiary correction mechanisms that allow individuals to opt in or out if their birthright citizenship does not match their residence and if they themselves are willing to change citizenship.

Many liberal political theorists find the basic structure of this nearly universal citizenship regime normatively objectionable. Some advocate automatic naturalisation for first generation immigrants (Rubio-Marín 2000), others raise global justice objections to the "birthright lottery" (Shachar 2009) and some suggest that citizenship in a state should be generally based on residence both on the entry and exit side in roughly the way that I have described above for local citizenship regimes (Kostakopolou 2003, López-Guerra 2005).

I disagree because a normative assessment of membership regimes must not be indifferent to the type of polity. As a polity species, states are not like municipalities. They have evolved by adapting to a different 'polity environment' – the international state system – and we cannot ignore that system as the relevant background for determining who should be recognized as a citizen of which state. The question is then whether for this kind of polities a birthright membership regime is more adequate than a residential one. I think it is.

Birthright citizenship allows states, first, to protect their citizens abroad and it gives these a legal status protected under international law that can become an anchor for some of their most important rights (Goodin 1988). It protects specifically temporary and circular migrants who often never meet even the most inclusive conditions for permanent residence status or naturalisation.

Second, naturalisation within a birthright regime is an act that marks the inclusion of immigrants into the polity through double consent: the immigrant needs to express her desire to become a citizen and the state formally accepts her on behalf of the current citizens. Naturalisation is a procedure that signals that somebody not born into a birthright community now belongs to that community as an equal member. It offers therefore a stronger affirmation of inclusion for migrants, who are often especially vulnerable as targets of xenophobia or as victims of economic exploitation, than automatic naturalisation or a residence-based extension of citizenship rights can provide.

Third, and most importantly, birthright citizenship allows tapping into resources of solidarity among citizens who see themselves as belonging to a transgenerational political community. Such resources are not only needed for states to make citizens comply with the burdens of citizenship (i.e. to make them obey the law without overt coercion), but also to hold governments accountable, to contest illegitimate uses of political power (e.g. to care about corruption and the

violation of the rights of others by the government) and to provide citizens with reasons for including an orientation towards the common good and the interests of future generations into their individual interests and political preferences.¹²

After analysing the distinct characteristics of the two basic membership regimes I will now show that they are not freestanding but closely connected to each other. The conclusion is that democracies exposed to migration do not have to choose between them, but ought to combine them in such ways that their membership regimes include all citizenship stakeholders and only these.

5. Commonalities, Constraints and Connections

In spite of their strong contrasts, the two membership mechanisms share important common features. By generating boundaries that demarcate members from non-members and that secure the continuity of a polity over time they escape the indeterminacy problem conjured up by the political philosophers' favourite principles. Let me consider the demarcation and stability properties of both mechanisms in turn.

Birthright mechanisms are somewhat messier with regard to demarcation, since they permit a lot of variation between national citizenship laws and inevitably produce multiple citizenship. This is so because of the interaction between *ius soli* and *ius sanguinis* and because of the gender-neutral application of *ius sanguinis* to both parents in case of mixed-nationality parentage. Only in naturalisations can states still prevent dual citizenship unilaterally through a renunciation requirement and by withdrawing citizenship from emigrants who voluntarily acquire another nationality. However, there is a strong global trend towards dual citizenship toleration also in case of naturalisation (Spiro 2010, Blatter, Erdmann et al. 2009, Faist and Kivisto 2007). Dual citizenship does not mean that a state no longer knows for sure who its citizens are. The very fact that

nationality is a formal status that other states are obliged to recognize under international law¹³ prevents any such indeterminacy.

This is not so for residential citizenship where there is generally no formal status apart from registries of residence and various types of residence permits. There is thus, on the one hand, a zone of uncertainty built into the residence criterion, especially for short term residents or those who register as multiple residents in different municipalities. On the other hand, a residence mechanism that leads to automatic acquisition and loss of citizenship based on cross-border movement creates significantly less overlap between memberships than birthright does.

So, overall, the determination of membership is not a major problem in either regime. This is specifically important for the franchise and the democratic process. As many scholars have pointed out, citizenship boundaries have become blurred through disaggregating citizenship rights and disconnecting them from citizenship status (Hammar 1990, Bauböck 1994, Bosniak 2000, Benhabib 2004). This trend has allowed for a graded inclusion of immigrants through denizenship and of emigrants through external quasi-citizenships (Bauböck 2007: 2395-6). Boundary demarcation is thus a lesser concern for citizenship if it is understood as a bundle of rights rather than as a status under international law. This is quite different for the demos that does require an unambiguous distinction between those who are eligible for the franchise and those who are not. It is not possible to have a system of democratic representation and accountability if there is uncertainty about who has the right to vote in elections (Song 2012: 59). There is of course variation between states with regard to how narrowly or widely they draw the boundaries of the demos. In a few exceptional cases, such as New Zealand, Chile, Uruguay, Malawi, the UK and Portugal, the national demos stretches even beyond the boundaries of national citizenship status, but whatever combination of citizenship and residence criteria is used, the demos must be determined unambiguously and prior to elections.

Both membership regimes also provide for continuity of the citizenry over time, but they do so in very different ways. In a residence-based regime it is the territory itself that is continuous. The land, the human-built infrastructure and the social and political institutions are perceived as durable features of the polity that had been there before current residents were born or moved in and will remain there after they have moved out or died. This may be sufficient to sustain general compliance with the laws, a certain respect for the political institutions and a sense of community that comes from sharing a distinct social space, all of which support a locally-based collective identity. Newcomers are not likely to challenge existing institutions that they are not familiar with and those who have left are not likely to seek to influence the future destiny of a residence-based polity. Yet these very characteristics of residence-based membership also diminish the sources of solidarity between sedentary and temporary residents. The former tend to see themselves as “owning” the polity and the latter will less often commit themselves to the common good or will even refrain from claiming basic rights and equal respect for themselves (Ottonelli and Torresi 2010). The continuity provided by residence-based regimes is thus associated with objects that constitute the polity, its territory and institutions, more than with its subjects, the citizenry. For this reason, transgenerational continuity is rather weak.

Automatic birthright acquisition supports a much stronger perception that the citizenry is continuous across generations as a *people* rather than just as a polity in its territorial and institutional dimensions. This explains why it seems more natural to speak of the people of Austria and the citizenry of Vienna than the other way round. The difference between *ius soli* and *ius sanguinis*, which are often taken as indicators for civic or ethnic citizenship regimes, is relevant for the way in which the people is imagined. The image of political community supported by *ius soli* is of a people of natives, in the literal sense of those born in and belonging to the territory, whereas that created by *ius sanguinis* is of the people as an extended family. We have to remember,

however, that *ius soli* and *ius sanguinis* are not alternative rules, but tend to be combined in different ways. Finally, conditions for naturalisation and renunciation are at least as important as is the mixture between *ius soli* and *ius sanguinis*. Even a regime exclusively based on *ius sanguinis*¹⁴ is not a purely ethnic one if there is substantial immigration and naturalisation barriers are not too high. New generations of birthright citizens in such a regime will include the descendants of non-co-ethnic immigrants.

This point shows that birthright and residence do not only share some commonalities, but also constrain each other. On the immigration side, pure *ius sanguinis* would lead to an ever-growing gap between a shrinking citizenry and a growing transgenerational community of foreigners-by-birth. This is not merely a hypothetical scenario but stark reality in Arab Gulf states with large immigrant populations. Residence-based naturalisation for first generation immigrants helps to close this gap. However, second generations of immigrant origin are birthright stakeholders in the same way as those born in the country to citizen parents. This is why some form of *ius soli* is normatively required in immigration countries. But *ius soli* on its own is, once again, not enough if it is not complemented by residence-based access to citizenship. Consider the situation of children born abroad and brought by their parents to a *ius soli* country like the US a few days after their birth. They will be foreign citizens until the age of majority when they can naturalise. *Ius soli*, too, has thus exclusionary features, even where there are adequate opportunities for first generation immigrants to naturalise (Aleinikoff and Klusmeyer 2002: 10-12).¹⁵

Just as residence-based access to citizenship serves as an inclusionary corrective for immigrants and their offspring, a residence conditionality may prevent over-inclusion generated by birthright regimes for emigrants. Suppose that the transmission of citizenship *iure sanguinis* formally stops with the second generations. This does not mean that the children of emigrants cannot pass this citizenship on to their grandchildren; it just means that the second generation has to resume

residence in the parents' country of origin before they can do so. As citizens, they have an unconditional 'right to return' and they could even go back to their country of birth thereafter, which would turn them into first generation emigrants. Resuming residence counts in this scenario as an act that reconnects a generational chain of descendants to a territorial polity in a way that justifies their maintaining of citizenship status.

In a similar way, a residence conditionality can help to correct the expansion of the demos through an external franchise attached to citizenship status. At the one extreme end of the spectrum, we find in-country voting systems that allow expatriates to vote only inside the territory.¹⁶ Such a conditionality is not related to residence but presence on election day. It may be argued on grounds of practical concerns about the integrity of postal and proxy voting, but does not establish a justifiable distinction between the external citizenry and demos. At the other extreme end, the franchise is simply attached to citizenship status and completely disconnected from residence. This may be defensible if citizenship status itself cannot be passed on to next generations born abroad, but can create a hugely over-inclusive external demos in perpetual *ius sanguinis* regimes. In between these two extremes, a residence conditionality can serve to differentiate between external citizenry and demos in a way that fits a plausible interpretation of the stakeholder principle. In birthright regimes, the transmission of citizenship abroad is best stopped at birth rather than through automatic loss at the age of majority. But the demos is always distinguished from the citizenry through an age threshold. Access to citizenship occurs at birth, but access to the demos only at voting age. The general features of birthright citizenship and age-dependent membership in the demos suggest thus that second generations born abroad should be allowed to retain their citizenship status acquired at birth, but need not be enfranchised when reaching voting age, unless they return and take up residence.

Residence conditions can in these ways correct excessive mismatches between the demos and the territorial population created by birthright regimes in migration contexts, without undermining their positive effect of sustaining a strong transgenerational continuity of the demos. The converse problem with residence regimes is their weak potential for transgenerational continuity, the detrimental effects of which for democracy is overcome through their embedding in encompassing birthright regimes.

This point can be stated as a variation on a Walzerian theme: “Neighborhoods can be open only if countries are at least potentially closed” (Walzer 1983: 38). There is an analogous relation between the two membership regimes: A residence-based demos can remain open only if it is embedded in a birthright-based polity. Instead of a local franchise being *constrained* through national citizenship conditionality, the two polities are *connected* as territorially nested jurisdictions. Since in contemporary democracies, residence-based membership regimes exist only at the local level, they are always embedded within a birthright-based regime. This nestedness in a thicker regime of birthright membership may be the condition for turning mere co-residents into local citizens who can see each other as stakeholders in the local common good.

The negative version of Walzer’s proposition is: “If states ever become large neighborhoods, it is likely that neighborhoods will become little states” (ibid.). I disagree that territorial closure of states is the condition for keeping neighbourhoods open. In spite of all its setbacks, the European experiment with a supranational citizenship and open internal borders has not had this effect. However, I do think that abolishing birthright citizenship in the European states and replacing it with a general European denizenship would undermine a crucial source of solidarity between sedentary and mobile populations and could lead to much deeper cleavages and harder closures inside European societies.

5. Conclusions

In this paper I have, first, criticized democratic inclusion principles that are indeterminate with regard to democratic boundaries and indifferent towards the structural features of polities. I have suggested that a democratic stakeholder principle passes these critical tests and can be applied to democratic polities of different kinds. Second, I have compared birthright-based and residence-based membership regimes at state and local level and considered how they can accommodate international migrants. Third, I have argued that these two regimes are not freestanding alternatives between which democratic polities have to choose, but are combined in a multilevel architecture of democratic citizenship, in which the inclusion and exclusion dynamics of birthright and residence mutually constrain each other and every individual is included as a citizen in both types of polities.

There are several questions that I have put aside for the sake of a more focused argument. One is the special phenomenon of EU citizenship that illustrates a third possible regime in which citizenship is derivative from membership in a different polity (in this case the member states) rather than based on birthright or residence in the reference polity (the EU). I have also not discussed an intermediate level of regional or provincial citizenship between the local and the national one, which exists in many, but not all democratic states. What we tend to see there are contingent mixes of all three principles: derivation from state level citizenship, residence-based franchise in a few cases,¹⁷ and birthright in special territorial autonomy arrangements for indigenous peoples, offshore or ethnic minority territories. I have also not discussed how separate polities could form temporary or issue-specific transborder demoi through deliberation among representatives or plebiscites on questions that concern several independent countries (Song 2012: 64-5). Finally, I have completely set aside how citizenship is determined in newly formed polities or where territorial borders have changed. Such initial determination of the citizenry and

the demos raises a whole range of new issues, among which is the question of who the demos should be that has the right to decide on a secession or independence claim.¹⁸

This paper has focused instead on individual transborder membership of migrants and has put access to voting rights in a broader context of access to citizenship status. Many analyses of the franchise of non-resident citizen and noncitizen residents take the citizenship element in the determination of these two categories as given. Yet the differences between states' electoral inclusion of both groups cannot be assessed without taking into account how they provide access to citizenship for both emigrants and immigrants. Databases and comparative studies published by the EUDO Citizenship observatory have for the first time systematically connected information on access to citizenship and to the franchise both inside and outside the state territory. This paper has attempted to do the same within a normative theory approach by relating the demos to the citizenry and inclusion claims of immigrants to those of emigrants.

The most important substantive argument of this paper has been for a multilevel conception of democratic citizenship, the basic outline of which we can find in current democratic states even if many of its normative implications remain unaddressed. This architecture includes international migrants in a particular way. Most migrants are external citizens of their countries of origin and local citizens of the municipality where they take up residence. Residence is also the crucial condition for migrants becoming full citizens of their 'host state'. However, since national citizenship is based on birthright, they need to express their desire to join and be formally admitted as new members. Finally, residence should also be the condition under which birthright citizens born abroad to emigrant parents can exercise external voting rights or pass on citizenship to subsequent generations.

This multilevel architecture has not been primarily designed for international migrants. Its historic origin is the need for opening up the borders of local jurisdictions for internal free movement. Native citizen residents are thus always multiple citizens – by birthright in their state and by residence in their municipality. Such vertical dual citizenship supports solidarity within a large and anonymous national citizenry while at the same time preserving the crucial liberty of free movement that secures individual exit options. It is an architecture that has been fortified by nationalism, which tends to close the doors of the building for international migrants. But it has not been demonstrated conclusively that nationhood is the indispensable foundation for a multilevel architecture of democratic citizenship. If the basic structure can stand alone without nationalist fortifications it should be perfectly capable of accommodating international migrants as external citizens of their home states, as residential citizens at the local level and as optional citizens of the states where they settle.

This argument relies on two background assumptions that by and large hold in the present world but can be upset in possible future worlds or locally in the present one. One background assumption is a relative stability of territorial borders of states, the other one is that resident citizens form a majority among both citizens and residents. If state borders become structurally unstable, if majorities of citizens live outside the territory, and if majorities of residents are non-citizens, the conditions for integrating migrants into the demos and multilevel citizenship would be dramatically different. Where these changes occur locally and temporarily, democracies may be able to adapt, although it will be difficult to hold them up to standards of inclusion that apply in more stable contexts. If the world as a whole moved in this direction, democratic theories of inclusion would have to be radically rethought.

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¹ I have received many useful comments on drafts from Veit Bader, Daniele Caramani, Raul Magni-Berton, Takeshi Miyai and David Owen, not all of which I could take into account in the final version.

² Non-European cases include a few towns in Maryland (Hayduk 2006), Chile, Uruguay, Malawi and New Zealand, where resident noncitizens can also vote in national elections, and South Korea which introduced a local franchise for immigrants with a special residence permit in 2005 (Mosler and Pedroza 2013).

³ Exceptions In the empirical literature include Blais et al (2001) and Arrighi et al (2013), Caramani and Strijbis (2013), in the normative literature Bauböck (2005) and Owen (2010).

⁴ Noncitizen voting is analysed empirically by Raskin (1993), Hayduk (2006), Motomura (2006) for the US, by Hammar (1990), Jacobs (1999), Earnest (2008), Pedroza (2012) and many others for European states. Normative discussions include Beckmann (2009), Song (2009) and Eisenberg (2013). External voting by non-resident citizens is studied empirically amongst others by Nohlen and Grotz (2000), IDEA (2007), Gamlen (2008), Lafleuer (2013) and Collyer (2013). The first major assessments from legal and political theory perspectives were López-Guerra (2005), Barry (2006), (Spiro 2006), Rubio-Marín (2006), Bauböck (2007) and Honohan (2011).

⁵ Horizontal recognition between citizens can determine a citizenry in situations such as authoritarian rule or foreign occupation where political authorities do not represent citizens striving for self-government. In such contexts it may be more appropriate to use concept of a “democratic people” instead of a “citizenry” (cf. Altman and Wellman 2009, chapter 2).

⁶ For major contributions see Whelan (1983), Dahl (1989), Arrhenius (2005), Goodin (2007), Näsström (2007), Abizadeh (2008), Owen (2012), Song (2012).

⁷ For similar reasons, Sarah Song regards the all-affected and all-subjected principles as “supplementary principles for adjusting the boundaries of the demos” (Song 2012: 63). Her critique of the two principles shares with mine an emphasis on the need for clearly demarcated and relatively stable political boundaries. Song’s account differs from mine in two respects: first, she claims that the two principles fail to resolve the problem because they are procedural rather than substantial, whereas I think they fail because they are output-based. Second, she claims that democracy should be bounded by the state and its territory because of the state’s special role in securing individual rights, promoting solidarity and linking representatives to citizens, whereas I suggest that state-based demoi extend beyond the state territory and that democratic self-government is also possible in sub-state and supra-state polities.

⁸ Harry Beran (1989), David Gauthier (1994), Thomas Pogge (1992) and Altman and Wellman (2009) defend that every territorial association of citizens has the right to secede, provided that it gets support from a majority of the residents in the territory that it claims and provided that it allows any other association inside this territory to secede on the same terms. Such a plebiscitary principle of self-determination is not circular in the same way as output-based principles are and is, arguably, procedural rather than substantial, which undermines Song’s (2012) critique that procedural principles cannot resolve the boundary paradox.

⁹ In her discussion of emigrants' claims to voting rights, Iseult Honohan combines a legitimate coercion principle with a stakeholder principle when she proposes that "[t]he demos should consist of those whose lives are interdependent in their subjection to a common authority, and [who, *sic!*] have shared future interests" (Honohan 2011:558).

¹⁰ This broad overlap is an empirical fact about the present world, not a conceptual necessity. In Bauböck (2011) I discuss a hypothetical scenario of hypermigration in which there is no stable core of resident citizens.

¹¹ In the EU only Estonia grants full local voting rights to citizens residing abroad and France allows these to vote through a resident proxy citizen. Several other countries have special provisions for certain categories of non-resident citizens (Arrighi et al 2013: 21).

¹² See also Song (2012) who emphasizes the need for stability of the demos over time in order to secure substantive rights and freedoms, solidarity and trust, and effective representation.

¹³ The International Court of Justice attempted to set the limits for such a duty of mutual recognition in its 1955 Nottebohm decision, which refers to the need for a 'genuine link' between a person and the state that grants a person nationality. The decision was meant to apply only in case of arbitrary bestowal by a state or abuse of rights by individuals attempting to escape citizenship duties in another state (Sloane 2009). It did not establish a positive stakeholder principle as an individual claim to citizenship. In a resolution of 16 January 2014 condemning the sale of EU passports by Malta, however, the European Parliament endorsed "that EU citizenship implies the holding of a stake in the Union and depends on a person's ties with Europe and the Member States or on personal ties with EU citizens" (European Parliament 2014:2).

¹⁴ Dumbrava (2013:4) lists 14 states in Europe with unconditional *ius sanguinis* and 5 more where *ius sanguinis* is not restricted by a residence requirement, but by restrictions on *ius sanguinis ex patre* in case of birth out of wedlock.

¹⁵ Some European countries, most prominently among them Sweden, have adopted a residence-based entitlement to unconditional naturalisation for minor children born abroad, which avoids the clearly undesirable exclusion of “generation 1.5” in pure ius soli states.

¹⁶ Greece is the only European state with this restricted franchise for expatriate citizens (Arrighi 2013: 22). Turkey has recently abandoned a similar policy and will allow its citizens abroad to vote in embassies and consulates in the August 2014 presidential elections.

¹⁷ The FRACIT study has found residence-based voting rights for non-citizens in regional elections in Denmark, Hungary, Slovakia and Sweden, i.e. states without a federal constitution and with weak competencies for regional governments.

¹⁸ See Shaw (2013) for a discussion of Scottish citizenship in case of independence.