CITIZENS ON THE MOVE: DEMOCRATIC STANDARDS FOR MIGRANTS' MEMBERSHIP*

ABSTRACT

This article proposes a stakeholder criterion for deciding who has a claim to be a citizen of which state and discusses how this principle could guide reforms of birthright citizenship and of naturalization procedures.

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Democracy is a government accountable to its citizens, and states are territorial jurisdictions. International migration creates a tension between these two basic facts about our world because it produces citizens living outside the country whose government is supposed to be accountable to them and inside a country whose government is not accountable to them. There is thus a mismatch between citizenship and the territorial scope of legitimate political authority. In response to this challenge, political theorists have occasionally raised the question of how to redraw the boundaries of political community, but this problem rarely troubled policy-makers or voters.

But times have changed. Citizenship policies, which used to be fairly stable and supported by cross-party consensus in many countries, have become thoroughly politicized and volatile. In immigrant-receiving democracies, citizenship policies now are driven by anxieties over security risks and the failed integration of newcomers, while more and more sending countries are actively reaching out to their expatriates by offering them dual citizenship and absentee voting rights.

The new emphasis on citizenship as a shared core identity in democratic polities should be welcomed. It adds an important political dimension to past debates about the economic and cultural impact of migration. However, the interests and ideologies that drive current public concerns are often extremely myopic, in three ways: they do not rely on defensible principles, they do not look across borders and they disregard the counter-productive effects of the policies advocated.

This article addresses such deficits by proposing democratic principles for citizenship policies and applying them to several controversial issues on the political agenda. It starts with a brief discussion of the various dimensions of citizenship and then focuses on norms governing access of citizenship status at birth, and after birth, inside and outside the territory.

Stakeholder citizenship

Citizenship is a concept with multiple dimensions. It is impossible to encompass all of its uses and meanings in a single definition. It is also pointless to try and do so since many interpretations of citizenship are metaphorical or overstretched. While we cannot define the concept's boundaries, it is possible to define its centre. At its core, citizenship is about equal membership in a self-governing political community. Four interpretations of citizenship are directly connected to this core meaning and spell out its implications in the context of modern democracies. Citizenship is: a) a formal legal status that links individuals to a state or another established polity, such as the European Union or a federal province; b) a bundle of legal rights and duties associated with this status; c) a set of responsibilities, virtues and practices that support democratic self-government; and d) a collective identity that can be shared across distinctions of class, race, gender, religion, ethnic origin or way of life.

Taken together, these four elements make up democratic citizenship; taken separately, they apply also to other political formations. For example, in international law, the legal status of citizenship is usually called nationality and refers to the subjects of authoritarian regimes just as much as to the citizens of democratic ones.

The link between the four elements is, however, not a straightforward one, even in democratic states. The rights and duties of citizenship need not be strictly attached to status, but can be partially disconnected from it. The status of long-term resident foreign nationals who live in democratic countries provides an illustration of this. Many of the historic privileges of citizenship have been

extended to these populations, creating a quasi-citizenship (now often called "denizenship") with rights derived from residence rather than from formal membership. More recently, some states have also experimented with offering quasi-citizenship status outside their territory to emigrants who have lost or renounced their citizenship or to ethnic kin minorities living in neighbouring countries.

A second important distinction must be drawn between the formal legal and the informal aspects of citizenship. As the core definition implies, democratic citizenship is produced by citizens themselves and only indirectly by the state authorities who act on their behalf. It is, therefore, important to realize that states can regulate some dimensions of citizenship but not others. Legislators decide on the norms that govern citizenship as a legal status and bundle of rights and duties, but they should not try to legislate the ethical responsibilities, virtues and practices of good citizenship or the collective identities that citizens share as members of the polity. Important as these dimensions are for sustaining democracy over time, political authorities can only promote them indirectly through building institutions that enable individuals to develop, themselves, the habits and identities of good citizenship. Where state institutions try to do this directly, either through enforcement or through exclusion, democracy becomes illiberal and ultimately tyrannical. This is a historic lesson that should have been learned since the times of the Jacobins. It still applies today to contemporary efforts to test immigrants' civic virtues and attitudes before they are admitted to citizenship.

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This article focuses specifically on citizenship as a legal status and explores what the core meaning of citizenship as equal membership in a self-governing political community implies in order to answer the question of who ought to be included and who can be legitimately excluded from that status.

A starting point for this inquiry is the human right to citizenship. Analyzing the plight of refugees and stateless people in the wake of World War II, political theorist Hannah Arendt called citizenship "the right to have rights." In her view, there was a paradox at the heart of the idea of universal human rights: the most fundamental of these rights could only be effectively protected once a state had recognized a human being as his or her citizen. The paradox could in principle be resolved through including a right to citizenship in the catalogue of human rights. This is what the *Universal Declaration of Human Rights* of 1948 did. Article 15 states that "everyone has a right to a nationality" and "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Yet the protection of individuals against statelessness and coercively imposed citizenship does not entail any obligation for states to offer their citizenship to persons who are recognized as citizens by another state.

In order to respond to the mismatch between territorial borders and boundaries of membership, we need to know which individuals have claim to which citizenship. The above definition provides a very general answer. The members of a self-governing community can be seen as stakeholders in the future of a politically organized society. Their individual rights and well-being are tied up with those of other members because they jointly depend on the protection and public benefits provided by the same political institutions. Stakeholders in this sense have a moral claim to be recognized as citizens and to be represented in democratic self-government.

A stakeholder principle for determining who has a claim to citizenship differs in important ways from alternative answers to the question we have asked. One such answer is that the decision on whom to admit as a citizen is not a moral issue. It is instead a matter of sovereign self-determination for each state under international law and a matter of legislative procedures regulated by domestic constitutional law. Just as a club can adopt its own statute for admitting new members, so every state can choose its new citizens. Why is this view implausible? In liberal democracies, even social clubs are no longer permitted to discriminate in their admission policies on grounds of race, gender or ethnic origin. Since states are responsible for protecting much more fundamental interests and rights of those under their jurisdiction, they cannot claim powers to make arbitrary decisions in matters of citizenship – even when these decisions reflect the preferences of a majority of current members.

The implications of a stakeholder view of citizenship can be specified by contrasting this principle with two more plausible alternatives. Some authors have suggested that the scope of democratic inclusion ought to be determined by the scope of territorial jurisdiction, so that everybody *subjected* to the laws is also represented in the making of the laws. Others have modified this principle by claiming that democracies must offer citizenship to all whose interests are *affected* by their legislation. The former principle requires that all residents (and maybe even temporary visitors) must be included, while those who leave the territory for an extended period have no more claim to retain citizenship status or to participate. This idea is thus over-inclusive inside the territory and under-inclusive outside. It is also at odds with current laws in all democratic states, which permit emigrants to retain their citizenship and even to pass it on to a next generation born abroad. Moreover, since World War II, the vast majority of democratic states have introduced external voting rights for expatriates, a practice that would seem clearly illegitimate under a strict principle of territorial inclusion.

The alternative "all affected interests" principle could easily account for emigrants' citizenship. Many expatriates have ongoing ties and interest in their ability to return at

some point to their country of origin, so political decisions taken there affect some of their fundamental interests. However, this principle clearly applies far beyond emigrants and would provide native populations of distant countries – whose interests are affected by policies on foreign relations, trade or industrial emissions of another state – with a claim to citizenship in that country. Even within the domestic territory, democratic legitimacy of decisions is not achieved through representing affecting interests, since this would require a changing composition or voting procedure in the legislature for each decision depending on who is likely to be affected by it. Instead, representative democracy means that citizens empower legislators through their votes to take decisions on a broad range of issues that affect various groups in society in different ways.

A stakeholder principle differs from both alternative views of democratic inclusion. It applies to persons who have a permanent interest in membership and political participation rather than in particular decisions. All long-term residents can be seen to share such an interest because of their permanent subjection to a territorial political authority. But first generation emigrants as well as minor children born abroad can also claim to have a stake in the future of the polity if their life prospects depend on that country's laws and political course.

This interpretation of stakeholder citizenship leads to a straightforward conclusion. If resident foreigners enjoy a claim to be admitted as new citizens and emigrants enjoy a claim to retain their citizenship of origin, then both receiving and sending countries ought to tolerate dual citizenship. This does not mean that the problem of mismatch can be resolved by simply turning every migrant into a dual citizen. Article 15 of the Universal Declaration of Human Rights supplements the principle of stakeholder inclusion with an element of individual choice. Emigrants must be free to renounce their citizenship provided they acquire another one abroad, and immigrants cannot be forced to naturalize as long as they have another citizenship. In liberal democracies exposed to migration, there will, therefore, be many who are not fully included although they have an individual claim to citizenship. This means that the principle must apply beyond the allocation of citizenship as a legal status. In a more general sense, denizens are dual citizens, too, because their overall bundle of rights and duties is generated by the laws of two independent states.

The short answer to the problem of boundary mismatch is, therefore, that citizenship status and rights ought to be extended to all persons whose circumstances of life tie their personal fate to the long-term prospects of a political community. Migration generates overlapping sets of persons to whom this principle applies. If the states connected through migratory chains are liberal democracies, they ought to include immigrants as well as emigrants in their conception of political community while respecting individual choices of primary affiliation. Furthermore, since the citizenship status of migrants is jointly produced by several states, their governments ought to coordinate their citizenship policies in order to avoid unjustified exclusion or inclusion as well as conflicts between their respective territorial jurisdictions over residents and personal jurisdiction over emigrants.

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Birthright citizenship

Less than 4% of the world population are classified by the United Nations as migrants. Most persons acquire citizenship not through naturalization but at birth, and they retain it for all their lives. From a global perspective, the most fundamental moral question about citizenship policies is how birthright citizenship determines the opportunities of human beings worldwide. Political theorist Joseph Carens has suggested that in today's world citizenship is like feudal status in medieval societies. The citizenship people are born with pervasively determines their life prospects, and through immigration control, rich and secure states keep out those unfortunates who have been born as citizens of poor, authoritarian or violence-ridden countries.

This is a morally troubling analogy. Yet its implications are not obvious. Should liberal states open their doors to free immigration? Or do they instead have a responsibility to improve the lives of citizens in those countries that are worst off? If one accepts the latter answer as more plausible, do rich countries have to redistribute their wealth until opportunities have been equalized worldwide? Such a demanding standard for global justice would be hard to reconcile with the commitments of citizens and their representatives to improve opportunities in their own countries. British political theorist David Miller suggests, therefore, that global justice does not require equalizing opportunities worldwide, either through open doors for immigration or through global redistribution of wealth, but rather requires assisting disadvantaged societies in achieving minimum standards of decency that enable them to secure the basic needs of all their citizens.

Moreover, unlike feudal status, citizenship in democratic countries is an institution that supports important moral values of individual liberty, equality and collective self-government within a territorially bounded society. Birthright citizenship specifically secures the continuity of democratic polities across multiple generations. Sustainable democracy requires not merely stable institutions but also a stable core population whose members have been raised as citizens and

conceive of their own future and that of their children as linked with this particular country. Territorial democracy as we know it could not work in nomadic societies. A society composed of individual nomads of different origins without shared citizenship would be anarchic, unequal and violent. In our world, migrants enter or leave state territories. They can stretch their affiliations across international borders, but they cannot carry their own political authorities with them and establish them wherever they go.

Birthright citizenship can be acquired through descent (*jus sanguinis*) or birth in the territory (*jus soli*). These two rules are complementary rather than alternative. Virtually every country in the world applies *jus sanguinis*, which was first introduced in Europe with the French Revolution. In a much smaller number of countries, birth in the territory is the dominant principle and citizenship by descent applies there only to children born to expatriates. Several European states modify their *jus sanguinis* regimes with a conditional form of *jus soli*. In some countries, acquisition through birth in the territory depends on the parents' legal status or time of residence (Germany, Ireland, Portugal, the United Kingdom); in others a parent must have been born in the country. In several European states, citizenship for the second generation is generally not acquired automatically at birth but depends on parental decision after birth or is granted at the age of majority.

In the absence of international migration, *jus sanguinis* and *jus soli* don't make a difference. Both secure the intergenerational reproduction of a territorial citizenry. It is migration across state borders that makes a pure regime of *jus sanguinis* exclusionary. The children of settled immigrants who grow up in the receiving country are obviously stakeholders in that society's future. From this perspective, denying them citizenship or even requiring them to undergo a procedure of naturalization is clearly indefensible. They are members of society from birth and ought to be recognized as such.

The US model of unconditional *jus soli* is necessarily the best alternative, however. First, as a federal constitutional principle, its historic roots go back to post-Civil War Reconstruction and have nothing to do with immigration; second, it attributes citizenship to children whose birth in the territory is accidental; third, it does not include those who arrive with their parents at a very early age. Today, there is no prospect for introducing the American model to any European country. Ireland, the only European country that had adopted it (also not for reasons related to immigration) abandoned it in 2004.

A combination of automatic acquisition at birth for children of settled immigrant parents, with the Swedish model offering unconditional citizenship to minor children after five years of residence, would best capture the idea of stakeholder entitlements. Recent reforms in Germany and Portugal show that such ideas can also win sufficient political support. In Western Europe, public attention is currently focused on selecting the right kind of immigrants, those who are "worthy" of naturalization. Only extreme anti-immigrant forces argue openly, however, that children born in the country should be excluded because of their descent. Political efforts to introduce or extend an appropriate form of *jus soli* could, therefore, have a reasonable chance of success even under current conditions.

Birthright citizenship, rather than lenient conditions for naturalization, is also the main cause for the proliferation of multiple citizenship. Children are born as dual citizens when their parents are of different nationality or when a foreign citizenship acquired by descent adds to a domestic one obtained through *jus soli*. In this way, inclusive rules for birthright citizenship produce overlapping memberships. Yet several European states still cling to the idea that dual citizenship is an irregularity. The German case illustrates the absurd effects of attempts to adopt liberal rules for citizenship while constraining dual nationality. In Germany, there are currently three categories of dual citizens: descendants from parents of different nationalities, those born in Germany to long-term resident foreign parents and those who were granted permission to retain a previous nationality when naturalizing because renouncing it would have been impossible or unreasonably difficult. The first and third categories of citizens can keep their two citizenships indefinitely, while the second category of citizens have to choose a singular citizenship status between the age 18 and 23. Because of a retroactive application of the *jus soli* reform of 2000, there will soon be cases of young adults who have spent all their lives in Germany but who will be stripped of their German citizenship unless they return their second passport.

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While a regime of pure *jus sanguinis* is exclusionary in immigrant-receiving societies, it becomes over-inclusive in source countries of emigration. Seven of the 15 previous EU member states and all 12 countries that have joined since 2004 permit their emigrants to transfer their nationality by descent from generation to generation without any residence requirement in the country of origin. A number of states also offer extraterritorial naturalization to persons whom they consider as ethnic kin because their ancestors emigrated from that country or because their homeland was once part of the state territory. Individuals claiming their ancestors' citizenship in these ways are often

mainly interested in a European Union passport that gives them visa-free access to the United States and all EU-member states rather than in "returning" to a country of distant origin. A stakeholder criterion suggests, therefore, that *jus sanguinis* should not apply automatically beyond the first generation born abroad and that naturalization should generally require a prior period of residence in the country.

Naturalization

Naturalization is at the centre of current political debates, although citizenship acquisition by birth and abroad raises questions that are no less important. The background for these debates is a widespread perception, which is stronger in Europe than in the United States, that integration of newcomers is not working as it should. There are good reasons to be concerned about long-term unemployment, low educational achievements and segregated housing for groups of migrant origin. In Europe, immigrant integration is rightly seen as a public policy concern rather than as a problem that civil society can take care of without state support and interference.

Yet there is also a strange discrepancy between a *laissez-faire* regime of free movement for Union citizens, which has surged after the last two rounds of enlargement, and the heavy-handed control approach towards third-country nationals who migrate for similar motives and face similar social, economic, linguistic and cultural challenges of integration. A growing number of European countries introduce integration courses and tests as a condition for citizenship access, permanent residence and even family reunification in the host society. None of these conditions apply to EU citizens.

What purpose is served by such tests? Are they meant to encourage immigrants to acquire linguistic skills and general knowledge about the history and public institutions of their society of residence? Or is their goal to select those worthy of becoming citizens and keep out the rest? Current European governments differ in regarding naturalization as a step and tool in the integration process or as the end and ultimate reward for individual success in this process. These two goals are hard to reconcile. Raising the hurdles for access to denizenship and citizenship will exacerbate the problems of socio-economic or cultural integration if the groups that are excluded remain in the country in an insecure legal status. Forced mass return to countries of origin is not only morally indefensible but, for the time being, also politically unfeasible. Exclusion from citizenship contributes, therefore, to the very problems that harsher integration tests are meant to address.

The opposite policy of actively promoting naturalization does not rule out using tests as incentives for acquiring additional skills rather than as deterrents from applying. What is needed in this regard is not merely a fine-tuning of conditions for naturalization but a general change in public philosophies of citizenship. So far, all European countries regard naturalization as a legal procedure through which an individual attempts to improve her or his legal status while state authorities have to check that the applicant meets criteria determined by public interests in selecting who gets admitted to membership in the polity. The mismatch between the citizenry and permanent residents subjected to the laws suggests, however, that democracies also have a public interest in promoting the naturalization of immigrants in order to avoid a growing deficit of democratic legitimacy.

This consideration makes not only the currently popular integration tests problematic but also a host of other conditions for naturalization, including very common ones, such as proof of independent income and absence of any criminal record. In the 19th century, most European democracies excluded from the franchise adults who did not have enough income or property to pay taxes. Immigration countries may want to make sure that persons who are admitted for employment purposes do not end up on public welfare. But if such individuals meet the permanent residence conditions for naturalization, how can one justify denying them political representation on grounds of their lack of means of subsistence?

Similarly, most democracies deny voting rights to prison inmates. However, once they have served their sentence, former criminals must be readmitted to full citizenship. In many European states, immigrants are today denied naturalization forever when they have committed even minor offenses. The rationale behind this exclusion is that citizenship status protects immigrants from deportation. But if the crime they have committed is not severe enough to justify deportation before they are naturalized, how can it be severe enough to exclude them from becoming citizens? And how does retaining such people in a non-citizen resident status improve domestic security?

A principle of stakeholder inclusion is, therefore, incompatible with viewing citizenship as a special reward for individual achievements and with selecting those candidates whose contributions will yield the greatest public benefits. These principles had been overcome when full citizenship was gradually expanded to previously excluded domestic groups. There is no reason why they should still be regarded as legitimate today when applied to immigrants.

One objection to this line of reasoning is that there is nothing wrong with excluding immigrants from citizenship as long as they are offered an alternative status of denizenship that includes most of the rights of citizens. This argument fails for two reasons. First, there are only four countries (Chile, Malawi, New Zealand and Uruguay) that offer all long-term residents voting rights in national elections, and even in these cases there are various restrictions. So the democratic representation deficit persists in the absence of high naturalization rates. It is also not plausible to claim that granting denizens the national franchise in national elections is a matter of democratic justice. If they are entitled and encouraged to naturalize, then rejecting this offer amounts to much the same thing as not exercising their right to vote.

Denizenship is not equivalent with citizenship in a second respect. The former status depends on living in the territory and is lost with taking up residence elsewhere. An extraterritorial denizenship would be a contradiction in terms. Denizens may be able to retain, for a while, a right to return to their country of settlement but they can't pass on their status to a next generation born abroad. Contrary to the claims of several authors in the 1990s, the distinction between denizenship and citizenship is both empirically persistent and normatively important. Denizens are citizens of external countries who enjoy domestic rights derived from residence. They are not stakeholders in an indefinite

future of the domestic polity and lifelong members of its intergenerational people.

Denizenship is always only a supplement and never a full substitute for citizenship – neither for individual migrants, who would be stateless without an external citizenship, nor for the political community as a whole that could not generate joint commitments towards a long-term future if it consisted only of denizens.

Prospects for stakeholder citizenship

Stakeholder citizenship is not a utopian idea. It was already spelled out in the 1955 Nottebohm judgement of the International Court of Justice in which the court stated that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments." The same principle is in many ways reflected in current policies of both immigrant-receiving and emigrant-sending states as well as in evolving norms of international law. We find evidence in the growing number of countries tolerating dual citizenship at birth and through naturalization in the rapid proliferation of voting rights for expatriates and the more modest spread of the local franchise for third country residents and in the growing number of EU member states that have made birth in the territory a criterion for entitlement to citizenship.

Yet even in democratic states, this principle is still far from being universally respected. Resistance comes, on the one hand, from old notions of state sovereignty and self-determination and, on the other hand, from new fears about security threats and integration failure in immigrant-receiving countries.

Political theorists may argue that restricted access to citizenship for immigrants and their offspring creates a growing legitimacy deficit for democratic governments. This argument is, however, unlikely to impress policy-makers who are not accountable to foreign nationals excluded from the franchise through tough citizenship laws. The case for stakeholder access to citizenship must, therefore, be strengthened by other reasons that will resonate more strongly in the public arena.

In the United States and Canada, it is not difficult to find such reasons in their respective histories as nations built by immigrants. The appeal to national history is less likely to win broad popular support in European countries whose national identities are ancient and territorially rooted. In Europe, the case for liberal citizenship regimes must be made with a view towards the future rather than the past. Europe is not only an ageing continent that needs new immigration for demographic and economic reasons. It has also formed a unique supranational union of states with a common citizenship whose core is a right to free movement across state borders. EU citizenship is derived from member state nationality. Each country in the EU produces, therefore, Union citizens with a right to admission in all other states. This should be sufficient reason for states to coordinate their citizenship policies and adopt common standards. Of course, such pressure towards harmonization may result in more liberal or more restrictive legislation. But if current debates on citizenship reforms were moved to the European level, this could at least weaken the idea that citizenship is primarily a matter of national self-determination rather than of international cooperation.

On both sides of the Atlantic there are, therefore, at least good conditions for public debates about the principles that should guide citizenship policies. The main idea outlined in this article can thus also be defended in the political arena: citizenship should be offered to all those (and only those) who have a stake in the future of the political community.

Note

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