The Journal of Political Philosophy: Volume 17, Number 3, 2009, pp. 275–306

Citizenship Goes Public: The Institutional Design of Anational Citizenship

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FORCES and developments above and below the state, such as processes of globalisation, European integration, increasing demands for cultural diversity and devolution of power, have called into question the traditional nationality model of citizenship. In the 1990s, theorists embarked upon a search for new forms of citizenship to replace the old model of singular membership in a national community. Two alternative conceptions of citizenship have featured prominently in this search: postnational citizenship and transnational citizenship. According to the postnational model, the legal discourse on human rights has permeated national legal orders, thereby leading to an increasing intensification of legal pluralism and a new type of membership based on 'deterritorialised notions of persons' rights'. The codification and elaboration of human rights principles have thus led to the dilution of the 'natural dichotomy' between citizens and aliens and the decline of national citizenship.[1] Transnational citizenship, on the other hand, refers to the fact that international migration and the ensuing interactions between receiving and sending countries result in the creation of mobile societies beyond the borders of territorial states. Although these conceptions of citizenship reflect praiseworthy efforts to solve the problems inherent in national citizenship, they, nevertheless, leave many issues unresolved. Citizenship continues to be a national affair and the institutional framework of postnational citizenship remains unexplored.[2]

Yet such a framework is necessary, because citizenship as national membership has exclusionary effects which undermine the normative ideals of democratic participation and equality.[3] Liberal nationalism and contractarian moral theory do not regard this as problematic, because they have been premised on the assumption that national societies are self-sufficient and self-enclosed schemes of

[1]Jacobson 1996. Soysal 1994. Baubock 1994.

[2]This deficit has been pinpointed by Karst (2000, pp. 599–600) who has argued that 'if the proponents of postnational citizenship are to persuade US citizens to go along with their project, they will have to offer an institutional framework that serves the substantive values of citizenship . . . In short, what the proponents of postnational citizenship need to offer is law'.

[3]Dahl 1989. Young 1990. Baubock 1994. Kostakopoulou 1996; 1998b; 2001. Shaw 1997. Rubio-Marin 2000. Honig 2001. Benhabib 2004. Goodin 2007.

doi: 10.1111/j.1467-9760.2008.00311.x

social co-operation the membership of which is by and large confined to co-nationals. Accordingly, the exclusion of non-national residents from the rights and benefits of citizenship is seen as a necessary consequence of a community's process of self-definition. But this assumption is flawed, as it is based on an odd circularity, whereby aliens are by definition outside the community by virtue of a prior self-definition of the community which separates 'us' and 'them' and privileges 'us' over 'them'. In addition, it screens out the various lines of connections and ties of interdependence between 'us' and 'them'. If I am correct on this, then political exclusion and the transformation of democracy into an ethnarchy might not be necessary, albeit unfortunate, consequences of a community's right to democratic self-determination, but, instead, they may be contingent consequences of a contestable model of democracy which is rooted in the modern national-statist world and is, therefore, in need of correction in this millennium.

The discussion in this article is structured as follows. In section I, I argue that citizenship has been an oligarchic good and that this has given rise to a number of important externalities. Citizenship might be best conceived of as a network good with low excludability (section II). Although we tend to believe that being together and doing things together[4] presuppose either a prior cultural cum political homogeneity or the favourable reception of a national culture, I argue that domicile and equal participation in the social, economic and political spheres of the community may provide a better foundation for citizenship than the priority thesis underpinning liberal nationalism and contractarian moral theory (section III).[5] Section IV furnishes a model of anational citizenship, while in the final section I consider some objections to my argument.

I should mention, here, that the underlying premise of the subsequent discussion is not that everything we know about citizenship is wrong and that national citizenship is useless in its present context. Rather, my starting point is that if we are seriously concerned about the deficits of the nationality model of citizenship and wish to develop an inclusionary agenda that lives up to democratic and egalitarians ideals, and to create a democratic community that is reflective of and responsive to ethnic and cultural diversity, then we must consider seriously the possibility of going beyond the framework of nationality.[6]

1. CITIZENSHIP AS AN OLIGARCHIC GOOD

Citizenship has been an oligarchic good: membership of the territorial state has traditionally been confined to certain classes of people, namely, to nationals and

[4]The term is borrowed from Howard Becker (1986, pp. 11–24).

[5]The article focuses on internal inclusion and exclusion. Issues concerning the external manifestation of the bond between individuals and the state fall outside the scope of the discussion.

[6]My position differs from Benhabib's (2002; 2004, pp. 171–221) approach to incorporate citizenship claims into a universal human rights regime and from her argument about cosmopolitan federalism.

naturalised persons. While in theory electoral participation is governed by the universal principle of political equality, the historical trajectory of citizenship shows that in reality only particularist constituencies have been taken to constitute 'the demos'. True, bars to citizenship owing to class, race and gender differentials have been progressively removed, at least formally, as a result of the struggles of discriminated against groups. While the progressive expansion of the personal scope of citizenship has undoubtedly made citizenship less oligarchic,[7] it has not democratised citizenship fully.[8] Citizenship remains conditioned on nationality and the term 'citizen' is normally equated with 'national' and 'naturalised' persons. More importantly, as gatekeepers, states retain the sovereign prerogative to decide who may be naturalised in accordance with distinctive nationality traditions and official discourses about the behaviour, traits and attitudes of migrants.[9]

Citizenship thus remains a positional good that is reserved for a national oligarchy. For those who view nation-states as self-contained political units, encompassing distinctive and homogenous cultures, this is both natural and desirable. According to this view, diversity undermines democratic governance.[10] But for others, the conditioning of citizenship by nationality reveals the 'tragedy of citizenship', since the promise of equal democratic participation that citizenship entails is not matched by rules that give all the inhabitants, who are subject to laws, directives and political decisions, a stake in the process of making them.[11] It is the disjunction between citizenship as formal national membership and the normative ideals of democratic participation and inclusion that has led Dahl to argue that democracy requires inclusion: 'the demos must include all adult members of the association except transients and persons proved to be mentally defective'.[12] Although democracy requires political inclusion and residence tends to give rise to entitlements in contemporary states, exclusion on the ground of national origin remains a defining characteristic of modern citizenship.

Liberal democratic theory has traditionally taken for granted the existence of bounded national societies that are relatively unified and homogeneous. Homogeneity may take the form of either prepolitical commonalities, such as ethnonational traditions and beliefs (culturalism) or a civic community constituted by shared beliefs and mutual commitments (civic nationalism). It is thus assumed that democracy can only flourish within the national context and that democratic politics is politics in the vernacular.[13] Indeed, the paradigmatic

[7]Karst (1989, p. 3) has commented on 'citizenship's expanding circle of belonging'.
[8]Neuman 1996. Kostakopoulou 2001. Aleinikoff 2002. Benhabib 2002; 2004.
[9]Carens (1998) has put forward a convincing argument for the separation of the above elements.
[10]Mill 1972.
[11]Kostakopoulou 1996; 1998a; 1999; 2000; 2001. Rubio-Marin 2000. Honig 2001. Bosniak 2000a; 2000b. Benhabib 2004.
[12]Dahl 1989, p. 70.
[13]Kymlicka 1999.

literature on democracy is ground in the belief that: 'self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well; aliens are by definition outside the community'.[14] The existence of a given demos united by the commonalities of history, language and culture has been considered to be a sine qua non of democracy. Without the existence of a demos, defined as either a community of fate or a liberal contractual community of shared values, there can be no democracy.

Heterogeneity in interests, opinions and preferences within a polity does not only rest upon an assumed prior cultural-cum-political homogeneity, but the latter is also elevated into a condition of possibility for a flourishing democracy.[15] This is the paradox of the inherited understanding of democracy: the political system must be sufficiently complex, differentiated and disharmonious to require the pursuit and political management of conflicting interests, opinions, disputes and so on, yet sufficiently homogeneous and harmonious for democracy to take root and survive. Homogeneity can take various forms and consensus can be of varying degrees, ranging from a common understanding of the public good to shared political values or to a mere agreement on some procedural organising principles of society which form the common platform on which the conflicts of beliefs are fought out. In the latter sense, what is required is an overlapping consensus on 'constitutional essentials', that is, on the fundamentals of the institutional culture.[16] Where such agreement is lacking, the prospects of the governability of the system apparently diminish. In the consociational model of democracy, too, the internal cohesion and homogeneity of segments and general acceptance of the principle of government by elite cartels are vital to the functional stability of societies that are divided by deep and reinforcing cleavages across ideological, ethnic and religious divides.[17]

Although the above ideas echo the basic prerequisites of democracy, in reality they are historical articulations attached to our inherited understanding of democracy.[18] Accordingly, they reflect the institutional arrangements and historically situated practices that have sustained national democracy.[19] By examining the close link between ideals and historical context and institutional practices, we discern that the assumption that the national context is the

[14]*Cabell v Chavez-Salido*, 454 U.S. 432, 439–40 (1982).
[15]Kostakopoulou 2003.
[16]Rawls 1993.
[17]Lijphart 1975.
[18]Lipset 1960.
[19]The same applies to the belief that welfare states are predicated on some form of closure, since the system can only distribute benefits to its members if it insulates itself from external pressures (Walzer 1983). Because welfare systems have developed within nation-states and the principle of nationality was naturally grafted into them we tend to believe that there is a natural link between membership and nationality. But welfare benefits and nationality status are not perfectly correlated, and the fact that resident migrant workers have been drawn into the net of national welfare systems proves this.

necessary setting for democracy to work (the necessity theorem) has filtered out the possibility that the national context may actually be a hindrance to democratic ideals (the disability theorem) by precluding groups residing within, and subject to the jurisdiction of, a country from expressing their views and pursuing their interests in the political arena.

Polities are not clubs, that is, voluntary associations which people choose to join in order to enjoy the benefits of membership.[20] Rather, people find themselves enmeshed in citizenship bonds and institutional structures, and remain life-long citizens. For the vast majority of them, exit is a mere theoretical possibility. But even those who decide to opt for exit almost never cast off and acquire citizenships in the same way they might do with gym or golf membership. After all, one has a fairly good idea about what he/she is entitled to as a member of a golf club, but can never know in advance what to expect or whether he/she will be better off in a host state, even if he/she manages to gain admission. Nor is the presence of an exclusion mechanism, whereby the members' utility rates can be monitored and non-members can be barred, the main incentive for members to join a polity and to pay their dues and other fees.[21] Residents pay taxes and share the collective burden, irrespective of their citizenship status, and make contributions to the commonwealth even though they know their payoffs are invariably less than those citizens derive and can be limited for a variety of reasons at any time. A polity that prides itself on its democratic underpinnings, therefore, cannot exclude segments of its population from influencing or taking part in decision-making that affects them, thereby treating them as a subject class.[22] Disenfranchisement and exclusion from the political process seriously disadvantages an identifiable segment of the commonwealth by 'withholding the political power that would enable persons and groups to protect themselves in the legislative forum'.[23]

Unfortunately, the question 'who makes up the people', who are not only subject to a state's laws, but are also the source of their legitimacy, only recently has been put under normative scrutiny.[24] It has been assumed that non-citizen residents 'lack an interest in, and the power to effectually work for the welfare of the state.'[25] But this assumption legitimises pre-existing exclusions on the grounds of national, ethnic or racial origin; it does justify such exclusions. Non-national residents are de facto members of the polity by virtue of their work, multifarious contributions and their participation in a web of social interactions. Their

[20]On this, see Buchanan (1965) and Cornes and Sandler (1986).

[21]These are the distinguishing features of a club according to Cornes and Sandler (1986, p. 160).

[22]Walzer 1983. Carens 1987; 1989. Kostakopoulou 1996; 2001. Rubio-Marin 2000. The 'all affected principle' has escaped the 'domain of the governed' and has been applied to the global order. Held (2004) has argued for an equal opportunity of all those affected to influence a decision and Goodin (2007) for the enfranchisement of all possibly affected interests.

[23]Rosberg 1971, p. 1107.

[24]Compare Schumpeter (1942). For a critique, see Baubock (1994).

[25]Compare *Terrace v Thompson*, 263 U.S. 197 (1923).

commitment to the host country has been proven by their voluntary settlement and engagement in practices of socio-economic co-operation and, unavoidably, the future of the polity is inextricably linked with their own future and the future of their families. Accordingly, their interests as taxpayers, consumers, employees, parents, homeowners and so on are no different from the interests of national residents. To assume otherwise is to create the presumption that non-national residents are 'outsiders'. But this presumption stems from the intuitive belief that the national community resembles a club having a predefined membership, which, in turn, implies special obligations for members, including the obligation of sharing and cherishing the common culture, and that resident migrants possess qualities or characteristics which make them unsuitable for membership. Viewed from this perspective, proposals to accentuate the national character of citizenship or 'to make citizenship more valuable', by denying birthright citizenship to the children of undocumented migrant parents who are born in the country[26] or by introducing more restrictive provisions concerning naturalisation, seek to maintain the oligarchic character of citizenship and leave its specific ethnic centre intact.[27]

Citizenship theory and practice can no longer overlook the externalities that accompany the 'affinity' between demos and nation or ethnos.[28] Three types of externalities deserve special mention, here: normative, felt and expressed externalities. As regards the former, the failure to consult all the inhabitants in a polity irrespective of their nationality damages democracy and undermines the liberal principle of equal concern and respect.[29] Fair minded co-nationals view their own critical interests as 'inevitably thwarted when their community fails in its responsibilities of justice'.[30] If a society places value on equity considerations and on the liberal principle of fairness, which normally entails equal opportunities for all, then limiting the domain of equality emits powerful signals not only about how much society cares for different groups, but also about how much it values equality itself.

In addition to normative externalities, political exclusion gives rise to 'felt externalities'. Placing resident non-nationals, who have lived in the host society for a number of years, in a more or less permanent state of alienage downgrades their multifarious contributions, often results in creating a sense of powerlessness, impedes personal development and social advancement and perpetuates stereotypical views and subordination.[31] When this happens, human and social

[26]Schuck and Smith (1985) stated that the Fourteenth Amendment permitted Congress to legislate on this matter.

[27]Back et al. 2002.

[28]According to economic theory (Pigou 1920), externalities denote the effects of an economic agent's actions on another agent's welfare. According to Stigler (1975, p. 104), 'an external effect of an economic decision is an effect, whether beneficial or harmful, upon a person who was not a party to the decision'.

[29]Walzer 1983. Dahl 1989.

[30]Dworkin 1989, p. 504.

[31]Honneth 1995.

capital formation is hindered and, inevitably, society itself loses out. In addition, since institutionalised discrimination and experiences of non-belonging shape peoples' attitudes to citizenship, it is unlikely that excluded groups will develop a sense of deep attachment to the polity, if they feel that it is indifferent and unresponsive, notwithstanding their efforts and contributions. Moreover, political exclusion can give rise to expressed externalities; people are bound to demand a stake in society and may eventually turn into action in order to gain visibility and empowerment. The ensuing instability[32] can undermine both the credibility of the democratic process and the legitimacy of a specific policy output.

Critics may object, here, that the above mentioned externalities do not pose any serious problem for liberal democratic states in so far as they are temporary. If access to citizenship via naturalisation remains open and flexible, then political exclusion could be tolerated during the 'probationary period' of citizenship. Conversely, if alienage were to become a permanent or semi-permanent status, then liberal democratic principles would be violated. With this in mind, Baubock has advocated the 'egalitarian' strategy of making the transition to the higher status of citizenship an entitlement, thereby reducing the discretionary power of the authorities of the host state. According to Baubock, such a right to naturalisation would be available upon request.[33] In contrast to Baubock's optional naturalisation strategy, Rubio-Marin has defended the policy of granting automatic and unconditional national citizenship to resident migrants after a period of ten years.[34] Whereas both arguments are insightful, the proposed strategy of liberalising naturalisation laws, thereby seeking to reconcile nationalism with democratic norms, circumvents the full implications of the link between nationality and citizenship. More specifically, it overlooks the fact that naturalisation is not a neutral process: it involves various conditions and requirements, some of which can be both quite restrictive and costly. The recent reform of citizenship laws and the adoption of 'integration' requirements and tests in Europe and elsewhere following 9/11 attest this. More importantly, 'thin' naturalisation is premised on a superficial de-ethnicisation. This is not only due to the fact that complex migration rules ensure the entry of 'favoured' nationals, having the right qualifications, race, age and socio-economic background. It is also due to the fact that language and civic orientation courses and tests reveal the host communities' fears that societies will somehow disintegrate if newcomers and settlers do not speak the host language at home and in public and do not have knowledge of the society, its history and constitution. Such fears are appeased when aspiring members are seen to 'make the choice' to conform to the majority community's notion of national identity by taking linguistic and civic orientation tests, being fluent in the host language and informed about its institutions and collective history. Indeed, even if naturalisation laws were

[32]See Layton-Henry 1991.
[33]Baubock 1994, pp. 73–114.
[34]Rubio-Marin 2000.

reformed and the discretionary power of state authorities was reduced—a reform that seems highly unlikely in the present era, owing to the weight of its past and its symbolic significance, 'thin' naturalisation will continue to be rooted in and be configured by ethnicity, thereby making any claim to inclusivity either spurious or temporary. As I have argued elsewhere, it is impossible to divorce naturalisation from nationalisation and the gate to full membership can be shut at a moment's notice.[35] In this respect, a political risk associated with 'thin' naturalisation is that it may thicken over time. Politicians interested in re-election might be tempted to introduce stricter requirements thereby capitalising on popular fears about 'inassimilable aliens'. By so doing, they could generate interest in the re-ethnicisation of naturalisation and the 'survival' of national identity. Finally, Baubock and Rubio-Marin's arguments evade the question of why it would be permissible to suspend the application of normative principles for a ten or five year period, during which non-national residents are required to share the burdens of membership by paying taxes and national insurance contributions.

Second, it may be objected that the above mentioned externalities do not necessarily call for the transcendence of the nationality model of citizenship. After all, the costs of 'institutional change' may exceed the benefits of any progressive citizenship reform. But given the failure of national citizenship to honour the promises of equal membership and participation in the democratic process and the fact that in practice these externalities cannot somehow be ironed out by the participants themselves, the troubling question remains: what if nationalism and citizenship are uneasy bedfellows and their uneasy co-existence is neither an aberration nor a temporary inconvenience which will improve with time, but is, instead, a built-in feature of national citizenship? In what follows, I pursue this line of inquiry and argue that if we wish to correct the contradiction between formal membership and informal membership which results in long periods of residence and social participation without any effective voice in the governmental affairs,[36] we might need to shift the centre of gravity from nationalism to democratic principles and to make nationality weightless for citizenship eligibility and practice.

II. CITIZENSHIP AS A NETWORK GOOD

In light of the above mentioned externalities of citizenship qua national membership, citizenship might be better understood as a network good. Existing definitions of citizenship (such as 'citizenship as status', 'citizenship as rights', 'citizenship as practice' and 'citizenship as identity') embrace the idea that citizenship implies and flows from active connections, be they vertical, that is, between the individual and the state, or horizontal, that is, between the

[35]Kostakopoulou 2006.
[36]See Buchanan and Tullock 1962.

individual and the community (the nation) which endows him/her with identity, or both. Vertical and horizontal connections are mediated by intermediary bonds of citizenship in civic associations, civic forms of public service, social class and so on. The English Pluralist School, and to an extent Otto von Gierke's association theory, have painted a sophisticated picture of individuals as being situated within numerous social entities and associations.[37] And although one may not necessarily agree with the demotion of the state into just one association among others underpinning pluralism, it is, nevertheless, the case that individuals have multiple connections with a political community, as they are part of webs of interactions and reciprocal relations among other units, persons, and groups exhibiting mutual concern about the future of social co-operation. In addition, their identities are produced within such webs of social relationships. Citizens are thus members of, and participants in, associative networks which distribute the benefits and burdens of co-operation, rights and obligations. Moreover, individuals are no longer locked within a single, unified and finite network commanding unqualified allegiance. They have connections with other networks (i.e., the country or origin or the country of employment) and, owing to international law developments and to regional forms of co-operation, such as the European Union, new connecting lines have been developed between individuals and normative orders beyond the nation-state.[38] Citizens can thus shift subject positions and activate their link with a normative system (i.e., the human rights regime or the EU) when their link with another normative system is either blocked or fails to yield a positive outcome.

As a network good, citizenship exhibits complementary consumption: one person's consumption of the good does not prevent someone else from using it. The inclusion of women into the body of citizens, for instance, has not limited the consumption of citizenship by male citizens. Citizenship is capacious and the entry of additional participants, and of more connecting lines, often increases the benefits other users draw from the network good. This is due to several factors. First, whereas the exercise of civil and political rights does not prevent any other person from exercising these rights, the utility of social rights is raised for all participants owing to the increased resource base and the risk spreading function of extended participation. The possibility of a significant narrowing of 'the community of risk-sharers', owing to the ageing populations of Western European countries, has prompted a reconsideration of existing policy responses to migration. Admittedly, this view does not cohere with public perceptions; many native-born citizens tend to view citizenship as a rival good and prone to congestion. As a consequence, they demand some form of managing congestion by limiting access to it. But such claims are predicated on the incorrect assumptions that new participants draw from public funds much more than what

[37]On this, see Laski 1917.
[38]Kostakopoulou 1996; 2001; 2002.

they contribute to it through the payments of taxes of all sorts and of national insurance contributions, and that too many people would try to use or access the same service at the same time. Secondly, the utility of a network good, such as citizenship, itself increases as more participants join the network. The inclusion of more groups, and thus of voices, preferences and interests is bound to yield better and fairer decisions and more credible policies. Polyphony lessens 'bounded rationality' problems and enables parties to gain a better understanding of competing claims, to share information about issues they know and to find solutions to common problems. It also enhances the legitimacy of a given political order, since decisions taken on the basis of the highest possible input are bound to elicit the identification of the highest possible majority of individuals. The political inclusion of women or African Americans in the US in 1965 are cases in point. And although many male and white citizens worried at the time that the extension of suffrage would reduce the value of citizenship, making it more difficult and less enjoyable to engage in public deliberation or to reach political consensus, such views would be strongly condemned as being antithetical to good democratic governance today. True, some of the empirical literature in the US appears to suggest that ethnic divisions make the provision of public goods more difficult; if, for example, 'a white person perceives that a public good is enjoyed mostly by black citizens, he would oppose it precisely for that reason'.[39] However, besides the fact that it is highly debatable whether such a finding would apply to other countries which have not been polarised on race, basing policies on such perceptions (and prejudices) is at best problematic and at worst profoundly detrimental to constitutional principles. Finally, while it is often stated that the heterogeneity of migrants' preferences regarding public decision-making might result in fundamental changes in public policies or increase the political power of certain groups, the first and second phases of migration to Europe since World War II (i.e., 1945–73, 1973–1989) suggest that migrants' preferences are neither unified nor different from those of the settled population. Inclusionary processes can thus reveal, and gradually change, misguided assumptions about settled boundaries, the meaning of belonging and the character of political culture. And empirical evidence from Europe suggests that the political incorporation of resident non-nationals nurtures social cooperation and thwarts permanent divisions and conflicts, thereby performing a vital integrative function.[40]

While citizenship as a network good exhibits complementary consumption, its excludability varies. In the past, excludability was high as citizenship was the privilege of few wealthy white males. Restrictions based on ascriptive assumptions relating to race, gender and class which allegedly make certain groups unfit for the requirements of public life have been progressively removed, thereby making citizenship a good of decreasing excludability. However,

[39]Alesina et al. 1999, p. 11; see also Alesina and La Ferrara 2002.

[40]See, for example, Fennema and Tillie's (1999; 2001) work on political participation and political trust in Amsterdam.

important issues remain about not only how to make substantive citizenship more meaningful, but also how to make formal citizenship more inclusive. It is true, for instance, that denizens enjoy many of the civil and socio-economic rights of citizenship; they enjoy the rights of free expression and association, and can thus join political parties and trade unions and occupy positions within their internal hierarchy. They may also participate in alien assemblies and consultative councils. In Sweden (since 1975), Denmark (since 1980), the Netherlands (since 1985), Finland (since 1991), Belgium (since 2004), Ireland (since 1974), Luxembourg (since 2003), Estonia (since 1996), Hungary (since 1990), Lithuania (since 2004), Slovakia (since 2002), Slovenia (since 2002) and Norway (since 1983) local electoral rights have also been granted to resident non-nationals. Spain, Portugal and the UK also allow voting rights to citizens of certain countries. However, denizens are excluded from political rights, such as national suffrage, the right to hold public office, the right to serve on juries and public service employment. Equally true, in countries embracing a corporatist policy-making style, migrants have more opportunities to influence policy making through union organisations and migrant organisations.[41] But even in these countries corporatist channels do not guarantee inclusion and equal membership. Nor are non-national residents protected from retrogressive policy changes and shifts in membership entitlements. In the 1980s the Swedish government, for example, distanced itself from the 1970s Immigrant and Minority policy, which encouraged multiculturalism and a group oriented approach and adopted a more individualistic approach which undermined cultural rights. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act which restricted access to federally-funded public benefits for legally resident migrants in the US is yet another example.[42]

The foregoing discussion shows that citizenship's network morphology is very much embedded within power relations, and it would be a serious mistake to assume otherwise. Although individuals participate in a web of social relations and are affected by processes of collective decision-making, they can easily be excluded from formal political networks in various socio-political conjunctures. By turning off the switches connecting the networks, gates within the circuit can become shut, thereby leaving parts of the networks as the preserve of political elites. As Castells has noted, in another context, 'switches connecting the networks . . . are the privileged instruments of power'.[43] They are essentially nodes of concentration of economic and political power and can be used in order to exclude the input of certain groups and individuals.[44] In the light of the progressive shift of citizenship from high to lower excludability, an argument can

[41]Soininen 1999.
[42]Pub. L. No. 104–193, 110 Stat. 2105 (1996).
[43]Castells 1996, p. 471.
[44]Citizenship thus resembles a highly differentiated and polymorphic network. It contains multiple, overlapping and intersecting social networks of power, but it has the capacity to expand, incorporate new nodes and to integrate a multitude of potential connecting routes and intersections.

thus be made for lowering even further the threshold of excludability established by alienage and for extending full network access to all participants. This can be achieved by decentring the national frame of reference from its privileged position in citizenship theory and practice and by accentuating the public-good like nature of citizenship (see section III below).

The public quality of citizenship is not solely a measure of the existence of a government that ensures, through direct and indirect tax collection, that all citizens and residents share the collective burden and enforces payment for the benefits of membership. Rather, the publicness of citizenship is a function of the ideals of equal membership and civic participation it entails. As noted earlier, a political community that is ostensibly committed to those ideals must ensure that all the inhabitants, who are subject to its laws, directives and decisions, take part in decision-making and are recognised as full and equal members. And although a democratic community has a legitimate interest in limiting political participation to persons who are concerned about it and committed to its welfare, residence and participation in the web of socio-economic interactions for an indefinite period of time and contribution, be it monetary or otherwise, are good evidence of this sort of commitment. In this respect, artificial distinctions based on the political formalities of membership which result in widespread exclusion from political participation tend to corrode the democratic credentials of political cultures.[45]

If we are to do better than we have done, we must find ways of correcting the above mentioned externalities. We need to ensure that all domiciled individuals have equal access to citizenship, an equal opportunity to take part in 'the common weal' and to enjoy a modicum of state-provided welfare and stakeholder status. But in order to inject democratic norms into the network good of citizenship and to affirm its open and inclusive character, we need to devise principles and policies that prevent oligarchic citizenship.

III. CITIZENSHIP BASED ON DOMICILE

Domicile could well be an alternative premise for citizenship. Whereas national citizenship denotes formal membership of a national state to which a person owes allegiance,[46] domicile indicates the various legal connections and bonds of association that a person has with a political community and its legal system. Domicile could reflect either the special connection that one has with the country in which (s)he has his/her permanent home, or the connection one has with a country by virtue of his/her birth within its jurisdiction or of his/her association with a person on whom (s)he is dependent. As already noted, national citizenship

[45]By the end of the nineteenth century nearly one-half of the states and territories in the US had some experience of voting by aliens (Rosberg 1977).

[46]Nationality is defined as the status of belonging to a state for certain purposes of international law; see Weis (1979).

has traditionally overlooked the connections that non-national residents have with a juridicopolitical system, even though they are subject to its laws and as much a part of the public as birthright citizens. By putting emphasis on the national cum political nature of citizenship, it cannot capture the complexity of membership, which results in individuals taking on an identity within a community by virtue of the social facts of living, working and interacting there, and the endemic variegation of human interaction. The reductionist character of such an approach is attested to by the fact that non-national residents are often seen to lack 'an interest in the country or its institutions'.[47] Nationals and their descendants, on the other hand, remain citizens for life even when they may lose all connections with their state of origin, owing to long-term residence abroad.

Domicile attributes both relevance and weight to the connections that individuals have with a particular jurisdiction. Citizenship is thus converted into a 'shareware' (i.e., a network good), which is distributed to all the participants in a given network. Instead of being either liberal or communitarian, citizenship becomes connexive. Connexive citizenship also recognises that maintaining plural attachments is an expression of multiple identities and a reflection of the legitimate and enriching connections that individuals may have with two polities, thereby facilitating the acceptance of dual citizenship.[48] But what connections are deemed to be relevant and how may these be weighed? Before elaborating on this by articulating a typology of domiciles (section III.B below), I would like to state here that domicile is weaved together with three other, equally important, principles in an attempt to render nationality weightless for the purpose of citizenship acquisition[49]: i) the principle of ius soli; ii) the non-effect of marriage upon the acquisition or loss of citizenship; and iii) the principle of free will.

A. Founding Principles

i. Domicile

In private international law, domicile is distinguished from habitual and ordinary residences.[50] Ordinary residence reflects physical presence in a country: living 'in a place with some degree of continuity and apart from accidental or temporary

[47]See Justice Field's statement in *Chae Chan Ping v United States* (The Chinese Exclusion Case), 130 US 581, 595–596 (1989).

[48]It is true that the ideal of monopatride citizens has been the hallmark of the nationality model of citizenship. But international norms are changing, as attested by the 1997 European Convention on Nationality (Council of Europe, ETS 166, in force on 1 March 2000) and it is widely recognised in Europe and elsewhere that the ideal of a single nationality is no longer suited to contemporary globalised environments.

[49]Domicile is the dominant connecting factor in common law jurisdictions, whereas nationality is the personal connecting factor in civil jurisdictions. The notion of habitual residence emerged over the last 30 years as a compromise between the common law concept of domicile and the civil law notion of nationality in Conflict of Laws.

[50]I will draw on these definitions, but will also give creative meanings to domicile.

absences'.[51] This means that an individual can be resident in two countries at once, even though (s)he might have a principal residence.[52] Habitual residence, on the other hand, denotes one's voluntary settlement in a particular country 'as part of the regular order of one's life for the time being'.[53] Regular physical presence in a country in order to complete a university degree or perform an employment contract thus suffices for the establishment of habitual residence. And since the latter does not require an intention to reside permanently in the country,[54] regular absence from the territory does not deprive a residence of its habitual or usual character. This means that individuals can be habitually resident in more than one country at the same time.[55]

In contrast, at the heart of domicile lies the idea of a permanent home.[56] A domiciled individual person must intend to make a country the hub of his/her interests, irrespective of his/her motives that preceded settlement. Indeed, it is the intention to become an 'inhabitant' that has led judges and scholars to argue that test of residence for the purpose of acquiring a domicile is a qualitative rather than a quantitative one.[57] This means that, in addition to the mere fact of residence, an intention of permanent settlement is required. The combination of the factum of residence and the animus to reside permanently or indefinitely rules out short-term residents, travellers and persons, whose residence is associated with a completion of a special purpose or a project. A university professor, for example, who was born in France, migrated to the US, obtained domicile and citizenship by living and working there, and who spends three months every summer at the European University Institute in Florence would not be considered to be domiciled in Italy and thus eligible for citizenship there. He would remain a dual (French-US) citizen. Similarly, students from overseas, persons travelling abroad in order to receive medical treatment, posted workers and refugees do not acquire domicile, unless they decide to settle in the host country for an indefinite period.[58] A refugee, for instance, who decides to remain in the host country even though he can return home, could establish domicile. Posted workers may also decide to establish their permanent home abroad, even though their initial residence was 'involuntary'. Given that individual circumstances frequently change, institutions, such as citizenship, must be flexible enough to accommodate such changes. For this reason, under anational citizenship, domicile would be perfectly compatible with residence or habitual residence in another country,

[51]See Colier 1994, p. 59.
[52]*Plummer v IRC* [1988] I WLR 292. But in *IR. C. v Lysaght* it was held that a person, who lived in Ireland but spent about a week in each month in England living in hotels when on business there, had his ordinary residence in both places; [1928] A.C. 234 H. L.
[53]R *V Barnet London Borough Council ex p. Shah* [1983] 2 AC 309 at 344.
[54]*Cruse v Chittum* [1974] 2 All ER 940.
[55]*Ikimi v Ikimi* [2001] EWCA Civ 873, [2001] 2 FCR 385.
[56]*Whicker v Hume* (1858) 7 HLC 124, p. 16.
[57]*Ramsay v Liverpool Royal Infirmary* [1930] AC 588 at 595, 598.
[58]*Brown v Brown* [1982] 3 F.L.R. 212 C.A.

thereby accommodating the needs of mobile individuals, who either live in one country and work in another, or spend certain months in the home country and the remaining months of the year in another country.[59]

I should make it clear, here, that the notion of a permanent home underpinning domicile does not imply that an individual must live in a country until his/her death. Animus manendi (the intention to reside in a country indefinitely) cannot be made a life-long affair, for people are not inherently sedentary and their circumstances frequently change. Many dream of overseas paradises and/or retirement in sunny places or in their states of origin. Notwithstanding such dreams, domicile is acquired by being an inhabitant of a country, that is, by taking up residence with the intention to remain there for an unlimited period of time. And it is this element that furnishes sufficiently strong connections with a community, and a concern for and an engagement with its affairs. To an extent, the subjective dimension of domicile resembles the intentions of parties in a marriage. Marriage is 'a union for life', but this does not mean it cannot be dissolved. What is important is that the partners genuinely believe their marriage is potentially indefinite in duration and, therefore, its dissolution does not feature as a relevant consideration. Similarly, an intention to reside indefinitely in a place will suffice for acquiring domicile and, therefore, citizenship.

Critics may observe here that, unlike the fact of residence, the subjective intention to reside indefinitely in a country (animus manendi) is difficult to ascertain. But this is not necessarily true. There exist a number of 'indicators' of such intention, such as long-standing and uninterrupted residence in a polity, family ties and the existence of a matrimonial home, social ties, acquisition of property, a professional career, schooling, participation in local politics, the purchase of a burial ground, membership in associations, churches and clubs. Uninterrupted residence, and the numerous connections associated with it, thus creates a presumption of an intention to remain in a polity for an indefinite period which is difficult to rebut.[60] It is true that unforeseen circumstances change the lives of people, but misfortunes affect both newcomers and autochthones citizens. The death of a parent, for example, may prompt someone to abandon his/her country of domicile and return to the country of origin in order to take care of the family estate. Similarly, the death of a companion may lead a national to abandon his/her domicile of origin and to acquire a new domicile in another country where (s)he can enjoy the warmth and security that close relatives or friends can provide.

[59]Consider, for example, Mr X, a dual citizen, who was born in Italy and obtained domicile by virtue of his birth, according to my schema. Mr X immigrated to the UK when he was 27 years old, lived and worked in the UK for decades and during his retirement spends five months of the year in Greece, three months in London and four months in Italy. Mr X's habitual residence in Greece would neither undermine nor affect the special connections he has with the Italian and British polities owing to his birth and socialisation in the former and the permanent home he established in the latter.

[60]Law Commission Working Paper No 88 (1985) para 5.15.

Critics might also object that one does not become a citizen by simply inhabiting a place.[61] But, as the preceding discussion has shown, the relevant and important factor for citizenship acquisition is not place per se, but the connections and bonds of association that one establishes by living and participating in the life and work of the community. Citizenship law and theory have traditionally disregarded these connections. By presuming that non-national residents are by definition outside the bounds of the community, lack allegiance to the state and have no interest in its welfare, little credence has been given to the idea that political communities very rarely arise through people having feelings for one another or holding the same, or similar, beliefs and values. Rather a community emerges through individuals being in mutual relations with one another and through their engagement in reflexive forms of community co-operation.[62]

ii. The Territorial Principle (Ius Soli)

This principle prescribes that all children born within the dominion of a state become citizens at the time of their birth. Patrilinear or matrilinear connections are not relevant for the automatic acquisition of citizenship at birth. Citizenship is based on subjection to the territorial jurisdiction of a state at the time of birth. It may be recalled, here, that Francisco de Vitoria championed the adoption of ius soli as an international standard and, in discussing the legality of the Spanish conquests of Peru and Mexico, he proposed the conferral of citizenship on Indian children on the basis of 'the rule of the law of nations, that he is to be called and is a citizen who is born within the state'.[63]

Despite its medieval origins and ascriptive nature,[64] territorial birthright citizenship has had, and continues to have, considerable appeal. Generally speaking, ius soli is a more flexible, inclusive and easily administered form of citizenship acquisition than ius sanguinis. Ius sanguinis, that is, the acquisition of citizenship by descent, has been associated with 'thick' notions of the nation highlighting common blood descent or strong cultural and linguistic commonalities. Accordingly, citizenship laws based on ius sanguinis are internally exclusive and externally overinclusive, since, by conferring citizenship automatically to the children of emigrants born abroad, they result in creating nominal citizens who are totally disengaged with a polity in which they may never take up residence. And while a polity's adherence to the principles of ius

[61]Miller 1995; 1998. Schnapper 1997.

[62]Honneth 1998.

[63]It is cited in Ruth Donner, The Regulation of Nationality in International Law (1983, p. 37). See also the US Supreme Court's decision in *United States v. Wong Kim Ark* which stated that the children born to Chinese migrants were US citizens; 169 US 649 (1898). However, the Court stated that this principle did not apply to American Indians who were 'standing in a peculiar relation to the National Government, unknown to the common law'. Citizenship was finally conferred on all Native Americans born in the United States in 1924 by the Indian Citizenship Act.

[64]Both Carens (1987) and Shachar (2003) have commented on the global inequalities that citizenship laws may sustain.

soli or ius sanguinis is often seen to reflect distinctive conceptions of nationhood, reservations have been raised about the usefulness of this distinction, since it underscores the common ground shared by these two conceptions.[65] In addition, it sidesteps the fact that in most states the principle of descent is complemented by the territorial principle.

According to the model of anational citizenship, birth in the territory of a country would culminate in the grant of a domicile of birth and thus of citizenship. Domicile of birth is a construction, an inference that the law would make and its rationale lies in the fact that, irrespective of their parents' nationality or membership status, children are born within a pre-existing 'web of ties' that profoundly shapes their identities and lives. Domicile of birth thus reflects their formal connection with a juridicopolitical system and its rules as well as their pragmatic connection with a society within which they grow up. For the vast majority of them, the place of their birth will remain their permanent home until their death, regardless of the membership status of their parents. Territorial birthright citizenship reflects this. It ensures intergenerational continuity[66] as well as equality and inclusiveness, by preventing the formation of different citizenship classes and anomalies in relation to the status of second generation migrants. It also guards against statelessness—a function that is explicitly entailed by the 1997 European Convention on Nationality, which states that member states should include in their laws a provision for the acquisition of nationality by children born on their territory who do not acquire another nationality by birth.

For certain people the place of one's birth may not be the place where one has spent much time at all beyond infancy. The children of posted workers would fall within this category. But this does not impact upon the principle of automatic access to citizenship at birth. Nor does it imply that domicile of birth may not be consistent with the premise of domicile which is underpinned by the notion of permanent home. For, as mentioned earlier, domicile of birth is a legal construct which affirms that every newborn child is a citizen and has a stake in the country of his/her birth. One can hardly find another, more egalitarian approach for attributing citizenship and a better operational legal standard for the vast majority of the population of a country. And although critics may raise concerns about the imposition of citizenship at birth and its compatibility with liberal autonomy, it is, nevertheless, the case that any form of acquisition of citizenship at birth by operation of law would be an imposition. What really matters, in my opinion, is that the child has the choice of retaining or casting off his/her domicile of birth by voluntarily choosing another domicile at the age of majority.

[65]Xenos 1996. Brubaker's (1992, pp. 14–15) typology between a state-centred and inclusive nationhood in France and an exclusive and restrictive conception of nationhood in Germany, for example, did not highlight sufficiently the descent-based notion of citizenship institutionalised by the post-revolutionary French Civil Code of 1804. In addition, citizenship reform in both countries in the 1990s has called into question Brubaker's thesis.

[66]Brubaker 1992.

Another objection to ius soli is that it is an ascriptive rule, a remnant of feudalism which cannot easily be reconciled with the consensual underpinnings of liberalism. As Schuck and Smith have put it, 'in a polity whose chief organising principle was and is the liberal, individualistic idea of consent, mere birth within a nation's border seems to be an anomalous, inadequate measure of expression of an individual's consent to its rule and a decidedly crude indicator of the nation's consent to the individual's admission to political membership'.[67] While it is undoubtedly the case that ius soli is historically linked with the feudal doctrine of perpetual allegiance to a sovereign Lord and the disintegration of feudalism brought upon its demise and the re-emergence of ius sanguinis, one needs to weigh the implications of ius soli and of its rivals. After all, consent is not the only principle that is indispensable to liberalism,[68] and if 'consensual liberalism' is not balanced by other normative principles and human rights norms, it is bound to yield exclusionary results. The proposal to exclude the children of undocumented migrants from US citizenship, thereby penalising them for circumstances that are beyond their control, serves as a reminder of the risks entailed by unprincipled consensual liberalism.

iii. Independent Domicile for Married Partners

While this principle epitomises the principles of equality and liberal autonomy in our era, until the first quarter of the 20th century citizenship was a status of dependency for women. Upon marriage, they were divested of their citizenship, and, in the eyes of the law, 'though loyal at heart, they became alien enemies by their marriage'.[69] Section 3 of the US 1907 Act stated that 'any American woman who marries a foreigner shall take the nationality of her husband'. In *Mackenzie v Hare* the constitutionality of section 3 was upheld on the basis that 'it is of public concern to merge the identity of husband and wife and give dominance to the husband'.[70] It was not until 1922 that marriage was pronounced to have no effect on the nationality of the spouse, unless she made a formal renunciation of her citizenship.[71] In Britain, the common law doctrine that marriage had no effect on the nationality of the spouses was reversed by the Aliens Act of 1844 which proclaimed the unity of the nationality of spouses. Accordingly, s 10 of the 1870 Naturalisation Act stated that 'married women shall be deemed to be a subject of the State of which her husband is for the time being a subject'. This provision survived until the formal recognition of sex equality by the 1948 British Nationality Act.

International law embraced the principle of sex equality in matters of nationality in 1932, while the principle of the unity of the family from the point

[67]Schuck and Smith 1985, pp. 2–3.
[68]Martin 1985.
[69]Congressional Record, 67th Congress, Second Session (1922), p. 9941.
[70](1915) 239 US 297.
[71]See section 3 of the Cable Act (1922).

of view of nationality was losing its privileged status.[72] The 1957 Convention on the Nationality of Married Women (in force on 11 August, 1958) recognised the principle of independent citizenship for spouses. The principle has also been enshrined in the 1967 Declaration on the Elimination of Discrimination against Women (Article 5) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which states that 'state parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband' (Article 9(1)). The 1997 European Convention on Nationality reiterates this (Article 4(d)). In line with international law, anational citizenship would maintain the principle of independent citizenship for spouses. Spouses would thus retain their original citizenship, which could, then, be combined with citizenship of the state of their domicile, thereby enabling them to enjoy their multiple connections.

iv. The Principle of Free Will

Citizenship based on domicile puts emphasis on the bonds of association that individuals establish as members of a society. As such, it is consonant with human mobility and peoples' right to choose their civic and political home and, indirectly, the rules of the association which govern them. Such decisions almost never take place in a vacuum. External constraints and a myriad of crucial or lesser pressures set the perimeters within which decisions about migration take place. But irrespective of the motives of individuals or other contingencies, the decision of a person to leave his/her state of origin, to settle elsewhere and to become a full member of that community should be fully respected by the home and host states. Respect is manifested by the acceptance of dual citizenship, the recognition of multiple identities and by ensuring that lives and future prospects are not frustrated by restrictive rules that reflect the whims and prejudices of transient majorities.

It is certainly the case that within the setting of the nation-state, people have been presumed to be rooted in a national homeland which is taken to be the supreme locus of identification. Accordingly, citizenship is a life-long affair (semel civis semper civis) and remains unaffected by the actual loss of all connections with 'one's nation-state', unless, of course, the individual concerned manifests his intention to acquire another citizenship. But even in the latter case, a wish to acquire another citizenship may not be sufficient in bringing about the forfeiture of the original citizenship. In certain states, conditions and restrictions have been attached to the forfeiture of citizenship, such as a prior authorisation from Home Affairs authorities.

[72]See Nationality of Married Women (Danzig) Case, Danzig High Court, November 30, 1932, 6 AD (1931–1932) Case No. 130.

B. Templates of Domicile

By drawing on, and weaving together, the earlier mentioned four principles underpinning anational citizenship, we could envision three types of domicile as the basis for citizenship acquisition: (i) domicile of birth (Db), that is, the domicile that a person acquires at birth; (ii) domicile of choice (Dc), that is, the domicile that a person of full age may voluntarily acquire by residing in country other than that of his/her origin; and (iii) domicile of association (Da), that is, a domicile that one acquires by being legally dependent. Before elaborating on this typology, I should note, here, that although an individual can combine any two types of domicile and thus citizenship (Db and Dc, Db and Da and on the age of majority Db and Dc), it would be impossible to possess more than one domicile of the same type simultaneously. Evidently, a person cannot have two domiciles of birth. Similarly, a person would not be able to have two domiciles of choice, since it would be impossible for somebody to have two operative domiciles, signalling bonds of equal intensity and dense and lasting connections with several countries, simultaneously. But a person could combine his/her domiciles and dual citizenship with ordinary or habitual residence in another country, thereby enjoying variable and multiple modes of belonging. The earlier mentioned example of the university professor who spends his summers in Florence is a case in point. His habitual residence in Italy cannot be considered to be an unacceptable gradation of membership culminating in illegitimate exclusions from the perspective of democratic theory.

In addition, while the combination of different domiciles is acceptable, the abandonment of all domiciles would not be possible under my model, since it would result in statelessness. This is due to the fact that no one can be without a domicile, that is, totally disentangled from a social and juridicopolitical network which regulates his/her legal relationships. As mentioned earlier, domicile is deemed to be the connecting factor between an individual and a particular country (or countries) which will continue to exist until a new and different domicile usurps its place.

i. Domicile of Birth

Domicile of birth is the domicile that a person acquires at birth. Domicile of birth is ascribed by law: all those born (including the children of undocumented migrants) within a state's territorial jurisdiction would acquire citizenship at the date of his/her birth (ius soli).[73] This does not mean that territorial birthright citizenship is an unchanging status, for it could change following the adoption of a child and voluntary renunciation. Perhaps, the most

[73]Gerard-Rene de Groot's (2005) study of nationality legislation in the European Union and the European Economic Area has concluded that none of the countries now applies a strict ius soli rule for the acquisition of nationality. Ireland amended Section 6 which provided that every person born there is entitled to be an Irish citizen in 2005. It now requires that a parent fulfils residency requirements.

distinguishing characteristic of domicile of birth is that it is presumed to be tenacious: it can co-exist with a domicile of choice and, more importantly, can re-assert itself as the actual domicile of a person in the absence of any other domicile—for example, when a later acquired domicile is lost or renounced.[74] This rule would guard against statelessness. Another possibility in such a case would be to make release from a domicile of choice conditional upon acquiring another domicile of choice within a certain period of time. However, this might not be consonant with the principle of free will, particularly if an individual wishes to renounce his/her citizenship in protest for the aggressive foreign policy or human rights record of a country, without acquiring a new domicile. A revival of a domicile of birth, in the absence of any other domicile, might thus be a better policy option.

ii. Domicile of Choice

Domicile of choice is the domicile that a person acquires by being an inhabitant of a country for an indefinite period of time. As noted earlier, domicile of choice requires the combined presence of two distinct, albeit related, elements: factum, that is, the taking up of residence in a particular country as an inhabitant and animus, that is, a freely formed intention to reside there permanently or indefinitely. If one intends to reside for a limited period or a specific purpose, then domicile cannot be established. A fugitive from justice, for example, who seeks refuge abroad and intends to remain there until the statutory time limitations for his offence have expired cannot acquire a domicile of choice, since the animus is missing.

Unlike the domicile of birth, a domicile of choice can be easily shaken off. In the same way that its acquisition requires the combination of factum and animus, its forfeiture would require that both elements must be brought to an end. A change of residence must be accompanied by the termination of an intention to reside in the country indefinitely. This may be due to settlement elsewhere. In this case, the acquisition of a new domicile of choice would be contemporaneous to the loss of the previous one. But if an emigrant continues to retain active links with the country of emigration by running his/her business, maintaining his/her property, renewing his/her passport and so on, it is reasonable to suppose that his/her intention to reside there for an unlimited period of time has not withered away. In this case, his/her domicile of choice will continue to exist, unless of course (s)he rebuts this presumption by showing the termination of his/her intention to reside. This could be done by acquiring a new domicile of choice or by renouncing the old one. In the latter case, a person would retain his/her domicile of birth as the actual domicile. Whereas the domicile of birth is granted automatically, acquisition of a

[74]In conflict of laws, it is generally recognised that domicile of origin cannot easily be shaken off; see *Udny v Udny* 1869 1 L.R.Sc and Div. 441 H.L. and Briggs (2002, p. 24).

domicile of choice would depend on the application of the domiciliary.[75] In assessing the application, the relevant authorities could thus confirm the existence of factum and animus, but their decisions would also be subject to judicial review. Whereas the nationality model of citizenship conditions political membership upon the fulfilment of a number of conditions, such as language tests, knowledge of the history of the country and its constitution, participation in citizenship ceremonies, the taking of citizenship oaths, the renunciation of 'foreign allegiances' and good character conditions, in addition to residency requirements that are often needlessly long, the new pathway would entail two requirements only: domicile and the absence of serious criminal convictions suggesting that the applicant represents an actual and sufficiently serious threat to the host community. In this way, naturalisation would be replaced with a system of civic registration, thereby affirming the right of all domiciled persons to take part in the life of the polity as citizens and to have a full and equal share of its burdens as well as resources.[76]

iii. Domicile of Association

This is the domicile that a dependent person acquires by virtue of her/his association with a person on whom (s)he is legally dependent. Domicile of association is a derived domicile, that is, it is activated by virtue of the personal link between legally dependent and independent persons. Children would thus acquire a domicile of association, if the domicile of the parents is different from their domicile of birth and the parents wish to pass on their close connections with a country to their children. The domicile of association is thus justified on the basis of the importance that people attribute to their cultural identity and the network of connections with a country, be they actual or dormant. If the parents have different domiciles they could decide which domicile they wish to transmit to the child. This could be either a domicile of birth or a domicile of choice. A child under the age of 16 will thus be endowed with a domicile of association which will supplement (or supplant, if the parents wish so) his/her domicile of birth.

When the age of independence is reached, then either the domicile of association is lost by operation of law, and the domicile of birth, if different, takes its place in addition to any domicile of choice that is immediately acquired, or the domicile of association is presumed to continue to exist as a 'deemed' domicile of choice, unless a new domicile of choice is acquired. Countries whose citizenship traditions favour the ius soli principle could embrace the former option, while countries favouring the ius sanguinis principle could opt for the latter option. At the age of 16 a child would make a declaration as to whether (s)he wishes to retain his/her domicile of association as his/her deemed domicile of choice or whether (s)he wishes to acquire

[75]A domiciliary may decline the citizenship option, preferring, instead, to live in a country as a non-citizen resident. This decision must be respected and in so far as the citizenship option remains open, the democratic norm of inclusion would not be violated.

[76]For a detailed discussion of this model, see Kostakopoulou (2006).

a new domicile of choice. Similarly, a child should be allowed to renounce one of the domiciles upon attaining the age of majority. If a domicile of association has been cast off and a new domicile has not been acquired, the domicile of birth could be revived and assert itself as the person's actual domicile.

Adopted children would be treated in the same way. If the parents have different domiciles, they would decide which domicile the child should take. If the parents are not living together, or one of them is dead, then the child could take the domicile of the person with whom (s)he lives, since his/her home would signal the country with which (s)he is most closely connected. This domicile would be retained until the age of majority. If a mother changes her domicile while the child is a minor, but leaves him/her behind to be looked after by relatives, then her new domicile will not pass on to him/her as a domicile of association. The rule that a minor's domicile of association is the domicile of the parent with whom she lives, therefore, helps address the various issues arising from the break up of families and parents living in different countries and having different domiciles. The same principle would apply to persons suffering from severe mental disorders and thus lack the legal capacity to form the requisite intention for acquiring citizenship.

IV. OBJECTIONS

Although throughout the discussion I have sought to anticipate possible objections to my argument, three main criticisms may be raised, which need to be considered in more detail, as follows.

> Objection 1: As an institution and practice, citizenship can only flourish if people identify with each other and have 'a sense of belonging together'. The model of anational citizenship is premised on weak ties, thereby undermining stability and social cohesion. After all, civic commitments do not develop in a cultural vacuum. Citizenship's social cum cultural underpinnings provide the foundation for interpersonal trust, social cohesion and political integration. For this reason, a polity legitimately confines citizenship to those, who are likely to take its welfare and values to heart, and resident migrants, as expected, lack the loyalty required in order to be full members of a political community after a relatively short period of residence.

The nationality model of citizenship is premised on the idea that national belonging gives rise to natural allegiance to the political community and its institutions. As the US Supreme Court stated in *Foley v Connelie*: 'The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others . . . The individual, at that point, belongs to the polity and is entitled to participate in the process of democratic decision-making'.[77] Owing to the presumed link between alienage and disloyalty, non-national residents are

[77]435 US 291, 295 (1978). The Foley Court upheld the constitutionality of a state statute which reserved the post of state trooper for American citizens. For a critical assessment, see Walter (1979).

often deemed to be potential threats to national security and/or the requirements of public policy. In addition, their presumed lack of commitment to the polity raises questions about their citizenship capacity.

Both assumptions, however, are not as unproblematic as they first appear to be. The main problem with making national origin the foundation of loyalty is that it is both overinclusive and underinclusive. It is overinclusive, because it is based on generalisations and stereotypical views of people as a group, thereby overlooking that non-national residents often develop loyalties that are as strong as those of citizens. In fact, as Rosberg has observed, 'many aliens will have the characteristics that the state associates with membership in a polity, and by the same token many citizens will not'.[78] If security concerns exist, these can be ameliorated by scrutinising the personal conduct of individuals and punishing criminal conduct in the same way that citizens' criminal conduct is punished, rather than by excluding non-nationals as a class from political participation in democratic decision-making. For such exclusion is more likely to reflect an intention to discriminate on the grounds of race, ethnic or national origin. The association of nativism with loyalty is also underinclusive, since it sidesteps the fact that both ethnic and naturalised citizens can act in ways that subvert national security and public order. The ideological clashes of the 20th century and both right and left wing political extremism are pertinent reminders.

Equally problematic is the second assumption, namely, that resident migrants are legitimately excluded from full membership, since they cannot develop an appreciation of, and commitment to, a country's institutions, values and traditions after the short period of domicile. The five to ten year residency requirement stipulated by naturalisation laws allegedly furthers social cohesion by giving non-national residents the opportunity to learn and to familiarise themselves with the host society's system, culture and traditions. Similarly, other naturalisation requirements, such as language tests, self-sufficiency tests, knowledge of the history and the constitution, allegiance oaths and so on, result in selecting out the deserving candidates and ensuring that prospective citizens accept the community's values and traditions as their own. If citizenship is seen as a national project, then the above naturalisation requirements make sense. After all, the goal of any naturalisation policy has, traditionally, been the 'nationalisation' of applicants; that is, aliens have to 'become [like] nationals'. Conversely, if emphasis is put on democratic participation and citizenship is conceived of as a network good, then many naturalisation requirements are open to question.[79] For all those who have chosen to take part in the life of a community (the objective element of domicile) and intend to reside there permanently (the subjective element of domicile) have made a formal and solemn

[78]Rosberg 1977, p. 328.
[79]Kostakopoulou 2006.

commitment to the country and its institutions, and these are the crucial and relevant qualities for citizenship capacity.

Objection 2: The foregoing discussion is insufficiently attuned to the importance of national culture in politics.

Critics may argue that my general argument underestimates the importance of national cultures and identities. After all, individuals are embedded in national cultures and their well-being, however this might be conceived of, is tied up with the flourishing of these cultures. Given the importance of cultural membership for either enhancing individual freedom or autonomy,[80] or fostering relations of trust and social solidarity,[81] or satisfying the human quest for secure belonging and mutual attachment[82] or identity recognition,[83] promoting 'integration in a societal culture centred on a common language and social institutions' is a legitimate goal of the state.[84] This line of criticism underpins liberal nationalist perspectives or, what Kymlicka calls, forms of 'liberal culturalism'.[85] Owing to space limitations, I shall not examine all liberal culturalist accounts here. Instead, I will respond to this objection by focusing on two points that underpin both the general instrumental defence of nationality and specific justifications of nationality.

First, it seems to me that liberal nationalist perspectives exhibit a circular reasoning whereby the explanandum is always defined, understood in relation to and sustained by the explanans. Liberal nationalist scholars' point of departure is that nationhood has symbolic and political weight, which is probably the by-product of the ideological strength of the national-statist paradigm, and this premise runs throughout their argumentation. In other words, they presuppose what they seek to explain, namely, the priority, primacy and significance of nationhood. For instance, according to liberal nationalists, the value of national culture lies in the instrumental value of cultural membership for either making various options available and meaningful to us, thereby instantiating norms of freedom or autonomy,[86] or generating feelings of belonging and fostering mutual attachments,[87] or promoting relations of social solidarity and mutual trust which is a presuppositional framework for redistribution.[88] All this makes perfect sense if one takes the nation-state paradigm as the starting point, and believes that 'liberal democracy works best within national political units' and that 'nations provide the most valuable cultural context'. But if one searches for a convincing explanation for all the above, then it is not clear: a) why national qua cultural

[80]Margalit and Raz 1990. Kymlicka 1995.
[81]Miller 1995.
[82]Tamir 1993.
[83]Taylor 1994.
[84]Kymlicka 2001, pp. 25–6.
[85]Kymlicka 2001, pp. 39–48.
[86]Kymlicka 1995.
[87]Tamir 1993.
[88]Miller 1995.

membership should have a monopoly in realising these values and goals. Liberal nationalists could object here that they do not believe that only national qua cultural belonging can promote the above mentioned liberal values and goals (a1). Rather, they believe that national culture provides the best or the most effective context for securing all the above (a2). By arguing either a1 or both a1 and a2, however, liberal nationalists would have to concede that a shared national culture is not the key explanatory variable; b) why the realisation of these liberal values and goals requires institutionalised cultural membership as opposed to social membership and participation in reflexive practices of social co-operation among co-venturers which include, but are not limited to, co-nationals; and c) even if we accept, for a moment, the liberal nationalist connection between cultural membership and the achievement of liberal goals, scholars have not adequately demonstrated why cultural membership must necessarily take the form of national membership. Scholars simply assume that the nation provides the most valuable cultural context and by so doing often rely on 'a culture-concept that best suits their political theory'.[89] Kymlicka himself does not conceal the presuppositions of his argument, since he argues that liberal goals, such as freedom or autonomy and equality are achieved in a liberalised societal culture or nation. According to Kymlicka, societal culture is valuable because it constitutes the context that makes choices meaningful to us. However, Kymlicka provides no explanation as to why the national context should offer individuals the most meaningful life options, and why it should be privileged over other contexts, sources and narratives in all contexts and at all times.

The circular reasoning underpinning liberal nationalism can also be seen in the strategy of 'making a virtue out of the necessity of nations'.[90] The latter is grounded in the belief that nations are necessary because they exist, have been successful and resilient. Most human beings regard themselves as members of the nation and are thus willing to make the sacrifices commanded by their national identification. It is immaterial whether national identities have real or shallow foundations; they may have been built on myths and symbolisms, invented traditions, or even false beliefs abut the origins and history of a people and its culture. What is important, however, is that beliefs are powerful enough to resonate among the population and to foster a sense of mutual attachment. But the strategy of making a virtue out of the necessity of nations entails a circular reasoning whereby the fact and the reasons for it somehow converge:

F 1: Nations exist since most people in the world regard themselves as members of a nation and feel that membership is an essential part of their identity.
F 2: National identities provide the affective resources, the fellow-feeling that inspires people's loyalty and prompts them to make the sacrifices that distributive justice requires.

[89]Scott 2003, p. 97.
[90]Tamir 1993.

The necessity of the nations is virtuous since:

V 1: Co-nationals are bound together in a community of transcendence and permanence that carries the dead, the living and those yet to be born forward into a limitless future, thereby turning chance into destiny.

V 2: Nations provide the intense experiences of solidarity and nurture the relations of mutual trust required for the realisation of social justice and democratic politics.

Evidently, foundation (F1 and F2) and justification (V1 and V2) converge, since V1 and V2 that purport to justify F1 and F2 are themselves part of F1 and F2. In principle what appears to justify nationality, is the outcome of and is sustained by nationality in practice. National culture is both the starting and the reference point, and the privileged status of nationhood is not in itself in question.

Second, liberal nationalist accounts are characterised by an idealised vision of 'societal culture' or 'shared national culture', which is oddly ahistorical. These accounts tend to sidestep the historical process of nation-building (along with its injustices and racist exclusions), the politics of national identity, the resilient power of 'whiteness' and the transformation of national cultures and identities owing to the struggle, contestations and sacrifices made by racial and ethnic minority groups. By so doing, they give a partial and flawed account of national communities and their cultures by assuming that they are internally uniform, separate, bounded, coherent and relatively static. This may correspond to the ideological demands of our era, but it overlooks the fact that empirical reality is more complex, contradictory and messy. Indeed, liberal nationalism cannot operate within a decontextualised historical vacuum, for the 'success' of liberal nationalist projects in most countries depended on the earlier deployment of repressive measures and the coercive power of the state against minority communities. As Gerstle has argued, liberal nationalist concerns about liberty and equality in 1930–1960 in the USA were made possible by the repressive measures of the 1910s and the 1920s against Germans, new migrants, Asians and political radicals.[91]

Objection 3. Citizenship based on domicile holds on to territoriality. But mobile individuals often reside in multiple locations, may not wish to establish single and long-term domiciles and may maintain close links with a society without being physically present. In this respect, the nationality/citizenship link needs to be more radically ruptured, and this can only be done by articulating conceptions of deterritorialised citizenship.

It is certainly the case that globalising processes and the pace of technological change, the perforation of national borders by flows of all sorts and institutional arrangements below, above and beyond the states have challenged central organising principles of our political life. The emergence of new collective actors working within, across and above state lines has exposed the legal fiction of a

[91]Gerstle 1997.

political universe consisting of states only.[92] In addition, this process has shown that claims made by national governments should not always be conflated with the needs or demands of communities, and that the allegiances of citizens are no longer confined within national borders. However, these developments have not rendered the state obsolete, and its alleged loss of sovereignty to regional and global institutions and markets has been accompanied by the occupation of new fields and the extension of its powers of control and repression. Similarly, the pluralisation of identities may have undermined the monopoly commanded by overarching national identities, but it has neither effaced the institutional reality of the state nor undermined the relevance of citizenship. State citizenship co-exists with other forms of citizenship, such as European Union citizenship, and is perfectly compatible with cosmopolitan sensibilities, such as a concerted effort to protect the environment, to criticise human rights abuses in the world and to boost the prospects of democracy on a global scale. But apart from the improbability of transplanting state structures to the global level and institutionalising a form of cosmopolitan, universal citizenship which would make all rights and duties portable throughout the world, there is another reason as to why conceptions of deterritorialised citizenship based on either universal personhood or membership in global communities defined in ascriptive terms (e.g. gender, disability, sexual orientation, religion and so on) cannot supplant state citizenship. Statal institutional arrangements are not only crucial to enforcing the rights and obligations associated with citizenship, but they are also the arenas within which redistributive politics, comprehensive rights protection, elections, citizen exchanges and other forms of political participation can be realised.

While the deterritorialisation of rights does not undermine the model of anational citizenship, would the phenomenon of new diasporas call into question the emphasis I put on domicile? Given the possibility of combining domiciles and thus citizenship, I do not see why this should be the case. But would the model also apply to 'rootless' business elites, artists and intellectuals, who may have neither an interest nor an intention to settle within a particular country?[93] In response, the reader may recall that a crucial feature of habitual residence is that a person makes a particular country part of the regular order of his/her life for the time being, that is, for instance, for the duration of an employment contract or a postgraduate degree. Residence associated with a completion of a special purpose or project within a certain period of time does not furnish sufficiently strong connections with a community, and quite often mobile individuals move from country to country before they become enmeshed into its network, but it is

[92]Melluci 1996.

[93]The issue of migration policy falls outside the scope of this discussion. But I should mention, here, that my arguments are compatible with both liberal migration policies, entailing soft migration controls, and more porous borders. For a discussion on the latter, see Kostakopoulou (1998b, p. 896; 2001; 2004).

perfectly compatible with (plural) domicile and thus citizenship. Accordingly, 'rootless' individuals would be able to combine multiple subject and citizen positions: a domicile of birth and a domicile of choice would co-exist with residence status in a certain state, thereby activating the general protection of laws, civil rights, perhaps local and regional electoral rights, and certain social rights in the country of employment, but not the full panoply of rights enjoyed by citizens. But habitual residence could lead to domicile, if an individual decides to settle in the country for an indefinite period.

V. CONCLUSION

Believing that ideas matter a lot, since they do not only make the constraints of existing paradigms more visible, but also activate processes of institutional change, the foregoing discussion presented an outline of anational citizenship. The need for an alternative citizenship design flows from two simple observations. First, democratic decision-making and the flourishing of a political community require the involvement of all the community and not simply of a segment of it. In the same way that the democratic process cannot exclude the uninterested voter, the non-knowledgeable citizen and the dissident—and any attempt to exclude them would damage the integrity of democracy—it cannot exclude non-national domiciled residents. Second, the nationality model of citizenship has thus far failed to provide a fair and satisfactory solution to the unequal membership and political exclusion of non-national residents, and it is very doubtful whether any reformulation of it can do so in the future. As noted above, there exists a long list of externalities which can be addressed by a model of citizenship based on domicile.

Many will see my model as representing a challenge to the ideational foundations of liberal democracy, since it calls for the disentanglement of the state from the nation and for the demise of traditional ways of thinking about community and membership. But these are neither unthinkable nor impossible steps, and institutional change is something that can be achieved incrementally. One may recall, for instance, that in the 15th century the state broke away from the divine, and religion was replaced with the profoundly anti-medieval concept of the nation. But the principles of the old order did not simply disappear: many survived and were grafted onto the new institutions, traditions and practices. This is not surprising since the invention of any new world view is, necessarily, the by-product of a reflexive understanding of the past and of a selection of those elements which will carry the past into the future, without at the same time making the future a mirror image of the past. By rethinking citizenship and rewriting some of the crucial elements of the nationality model of citizenship, the preceding discussion has sought to furnish an alternative, and, in my opinion, a better, model of citizenship. The potential benefits from such a bold experiment in public policy should not be underestimated. After all, few matters deserve

higher priority than institutional changes that deepen and extend democracy, and concern for improving the quality of citizenship points unmistakably towards more democracy.[94]

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[94]I would like to thank Nick Barber, Philip Cole, Cathryn Costello, Lynn Dobson, Iseult Honohan, Kim Rubenstein, Jonathan Seglow, Jo Shaw and the referees of this journal for comments and suggestions.

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EDITOR'S NOTE: This article was originally published online on 25 March 2008. It is part of a larger project on 'The Future Governance of Citizenship', the full fruits of which appear in a book of that title from CUP (2008). The analysis and the international aspects of anational citizenship are more fully developed there.