Nationality, Citizenship and Ethno-Cultural Membership. Preferential Admission Policies of EU Countries

Costica Dumbrava

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

Florence, December 2012

European University Institute
Department of Political and Social Sciences

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Examining Board

Prof. Rainer Bauböck (European University Institute)
Prof. Ruth Rubio Marín (European University Institute)
Prof. Joseph Carens (University of Toronto)
Prof. David Owen (University of Southampton)

Dumbrava, Costica (2012), Nationality, Citizenship and Ethno-cultural Membership: Preferential admission policies of EU Countries
European University Institute DOI: 10.2870/72944

Abstract

In this thesis, I analyse justifications for preferential admission to citizenship based upon ethno-cultural grounds. My point of departure is the puzzling observation that, in matters of membership, states not only differentiate between citizens and foreigners, but also between different categories of foreigners, as well as between different categories of citizens. In the first part of this work, I explore possible justifications for boundaries of membership. I look into arguments of justice, nationalism, liberalism and democracy in order to identify principles for demarcating boundaries and for assessing various claims of inclusion/exclusion. In the second part, I address more specific questions related to the regulation of admission to citizenship. For this purpose, I examine a set of concrete rules of citizenship presently enforced by 27 EU countries.

My proposal is to overcome the boundary problem by shifting the focus from the constitution of the boundary towards policies of boundary making. I affirm the principle of general openness of membership that is intended to provide normative corrections to the actual structure of boundaries. Against the common view that perceives citizenship as a fruit that is soft on the inside and hard on the outside, I argue that citizenship should be seen as soft on the inside and even softer on the outside. In order to respond to different claims of admission, I suggest breaking up the unitary concept of citizenship and distinguishing between legal, political, and identity memberships. This proposal is not meant to weaken or devaluate citizenship, but to reaffirm its essentially political value. By rejecting ideas of automatic and inherited citizenship and by insisting upon democratic recognition and commitment to political membership, I aim at recasting admission to citizenship as a transformative process through which individuals not merely receive membership but become members in a political community.

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Acknowledgements

I would like to express my sincere gratitude to my supervisor, Rainer Bauböck, for his help and encouragement. His professional excellence and personal spark have been a true inspiration for my endeavours.

I am grateful to my professors at the European University Institute who directed me and enthused me. I should mention here the names of Peter Mair, Christine Chwaszcza and Michael Keating.

I am indebted to my colleagues from the EUDO Observatory on Citizenship for their guidance and support. I am particularly thankful to Jo Shaw, Gerard-René de Groot, and Maarten Vink. I am grateful to Iseult Honohan for her valuable comments on several parts of this dissertation.

I would like to thank the jury members: Ruth Rubio Marín, Joseph Carens and David Owen for their willing reviews and helpful comments.

I am obliged to all my colleagues and friends who helped me and encouraged me throughout these long years of searching. I am especially thankful to Ciarán J. Burke, Tomasz Gabor, Oleg Bernaz, Marija Bartl, Roxana Bărbulescu, Andrei Stavilă, and Henio Hoyo. I should not forget my football teammates from Squadra Fantastica and Loko-motiv Fiesole.

I would like to acknowledge the financial support of the European University Institute. I am thankful to the whole EUI community that stood by me and my fellow Romanian researchers in difficult times.

I am greatly indebted to my wife for her professional, moral and emotional support and for her great patience at all times.

I dedicate this dissertation to Giulia.

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1. INTRODUCTION

Rules of citizenship distinguish between members and non-members of particular political communities. While recognising certain individuals as citizens, these rules turn all others into foreigners. However, rules of citizenship do not only differentiate between citizens and non-citizens; they also differentiate between different categories of citizens and foreigners. In particular circumstances, certain categories of citizens are deemed worthier than others to uphold the status of citizenship. By virtue of certain personal characteristics or of some special relationship with the state, certain foreigners are held 'dearer', worthier, or more ready for citizenship than others. In these cases, the division is not between citizens and non-citizens, but rather between citizens and lesser citizens, and between foreigners and lesser foreigners.

Citizenship does not only help to define membership anew; it also works as a device for the recognition or confirmation of membership for people who are allegedly in a special relationship with the community of members. In this respect, those persons who are *like citizens* in some essential ways are recognised and accepted as citizens. This sort of preferential admission can take different forms. A socialist state may recognize as citizens only those individuals who are commitment to socialism. A theocratic state may reserve membership only to individuals of its particular faith. A state that defines itself essentially as an ethno-national community may ask new members to prove that they share or celebrate some fundamental ethno-cultural features. In this thesis, I focus on one particular type of preferential admission to citizenship, namely preferential admission based on ethno-cultural grounds. The key question is: what are the justifications for ethno-cultural preferences in admission to citizenship?

I address the issue of preferential admission to citizenship in the light of both general normative principles and specific legal regulations. First, I look into general normative principles that inform our thinking regarding citizenship and admission. Second, I discuss several rules of admission that are likely to amount to ethno-cultural preferentialism. My intention is to bring the theoretical and the empirical in conversation with one another. After a discussion of theoretical arguments concerning admission to citizenship, I develop a comparative study of citizenship rules in 27 member states of the European Union (EU27). By assessing concrete rules of citizenship against general theoretical principles, I arrive at several normative standards that sketch an applied theory of admission to citizenship.

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In this chapter, I first discuss the concept of citizenship by exposing its inclusionary-exclusionary dialectic. Then, I introduce the issue of ethno-cultural preferentialism in admission to citizenship.

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1.1 Normative Citizenship

Although citizenship has been at the centre of political philosophy at its beginnings, it has played a rather marginal role in modern political theory. Modern political theorists have been mainly preoccupied with good government, justification of authority, and social justice. In this context, citizenship as membership in the state or political body has been taken for granted. As Daniel Philpott notes, "Kant has told us that the state ought to be governed by the law of right, Rawls, by justice as fairness. But in which state ought people to live? Rousseau has told us that the general will of the people should rule. But which people? Who is included? These questions, liberal theory does not answer" (1995: 376).

In the last few decades, however, citizenship has been placed back "at the heart of political theory" (Hampshire, 2009: 84). This comeback was mainly triggered by the communitarian critique of liberal citizenship that shifted the focus of theory from justice and rights to issues of community and membership (Kymlicka and Norman, 1994; Kymlicka, 2002). The general idea behind this shift was that liberal democracies require more than fair procedures and abstract principles of justice. In order to function, liberal democratic institutions require proper citizens, individuals who share certain community-oriented qualities, attitudes, and identities (Kymlicka and Norman, 2000).

1.1.1 "Inward-Looking" Citizenship

The contemporary success of the concept of citizenship is revealed by the fact that many theoretical and practical issues affecting contemporary liberal democracies are framed in the language of citizenship.[1] In the words of Richard Bellamy, "whatever the problem – be it the decline in voting, increasing numbers of teenage pregnancies, or climate change – someone has canvassed the revitalization of citizenship as part of the solution" (2008a: 1). David Miller demonstrates how the idea of citizenship has served both the political right and left. The conservatives located in it an opportunity to press for social responsibility and public virtues, while the left have used citizenship as a replacement for the idea of class struggle (Miller, 2000: 42).

The increased popularity of citizenship did not, however, bring conceptual accuracy. On the contrary, claimed by competing ideologies and disputed by different scholarly disciplines, citizenship has emerged as a highly complex and widely contested concept.

[1] Notice the long list of adjectives that can accompany the term citizenship: anational, cosmopolitan, civic, corporate, democratic, ecological, economic, global, liberal, multicultural, national, neo-liberal, post-national, republican, social, trans-national, virtuous, workplace, et cetera.

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Analytically, we can identify three main components of the concept of citizenship: (1) a formal status that links individuals to a state and is attached to a bundle of rights and duties, (2) various forms of participation in the political community, and (3) a collective identity that is shared by individuals holding the same status (Carens, 2000: 162-175). This manifold conceptual framework invites different questions. Linda Bosniak distinguishes between three major questions of citizenship: (a) a question about the substance of citizenship – what specific combination of rights and obligations should citizenship entail, (b) a question about the domain of citizenship – where should citizenship take place, and (c) a question about the subjects of citizenship – who is or who should become a citizen (2006: 13). Although each of these questions has received academic suitors from the whole spectre of social sciences, it is most common that political theorists focus on the questions of substance and domain of citizenship.[2]

Ideologically, we can distinguish between two major traditions that shape our thinking about citizenship: (i) a "Greek" tradition that puts emphasis on the political-participatory dimension of citizenship, and (ii) a "Roman" tradition that is primarily concerned with the legal-protective dimension. The two traditions are often seen as premises for two paradigmatic models of citizenship, namely liberal, and republican (Pocock, 1995). Whereas the liberal model is centred on rights and status (Kymlicka, 2001b: 250), the republican model focuses on self-rule and democratic participation.[3]

A liberal is more likely to be an instrumental democrat, meaning that he or she may cherish democracy mainly because of its presumed outcomes, such as freedom and welfare (Miller, 2009a: 205). But many liberals concede that democratic participation is important. John Stuart Mill, for example, favoured a liberal model of democracy in which active participation offer people the power to be "self-*protecting*... and self-*dependent,* relying on what they themselves can do" (2008: 245). At the communal level, participation generates the "unselfish

[2] In the last few decades, we have seen various attempts to reinterpret the concept of citizenship. I list here three types of proposals: (1) proposals to rebalance the rights and duties of citizenship (e.g. communitarian v neoliberal citizenship); (2) proposals to reconcile the rights of individuals with the rights of groups (e.g. multicultural citizenship); and (3) proposals to redraw the line between the private and the public (e.g. feminist citizenship).

[3] I should make one remark regarding the link between liberalism and republicanism on the one hand, and democracy, on the other hand. Neither liberalism nor republicanism is free from anti-democratic impulses. Classic republicans, from Aristotle to Kant and Madison, were fond of the idea of mixed constitution through which democratic forces were prudently kept in check by aristocratic and monarchic elements. The link between liberalism and democracy is also not a necessary one. From a liberal utilitarian perspective, for example, democracy can be abandoned if "the greatest happiness of the greatest number" can be achieved through other means. However, the great success of the idea and ideology of democracy in the contemporary world makes it very difficult to advance liberal or republican accounts that are plainly anti-democratic.

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sentiment of identification with the public," which distinguishes the community from what would otherwise be "a flock of sheep innocently nibbling the grass side by side" (Mill, 2008: 255).[4]

Participation and citizens' virtue are at the heart of the republican tradition of citizenship. According to Aristotle, the human nature realizes its full potential only in the polis by sharing in the "civic life of ruling and being ruled in turn" (1995: 117 [1283b]). However, not all republicans are keen on popular participation. Philip Pettit, for example, rejects the "populist" version of democracy (1997: 179-180) and advocates a republicanism centred around the idea of freedom as non-domination. Many contemporary republicans work "towards a distinctive theory of citizenship organized around the ideal of non-domination" (Laborde and Maynor, 2008: 2). Democracy, in this view, is not about participation but mainly about " the possibility of its effective contestation" (Laborde, 2010: 61; also Pettit, 1997: 63, 185). The attempts to relax the demands of participation and public engagement is a concession made in order to accommodate the modern condition of people who, more often than not, "would rather cultivate their garden than the public good" (Bellamy, 2008b: 162). This accommodation does not, however, collapse republicanism into liberalism. Although most republicans accept the liberal idea of individual rights, they tend to remain "sceptical of accounts of rights that totally abstract from the political conditions of their formulation, realization, and protection" (Laborde and Maynor, 2008: 16).

Despite ideological divergences, the liberal and the republican models of citizenship share the same perspective with regard to the core question of citizenship. They are "inward-looking" (Bosniak, 2006: 2-5). Their normative concerns gravitate around internal issues of citizenship – such as the range of inclusion, the grammar of equality, and the depth of social bonding. For the most part, these theories fail to address the boundary dimension of citizenship, namely the fact that citizenship constitutes not only entitlements and activities, but also an essential boundary between people. The inward-looking view of citizenship categorises the state/political community as "the total universe of analytical focus and normative concern, and citizenship then has to do with the nature of the relationships prevailing among already assumed members" (Bosniak, 2006: 2).

[4] According to J. S. Mill, participation is "the food for feeling and action… let a person have nothing to do for his country, and he will not care for it" (Mill, 2008 [1861]: 240).

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1.1.2 Citizenship and Exclusion

The wide contemporary appeal of citizenship can be at least partly explained by the myth of citizenship as the "Good Thing" (Miller, 2000: 43). Citizenship seems to bring together all the great things theorists and citizens cherish: liberty, welfare, equality, inclusion, virtue et cetera. In a classic formulation, modern citizenship is portrayed as a story of gradual thickening and continual inclusion (Marshall, 1965), "a tale of progressive incorporation" (Bosniak, 2006: 29). Driven by an inherent ideal of equality, modern citizenship expands to include ever more rights (civil, political, social) and to embrace ever more people (the poor, women, ethno-racial minorities). In this story, freedom is nothing but "equivalent to citizenship" (Pettit, 1997: vii).

Major political theorists have disregarded the boundary dimension of citizenship. John Rawls, for example, masterminded a theory of justice for a society understood as "a complete and closed social system…[where] entry into it is only by birth and exit from it is only by death" (1993: 40-41). Another key contemporary theorist, Philip Pettit, notes that "in substantive ways all responsible adults should have access to the same freedom as non-domination" and that "citizenship must be a universally available status" (2000: 33). However, Pettit pays no particular attention to questions of admission.[5] It is the merit of recent scholarship to seriously question the legitimacy of membership and boundaries. Boundaries of citizenship imply a great deal of coercion and exclusion. This alone begs justification because "like the constitution of government, the constitution of the people raises a claim of legitimacy" (Nasström, 2007: 649).

Despite its much-celebrated inclusionary force, modern citizenship has sharp edges. As Rogers Brubaker famously put it, citizenship is a "powerful instrument of social closure" (1992a: x). Citizenship is "internally inclusive" and "externally exclusive" (Brubaker, 1992a: 21), as it divides the world into members and non-members, including the former and excluding the latter. Modern citizenship can also be described as "hard on the outside and soft on the inside" (Bosniak, 2000: 99). This "Janus-faced" quality of citizenship seems in tension with general liberal-democratic principles, such as moral equality, democratic inclusion and freedom of movement (Cole, 2000; Benhabib, 2004; Bosniak, 2006). According to Seyla Benhabib, the tension between universal human rights and particular national identities lies at the heart of the concept of democratic legitimacy. The problem is that "modern democracies act in the name of universal principles which are then circumscribed within a particular civic

[5] When confronted with the issue of resident non-citizens, Pettit mentions that they "perhaps do not wish to become proper citizens" (2000: 33).

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community" (Benhabib, 2004: 44). While claims of equality and universality characterize democratic citizenship at its core, inequality and exclusion are thought to reign at its edges.

1.1.3 Immigration and Citizenship

Political theorists have recently taken questions about the boundaries of citizenship seriously. In this novel literature on membership, two types of boundaries seem to have attracted most interest, namely the territorial boundary and the political boundary. The relationship between these two boundaries is complex and often ambiguous. The question of territorial admission, however, seems to have monopolized the discussion about membership.

One of the pioneers of the membership literature, Michael Walzer, framed the problem of membership primarily in terms of territorial admission. Walzer defended a fundamental right of "communities of character" to control immigration. When confronted with the question of admission to citizenship, Walzer made a strong case for the quasi-automatic inclusion of long-term residents. In his view, "every resident is a citizen too or at least a potential citizen" (Walzer, 2008: 166). In the light of the obligation to include residents, a permission of entry into territory should be seen as a decision of admission to citizenship. Despite the obvious link between immigration and citizenship, in practical and normative terms, I think that the assumption of automatic congruence between membership in the polity and residence is problematic. In my view, the process of becoming a citizen implies some sort of mutual recognition that cannot be obtained through a mere unilateral permission to immigrate. I take that the two types of membership are normatively important but counsel that they should be analysed within different frameworks.

In the literature, arguments often migrate from one boundary to another without sufficient normative adjustment. This is common, for example, in discussions about distributive justice. For example, critics of the Rawlsian view of national society as "a closed system" (Rawls, 1999b: 7), have proposed several principles for extending the scope of justice without clearly distinguishing between territorial and political membership. Joseph Carens has criticized Rawls' neglect of the "contingency of nationality." He has famously called birthright citizenship "the modern equivalent of feudal privilege" (Carens, 1987: 252). As for solutions, Carens put forward an argument for open borders. But why borders? Why not a principle of open nationality/ citizenship? Carens' shift from citizenship to borders seems to imply that a world of open borders is normatively acceptable even if states maintain feudal-like rules of admission to citizenship. More recently, Christopher Wellman (2008) defended the prima

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facie right of states to exclude immigrants based on the liberal idea of freedom of association. However, Wellman's argument seems more suited for the issue of admission to citizenship than for the question of admission to territory. This is because "the mere presence of immigrants within the state's borders cannot be a serious problem with regard to the associational rights of individual citizens" (Fine, 2010: 343).

I think that the recent obsession with immigration does not do justice to the idea of citizenship. I argue that the normative discussion of citizenship (admission) should not be treated as an appendix of an argument about immigration. I do not deny that admission to territory and access to citizenship are practically and theoretically connected. My point is that admission to citizenship raises distinct normative issues that deserve more than a footnote in an argument about the ethics of immigration. In this work, I place the issue of admission to citizenship in the centre of the discussion about boundaries.

1.1.4 'Citizenhood' and Boundary

Theorizing about the new interest in citizenship, Will Kymlicka and Wayne Norman argued that the question of "who is citizen" should concern legislators rather than theorists. In their view, "we should expect a theory of the good citizen to be relatively independent of the legal question of what is to be a citizen" (1994: 353). Restricting the reach of theory only to the "good citizen", however, amounts to taking for granted political boundaries and the processes of boundary making. If we consider the great deal of coercion involved in these processes, then leaving the question of "legal" membership outside normative scrutiny seems misguided. As clearly borne out by recent debates on citizenship and immigration, issues of formal membership trigger important queries about the nature, aims and legitimate expression of political community.

I take that Kymlicka & Norman's distinction between citizenship-as-legal-status and citizenship-as-a-desirable-activity remains important not because it delimitates the legal (non-normative) domain from the normative domain but because it describes two distinct normative sites of membership. I agree that there are important differences between the concepts of "legal citizen" and "good citizen". But I believe that this acknowledgement should be the starting point of the normative inquiry rather than the reason to endorse one concept and reject the other.

My intention, then, is to give normative standing to the boundary of citizenship by dissociating it from the substance of citizenship. In this direction, I distinguish between two

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normative sites of membership: (1) the inside of citizenship – which I tentatively call '*citizenhood*,' and (2) the boundary of citizenship. On the one hand, the inside of citizenship refers to the "citizenship of citizens." It includes legal rules, social-cultural norms and socio-political expectations necessary or desirable for the functioning of democratic citizenship. This normative site has been the traditional focus of the literature on normative citizenship. The boundary of citizenship, on the other hand, refers to rules, conditions and expectations related to access to citizenship.

The distinction between the inside and the boundary of citizenship does not overlap with the more standard distinctions between legal/political or liberal/republican citizenship. The two sites of membership are not exactly dimensions of citizenship in the sense of analytical or ideological layers of a complex concept. Rather, they describe fields of normative concern in which such dimensions can be defined and understood. It is one of the aims of this thesis to demonstrate why the two sets of rules and expectations pertaining to the two sites of membership should not coincide.

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1.2 Ethno-Cultural Citizenship

The debate about membership in political theory is centred upon the issues of borders and immigration. Even when citizenship takes central stage, the quarrel is mainly about the political incorporation of resident aliens. What is puzzling, however, is the fact that claims of admission to citizenship do not always rely upon residence or political membership. For example, many countries offer privileged access to membership to various categories of non-residents, while maintaining restricted access for permanent residents.[6]

Although theorizing about citizenship may be a captivating business, I believe that political theory should engage with earthly problems. In this thesis, I propose to analyse concrete rules of citizenship. I approach these rules from a particular perspective, namely from one concerned with the ethnic-cultural instrumentalisation of citizenship. I proffer two reasons for focusing on this aspect. First, it would seem that claims of admission to citizenship derived from nationalistic grounds are deeply problematic, and that they beg normative scrutiny. Secondly, I view this type of nationalist instrumentalisation as a powerful test case for any theory of democratic citizenship that takes the issues of the boundary of citizenship seriously.

In this section, I introduce the debates concerned with the link between nationalism and citizenship. I also explain the methodology behind the idea of ethno-cultural preferentialism.

1.2.1 Citizenship De-Nationalised

There are two broad tendencies that are intertwined in the theory and practice of modern citizenship. On the one hand, there is a nationalising tendency that renders citizenship an instrument of nation building. On the other hand, there is a universalising tendency that brings citizenship into line with liberal principles of non-discrimination and cultural neutrality.

The privileged inclusion and the explicit exclusion of certain individuals or groups on grounds of nationality, ethnicity or race have been quite common in the citizenship policies of the past. As part of a broader design of creating national states, sorting out people by assigning them to their "own" national state was considered legitimate, although such matching often implied population transfer, collective deprivation or imposition of citizenship. Membership of the nation-state was equivalent to belonging to the nation (Heijs, 1995: 9); therefore access to citizenship for people who did not "belong" was strongly discouraged.

[6] In Chapters 4-6, I identify and discuss instances of nationalist instrumentalisation of admission to citizenship.

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In a pioneering work on comparative citizenship, Rogers Brubaker argued that "politics of citizenship vis-à-vis immigrants has been informed by distinctive national self-understandings, deeply rooted in political and cultural geography and powerfully reinforced at particular historical conjunctures" (1990: 379). Against this view, Christian Joppke argued that liberal principles and human rights norms have put brakes on particularistic and nationalistic drives of modern states and that the nineteenth century-style paradigm, according to which citizenship policies serve to reproduce "internally homogenous yet externally sharply bounded collectivities", have been largely abandoned (2005a: 48). According to Joppke, contemporary rules of membership are individualistic and do not classify persons according to explicit ascriptive traits. The gradual universalization of citizenship is expressed by the "tendency toward removing cultural assimilation as a prerequisite for naturalization" (Joppke, 2010: 46).

The modern concept of citizenship as an overlap between legal status, rights and ethno-cultural identity would seem to be fading away. A series of developments that account for such a divorce have led theorists to affirm various models of post-national citizenship. It is argued that most of the elements traditionally associated with the status of national citizenship have become available outside or independent of the nation-state. This holds true for rights, participation and identity. The powerful discourse of human rights and several successful regional legal regimes push states to recognise a series of important rights that are no longer grounded in citizenship status, but rather in personhood (Soysal, 1994). Increased global mobility and communication have led to the formation of transnational networks of participation that define and affirm global or sectorial political interests (Folk, 1993). Inevitably, these transnational political and social processes have contributed to the changing of individual identities and solidarities.

Despite their interesting evidence and bold assertions, postnationalists do not always pay sufficient attention to the political character of citizenship. First, postnational rights are, in fact, granted and implemented by national states,[7] and they remain dependent upon the will of states. Second, much of the transnational form of participation is not political; neither in the sense of the generality of its goal, nor with regard to the scope of representation. Recent

[7] The European Union, which looked like a promising postnational experiment in the 1990s, seems to be reinforcing rather than undermining the logic of the nation-state. For example, it has tied up European citizenship with the citizenships of the member states and it has built an area of free movement at the cost of enhanced external border control.

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examples of tightening border controls and harshening citizenship laws demonstrate the limits of the postnational view.

It is beyond doubt that national citizenship has recently undergone important changes but, despite postnationalists' predictions, it remains both theoretically and empirically relevant. This is because of the important impact it has on individuals' opportunities. The much-debated status of *denizenship*[8] (e.g. Hammar, 1990; Soysal, 1994; Atikcan, 2006) is still a limited and insecure status. It rarely guarantees all of the socio-economic benefits of citizenship or the maximum of political participation (voting in national elections). From a migration perspective, lacking the *right* citizenship may often be a source of considerable distress – such as social benefit cuts, deportation – while holding the *right* passport may count as a great asset. Finally, focusing on such fragile developments may even be dangerous because "a literature that celebrates denizenship, permanent residence with economic and social but not political rights, that trivializes national citizenship, is a tribute to mass disenfranchisement" (Hansen, 2008: 20).

A more useful approach to account for transformations of citizenship in the era of increased international mobility is the perspective of transnationalism. There is a growing literature dealing with the problem of non-citizens from within the state. However, many of these theories disregard the fact that the great majority of foreign residents are, in fact, "external citizens of countries of origin until and unless they decide to naturalize" (Bauböck, 2009b: 476). In terms of political membership, transnationalism describes "simultaneous overlapping affiliations of persons to geographically separate polities" (Bauböck, 2003: 705). Such "overlapping structure of membership" (Bauböck, 1994) derives practically from the parallel expansion of residential citizenship for immigrants – e.g. local voting rights for foreign nationals – and external citizenship – e.g. absentee voting rights for expatriates.

Although some may equate transnationalism with de-territorialisation – of politics, economy or culture –, transnationalism does not amount to a dismissal of the state or of the political membership based on national citizenship. It is not a form of postnational citizenship because important privileges, such as national voting rights, are reserved to formal citizens (Bauböck, 2007a). The novelty of the transnational perspective lies exactly in insisting on the role of states in promoting trans-border forms of membership. This only adds complexity to the membership problem. It shows that states rarely draw their membership boundaries

[8] Denizenship describes a status enjoyed by long-term immigrants that contains an open-ended collection of sub-citizenship rights.

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independently of each other and that there is more than just one package of membership that different members and non-members compete for.

1.2.2 Citizenship Re-Nationalised

At the opposite end of universal or postnational views on citizenship lie suggestions that citizenship is becoming increasingly re-nationalized or re-ethnicized. It is undoubted that rules of citizenship have become more open and less discriminatory that they were a century ago. However, not everybody agrees that this is a good standard for assessing the normative credentials of contemporary citizenship policies. In fact, several authors have shown that some elements of ethnicity, nationalism or culturalism remain important components of the contemporary definition of membership and are constantly reinforced by citizenship rules. Rogers Brubaker developed the concept of "nationalising state" (1996) in order to describe resilient forms of ethno-nationalism in Europe. While nationalising states are more easily noticeable in Eastern Europe, certain nationalistic elements can be traced in the West as well. In many Western countries the presence of Muslim populations has led to the "ethnicization of national self-understandings" (Brubaker, 2008: 5). Dora Kostakopoulou argues that we can only talk of a "superficial de-ethnicization" of citizenship in Europe, where it becomes obvious that only persons with the "right" background are welcome (2009: 280).

In the literature, authors often refer to *ethnicity*, *nationalism*, and *culture* in order to highlight derogations from a *liberal* regime of citizenship. The opposition between liberal and ethnic comes dangerously close to several other highly-contested dichotomies from the literature on nations and nationalism, such as Eastern-Western (Kohn, 1944), political-cultural (Hutchinson, 1987), and civic-ethnic (Smith, 1992). Rogers Brubaker (1992a), for example, reinforced the dichotomy between civic-political and cultural-ethnic nations by making the case for two paradigmatic models of nationhood in Europe – that of France and Germany. This type of account faces important criticism as to historical accuracy, theoretical consistency, and ideological charge. All nation-states have defined their nationhood and membership rules using both civic and ethnic elements (Keating, 1997). At the normative level, it is hard to make a clear distinction between these concepts. The lines between civic and ethnic or between political and cultural are blurry. At the extreme, one could argue that we stick the label of civic or cultural on something depending on "whether [we] support it or not" (Brown, 1999: 288).

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With regard to ethnicization of citizenship we can distinguish between two contexts that correspond roughly to the Western/Eastern regional divide: (a) migration-driven ethnicization, and (2) ethnic minority-driven ethnicization.

In the Western European context, ethnicization is related to the tendencies of making privileges of citizenship available to emigrants and their descendants[9] (Joppke, 2003) and of redefining citizenship in ethno-cultural terms "in response to growing Muslim and non-European immigrant populations" (Brubaker, 2008: 5).[10] Alan Gamlen challenged the assumption that contemporary diaspora policies reflect ethnic conceptions of citizenship by arguing that "diaspora engagement policies are also used by a number of home-states – including Malaysia […] Australia […], and New Zealand […]– which adhere to the civic model of citizenship, based on residence within the territorial borders of the nation-state" (2006: 11). However, the problem is that Gamlen first posits unitary models of citizenship – ethnic versus civic – and then analyses diaspora policies. My suggestion is that such diaspora policies should be factored in when defining ethnic or civic features of citizenship. They are not an object of assessment but rather part of the diagnosis.

In the Eastern European context, ethnicization is usually associated with the re-nationalising policies implemented by states newly-"liberated" from communism. Taking into account certain common features of citizenship regimes – the emphasis on ius sanguinis, the opposition to dual citizenship, and the absence of an automatic right to citizenship for second generation immigrants – Wiebke Sievers concluded that, in Central and Eastern Europe (CEE), citizenship is "closely linked to an ethnic interpretation of nationality" (2007: 8). Other authors have argued that the residence-based model of citizenship adopted in the West did not apply in the East (Hansen, 2008: 18), and that, in this region, there seemed to be a "triumph of ethnic conceptions of citizenship" (Liebich, 2009: 24).

Typically, the two issues of emigrant citizenship and co-ethnic citizenship make the object of different bodies of literature. On the one hand, the issue of emigrant citizenship has been addressed in debates about transnationalism and multiple membership (e.g. Barry, 2006; Fitzgerald, 2006). In this context, states have been mainly regarded as agents of transnationalism that allow for extraterritorial membership in order to extract resources from their external citizens (Gamlen, 2006). On the other hand, the issue co-ethnic citizenship has

[9] This includes the removal of restrictions on ius sanguinis for descendants of citizens abroad, the toleration of dual citizenship, and the adoption of various diaspora policies.
[10] This includes the testing of individuals' civic knowledge and cultural attitudes in naturalisation process.

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been primarily discussed in relation to nationalism and nation building in the new Europe (e.g. Brubaker, 1996; Iordachi, 2004). The imperfect overlapping between territorial and "national" membership in this region has pushed nationalising states to claim various categories of non-residents (formal citizens and co-ethnics) who were perceived as "belonging" to the state.[11]

It is my contention that keeping issues of emigrant and co-ethnic citizenship separate obstructs us from considering important similarities. Co-ethnic and emigrant citizenship represent two types of external membership. Analysing general implications of transnational citizenship in the emigrant and co-ethnic contexts, Rainer Bauböck (2003) found that, generally, policies of emigrant citizenship contribute to enhancing freedom of movement while policies of co-ethnic citizenship are more prone to challenge state sovereignty. In many cases, however, policies of co-ethnic citizenship provide important opportunities for free movement – e.g. the cases of "emigration of ethnic affinity" (Brubaker, 1992b). They may serve pragmatic goals as well as nationalistic ideals. Although the expansion of emigrant citizenship is mainly linked to states' economic interests, such policies may also be framed in "national" terms. For example, external citizens can be portrayed as "heroic citizens contributing to the national project by undertaking the great sacrifice of living abroad" (Barry, 2006: 34).

A simple glance at history reveals that most nation-states have defined their membership using a number of "ethnic" elements and, at some point in time, they have taken action to incorporate non-residents who were considered ethnically or culturally related. Screening constitutional provisions and kinship laws of European countries, Eniko Horvath (2008) found that 16 out of 27 EU countries have provisions regarding facilitated naturalisation based on ethnic or cultural affinity. In fact, the first states to grant preferential treatment or special status to non-national co-ethnics were those from "old" Europe.[12] Similarly, states that use citizenship rules in order to reach emigrants can be found both in the West and East. Many Asian states, for example, have adopted diaspora policies that are justified predominantly in economic terms (Skrentny et al., 2007). It is simply dubious to interpret

[11] Estimates of external minorities of kin-states: 1.5-2.0 million Poles in the former Soviet Union, 7 million Romanians in the former Soviet Union, Hungary and south-east Europe, Moldova and Ukraine, 2.7-3.3 million Hungarians in neighbouring states, 0.5 million Slovaks in various states of the region. Western diasporas amount to about 12 million for Poland, 3 million for Romania, 2.5 million for Hungary and 2 million for Slovakia (Fowler 2002).

[12] Germany (1953), Austria (1979) Greece (1991) and Italy (1991).

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diaspora policies in the West as pragmatic or post-modern and diaspora policies in the East as nationalistic and pre-modern.

1.2.3 Ethno-Cultural Preferentialism

There are great difficulties behind any attempt to define concepts that contain highly contested terms such as 'ethnic' and 'cultural'. My proposal is to use these frames as heuristic rather than explanatory tools.

I distinguish between two myths of political community, namely ethno-cultural and civic-territorial. The ethno-cultural myth describes a political community based on shared descent **(**ethnicity) and culture – understood as a complex milieu formed by language, history, cultural markers, and customs. The civic-territorial myth portrays the political community as based on a set of shared political institutions and common territory. With regard to membership in the political community, the two myths recommend different criteria. While membership in an ethno-cultural community is a matter of descent or of confirmed acculturation, membership in a civic community is conceived of as an expression of attachment and commitment to political institutions. These myths constitute two major ordering principles of modern political imagination. I do not construct them in terms of good or bad, although they may have different normative standing. Good or bad, they are two powerful metaphors that organize our thinking about political community. They are not the only available metaphors. They are also not mutually exclusive. If descent (or ethnicity) is a clear indicator of an ethno-cultural view, the reference to culture is highly disputed between the two models.

By ethno-cultural rules of admission to citizenship, I mean those rules that refer explicitly or implicitly to characteristics, qualities or capacities that demonstrate membership in a (real or imagined) ethno-cultural community. The purpose is not to give an account about the nature or development of citizenship regimes or about specific models of national identity. Rather, it is to identify features of citizenship regulation that are *somehow* linked to ethno-cultural narratives.

In the literature, the tags of ethnic, ethno-national or ethno-cultural have been put on entire 'regimes' of citizenship.[13] Resisting such a holistic approach, some have identified only certain rules or features of citizenship regulations as ethnic or potentially expressing ethnic

[13] If countries such as Germany and Israel have long been described as archetypes of ethnic citizenship, more recent accounts associate ethnic citizenship with membership policies of post-communist European states.

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conceptions of citizenship. For example, opposition to rules of ius soli citizenship[14] in the context of multigenerational migration and rules of preferential admission to citizenship for ethno-national kin are among the most common examples of ethnic features of citizenship.

How to recognize rules that make reference to the ethno-cultural myth? If a rule explicitly targets 'ethnic' individuals – say Polish or Bulgarian ethnics – there is little doubt that a narrative of common ethnicity informs this rule. Things get cloudier when rules refer only to 'origin', 'native', 'association' et cetera. In these cases, we have to interpret whether or not a nationalistic logic is at work. Apart from the few rules that explicitly use the language of ethnicity in defining access to membership, the assessment of all other potentially ethnic rules requires interpretation. What does it mean to say that a rule of admission to citizenship is ethnic or ethno-cultural? As Christian Joppke notices with regard to selective immigration, there is "no agreement, not even among liberal theorists, sometimes not even within the same liberal theorist, on the normative status of ethnic selectivity in immigration policy" (2005b: 15).

In recent decades, we have witnessed an increased interest in the empirical and comparative study of citizenship. The empirical work includes surveying, mapping and building typologies of specific rules of modes of citizenship regulation. In this literature there is a tendency to treat deviations from what is believed to be liberal citizenship regimes as ethnic or ethnicist. Theorists have used the ethnic tag for various situations such as perpetual ius sanguinis abroad (Liebich, 2009: 2), inadequate ius soli (Bauböck et al., 2006b: 30), "crypto ethnic bias toward ethnic Europeans" (Smooha, 2008: 6), "dual citizenship for emigrants, but not for immigrants" (Joppke, 2008a: 18), harsh language and integration clauses (Bauböck et al., 2006b; Kostakopoulou, 2009), privileged re-acquisition of ancestral citizenship (Waldrauch, 2006; Joppke, 2008a), preferential citizenship for co-ethnics (e.g. Brubaker, 1996; Fowler, 2002; Iordachi, 2004; Sievers, 2007; Liebich, 2008; 2009), et cetera. However, it is not always clear what *ethnic* means, what exactly makes a rule *ethnic,* and what is wrong about *ethnic* rules*,* in the first place.

The tendency to interpret illiberal citizenship rules as ethnic is problematic in the absence of normative discussion of what ethnicity stands for in the area of citizenship.[15] It is often suggested that "open" citizenship regimes stand for liberal citizenship. More generous

[14] Rules of ius soli ascribe citizenship at birth to children born in the territory of the state.

[15] Not many studies on comparative citizenship claim to be normative. Although most of these studies are mapping exercises or mixed legal-sociological accounts, they inevitably pick up and reinforce some normative assumptions.

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provisions concerning ius soli, minimum residence, and dual citizenship are regarded as liberal rules. However, I think that the crucial question to ask is: *open to whom?* As I demonstrate in this study, there are many cases where citizenship rules are very generous with some but not with others. How liberal would those cases be? And how normatively sound?

The usual strategy in the comparative literature on citizenship is to select several "fundamental" rules of citizenship in order to use them for building typologies and "models" of citizenship. Rogers Brubaker, for example, took certain formal rules of citizenship – rules concerning birthright citizenship and naturalisation – as indicators for broader normative conceptions of political community. He treated France and Germany as "exemplary pair" of two opposite models of nationhood. In Brubaker's view, the French model of nationhood is based on political unity and it is unitarist, universalist and secular. In contrast, the German model of nationhood is grounded in pre-politic culture and it is particularist, organic and differentialist (Brubaker, 1990: 386; also 1992a). Brubaker's culturalist explanation is problematic because it locks polities into rigid normative frames (nationhood) and leaves us with no tools to grasp eventual changes in membership policies. This seems tautological because "something as intangible as 'culture' can always be found to explain an outcome (which in turn, is taken to demonstrate the existence of such 'culture' (Joppke, 2010: 20).[16]

Other comparative studies have shifted the focus towards the empirics of citizenship regulations and have developed more complex typologies of citizenship or overall integration regimes using indexes or scores. Marc H. Howard (2006) has designed a Citizenship Policy Index that accounts for three main citizenship rules: ius soli, residence requirement for (regular) naturalisation and dual citizenship.[17] Stephen Castles (1995) has identified three policy models – differentialist, assimilationist, and pluralist— that states adopt in order to cope with migration and ethnic diversity. Castles' framework is based on a combination of two dimensions: policies of access to citizenship and policies of ethno-cultural recognition. Koopmans and Statham (2000) has used a similar approach but they conceptualized the intersection between the two dimensions – formal access to citizenship and cultural rights – as

[16] Christian Joppke argues for the contrary. He claims that "one can detect the decoupling of citizenship and nationhood in the changing micro-rules of access to citizenship, which have generally become non-discriminatory, in the sense of shunning group-level exclusions on the basis of ethnicity or race, and which do not require a particular cultural identity as a prerequisite for citizenship" (Joppke, 2008: 543).

[17] Howard found that all European countries that have changed their citizenship rules in the two decades after 1980 (five countries out of 15) did so in a liberal direction. When applying this Western-inspired theoretical framework to post-communist countries of Central and Eastern Europe, Howard's conclusions seem to reinforce an old cleavage between liberal/civic, liberal West/illiberal-ethnic East. According to his CPI, citizenship regimes in ten new EU countries are restrictive and very restrictive. A refined citizenship index is proposed in (Howard, 2009).

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spaces rather than cross-cutting points. In this way, they arrived at four normative zones of integration: ethnic assimilation, ethnic segregationism, civic republicanism, and civic pluralism. Finally, Sara Goodman (2010) built a Civic Integration Index that accounts for two dimensions of integration: the scope of integration – whether access to citizenship is wide or narrow – and the depth or thickness of integration – whether states impose barriers to naturalisation. She identifies four strategies of integration: prohibitive, conditional, insular, and enabling. These studies have in common the propensity to posit general models of membership and the tendency to treat access to citizenship as an element of broader policies or philosophies of integration.

I propose to abandon the traditional methodology that aims at identifying wholesale regimes and general models of membership. I suggest analysing rules of citizenship by looking into their specificities and interdependencies. In this regard, I oppose bundling together concerns with migration, access to citizenship and social integration. It is my contention that such a bundling often comes at the cost of losing sight of the normative specificity of admission to citizenship. Framing admission to citizenship solely or primarily in terms of integration seems to obscure essential questions about the scope of political membership and the justification of inclusion and exclusion.[18] What integration? Who should integrate where? In my view, we should address issues of integration only after we have examined more basic questions about the justification of membership. In this way, we may discover arguments that challenge the very theoretical background against which we stage discussions about citizenship and integration.

[18] It surely matters whether admission to citizenship is seen as a means or an endpoint of immigrant integration. However, at the end of the day, these two perspectives share the assumption that newcomers must integrate into an established community of citizens, something that is usually taken for granted.

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1.3 The Structure of the Thesis

In Chapter 2, I examine several political theories in order to locate justifications for boundaries of citizenship. I identify a set of normative perspectives: (a) the perspective of justice; (b) the perspective of liberal nationalism; and (c) liberal-democratic perspectives. I do not attempt to spell out novel theories in these areas, nor do I attempt to provide extensive and comprehensive analyses of existing ones. Rather, I focus upon specific theoretical aspects that may be useful in assessing claims related to admission to citizenship.

In Chapter 3, I provide an overview of public international law and principles in the area of nationality. I pay particular attention to the right of states to define their nationality rules, including rules that amount to ethno-cultural preferentialism.

In Chapters 4-6, I develop a comparative analysis of citizenship rules in 27 EU countries. I analyse three major aspects of citizenship regulation: birthright citizenship (Chapter 4), regular naturalisation (Chapter 5), and preferential admission (Chapter 6). Although I present an overview of these *modes* of acquisition of citizenship, my aim is to identify those specific aspects that are actually or potentially charged with ethno-cultural views on citizenship.

The strategy is to assess specific citizenship rules in their own terms. This approach promises gains in empirical accuracy, contextual sensitivity and normative versatility. The analysis is undertaken in three steps. First, I provide a comparative overview of legal rules corresponding to each mode of acquisition or loss of citizenship being discussed. Second, I assess whether these rules are ethno-culturally charged. Third, I look at different normative justifications in the light of the specificity of the rules and other contextual factors.

Why EU countries? First, I, like many, hold a personal interest in European developments with regard to citizenship. It is certainly fascinating how, faced with increased international migration and caught in between contradictory normative commitments such as nationalism and human rights, many of the old and new democracies of Europe have recently amended, sometimes repeatedly and confusingly, their citizenship policies. Second, I choose to focus on EU member states because of the particular development of the EU polity. The relatively large number of states offers a useful "laboratory" for analysis (Howard, 2009: 2). Apart from scale and diversity, the EU promises to be normatively interesting due to the genuine though incipient form of polity it has developed. It offers a good opportunity to test theoretical suggestions, such as post-national citizenship. Finally, focusing on both old and new EU

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member states offers us a chance to once again test traditional dichotomies between (liberal) West and (ethnic) East.

The survey of citizenship rules of 27 EU countries[19] makes use of a vast collection of legal texts – national citizenship laws, constitutions and other relevant national laws – data and specialist reports produced within the framework of several comparative research projects.[20]

[19] This thesis uses data up to July 2012.

[20] I use materials produced within the framework of several comparative research projects: NATAC, CPNEU, EUCITAC, CITSEE. The project Acquisition of Nationality in EU Member States: Rules, Practices and Quantitative Developments (NATAC) was coordinated by the Institute for European Integration Research at the Austrian Academy of Sciences and dealt with rules of acquisition and loss of nationality in the EU-15 states. The findings including a comprehensive methodology for comparing citizenship regulations were published in two volumes (Bauböck et al., 2006a; 2006b). See http://www.imiscoe.org/index.php?option=com_content&view=category&layout=blog&id=26&Itemid=31. The project Citizenship Policies in the New Europe (CPNEU) was managed by the IMISCOE Network of Excellence on International Migration, Integration and Social Cohesion in Europe and analysed citizenship policies in the EU-10 accession states of 2004 and Turkey. The findings were published in: (Bauböck, et al., 2007; 2009). The EUDO Citizenship Observatory has carried out a number of comparative research projects and provides for analyses and data on citizenship laws and policies of EU and neighbouring countries. Among others, the Observatory publishes regular country reports that are designed to facilitate comparison. For more see http://eudo-citizenship.eu. The project The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia (CITSEE) is run by professor Jo Shaw at University of Edinburg (School of Law) and provides for data and analyses on citizenship in seven successor states of the former Yugoslavia. See http://www.law.ed.ac.uk/citsee.

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2. JUSTIFICATIONS FOR MEMBESRHIP(S)

Who is a citizen? Why does a citizen belong to one state rather than another? How does one become a citizen? Modern political philosophers have rarely asked questions about membership. They have usually assumed that political boundaries were natural and self-justified. It is only recently that the idea of natural boundaries has been seriously challenged. A novel literature dealing with questions about membership has emerged and it has re-vitalised ancient debates about, among others, the scope of equality and justice, self-determination, and democratic legitimacy.

In this chapter, I explore justifications for membership by appealing to several normative perspectives. First, I address arguments concerning the scope of social justice and assess their implications with regard to the boundaries of political membership. Second, I explore liberal nationalist arguments that are relevant for the problem of membership. Third, I discuss a series of more specific proposals that aim to determine the boundaries of membership by appealing to prominent liberal and democratic norms. In this respect, I examine arguments from consent and freedom of association, all affected interests, subjection to coercive power of the state, and genuine membership. Finally, I propose a principle of democratic recognition in order to justify minimal democratic control over boundaries derived from legitimate concerns about democratic continuity.

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2.1 Boundaries of Justice

Justice is a powerful concept, both in theory and in everyday life. Claims of justice are numerous, various and often incompatible.[21] In this part of the chapter, I do not provide an overview of the variety of theories of justice, nor an enlightened discussion of major points of discord. My focus is limited to one aspect of general theories of justice, namely the aspect dealing with the scope or the boundaries of justice. I ask whether the common assumption according to which the boundaries of justice coincide with the boundaries of citizenship is valid.

It is useful to start by distinguishing between two broad categories of conceptions of justice, namely (1) relational, and (2) non-relational (Sangiovanni, 2007).[22] According to relational conceptions of justice, duties of justice arise among people who are engaged in certain relevant relationships. Theorists who take this approach are preoccupied with finding the relational element(s) in human activities that are sufficiently significant in order to justify the establishment or the preservation of particular systems of justice. The resulting theories of justice are most likely to be "bounded" rather than global, although their boundaries may not strictly follow the actual boundaries of nation-states. Non-relational conceptions of justice start with the normative premise of a universal scope of justice. Systems of justice are not seen as derivative from human relations, but rather as pre-requisites for achieving important universal human values, such as individual autonomy and human dignity. Critics, however, contest that these are theories of *social* justice. Such universalistic concerns are often relegated to the domain of humanity. According to Brian Barry, obligations of humanity concern efforts to relieve suffering, whenever we are able to and whenever it does not come at a great cost to us (2008: 180). Obligations of justice, on the other hand, imply certain patterns of interaction and cooperation. While obligations of humanity are concerned with well being, obligations of justice deal with distribution and power (Barry, 2008: 202). It follows that duties of humanity are universal but weak whereas duties of distributive justice are strong but

[21] Theories of justice differ in several dimensions such as the moral-ontological perspective (universalist v contextualist), the underlying principle (utility, need, desert), the subject of justice (individuals v institutions), and the currency of justice (welfare, opportunities, resources, et cetera).

[22] Raffaele Marchetti (2005) proposed a distinction between interaction-dependent and non-interaction dependent conceptions of justice. The two typologies do not overlap perfectly because not all relations are interactional.

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conditional – they depend on the existence of certain relevant patterns of relations between individuals (cooperation, coercion).[23]

Despite differences, both relational and non-relational theories of justice often treat citizenship as instrumental to justice. In his original theory of justice, Rawls, for example, assumed the modern paradigm that boundaries of justice coincide with boundaries of citizenship. By simply contesting the actual boundaries of justice, many of his critics do not necessarily leave this paradigm. An argument for a global scheme of justice that also recommends global citizenship is a reiteration at the global level of the justice-equals-citizenship paradigm.

In what follows, I mainly focus on accounts pertaining to relational- justice – "the mainstream in current political philosophy" (Marchetti, 2005: 494). I address three types of arguments of justice that have implications with regard to the scope of boundaries. I classify them according to the key normative element that triggers duties of justice: (a) cooperation; (b) coercion; and (c) compensation.

2.1.1 Boundaries of Cooperation

According to one influential contemporary view, national societies are the privileged site for maintaining schemes of distributive justice because they are "cooperative venture[s] for mutual advantage" (Rawls, 1999b: 4, 73-74). The Rawlsian theory of justice is premised on the idea of closed [national] societies (Rawls, 1999b: 4, 73-74)[24]. I discuss two arguments for bounded distributive justice derived from the idea of closed social cooperation. The first argument is about the socially constructed value of distributable goods. The second argument is about the communal responsibility for collective decisions.

According to the first argument, the social meaning of goods determine the criteria and the scope of the distribution (Walzer, 1983). Because political communities are worlds of shared meaning and because goods that are produced and distributed within the community have particular social and cultural meanings, they cannot be distributed across communal boundaries (Miller, 1988: 660-1). In the absence of common membership, social goods lack

[23] Some may accept this distinction, but still argue that the duty of humanity is actually demanding, and that it should play a far more important role in our world, which is affected by famines, ecological disasters, and large-scale violence.

[24] Miller notices how Rawls makes this assumption more explicit by switching from "persons", "men" "parties" from earlier works to "citizens" in later writings (2000: 45).

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comparability and specific rights lack shared meaning (Miller, 2000: 93).[25] This argument, however, overestimates the constructed character of goods. We can certainty identify some situations that are simply unacceptable, and some set of basic goods that are relatively non-socially constructed (Kymlicka, 2001b: 275, note 33).

The argument about the social meaning of goods is often paired with an argument about collective responsibility. It is argued that "the resource base of each society will depend on its cultural features and on political decisions already taken" (Miller, 1995: 106). Therefore, each community bears responsibility for its welfare (Miller, 1995: 108). This argument is shared by Rawls, who believes that the main causes of social wealth lie "in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues" (1999a: 108).[26] Thomas Pogge treats this view as a dubious form of "explanatory nationalism" that aims at blaming the poor and the destitute for their deplorable state (1998: 497). The argument ignores historical patterns of violence and exploitation and actual relations of power and dependency. It gives the community a problematic agency despite difficulties in defining collective, intergenerational responsibilities. It assumes, for example, that communities have in place genuine democratic mechanism of collective decision-making (Tan, 2002: 449).

Do or should boundaries of justice-as-cooperation coincide with boundaries of citizenship? First, it seems increasingly difficult to match the idea of bounded national justice with the picture of a global world characterised by huge and persistent inequalities, as well as desperate situations such as famine, endemic violence and radical poverty. In this context, some have attempted to use Rawlsian methodology in order to globalize the theory of social justice.[27]

From within relational conceptions of justice, several theorists have argued that the existing patterns of interaction and exchange across national boundaries require the extension of the scope of the "social", so that schemes of distributive justice become global or international. Thomas Pogge suggested that there is no need to restrict Rawls' argument to the sphere of the

[25] Brian Barry expresses the worry that resource redistribution may amount to a form of neo-colonialism (2008: 195).
[26] Rawls includes here the responsibility of governments for "their territory and the size of their population" because people "cannot make up for failing to regulate their numbers or to care for their land by conquest in war, or by migrating into another people's territory without their consent" (1999a: 8).
[27] Other theories have rejected altogether the cooperative framework and developed international or transnational accounts of justice on non-cooperative grounds, such as basic human rights or human dignity.

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nation-state because "any comprehensive social system has a basic structure and thus falls within the purview of Rawls' conception of justice" (1989: 24). Charles Beitz also argued that "if social cooperation is the foundation of distributive justice, then one might think that international economic interdependence lends support to a principle of global distributive justice similar to that which applies within domestic society" (1999: 144).

Sceptics have responded that actual global links are not sufficient in *strength* or that they are not of the relevant *kind*. Brian Barry pointed out that trade is not a cooperative venture – trade alone does not create the cooperative scheme required for redistributive justice (2008: 191). John Rawls (1999a) rejected attempts to globalize the original position and offered an alternative model in which representatives of peoples participate in a second original position and decide on (weaker) international principles of justice among peoples.

The problem is that a theory of social justice grounded solely in the idea of cooperation does not properly *describe* the actual national systems of distributive justice. In any such social system there are individuals who do not or cannot cooperate, such as the congenitally handicapped. In these cases, "the conditions for reciprocity – that all the parties stand prospectively to benefit from the scheme – simply do not exist" (Barry, 2008: 192). According to Martha Nussbaum, one of the major problems of the social theories of justice is their neglect of the interests of mentally and physically impaired (2006: 1).[28]

Another important objection to the cooperation view is that cooperation alone does not generate genuine reasons for why schemes of redistributive justice should be put in place (Miller, 2009b: 299). A theory based on cooperation "does not say that it is unfair for a practice that would, if it existed, be mutually beneficial, not to exist" (Barry, 2008: 190). It does not establish that a "duty of justice exists to enter a co-operative practice" (Marchetti, 2005: 495). What such theory says is only that, if schemes of justice are established, they must be based on solid patterns of cooperation. What is needed is an independent normative ground for why the establishment of a system of justice is necessary. For example, Barry uses the conception of justice as equal rights arguing that "justice as reciprocity needs a prior assignment of rights before it can get off the ground" (2008: 193).

If there is no duty to enter schemes of social justice, is there an obligation incumbent upon outsiders to stay out? Or, is there a right of members to exclude outsiders? A theory of bounded justice based on the idea of cooperation does not answer these questions. Who

[28] Rawls acknowledged that this constitutes one of the tests in which "justice as fairness may fail" (1993: 21).

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should be admitted into a structure of cooperation? At best, the argument is tautological: only those who are members are to be recognised as members.

2.1.2 Boundaries of Coercion

An alternative means of justifying bounded justice is to argue that boundaries of justice should coincide with boundaries of coercion.

According to Michael Blake, the state must be regarded as the primary locus of justice because the state severely affects the autonomy of individuals through its coercive institutions. State borders, "however arbitrarily constructed – mark out something of great moral significance […] the boundaries of shared liability to a political state" (Blake, 2005: 226). The argument rests on the idea that the coercive institutions of the state produce direct and unavoidable effects on citizens' autonomy. Only citizens are owed special justification, and the state honours this by including them into a bounded system of distributive justice. As Blake argues, "not because we care more about our fellow countrymen than we do about distinct principles of distributive justice applicable only within the national context, but because the political and legal institutions we share at the national level create a need for distinct forms of justification" (2001: 259).

Thomas Nagel argues that the state constitutes a joint authorship of laws that justifies restricting political equality to its citizens. In this scenario, "justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation" (2005: 121). In order to convince, claims for international distributive justice must bring evidence that coherent structures of power and coercion are in place across national borders. After scrutinising the actual level of institutionalised coercion, Nagel concludes that there is no room for an international principles of justice because "the nation-state is the primary locus of political legitimacy and the pursuit of justice" (2005: 113).

Andrea Sangiovanni distinguishes between an empirical and a normative claim promoted by the (state) coercion view. The empirical claim reads that there is a qualitative difference between state coercion and forms of coercion that are generated by other structures. The normative claim reads that there are some special reasons for why this fact is relevant for justice (Sangiovanni, 2007: 8). Both claims are contested. The empirical claim is problematic because it disregards coercion outside national borders. It ignores historical injustices related to the formation of the actual international system, as well as the actual manoeuvres of the powerful states to reproduce the system, including by sponsoring autocratic regimes around

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the world (Pogge, 2002). It also underestimates the influence of various structures of transnational and supranational governance that exercise coercive power outside the traditional paradigm of democratic legitimacy. According to the normative claim, boundaries of coercion should coincide with boundaries of distributive justice. But boundaries of authority are not self-justificatory. One may refuse to be coerced or to be coerced in a particular way or coerced by a particular system, even if one is offered adequate justification and a share in the distributive scheme associated with that particular system of coercion.

The coercion-based argument for bounded justice is conservative in the sense that it assumes the necessity of sovereignty. Thomas Nagel talks about the necessary sovereign as an "enabling condition" of justice (2005: 116). But the *conditions* of justice are not the same as *justifications* for justice. Should we stumble over a compelling reason for why distributive justice is necessary, we may want to work towards creating those conditions for implementing it. For example, Cécile Laborde argues that "a republican world order *demands* high levels of 'civil' interaction – economic, political, cultural – and direct interference in the affairs of other states – humanitarian, diplomatic, even military – as long as interference is non-alien" [emphasis added] (2010: 60). The logic is that some sort of actions and interactions are demanded by justice and not that justice is activated when some kind of interaction are in place.

Nagel also gives a conservative answer to the question of inclusion into the boundaries of coercion. According to him "there is no obligations to enter into that [political] relation with those to whom we do not yet have it" (Nagel, 2005: 121). Moreover, states can actively prevent such contacts in order to justify the limited scope of their system of justice. States are confronted with the dilemma between the need for "more governance on a world scale" and "the increased obligations and demands for legitimacy that may follow in its wake" (Nagel, 2005: 136).[29]

The coercion view on justice cannot establish the boundaries of coercion, let alone the rules of boundary making. While long-term residents non-citizens may easily fit into this framework, this is not the same for non-resident citizens. The attempt to justify bounded justice on the basis on coercion says little about the legitimacy and the configuration of the boundaries of citizenship.

[29]Abizadeh (2008) argues that this very preventive action should be counted as coercion. Hence it should generate a claim for justification.

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2.1.3 Just Compensation

The view that justice should be confined to the boundaries of the national state can be challenged from different perspectives. From within a conception of relational justice, one could argue that the world as we know it *is* a robust system of cooperation or interdependence that requires transnational schemes of justice (e.g. Beitz, 1999). Using a non-relational approach, one could also argue that schemes of justice are demanded by a commitment to the satisfaction of basic human needs that are inherent to the exercise of human dignity (e.g. Nussbaum, 2006).

Many theorists of justice agree that rich states have some duties of assistance or aid towards poor states. Obviously, they tend to disagree on the nature of the principle (justice v humanity), the currency, the level of assistance or the specific methods of implementation of such duty. John Rawls, for example, responded to those who attempted to globalise his theory by designing a more minimalistic charter of the Law of People.[30] In this charter, Rawls enlists the duty to assist people "living under unfavourable conditions" (1999a: 37). The duty to assist "burdened societies"[31] does not, however, amount to a principle of distributive justice (Rawls, 1999a: 106). The international duty to assist must be limited for practical and normative reasons. Practical concerns regard, for example, the problems of efficiency in transferring resources to peoples who lack organisational capacities. Normative concerns are related to the duty to respect the peoples' political autonomy.[32]

Confronted with evidence that states do not live up to their duties, however minimalistic they are conceived, some theorists have suggested that we should use membership (immigration or/and citizenship) as a remedial instrument. In the immigration debate it has been suggested that failure to observe duties of distributive justice demands opening the borders. Robert Goodin, for example, argued that if rich states do not move money where it is needed then they should allow "moving as many of the needy people as possible to where the money is" (1992: 8). Michael Blake and Matthias Risse suggested that privileged immigration may be used to compensate "the ones who are not getting their share of commonly owned resources"

[30] The principles contained in Rawls' charter are, in fact, general principles already recognized by "free and democratic peoples". Apart from the duty of assistance, they include the respect for freedom and independence, the observance of treaties, the right to equal treatment, the principle of non-intervention, the right to self-defence, the respect of human rights, and the observance of the rules of war (Rawls, 1999: 37).
[31] Rawls defines these societies as those who "lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered" (1999: 106).
[32] Other theorists recognize forms of assistance that fall short of membership. Thomas Nagel accepts duties of humanitarian assistance although he sees them as "quite apart from any demand of justice" (2005: 118). David Miller (2007) recognises international obligations of justice that are much weaker that domestic duties of justice.

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(2006: 31). From the perspective of ethno-cultural justice, Will Kymlicka argued that states can justify their project of national building, including the control over the admission to territory and citizenship, only "so long as there is no gross economic inequalities between nations" (2001b: 267). In a context of complex interdependence, some sort of redistributive tax is needed in order to make sure that "all people are able to live a decent life in their countries of birth" (Kymlicka, 2001b: 271). If states fail to discharge their duties of justice, they lose the justification for the control of borders and boundaries.[33] In these proposals, the claim to redistribute membership is not grounded in a duty of justice *per se*, but it is seen as a compensatory measure for independently construed duties of justice, such as a duty to assist. In this case, membership is instrumental to discharging duties of justice.[34]

Ayelet Shachar (2009) offers an interesting compensatory argument that focuses explicitly on citizenship. National citizenship is a key component of the global system of inequality because it helps concentrating resources in privileged societies by raising barriers to mobility and redistribution. As suggested by Joseph Carens, citizenship status amounts to a feudal-like privilege because of its inherited character and because its possession "greatly enhances one's life chances" (Carens, 1987: 252). But Shachar does not follow Carens' line of argument in the direction of open borders. Her aim is "reforming the existent birthright-allocation system" (Shachar, 2009: 4) without actually making radical changes in the structure and the scope of citizenship.[35] Shachar's first proposal is to establish a birthright levy. The levy is based on the idea that citizens of rich states, who have acquired the "good" of membership due to mere contingency of birth, should pay to the less fortunate citizens of poorer states. Secondly, Shachar proposes a principle of 'jus nexi' citizenship. According to this principle, citizenship should be attributed to persons who demonstrate "real and effective link" with the polity (Shachar, 2009: 165). The principle is intended to address the problems of birthright citizenship related to over-inclusion and under-inclusion.

[33] This is a surprising argument from someone who advocates for robust systems of minority protection. We should maybe see this argument in the light of Kymlicka's limited interest in the question of legal membership. National citizenship is, in the end, an artificial framework designed by majority nations in order to promote their project of national building.

[34] I should add that there are serious doubts that membership policies (alone) are likely to solve the problems of global inequality or widespread radical poverty.

[35] Shachar makes a thorough critique of various proposals of "world citizenship". Among the main problems, she mentions: the top-down approach, the danger of losing valuable achievements of actual citizenship system, the problem of socio-cultural alienation, the problem of minorities, high administrative costs (Shachar, 209: 46-48).

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There is an ambiguous relationship between Shachar's two proposals.[36] Shachar seems to be hesitating between safeguarding birthright citizenship, although taxing it, and abandoning birthright entitlement altogether for the sake of jus nexi. Her hope of using citizenship in order to extract money and resources for the so much needed projects of improving the opportunities of the global poor justifies the preservation of birthright rules of membership. However, the jus nexi argument seems to beg an independent argument for (more) open borders, and that is unlikely to fit very well with the proposal for a birthright levy. Shachar aims to "free up citizenship from its current umbilical cord attached to fixed inheritance regimes that lock the vast majority of the world population in countries in which chance, not choice, has placed them" (2011: 15). Providing the states the possibility to pay a birthright citizenship levy in exchange for keeping borders closed may, in fact, strengthen the said umbilical cord. This is because states may prevent non-residents to enter their territories, thus preventing them from developing genuine connections that would qualify them for citizenship via the jus nexi principle. Shachar also argued that immigrants who are on the path to citizenship must also pay the birthright levy (2009: 214, note 108). But, as Rainer Bauböck notes, it seems contradictory to propose that all individuals have equal chances to acquire any particular citizenship and that they also "should have the citizenship of those state with which they are most strongly connected" (Bauböck, 2011a: 8). Once individuals accede to citizenship in a normatively justified way – by virtue of genuine connection with the polity – why should they pay a *citizenship-by-ascription* levy? For citizenship levy was grounded in the idea of arbitrarily ascribed citizenship at birth.

The tension present in Shachar's proposals is due to the difficulty of squaring two distinct perspectives on membership, namely the perspective of (distributive) justice, and the perspective of (political) citizenship. Despite her efforts to strike "a new balance between political membership and global justice without substantively detracting from the participatory and enabling qualities of membership in a self-governing polity" (2009: 22), Shachar tends to prioritize the perspective of justice. In this respect, the idea of jus nexi seems somewhat misplaced. Although normatively promising, this idea makes membership conditional on genuine links with *actual* political communities, regardless of the justifications of the present demarcations of political boundaries. If these boundaries are regarded as contingent or unjust, the idea of jus nexi citizenship loses its allure.

[36] Shachar is ambiguous about the relationship between the two proposals. She writes that "jus nexi can be viewed either as a complete alternative to jus soli and jus sanguinis or as a supplementary principle for citizenship acquisition" (Shachar, 2009: 179).

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Finally, considerations of aid or assistance appear in matters of membership as claims to protect vulnerable people, such as apatrides and refugees. In these cases, the real question is: protection from what? Is citizenship a form of protection for those who suffer from famine, civil war, and lack of economic opportunities?

In my view, those who suffer from famine require adequate access to food; those who suffer widespread violence and prosecution need a safe house and adequate security, those who lack economic opportunities need access to robust labour markets and so on. Although the status of citizenship in particular countries may satisfy some of these needs, it is not obvious why citizenship is the correct solution. Firstly, many such claims can be addressed more or less successfully by means other than membership, such as international aid, diplomacy, special immigration opportunities, et cetera. Secondly, even if citizenship proves to be the most efficient way to satisfy all these claims, such solution may be resisted on grounds that it deprives citizenship of its normative meaning.

2.1.4 Justice and Membership

In this part of the chapter, I discussed several arguments about the scope of justice and their implications regarding boundaries of citizenship. Despite a common assumption, I found that there is no necessary link between boundaries of social justice and boundaries of citizenship. From a practical perspective, schemes of social justice do not match perfectly with national citizenship. Normatively, there are no compelling reasons why they should. Proposals for determining the scope of justice do not provide adequate principles of political membership. For example, admitting that there are special duties of justice towards co-members does not necessarily prescribe the inclusion or exclusion of outsiders. Focusing on who is included does not give us an answer as to who is excluded. Rather it begs the question: who else can be included?

There is something about membership that seems to escape the perspective of justice. This becomes apparent when discussing proposals for just compensation. Ayelet Shachar offers an ingenious proposal to reform birthright citizenship as a means to alleviate global inequalities. Although I share with Shachar the intuition about the problematic nature of birthright citizenship, I think that her account does not sufficiently differentiate between different functions of citizenship. Even in the case of a successful application of Shachar's birthright levy, the practice of birthright citizenship – that guarantees automatic and unconditional access to political membership – remains problematic from a democratic perspective. Critics

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and defenders of birthright citizenship assume that answering the question of access to legal membership also settles the question of access to political membership. I think that this assumption disregards important normative aspects of political membership. Shachar's hesitation between (distributive) justice and (political) membership is telling regarding the inadequacy of our normative framework of citizenship that bundles legal, political and identity membership into one conceptual and legal entity.

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2.2 Nationalist Boundaries

Nationalism has been the tacit answer of modern political theory to the question of membership. Nationalism has provided the ideological foundation of the modern international system – built around the concept of the "nation" (e.g. United *Nations*). Although it is most visible in the struggles of national groups to attain statehood, nationalism does not end with the recognition of statehood. Nation-states typically engage in various policies aimed at preserving or promoting national identity. Most nation-states are "nationalising states" – a "state of and for a particular ethnocultural core nation" (Brubaker, 1996: 431). In this regard, membership policies (immigration and citizenship) offer particularly effective channels to promote nationalistic goals.[37]

Nationalism has rarely been articulated as a fully-fledged political theory; political theorists have preferred to ignore it, take it for granted or demonize it. Recently, however, a series of theories have attempted to justify nationalist claims by referring to broadly-accepted liberal-democratic principles, such as moral autonomy, liberty and justice.[38] This development can be linked to a more general shift in the focus of political philosophy from economic distribution to culture and identity (Tebble, 2006). Although justice remains the primary topic of theorizing, there is a shift in the "emphasis on what constitutes justice" (Honohan, 2002: 251). Demands of cultural and identity recognition are expressed in the language of justice. As a normative theory, liberal nationalism views national identity as a fundamental individual interest that ought to be recognized and upheld. Claims about cultural survival are uttered by both majorities and minorities (Bader, 1995: 220). On the one hand, minorities demand to break the cultural monopoly of citizenship in the name of ethno-cultural justice (e.g. Kymlicka, 1995). On the other hand, majorities defend their interests in safeguarding the cultural integrity of the nation (e.g. Miller, 2000). Paradoxically, majority nationalism seems

[37] We can distinguish between two main dimensions of nationalised policies of membership. On the inclusionary side, admission is offered to those who are identified as co-members in the national community. On the exclusionary side, admission is refused to those who do not share national identity or, specifically, to those who share a particular national identity that is seen as significantly different from that of the actual members.

[38] Liberal nationalism does not constitute a coherent theoretical school. The term is meant to describe a view shared, in full or in part, by theorists with different and sometimes conflicting theoretical orientations, and who often also reject the association with the term. Obviously, not all nationalist theories claim to be liberal. One can still find voices that defend non-liberal versions of nationalism. There are authors who still defend ethno-national (democratic) nationalism as a pragmatic way of accommodating complex ethno-national situations. Sammy Smooha (2002), for example, elaborates a model of ethnic democracy in order to describe and justify national arrangements in Israel. The more we move from theory to policy and politics, the more we realize that non-liberal nationalist ideas are far from extinct. The idea that the state belongs to the (majority) nation remains a powerful political intuition that often commands public policies. There is, however, a wide consensus among theorists that such idea cannot be endorsed without serious risks. Ethno-nationalism is not a doctrinal choice to guarantee you a thriving academic career, at least not in most liberal-democratic countries.

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to justify itself by borrowing from "the ethical and rhetorical resources of multiculturalism" (Tebble, 2006: 466). In both cases, the claims involve complex twinning between arguments about identity, justice and democratic self-determination. The novelty lies in the fact that identity comes to play a principal role.

In this second part of the chapter, I discuss several theories that attempt to justify membership and boundaries by reference to nationalism. Although nationalist theories range from explicitly racist or ethnic nationalist accounts to sophisticated philosophies of liberal nationalism, in my analysis, I only consider arguments that claim to be compatible with broad liberal democratic ideas.[39] After discussing liberal nationalist claims about the morality of nations, I address several proposals about national self-determination and their implications with regard to admission to citizenship.

2.2.1 The Morality of Nations

Liberal nationalists hold that national identity constitutes a fundamental individual interest although they may disagree on what political claims can be derived from it. Rejecting the "straw-men" of liberalism Yael Tamir talks about "contextual individuals" " (1993: 32-34) who have fundamental interests in their national cultures. National membership is a "constitutive factor of personal identity" (1993: 32-34). David Miller argues that nationality is a constitutive part of individual identity and that nations are ethical communities (1988; 1995). Similarly, Chaim Gans maintains that individuals have "a fundamental, morally significant interest in adhering to their culture and to sustain it for generations" (2003: 39).

In a pioneering attempt to bring culture into liberal theory, Will Kymlicka developed an argument about the importance of culture for individual autonomy (1989; also 1995). Access to a "societal culture" offers essential resources and the overall context of choice that make possible the development and pursuit of individual plans of life. It provides individual members with "meaningful ways of life across the full range of human activities, including social, educational, religious and economic life, encompassing both public and private spheres" (Kymlicka, 1995: 76). Kymlicka's argument about societal culture was intended to support the claims of national minorities for cultural recognition within a liberal state. In an interesting turn, "majority" liberal nationalists took up the idea and applied it in the context of the wider national community/state.

[39] I address more specific arguments about the link between the preservation of the nation and admission to citizenship in Chapter 6.

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The argument from freedom underlines the importance and the usefulness of national cultures for individuals. However, it fails to explain why *particular* cultures should survive. By this logic, assimilation seems legitimate provided that the loss of actual culture is gradual and that alternative societal cultures are available. This leads to the conclusion that there is no justification for "measures intended to ensure the long-term survival of a particular culture or of particular elements of a culture, such as the use of its language" (Perry, 1995: 117). From a nationalist perspective, the argument from freedom disappoints because it does not seem to grasp the rootedness and the distinctive character of national identity. An instrumental defence of national culture cannot explain why people (should) stick with *their* national identities despite the availability of other comprehensive cultures. Once individuals are given a cultural framework to pursue their life, they cannot claim additional cultural resources in order to preserve their own cultural project. In this scenario, the best option that weak national minorities have is to assimilate into more powerful cultures (Mason, 1999: 271). This view disregards "people's aspirations that their descendants live within the same culture within which they themselves live" (Gans, 1998: 164). It is not just *any* culture that individuals claim, but *their* culture with its distinctive features. This is the reason why liberal nationalists have shifted the focus from freedom towards identity.

In Tamir's view, individuals have fundamental rights to culture because (national) culture is constitutive to individual identity (1993: 11).[40] Individuals are not only interested in having access to *a* culture, but they demand access to their *own* inter-generational culture (Tamir, 1993: 26, 160). Similarly, Gans argues that individuals have a fundamental "interest in adhering to their culture and preserving it for generations" (2003: 1). Culture is not merely a prerequisite for liberty or "context of choice", it constitutes a meaningful historical project that surpasses the life of individual members (Gans, 1998: 166). Self-respect is linked with the hope that "the results of one's efforts have a chance of enduring" (Gans, 1997: 212). Hence, individuals have "an interest in the meaningfulness of their endeavours", which is an interest in seeing their culture celebrated beyond "their own lifetime" (Gans, 2003: 52-53).

What should we make of the claim that national culture and national identities are fundamental individual interests? According to David Miller, nations are moral communities and membership in such communities generates special moral obligations among co-

[40] Tamir also rejects Kymlicka's suggestion that the strength of national claims lies with the un-chosen character of their identities. National identity generates important claims despite the fact that it is, in part, chosen.

members.[41] In Miller view, "I owe special obligations to fellow members of my nation which I do not owe to other human beings" (1995: 49). This does not mean that I do not have any duties towards outsiders, but that "duties we owe to our compatriots may be more extensive than the duties we owe to strangers" (Miller, 1988: 655; also Tamir, 1993: 99).[42] The relationship of nationality thus creates special obligations towards co-nationals and justifies national partiality.

Thomas Hurka distinguishes two main arguments about national partiality: (a) a metaethical argument; and (b) a perfectionist argument (1997: 141). The metaethical argument holds that the national community is the source of morality. Morality is always *our* morality, it "must be partial because the impartialist alternative is conceptually incoherent" (Hurka, 1997: 143).The major problem with this argument is that it confounds the source of morality with the object or the sphere of its application. It may be the case that morality is learned in the community, like basically everything else, but it does not follow that moral concern must be limited to the community. This view makes all committed impartialists moral schizophrenics.

The perfectionist argument for moral partiality states that membership in communities constitutes an essential individual good. From this fundamental interest, partialists derive the idea that members should be partial towards co-members. Hurka finds problematic the shift from the *form* of partialist ethical concern – to care more for the good of co-members – towards the *content* of the ethical concern – the nature of the good of co-members. He rightly notes that "no claims about what people's good consists in can justify the idea that we ought to care more about some people's good than about others" (Hurka, 1997: 143).

Let us agree that nationality is morally important and that some *moral* partiality is acceptable. The crucial question is, then, "conational partiality *with respect to what*" [original emphasis]

[41] Miller argues that a particular national identity is legitimate even if it is grounded in false knowledge or misperceptions. In fact, national communities' "ethical character will be strengthened by the acceptance of such myths" (Miller, 1995: 36). Miller gives the example of a child who is brought up in a family that is not his biological one because of some a mix-up in the hospital at the time of his birth. In this case, Miller argues, the child will and should continue to observe his special moral duties towards his actual family despite the fact that this is not his "true" family (1988: 659). The example is intended to show that origins matter less than relations. But we can think of a less innocent example that may fit better with the history of nationalism. Imagine that a child is sold into "his" family, or that he is the result of a rape "legitimized" by marriage. I think the latter example shows that the argument about the usefulness of false belief is deeply problematic. The argument seems to me a recipe for indoctrination and subordination.

[42] Robert Goodin offers a fact-based counterargument inspired by the practice of international law. He argues that we actually treat our co-nationals worse than non-nationals (e.g. with regard to expropriation, conscription, taxation, pollution). Goodin finds that rather than plain favouritism of co-nationals, the practice shows a "mixed situation", in which we may treat co-national better or worse. The argument is not fully convincing because it does not look at the corresponding rights. Eventually, Goodin admits, "even within our borders, we may treat citizens better in all sorts of ways than we treat noncitizens" (1988: 670).

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(Tan, 2005: 52)? Even if we accept some sort of moral partiality towards co-nationals, can this be simply translated into *political* partiality? Take the analogy between nationality and the family. We may have special obligations of care and love towards our parents but this does not mean that we should argue for extending a scheme of justice only towards our family (Tan, 2005: 58).

If we think that partiality is a "psychological truth about human beings" we still need an argument for why the boundaries of the nation-state should be the focus of partiality and not, say, those of the city, town or neighbourhood (Dagger, 1985: 441). Why stop at these particular sites of duties and not go downward (family), or upward (region, world)? In fact, nation-states are a result of an impressive process of extending our moral universe. As Kok-Chor Tan remarks, "if anything, nationalism shows us that it is possible to overcome the near and the familiar and to include strangers in our moral world as well" (2002: 454). Finally, the fact that a relationship is special and that there are some moral duties attached to it does not say anything about how one became part of it or who can join it. The relationship of nationality, for example, "does not provide fellow citizens with a right to prevent others from becoming part of it" (Mason, 2011: 274).

2.2.2 National Self-Determination

There are people who claim that the state belongs to the (majority) nation, in which case, citizenship policy constitutes yet another tool for preserving this unity. In this perspective, nation-states have a fundamental right to control admission to territory and citizenship, and this right justifies national-based selectivity in admission. In this section, I address several liberal nationalist claims about national self-determination and their implications with regard to admission to citizenship.[43] I discuss arguments advanced by Michael Walzer, David Miller, Yael Tamir, and Chaim Gans.

Walzer – The Right of Communities to Self-Definition

Michael Walzer offered one of the most famous defences of the right of political communities to control boundaries of membership. Walzer put forward two interdependent arguments concerning admission: an argument about the right to control immigration, and an argument

[43] Like most political theories that take into account issues of membership, theories of liberal nationalism tend to focus on immigration rather than citizenship. They either assume that admission to citizenship is non-problematic, or tend to regard citizenship itself as an artificial or secondary form of membership. However, nationalist arguments are abundant in the debates concerning the regulation of citizenship.

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about the obligation to include residents. On the one hand, the right to control immigration is essential in order to preserve the distinct character of each community. Communities have a fundamental right of self-determination. On the other hand, communities have the obligation to include all permanent residents in their territory. Walzer compares the situation of alien guest-workers in Western Europe of his time with that of metics in Ancient Greece. In both cases, alien residents were "ruled… by a band of citizen-tyrants" (Walzer, 2008: 171).

The major problem with this account is that Walzer builds his argument having in mind an ambiguous conception of "political communities" as distinct from states. He, nevertheless, believes that "[t]he politics and the culture of a modern democracy probably require the kind of largeness, and the kind of boundedness, that states provide" (Walzer, 1983: 39). The argument rests on the presupposition that states are political communities that are culturally homogenous and democratic (Bader, 1995: 217-8).[44] Walzer's "communities of character", however, cannot be properly identified with states or with nations. Modern states are not homogenous cultural communities. They are heterogeneous political sites shaped by old and new political, social, religious, ethnic struggles. Neither are nations "communities of fate". This view disregards past and current internal divisions, as well as external issues of exploitation and domination. In order to make the state fit his idea of self-determination, Walzer implausibly normativises the state.

Walzer admits to some general limitations of justice. As he points out, "to say that states have a right to act in certain areas is not to say that anything they do in those areas is right" (2008: 154). Walzer refers to racial and religious discrimination in the US admission policies of the 1920s aimed at preserving a homogenous white protestant country.[45] But these constraints of justice seem to vanish at the border. Walzer finds only a few situations in which the right to control admission is limited. He gives the example of racist policy of White Australia that was intended to exclude non-white immigrants. In Walzer's view, White Australia could justify its exclusivist racist immigration policy on the condition that it gave up some of its vast lands. He also accepts some (weaker) limits derived from the obligation to take in refugees.

[44] Veit Bader identifies four implausible presuppositions contained in Walzer's argument, namely (1) states overlap with political communities, (2) states are worlds of common meaning, (3) states are culturally homogeneous and democratic, and (4) closure is necessary for cultural preservation (1995: 217-221).
[45] Walzer also argues that states do not have the right to expel non-ethnic residents, "the state owes something to its inhabitants simply, without reference to their nationality" (2008: 157).

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In the light of the obligation to include residents, any permission to enter the territory could be seen as a decision of admission to citizenship. Decisions concerning citizenship seem to be pre-determined by decisions concerning immigration. It is curious that Walzer fails to acknowledge the link between the "character" of the community and the process of becoming a citizen. The focus on immigration shadows the idea of citizenship as political membership. In my view, the process of becoming a citizen implies a sort of mutual recognition that cannot be delivered by a mere unilateral permission to immigrate. In fact, we can envisage claims of citizenship that are cast independently of immigration or residence.

Walzer's defence of national selectivity in immigration— which implies national selectivity in access to citizenship – is based on the ideas that there is such a thing as national character and that there are available mechanisms through which such character can be identified and preserved by means of public policy. Unfortunately, modern states are anything but homogeneous communities of character. Any attempt to select immigrants based on national considerations is likely to disregard the national interests of certain sections of the citizenry. Introducing a quota-based admission system that aims at reproducing the ethno-national structure of citizenry might look like a better alternative. However, it is not at all clear why states should categorise individuals according to their national characteristics.

Finally, other liberal nationalists may actually reject Walzer's suggestion of quasi-automatic admission to citizenship for permanent residents on grounds that it offers little reassurance about the national integration of would-be citizens. They may argue, as many do nowadays, that additional proofs of national compatibility must be presented before full admission to citizenship.[46] This is only to show that Walzer may also fail to be good nationalist.

Miller – Statist Nationality

David Miller has elaborated a complex argument in the support of the nation-state. His claim about the morality of nationality is complemented by a claim about the importance of nationality for the survival of liberal-democratic states. The nation and the state reinforce each other. States ensure that moral national duties are properly reinforced and that national culture is preserved. National ties help maintaining social trust, which is essential for the functioning of democracy and welfare state.

[46] For example, language or citizenship tests, and proofs of good character and loyalty.

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David Miller offers a pragmatic argument about the motivational value of national identity for the preservation of schemes of social justice and for the functioning of democratic institutions.[47] In Miller's view, a just system of welfare needs to "be democratically supported" and this support can be primarily derived from a "common identity" (1988: 236-37). Cultural identity fosters social trust, which is vital to any democratic community (Miller, 2007) and in the contemporary world, nationality constitutes the most pervasive type of identity. However, not everybody agrees that national identity is required for the functioning of liberal-democratic institutions. Arash Abizadeh, for example, argues that "people can affectively identify with each other despite not sharing particular norms or beliefs" and that "the trust indispensable to social integration is not dependent upon shared national culture" (2002: 507). It may be the case that identification is a matter of institutional design rather than shared cultural characteristics (Pevnik, 2009: 149-50). Will Kymlicka also challenges the idea of a trade-off between cultural diversity and the welfare state.[48] Moderate multicultural policies can, in fact, increase solidarity by reducing stigmatization, supplementing efforts of nation-building, and generating collective pride (Kymlicka, 2006: 15). Moreover, the idea that people are unwilling to contribute because of lack of identification with others seems normatively weak because "the mere fact of powerful opposition to a policy ought not to be taken as justificatory for its repudiation" (Pevnik, 2009: 154).

One may admit that some sort of solidarity may be instrumental for maintaining viable liberal-democratic institutions but disagree that this solidarity must be of a national kind. What exactly is *national* identity? Due to his statist and republican view on nationalism, Miller favours a concept of nationality that is fairly wide and that (virtually) overlaps with state citizenship. There is a puzzling circularity in Miller's arguments. He makes the claim of self-determination available for nations but he defines nations as communities that have an "'aspiration' to be politically self-determining" (Miller, 1995: 19). The definition of nationality already contains the criterion of potential self-sufficiency; it remains unclear

[47] John S. Mill offers a classic defence of the principle of nationality. In Mill's view, "it is in general a necessary condition of free institutions that the boundaries of governments should coincide with those of nationalities" (2008: 430). He offers two main arguments. The first argument is about the essential role of a united public opinion in preserving free institutions and united armies. The second argument is about the need to prevent manipulative actions of any government "of the peoples artificially tied together" (Mill, 2008: 430). The tricky word is "artificially". Although Mill underlines the role of language and religion in the creation of nationalities, he maintains that "the strongest of all is identity of political antecedents" (2008: 427).

[48] Kymlicka finds that multicultural diversity has different impact in different contexts, depending on the nature of groups and the strength of state.

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whether a specific ethnic group "has the chance to determine its own destiny" (Miller, 1988: 659).[49]

When confronted with the issue of multinational states, such as Switzerland and Canada, Miller goes on and defines overarching nationality-like "communal identities." Nationality seems to be anything that gives citizens "a sense that people belong together" (Miller, 1995: 25) as long as it serves the functioning of the state. Miller's definition of national culture cannot be easily distinguished from alternative views on public culture. The sophisticated case he builds for the importance of national culture for the functioning of democratic societies may convince us that some form of common culture is needed, but this may not necessarily be of a national(istic) sort. If Miller's national cultures refer to "encompassing communities which aspire to draw in everyone who inhabits a particular territory" (1995: 92), I see no reason why different configurations of boundaries could not constitute such communities.

In his quest to legitimise the state *qua* nation-state, Miller gets seriously caught in a tension between a moral view of nationality as membership in a meaningful cultural community and a political/republican view on citizenship as membership in a political community. He tries to mitigate this tension by expanding and thus watering down his concept of nationality. For example, when confronted with internal ethno-national diversity, Miller refers to the idea of common identity through which different groups receive accommodation under the same political roof. This statist view prevents Miller from fully addressing claims of national identity. At one point, Miller argues that "we need to be clear whether we are trying to assess the ethical significance of nationality as such, or instead the ethical significance of membership in a scheme of political co-operation" (1995: 59). In this sense, he distinguishes between obligations of citizenship – based on reciprocity –, and obligations of nationality – based on common ties of identity. He warns that citizenship without nationality leads to "little more than minimal states, providing only basic security to their members" (Miller, 1995: 72). However, when discussing immigration and admission to citizenship, the idea of nationality and citizenship seem to merge and to form, indeed, national citizenship.

Miller expects immigrants to develop "a common national identity" (1995: 26). He admires the French model of assimilation because "if you want to extend full rights to citizenship to

[49] This adds a Darwinist twist to the theory because it recognizes political standing only to those groups that have chances of being successful. We can recall here J. S. Mill's argument about the benefits of assimilation for "inferior" national groups. But what exactly gives us a measure to the viability of an ethnic group?

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everyone who resides on French soil regardless of cultural background, and at the same time to have generous immigration laws, then you must take steps to ensure that the incoming groups are properly incorporated into French nationality" (Miller, 1995: 143). Limitations on immigration on grounds of threat to national identity are envisaged only in two situations: when immigrants arrive in large numbers, and when they carry strong alien national identities. Miller rejects explicitly nationality-based criteria for admission to citizenship. For the purpose of naturalisation, for example, immigrants are required to "accept the basic principles of liberal democracy, as these are instantiated in the laws and practices of the state" (Miller, 2008: 384) and to prove a working knowledge of the national language, and some familiarity with the history and institutions of the country. In the same respect, "citizenship tests become objectionable, however, when they overstep the line that divides private from public culture by requiring immigrants to engage with *cultural matters that have no intrinsic connection with citizenship itself*" [emphasis added] (Miller, 2008: 385).

This view may be seen as treating inappropriately the individual interests of immigrants in having *their* national identity recognized. Saying that immigrants are accepted only to the extent that they do not pose a threat to the national identity of the host group (assuming there is only one) is the same as agreeing with national compatibility tests for the purpose of immigration. In both cases, the decision about what constitutes a "threat" is left to the discretion of the host group. Chaim Gans is right to be suspicions about this apparent generosity when he notes that the titular national groups may find, in practice, many occasions to apply selective criteria on grounds of threats to their national identity (2003: 134).

Miller's statist-republican conception of citizenship keeps him busy with obligations towards "compatriots" who are synonymous with co-citizens. He takes little interest in the claim of external nationals who may share the same national identity with certain groups within the state. His statist view cannot make sense of the idea of privileging some non-citizen individuals before others, since it is only the citizens who matter for the purpose of national justice. Miller recommends the co-option of competing national groups within an overarching identity, while completely neglecting the nationality interests of external members, such as members of national diasporas. As Gans shows, his pragmatically-inspired offer of common cultural identity "may not satisfy the aspirations of minorities/immigrants who have national obligations towards external nations" (2003: 35). Miller seems to hold the conviction that the latter will enthusiastically embark on the new identity because they need "to belong as full

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members to the national community" (1995: 139). But the view that each state should mind its own citizens (and immigrants) does not answer important "nationalist" questions related to trans-state communities, diaspora and external citizenship.

Tamir – The Individual Right to Culture

The positions adopted by Walzer and Miller come closer to more traditional forms of nationalism that gravitating around the idea of independent statehood. But not all theories of nationalism defend statist forms of self-determination. Gans makes a useful distinction between two versions of nationalism, namely, a statist version, and a cultural one (2003: 7). Whereas statist nationalism perceives national culture as a condition for the realization of strong political communities/states, cultural nationalism focuses upon the preservation of culture within or beyond a particular state.[50] I turn now to such cultural nationalist arguments.

Yael Tamir argues that the constitutive character of national identity generates a fundamental individual interest in the affirmation and preservation of national identity. This interest generates an individual right to culture (Tamir, 1993: 35). The satisfaction of the right to culture demands "a public sphere in which individuals can share a language, memorise their past, cherish their heroes, live a fulfilling national life" (Tamir, 1993: 8). This public sphere needs to reflect the uniqueness of the national culture and to secure it by the work of political institutions. As for practical arrangements, Tamir prefers schemes that provides the "widest possible degree of autonomy" (1993: 74) and she is ready to accept various solutions that fall short of statehood,[51] such as federalism or cultural autonomy.

Like other liberal nationalists, Tamir tends to look at citizenship as "a formal concept, based on legal criteria rather than on feelings of membership" (1993: 134). In this light, citizenship is "a primary good that all individuals deserve" (Tamir, 1993: 126). Nevertheless, she points out one main problem of liberal citizenship. According to Tamir, a coherent liberal theory should "grant citizenship only to informed adults who actively request it, thereby expressing their willingness and consent" (1993: 125). While showing that this is not the case, Tamir suggests that considerations of national belonging may play out in citizenship policies.

[50] In Gans' interpretation, cultural nationalism is not necessarily ethnic or non-political and statist nationalism is not necessarily civic or non-cultural. It must also be noted that specific theories no not fall strictly within these analytic categories and that they tend to mix elements from both strategies. However, one can usually identify a dominant approach in each of them.

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Making reference to liberal democratic principles, Tamir argues that "a national entity might be seen as entitled to restrict immigration in order to preserve the existence of a viable majority" (1993: 160). Moreover, the state is also "justified in offering citizenship only to those committed to respect its communal values, collective history, and shared aspirations for a prosperous future" (Tamir, 1993: 129). She accepts some constrains to such preferentialism. Selectivity is legitimate only "if all nations have an equal chance of establishing a national entity, in which its members will be given a fair chance of pursuing their personal and collective goals' (Tamir, 1993: 161). Although this establishes a high threshold, the argument is problematic because it assumes that in a world of perfectly self-determining nation-states people will not have reasons to migrate or change membership.

Although Tamir accepts more "flexible" arrangement for accommodating national cultures, she eventually pays large reverence to the state. She admits that, in many cases, "the political system will reflect a particular national culture" and members of (minority) cultures "will unavoidably feel alienated to some extent" " (Tamir, 1993: 163). Selectivity in admission must be limited and may be used only by the (majority culture of the) state. Tamir seems to disregard the "national" claim of emigrants. Because emigrants "have deliberately placed themselves in this position [they] should therefore bear the consequences" (Tamir, 1993: 42). Claims for extra-territorial inclusion are dismissed.

Gans – National-Based Admission

Finally, Chaim Gans offers us a complex cultural nationalist argument that also aims at justifying national preferentialism in immigration. Gans claims that "each national group in the world" has a right to self-determination. Although he distinguishes between a right to statehood and a right to sub-statist self-determination, he maintains that the latter "must be realized at least in one place, usually the historic homeland of the national group enjoying it" (Gans, 2003: 4).

Unlike Tamir, Gans does not affirm individual rights and obligations but argues that the interest in national culture constitutes "sources of reasons for action" (2003: 57). Public officials are obliged to "forge practices and institutions" that allow individuals to act in accordance with reasons arising from their interest in their endeavours (and their ancestors'), although without forcing them to do so. Like Tamir, and unlike Miller, Gans rejects statist self-determination. Given actual geo-demographic conditions, a state cannot be conceived of as belonging to one national group, even if that group constitutes a majority. Self-

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determination occurs at sub-state (multicultural) and inter-state (diaspora) levels. In cases of competing claims, Gans proposes that national groups who live in their homeland should be allowed to shape the main institutions of the state (2003: 96).At the inter-state level, members of the national group that live outside their homeland are recognized as holding legitimate interests in their national culture (of origin), therefore they are given voting rights on matters of national identity, as well as rights of return (Gans, 2003: 84).

Gans' defence of preferential immigration for co-nationals is based on the idea of "universal" moral obligations (2003: 4). He rejects versions of national preferentialism advocated by statist nationalists.[52] Gans makes the case for preferential immigration required by remedial, sub-statist and inter-statist justice. In this respect, he identifies three principles: (1) priority of national "needs" of potential migrants; (2) preferential immigration driven by concerns with national self-determination of the core national groups; and (3) general priority for co-nationals within immigration channels (refugees, guest-workers) based on general arguments of solidarity and compatibility.

According to the first principle, the state can admit co-national immigrants (quotas) who wish to enjoy full self-determination rights within the core nation. This does not count as an individual right to immigration, but as a consideration of their national claims. Gans believes that, unless persecuted, diaspora members can satisfy some of their national needs in their states of residence. The very existence of a self-determining homeland is deemed to satisfy the need of *all* co-nationals for the continuation of their endeavours. There is no absolute need of "physical presence in that centre" (2003: 136). According to the second principle, the core national groups may decide to open channels for preferential admission of co-nationals in order to preserve their self-determination within the territory. Gans constructs this right as a "case of the continuing sons" (2003: 139) according to which intervention is required for maintaining the status quo and not for altering it. According to the third principle, self-determination imposes a general duty to prioritize co-nationals within (and not across) various immigration policies. This principle makes room for pragmatic considerations related to efficiency and the assimilability of newcomers. In this case, solidarity is considered as "one among many expressions of national self-determination" (Gans, 2003: 140). Unlike the first

[52] In Gans' view, statist nationalist policies of national preferentialism in immigration are wrong at different levels. At the domestic level, they reinforce the dominance of the core national group vis-a-vis minorities. At the international level, they disregard the interests of national groups without statehood. At the intra-national level, they disregard the interests of the members of national diaspora.

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principle, the third one does not require that immigrants show explicit nationalist commitments.

Gans' complex theory offers a wider net for catching the national interests of individuals than other liberal nationalist approaches. However, it has several important limitations. First, Gans assumes that national groups control immigration policies. He argues against "the case of the founding fathers" that recommends active policies for ethno-homogenising the state but he stops somewhere in mid-way. His argument is about the preservation of ethno-national status quo. However, the dissatisfaction with the status quo is most often what triggers struggles over national self-determination. Second, Gans believes that most national interests of diaspora members are satisfied by integration in the state of residence and by remote connection with self-determining homelands. This account dismisses too quickly claims of self-determination outside the homeland. Diaspora communities, even immigrant ones, may develop genuine forms of national culture and they may attach to them political claims that must be treated independently from what is happening in their homelands. By shifting between individual interests in national culture and group interests in cultural survival, Gans seems to punish emigrants and other members of national groups who do not live in their national homeland.[53] The offer of some sort of polyethnic rights by their host states (also: Kymlicka, 1995) cannot fully satisfy the national interests of diaspora groups. Gans assumes that descendants of immigrants will integrate into the host cultures and that they will have their national interests satisfied within their adoptive cultures. But this seems to ignore the main argument of liberal nationalism, namely that (all) individuals have a fundamental interest in *their* national culture. In Gans' case, the group interests in the survival of homeland culture outweigh the national interests of certain individuals.

2.2.3 Nationalism and Membership

The implicit modern answer to the problem of membership was that the nation constitutes the people. Nations were seen as moral entities that are entitled to self-determination. Whereas national membership appeared natural and unproblematic, the coincidence between national and state boundaries provided a comfortable solution to the problem of boundaries.

In this part of the chapter, I have addressed several liberal nationalist arguments that offer justifications for boundaries and boundary making. I first explored the difficulties that these theories encounter while trying to mould nationalist ideas into liberal frames. I found that the

[53] An obvious problem here is the case of minorities without self-determining homelands.

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main problem arises when moral claims about national partiality are translated into political claims about exclusion. Although certain arguments about the morality of nationality may convince, they quickly become problematic when they assume the naturalness of the national boundaries and when they imply that state boundaries should ideally coincide with national boundaries. Second, I have addressed more specific claims about nationality-driven admission. Interestingly, I have found that, despite their shared commitments to protect fundamental interests in national culture, liberal nationalists are often reluctant to make a direct connection between admission to citizenship and nation-building. Michael Walzer accepts national preferentialism with regard to immigration but denies states (communities) the right to exclude long-term residents from citizenship. David Miller asserts the right of the (nation) state to reproduce its national culture – which may exceptionally imply nationalist control over immigration – but he rejects the idea of national selectivity in access to citizenship. Chaim Gans strongly defends national-based preferential admission in immigration but opposes the idea of using admission as a means to ensure national domination in a territory. In what concerns admission to citizenship, the *liberal* commitments of these theorists seem to outweigh their *nationalist* ambitions.

To simply reject nationalism as a solution for the problem of membership would not serve us particularly well. Any proposal to reform boundary policies *without* fundamentally restructuring the actual international order based on autonomous states must address claims advanced in the name of the nations that these states claim to represent. My proposal is to accept the *fact* of the nation-state but only as long as its membership policies receive much-needed normative corrections. On the one hand, nationalism does not offer a sound justification for state boundaries. Although it may be desirable or useful that states coincide with nations, the coercive nature of the state raises independent demands of justification. On the other hand, democratic politics is "politics in the vernacular" (Kymlicka, 2001a) and all states are engaged "in the business of nation building" (Tan, 2005: 51). As Carens nicely put it, "there is no political equivalent to vegetarianism when it comes to culture" (2004: 121).

If we were to accept liberal nationalist claims about the importance of national identity and the moral relevance of national community, we could agree that, in principle, nation-states may promote some distinctive national-cultural features. Apart from a concern with the respect for liberties, freedoms and democracy, states may also address claims of groups or

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individuals related to their identity and culture. [54] I admit that liberal nationalism "commands the establishment of certain *nationalised institutions* for the purpose of promoting and securing a cultural identity in the name of self-determination" (Tan, 2002: 438). However, I argue that membership policies should not be among these nationalised institutions. This is not only because the instrumentalization of membership policies will most likely serve the national interests of the majority.[55] It is because the nation-state cannot properly justify its own boundaries.

One may object that this argument will not work because denationalised rules of admission and nationalised policies of citizenhood contradict one another. I answer that this is not the case. First, we already see that admission policies in Western world have come a long way in terms of incorporating liberal norms, such as gender equality and racial non-discrimination. It is only recently that a counter-trend towards re-ethnicization has occurred, as shown by the introduction of naturalisation tests in several European states and the expansion of privileges of external citizenship. I would argue for the re-launching of the liberal program. Second, by denationalising the boundary, I do not mean simply *de-normativising* it. I admit that admission policies should respond to certain major normative concerns, such as concerns about the justification of coercion and democratic membership. I specify these concerns in the next part of this chapter.

[54] I am aware that this statement opens the floodgates for complex debates about the nature, conditions, and limits of legitimate domestic nation building. To anticipate the protest of those who are concerned with the rights of national minorities, I add that policies of nation building should take into account the views and the interests of such minorities. My point here is merely that a certain degree of state-led nation building may be, in principle, legitimate.

[55] I discuss this argument in Chapter 6.

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2.3 Liberal and Democratic Proposals

Democratic communities cannot define their own boundaries simply by using the democratic method. As the "boundary problem" (Whelan, 1983) in democratic theory shows,[56] the question of "who is the people" cannot be democratically answered by 'the people' who is to be defined by the answer to the very question. Political theory has traditionally ignored this problem. The general assumption was that 'the people' is historically a given – this is what Robert Dahl calls "the shadow theory of democracy" (1989: 4). In a pioneering study, Frederick Whelan scrutinised three general democratic theories – participative, majoritarian, and consent-based theories – and concluded, rather discouragingly, that "democratic methods themselves are inadequate to establish the bounds of the collectivity" (1983: 22). He remarked, however, that this apparent failure of the democratic method was not fatal to democracy. First, the finding should determine us to moderate our claims about democracy. Second, it should push us to look beyond the procedural aspects of democracy.

At one extreme, it can be argued that because democratic principles cannot prescribe political boundaries the demos should be left to decide on its own composition. From a historical perspective, Joseph Schumpeter notes that the "*populus* in the constitutional sense may exclude slaves completely and other inhabitants partially. The law may recognize any number of status between slavery and full or even privileged citizenship" (Schumpeter, 1994: 244). Such approach leads to the worrying conclusion that even a military *junta* could pass the test of democracy, as long as it is internally democratic. In this way, democracy becomes "conceptually, morally, and empirically indistinguishable from autocracy" (Dahl, 1989: 120). In order to avoid Schumpeter's path, we may shift the focus from the democratic method towards the underlying values and norms of democracy (Miller, 2009a: 204; also Arrhenius, 2005). Alternatively, we could also look into other major normative principles that are not strictly related to democracy, such as liberal values and norms.

In this part of the chapter, I discuss several liberal and democratic arguments that deal specifically with the boundary problem. In the debates regarding borders, it is commonly expected that liberals take a stance towards more open borders, while democrats are expected to lean towards more closed borders. On the one hand, liberals are typically concerned with individual freedom and moral equality and they often protest against arbitrary borders and

[56] Goodin remarks that the term "boundary" unnecessarily shifts the focus towards geography (2007: 40, n 1). But his preferred terminology — the problem of "constituting the demos" — seems to limit our concern to the stage of the initial constitution of the demos. In my proposal, I suggest that we could escape or at least bracket the problem of the initial constitution by focusing on the problem of the "reproduction" of the demos.

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against the deprivations and inequalities caused by them. On the other hand, democrats are typically concerned with collective self-rule and meaningful participation in particular communities and they often defend the right of the people to control the boundaries of their political communities. This division of labour between liberals and democrats is not, however, strictly respected. In what follows, I discuss several arguments that seem to overcome this dichotomy. For example, Christopher Wellman offers a defence of the right to exclude, grounded in the *liberal* value of freedom of association. Conversely, Arash Abizadeh makes a case for an unbounded demos, a principle that he derives from a *democratic* reading of the boundary problem.[57]

2.3.1 Consent and Freedom of Association

The idea of consent constitutes a powerful myth of modern political thinking. Basically, the consent theory prescribes that political communities should be the result of a free agreement (contract) between free and equal individuals. A government that is founded on a genuine agreement is a legitimate government. Citizens who are under a legitimate government are also under a general obligation to obey its laws. The consent theory has a great appeal for justifying authority because it "reconciles power with equality and liberty in a way that respects autonomy… the state may coerce me only if I freely limit my own liberty by authorizing the state to impose rules on me" (Buchanan, 2002: 698).

Despite their intuitive appeal, consent theories are known to encounter serious problems (e.g. Simmons, 1979). Apart from the fact that, historically, states have hardly been based on explicit consent, these theories face difficulties with regard to a series of other issues, such as the determination of the proof of consent, the assumption of mutuality, various assumptions about the circumstances of consent[58] (Schuck and Smith, 1996: 20-1). My concern here is limited to the question of whether consent can be used in order legitimise not only authority but also membership.

There are several contractualists thinkers who have attempted to use the idea of consent in order to justify political membership. According to John Locke, for example, consent is the only way through which free men could ""unite to" a "Body Politick" (1980: 63). More recently, Schuck and Smith (1985) offered a defence of a "consensualist based political

[57] A series of other arguments combine liberal and democratic perspectives. They either converge at the level of basic concerns – e.g. the need to justify coercion – or at the level of solutions – e.g. status, inclusion.
[58] Among the problematic assumptions of consent theories Schuck and Smith count assumptions about the scope of free will, about the nature of informed choices, and about the availability of alternatives (1996: 21).

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membership", insisting on the need to eliminate the rule of automatic ius soli in the US.[59] Generally, proposals to use consent as the primary criterion for membership encounter serious problems both practical and theoretical. I briefly discuss two objections to the argument from consent.

First, states are not voluntary associations. Despite the myth of social contract, actual political communities are not based on consent – neither explicit nor implicit. States are "compulsory associations, that claim jurisdiction over all residents from the time of their birth or arrival within their borders" (Whelan, 1983: 26). Individuals are mostly born into political communities. As for those who seek to change their membership, the sole expression of consent is usually insufficient to trigger inclusion in the community of their wish. Moreover, individuals *have to* have a membership because "the allocation of rights and services in the modern world depends on membership in a state" (Tamir, 1993: 126). Unlike in the case of being refused membership in a club, individuals without state membership cannot plausibly create their own state.

Second, the argument of consent fails to give a plausible theoretical solution to the problem of membership. As Abizadeh argues, the logic of the consent argument in the context of membership leads to the problem of "serial consent," meaning that "legitimate boundaries require that *every* individual consent not just to his or her inclusion or exclusion, but also, in the case of willing would-be insiders, to the inclusion of *each* other willing individual" (2012: 9, emphases in original). The requirement of universal serial consent is unlikely to take us far. Because people may legitimately refuse to consent to their own exclusion, Abizadeh argues, serial consent will inevitably lead to global membership. Less optimistically, I think that because each individual has the possibility to legitimately refuse to consent to the inclusion of consenting others we will end up without any membership.

Despite its failures, I think that the argument from consent remains relevant for the problem of membership. The questions before us are whether consent should be regarded as the *sole* criterion of membership and for what *kind* of membership is consent relevant. As I argue later in this chapter, democratic membership implies that members actively *recognise* each another as co-members. In this framework, consent can be seen as an element of the principle of democratic recognition. However, democratic membership is not the only type of membership that characterises the contemporary (democratic) state. The coercive nature of the state and

[59] I discuss these arguments in Chapter 4.

the ultimately arbitrary nature of its boundaries generate duties of justification that must be met regardless of individual (capacities or willingness to) consent.

Another liberal argument that links the admission to membership with the consent of members is offered by Christopher Wellman (2008; 2011). Wellman defends a presumptive right of legitimate states to exclude based on the liberal value of freedom of association. The premises of his argument are: (1) legitimate states enjoy self-determination; (2) freedom of association is an important element of self-determination; and (3) freedom of association entitles one not to associate with others. The conclusion is that the state has the right to control immigration in virtue of its (citizens') right not to associate with outsiders (Wellman, 2011: 13).[60]

It must be noted that Wellman's argument does not deal primarily with citizenship. Wellman takes a Walzerian view according to which immigrants are to be considered future citizens.[61] Immigration, and not citizenship, is the paradigmatic boundary of membership and the relevant act of association.[62] Sarah Fine comments that Wellman's argument about association is better suited to the case of citizenship than to that of immigration (2010: 343). Wellman's response is to emphasize on the overwhelmingly territorial character of the modern state. Because states are "necessarily territorial," resident citizens are entitled "to keep foreigners out of their association *and off their territory*" (Wellman, 2011: 100, emphasis in original). This view forces Wellman to talk about the rights of "constituents" rather than "citizens." By constituents he means "everyone (including foreigners) residing on the territory" (Wellman, 2011: 55, n. 1). In consequence, Wellman does not "assume that states must necessarily protect the rights of their citizens who are living abroad" (2011: 55, n. 1). However, this view seems practically inaccurate and theoretically problematic. Neither the scope of state coercion, nor the boundaries of political membership perfectly match territorial borders. In fact, the disconnection of political membership from territorial membership poses one of the most important challenges to contemporary political theory. The issue deserves more attention than can be crammed into a footnote.

The core argument is that a legitimate state has the right to exclude immigrants by virtue of its citizens' freedom of association. Wellman carefully denies such right to illegitimate states. By

[60] For a previous version of the argument see (Wellman, 2008).
[61] According to Wellman, "immigration… can involve costs to those who *must include you as an equal* in their political community" (2012: 90; my emphasis).
[62] Similarly, Michael Blake argues that immigration "represents not simply a change in physical location; it represents a change in political relationship" (2006: 2).

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legitimate states, he understands only those states that provide justification for their recourse to *non-consensual* coercion. In a liberal fashion, Wellman argues that justification is given when the state "adequately protects the human rights of its constituents and respects the rights of all others" (2011: 16). Wellman openly rejects the idea that states are based on consent. He admits that states are not voluntary associations and that "country's membership does not depend on an autonomous choice" (Wellman, 2011: 20). It is nothing but "mere luck [that] determines whether one is born inside or outside any state" (Wellman, 2011: 74). In Wellman's view, the fact of non-consensual membership does not render the state illegitimate as long as the non-consensually constituted state delivers adequate protection to its constituents. At this point, he invokes "how utterly horrible life would be in the absence of political stability" (Wellman, 2011: 75). Although I agree that the problem of political stability is not trivial, my question is why stability should necessarily imply the preservation of (membership) status quo. What is so special about the claim of *this* political authority – however properly justified to its subjects – over *these and only these* people?

It is my contention that Wellman prematurely dismisses the problem of non-consensual membership. It strikes me as somewhat odd that an argument about freedom of association relies on the blind acceptance of *non-associative* membership. It follows that, although we are not free to associate with one another – nor free to individually associate with people from another country – we are nevertheless free to (collectively) reject others who wish to associate with us. The problem is that citizens have not actually associated with one another. What Wellman defends is a *right of non-associations to freedom of (non-)association*.[63] In my view, merely providing an adequate package of human rights *after* the constitution of the state cannot dissolve the problem of non-consensual membership. This initial arbitrariness[64] of membership is constitutive for the state and, I argue, it should imposes normative constraints to membership policies. Because initial membership cannot be properly justified, policies of membership are not self-regarding matters of state.

Finally, despite Wellman's insistence that his account of self-determination is political and not national,[65] I find that his solution is no better. Although the removal of the content of self-

[63] The only true associates are maybe those latecomers who were accepted as members through consented immigration.
[64] One could object that I jump too quickly from "non-consensual" to "arbitrary" membership as if a legitimate form of membership should always be consensual. Maybe this is because here I only oppose consensual to functionalist without looking into other possibilities. I am definitively not satisfied with a functionalist defence of legitimacy, according to which something is legitimate because it *works*.
[65] Wellman does not really reject the national version of self determination, he just puts it aside as unnecessary for his argument (2011: 53)

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determination – such as the protection of national character (Walzer) – saves Wellman from several contentions, the liberal endorsement of freedom of association is eclipsed by an incomplete account of state legitimacy. The mere justification of coercion does not annihilate the problem of arbitrary membership. It is not sufficient to reason about the "determination" implied in the concept of "self-determination", as long as "the appeal to self-determination… begs the question of who the relevant collective 'self' is" (Abizadeh, 2008: 49).

Wellman offers a good argument in support of a general duty of states to justify their coercive powers. He also proposes a liberal method of justification by which states discharge their duty of justification through the provision of an adequate package of rights. I think that both arguments are useful in order to address certain, though not all, claims of membership.

2.3.2 All Affected Interests

The principle of all affected interests promises a simple and commonsensical solution to the boundary problem. The idea is that "everyone who is affected by the decisions of a government should have the right to participate in that government" (Dahl, 1970: 64-65).[66] The principle has received considerable attention in the context of increased awareness about the unaccounted externalities of domestic democratic decisions.

Despite its simplicity, the principle of all affected interests conceals important problems. First, it seems logically incoherent. We cannot know who is affected by a decision before the decision is actually taken. This is because being affected by a decision depends logically on the outcome of the decision itself (Goodin, 2007; Miller, 2009a). As Whelan notes, "the scope and nature of the impact of different laws or policies on different categories of people is often their most controversial feature" (1983: 19). As a way out of this impasse, David Owen proposes a reading of the principle in which the "decision" is interpreted in terms of a *choice* among possible decisions rather than the *outcome* of the decision. The incoherence of the principle disappears because "we can perfectly well state whose interest are affected by the decision (choice) prior to the determination of outcome" (Owen, 2012: 133).

Apart from issues of coherence, the principle of all affected interests raises problems with regard to its implications. Should all affected interests be included or only those who are affected in a substantial way? Rainer Bauböck argues that being affected by decisions is not

[66] In Whelan's reading "all those people who are affected by a particular law, policy, or decision ought to have s voice in making it" (1983: 16). According to Philip Pettit, what separates interference from domination is that political authority "is controlled by the interests and opinions of those affected, being required to serve those interests in a way that conforms with those opinions" (1997: 35).

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always a sufficiently strong claim to justify democratic inclusion (2009a: 15). Although those affected in some way may have a right to see their interests taken into account, the principle of all affected interests "cannot provide a criterion for determining claims to citizenship and political participation" (Bauböck, 2009a: 18). However, democratic inclusion is not incompatible with the idea of differentiated inclusion. According to Owen, although the duty of justification towards those affected generates "an equal right of participation," such right does not necessarily amount to "a right to equal participation" (2012: 147). If we accept the idea of partial representation, we have to find a way to normatively match degrees of affectedness with degrees of participation. To try to do so, we should first check whether "those affected are *unjustly* affected" (Lister, 2010: 218). Second, we should check whether adequate compensation could be given to those affected without including them into the demos. It is only at a third stage that we could respond to affectedness with democratic inclusion. This may be the case, for example, "when one demos finds itself systematically vulnerable to the decision taken by another" (Miller, 2009a: 224). However, not even in such cases should political membership be granted automatically.

The principle of all affected interests is interesting because it does not assume a privileged people that has access to democratic power in virtue of some inherent pre-political features. But this advantage also constitutes one of its main problems. The principle can be criticised because it does not offer a plausible account of the political community. As Whelan complains, the principle of all affected interests leaves us with nothing but a series of ad hoc constituencies, one for each round of decision-making (1983: 19). Despite its ambiguities, I admit that the principle may serve as a starting point for addressing democratic claims in a non-standard (state-centred) political context. Because I ultimately concentrate my study on the issue of membership in a democratic state, I think it is more useful to focus on a related but more specific principle, namely the principle of subjection to state coercive power.

2.3.3 Subjection to State Coercive Power

According to the principle of subjection (or coercion), all those who are subjected to the political authority should participate in the making of the authority. Robert Dahl makes this principle one of the five criteria of a full democratic process. Dahl's criterion of inclusion reads that the demos should include all adults subject to the binding collective decisions of the association except for transients and persons proved to be mentally defective (1989: 119,

129).[67]

The argument of subjection or coercion has been invoked in different theoretical contexts. Responding to claims about arbitrary membership in the context of severe global inequalities, Michael Blake (2001) has argued that membership – and the distributive benefits attached to it – is something that the state owes (only) to those who are subject to its coercive power. Because the special political relationship created by the state is "altered" by immigration, the state has the right to refuse entry to foreigners (Blake, 2006). Blake concedes that, in certain circumstances, individuals have a moral right to immigrate, as in the case when they cannot avail themselves of the adequate protection of their home states. However, he maintains that would be immigrants have a duty to provide justifications for their admission. Thus, depending on the strength of their claims, "some individuals may legitimately be refused" (Blake, 2006: 3).[68] I disagree that the mere fact of immigration alters the political relationship of citizens. In my view, political membership requires something more than just physical presence. Although Blake admits that that borders are arbitrary, and that "[s]overeignty is, indeed, often found against a backdrop of theft and imperialism," he remarks that "what is created by arbitrary facts can nonetheless be morally relevant" (2006: 4). In his view, the moral character of the shared political relationship established and sustained by a state vindicates the initial arbitrariness of state borders. However, even if we accept that the political relationship that exists among citizens/residents at a given point has moral value, we should still ask why the established rules of boundary making are morally justified. For example, Blake accepts the rule of birthright citizenship (ius soli) in virtue of the fact that individuals born in the state "have a right to continue to live in the political community of their birth" (2006, 4). However, the question remains as to why the mere fact of birth in the territory should count as an act of admission to political membership.

Christopher Wellman (2011) puts the problem of non-consensual coercion at the centre of his account about state legitimacy. In his view, states may legitimately enjoy the right to exclude only if they provide for an adequate package of rights to those who are subject to their power. The beneficiaries of these rights are, according to Wellman, the "constituents" of the state, namely, its long-term residents. As previously discussed, Wellman is not impressed with the

[67] The qualification regarding children and mentally defective anticipates some of the problems related to the concept of subjection. David Owen correctly points that Dahl assumed the equal subjection of individuals residing in a country (2011: 656).

[68] Blake admits that "[i]f …individuals have to make some sort of showing before they can be understood to have a right to emigrate; in a world as riven with injustice as our own, however, such a showing will not be difficult to make" (2006: 6).

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problem of non-consensual membership. His proposal for the justification of coercion consists of granting the constituents a bundle of rights – that includes the right to exclude outsiders. Wellman does not link the duty of the state to justify coercion with the right of coerced individuals to political participation.

Arash Abizadeh offers an alternative solution to the problem of coercion when he argues that coercion can only be legitimated through democratic inclusion. Because "coercion always invades autonomy,"[69] it must be justified in a way that is "consistent with the ideal of autonomy" (Abizadeh, 2008: 40). Abizadeh's innovation is to challenge the conventional view according to which coercion is exercised only towards those who are members of a coercive structure. In his view, the very fact of establishing and defending boundaries constitute acts of coercion. Because boundaries generate and rely heavily on coercion, they must be justified to both insiders and outsiders. This expansive interpretation of the scope of coercion triggers a call for a generalised duty of justification. Unlike "liberals," who rely on hypothetical justification,[70] Abizadeh defends a democratic principle of justification that matches coercion with political inclusion. He rejects the conventional democratic position according to which democracy requires clearly delimitated boundaries (Whelan, 1983). In his view, this position faces two major problems. First, there is the "boundary problem" that posits the inability of democratic theory to specify democratic boundaries. Second, there is the "externality problem", according to which the exercise of democratic power generates an amount of trans-border coercion that is unaccounted for by the domestic democratic process. It follows that "the demos of democratic theory is in principle unbounded" and that in order to justify coercion and coercive borders, states must be "*democratically justified* to foreigners as well as to citizens" (Abizadeh, 2008: 38).

I discuss two objections to Abizadeh's argument. The first objection concerns the scope of coercion. The second objection is related to the proposed method of justification. First, one may disagree that the establishment of boundaries and the control of border constitute acts coercion. David Miller argued, for example, that immigration laws do not coerce but merely prevent immigrants from entry. An action is coercive when it forces individuals to take one course of action. Immigration control of one country only prevents individuals to take one

[69] Abizadeh uses Raz's theory of personal autonomy that distinguishes three conditions of autonomy: mental capacity, availability of an adequate range of valuable options, and independence. While the first two conditions of autonomy can only sometimes be affected by state coercion, the condition of independence "is always invaded by subjection to coercion" (Abizadeh: 2008: 40).

[70] As Abizadeh explain, the liberal strategy of justification requires to pay due to "each person's interests and status of free and equal agents" without being concerned – as democrats would – with the actual participation of the person in the very structures that coerce her (2008: 41).

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particular course of action (Miller, 2009a: 220). However, it may be the case that immigrants have no alternatives because all the states available to them enforce *preventive* policies. In such case, we have a problem of unjustified coercion but no agent to whom to attribute duties of justification. Although I am sympathetic to Abizadeh's argument from the externality problem, I do not think that it is necessary in order to impose general duties of justification on states. For such purpose I think that the argument about the arbitrariness of boundaries is sufficient. Because state boundaries cannot be normatively fixed, states are obliged to keep their boundaries open. Individuals are not owed justification abstractly – because of the mere demarcation of boundaries – but because and when they find *or put themselves* under the coercive power of the state. It is becomes essential then to distinguish between different degrees of coercion in order to assign duties of justification. As a general rule, I take *sufficient residence* in the territory of the state as an indicator of relevant coercion to state power.[71] At this point, it is sufficient to say that tourists, transients and holiday- makers do not have sufficient residence in the country; hence they are not owed special justification in virtue of coercion to state power.

The second objection to Abizadeh's proposal concerns his proposed strategy of justification. Abizadeh argues that the only appropriate way of justification for state coercion is democratic participation. As Wellman remarks, Abizadeh's view hinges on a commitment to democracy and on a particular reading of democracy as equal say (2011: 96). It is true that Abizadeh is open as to the exact method and degree of participation, as long as it allows people to "be able to see themselves as the free and equal authors of the laws to which they are subject" (2008: 41). The question is what kind of participation and what degree of inclusion is required in order to safeguard individual autonomy. Does the state owe full membership (citizenship) to all individuals who are subject to its rule? Does the state owe full membership *only* to his subjects, or only *as long as* they remain subjects? Does the state duty of justification require *automatic* inclusion of subjects and automatic *exclusion* of non-subjects? I pose these questions in order to problematize the link between the state's duty to justify coercion and political membership. My main concern is related to the idea of automatic access to political membership. Although I agree that the state has a duty of inclusion due to its coercive actions, I disagree that this duty should be discharged by way of automatic political inclusion. In the context of contemporary state, I think that coercion triggers a duty to grant a status of special legal protection – which *includes* the right to access full political membership. This is what I

[71] I am open to hearing arguments about other forms of relevant coercion. Nevertheless, sufficient residence can be considered as the core element that falls under the state coercion argument.

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call the status of legal nationality. In order to access full political membership, nationals must express their willingness to become members in the political *community*. Later in this chapter, I defend this position by arguing that democracies have legitimate concerns about democratic continuity. At this point, I need to show why granting legal nationality is sufficient for the justification of state coercion.

I am not the first to distinguish between different statuses of membership. Recently, David Owen has proposed to differentiate between political membership and national citizenship as a way of solving the problem of the "antinomy of incorporation" – whether non-citizens who are long-term legal residents should be naturalised automatically, or whether they should only be offered the option to naturalise (2011: 651-5). Owen's argument is that long-term residents should be offered automatic political membership in virtue of their subjection to state power, whereas the status of national citizenship should be acquired voluntarily as an act through which immigrants acknowledge their non-instrumental link with the state. Full political membership is "a necessary condition of political autonomy" (Owen, 2011: 652). Owen distinguishes between conditions of political autonomy and exercises of political autonomy. Whereas citizens' decision to cast votes in particular elections constitutes an exercise of their political autonomy, the possession of the status that confers them the right to cast votes is a condition of political autonomy. The latter cannot depend on a voluntary decision because individuals cannot morally choose to refuse a status that enables them to be autonomous.

If it were to use Owen's framework, I would argue that *automatic* access to the status of legal nationality that includes a right to access full political membership constitutes a necessary and sufficient condition of political autonomy. The decisions to take up full political membership and to actually cast votes then represent exercises of political autonomy. It matters, of course, how easy is for a national to take up political membership. It can be argued that, whereas in the case of exercising the right to vote citizens have only to make up their mind to actually cast their vote, in the case of accessing political membership nationals face external constraints. I answer to this objection in two points. First, it is not true that the exercise of voting is always unconditional and unconstrained. Depending of certain circumstances (type of elections, voters' residential status, administrative constraints, et cetera), voters may be required to take some preliminary voluntary steps in order to cast their vote, such as to register for elections. We could think of nationals as a special category of would-be voters who have to take such voluntary steps. The question that arises is whether nationals could be *refused* political membership? My second point is about the nature of the external constraints

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with regard to access to political membership. I argued that nationals have a right to access full political membership. In order to use this right, however, they must publically express their willingness to become members in the democratic community. This is because democratic rights are not precisely claims against states – as the claims to automatic nationality are; they are claims against the democratic communities subsumed by (democratic) states. Satisfying rights of democratic inclusion must take into account certain fundamental concerns of democratic communities, such as the concern about democratic continuity. The principle of democratic recognition that I develop later in the chapter requires nationals to expressly consent to political membership in order to ensure minimum conditions for democratic preservation. It follows that nationals *can* be refused political membership, and hence the right to exercise political autonomy, if they fail or refuse to consent to political membership. But the same can be said about the exercise of political rights in the case of citizens. Does a democracy allow its citizens to exercise their political autonomy at any time and in any way? Can children vote? Can a citizen fetch a ballot box, place it in the market place and claim that he is organizing a referendum on an issue of his choice? Restrictions as to the exercise of political rights can be procedural and substantial. We typically resist granting political rights to children because of their insufficient capacity of judgement, which includes the capacity to take sound voluntary decisions.[72] In some countries, restrictions also apply to convicts.[73] My point here is that in real democracies the granting of political rights is not always just an automatic consequence of subjection but it also responds to concerns about the coherence of the democratic community.

Owen's proposal for automatic political membership and voluntary national citizenship was meant to address claims of adult individuals (immigrants and emigrants). If we, nevertheless, apply it to the case of children, it becomes problematic. Since children cannot exercise political rights, they cannot be seen as full political members. Moreover, because children cannot take legally responsible decisions, they cannot opt for the status of national citizenship. At this point, Owen embraces the idea that birthright nationality via ius sanguinis is a right of parents to pass nationality on to their children (2011: 652). But why should the membership status of children depend essentially on the membership status of their parents?[74] What about children of unknown parents? It seems to me that in Owen's account the fact of

[72] It is true that they eventually access political membership automatically at majority.
[73] One reason to deny political rights to convicts is that by committing a crime citizens breach the (hypothetical) social contract.
[74] In Chapter 4 I come back to this issue and argue against the idea of inherited membership.

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state coercion towards children receives no justification *to children* and at the time when coercion is actually exercised. Here is where I think that my proposal for automatic nationality does better. By automatically conferring a status of fundamental legal protection to children the state offers them an adequate justification for coercion at the time when coercion is actually exercised.

I believe that the argument of subjection offers a good justification for boundaries of legal nationality. Although it cannot define the boundaries of coercion, and thus cannot prevent individuals to put themselves under the coercive power of a state or another, the argument from coercion does a god job in assigning to states duties to justify their coercive power. As to the method of justification, I reject the strong democratic argument according to which coercion should automatically translate into full political membership. In my view, granting a status of fundamental legal protection, which includes the right to access political membership, is sufficient in order to justify coercion. Moreover, separating the status of legal nationality from the status of political membership has the advantage of making the argument from coercion compatible with concerns about democratic continuity.

2.3.4 Genuine Membership

In this section, I briefly discuss several proposals to the boundary problem that perceive inclusion not only as a consequence of the coercive relationship between the state and its subjects, but also as a means of acknowledging the special relationships between members themselves. These theories echo a famous legal definition of nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties."[75]

Ruth Rubio-Marin brings an important modification to the principle of subjection by arguing that, apart from subjection, social membership should also be taken into account when deciding political membership. She makes a case for the inclusion of permanent resident aliens on the grounds that, by living in society, they "already belong to the polity" (Rubio-Marín, 2000: 60). As a result, these people should be granted automatic and unconditional citizenship after some period of residence. Against the "democratic objection" that links the competence over decision making with claims of democratic self-definition and self-preservation, Rubio-Marin argues that "the national community cannot exercise such a right vis-a-vis those whom it should consider full members according to democratic principles"

[75] *Liechtenstein v Guatemala*, Second Phase 1955 ICJ Reports 4 (Judgment of 6 April).

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(2000: 60). The principle of democracy is then substantially constrained by justice when it comes to membership. On similar lines, Joseph Carens (2010) argues for the amnesty of irregular immigrants after a certain period of time. For Carens, simple residence should be considered as an approximation for social membership. This is justified both in terms of efficiency – it is relatively easy to prove without much state resources, discretion or other ambiguous criteria of belonging –, and normatively – living in a society creates a moral claim to inclusion (Carens, 2010: 24-26).

One major objection to these principles of social membership is that they assume the discrete boundaries of national societies. But what are the boundaries of 'the social'? As Bauböck argues, the space of the social is already circumscribed by the political (2009b: 482). There is a wide theoretical consensus that long-term residents should be set on the path of citizenship because they have a relevant link with the political community. But the problem becomes apparent when dealing with claims of inclusion by non-residents – e.g. descendants of citizens abroad. Should residence be the only indicator of social membership?

Rainer Bauböck offers an interesting way to overcome difficulties related to the social membership theories. He develops the argument of stakeholder citizenship by combining the principle of subjection to authority with the idea of a "stake" in the political community. According to Bauböck, political membership is owed to "individuals whose circumstances of life link their future well-being to the flourishing of a particular polity" (2007a: 2423). Admission to membership should then be based on three main factors: dependency on the community for the protection of basic rights, subjection to the political authority for a significant period of time, and a declared interest in membership. As for criteria of membership, Bauböck refers to several "objective biographical circumstances, such as birth in the territory, present or prior residence, having a citizen parent, or being married to a citizen." These criteria are seen as mere "indicators for a presumptive interest in membership" (Bauböck, 2007a: 2421).

Stakeholder citizenship is an attempt to bridge between retrospective and prospective views on political membership. More than a confirmation of passive biographical subjection, citizenship is linked to an interest in the fate of particular democratic community. It accounts for past subjection, actual dependency on the political community, and for the individual commitment to maintain ties with the community. As with theories of social membership, the theory of stakeholder citizenship does not actually addresses the problem of initial determination of the boundaries. Although the model shifts the focus away from mere societal

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membership, it remains centred on political communities rather than the state. Bauböck is primarily interested in defining membership in political communities and he does not differentiate between different statuses of membership.

Despite their inability to overcome the problem of constitutional indeterminacy of boundaries, theories of genuine membership raise interesting concerns concerning membership. The main idea is that membership is defined in terms of a genuine relationship between members. Questions arise as to the precise nature of the genuine link, as well as with regard to the implications of such link for the determination of membership(s). On the one hand, Rubio Marin argues that the fact of social membership within a context of state coercion generates a right to automatic political membership (citizenship). On the other hand, Bauböck defends a theory of stakeholder citizenship and insists that political membership should be offered to those who "link their own future with that of the country of settlement" (2007a: 2419). The collision between these two arguments results in the problem of the "antinomy of incorporation" – whether long term residents should be granted the right to naturalise or whether they should be naturalized automatically (Owen, 2011: 651). I agree with Owen that one way of tackling the problem is by distinguishing between different types of membership. In my view, however, political membership should not be granted automatically.

Admission to political citizenship should imply an act of commitment to political membership on behalf of individuals (nationals). My argument shifts the idea of genuine link from social membership to manifest commitment. In this light, the original argument of social membership becomes useless.[76] First, admission to legal membership (nationality) is owed to individuals who are coerced by the state, regardless of whether they have developed significant relationships within a particular society or not. Second, admission to political membership (citizenship) is accessible to nationals who publically commit to becoming citizens in the political community subsumed by the state of their nationality. One may argue that commitment to political membership is causally or normatively related to social membership. I disagree. In light of the ambiguities of the argument about social membership, and taking into account the minimalistic nature of the legitimate democratic concerns that operate at the level of the boundary,[77] I think that the argument from social membership should be put aside. As to the argument from stakeholder citizenship, I think that it can survive, but only if it is torn apart. In order to fit into the frame of the contemporary

[76] This is true unless it can be made to play a part in the definition of the scope of coercion.
[77] See next section.

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democratic state, it must be made to address distinct claims about distinct types of membership.

2.3.5 Democratic Recognition

The boundary problem is often addressed by reference to principles of democratic legitimacy. The basic argument regarding democratic legitimacy is that a democratic process is legitimate if the ruled are, in some meaningful way, also rulers. In this view, democracy describes a vertical relationship between citizens and political authority. A legitimate political power requires the adequate inclusion of those over whom political power is exercised. Apart from the issues of political authority, theories of democratic legitimacy have been invoked in order to justify political boundaries. Applying the general theory of democratic legitimacy to the problem of membership, we arrive at the argument that membership is owed to those and *only to those* who are subject to political authority.

It is my contention that this strategy of justification does not work entirely because the (initial) boundaries of political authority cannot be justified. I agree that the (de facto) exercise of political authority can be justified by a theory of democratic legitimacy – that requires the democratic inclusion of those subject to authority. However, the very scope of political authority remains theoretically unjustified. In this case, the boundaries of authority must remain open to anyone who wants to join. The revised argument about the legitimate democratic inclusion is then: membership is owed to those who are *or become* subject to political authority.

Does the relationship between rulers and ruled exhaust our normative imagination about democratic membership? In this section, I wish to appeal to an alternative description of democracy. Apart from a vertical relationship between citizens and authority,[78] democracy can also be described as a horizontal relationship between citizens, who are both *co*-rulers and *co*-ruled. In this latter sense, democracy can be defined as an *inter-citizen enterprise*. I can think of a series of arguments that refer, in one way or another, to this horizontal dimension of democracy. First, we have theories about the intrinsic value of democratic community and about citizens' virtues – which underpin purposeful democratic communities. Second, we have arguments about the instrumental value of citizens' attitudes for a democratic project. Without plunging directly into these important arguments, I wish here to explore the

[78] This may be seen as a solipsistic relationship to the extent that it describes a relationship of citizens with themselves.

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implications that this general inter-citizenal view on democracy bears on the question of membership.[79]

Typically, a non-instrumental (genuine) model of democracy portrays citizens as agents actively committed to the common good of the community. Citizens must be willing and able to engage with one another and to contribute to the good of the community. Membership in such democratic communities requires certain capacities (mental, communicational), knowledge (language, customs) and virtues (honesty, courage, love). Should individuals not possess such capacities, knowledge and virtues, they might fail to be *good* members of the democratic community. The logical implication is a claim that admission to membership should be restricted to those who are able and willing to participate in the democratic community, namely those who posses the adequate capacities, knowledge and virtues.

From an instrumental perspective, a functional democracy may also require that citizens possess certain qualities and dispositions. After the communitarian critique of liberal citizenship, many theorists will agree that democracy is underpinned by a series of civic attitudes. Arguably, instrumental democrats would be less demanding than intrinsic democrats with regard to prerequisites for membership. They would probably dismiss requirements about a deep commitment to the common good, but they might agree about the need to check for mental and communicational capacities.

I do not engage with the arguments advanced by either the intrinsic or the instrumental democrats with regard to the meaning and conditions of democratic citizenship. I leave aside the question as to whether citizens in a democracy should tirelessly labour for the realisation of a genuine common good or whether they should merely compete civilly in a public space. I simply acknowledge that concerns about the qualities and dispositions of citizens are relevant for the democratic process. My question is whether assumptions about the good citizen can be made into normative guidelines for the process of admission to citizenship. Can democracies exclude individuals on the ground that they are not (likely to be) good citizens?

I have already discussed and rejected nationalist and associationist arguments about the right of members to exclude non-members. I argued that such preservationist arguments for closure could not justify the boundaries of the communities or associations that they aim to preserve. The main problem is that these arguments shift between cultural or associational membership

[79] Notice that when I discussed possible answers to the boundary problem, I found arguments that account for both the vertical and the horizontal dimensions of democracy. For example, arguments about all affected interest and about subjection to law typically focus on the ruler-ruled dimension of democracy, whereas arguments about genuine membership make room for considerations that pertain to the inter-citizenal dimension.

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and membership in coercive states. In the light of the critique of nationalist and associationist arguments, the claims of democratic communities to exclude in order to preserve a model of good citizen seem problematic. However, I do not want to dismiss the democratic argument too quickly.

Is democratic preservation special? So far, I have argued that because state boundaries cannot be normatively justified, they should be open. Because states coerce, they owe adequate justification to all individuals who are subject to their laws. With regard to the method of justification, I proposed to grant coerced individuals a status of fundamental legal protection. I have not insisted on a strict democratic method of justification because I consider that a status of fundamental legal protection – together with a right to access political membership – as normatively sufficient in order to render coercion legitimate.[80] Presuming that democracy is a legitimate and desirable form of political life,[81] I want to reflect on the conditions under which democracy is possible and can thrive. I agree with the general thesis that there is a connection between the health of a democracy and the civic qualities of its citizens. For this reason, democratic states have an interest in promoting democratic values and attitudes amongst their citizens. They have an interest in transforming mere citizens into *good* citizens. For citizens (residents) by birth, this transformation can be accomplished with the help of a set of institutions, such as public education. The problem arises in the case of adult immigrants who have not been educated in the state. In this case, the argument goes, the state should use policies of admission (immigration and citizenship) in order to select, if not create, good citizens. Principles and criteria of admission are thus called to reproduce the moral and socio-cultural model of the good citizen. I find this unfolding of the argument problematic.

It is important that what I have in mind here is not an abstract model of a "pure" democratic community. My analysis concerns contemporary democratic states. This means that my previous case for openness of (legal) membership applies. My hesitation to translate (the justification of) coercion into political membership has to do with the issue of reproducing democratic communities. It is my contention that the legitimate concern of democratic *communities* to preserve and reproduce themselves requires a certain degree of democratic control over political boundaries. However, in the context of contemporary democratic *states*, this control cannot amount to a fully discretionary right. The coercive nature of the state

[80] This method may also be useful in order to accommodate states that are not genuinely democratic but enforce a decent standard with regard to the rule of law. Nevertheless, my aim is to make a case for adequate inclusion in democratic states.

[81] I assume that representative democracy is a decent normative model and I accept that democratic states can be a legitimate form of political organisation in the contemporary world.

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imposes a duty of justification towards all individuals who are subject to coercion. Although this duty does not imply automatic political inclusion, it generates a right to access political membership. However, unlike in the case of granting legal membership – an automatic process triggered by the fact of coercion – granting democratic (political) membership must take into account the inter-citizenal character of democracy and the fundamental concern with democratic continuity.

I argue that becoming a citizen should be seen as a process of *democratic recognition*. What does democratic recognition imply? Does it imply that democratic states can use the model of good citizen as a standard for admission to citizenship? I disagree. Democratic states face strong normative constraints with regard to membership policies. First, the problem of democratic indeterminacy of membership raises legitimacy concerns not only with regard to the initial historical configuration of membership, but also with regard to the ongoing rule of membership, such as birthright citizenship rules and rules of naturalisation. Second, the overlap between coercive states and democratic communities generates additional normative constraints to the way in which democratic states exercise their power. Membership policies constitute a privileged site where such constraints apply. A principle of democratic recognition in admission to membership has then to be compatible with the principle of openness of (legal) membership and with the right of legal members to access political membership.

In order to better visualise my conceptual map of democratic membership, I propose to distinguish between two normative sites of membership: the inside of membership, or *citizenhood*, and the boundary of membership or *citizenship*. The inside of membership, or citizenhood, is the normative site where one should place concerns about the nature, character and the conditions of production and reproduction of the good citizen. This sphere corresponds approximately to the legal domain of internal self-determination – where states enjoy legitimate authority over their self-regarding affairs. The concept may be extended to include more particular concerns about the character of the self-determining community, such as concerns about national culture (nationhood). To be sure, the site of citizenhood is not perfectly determined and free from normative quarrels. In fact, citizenhood is the privileged battlefield of political philosophers for the last two and a half millennia. By contrast, the boundary of membership or citizenship is the normative site where we should place concerns about inclusion, exclusion, boundary setting and boundary reproduction. This sphere becomes apparent once we move away from the reductionist inward-looking perspective on

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membership. My suggestion is that giving conceptual shape to the boundary of membership allows us to explore various concerns about membership and to integrate different normative perspectives that seem incompatible.

The distinction between citizenhood and the boundary offers a normative background against which I specify the principle of democratic recognition. This principle takes into account concerns about democratic continuity in the context of the boundary of membership. On the one hand, democratic *states* face important constraints with regard to the boundary. These constraints translate into automatic legal membership for coerced individuals together with a right to access political membership. On the other hand, at the level of citizenhood, *democratic* states enjoy an area of self-determination that gives them the opportunity to pursue policies of producing and reproducing good citizens. In light of the first argument, the requirements and procedures specifying the principle of democratic recognition should not unjustifiably prevent legal members[82] from using their right to accede to political membership. In light of the second argument, democratic states should refrain from using membership policies as a tool for selecting or creating good citizens – they should pursue such aims only at the level of citizenhood. The concern to secure democratic continuity at the boundary can be addressed through the principle of democratic recognition. Whereas the principle of democratic recognition prohibits democratic states to enforce *thick* criteria of admission – such as a high degree of cultural compatibility –, it demands that aspiring political citizens make an explicit commitment to political membership in a particular democratic community/state (in which they are legal members). In their commitment to political membership, would-be citizens *recognise* the actual citizens of democratic community as co-citizens, free and equal members in a self-governing polity. Admission policies, therefore, should specify procedures through which such commitment is expressed.

In order to be recognised as political citizens, individuals must be willing and able to publicly commit to political membership. The requirement of public commitment can be carried out by way of taking an oath or submitting a solemn declaration. This presupposes that would-be citizens possess the mental capacity that renders them legally responsible. Should they also possess communicational skills and competence in the language(s) spoken in the particular political community in which they want to become members? It can be argued that in order to take a public commitment, one should be able to express it in the language of the public.

[82] I take it that in the context of contemporary democratic states, (political) membership in the democratic community is preconditioned, though not determined, by (legal) membership in the state. I do not contest, however, that it is possible to imagine democratic communities outside the frame of the state.

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Although I am inclined to think that what matters most is the content rather than the form of the commitment, I could accept that linguistic skills play a role in the process of recognition. However, I think that the language requirement should not be used as a prohibitive tool. On the contrary, democratic communities should use the opportunity offered by the admission process in order to offer would-be citizens the opportunity to improve their language skills by organising appropriate language courses and training programmes. The issue of linguistic skills may then be considered as another concern about the good citizen from the perspective of citizenhood that could be legitimately raised at the boundary of membership.

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2.4 Chapter Conclusions

In this chapter, I explored a series of theoretical answers to the question of membership. I arranged the arguments into three general perspectives: justice, nationalism and liberal democracy. My strategy was to identify relevant normative concerns with regard to membership, to map arguments that plausibly address these concerns and, finally, to try to combine the best arguments into a coherent normative framework that describes legitimate principles of inclusion.

In the first part of the chapter, I discussed arguments concerning the scope of social justice. I found that the perspective of justice fails to justify the constitutive boundaries of the relevant units of justice – cooperative or coercive structures. By focusing on inequalities and welfare distribution, arguments about the scope of justice tend to disregard important aspects of membership. This is especially true about arguments that conceive of membership (citizenship, immigration) as a currency of justice or as compensation for unfulfilled duties of justice. The problems encountered by Ayelet Shachar in her attempt to reform birthright citizenship are exemplary for the substantial tensions between the perspective of distributive justice and the perspective of political membership. I admitted, however, that the argument of coercion offers a plausible justification for the inclusion of some. States have a duty to justify their coercive power to those over whom they exercise coercion.

In the second part of the chapter, I addressed several liberal nationalist theories focusing on their implication for the question of membership. I found that, despite some plausible arguments about the moral relevance of national identity, these theories fail to specify the boundaries of national communities and offer poor justifications to the claim that (moral, historical) boundaries of the national community should coincide (political, historical) boundaries of the state. Notably, liberal nationalists authors also hesitate to make a strong link between the two boundaries. They admit that important normative constraints restrict the scope of nationalism when it comes to admission to citizenship. Although I argued that state memberships should not be linked to national membership, I did not dismiss all concerns about national identity and culture. I contended that some form of liberal-nationalist policies could be reasonably enforced by states in order to promote a sense of national solidarity and identity. My proposal was that that these policies should not play a role when it comes to admission to citizenship. Because nationalist strategies fail to justify the boundaries of the state – the inclusion of citizens and the exclusion of non-citizens –, the boundaries of citizenship should not be nationalised.

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In the third part of the chapter, I discussed more specific liberal and democratic arguments for determining boundaries of membership. Generally, I did not find arguments to solve the basic problem of the arbitrariness of boundaries. I found, however, that some of the arguments do a better job than others in specifying principles of inclusion, which respond to relevant normative concerns about membership.

First, I explored the implications that arguments of consent and freedom of association have for the problem of boundaries. Disregarding the more general problems that pit the argument from consent, I briefly considered several practical and theoretic difficulties generated by the idea of consent when applied to membership. I concluded that the requirement of serial consent – which follows logically if we use consent as a generalised principle of inclusion – gives us a highly impractical solution to the problem of membership and boundaries. I admitted, however, that consent might play a role in the determination of membership as an element of a more complex principle. Furthermore, I discussed and rejected Wellman's argument about the right of a state to exclude by virtue of its citizens' freedom of association. The main problem was that Wellman justified legitimate state coercion without addressing the problem of non-consensual membership. In other words, the issue of non-consensual membership and the arbitrariness that it generates casts a dark shadow over the argument about the legitimacy of state coercion. Although I rejected the thesis about the right of states to exclude, I retained Wellman's argument about a liberal strategy to justify of coercion that does not rely on automatic democratic inclusion.

Second, I discussed the principle of all affected interests. Despite its intuitive appeal, the argument raises concerns about logical coherence and normative implications. Once we go past the problem of coherence, we still face difficulties to apply the principle in the context of democratic states. Although the argument of all affected interests seems, generally, a useful tool to address democratic claims, it remains too imprecise for tackling the problem of membership in democratic states.

Third, I addressed the principle of inclusion of all subject to coercive state power. I found that this is the most convincing argument for inclusion. Individuals who are coerced by a state should be granted a special status of membership in that state. Sufficient residence in the country, I assumed, is the most important indicator of subjection to coercive state power. Although I agreed that granting a status of membership is the best method through which the state could justify its recourse to coercion, I argued that such membership should not amount to automatic political inclusion. In my view, a status of fundamental legal protection that

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includes a right to voluntarily access political membership counts as sufficient justification. I thus proposed to distinguish between two statuses of membership: a status of legal membership or nationality, and a status of political membership or citizenship. Whereas the status of nationality should be granted automatically to individuals by virtue of their subjection to state power and, access to political membership should depend on individuals' voluntary consent and commitment to membership.

In the fourth section, I discussed several principles of inclusion derived from the idea that membership should be based on genuine link between individuals and the social or political community. I found that, despite their innovative attempt to develop and supplement the argument of coercion, these arguments could not justify the boundaries of the community that they deemed to be relevant for membership. I concluded that principles of genuine membership could not serve as a justification for legal nationality – for this purpose mere subjection to coercive power is sufficient. Nether could these principles alone offer a justification for political membership – for which mere social membership is insufficient.

Finally, in the last section, I explained why it is useful to distinguish between two statuses of membership. I argued that legitimate concerns with democratic continuity justify a minimum democratic "control" over membership. I developed a perspective according to which democracy should be seen not only as a vertical relationship between citizens and political authority (citizens themselves), but also as a horizontal inter-citizenal enterprise. I took that this view provided the background assumption of a series of different arguments about democracy. On the one hand, the intercitizenal dimension of democracy seems implicit in theories about genuine democratic communities that are based on active participation and the pursuit of a common good. On the other hand, intercitizenal aspects of democracy underpin arguments about the instrumental value of citizens' democratic attitudes. Without engaging with these arguments, I admitted that, generally, concerns about the quality of the intercitizenal democratic relations and about the continuity of the democratic community are relevant for the problem of access to political membership. A principle of political inclusion should take into account concerns regarding democratic stability and continuity. However, I argued that these concerns could only play a limited role in policies of membership.

The reason why democratic control over political boundaries should be limited is that both the democratic communities and their overlaying states face the problem of the arbitrariness of boundaries – which leads to a principle of prima facie openness of boundaries. As I argued, democratic states have a duty to grant a status of fundamental legal protection (nationality) to

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those who are subject to their coercive power, which includes a right to access political membership. This implies that any refusal to grant political membership to nationals should be thoroughly justified. What grounds could justify such refusal? At this point, I distinguished between two normative domains of membership: the inside of membership or citizenhood, and the boundary of membership or citizenship. I argued that legitimate normative concerns about membership could be raised at each domain of membership but that certain concerns from the domain of citizenhood – such as the concerns about reproducing certain socio-cultural or moral models of citizens –could not be raised at the boundary. This is because constraints derived from the problem of arbitrary membership and from the duty of states to justify coercion act as a normative firewall.

In my interpretation, the only legitimate concerns related to democratic membership that are relevant at the level of the boundary of membership are concerns related to democratic stability and continuity. In order to account for these legitimate concerns, I proposed the principle of democratic recognition. According to this principle, a democratic community is justified to ask nationals who want to join it that they publically express their commitment to political membership. Finally, I accepted that the condition of publicity included in the principle of democratic recognition could justify a requirement that candidates for admission are able to express their commitment in one of the languages spoken in the democratic community. Political membership is, in this perspective, not an automatic consequence of coercion or social membership, but the recognition by the democratic community of the voluntary choice and genuine commitment of legal nationals to become full citizens. The possession of certain communicational skills could be accepted as part of the genuine commitment.

In sum, my argument is that, because the boundaries of democratic states are arbitrary, membership policies should be brought under strict normative control. In this view, the original arbitrariness of boundaries can be seen as an *original sin* of (democratic) states.[83] Instead of arguing for the reconfiguration or the dissolution of boundaries, I propose to accept the actual system of state boundaries under the condition that membership rules receive adequate justification. I reject the traditional view that sovereignty implies, among other things, a near-absolute power of states to decide on issues of membership. I agree that concerns about democratic self-government are relevant in the process of boundary-making, but I think that these concerns do not justify full democratic control over admission. In the

[83] On similar lines, Goodin talks about "initial fraud" of democracy (2007: 43).

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context of the original sin of boundary making, states have both specific obligations to include certain people and a general duty to maintain their membership open to outsiders.

When asking the question of legitimate boundaries of citizenship, I found that it might be useful to also ask the question as to what kind of membership we are referring to. It is my opinion that part of the theoretical difficulties encountered in this chapter may be avoided if we abandon the paradigm of unitary citizenship. In modern times, citizenship is called to play several distinct and often conflicting roles. First, citizenship *qua* nationality provides a status of legal protection to individual who are legally connected with a particular state. Each state guarantees protection and opportunities for its citizens and, in turn, each state claims citizens' allegiance. Second, citizenship *qua* political membership describes a political relationship between citizens and authority. Third, citizenship *qua* national belonging describes ties of identity and culture that bind members of national communities. The paradigmatic model of the nation-state bundles these three distinct functions into one unitary concept of national citizenship. But the bundling becomes increasingly problematic in a world that that is ever more fluid and interconnected. Surely, not everybody will hurry to trash the myth of national citizenship. Some may hesitate out of romantic hangover; others may cling to it out of fear and anxiety. Despite recent normative and institutional developments related to the spread of human rights and regional integration, the status of national citizenship still constitutes an important guarantor of rights. Although I am sympathetic to such concerns, I think that they should not stop us from imagining alternatives to all-in-one citizenship.

My proposal is to give real teeth to the analytical distinction between different components of citizenship by establishing different legal statuses of membership. I dissociate between: (1) legal membership; (2) political membership; and (3) cultural membership. I admit that defining the exact relationship between the three statuses – particularly their disjunctions and areas of overlap – constitutes a taxing task. However, we may succeed in this endeavour if we focus on the function that each status is supposed to have. The question of admission to citizenship becomes, then, a question of admission to each of these statuses.

In this chapter, I focused mainly on two types of membership: legal nationality and political citizenship. Concerning the third type of membership – cultural membership –, I argued that it does not and it should not overlap with legal and political membership. Should states be allowed to create special legal statuses of membership in national communities? This is not merely an academic question. In recent years we have witnessed a proliferation of initiatives, mainly among states in Eastern Europe, that confer special statuses to particular non-citizens

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who are seen as ethno-national kin. This may be seen as challenging both the theoretical concept of unitary citizenship and the traditional model of territorial sovereignty. I confess that, in my view, most of the fundamental individual interests that liberal democratic states are required to attend to are satisfied by establishing adequate access to legal and political membership. I agree that membership in a national community may generate feelings of belonging. I am just not sure how these feelings could be captured in a special legal status. There are many other forms of belonging that are not validated in such ways. Moreover, entering a legal or political community will inevitably generate some feelings and identities. Cautiously, I admit the possibility of creating statuses of cultural membership within, outside or across legal and political membership. In this case, statuses of cultural membership are acceptable if they are based on self-identification, and as long as the benefits and obligations related to them do not challenge or replace privileges of nationality and political membership.

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3. NATIONALITY IN PUBLIC INTERNATIONAL LAW

In order to assess norms of admission to citizenship, I propose to analyse various international and national rules concerning nationality and citizenship. In this chapter, I examine several key norms of public international law that regulate or guide the regulation of nationality by individual states. I focus on two major questions: (1) whether states are constrained by public international law in matters of citizenship; and (2) whether such constraints provide any legal-normative guidance in cases of ethno-cultural preferentialism in matters of citizenship.

First, I briefly discuss the distinction between nationality and citizenship. Conceived of as a status of membership in a state, the concept of nationality in public international law partly overlaps[84] with the concept of citizenship as developed in social and political theory. Nationality and citizenship can be seen as the two faces of the same coin. On the one side, citizenship describes the status of individuals as full members of a political community. On the other side, nationality defines the legal tie between an individual and the state as recognised by the international community. While citizenship is most often associated with (democratic) rights, nationality[85] is invoked to determine "the scope of application of basic rights and obligations of states vis-à-vis other states and the international community" (Hailbronner, 2006: 36).

This perspective suggests that the two concepts belong to two different domains— legal and political. Nationality is mainly *legal* insofar as it describes a legal status created by national law and recognised by international law. It also constitutes a "mechanism by which states designate individuals to themselves in dealing with other states" (Blackman, 1998: 1148-49). Citizenship is mainly *political* insofar as it defines membership in a democratic political community. Technically speaking, both nationality and citizenship are *legal*. The law defines the rights and obligations of citizenship, as well as the procedures through which individuals acquire the status of nationality. Normatively speaking, both nationality and citizenship are *political*. While citizenship is essentially a political concept – to the extent that it is often

[84] There are several cases in which the law formally distinguishes between the two statuses of nationality and citizenship: (a) where certain citizens are not nationals for the purpose of international law (e.g. British Oversees Citizens); and (b) where certain nationals are not citizens for the purpose of domestic law (e.g. Puerto Rican American nationals).

[85] In fact, nationality is linked with certain important rights, such as diplomatic protection and immigration rights. The rights of exit and re-entry into the territory of the state of own nationality are more recent developments related to the affirmation of human rights. The right to diplomatic protection has been traditionally conceived of as a right of states to protect their nationals, rather than as a right of citizens.

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synonymised with *democratic* citizenship – the political character of nationality is less obvious. The determination of nationality is, nevertheless, a matter of political – though not necessarily democratic – decision of states.[86]

The term 'nationality' has also been associated with ethno-national identity. Etymologically rooted in the term 'nation,'[87] nationality borrows from the former its ambiguities. In several countries, nationality is conceived of as separated from citizenship, and as referring to ethnicity and national identity.[88] It is exactly this aspect of nationality that is exploited by various attempts to redefine nationality along nationalist lines or to create quasi-legal forms of national membership separated from state membership, such as the special statuses created by transnational kin laws in Eastern Europe (Fowler, 2002; Shevel, 2009).

The chapter has five sections. First, I ask whether matters of nationality fall within the domain of international law. In this respect, I discuss the legal doctrine of genuine link and international norms on dual nationality. Second, I address the developments in the area of nationality triggered by the human rights 'revolution' and the affirmation of a human right to citizenship. I focus on the principles of avoiding statelessness and non-discrimination. Third, I scrutinize several international norms that tackle the link between nationality and national identity. In this respect, I briefly examine the international norms of self-determination and minority protection. Fourth, I discuss the constraints to state sovereignty in nationality matters derived from the development of the legal order of the European Union— which concern all cases accounted for in this study. In this respect, I address the relationship between the nationality of Member States and EU citizenship as derived from the Treaties and the interpretation of the European Court of Justice. Finally, I conclude by summarising the findings and by acknowledging the "limits of the limits" that public international law imposes upon the sovereign right of states to regulate nationality, including on their discretionary power to adopt nationality rules that advance ethno-cultural preferentialism.

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[86] In the opening of the First Committee of the Conference for the Codification of International Law (1930) Chairman Politis stated: "The delicacy of our task lies in the fact that nationality from whatever standpoint it be viewed, is, by nature, essentially a political problem. It is a matter that comes within the exclusive jurisdiction of each State, since, under International Law, States are at liberty to settle nationality questions in the manner they consider most consonant with their own security and development" See International Law Commission, 'Survey of the problem of multiple nationality prepared by the Secretariat' (1960) *Yearbook of International Law Commission* vol. 1954, no. II 52 59.

[87] The term 'nation' comes from Latin *natio*, *nascere* ('to be born') and suggests a community based on blood and descent.

[88] For a brief overview: EUDO Citizenship Discussion 'Citizenship or Nationality?' <http://eudo-citizenship.eu/citizenship-glossary/terminology> accessed 12 May 2010.

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3.1 Nationality and State Sovereignty

In the era of modern states, the power to regulate nationality is regarded as an essential attribute of sovereignty. On the one hand, this exclusive power allows states to define and manage their permanent population— which constitutes one of the basic conditions of statehood.[89] On the other hand, the capacity to regulate nationality constitutes a hallmark of autonomy, understood as the power to decide on 'own matters', that is essential to the idea of sovereignty. The few traditional principles developed in public international law express the reluctance of states to relinquish or *share* nationals, primarily motivated by military, economic or security concerns. For example, the principle of avoiding statelessness – which nowadays seems firmly grounded in the idea of human rights – was firstly upheld in order to ensure that no additional burdens fell on states due to the migration of non-attributed individuals (Hailbronner, 2006: 64).

In the remainder of this section I discuss three international legal doctrines or principles on nationality that emerged before the affirmation of human rights to nationality: the doctrine of nationality as *domaine reservé*, the doctrine of genuine link, and the principle of avoiding multiple nationality.

3.1.1 Nationality as Domaine Reservé

Despite the fact that nationality plays an important role in structuring international legal system, its regulation falls almost exclusively within the *domaine reservé* of states. The interdependence of nationality laws has long been a source of international conflicts. From a Westphalian point of view, sovereignty meant that "relations between rulers and ruled ought not to be subject to any external actors" (Krasner, 1999: 73). Certain rules of nationality – such as the rules of acquisition and naturalisation – fall outside the relationship between rulers and ruled. In fact, they precede and constitute such a relationship. In a world where people are *naturally* incorporated into the states where they are born, and where they are most likely to remain until their death, the issue of turning foreigners into citizens is of little importance. But in a world where people move regularly across state borders, the question of regulating nationality promptly arises. In the latter context, the exercise of the sovereign right to regulate nationality may easily obstruct similar sovereign rights of other states.

[89] The *Montevideo Convention* enlisted four basic elements of statehood for the purpose of international law: a permanent population, a defined territory, government and the capacity to enter into relations with other states. *Montevideo Inter-American Convention on the Rights and Duties of States*, opened for signature 26 December 1933, League of Nations Treaty Series, vol. 165, pp. 20-43 (entered into force, 26 December 1934).

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Each State shall determine under its own law who its nationals are. This general principle was recognised by the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws.[90] The drafters added that other States shall accept nationality law only if it is consistent with international law. The vagueness of this qualification, then and now, is telling about the difficulties faced by any attempts to specify legal limitations to state powers in the field of nationality.[91] The Convention only acknowledged that the domestic regulation of nationality "shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality" (Article 1). This "legal curiosity" (Brownlie, 2008: 387) seems to undermine the principle of state autonomy. On the one hand, it fully preserves the powers of states to regulate nationality. On the other hand, it makes the recognition of such regulations dependent upon the acquiescence of other states (Sloane, 2009: 4). It followed that states are *not* under an obligation to recognise certain ascriptions or deprivations of nationality that are plainly unreasonable. How to determine which decisions are unreasonable or inconsistent with international law remained unclear.

After the Second World War, the newly established International Law Commission (ILC) took an interest in the subject of "nationality, including statelessness." The overview of nationality laws prepared by the Secretariat of ILC in 1954 found that "there are no, or very few, general principles of international law applying to the matter" and that "legislation on this subject remains, for the most part, within the domestic jurisdiction of each State."[92] The Secretariat's report enlisted, however, several legal principles meant to limit the absolute competence of states: (1) the prohibition of legislation on nationality of subjects of other states; (2) the prohibition of the abuse of right; (3) the right of expatriates to change their nationality (against perpetual allegiance); (4) limitations on deprivation of nationality (concerns about immigration control and statelessness); and (5) limitations in connection with changes of sovereignty.

The report prepared by Manley O. Hudson unveiled a great diversity of legal rules and found

[90] Convention on Certain Questions Relating to the Conflict of Nationality Laws, opened for signature 12 April 1930 League of Nations Treaty Series vol. 179 No. 4137 89 (entered into force 01 July 1937).
[91] Prior to the 1930 Convention, the Permanent Court of International Justice in the Advisory Opinion on the Tunis and Morocco Nationality Decrees stated that nationality falls within the 'reserved domain' of the state. The Court, however, admitted that '[t]he question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.' Nationality Decrees Issued in Tunis and Morocco on 8 November 1921 Advisory Opinion 1923 PCIJ (ser. B) No. 4 (7 February) 40.
[92] Survey of the problem of multiple nationality, 59.

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it difficult to assert general principles. Certain practices, however, seemed unacceptable. This was the case of collective naturalisations – e.g. naturalisation by decree in Nazi Germany, automatic naturalisation after short periods of residence in Argentina – and collective denationalisation – e.g. post-war denationalisation of Germans and Hungarians in Czechoslovakia, denationalisation of Germans in Poland.[93]

3.1.2 The Doctrine of Genuine Link

In 1955 the International Court of Justice (ICJ) delivered its famous judgment in *Liechtenstein v Guatemala*[94] (better known as the *Nottebohm case*) where it defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties."[95] This fairly ambiguous phrase developed over time into a fully-fledged doctrine with various defenders and detractors. On the one hand, it suggested a way to bring nationality issues under the scrutiny of international law. On the other hand, it set the foundations for an "unreflective dogma about general international law" (Sloane, 2009: 4).

Nottebohm was a German citizen who lived and conducted business in Guatemala over many years. In 1939, after the beginning of the war that brought Germany and Guatemala into conflict, Nottebohm applied and swiftly acquired the nationality of Liechtenstein— a neutral state— to the effect of losing German nationality. Despite this, Guatemala continued to treat Nottebohm as a German national—an enemy alien— and hence, deprived him of liberty and properties. Seeking to exercise its sovereign right of diplomatic protection with regard to its national, Liechtenstein complained against Guatemala to the International Court of Justice. In its Judgment, the Court carefully rejected Liechtenstein's claim, by arguing that, despite having legally acquired the nationality of Liechtenstein, Nottebohm had no genuine link with that country.

Before *Nottebohm* the principle of effective or predominant nationality was asserted only in cases involving dual nationality. In 1912 a Permanent Court of Arbitration case between Italy and Peru invoked the principle of "effective nationality"[96] in the *Italy v Peru*[97] (*Canevaro)*

[93] M. O. Hudson, 'Nationality, Including Statelessness. Report to the International Law Commission' UN Doc. A/CN.4/50 (1952) in Yearbook of the International Law Commission Vol. II 4.
[94] *Liechtenstein v Guatemala*, Second Phase 1955 ICJ Reports 4 (Judgment of 6 April).
[95] *Ibidem* 23.
[96] The ICJ affirmed the doctrine of "genuine connection" by referring to the principle of "effective" link. Brownlie suggests that we could 'treat the two elements as aspects of the same thing, the reference to genuineness being intended to emphasize that *the quality and significance of factual relations* with a given country are to be taken into account' [emphasis added] (2008: 417).

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case. Canevaro was a dual Peruvian-Italian national who sought protection from Italy against Peru. The Court held that Canevaro had "effective" Peruvian nationality due to his effective connection to the country (despite also being an Italian citizen) proven by the circumstances of his life and, especially, by the exercise of political rights and his holding office in Peru. The 1930 Convention provided that, when dealing with a dual national, third States shall recognise "either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected" (Article 5). The principle of effective nationality was also proposed as a means to reduce cases of dual nationality, by stripping dual nationals of their less effective nationality.[98] In a less radical form, the idea of active or effective nationality – as opposed to formal nationality – was recognised as the guiding principle to be used when dealing with conflicts related to dual nationality.[99]

Why did the Court invoke this principle in the *Nottebohm* case? According to a radical interpretation, the genuine link doctrine reads that *any* ascription of nationality is internationally valid only if it is backed by a genuine link of attachment between the possessor of the status and the country in question. Nottebohm could, therefore, not claim protection from Liechtenstein because he lacked such a genuine link, despite him holding its formal nationality. Is this what the ICJ asserted? By contesting Nottebohm's status of a national of Liechtenstein, the Court reached the paradoxical situation of either rendering Nottebohm stateless, or, in line with the idea of genuine link, ascribing to him the effective nationality of Guatemala. In neither case, Guatemala should have treated Nottebohm as a German national.

In fact, the Court did not question the attribution of nationality by Liechtenstein, but refused to accept it as relevant for the recognition of the right to diplomatic protection. By carefully circumscribing the answer to a specific question – whether Liechtenstein had the right to seek to protect Nottebohm – the Court invoked the genuine link principle only to avoid sanctioning a sovereign state. As John R. Dugard argues, "faced with the choice between finding that Liechtenstein had acted in bad faith in conferring nationality on Nottebohm and finding that he lacked a 'genuine link' of attachment with Liechtenstein, the Court preferred the latter

[97] *Italy v Peru* (1912) 6 A.J.I.L. 746-751 (The Permanent Court of Arbitration at the Hague).
[98] R. Cordova, 'Nationality, Including Statelessness; Third Report on the Elimination or reduction of statelessness' in *Yearbook of the International Law Commission*, United Nations A/CN.4/81 1954 vol. II 41.
[99] Article 2 § 2 of the Statute of the International Court of Justice states that "a person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights." Charter of the United Nations 24 October 1945 1 UNTS XVI.

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course as it did not involve condemnation of the conduct of a sovereign State."[100]

The argument of genuine link was neither central for the case in point, nor was it intended to revolutionise international law. The Court did not assert any positive obligations incumbent upon states with regard to ascription of nationality, nor did it specify rights for individuals or put forward criteria of effective nationality (Blackman, 1998: 1158). The genuine link theory served the ICJ to avoid "imputing bad faith to a sovereign state, Liechtenstein – even though mindful of the abusive manner in which Liechtenstein had conferred its nationality on Nottebohm" (Sloane, 2009: 26). The underlying principle that guided the Court's reasoning was that of abuse of right, rather than genuine link. As codified in the second part of the first article of the 1930 Convention, states have the right not to recognise nationality decisions of other states whenever these decisions are taken in bad faith. Technically, there was no need for the ICJ to invoke the genuine link doctrine.

Regardless of what the ICJ intended, some commentators have argued that the unreflective embracing of the genuine link theory in international law raises important concerns. The major concern was related to its indeterminacy. The Court asserted that the legal bond of nationality is grounded in "a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." The wording of the judgment is highly imprecise. Whereas facts of "existence", "interests", and "reciprocal right and duties" can be roughly translated in the language of law, the reference to 'attachment' and "sentiments" is fairly problematic.[101]

Two main problems stand out when taking the principle of genuine link seriously. First, it constitutes a dramatic challenge to the actual practice of states in the field of nationality. Theoretically, by refusing to accept Nottebohm's formal status as a national of Liechtenstein, the ICJ rendered Nottebohm stateless. If consistently applied, this doctrine seriously questions the main modes of ascription of nationality at birth – by birth in territory and by descent from national(s). As argued by Judge Reads in his dissent,[102] applying the genuine link doctrine in a world of increased mobility will endanger the status of millions of persons who reside and

[100] J. R. Dugard, 'First Report on Diplomatic Protection' (2000) International Law Commission, United Nations A/CN.4/506 37.
[101] For a discussion on the difficulties in codifying the factual criteria for genuine link, see (Brownlie, 2008: 414-15).
[102] Judge Reads argued that "the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance... [m]ost States regard non-resident citizens as a part of the body politic… [m]any of these non-resident citizens have never been within the confines of the home State." *Nottebohm Case.*

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do business outside of the country of their nominal nationality.[103]

In the post-Nottebohm era "no comparable case amounting to a refusal of diplomatic protection has ever been decided by international courts" (Hailbronner, 2006: 60). In the *Mergé case*,[104] an Italian-United State Conciliation Commission refused the US the right to exercise diplomatic protection towards a dual Italian-US national because it considered that the US nationality was not 'predominant'. In the *Flegenheimer case*,[105] the Conciliation Commission rejected the genuine link doctrine because it lacked "sufficiently positive basis" and could not invoke a clear criterion of effectiveness, leading to the undesirable situation in which thousands of mobile individuals were "exposed to non-recognition, at the international level" despite possessing formal nationality.

The second problem of the genuine link thesis concerns its likely over-inclusive and discriminatory effects. If attachment is taken as the main criterion, then certain interpretations of such attachment may be dangerous. For example, an ethno-nationalist version of the genuine link argument will allow states to align nationality with membership in the ethno-national community to justify policies of denationalising non-ethnic nationals and nationalising non-national co-ethnics.

The idea of genuine link – like that of social contract – constitutes a powerful political metaphor to which various political theories appeal. Regarding international law, however, the principle of genuine link is rarely recognised outside cases that involve multiple nationality. There are several areas of public international law in which the idea of genuine link or effective nationality seems to have gained ground. One case in point is the European human rights jurisprudence dealing with statelessness and immigration. Although the European Court of Human Rights (the Strasbourg Court) has no legal basis to rule directly on matters of nationality, it interpreted certain provisions of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms[106] in a manner that limits the sovereign right of states to control immigration and residence in their territory.

Under Article 3 of the 1950 Convention, for example, foreigners may receive protection

[103] Similar concerns are raised by Dugard with regard to diplomatic protection. In his view, "[t]he genuine link requirement proposed by Nottebohm seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection." Dugard, 'First Report on Diplomatic Protection', 41.
[104] *Mergé* case, Decision No. 55 Reports of International Arbitral Awards United Nations Volume XIV 236.
[105] *Flegenheimer case,* Decision No 182 Reports of International Arbitral Awards 1958 Volume XIV 377.
[106] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

against expulsion if the Court identifies credible threats against their life or the danger that they will be submitted to torture, inhuman or degrading treatment at the destination. Under Article 8, non-nationals who have their family or social life in a country could enjoy protection against forced removal even despite the sovereign will of the state of residence. Far from constituting an absolute right, such privileges are granted only after a careful balancing of interests.

In *Beldjoudi v France*[107] the Court argued that an Algerian national who had spent his whole life in France was to be considered as sufficiently "connected to French society," to the effect that his removal from the country, on grounds of public order, would disproportionately affect Beldjoudi's right to private and family life (Article 8 of the 1950 Convention). Despite evidence that Beldjoudi was a formal national of Algeria, the Court found that he lacked a genuine link with the respective country. Such development is quite revolutionary.[108]

It must be stated, however, that by asserting the principle of effective nationality, the Strasbourg Court does not alter state regulations on nationality but rather circumvents them. Rights that have been traditionally linked to nationality, such as the right to entry, stay and exit, are becoming more connected to the status of social membership (family, social ties and residence). The right to stay for non-nationals, as recognised by the Court, is relative and contingent on a careful balancing of interests. Such quasi-nationality concerns a very limited number of non-citizens, namely, those who are already part of the social fabric of the society. It does not constitute a serious answer to general claims to nationality.

3.1.3 The Principle of Avoiding Multiple Nationality

Concerns with preventing dual nationality were at the origin of the first attempts to bring nationality matters under international law. The 1930 Convention addressed exclusively the two issues of multiple nationality and statelessness and proclaimed a principled opposition to both.[109] Acknowledging that cases of multiple nationality could not be fully eliminated, the Conference focused on the reduction of multiple nationality and on the mitigation of some of its adverse consequences. Article 3 § 1 of the Convention established the long-standing

[107] *Beldjoudi v France*, 55/1990/246/31; 12083/86, Council of Europe: European Court of Human Rights, 26 February 1992.
[108] Judge Martens notes, "mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases may be called his 'own country'." Judge Martens' Concurring opinion in *Beldjoudi v France*. Ibidem.
[109] The Preamble of the 1930 Convention stipulates that "it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only." 1930 Convention.

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principle according to which "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."[110] The 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality[111] introduced the distinction between acquisition of nationality "of free will" (naturalisation, option or recovery) and automatic acquisition (at birth) maintaining that the latter may be compatible with multiple nationality (Article 1 § 1). This distinction is still used by a number of states in order to prevent multiple nationality.

One of the most impressive developments of the last decades is the increased toleration of multiple nationality. The main causes are the alignment of nationality laws with the principle of gender equality – that conferred independence of status in cases of changes in civil status and equality between spouses/parents with regard to transmission of nationality to children – and the increased need (in the West) to integrate long-term immigrants and their children. The Second Protocol amending the 1963 Convention extended the list of cases where multiple nationality could be tolerated to include second-generation migrants, spouses of mixed marriages and their children.[112]

With the 1997 European Convention on Nationality the principled opposition to multiple nationality is replaced by a "desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals."[113] The 1997 Convention requires Parties to tolerate multiple nationality in cases of automatic acquisition of (a second) nationality due to marriage or birth (Article 14) and in cases where renunciation is not reasonably to be expected (Article 16). In all these cases, "each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality."[114]

The authors of the 1997 Convention took note of the various approaches to integration of immigrants and of the various perceptions regarding the connection between integration and multiple nationality present in different European states and took no further steps to alter

[110] Chapter II of the 1930 Convention contained rules on military obligations in cases of multiple nationality in order to ensure that persons with multiple nationality are not required to carry out their military obligations in more than one State Party.
[111] Council of Europe, Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, opened for signature 6 May 1963 ETS 43 (entered into force 28 March 1968).
[112] Council of Europe, Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, opened for signature 2 February 1983 ETS 149 (entered into force 24 March 1995).
[113] Council of Europe, European Convention on Nationality, opened for signature 6 November 1997 ETS 166 (entered into force 1 March 2000), Preamble.
[114] Ibidem.

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states' powers in this respect. Article 15 recognised the right of states to require renunciation of a previous nationality by immigrants who seek naturalisation or to withdraw nationality from emigrants who naturalise elsewhere.

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3.2 Nationality and Human Rights

After the Second World War, one could argue that international law has gradually shifted the focus "from a system of coordination of sovereign states to wellbeing of human beings" (Hailbronner, 2006: 3). Increasingly, state sovereignty is balanced against individual human rights.[115] The steady affirmation of certain universal rights seems to suggest that nationality is becoming progressively less and less relevant. This perspective, however, may disregard the powerful role that nationality plays in guaranteeing the certainty of status and privileges. It may also fail to acknowledge that nationality remains a crucial principle in substantive areas of international law, including in core areas of human rights, such as refugee law. Instead of focusing on how human rights have replaced the principle of nationality, in this section I seek to reveal how the regulation of nationality has been "humanised" by the affirmation of human rights to nationality.

In a critical point on the road to "humanising" international law, the Universal Declaration of Human Rights[116] (UDHR) affirmed a universal right to a nationality (Article 15 § 1) and two correlative rights, namely the right not to be arbitrarily deprived of nationality and the right to change nationality (Art 15 § 2). Unfortunately, the International Covenant on Civil and Political Rights[117] (ICCPR), which gave legal force to the civil and political rights enlisted in the Declaration, failed to establish a right similar to those specified in the Article 15 of the UDHR.[118] In the words of the Explanatory Report to the 1997 Convention, "while there is a recognition that a right to a nationality exists, the right to any particular nationality is determined by the rules on nationality of each State Party."[119]

Below I discuss two basic human rights principles that are relevant to matters of nationality: (a) the prevention of statelessness, and (b) non-discrimination.

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[115] The Preamble of 1997 Convention states provides that "in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals." 1997 Convention. See also the Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica by The Inter-American Court of Human Rights, where it is stated that "to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State with the further principle that international law imposes certain limits on State's power, which limits are linked to the demands imposed by the international system for the protection of human rights." Inter-American Court of Human Rights, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* Advisory Opinion OC-4/84 19 January 1984 (Ser. A) No. 4 (1984).

[116] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948 217 A (III).

[117] International Covenant on Civil and Political Rights, opened for signature 19 December 1966 999 UNTS 171 (entered into force March 23 1976) Article 19 § 1.

[118] The ICCPR only affirmed a right to acquire nationality for "every child" (Article 24). *Ibidem*.

[119] Council of Europe, The Explanatory Report to the European Convention on Nationality, 1997 ETS 166 § 32.

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3.2.1 The Principle of Avoiding Statelessness

Recent developments in international law suggest "a strong presumption in favour of the prevention of statelessness in any change of nationality, including in state succession" (Blackman, 1998: 1183). Although international concerns with statelessness preceded the human rights momentum, it is with the affirmation of human rights norms that the principle gained wide recognition. The 1997 Convention, for example, affirms the principle of the prevention of statelessness in relation to acquisition of nationality at birth, foundlings (Article 6 § 1), marriage, multiple nationality, loss of nationality (Articles 7 and 8) and regulation of nationality in cases of state succession (Article 18).[120]

The principle of avoiding statelessness has received considerable attention with regard to cases of state succession. In the Declaration on the Consequences of State Succession for the Nationality of Natural Persons,[121] the Council of Europe's European Commission for Democracy through Law (Venice Commission) recommended that "the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on the transferred territory without discrimination on grounds of ethnic origin, colour, religion, language or political opinions." Article 2 of the 2006 Convention on the avoidance of statelessness in relation to State succession[122] recognised the right to a "nationality of a State concerned' for 'everyone who, at the time of the State succession, had the nationality of the Predecessor State and who has or would become stateless as a result of the State succession." Blackman enthusiastically suggests that the recognition of a right to nationality in the case of state succession could be seen as a first step before proclaiming a general right to nationality based on the idea of effective link. In his view, "the individual right to a nationality does not implicate a greater number of states generally than it does in the specific context of state successions […] [t]he vast majority of people on this planet have effective links with only one state, and the individual right to nationality for such people can only give rise to a corresponding obligation of but one state to confer nationality" (Blackman, 1998: 1175).

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[120] There are an impressive number of international instruments that include provisions on statelessness, including: The Hague Protocol Relating to Certain Cases of Statelessness (1930), the UN Convention Relating to the Status of Stateless Persons (1954), the UN Convention on the Status of Married Women (1957), the UN Convention on the Reduction of Statelessness (1961), the International Covenant on Civil and Political Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention to reduce the number of cases of statelessness of the International Commission on Civil Status (1977), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the UN Convention on the Rights of the Child (1989).

[121] The European Commission for Democracy through Law, Declaration on the consequences of State succession for the nationality of natural persons, 14 September 1996 CDL-NAT (1996) 007.

[122] Council of Europe, Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, opened for signature 15 March 2006, CETS 200 (not entered into force).

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The 2006 Convention, however, fails to match rights with obligations in matters of access to nationality. Even in cases of state succession – where there may be a relative consensus as to who the "states concerned" are – there is no clear identification of the parties who are obliged to grant nationality to individuals. Blackman is well aware that this is not a problem of legal difficulty but a political impasse. His suggestion is certainly bold and interesting, but is well ahead of the actual development of international law in the area of nationality.

While the idea of genuine link, in conjunction with a right to nationality, has served the argument for certain entry routes to nationality for certain individuals, it has, nevertheless, retained its important negative function. An insufficient link with the state could be a valid reason for withdrawal of nationality.

The 1961 Convention on the Reduction of Statelessness[123] provides that *"a naturalised person* may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality." The 1997 Convention also permits withdrawal of citizenship from persons who habitually reside abroad and who lack a genuine link to the state concerned (Article 7 § 1 e), provided that they are not rendered stateless.[124] The Convention leaves to the state to assess the quality of the link necessary for the recognition of nationality. From the Explanatory Report we understand that non-resident citizens and their descendants could prove their link with the country by way of registration, application for national documents or declaration of the intention to retain nationality. A situation where a state makes the transmission of nationality for nationals abroad *sine die* is then perfectly compatible with the Convention.

3.2.2 The Principle of Non-Discrimination

The exercise of state sovereignty in the area of nationality had often gone hand in hand with discriminatory treatment of persons on various grounds. By the second half of the last century, however, we witnessed an impressive development of the norm of non-discrimination. Equality and non-discrimination have become the "idioms of the new world" (Joppke, 2007: 49). With regard to international law, Brownlie argues that "there is a considerable support for the view that there is a legal principle of non-discrimination which

[123] UN General Assembly, Convention on the Reduction of Statelessness, opened for signature 30 August 1961, United Nations, Treaty Series vol. 989 (entered into force 13 December 1975) Article 7 § 4.
[124] The Explanatory Report clarifies that "for the purposes of this article, the term 'lack of a genuine link' applies only to dual nationals habitually residing abroad […] for generations." Explanatory Report to 1997 Convention, § 70.

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applies in matters of race […] and sex" (2008: 572-3).

The UN Charter contains several articles that refer to human rights and freedoms "without distinction as to race, sex, language or religion."[125] The UDHR contains a non-discrimination clause (Article 2) that concerns "all the rights and freedoms set forth in this Declaration." Since the Declaration contains a right to nationality, it means that the principle of non-discrimination also governs matters of nationality. The 1950 Convention prohibits "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Article 14). This prohibition applies only to '[t]he enjoyment of the rights and freedoms set forth in this Convention."[126]

A series of Conventions targeting specific forms of discrimination inevitably touch upon issues of nationality. Concerning gender and nationality, international law gradually affirmed the principle of gender equality against the principle of the unity of the family.[127] The 1930 Convention provided for the independence of status of nationality for married women. Neither marriage nor change in the nationality of the husband should automatically affect the nationality status of his wife (Articles 8-10). The 1957 Convention on the Nationality of Married Women[128] reaffirmed the independence of status for married women and insisted that married women shall be offered the possibility of acquiring the nationality of the husband under facilitated procedure (Article 3). Article 9 of the 1979 Convention on the elimination of all forms of discrimination against women[129] confers to women "equal rights with men to acquire, change or retain their nationality", as well as equal rights with regard to transmission of nationality to children. One of the most direct consequences of the adoption of the gender equality principle is the spread of cases of dual nationality due to the fact that women are allowed to keep their nationality while marrying a foreigner and to transmit their nationality to their children.

[125] UN Charter, Art 1(3), Art 13(1), Art 55, Art 56, Art 62(2), Art 76. (Brownlie, 2008: 272).
[126] The limitation of the scope of the Article 14 is removed by the Protocol No. 12 to the 1950 Convention, which proclaims a general prohibition of discrimination in the "enjoyment of any right set forth by law" (Article 1). Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, opened for signature 4 November 2000, ETS (entered into force in 1 April 2005).
[127] According to this principle, in order to maintain the unity of nationality within the family in cases of international marriages, the wife automatically loses her nationality for the one of the husband, while the children acquire (only) the nationality of the father.
[128] UN General Assembly, Convention on the Nationality of Married Women, opened for signature 29 January 1957 (entered into force 11 August 1958).
[129] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979 United Nations Treaty Series vol. 1249 13 (entered into force 3 September 1981).

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As in the case of gender, racial and ethnic discrimination in the field of nationality was common practice in the past. The 1965 International Convention on the Elimination of all Forms of Racial Discrimination (CERD)[130] obliged parties "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law" (Article 5).[131] Interestingly, the right to nationality was included on the list of rights to be upheld with full regard to non-discrimination (Article 5 § iii). The Convention, however, carefully maintained that its provisions "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens" (Article 1 § 2) and that its provisions should not "be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, *provided that such provisions do not discriminate against any particular nationality*" (Article 1 § 3, emphasis added). According to Article 1 § 4, measures aimed at positive discrimination— such as "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms" are allowed. This is to the extent that they "do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

In its General Recommendation 30 (2004), the Committee on the Elimination of Racial Discrimination affirmed that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[132] On matters of access to nationality, the Committee recommends that state parties should "ensure that *particular groups of non-citizens are not discriminated against* with regard to access to citizenship or naturalisation."[133]

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[130] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, United Nations Treaty Series vol. 660 195 (entered into force 4 January 1969).

[131] The CERD defines "racial discrimination" in a broad way, so as to include "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Article1§ 1).

[132] Committee of the Elimination of Racial Discrimination, CCPR General Recommendation 30: Discrimination Against Non Citizens, 64th Session of the Human Rights Committee 10 January 2004 § 4.

[133] Ibidem, § 13-14 (emphasis added).

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The ICCPR prohibits "any discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." While Article 2 § 1 refers to the obligation of states "to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognised in the Covenant without distinction of any kind," Article 26 provides that "all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds."[134] Non-discrimination under Article 26 of ICCPR is conceived of as an autonomous right that applies to "any field regulated and protected by public authorities," including matters of nationality.[135]

Non-discrimination is also one of the guiding principles of the 1997 Convention.[136] Article 5 § 1 provides that "the rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin." In what concerns the rights of nationals, the Convention states that "each State Party *shall be guided* by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently" (Article 5 § 2, emphasis added). This provision does not amount to full prohibition but only to an invitation to state Parties to consider the matter in the light of the principle of non-discrimination.[137]

With regard to access to nationality, the 1997 Convention explicitly allows for certain forms of preferentialism. As argued in the Explanatory Report, "the very nature of the attribution of nationality requires States to fix certain criteria." These criteria may lead to "preferential treatment in the field of nationality,"[138] such as preferential treatment based on linguistic competence or nationality of another state. In certain circumstances, facilitated access to nationality is not only acceptable but also required by the Convention. This applies to spouses of citizens, children of citizens born abroad, children of persons who acquire nationality, children adopted by citizens, persons born or brought up in the state, persons who are legal and

[134] The term "discrimination" in the Covenant relies on the definition provided by the CERD. See ICCPR General Comment No. 18: Non-discrimination, 37th Session of the Human Rights Committee, 10 November 1989, § 12.
[135] ICCPR.
[136] 1997 Convention. Preamble.
[137] According to the Explanatory Report to 1997 Convention, "the words 'shall be guided by' in this paragraph indicate a declaration of intent and not a mandatory rule to be followed in all cases." Explanatory Report to 1997 Convention, § 45.
[138] Ibidem § 40.

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habitual residents from before majority age, stateless persons and recognised refugees with lawful and habitual residence (Article 6 § 4).

Facilitations in the acquisition of nationality for spouses have been recognised by international law once the principle of automatic substitution of nationality in marriage lost ground. The 1997 Convention affirmed a duty of states to facilitate the naturalisation of spouses of nationals, although it carefully avoided "any language which could be interpreted as a clear individual right to acquire nationality" (Hailbronner, 2006: 58). The Convention also urged states "to facilitate, in the cases and under the conditions provided for by it in internal law, the recovery of its nationality by former nationals who are *lawfully and habitually resident on its territory*" (Article 9, emphasis added). Such provisions reveal a concern with the recognition of actual links between individuals and the state, which is mainly evidenced by personal connections with nationals and/or habitual residence.

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3.3 Nationality, Nationalism and Minority Protection

In this section, I address the link between nationality and the contested international legal norms of self-determination and minority protection. My first aim here is to see how these prevalent interpretations of the notion of self-determining people in international law affect international norms with regard to nationality. My second aim is to analyse the way in which old and new norms of national minority protection, including protection of ethno-national minorities by kin-states can be invoked in adopting ethno-cultural preferentialism in the regulation of nationality.

3.3.1 The Principle of Self-Determination

As a passionate political claim, a controversial theoretical principle, and an indeterminate legal right, self-determination constitutes one of the most powerful ideas in international politics of the last two centuries. The right of "all peoples" to self-determination lies at the very heart of the international system, as designed after the Second World War. The key question is whether such right refers to a right of states to autonomy (sovereignty), a right of nations to statehood (national self-determination), or to a right of individuals to self-government (democratic self-determination). Each of these alternatives defines "peoples" in different ways and inevitably has different implications for the regulation of nationality.

The modern political world is organised into a society of sovereign nation-states. During the formation of this system, the ideology of nationalism has played a major role. In a classical formulation, nationalism is the principle that requires the political boundaries of the state to follow the cultural-national boundaries of the people (Gellner, 1983). Despite contemporary pejorative connotations, nationalism has long been considered a noble ideal and a valid political aspiration, especially when asserted against imperial domination. Most of the states emerging from the ashes of pre-modern empires have, more or less, acted as national states, including in moments when they came together to settle rules of international law[139]. The doctrine of self-determination can be seen as "the product of the interaction between nationalism and international law" (Summers, 2005: 353). In what follows, I will give a brief account of the development of the idea of self-determination from political ideal to legal right.

Woodrow Wilson is often credited with affirming the principle of self-determination as a solution for the reorganisation of the vast political space created by the break-up of the

[139] Despite certain contemporary pejorative connotations, nationalism has long been considered a noble ideal, as well as a valid political aspiration – especially when asserted against imperial domination.

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Austro-Hungarian, Prussian and Ottoman empires. His idea of self-determination mainly implied the right of peoples[140] to choose their own government through democratic means (Vrdoljak, 1998). In his "Fourteen Points," however, Wilson repeatedly referred to "nationality" as a criterion for implementing the right to self-determination.[141] This mix of democratic and nationalist ideas fuels the discussions on self-determination to this day.

Although Wilson's ideas added political weight to various claims of independence, the European victors did not accept them. The Treaty of Versailles made only partial and selective use of the principle of self-determination. Wilson's idea of a League of Nations was accepted but its Covenant did not mention the principle of self-determination. The peace makers did, however, create a system of minority protection through which ethno-national groups that were not allowed to establish their own state would enjoy individual and group rights within larger states. The system failed dramatically partly because of the reluctance of states to implement minority provisions. Paradoxically, arguments of minority protection were later used as a pretext for invasion and war.

After the Second World War, the political principle of self-determination was recognised as a fundamental principle of international law,[142] and subsequently affirmed as a fundamental human right.[143] Unfortunately, the legal codification of self-determination did not bring much clarification. The twin questions of who is the "self" and what "determination" means continue to trouble lawyers and theorists to this day. On the one hand, the right is universal, and is enjoyed by "all peoples."[144] On the other hand, it is only a few who can successfully invoke it. The right to self-determination was practically recognised only in the case of colonial territories seeking independence,[145] albeit "with little respect for natural or cultural

[140] Unfortunately, Wilson did not provide a clear definition of 'the people'.
[141] Wilson's proposal included: readjustment of Italy's frontiers "along clearly recognizable lines of nationality" (§ 9), granting of the "freest opportunity to autonomous development" for the "peoples of Austro-Hungary" (§ 10), setting of relations among Balkan states on "friendly counsel along historically established lines of allegiance and nationality" (§ 11), "an absolutely unmolested opportunity of autonomous development" for nationalities under Turkish rule" (§ 12). Wilson W., 'Fourteen Points', speech of January 8, 1918 <http://avalon.law.yale.edu/20th_century/wilson14.asp>, accessed 8 May 2010.
[142] The UN Charter describes as one of the purposes of the organization 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace' (Article 1 § 2). Similar formulations are to be found in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States (1970), the Helsinki Final Act (1975), the African Charter of Human and Peoples' Rights (1981), the Charter of Paris for a New Europe (1990), the UN Declaration on the Rights of Indigenous Peoples (2007).
[143] Although the Universal Declaration of Human Rights did not mention self-determination, the two Human Rights Covenants contain a common Article 1 § 1 that proclaim the right to self-determination.
[144] ICCPR.
[145] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, Res. 1514, UN GAOR, 15th Session, Supp. No. 16, UN Doc. A/4684 (1960) 66.

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boundaries" (Mccorquadale, 2001: 139). Apart from the colonial context, the legal right to (external) self-determination remained toothless. For example, after the fall of the Eastern bloc that led to the dissolution of the Soviet Union and Yugoslavia, the right to self-determination was not accepted as a ground for secession and independence. When recognized, independence was wrapped in different legal packaging, including: restoration of statehood (the Baltic states), negotiated partition (Czechoslovakia), and formal state dissolution (the Soviet Union). In the Yugoslav case, the preferred solution was *uti possidetis juris* – an international principle used during the South-American movements of independence that recommends partition of territories along internal state boundaries (Kovács, 2003).[146]

The limited impact of the legal principle of self-determination is caused by its impact on other major international principles such as sovereignty and territorial integrity.[147] Outside of colonial context the right of self-determination seems to be interpreted solely as a right to democratic government—so-called internal self-determination. Peoples— which is 'the whole people belonging to the territory'— have the right to "freely pursue their economic, social and cultural development."[148] The external aspect of self-determination— expressed by the right of people to "determine freely their political status"— is relevant only for cases of "alien subjugation, domination, and exploitation."[149] There is, however, a link between the two forms of self-determination. From the wording of the two International Covenants and of the 1970 Declaration, we understand that the trumping force of the principle of territorial integrity holds only to the extent that governments are fully representative and do not discriminate against certain groups. This makes a strong case for the claims to self-determination raised by non-represented or discriminated groups— the so-called remedial secession. The problem is then to find a threshold above which oppression and discrimination entitles groups to self-

[146] The principle of *uti posidesis* could not be used in the case of Kosovo, which was not a federal unit of Yugoslavia. Kosovars' claims to independence have been primarily grounded in the highly contested principle of remedial secession.

[147] As stated in the 1970 Declaration of Friendly Relations, "nothing in the foregoing paragraphs [that affirm the principle of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples […] and thus possessed of a government that representing the whole people belonging to the territory, *without distinction as to race creed or colour*." UN General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970 GA Res. 2625, UN GAOR, 25th Session, Supp. No. 28, UN Doc. A/8028 (1970)121 (emphasis added).

[148] ICCPR, Article 1 § 1.

[149] Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination, U.N. Doc. A/51/18, annex VIII, 125 (1996).

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determination.

If we interpret "peoples" as meaning nothing more than representative governments, then the right to "freely pursue their economic, social and cultural development" can hardly be distinguished from the general principle of state sovereignty in its negative interpretation of non-interference. The 1965 Declaration on the Inadmissibility of Intervention,[150] for example, affirms that "every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State." It follows that states can adopt whatever "cultural system" they wish. Hence, they have the right to foster their collective national identity through their institutions and policies. Interpreting this right as a right to self-determination simply conceals the fact that most states do not have homogenous "peoples" and uniform national identities. International law does not affirm a principle of *national* self-determination by which ethno-national groups could claim independence, but a principle of self-determination for "the whole people" represented by a State. In doing so, it leaves to the state to chose what national identity to champion.

International legal constraints with regard to non-discrimination and adequate representation of "all people" do not prevent states from pursuing nationalist policies. An instructive example is the surge in state nationalism in Central and Eastern Europe after the fall of the Berlin Wall. Most of the new and redefined states in the region have proclaimed themselves as "national" states with the explicit claim that they represent and care for the advancement of one particular ethno-national group—usually, the majority in the territory (Brubaker, 1996). The strategy involved, among others, the affirmation of the titular majority nation and the design of nationality rules that favoured co-ethnics while obstructing the inclusion of other groups. Although such policies have occasionally come to the attention of the international community, concerns were expressed mostly with regard to regional stability and peace.

3.3.2 Nationality and the Protection of Ethno-National Minorities

There are two situations in which nationality can be invoked as a means of protecting ethno-national minorities.[151] First, there is a case of access to nationality for resident individuals who are ethno-national minorities in their state of residence. Second, there is a case of access

[150] UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res. 2,131 (XX), 21 December 1965, 20th Session.

[151] In this chapter, I use the terms 'minorities,' 'ethno-national minorities' and 'persons belonging to minorities/ ethno-national minorities' interchangeably. Since my focus is limited, there is no need to enter the conceptual controversy over the individual vs collective character of minority rights.

to nationality for non-resident individuals who belong to ethno-national minorities of other states.

In the first situation, the claim of protection does not derive from the minority character of groups, but from universal norms, such as the human right to nationality and the principle of non-discrimination. As seen above, some progress has been made in codifying international norms to ensure that long-term residents are not denied access to the nationality of the state.[152] Nationality, in this sense, does not count for a "minority right" but as a basic right of individuals – including of those belonging to ethno-national minorities – to acquire the nationality of the state in which they live. As history shows, the legal status of individuals who suddenly became ethno-national minorities after redrawing state borders is often uncertain. Before claiming special rights stemming from needs of cultural preservation, these individuals usually need protection with regard to their physical and legal integrity, i.e. a legal status as nationals,

The protection of minorities has been a pervasive matter in international relations. From European pledges to protect Christians in the Ottoman Empire and the Treaty of Westphalia to the Versailles Peace and the recognition of post-Yugoslav states, "international attempts to influence the relationship between rulers and minority groups within their own country have been an enduring characteristic of international relations" (Krasner, 1999: 76). The complex system of minority protection implemented through the League of Nations and the International Court of Justice[153] was "meant to be compensation for the denial of self-determination to certain national groups" (Kovács, 2003: 439). Unlike previous international arrangements that relied on the willingness of the Great Powers, the League system was an attempt to ground minority protection in "impartial" international law (Pentassuglia, 2002: 26). Constitutional guarantees of minority protection were imposed in the Treaty with Poland, which served as a model for others. The protection system was based on three pillars: (a) access to nationality, (b) non-discrimination, and (c) special rights of cultural preservation.[154]

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[152] Such norms include the affirmation of duties of states to prevent stateless, including in cases of state succession, the right to nationality, and the prohibition of arbitrary deprivation as well as prohibition of discrimination on racial or ethnic grounds.

[153] Provisions of minority protection were included in the treaties signed with Poland, Austria, Czechoslovakia, Yugoslavia, Turkey, Bulgaria, Romania, Hungary and Greece, in declarations of admission to the League of Nations of Albania, Lithuania, Latvia and Estonia, in the Convention between Poland and the Free City of Danzig (1920), the Convention on the Aaland Islands (1921), the Convention between Germany and Poland Relating to Upper Silesia (1923), and the Convention Concerning the Territory of Memel (1924).

[154] For example, Poland was obliged to recognize as nationals "ipso facto and without any formality German, Austrian, Hungarian Russian nationals habitually resident on or born within its territory of parents habitually resident there, even if they were not presently living" in its territory (Art 3). Such (adult) persons retain a right to

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After the failure of the League system, in the post-war world, the idea of minority rights was largely abandoned.[155] Neither the UN Charter, nor the Universal Declaration of Human Rights or the 1950 Convention contain provisions of minority rights. The new paradigm was the respect for human rights, equality of treatment and non-discrimination. Article 27 of the ICCPR refers prudently to the right of "persons belonging to" minorities "to enjoy their own culture, to profess and practice their own religion, or to use their own language." The collective dimension of such right was reduced to a mere associational feature while the duty imposed on states was negative.

The dramatic changes in the post-communist world re-opened the questions of self-determination and minority rights. While the international community was reluctant to accept a right of external self-determination outside the colonial context, it gradually recognised a right to internal self-determination for "peoples" who represented less than the entire population of the state (Vrdoljak, 1998: 63). Advocates of sub-national group rights have argued that provisions of individual human rights and non-discrimination alone are insufficient for attaining "national" self-determination. Amid fears of widespread ethno-national conflicts in Europe, the international community viewed the treatment of ethno-national minorities as a cornerstone of regional stability. In exchange for recognition, the new states had to accept a series of Versailles-style mandatory clauses on the protection of national minorities (Kovács, 2003: 443). After a short period of enthusiasm and experimentalism, the initial tendency to empower national minorities through the means of collective rights, including territorial autonomy, has been replaced by a more generic approach recognising limited cultural rights for individuals in a manner not significantly different from Article 27 of the ICCPR (Kovács, 2003: 443). For example, the Article 5 § 2 of the 1995 Framework Convention for the Protection of National Minorities[156] prescribes only that states "shall refrain" from "policies aimed at the assimilation of persons belonging to national minorities against their will."

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opt for another nationality under the obligation that they move to the state of their choice. Non-resident persons who were born in Poland of parents who had been habitually living in Poland were to be considered Polish nationals unless they renounce Polish nationality (Art 4). Persons born in Poland and who no not have any other nationality become also Polish nationals (Art 6). Apart from inclusion through nationality and non-discrimination provisions, the treaty provided for genuine collective minority rights such as the right to establish specific charitable, religious, social and educational institutions (Art 8), public education in minority language (Art 9), and equitable share of public funds (Art 9-10). Such provisions seem extraordinary in the light of the limited development of international norms on nationality and minority rights at the time (Vrdoljak, 1998: 47).

[155] On several occasions, the "minority problem" was solved in old-style fashion, by way of population transfer; e.g. the expulsion of Germans from Central and Eastern Europe.

[156] Council of Europe, *Framework Convention for the Protection of National Minorities*, opened for signature 1 February 1995, ETS 157 (entered into force 1 February 1998).

The profound political transformations of the new era – ranging from regime changes to civil war – have created a series of problems of membership. Statelessness is the most obvious of these. Paradoxically, the few international legal instruments on minority protection do not include provisions of access to nationality. For example, there is not a single reference to nationality or citizenship in the text of the 1995 Framework Convention for the Protection of National Minorities. The unstated assumption was that the state where national minorities reside should guarantee, at least, their inclusion through nationality.

3.3.3 Kin-States and Kin Minorities

The problem of minorities rarely concerns only one state. As Rogers Brubaker argues, in many CEE countries, minority issues involve a triadic relationship formed by host state, kin state and minorities (Brubaker, 1995). Attempts of states to intervene on behalf of their kin-minorities are far from being exceptional in history. As mentioned, one of the main reasons for the failure of the system of minority protection under the auspices of the League of Nations was the pressure maintained by kin states.

Despite the new emphasis on individual rights after the Second World War, the issue of collective minority protection became the object of several international agreements. Seeking to protect the rights of German-speaking people in the Italian region of South Tyrol, Austria pressed for an agreement with Italy. The Paris Agreement of 1946 provided for 'special provisions to safeguard the ethnical character and the cultural and economic development of the German-speaking element' and gave Austria the role of "minority protecting power" (Alcock, 2001: 6). Dissatisfied with the implementation of the agreement, Austria soon raised the issue at the United Nations. In 1971 a new Austro-Italian treaty secured enhanced autonomy for the region on the condition that Austria would refrain from interference and that further disputes be referred to the International Court of Justice. Special provisions on the protection of minorities were also included in the memorandum of understanding signed by Italy and Yugoslavia over the status of Trieste (1954) and in the Austrian State Treaty (1955).

Kin-state activism was revived in the 1990s. Many of the new or reformed states in Central Eastern Europe have defined themselves as "national" states and have taken commitments towards members of the nation who were not their residents or citizens. For example, the Hungarian Constitution states that "the Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside of its borders and shall promote and foster their

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relations with Hungary."[157] Other constitutions throughout the region affirmed similar commitments towards co-ethnics (Horvath, 2008:141-2).

The adoption of various "kin laws" by a number of post-communist states also reveals the importance of kin minorities in the region. These laws provide for a series of benefits to individuals in virtue of their membership in the nation.[158] Although fairly diverse – in terms of benefits, eligibility, and requirements – these laws are interesting because they do not concern citizens, and sometimes not even residents of the state that issues them. Some laws provide for facilitations with regard to access to nationality while others make the benefits conditional upon non-possession of the nationality of the issuing state. At first glance these laws seem to offer a genuine solution to a salient problem. They try to redress some historical "wrongs" and present "misfortunes" without reviving revisionist territorial claims.

The debate generated by the Hungarian Law LXXII (Status Law) is revealing. After 1990, Hungary has re-affirmed a strong commitment to protect Hungarian communities left outside the borders of the Hungarian state in the aftermath of the fall of the Austro-Hungarian Empire. As part of this strategy, the Status Law of 2001 granted co-ethnics living in several neighbouring countries (Serbia and Montenegro, Croatia, Slovenia, Romania, Ukraine and Slovakia) a series of educational, cultural, and social benefits.[159] These benefits were to be delivered both in Hungary and in the state of residence but under the condition that beneficiaries do not take up permanent residence in Hungary or seek Hungarian nationality. A special identity card was to be issued by the kin state following the recommendation of specific ethnic organisations active in the host states.

Romania and Slovakia – the two neighbouring countries hosting the most important communities of Hungarian minorities— reacted promptly and vehemently. The Romanian government stressed that the Romanian nation includes all citizens regardless of their ethnic origin. It argued that Romania was committed to protect national minorities as Party to the 1995 Framework Convention and to other multilateral or bilateral agreements in the area of minority rights. Romania recognised the interest of other states with regard to their kin, but

[157] Constitution of the Republic of Hungary, adopted on 20 August 1949, and amended on 23 October 1989. The new Hungarian Constitution adopted on 25 April 2011 (to enter into force on 1 January 2012) maintains the responsibility towards Hungarians abroad and introduces the principle of a "united Hungarian nation".
[158] Council of Europe, European Commission for Democracy through Law (Venice Commission), Report on the Preferential Treatment of National Minorities by their Kin-State, October 19-20 2001, Document CDL-INF (2001).
[159] Among the benefits provided for by the Hungarian kinship law, we have: scholarship for students, financial and logistic support, training, facilitated access to cultural institutions and programs, travel grants, short-term working permits, exceptional rights of temporary residence.

held that any action that is not taken through "international recognised channels" and "in a spirit of mutual co-operation and understanding" is unlawful.[160]

There are very few specific provisions in international law on the proper relationship between minorities, states of residence[161] and kin states. The post-1990 system of minority protection was built on universal standards (Alcock, 2001: 6) without seeking to address the issue of kin minorities. Three main international provisions have been invoked to support kin state claims: (1) the duty to facilitate self-determination of people; (2) the responsibility to protect; and (3) the duty to respect the right of people to establish and maintain cross-border contacts.

Article 1 § 3 of the two Human Rights Covenants asserts the duty of states to "take positive action to facilitate realisation of and respect for the right of peoples to self-determination." Such provisions could be interpreted by kin states as an invitation to act in the support of the self-determination claims of their kin minorities. However, such actions are condemnable because they account for "interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination [of states of residence]."[162] An appeal to self-determination is unlikely to legitimise kin state policies. Kin states cannot support the claims to external self-determination of their kin minorities without breaching the right to self-determination of the home state. The only available route is the claim that kin states contribute to the realisation of internal self-determination of kin minorities. The concept of internal self-determination, which initially meant adequate representation and non-discrimination, has expanded to include considerations of cultural and identity preservation. However, under current international law, the sole responsible for satisfying this right is the state of residence. In virtue of its *erga omnes* character, the right to self-determination generates duties on all states[163] – including kin states. Nevertheless, state actions in support of self-determination of "all peoples" are heavily constrained by other major principles of international law.

The argument from the emerging international norm of responsibility to protect holds that a state may seek to protect its kin minorities when the state of residence fails to exercise its duty

[160] Report on the Preferential Treatment.
[161] The common terminological distinction between "home" states and "host" states that makes sense in the context of international migration becomes problematic in the context of ethno-national minorities. Historical ethno-national minorities are "at home" in the place where they reside although the state that encompasses them is perceived as a 'host' due to its different ethno-national character.
[162] Office of the High Commissioner of Human Rights, General Comment No. 12: The right to self-determination of peoples (Art. 1), Twenty-first session 1984 § 6.
[163] See Western Sahara, Advisory Opinion of 16 October 1975, ICJ Reports 1975 12; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 136.

to ensure self-determination to all of its constituent groups. In such situation it may be argued that, of all states, the kin state is in the best position to "provide much-needed assistance and fill capacity gaps, preventing and resolving minority tension" (Turner and Otsuki, 2010: 3). The privileged position of the kin state derives from technical rather than normative considerations. In such cases, kin states must act as "responsible members of the international community with respect to minorities under the jurisdiction of other states." (Turner and Otsuki, 2010: 6). Kin state actions substantiate a general duty of the international community to protect all persons rather than a particularistic duty to care for a state's own kin. Like the appeal to the duty to facilitate self-determination of "all peoples," the norm of responsibility to protect is controversial because it challenges the major international principle of state sovereignty.

Finally, a series of international instruments have affirmed the right of persons belonging to national minorities to establish and maintain peaceful contacts across borders. The 1992 European Charter on Regional and Minority Languages urged States to promote regional and minority languages also by means of trans-frontier exchanges "in the fields of culture, education, information, vocational training and permanent education" (Article 14).[164] The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities included, apart from the right to association, the right to establish and maintain "contacts across frontiers with *citizens of other States* to whom they are related by national or ethnic, religious or linguistic ties" (Article 2 § 5, emphasis added).[165] The protection of minorities, in this case, was to be undertaken "within their respective territories" (Article 1). States were invited "to cooperate on questions relating to persons belonging to minorities" in full accordance with their international obligations and paying respect to UN principles of sovereign equality, territorial integrity and political independence of State (Article 8). Article 17 § 1 of the 1995 Framework Convention established a negative duty incumbent upon states "not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage." A similar provision exists in

[164] Council of Europe, European Charter for Regional or Minority Languages, 4 November 1992, ETS 148.
[165] UN General assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992, A/RES/47/135.

the 2008 Bolzano Recommendations on National Minorities in Inter-State Relations.[166]

The security-driven approach to minority protection in post-communist Europe may explain the normative silence with regard to the role of kin states and the insistence on residence state responsibility and international scrutiny. The Venice Commission acknowledged that the "emerging of new and original forms of minority protection, particularly by the kin-States, constitutes a positive trend insofar as they can contribute to the realisation of this goal."[167] However, this role can be assumed only after observing the relevant principles of international law, especially the principles of territorial sovereignty, *pacta sunt servanda,* friendly neighbourly relations, respect for human rights and fundamental freedoms, and non-discrimination.[168] Responsibility for minority protection lies primarily with the home state and any other initiative of other states should be based on bilateral or multilateral treaties implemented in good faith and in the light of the principle of good neighbourly relations between states. Any *unilateral* award of benefits to citizens of other states in their respective territory is unlawful.[169]

The 2008 Bolzano Recommendations acknowledged that "a State may have an interest […] to support persons belonging to national minorities residing in other States." It also added that "this *does not imply, in any way, a right under international law* to exercise jurisdiction over these persons on the territory of another State without that State's consent."[170] The Recommendations provide that "[s]tates may take preferred linguistic competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad."[171] This is conditional upon states respecting the principles of friendly neighbourly relations and territorial sovereignty. However, the conferral of nationality *en masse* is not acceptable.

The Explanatory Note to the Bolzano Recommendations acknowledges that granting nationality to individuals abroad "can be a highly sensitive issue" but offers little guidance other that referring back to the doctrine of genuine link in the Nottebohm Judgement. Unable

[166] OSCE High Commissioner on National Minorities. The /Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note, June 2008. Recommendation 8.
[167] Report on the preferential treatment, Section D.
[168] The General Assembly of the Council of Europe endorsed the conclusions of the Venice Commission in Resolution 1335 (2003), Preferential treatment of national minorities by the kin-state: the case of the Hungarian Law on Hungarians Living in Neighbouring Countries ("Magyars") of 19 June 2001, General Assembly of Council of Europe.
[169] In the wording of the Report on the Preferential Treatment, "it is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter." Report on the Preferential Treatment.
[170] Bolzano Recommendations, Recommendation 4.
[171] *Ibidem*, Recommendation 11.

to determinate a clear legal diagnosis of the problem, the drafters recommend to pay "full consideration to the consequences of bestowing citizenship on the mere basis of ethnic, national linguistic cultural or religious ties, especially if conferred on residents of a neighbouring State."[172]

[172] *Ibidem*.

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3.4 Member State Nationality and the European Union

Apart from constraints of public international law, the regulation of nationality by the 27 states included in this study may face additional restrictions derived from their membership of the European Union. Rather than embarking on another analysis of EU citizenship, this section focuses on the major constraints on Member State (MS) nationality generated by the development of the EU legal order. First, I briefly discuss the scope of EU citizenship and its relationship with MS nationality. Together with relevant Treaty provisions, I discuss several landmark decision of the European Court of Justice (ECJ). Second, I briefly address two general principles of EU legal and political order that may impact on the regulation of nationality by MS: (1) the obligation of solidarity, and (2) the respect for national identity.

3.4.1 EU Citizenship and Member State Nationality

The literature dealing with the character, content or prospects of EU citizenship is growing at a rapid pace. Of all aspects of this fascinating topic, I am only interested here in the impact of the EU citizenship regime on the power of member states to regulate nationality.

Citizenship features were present in the European legal order long before the formal adoption of the Citizenship of the Union. The idea of a common citizenship itself has developed from the concept of non-discrimination in the context of free movement of workers required by the establishment of internal market (O'Keeffe, 1994). The formal incorporation into the Treaty of legal provisions on the Citizenship of the Union occurred with the adoption in 1992 of the *Treaty on European Union* (hereafter, the Treaty of Maastricht).

The Treaty of Maastricht established that "[e]very person holding the nationality of a Member State shall be a citizen of the Union"(Art 8.1)[173]. The *Declaration on Nationality* attached to the Treaty added that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned […] Member States may declare, for information, who are to be considered their nationals for Community purposes". This careful clarification is restated in the text of the

[173] *Treaty on European Union*, 7 February 1992, 1992 Official Journal C 191. 1, 31 I.L.M. 253 (entered into force 1 November 1993). The rights of EU citizenship are: the right to move and reside freely within the territory of the Member States, the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, the right to enjoy protection of the diplomatic and consular authorities of any Member State in the territory of a third country in which the Member State of which they are nationals is not represented, the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union (Art 20-25 Consolidated Treaty of the European Union).

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Edinburgh Agreement of 1992,[174] namely that "the provisions […] relating to citizenship of the Union give nationals of the Member States additional rights and protection […] [t]hey do not in any way take the place of national citizenship. The *Treaty of Amsterdam*[175] formalizes this point by stating that "citizenship of the Union shall complement and not replace national citizenship" (Art 17.1). Finally, in the *Consolidated version of the Treaty on the Functioning of the European Union*[176] – which also includes the *Treaty of Lisbon* (2007) – the formulation "shall complement" is replaced by the words "shall be additional to" (Art 20.1).[177]

Even before the adoption of EU citizenship, several MS have submitted special declarations defining who is to be counted as a national for European Community law (EC law). In 1957 Germany declared that in all that concerns EC law the term "German nationals" included all nationals of the German Democratic Republic and ethnic Germans in Eastern Europe covered by the article 116 of Basic Law (De Groot, 2002). In 1972 and 1982 the United Kingdom issued special declarations through which only certain categories of British nationals were recognized as nationals for Community purposes. Those included were citizens of United Kingdom and Colonies or British subjects who have the right of abode in the United Kingdom, and citizens of the United Kingdom and Colonies by birth or by registration or naturalisation in Gibraltar, or whose father was so born, registered or naturalised[178] (De Groot, 2004). Subsequent amendments have extended the scope of nationality for Community purpose by including citizens of Gibraltar and Falkland Islands and all British Overseas Territories Citizens.[179]

A straightforward reading of the Treaty informs us that EU citizenship is derivative from and additional to MS nationality. It is "derivative" because it does not have a mechanism of self-reproduction but relies on autonomous decisions on nationality by each and every MS. EU

[174] *Decision of the Heads of State and Government, meeting within European Council, concerning certain problems raised by Denmark on the Treaty of European Union*, 13 December 1992, Official Journal C 348, 31/12/1992 P. 0001 – 0001.
[175] *Treaty of Amsterdam Amending the Treaty on European Union*, *the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, Official Journal (C 340) 1, 37 I.L.M. 56 (entered into force 1 May 1999).
[176] *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 30 March 2010, Official Journal C 83.
[177] The provision is repeated in Article 9 of the *Consolidated version of the Treaty on European Union*. *Ibidem*.
[178] These declarations left outside the scope of the EC law the following categories of citizens: British Dependent Territories Citizens, British Overseas Citizens, British Subjects without Citizenship and British Protected Persons.
[179] British Overseas Territories (BOT) include Anguilla, British Antarctic Territory, Bermuda, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena and Dependencies (Ascension Island and Tristan da Cunha), Turk and Caicos Islands, Pitcairn Island, South Georgia and South Sandwich Islands, Sovereign Base Areas on Cyprus. With the exception of the Sovereign Base Areas on Cyprus, all citizens of BOT are EU citizens.

citizenship is "additional" because it generates a set of rights that top up the rights of national citizenship. Despite the view of EU citizenship as a "secondary" status, the ECJ has progressively broadened its scope to the point that rules of nationality adopted by MS are, in certain circumstances, tested against EU citizenship.[180]

In several landmark cases, the ECJ has asserted limits to MS power to regulate nationality in order to safeguard rights of EU citizenship. First, the Court consecrated the idea that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States.[181] Second, it re-interpreted the general principle of international law concerning the sovereign right of states to regulate nationality by incorporating considerations of EU law. According to the Court, "under international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality"[182] [emphasis added]. Advocate General M. Poiares Maduro found also that "primary law as well as general principles of Community law *can constrain* the Member States' legislative power in nationality law" [emphasis added].[183]

The most obvious situation where MS nationality rules undermine the idea of EU citizenship is the case where MS law provides for the loss of nationality due to prolonged residence abroad. When "abroad" means another MS, the national rule contradicts the logic of EU citizenship because it prescribes that the exercise of a basic EU citizenship right should bring about the loss of EU citizenship— the status that created the right in the first place.

In the *Rottman case* the Court dealt with such a situation of loss of EU citizenship due to uncoordinated application of MS nationality rules. A former Austrian national who naturalised in Germany, Rottman lost EU citizenship as a consequence of being denaturalised by Germany (due to fraudulent conduct) and because he was unable to re-acquire Austrian nationality (renounced in order to obtain German nationality). Arguing that the loss of EU citizenship "falls, by reason of its nature and its consequences, within the ambit of European Union law",[184] the ECJ invited national courts to apply a "proportionality test" and to establish "whether that loss is justified in relation to the gravity of the offence committed by

[180] For an overview of the literature on this topic, see (Kochenov 2010a).
[181] E.g. Case C-209/03 *The Queen, on the application of Dany Bidar vs. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119; Case C-184/99 *Grzelczyk* [2001] ECR I-6193 (para 31); Case C-413/99 *Baumbast and R* [2002] ECR I-7091, (para 82); e.t.c.
[182] Case C-200/02 *Kunqian Catherine Zhu & Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.
[183] Case C-135/08, *Janko Rottmann v Freistaat Bayern*, *Opinion of Advocate General Maduro* on 30 September 2009.
[184] *Rottman Case*, [42].

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that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality".[185] This surely "challenges to the scope of national citizenship law" (Shaw, 2010: 17).

In cases of dual nationality that involve nationals of a MS and of a third country, the ECJ established that the formal nationality of a MS is sufficient to guarantee the rights of EU citizenship despite the "effective" possession of any other nationality status. In the *Micheletti case*[186] Spain refused to guarantee fundamental freedoms of Community law to a dual Argentine-Italian national on the ground that his Argentine nationality took precedence over the Italian one (based on Micheletti's previous habitual residence in Argentina). The Court held that "it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty."[187]

Although the Treaty does not provide for EU competences in the area of acquisition or loss of EU citizenship, the ECJ has identified certain circumstances where basic rights of EU citizenship need to be asserted against, or independent, of the status of MS nationality. In the *Chen case*[188] a non-EU citizen (third country national or TCN) was granted the right to stay on the territory of a MS because she was the primary caregiver for a minor EU citizen. The Court dismissed as irrelevant the alleged abuse of the procedures concerning the acquisition of nationality.[189] Further, in the *Zambrano*[190] and the *McCarthy*[191] cases the ECJ fine-tuned its interpretation of the Treaty and EU citizenship, which prohibit MS to deprive EU citizens of "the very enjoyment of the substance of rights conferred by the status of EU citizenship" (Coutts, 2011).

The argument behind this ECJ's "minor coup d'etat" (Davies, 2011) or "judicial avant-gardism" (De Groot and Seling, 2011) is that the EU must have a say in cases where decisions

[185] *Ibidem*, para 56.
[186] Case C-369/90 *Mario Vinente Micheletti and Others v. Delegation del Gobierno en Cantabria* [1992] ECR I-4329.
[187] The ECJ judgment affected the system of reciprocal nationality privileges established between Spain and Latin American countries, through which non-nationals could access important nationality rights when resident in another contracting state. After *Micheletti*, Spain urged to introduce additional protocols to the effect of allowing both nationalities to be active simultaneously (De Groot, 2002).
[188] Chen Case.
[189] Chen allegedly gave birth in Ireland only for the purpose of obtaining the Irish nationality for her child (exploiting the Irish rule of pure ius soli), which entitled her to rights of residence and freedom of movement within EU.
[190] Case C-34/09 *Ruiz Zambrano v Office National de L'emploi,* (ONEM) [2009] OJ C90/15.
[191] Case C- 434-09 *Shirley McCarthy v. Secretary of State for the Home Department.* Judgement of 5 May 2011.

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on nationality impact on EU citizenship rights. Since EU citizenship is fundamentally tied up to national citizenship, one could argue that it is always the case that MS nationality rules impact on EU citizenship rights. This is especially obvious in all decisions on withdrawal of nationality where no other MS citizenship is available. The failure to grant nationality to individuals also amounts to an effective prevention from acquiring EU law rights (Davies, 2011).

3.4.2 Solidarity among Member States

Article 4 3 of the *Treaty on the Functioning of the EU* provides for the duty of sincere cooperation and to "refrain from any measure which could jeopardize the attainment of the Union's objectives."[192]

Although there is no formal obligation for MS to coordinate nationality rules, several states have introduced a series of facilitations for naturalisation of EU citizens.[193] A few others also adopted more lenient provisions regarding the loss of nationality in cases when their nationals naturalise in another MS.[194]

The issue of solidarity has been invoked in cases where MS granted nationality to a great number of TCN creating, therefore, EU citizens free to move and seek employment throughout the EU. According to Hailbronner, "it would seem a violation of the obligation of loyalty to the Community if a Member State were to grant nationality to a category of persons who obviously do not intend to make use of their nationality in the Member State of nationality, but in another Member State" (Hailbronner, 2006: 91). In 2005, for example, the Spanish initiative to turn 700 000 illegal immigrants into Spanish nationals stirred negative reactions in the EU. In recent years, the Romanian policy of restoring nationality to Moldovan residents also hit the spotlight. The Italian government has asked the European institutions to "closely watch this situation"[195]. It even suggested not recognizing Romanian-Moldovan

[192] The full article reads: "[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

[193] These countries are: Austria, Germany, Greece, Hungary, Italy, Romania and Slovenia. *See* section 6.1.2, *infra*.

[194] Germany and Slovenia do not withdraw nationality from nationals who naturalise in another MS.

[195] Presidenta dei Consiglio dei Ministri. *Moldova, Ronchi: Preoccupazione su cittadinanza romena a moldavi*, Comunicazione, 23 aprile 2009. Available at: http://www.politichecomunitarie.it/comunicazione/16576/moldova-ronchi-preoccupazione-su-%20cittadinanza-romena-a-moldavi.

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citizens due to their lack of effective nationality in Romania, which obviously goes against the ECJ conclusion in the *Micheletti case*.

Many of the EU countries, in fact, maintain citizenship rules that privilege certain persons or nationals on national or cultural grounds.[196] Under the Treaty, they are allowed to declare who their nationals are for the purposes of EU law. Apart from expressing "concern" (Andrew, 2009), the European Commission has not yet dealt with such issues[197]. The European Commission repeatedly stated, for example, that the reacquisition policy is an internal matter for Romania (Margiotta and Vonk, 2010). Moreover, the ECJ seems to accept re-definitions of MS nationality (for EU purposes) as long as they have inclusionary effects. In the *Gibraltar case*[198] the Court stated that the provisions of Community law "do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, *other than their own nationals or citizens of the Union* resident in their territory"[199] [emphasis added].

3.4.3 Respect for National Identities

Nationality constitutes a fundamental attribute of national sovereignty even in, or especially in, the European Union. Unlike the concept of the EU citizenship— which seems to embody a post-national, legal, and rights-based membership— nationality remains strongly associated with stories of belonging in historical national communities. Gerard-René de Groot finds it fascinating that despite the fact that "[s]tate autonomy in matters of nationality, in particular within the European Union, is gradually weakening […] [t]here is no tendency, however, to abolish the nationalities of the Member States" (De Groot, 2004).

According to article 4.2 TFEU, "[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities". Similarly, the *Preamble* of the *Charter of Fundamental Rights of the EU*[200] asserts that "preserving the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Members States" is a legitimate goal of the EU.

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[196] *See* section 6.1.3, *infra*.
[197] With regard to 1981 British declaration re-defining nationality for the purpose of EU law, De Groot mentions a Resolution of the European Parliament that stressed the desirability of some degree of harmonization of nationality law (De Groot, 2004).
[198] Case C-145/04 *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland.*
[199] The UK granted the right to vote for European Parliament to Commonwealth citizens of Gibraltar in 2004 following a judgment of the European Court of Human Rights that found the UK in breach of Article 3 of Protocol No 1 to the 1950 Convention. *Matthews v United Kingdom*, [1999] 28 EHRR 361.
[200] *Charter of Fundamental Rights of the European Union*, Official Journal C 83, 30 March 2010.

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An argument for the autonomy of MS nationality can be based on the connection between nationality law and national identity. Particular historical links between MS and peoples or states outside the EU[201] often constitute a reason for special relationships, which vary from preferential trade agreements to privileges of access to nationality. The basis of such links may lie in the colonial past (e.g. Portugal, Great Britain, France), a history of emigration (e.g. Spain, Italy), or ethno-national struggles (e.g. in Central and Eastern Europe) (D'Oliveira, 1999).

The problem is that unrestricted nationality rules that welcome large numbers of non-EU citizens on a national identity card inevitably affect the national identity of other MS due to EU freedom of movement (Margiotta and Vonk, 2010). Using the argument of national identity, the problem seems to boil down to an impossible choice between competing claims to national identity advanced by different member states.

[201] In cases where MS nationality laws differentiate between citizens of different MS nationality the EU provisions on non-discrimination apply. Notably, the 2001 Hungarian proposal of kinship law excluded Austria from its territorial scope precisely in light of the Hungarian accession to EU. The EU *Race Directive* allows for positive discrimination measures if they "prevent or compensate for disadvantages linked to racial or ethnic origin" (Art 5). In the *Bickel and Franz case* (C–274/96, [1998] ECR I-7637), the ECJ argued that "the protection of such a [ethno-cultural] minority may constitute a legitimate aim" that can justify derogation from the general principle of non-discrimination. The argument of positive discrimination requires solid proofs as to the disadvantaged situation of particular groups. As in the Hungarian case, it often happens that arguments for the protection of *disadvantaged* ethno-national minorities are indiscernible from arguments for the protection of *ethno-national* minorities qua ethno-national minorities (ethno-cultural relatives).

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3.5 Chapter Conclusions

Public international law imposes only minimal and imperfect constraints upon the sovereign right of states to regulate nationality. Early efforts to develop international rules in the area stemmed from the need to solve coordination problems related to the attribution of membership – problems of under-attribution (statelessness) and over-attribution (dual nationality). While the principle of preventing statelessness has been widely recognized, the twin principle of preventing dual nationality has been gradually, though not completely, discarded.

The proclaimed right to nationality has been only occasionally and partially coupled with specific duties of states to grant nationality to particular individuals. Apart from the reinforcement of the duty to prevent statelessness, the prohibition of discrimination is probably the most important contribution of the human rights revolution in the area of nationality. Particularly, the principle of gender equality and the prohibition of racial and ethnic discrimination have been generally acknowledged.

Despite its apparent revolutionary character, the doctrine of "genuine link" upheld by the ICJ in the Nottebohm case has only marginally influenced public international rules of nationality. Except for cases involving dual nationality, the idea of genuine link has been suggested in cases of state succession and for the protection of human rights. As for criteria to assess the genuine link, the emphasis falls on residence and social ties, rather than ethno-cultural connections.

Public international law generally accepts the two main principles of ascription of nationality at birth – ius soli and ius sanguinis. This holds true especially after the recognition that multiple nationality caused by simultaneous application of automatic birthright principles is acceptable. With such potential source of conflict minimized, international constraints only exist in order to ensure that birthright nationality does not create or it helps to prevent statelessness. The 1997 ECN, for example, obliges state parties to grant nationality automatically to foundlings and to facilitate the naturalisation of stateless children. The perpetual transmission of nationality abroad via ius sanguinis does not pose problems.

The ECN allows, but does not require, state parties to withdraw nationality from emigrants or descendants on ground of lack of genuine link. Although the principle of gender equality in nationality matters has been widely recognized, one can still find traces of unequal treatment, for example, in the impossibility of transmission of nationality by a father to children born out

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of wedlock in many states. New challenges to the principle and practice of gender non-discrimination in the area of nationality also arise with regard to competing socio-cultural conceptions of family and marriage as well as with new reproductive technologies.

The general principle of avoiding statelessness is particularly important for regulations of loss of citizenship. International law prohibits collective de-naturalisation and arbitrary deprivation of nationality. The ECN provides an exhaustive list of grounds of loss of nationality and maintains only one exemption to the general prohibition of loss if leading to statelessness (in cases of fraud). In line with norms on dual nationality, states can request renunciation of another nationality as a condition for naturalisation or withdraw their nationality in cases of voluntary acquisition of another nationality.

Discrimination between nationals by birth and other nationals in procedures of loss is not clearly prohibited. According to the ECN, states *can* withdraw nationality from persons (dual nationals) who habitually reside abroad. They can also withdraw nationality on ground of "prejudices to the vital interests of the state" although the Explanatory Report to the ECN clarifies that this refers to exceptional situations of treason or "activities directed against the vital interests of the State" and does not include regular criminal offences.

Provisions of public international law concerning naturalisation mostly deal with the issue of dual nationality. The long lasting general ban on dual nationality in naturalisation procedure has been recently relaxed. While the 1963 Convention on Reduction of Multiple Nationality still prohibited dual nationality in cases where the second nationality is acquired by free will – naturalisation, option or recovery – the 1997 ECN only provides that state parties *can* ask their immigrants and emigrants to renounce their nationality when they naturalise, except for cases where renunciation cannot be reasonably expected. There is no further guidance as to what happens if a state decides to enforce the renunciation requirement with regard to immigrants but not to emigrants (or vice versa). The ECN also addresses the issue of discrimination between citizens by birth and other citizens. Unfortunately, it falls short of imposing a clear prohibition of such discrimination since it only asks that state parties "shall be guided by the principle of non-discrimination."

Apart from issues of dual nationality, naturalisation remains widely unregulated by public international law. At the level of recommendation, states are asked to encourage or to consider lowering barriers for the naturalisation of long-term residents. Exceptionally, the ECN imposes a threshold for the minimum period of residence required in the naturalisation procedure. It also dedicates a whole Chapter IV to procedures.

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Generally, it is well accepted that states may offer facilitations in acquisition of nationality to various categories of persons. The ECN requires that states offer facilitations to certain categories of persons, such as spouses, adopted children, stateless persons, and refugees. It also recommends facilitated recovery of former nationals if they are "lawfully and habitually resident on its territory." Since such facilitations differentiate between potential candidates for nationality, they may be tested against the general principle of non-discrimination. As mentioned, this principle of non-discrimination has permeated post-war international law, growing from a mere clause to a full right to be upheld in any field of law. But the very specificity of nationality sets limits to norms of non-discrimination. Nationality laws are, by definition, instruments of selection through which states differentiate between nationals and non-nationals.

In the specific matter of ethno-cultural preferentialism, international law provides that distinctions between non-citizens are legitimate as long as they do not discriminate against particular nationalities, and as long as they take the form of positive discrimination. According to the CERD, preference for certain racial or ethnic groups is valid if three conditions are met: (1) legitimate goal – "securing adequate advancement" and "equal enjoyment or exercise of human rights and fundamental freedoms" of certain racial or ethnic groups or individuals; (2) proportionality between means and goals; and (3) temporary character. The ECN also accepted distinctions in nationality laws based on linguistic competence or nationality of another state.

Finally, EU countries face additional constraints with regard to the regulation of nationality due to their membership of the European Union. Although nationality remains formally in the domain of the states, decisions in this area should pay due regard to Community law. Limited constraints emerge from with the development of EU citizenship and the ECJ's active backing of EU citizenship rights and with the two Treaty principles of solidarity among members states and respect for national identities. The Court seems to push hard to extend of the scope of EU citizenship rights, promoting a protective and rights-based idea of citizenship rather than one inspired by ideas of genuine link. The formal possession of the status of EU citizenship may trump "national" considerations. However, there is still no EU control over rules of access to state nationality. Finally, the two principles of the Treaty mentioned above tend to neutralize each other because admission policies based on claims of respect for national identity can easily be counteracted by claims of solidarity among members states with regard to immigration controls at the EU borders.

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This chapter focused on normative development and not on the levels of state commitments (scope, reservations, et cetera) or practical enforcement. It showed that there are only few general principles of public international law in matters of nationality. The right of states to define nationality is strongly connected to the fundamental right of states to self-determination. Despite some reluctance to interpret the legal right and principle of self-determination in ethno-national terms, state nationalism strongly underlies the contemporary international system and, thus, it tempers the potential universality of international law.

Concerning specific regulations of nationality, public international law does accept or does not sufficiently oppose certain rules that may be regarded as normatively problematic— e.g. perpetual ius sanguinis abroad, differentiated dual nationality, and differentiation between citizens through birth and other citizens. Attempts to directly link admission to citizenship with ideas of minority protection or self-determination have been cautiously rejected by the international community due to the challenges they pose to the principle of state sovereignty. However, recent state initiatives aimed at establishing legal links with non-resident populations on grounds of ethno-cultural bond have revealed a certain unpreparedness of public international law. In such cases, international law remains vague and indecisive.

Some of the "limits" of public international law in this area of nationality are limits only insofar as we assume a full overlap between nationality and citizenship. However, we must acknowledge that the concept of nationality in international law is both wider and thinner than the commonly-accepted concept of democratic citizenship. It is wider because it refers to formal membership in states, regardless of their democratic nature. It is thinner because it is based on a formal status and leaves out many dimensions that the status of citizenship usually entails.

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4. BIRTHRIGHT CITIZENSHIP

The overwhelming majority of people in the world acquire citizenship status at birth. On the one hand, birthright citizenship can be perceived as an emancipatory tool because it provides a legal status that is critical for securing important individual rights and opportunities. It may also be regarded as a natural and convenient way to reproduce political communities. On the other hand, the acquisition of citizenship status on arbitrary grounds such as facts of birth seems illiberal and unjust. It does not involve consent and it perpetuates a system of global inequality that traps poor people into poor states through generations. Birthright citizenship has also been seen as a method of ensuring ethno-national continuity by including descendants of kin members and excluding unwelcomed others.

In this chapter I discuss legal rules and normative justifications of birthright citizenship. First, I survey of rules of acquisition of citizenship at birth in 27 EU countries. Second, I address three major critiques concerning birthright citizenship: (1) unjust entitlement, (2) non-consensual status, and (3) ethno-national privilege. I respond to these points of criticism by proposing a distinction between automatic birthright nationality and political citizenship.

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European University Institute DOI: 10.2870/72944

4.1 Rules of Birthright Citizenship in the EU27

There are two main methods for the ascription of citizenship at birth: (a) ius sanguinis, and (b) ius soli. According to the general principle of ius sanguinis, an individual becomes a citizen of a state if at least one of his or her parents is a citizen of the state at the moment of his or her birth. According to the general principle of ius soli, a person becomes citizen of a state if he or she is born in the territory of the state.

The two principles are not always applied in this general form. In many cases, the law introduces additional conditions or qualifications. Moreover, despite the existence of national traditions in the regulation of citizenship that may explain the preferences for one principle or another, nowadays, most of the countries make use of various combinations of the two principles. In what follows, I examine the main rules of acquisition of citizenship at birth in 27 EU states.

4.1.1 Rules of Ius Sanguinis

The rule of ius sanguinis is the most widespread contemporary rule of ascribing citizenship at birth. All citizenship laws of the EU27 countries have provisions of ius sanguinis.

In several states, the rule of ius sanguinis is applied in qualified form. These qualifications refer to one or more of the following factors: (a) the place of birth of the child – whether the child is born in or outside the territory of the state; (b) the citizenship status of the parents – whether one or both parents are citizens; (c) the marital link between parents – whether the child is born in or out of the wedlock; and (d) the particular modes or circumstances concerning the acquisition of citizenship by the parent(s) – whether the parent(s) has/have acquired citizenship by birth or through naturalisation, and whether the parent(s) has/have acquired citizenship in the country or outside the country.

The majority of the EU27 states provide for unqualified rules of ius sanguinis (17 countries). This means that children of citizens receive citizenship status automatically from their parents regardless of any of the qualifying factors mentioned above. These countries are: Belgium, Bulgaria, the Czech Republic, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, and Spain.

The most common limitation to the rule of ius sanguinis concerns the place of birth of the child. Children born outside the territory of the state and out of wedlock to a citizen father and a non-citizen mother do not acquire citizenship automatically in five states. These countries

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are: Austria, Denmark, Finland, Malta, and Sweden. With the exception of Malta, all of these states provide for subsequent access to citizenship, provided that some additional conditions are met.[202] In Austria, Finland and Malta the limitations to ius sanguinis for children born out of wedlock apply also if children are born in the territory of the country. In the case of Malta, the law provides no alternative means of acquisition of citizenship for children born out of wedlock to citizen fathers and non-citizen mothers.

Another type of limitation to the entitlement of ius sanguinis for children of citizens born outside the territory of the state refers to the modes or circumstances in which the parents of the child have acquired the citizenship of the state. Restrictions to automatic transmission of citizenship across generations and outside the territory of the state apply in seven countries. These countries are: Germany, Latvia, Malta, Ireland, Portugal, Slovenia, and the United Kingdom. In Germany, the limitation on the transmission of citizenship via ius sanguinis abroad applies only to citizens who are born outside the territory of the state after 30 December 1999 and who reside abroad. In this case, their children would still be able to acquire German citizenship by registration within one year after birth. Registration is also possible in all other cases, except for Malta. Maltese law provides no procedure of facilitated acquisition of citizenship for children born outside of the state to parents who have themselves acquired Maltese citizenship by ius sanguinis outside of the territory of the state (citizens by descent). In the United Kingdom, the registration of children born outside of the territory of the state is possible if the parent is a citizen by descent and resides for at least 3 years in the country. Finally, in Poland a child born to one citizen parent and one non-citizen parent (in or outside the territory of the state) does not acquire Polish citizenship if both parents declare within three months from the birth of the child that the child acquires the citizenship of the non-citizen parent.

4.1.2 Rules of Ius Soli

According to the general principle of ius soli, citizenship is ascribed at birth to individuals who are born in the territory of the state. In comparison with the rule of ius sanguinis, the rule of ius soli is far less common in the EU27 countries. There are no cases of pure or unqualified ius soli in the EU 27. Ireland was the last country to maintain such a rule until 2004.

[202] In Austria, the person acquires citizenship automatically as a minor if his or her father marries his or her mother. In Denmark, the person acquires citizenship automatically if he /she is unmarried and his father marries his mother. He or she can also acquire Danish citizenship by facilitated naturalisation if his or her father has custody over him/her. The child acquires citizenship automatically if his or her father, who is citizen of the state since the child's birth, marries his or her mother. The child can also acquire citizenship by declaration if paternity is established before he or she reaches 18 years of age.

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Nine countries out of the EU27 do not provide for any general form of ius soli. Neither do they provide for facilitated acquisition of citizenship based on birth in the territory. These countries are: Cyprus, Denmark, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, and Sweden.[203] The existing forms of ius soli make the acquisition of citizenship at birth conditional upon one or more of the following factors: (a) the residential status of the parent(s), (b) the place of birth of the parents – whether they were born in or outside the territory of the state, and (c) the occurrence of dual citizenship.

Rules of ius soli that condition the acquisition of citizenship on the residential status/record of the parent(s) exist in six countries. These countries are: Belgium,[204] Germany, Greece,[205] Ireland,[206] Portugal,[207] and the United Kingdom.[208] In Germany, the application of ius soli requires that parents have a permanent residence permit and eight years of residence before the child's birth. Moreover, these children have to confirm their German citizenship between the ages of 18 and 23 by renouncing any foreign citizenship they possess.

Another version of ius soli is based (only or primarily) on the fact that both the child and a parent have been born in the territory of the state – what is commonly called *double ius soli*. The countries that provide such rule are: Belgium,[209] France,[210] Greece,[211] Luxembourg,[212] the Netherlands,[213] Portugal,[214] and Spain.[215]

Special rules of ius soli exist for certain categories of children. All EU27 states have provisions for the acquisition of citizenship at birth by children found in the territory or children with unknown citizenship. All EU27 states, except Cyprus, Estonia, Germany, Malta, and Romania, provide for some form of ius soli for stateless children.[216]

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[203] Some of these countries, such as Sweden, offer citizenship to children who have lived in the country for some time even if they were not born in the country. This form of acquisition does not qualify as birthright entitlement.
[204] The child can acquire citizenship by registration if the parent has resided in the country for 10 years.
[205] The child acquires citizenship by declaration if both parents have five years of residence in Greece.
[206] The child acquires citizenship automatically if his or her parents have permanent residence in Ireland for three out of four years before the birth of the child.
[207] The child acquires citizenship by declaration if his or her parents have five years of residence in Portugal before the child's birth.
[208] The child acquires citizenship if his or her parents have the right to abode in the UK (five years of residence).
[209] The child acquires citizenship if his or her parents have five years of residence in the country.
[210] The child acquires citizenship automatically at birth.
[211] If the parents are permanent residents at the time of child's birth.
[212] The child acquires citizenship automatically at birth.
[213] Parents should be residents in the country at the time of child's birth.
[214] Parents should be residents in the country at the time of child's birth.
[215] The child acquires citizenship automatically at birth.
[216] In these cases, various restrictions exist as to the procedure of acquisition, residence of the child or of the parents, age limit.

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Finally, several countries provide for alternative means of acquisition of citizenship *after birth* on the grounds of birth in the country. Children born in the territory of the state can acquire citizenship after birth automatically or by declaration in eight countries. These countries are: Belgium[217], Finland,[218] France,[219] Greece,[220] Italy,[221] Netherlands,[222] Spain,[223] and the United Kingdom.[224] Provisions for facilitated naturalisations after birth for persons who have been born in the country exist in nine countries. These countries are: Austria,[225] Bulgaria,[226] Czech Republic,[227] Hungary,[228] Italy,[229] Portugal,[230] Romania,[231] Slovenia,[232] and Spain.[233] It must be noted that these types of facilitations in acquisition of citizenship are often weak because they presuppose many additional conditions, such as reaching the age of majority and long periods of residency in the country.

[217] The person acquires citizenship at the age of 18 if he or she had resided in the country since birth or the age of 12 if his or her parents had resided in the country for ten years.
[218] The person acquires citizenship when he or she is between 18-23 years of age, he or she has the status of permanent residence and had resided in the country for at least six years.
[219] The person acquires citizenship automatically at the age of 18 if he or she had resided in the country for five years since the age of 11, or by declaration at the age of 13 if he or she had resided in the country for five years since the age of 8.
[220] The person can acquire citizenship before reaching the age of 21 if he or she had completed six years of schooling.
[221] The person acquires citizenship at the age of 18-19.
[222] The person acquires citizenship at the age of 18-19 if he or she had been resident in the country since birth.
[223] The person acquires citizenship at the age of 18-20 if he or she had been resident in the country since birth.
[224] The person can acquire citizenship after the age of 10 if he or she had been resident in the country since birth.
[225] The period of residence required for naturalisation is reduced to four years (for minors) and six years (for adults).
[226] The person can acquire citizenship by facilitated naturalisation at the age 18 and he period of residence required for naturalisation is reduced to three years.
[227] The requirement of residence can be waved if the applicant is permanent resident.
[228] The period of residence required for naturalisation is reduced to five years.
[229] The person can acquire citizenship by facilitated naturalisation at the age 18 and the period of residence required for naturalisation is reduced to three years.
[230] The requirement of residence can be waved if the parents of the applicant have five years of residence in the country or if the applicant has four years of schooling in the country.
[231] The person can acquire citizenship by facilitated naturalisation at the age 18 and the requirement of residence can be waved.
[232] The person can acquire citizenship by facilitated naturalisation at the age 18 if he or she had been resident in the country since birth.
[233] The period of residence required for naturalisation is reduced to one year.

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4.2 Birthright Status and Legal Protection

In our world, states need people in order to be recognised as political units, whereas individuals need states in order to access fundamental rights and protections. Although this arrangement is far from perfect, I do not directly challenge the idea of separate states and separate citizenship regimes. My analysis follows two key questions. First, which people to which states? Second, according to which method? In this section, I address the critique of birthright citizenship that focuses on the arbitrary nature and unjust consequences of this method of distributing membership.

4.2.1 Arbitrary Status

For someone who is committed to moral equality of persons, the scale of actual global inequalities is appalling. It is no mystery that in the contemporary world, the possession of a particular citizenship has a significant impact on the prospect of welfare and the range of opportunities of a person. The normative problem is that, for most part, the attribution of citizenship is based on arbitrary facts of birth.

In the context of the Rawlsian theory of justice, the decision to keep citizenship (nationality) outside the veil of ignorance – a mechanism intended to remove arbitrary features from the process of the determination of principles of justice— seems problematic. Because access to birthright citizenship is based on nothing else but the mere contingency of birth, citizenship should not determine the scope of justice. It is as if "an arbitrary distinction is responsible for the scope of the presumption against arbitrariness" (Nagel, 2005: 128). As Joseph Carens famously put it, (birthright) citizenship constitutes "the modern equivalent of feudal privilege- an inherited status that greatly enhances one's life chances" (1987: 252). Several other theorists have objected that the attribution of nationality at birth is arbitrary (Beitz, 1999: 138), a mere contingency of birth (Pogge, 1989: 247). In this light, a theory of justice should treat citizenship as just another arbitrary feature, as it treats sex and race.

In response to the critique about the arbitrariness of citizenship, David Miller points out at two ways in which citizenship can be seen as arbitrary. First, citizenship is arbitrary because individuals do not choose it;[234] it depends on factors for which people cannot be held responsible. Second, citizenship is arbitrary in the sense that it is *morally irrelevant* for the purpose of justice (2009b: 296). Miller makes an analogy with the situation of a congenitally

[234] This view, obviously, does not account for those who apply for naturalisation.

handicapped person. This is meant to show that a feature that is arbitrary in the sense that it is not chosen may not be morally irrelevant for the purpose of justice (Miller, 2009b: 296). We still believe it morally justified that the congenitally handicapped person enjoys special treatment in order to help him/her overcome his/her condition. On similar lines, Matthew Lister refers to the particular moral obligations between mother and child, which are morally important despite the contingency of birth (2010: 195). The argument goes that citizenship, although acquired by the contingency of birth, is relevant for the purpose of justice because the fact of having and sharing a citizenship describes something of moral significance.

I generally agree that there is a difference between the two types of arbitrariness, but I doubt that the proposed analogies work very well. The fact of being congenitally handicapped and the fact of being somebody's child involve a sort of naturalness that is absent in the case of birthright citizenship. The odds that a person is born handicapped are hardly under the control of other people.[235] However, people can and do change the rules of nationality virtually overnight. As Ayelet Shachar put it, "the existing system of membership allocation "did not fall from the sky… it is the result of human agency" (2011: 190). My point is that the charge of arbitrariness cannot be washed away at the level of initial ascription of nationality/citizenship. The fact of being a citizen for some time, of living and participating within the national society may be a normatively relevant fact, but the ascription of citizenship at birth still begs thorough justification.

The critique of arbitrary nationality has developed in a theoretical context that is centred around issues of global justice and equality. In this context, nationality/citizenship is rarely the primary concern. Shachar's project to reform the actual system of citizenship regulation stands as an interesting attempt to combine considerations of justice with considerations of membership. Her aim is to alleviate some of the unjust consequences of birthright citizenship without dramatically upsetting the "good of citizenship." The major problem with this attempt, however, is that Shachar does not seem to sufficiently challenge the principle of birthright citizenship. Her proposal for a birthright privilege levy "allows her try to both have and eat her cake—to maintain citizenship as an institution while at the same time ameliorating the global structural inequalities that are associated with it" (Bosniak, 2011: 622). Leaving aside serious doubts about the feasibility and effectiveness of the proposed birthright levy, one is left wondering about the justifications for maintaining birthright citizenship.

[235] The fact that nowadays we can apply pre-natal tests so to reduce the risk of giving birth to severely handicapped children is not a game changer. We do not decide whether people are born handicapped or not; we just prevent some children from being born.

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Shachar is right in asking for the justification of the system of boundary reproduction but she is wrong in directly linking admission to citizenship to remedies for global inequalities. I share with Shachar the belief that focusing on the transfer mechanism of citizenship constitutes a promising avenue of research. I also share with her the hope that a balance between the perspective of justice and the perspective of democratic membership can be struck in order to safeguard the "good" of citizenship. Where I differ from Shachar is with regard to the balancing outcomes.

4.2.2 Legal Protection

Should we accept birthright citizenship? In what form should we preserve it? I distinguish between two general arguments in defence of birthright citizenship: (1) an argument about individual interests, and (2) an argument about collective interests. According to the first argument, making sure that individuals are assigned to a particular state is imperative for securing their fundamental interests. According to the second argument, granting citizenship to children of citizens or to children born in the territory of the state is a justified way of ensuring the continuity of the political community. In this section, I discuss the argument about individual interests.

There are two types of individual interests that are at stake in the acquisition of citizenship at birth. First, we have the interests of (newborn) children. Second, we have the interests of the parent(s). I first examine the claim that children have a fundamental interest in obtaining at least one citizenship at birth. Having accepted the contingency of the existing international system that puts a great emphasis on the status of nationality/citizenship, two questions remain. Which state should confer this status? Under what circumstances?

In our survey, we found that all EU27 states confer citizenship to descendants of citizens and that very few place limitations on the application of this rule. Only a minority of states grant citizenship to children born in their territory and, of those states that have such a rule, many apply it in a qualified manner.[236] There seems to be a relative consensus amongst theorists about the obligation of states to offer resident immigrants at least the possibility to apply for citizenship. With regard to the obligation to make citizenship available to children of immigrants, the consensus is even stronger. For example, Carens argues that birthright "is morally required because children are born into a community with ties to others that should be

[236] It is maybe because the great majority of states in the world apply rules of ius sanguinis that they do not find it necessary to adopt additional rules of ius soli. This view, however, disregards the important fact of international migration.

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acknowledged" (1992: 27). Disagreements remain in what regards the scope of and the conditions attached to the acquisition of citizenship.

In my view, the state that establishes the *first and the closest* contact with the child at the moment of birth has a prima facie responsibility to grant a legal status to the newborn. This entails a generalised rule of ius soli. Normatively, this is justified by the fact that the child is born in the territory and the jurisdiction of the state; hence he or she is subjected to the coercive power of the state. In practical terms, the state of birth is also presumably in the best position to provide legal protection for the newborn. The special position of vulnerability in which the young child finds him/herself makes more stringent the responsibility of the state to provide a secure legal status.[237]

The major innovation of this proposal is that the fundamental status of legal protection should be granted to all children born in the country, irrespective of the status of their parents. With the exception of several countries, such as the US and Canada, most states— including all EU27 states—apply the principle of ius soli conditionally. In this respect, we can distinguish between two types of conditionality: (a) conditionality with regard to parental status (legal status, length of residence), and (b) temporal conditionality with regard to the child. In the latter case, citizenship is granted to the child independent of the status of the parent(s) but only after a period of residence in the country. In my view, the first type of conditionality is problematic. It does not take into account the fundamental individual interest of the children. The status of parents is irrelevant for the moral status of the child (Lister, 2010: 214-215). As Ngai argues, "to deny citizenship to a person based on her parents' illegal status is to punish the child for the behaviour of the parent, something we have long recognized as morally and legally wrong" (2006: 2526). As a general rule, I claim that all persons who are born in the country and under the state's law should be granted legal nationality. If children born and resident in the territory of the state receive the status of legal nationality in another state — e.g. via ius sanguinis —, the state of residence may delay the granting of nationality for a minimum period of time[238] in order to avoid cases of accidental acquisition of nationality.[239]

[237] This puts the newborn in a different situation than newly immigrated adult— except if the adult immigrant is severely handicapped.
[238] I would propose a period not longer than one year. This period should be considerably shorter that the period necessary for proving substantial and continuous subjection in the case of adult residents.
[239] I use the term *generalised ius soli* in order to distinguish my position from those who defend unconditional ius soli. I do not think, however, that unconditional ius soli *nationality* is normatively wrong. Ideally, every person should enjoy as many statuses of legal protection as possible. But because in our world access to such statuses is highly unequal, a concern with fairness may justify states policies that refrain from granting nationality to the mere passer-by (or rather drop-by).

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Unconditional ius soli makes perfect sense if we think of the situation of foundlings. The principle of avoiding statelessness is one of the very few broadly accepted principles of international law in the area of nationality. Children found on the territory ought to acquire the citizenship of the state. But foundlings are usually treated as exceptional cases. The great majority of children have identifiable parents, who, in most cases, posses particular citizenship(s). Should then the citizenship status of the parent(s), or any other factors related to the relationship between the parent and the state, matter in the process of ascribing citizenship to newborn children?

The immediate objection to unconditional ius soli is that it disregards the risk of accidental or opportunistic birthright nationality. This phenomenon has received several names, such as "maternity tourism", "citizenship tourism", "anchor babies", "passport babies" (Grossman, 2008: 112). Since states cannot deport nationals, generalised birthright nationality seems to circumvent state powers to control immigration.[240] Schuck and Smith, for example, complain about the "disadvantage" of automatic citizenship in the context of illegal immigrants (1996: 21). They recommend the denial of birthright citizenship as a way to defend community's powers of self-definition.

In Chapter 2, I demonstrated that states boundaries do not sit on firm normative grounds and that their legitimacy depends on a general commitment to openness. In this light, restrictions on immigration should be seen only as related to proper management of public space; e.g. public security, traffic and crowed control. These exceptional restrictions may exceptionally prevent would-be parents from entry but they cannot prevent children from being born in the territory. Accidental birthright nationality may seem problematic but we should keep in mind the rationale for granting such status. Birthright nationality is a way to secure fundamental interests of legal protection to persons who are in a special position of vulnerability. Considering the spectre of statelessness, the stake is too high for states to be picky. Joseph Carens gave an argument about generalised inclusion of children of settled immigrants based on the credible expectation that these children will develop social ties with the community. Although he admits that there will be cases where these expectations are not fulfilled, he argue that "citizenship policy should err on the side of inclusion" (Carens, forth.: ch. 2). Although Carens does not differentiate between nationality and citizenship and although he does not insist on the need to secure legal protection, it is my contention that he is right to

[240] As it is the trend in Europe, the nationality status of the child may sometimes generate legal protection against deportation for parents or legal representatives who care for the child. See Chen case*, infra* Section 3.4.1.

prefer over-inclusion to under-inclusion. Moreover, the fact that the child may receive another status of nationality – for example, by extra-territorial application of the principle of ius sanguinis – should not affect the obligations of the state towards children born within its jurisdiction.

It may be argued that many contemporary states offer a good standard of legal protection to all residents, including children, regardless of their citizenship status. Many states, especially in the Western world, add to this basic legal protection important social and economic benefits. It is this kind of evidence that led some theorists to announce an era of postnational personhood rights (Soysal, 1994). I doubt that this is sufficient. Resident non-citizens may enjoy important protections and benefits but they do not enjoy full security of their status.[241] Moreover, they usually do not have guarantees that they can move upwards to a full status of membership that includes national voting rights.

Should children be immediately accepted as citizens? Here I want to reiterate my earlier distinction between different statuses of membership. Nationality should be seen as a status of legal protection that does not include political rights. Citizenship should be seen as a status of full membership in a state/political community that includes both legal protection (nationality) and political rights. Although we cannot talk of proper political membership for children— due to common age restrictions for the exercise of political rights— the status of nationality is commonly seen as equivalent to the status of citizenship. Except for age or mental capacity, there are usually no additional barriers or conditions imposed to nationals for accessing full political rights.[242] Although I agree with granting automatic nationality at birth, I disagree with the idea of birthright *political* citizenship. I think that there is an essential normative difference between nationality and citizenship.[243]

There are several countries in the world that distinguish between statuses of nationality and citizenship.[244] In Mexico, for example, the law not only differentiates between nationals and citizens,[245] but also delinks the idea of birthright membership from political citizenship. According to the Mexican constitution, citizens are those Mexicans who are at least 18 years old and who earn an honest living. So, "strictly speaking, no one is born a Mexican citizen"

[241] For example, they may be deported or their benefits may be cut by unilateral decisions of citizens.
[242] Some countries also have rules for the suspension of political rights following the committing of certain criminal offences.
[243] David Owen also sees a "non-trivial distinction between political membership and national citizenship" (2011: 652).
[244] This is common in Latin American countries.
[245] Mexican law further distinguishes among foreigners, naturalised Mexicans, native Mexicans of native parents, and native Mexicans of foreign-born parents (Fitzgerald, 2005: 178).

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(Fitzgerald, 2005: 178).[246] However, in this case, birthright nationality remains embedded in a nativist ideology that further generates problematic statutory distinctions between categories of nationals and citizens. Like in many other countries, including several from the EU27 group, Mexicans by birth enjoy special privileges with regard to security of status and dual nationality.[247] In my view, nationality should be seen as a fundamental legal status based on the individual need of legal protection that appeals to state responsibility to protect those under its jurisdiction, whereas citizenship should be seen as an essentially political status based on the explicit commitment of individuals to participate in the public affairs of the state. In the next section, I develop this argument by discussing specific conditions of access to these statuses, as well as their complex relationship.

Thus far, I made a case for generalised ius soli nationality. However, the predominant method of ascribing citizenship at birth in contemporary world is ius sanguinis. As it happens, "ius sanguinis provisions have received relatively little attention in political debates as well as in the academic literature" (Vink and De Groot, 2010: 5). Can ius sanguinis be justified? If all individuals are ascribed nationality at birth via ius soli, what is the need for maintaining rules of ius sanguinis?

I offer three main arguments in favour of ius sanguinis nationality. First, an additional status of nationality enhances the legal protection of children and provides extra safeguard against statelessness. Even if it were for states to adhere to my proposal of generalized ius soli, we can imagine that accidents of allocation may occur. When it comes to legal protection, two is better than one. Second, granting nationality through ius sanguinis meets the interests of the parents in seeing their children as potential members of their *own* political community. This is a legitimate way to ensure the continuity of the political community, although at the micro level. Third, this argument may also accommodate views about communal or national continuity. I refer here to liberal nationalist concerns about preserving the meaningfulness of inter-generational endeavours (e.g. Tamir, 1993; Gans, 2003).

Just as automatic ius soli, automatic ius sanguinis nationality should not translate into automatic political citizenship. This is especially important for cases where nationality is acquired via ius sanguinis outside the territory of the state. In these situations, the absence of

[246] The distinction does not have much practical relevance because nationals at birth do become citizens *automatically* at age of majority.
[247] Nationals at birth cannot be deprived of Mexican nationality and they alone can retain dual (external) nationality. Since 2005 external (dual) citizens can also vote from abroad in presidential elections.

genuine and consented link between nationals and the political community suspends the right of nationals to activate their full political citizenship.

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4.3 Birthright Status and Political Membership

The removal of inherited privileges from politics can be seen as a major credo of modern political philosophy. However, from a liberal perspective that places consent at the heart of the idea of political membership, ascribing citizenship at birth seems highly problematic. In this section I discuss two main arguments. First, I address the critique of birthright citizenship from the perspective of liberal consent. Second, I examine the defence of birthright citizenship based on the idea of democratic continuity.

4.3.1 Liberal Consent

If the very idea of boundaries is an embarrassment to liberal egalitarians (Kymlicka, 2001b: 249), the practice of ascribing membership at birth is even more problematic. Birthright citizenship seems fundamentally at odds with the liberal ideal of consensual politics.

Although admission to citizenship was rarely a key issue for classical theorists, we can identify several attempts to place political membership on sounder normative grounds. According to John Locke, every "naturally free man" is "at liberty what Government he will put himself under what Body Politick he will unite himself to" because there is nothing "to put him into subjection to any earthly power, but only his own consent" (1980: 63). But Locke omits children from the scope of membership. He develops the theory of tacit consent that, in fact, "severely restricts the implications of voluntary membership (Bader, 2005: 333). Moreover, he argues that, once consent has been registered, citizens owe perpetual allegiance to the state. Hence, we have "a new version of perpetual allegiance, now concealed in the language of consent" (Schuck and Smith, 1985: 33).

Jean-Jacques Burlamaqui offers a rectification to Locke's theory by prescribing a special civic status for children. He proposes that children are granted a provisional status until they reach majority. In Burlamaqui's view, the special status of children is part of the social contract of the parents (Schuck and Smith, 1985: 44-5). This is one of the first attempts to combine ascriptive status of membership at birth with consensual citizenship at adulthood.

Emmerich de Vattel reiterates the idea of provisional status by proposing a version of provisional ius sanguinis. The membership status of children is derived from the natural bond between father and child. This is because " it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it… the country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent" (Vattel, 2008: 218). In Vattel's view, individuals retain

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the right to expatriate, eventually by making "a compensation for what it [the society] has done in his favour" (2008: 221). Similarly, the state also retains the right to banish or denationalise individuals.

Peter Schuck and Rogers Smith offer a more recent attempt to make political membership more consensual (Schuck and Smith, 1985). They distinguish between ascriptive citizenship – where membership is "entirely determined by some objective circumstances" –, and consensual citizenship – which "can result only from free individual choices" (Schuck and Smith, 1985: 4). They particularly reject the "anomalous" ius soli citizenship that is enshrined in the US Constitution that automatically turns children of *illegal* immigrants into US citizens.

Schuck and Smith propose a model of "genuine inclusiveness" through which children of native citizens and of legal immigrants are granted provisional citizenship at birth. In this way, these children are guaranteed a status of legal protection. Although the status of full citizenship is granted to them *automatically* at majority, citizens-by-birth retain the right to renounce full citizenship. In case they chose to renounce full citizenship, they retain a special status of permanent residency. Like Burlamaqui, Schuck and Smith justify the extension of membership to children by appealing to parent's consent to citizenship – and to parents' consent to immigrate, in the case of legal immigrants. The social contract between the parents and the state includes "the guarantee that their children would enjoy all the right of citizenship during their minority (with the usual age restrictions) and would possess an absolute right to assume full citizenship at their majority if they wished" (Schuck and Smith, 1985: 118). The membership of the children is automatic but provisional in order to accommodate their right to choice. This model comes close to the French regime of ius soli. A person born in France whose parents are neither French nor born in France will automatically become French at age eighteen if he or she still resides in France and does not refuse French citizenship (Bertossi, 2010: 1). It must be noted that Schuck and Smith do not specify additional conditions for admission to full citizenship, such as residence.

In Schuck and Smith's view, consent is a necessary and sufficient condition for access to the status of full membership. However, their notion of consent does not seem as revolutionary as they claim. What we are dealing with is another version of tacit consent. First, the right to renounce full membership at majority "seems to fall short of the consensual ideal espoused by Schuck and Smith… [because] citizens already have the option to renounce and expatriate" (Ngai, 2006: 2526, n. 29). Second, Schuck and Smith are keen to defend the

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sovereign right to control boundaries and the idea that "boundaries of the political community [are], for better or worse, matters of self-conscious public choice" (1985: 129). But making access to full membership the default option removes the possibility that democratic community actually checks the genuine connection with the individual, as in the French model. Finally, the authors are not concerned with the issue of extra-territorial transmission of citizenship via ius sanguinis. They merely mention that, in those cases, Congress may ask for additional conditions (Schuck and Smith, 1985: 128). As it stands, this proposal does not offer convincing solutions to the problem of opportunistic or over-inclusive citizenship. Moreover, it fails to celebrate its own guiding principle, namely the re-casting of citizenship on a more consensual basis.

In what follows, I propose an improved model that combines ascribed nationality status at birth and consensual political citizenship at majority. First, I reject the arguments that birthright citizenship is justified due to the natural bond between parents and children or that this is a bullet point in the social contract signed between parents and the state. In my view, birthright nationality responds primarily to children's interests in having a secure legal status and secondly to parent's interests in having their children involved in their own political project.

According to a common argument, states have a duty to include children born in their territories because the latter have important ties with the community and because there is a good expectation that they are going to further develop these social ties. Joseph Carens, for example, argues that birthright citizenship "is morally required because children are born into a community with ties to others that should be acknowledged" (1992: 27). Birthright citizenship is a way of acknowledging the expectation that children will pick up and develop inherited social ties. Against the objection that some children will not develop these ties because, for example, they may take up residence abroad immediately after birth, Carens argues that "citizenship policy should err on the side of inclusion." In my interpretation, neither the initial social ties between newborns and the society, nor the expectation that children develop social ties are sufficient to generate a duty to recognise automatic and full citizenship for children. These considerations should only play a role in the recognition of the status of birthright *nationality*.

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Unlike nationality, citizenship cannot be an automatic status.[248] In order to give meaning to the principle of reciprocal recognition that should govern access to political membership, we should make sure that nationals – by birth or otherwise – commit themselves to membership. Maintaining a transit zone between nationality and citizenship allows us to tackle the problem of over-inclusion of birthright citizenship. While nationality should be granted automatically, citizenship should always involve individual consent. Neither birth in the territory of the state, nor mere residence or refusal to leave the country should count as consent.

For resident nationals[249] full citizenship should be activated by an explicit *commitment* to membership. The commitment to membership may be given by submitting an official declaration or by pursuing a voluntary political act, such as the enrolment for voting when or after they reach the age of majority. Those who are unwilling to commit themselves to full membership may retain the status of nationality, although they will not be able to transfer it to their children. In the case of nationals by birth who have not been residents in the country for a minimum period of time,[250] they should not be able to claim full citizenship status despite the fact that they are willing to commit themselves to political membership. The principle of democratic recognition that regulates admission to political membership implies a condition of reciprocity, meaning that citizens should have roughly equal stakes in the membership. In this view, substantive ties of shared membership should accompany the mere affirmation of commitment.

Non-nationals can become nationals through naturalisation. Naturalised persons receive the status of nationality after they have been substantially subjected to the coercive power of the state. Generally, substantial subjection can be demonstrated by residence in the country for a reasonable period of time. Naturalised nationals can become full citizens after they confirm their commitment to full membership.[251]

Nationality status should be for life. This has to do, first, with a concern with individual fundamental interests in legal protection. Second, it is justified by the concern with the interests of both individuals and the community in leaving open the possibility of accessing or "returning" to full political membership. In theory, citizens could lose or they could have their

[248] For an opposite view, see (Rubio- Marin, 2006) – arguing that democratic legitimacy requires automatic incorporation, and (Owen, 2011) – arguing that political membership is required by political autonomy and one should not be able to chose not to have it.
[249] Generally, states have or should have sufficient information about their residents. In any case, the burden of proof for contesting residential status should fall on the state.
[250] This period of time may be equivalent with the period of residence required from immigrants in order to obtain nationality status.
[251] I discuss conditions of naturalisation in the Chapter 5.

status of full citizenship suspended when they stop being substantially subjected to the coercive power of the state and/or when there are doubts about their commitment to political membership – e.g. the suspension of political rights after a prolonged period of residence abroad. In practice, however, this may confer a too-great discretionary power upon states that is likely to be abused. For this reason, I accept that both statuses of nationality and full citizenship should be for life.

The link between nationality and citizenship is reinforced by way of inter-generational transmission of nationality to descendants. Although nationals may keep their nationality status without ever accessing full political membership, they should be able to transmit their nationality to their descendants only if they are or if they were at some point full citizens in the country of their nationality. One justification of ius sanguinis citizenship is the expectation that children develop ties with the political community. However, this expectation is weak in the case of children born to parents who themselves neglected to develop such ties. If part of the justification of preserving nationality status throughout one's life is maintaining channels of entry into political community, the failure to make use of such an opportunity disqualifies people from passing nationality to their descendants. Because nationality responds to parents' interests in having their children involved in their political project, granting such status is not justified in cases where parents do not care about this particular political project. This model comes close to several rules of citizenship discussed above. In the United Kingdom, for example, citizens by descent – who became citizens by birth outside the territory of the state – cannot *automatically* transmit their citizenship via ius sanguinis to their descendants born outside the territory of the state. The idea behind this rule is that the second generation of nationals born abroad are less likely to have strong connections with the country, hence they should not be entitled to automatic citizenship.

One may object that this model blurs the distinction between nationals and foreigners with regard to access to political membership. First, this may look like a virtue rather than an objection. Equalising chances of access to membership is one way of satisfying the normative stringency I attach to the legitimacy of actual political boundaries, namely the commitment to openness. Second, nationals do benefit from a privileged position because they are more likely and more quickly able to commit to the political community. Even in the case of nationals born and living abroad, the likelihood that they have established and preserved ties with the community puts them in a different category to distant foreigners.

The most important objection here is, I guess, that the proposal produces mass

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disenfranchisement. It removes automatic political rights from nationals and non-nationals alike. Although I maintain that access to full citizenship should be fairly easy for those nationals who are subjected to the authority of the state (residents), there is still the risk that some of these people fail to declare their intention to become full citizens. There is also the risk that states manipulate the conditions of recognition of full membership in order to delay or bar access to citizenship to some categories of nationals. In these situations, we face the scenarios of adult individuals who are substantially subjected to the coercive power of the state but who do not participate in the making of this power. This seems to undermine the autonomy of individuals and renders state authority illegitimate. As David Owen argues, political membership cannot be derived from a choice because, although "the decision whether to acquire or not acquire political membership may both be expressions of individual autonomy", "they are not exercises of political autonomy" (2011: 653). My answer is that the status of nationality that children receive automatically at birth together with the right to choose full membership satisfies the condition of individual autonomy. Attempting to break down the concept of citizenship, David Owen distinguishes between political membership and national citizenship. On the one hand, political membership is due to individuals who are affected by state's coercive power. On the other hand, national citizenship is acquired voluntarily and relates to the symbolic belonging into a non-instrumental national community (Owen, 2011: 652).[252] Political membership is thus granted automatically to those who fall under the coercive net of the state as "a condition of political autonomy." In my proposal, however, resident nationals do not have political membership before they chose to exercise their political rights. They, nevertheless, have the right to become full citizens by simply enrolling for voting. Practically, there is not much difference between these two approaches. Theoretically, they are informed by different normative concerns. Whereas Owen is concerned with just inclusion, my concern is with democratic commitment.

A related objection is that raising barriers to admission to full citizenship may deepen the class division among nationals leading to a de facto disenfranchisement of the lower classes. This objection parallels Lijphart's argument that "low voter turnout means unequal and socioeconomically biased turnout" (1997: 2). In order to avoid such bias, Lijphart proposes a system of compulsory voting. As it stands, my proposal for voluntary access to full political membership is not incompatible with a system of compulsory voting, whatever its merits. One could argue that those nationals who decide to take up citizenship should have the obligation

[252] Owen distinguishes between cultural and political dimensions of membership. He does not see necessary to further separate a legal dimension from the political one.

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to vote. An argument for compulsory citizenship in order to reduce class bias in democratic representation is definitively interesting and may be useful in the debate about naturalisation and immigrant integration. However, I still think that this argument alone cannot settle the question of who should be considered a citizen in the first place. Rather than accepting automatic citizenship for resident nationals, I would argue for adopting sensitive rules and policies in order to make sure that all resident nationals have full opportunity to express their commitment to membership.[253]

Citizenship is a status of consented membership in a political community. It describes a political relation between a particular person and a particular political community that is *unique*, *individual*, and *non-transmissible*. We often talk about the *transmission* of citizenship from parent to child, as if we transmit the *same thing* from one to another. In fact, what is transmitted is only an expectation, namely the expectation that the child will develop a political relation with the community. However, this expectation of full membership should be duly confirmed in order to bear fruit.[254] The idea of non-transferable citizenship seems at odds with a powerful argument about the intergenerational character of political membership (Bauböck, 2011a: 14). In the next section, I try to show that the two positions are not completely divergent.

4.3.2 Democratic Continuity

In previous sections, I focused on individual interests related to access to birthright membership. But a defence of birthright membership can also be made from a perspective of the interests of the community. In this section, I discuss the argument that birthright citizenship is an important tool for ensuring the continuity of democratic community.

One strategy to defend birthright citizenship is to say that this rule offers "a convenient solution" to the general problem of reproducing political communities (Joppke, 2010: 34). The problem is that convenience alone does not qualify as a satisfactory normative argument. A normative argument must refer to the valuable purpose that birthright citizenship is supposed to serve.

According to Rainer Bauböck, the allocation of citizenship at birth is morally defensible because it underpins the "formation of stable political communities with a potential for comprehensive self-government" (2011b: 667). Democracy "requires a clearly bounded

[253] I conceive of general citizenship education and regular public campaigns. I also assume that political parties will do some part of the job.
[254] Even in the case of certain religious faiths, membership is sanctioned by a confirmation.

demos that is stable over time in the sense that its composition does not change with each decision" (Bauböck, 2007a: 2420). In this case, birthright citizenship may be seen as a "convention of recognition" (Chwaszcza, 2007: 176) that helps identify those individuals who are sufficiently connected to the community is a way of ensuring democratic unity and political continuity. It may also be seen as "a shorthand for interdependence" (Honohan, 2002: 287) or as a "proxy for future involvement in the country" (Shachar, 2009: 112).

I already argued that citizenship should not be granted automatically at birth. While making a case for automatic nationality at birth, I downplayed the importance of the argument about actual or expected social ties. I admitted, however, that parents' interests in securing access to their political project to their children – via birthright nationality – can be seen as an argument of democratic continuity at the micro level. What is so special about intergenerational citizenship? Commenting on Ayelet Shachar's proposal of a jus nexi principle of citizenship, Bauböck wonders why she did not take the idea to its logical end and eliminate birthright citizenship altogether (2011a: 13). He quickly finds two objections: (a) that this will create stateless children; and (b) that it will destroy the "relative stability of territorial borders and intergenerational continuity" that birthright citizenship generates (Bauböck, 2011a: 14). Bauböck admits that the first problem can be solved by a generalised regime of rights that is independent of citizenship. The second problem, however, is there to stay.

As the argument goes, political communities that reproduce by intergenerational birthright membership are more likely to appreciate and preserve their on-going projects of democratic self-government. On the contrary, "a general demise of intergenerational citizenship would radically change the conditions for building and sustaining liberal democracy" (Bauböck, 2011b: 667). This is because, unlike "intergenerational" citizens, temporary migrants and free movers are more likely to lack "a sense of belonging that sustain civic virtues" (Bauböck, 2011b: 667). Bauböck imagines a scenario of global hypermigration in which "the majority of citizens would be non-residents and the majority of residents would be non-citizens at any given point in time" (2011b: 668). In this world, the most plausible rule of membership will be *ius domicile* – by which citizenship is acquired after short periods of residence. Citizens will be unable to develop strong social ties and the state will most probably take the form of a libertarian or semi-authoritarian government. Ties of solidarity will probably be redrawn across formal status of citizenship, following personal, ideological, cultural, ethnic lines. In other words, this will be the end of territorially structured democratic citizenship.

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I agree that this is a disturbing picture, even though it may be dismissed as unrealistic. A quick answer is: well, too bad for our territorial model of citizenship! If "structural" factors have transformed people into restless movers,[255] then it is about time to radically change our ways of thinking about membership. These perpetual temporary residents may also become genuine citizens in a global community of free movers. Will this arrangement be democratic? We can only hope. Sufficeth to say that for many classic democrats the idea of a democratic state counting a few hundred millions citizens would most probably have sounded like Bauböck's cautionary tale.

I believe that democratic continuity can be assured by means other than birthright citizenship. For example, a reasonably long time of residence (say a decade) in a country may provide sufficient sense of belonging necessary for democratic self-government. As Chwaszcza argues, "democratic unity…require[s], first, shared political institutions and second, a fit of mutual political attitudes, neither of which can be considered a privilege of citizens by birth" (2009: 464). My point is that if temporary residence is not enough in order for persons to develop a sense of commitment or belonging, ancestry and life-long membership is more than enough. I do not dispute Bauböck's view that "a purely territorial conception of citizenship and political community is just wildly out of synch with the present world" (Bauböck, 2011: 6). This is why I am looking for a model that integrates the intergenerational perspective without making it the only game in town. I also worry that the argument of intergenerational citizenship may easily play in the hands of ethno-nationalists.

I agree that some degree of continuity across time is needed, but I disagree that this can be secured only by an intergenerational citizenship. More exactly, I disagree that intergenerational citizenship can be secured only by automatic *transmission* of citizenship via descent. In my view, a combination of automatic birthright nationality with the opportunity of voluntarily acceding to full citizenship will satisfy the condition of democratic continuity. My proposal does not, in fact, bring too revolutionary practical changes. We can assume that most of the native population will accede to full membership by continuing to reside in the country and by confirming their full citizenship. What it brings, I think, is an increase in the level of legitimacy by reasserting the political-consensual value of citizenship. It does this without

[255] Bauböck does not offer any clues about what could determine such a change. It is plausible to assume that, generally, people develop attachment to places and people around them and that most of them they will never move so easily and continuously even if most legal barriers are removed. Moreover if, say, tomorrow all borders would be removed, the scale of movement would not be as global and as multidirectional as in Bauböck's dystopia. Most likely, only some of the countries would be "flooded" with immigrants. Secondly, it is my contention that a radical transformation of this sort would come about with deep socio-psychological mutations and that would also challenge our (their) ideas about self-government.

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jeopardising individuals' fundamental interests in legal protection or community's interests in democratic continuity.

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4.4 Ethno-Cultural Birthright Citizenship

There is a long debate about the interpretation of the two methods of birthright citizenship—ius soli and ius sanguinis. Authors have argued that the preference for one method over the other is telling regarding the normative character of particular states and the meaning of their political membership. The two rules have been commonly associated with the dichotomy between ethnic and civic (nations). According to Roger Brubaker, for example, the two rules "express deeply rooted habits of national self-understanding." Whereas "ius soli defines the citizenry as a territorial community", ius sanguinis demarcates "a community of descent" (Brubaker, 1992a: 187).

In this section I discuss the ethno-cultural character of birthright citizenship. First, I dismiss the blank association between ius sanguinis and ethno-cultural membership. Second, I refer to specific rules of birthright citizenship in order to identify instances and cases in which ethno-cultural allegations are plausible.

4.4.1 Historical Perspective

The perpetuation of membership through bloodline, as in the case of ius sanguinis, seems to suggest an ethnic community, while the uniform acquisition of citizenship by birth on the territory, as in the case of ius soli, seems to imply a civic community. These assumptions are problematic both historically and normatively.

Ius soli was the traditional method of ascribing membership in feudal monarchies. In the common law tradition, the community of subjects was seen as a community of allegiance to the monarch and not as a territorial or ethnic community. As the famous judgement in the Calvin Case (1608)[256] asserts, the ascription of allegiance at birth is derived from the powers that the sovereign has over territory (Schuck and Smith, 1985: 12). Although the rule of ius soli was associated with monarchical privilege, in modern times it has played different roles. In post-revolutionary France, ius soli was initially rejected as a relic of feudalism (Weil et al., 2009). However, confronted with the phenomenon of migration, France had to reintroduce the principle of ius soli and, since 1889, "ius soli has been at the heart of French nationality law" (Bertossi, 2010: 3). The adoption of automatic and compulsory double ius soli in 1989 was a way to make sure residents undertake citizenship obligations, especially military obligations (Howard, 2009: 150). In the United States, ius soli was adopted through the citizenship clause

[256] Calvin's Case was about the right to inherit land in England by a Scottish born child following the establishment of the joint rule of England and Scotland by King James (Schuck and Smith, 1985: 12).

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of the 14th Amendment to the Constitution (1868) in order to recognize the citizenship status of people of African descent.[257]

The adoption of ius sanguinis rule in modern Europe had less to do with the spread of ethno-nationalism than with the attempt of states to modernize their rules of membership. The French Civil Code of 1803 provided that French nationality is acquired at birth by children born to French fathers, either in France or abroad (Bertossi, 2010: 3). In the nineteenth century the "French" rule has been adopted by most of the countries in continental Europe. Ius sanguinis was seen as "a quintessentially modern understanding of membership," according to which "the individual is no longer seen as the property of the feudal overlord, who had owned all the products of the soil, people included" (Joppke, 2005a: 53).

There is nothing in the general formulation of the two principles of ascription of citizenship at birth that makes them ethno-cultural. Historically, they were employed in different contexts to serve different purposes. For example, ius soli is celebrated today as an inclusionary tool whereas two centuries ago it was seen as method of subjection. This being said, we can still look into different ways the two principles are used in order to try to identify elements that can be seen as serving ethno-cultural or nationalist purposes. Andre Liebich, for example, interprets the prevalence of ius sanguinis in CEE countries as evidence of the unabridged "gulf between conception of citizenship in East and West" (2010: 3).[258] He omits to say, however, that all Western countries have provisions of ius sanguinis. Liebich's point is that, unlike in the West, citizenship in the East is acquired predominantly at birth via ius sanguinis, meaning that alternative rules of ius soli are not readily available. This example comes to show that, when evaluating rules of citizenship, one should keep in mind not only the general rule but also its contextual application and the interconnections between different citizenship rules.

4.4.2 Perpetual Ius Sanguinis Abroad

Ius sanguinis has long been associated with ethno-nationalism. From a conceptual point of view, it is problematic to assume that ius sanguinis alone defines an ethno-cultural conception of the nation. As a general rule, the transmission of citizenship via descent does not differentiate between ethnic and non-ethnic individuals. The configuration of membership

[257] The citizenship clause overruled the decision of U.S. Supreme Court in *Dred Scott v. Sandford*, according to which people of African descent were not U.S. citizens.
[258] Liebich also takes into account polls in the region showing the negative attitudes of native populations towards immigrants.

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that results from applying the ius sanguinis rule is, however, dependent on preliminary decisions about the initial determination of citizenship within a territory.

Whereas the general principle of ius sanguinis is not ethno-cultural by default, this cannot be said equally about all forms in which this principle is applied. In this respect, rules of unrestricted ius sanguinis can be seen as reinforcing the myth of ethno-cultural community. Granting citizenship automatically to children of citizens, irrespective of their place of birth and regardless of their social ties with the country is highly problematic. Applying ius sanguinis without any intergenerational stopping point invalidates the genuine link quality of citizenship[259] (Joppke, 2008a: 29; Bauböck, 2010b: 3).

In order to grasp the generational scope of the rule of ius sanguinis abroad, we should look at several external limits that derive from the interplay of citizenship rules, namely the combination of the rule of ius sanguinis and rules concerning dual citizenship and the loss of citizenship. All EU27 countries accept dual citizenship if it derives from the simultaneous application of distinct rules of ius sanguinis – when parents of different citizenships transmit to the child their own citizenship via ius sanguinis. Several countries, however, do not tolerate dual citizenship if their citizens acquire another citizenship voluntarily. These countries are: Austria,[260] the Czech Republic, Denmark, Estonia, Germany,[261] Ireland, Latvia, Lithuania, the Netherlands,[262] Slovakia, and Spain.[263] In the cases of Germany, Ireland, and Slovakia the prohibition of dual citizenship in cases of voluntary acquisition of another citizenship does not apply to citizens by birth. This is a clear example of discrimination among citizens on basis of circumstances under which they acquired their citizenship status.

There are a number of countries that provide for the loss of citizenship in cases of permanent or prolonged residence abroad. In several cases, the aim is exactly to avoid the retention of citizenship by citizens who acquired citizenship by ius sanguinis abroad and who did not develop a connection with the country. In Belgium, persons who have acquired citizenship by birth abroad and who reside outside of the country between the age of 18 and 28 may lose their citizenship if they do not make a declaration to retain it.[264] In Denmark, descendants of citizens can retain Danish citizenship abroad if they submit an application for retention of

[259] According to the Explanatory Report to the European Convention on Nationality "…the genuine and effective link between a person and a State does not exist […] [if] this person or his or her family have resided habitually abroad for generations.' "Explanatory Report", *op. cit*. No. 70.
[260] Citizens may obtain the permission to retain citizenship if they are citizens by descent.
[261] Many exceptions apply (e.g. citizens who naturalise in another EU state or in Switzerland).
[262] Many exceptions apply.
[263] Citizens may submit a declaration to retain citizenship.
[264] Except if they are in the service of the country or employed by a Belgian company.

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citizenship before their 22nd birthday, which is approved by the Ministry of Integration (Ersbøll, 2010). The same goes for Finland. Finnish citizenship is retained abroad if descendants of citizens prove that they have a sufficient connection with Finland (prior to their 22nd birthday) (Fagerlund and Brander, 2010). However, following the 2003 reform, such a connection can be established by simply giving a written notice to a Finnish diplomatic mission expressing the wish to retain citizenship. Finally, the loss of Swedish citizenship is automatic for persons after the age of 22 if they were born abroad, have never been domiciled in Sweden, and who possess another citizenship (Bernitz, 2010). Although it is possible for them to apply for retention of citizenship, the authorities have full discretion to assess the strength of the connection between the applicant and the country. There are several countries that provide for the loss of citizenship due to prolonged residence abroad without reference to birth outside the country. These countries are: Cyprus, France, Ireland, Malta, and the Netherlands. However, in all these cases, citizenship can be retained if those concerned follow some administrative procedure, which usually consists in submitting a declaration expressing the intention to retain citizenship.

We can say that the few restrictions on the intergenerational transmission of citizenship abroad that derive from rules concerning the loss of citizenship are rather weak. In most cases, prohibitions can be overcome by submitting formal declarations or requests. In some cases, restrictions come with important exceptions, such as those exempting original citizens or citizens by birth.

4.4.3 Absent or Inadequate Ius Soli

Ius soli has been at the centre of the debates about the normative and practical significance of birthright citizenship. On the one hand, critics deplore its illiberal and inegalitarian implications. On the other hand, advocates of ius soli praise its inclusionary and moral character.

It must be noted that attacks against ius soli citizenship do not always serve liberal purposes. For example, right-wing opponents of French automatic ius soli in the 1980s invoked the idea that imposed citizenship was unfair towards foreigners when, in fact, "their real motivation was not to help foreigners, but rather to purge France of non-European foreigners and former colonial subjects, who were the majority of new French citizens, and whom the right considered undesirable" (Bertossi, 2010: 8). Moreover, as Ngai notices, "even if racial

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exclusion is not the intended result of eliminating birthright citizenship, it is a certain outcome" (2006: 2527).

The rule of ius soli is often considered a basic feature of a civic-territorial conception of citizenship. Conversely, the lack of adequate ius soli can be seen as indicating "an ethnic privilege derived from descent" (Bauböck et al., 2006b: 30). This ethno-cultural charge becomes stronger in a context where absent or inadequate rules of ius soli match a history of long-term immigration. The majority of states in our survey do not have provisions of ius soli despite the fact that foreigners account for 6.4% of the EU27 population (31.9 millions) (Vasileva, 2010: 1). For example, although the proportion of foreign population is above 10% of the total population in Austria, Cyprus, Estonia, and Latvia, these countries do not have provisions of ius soli in their citizenship laws. Moreover, considering that the great majority of EU27 countries[265] allow for the transmission of citizenship abroad via ius sanguinis, the absence or inadequacy of ius soli runs the risk of ethno-culturalism.

Inappropriately qualified rules of ius soli may also be problematic. The German *option model* is an example. In order to retain citizenship, persons who have obtained German citizenship at birth via ius soli must renounce their foreign nationality between age 18 and 23. In this case, the rule of ius soli is heavily constrained. It also discriminates between German citizens by birth because it privileges those who have obtained citizenship via ius sanguinis to the detriment of those who have become German citizens via ius soli (Hailbronner, 2010)

Despite the apparent clarity of the principle of ius soli, as a rule based on birth into territory of the country, what counts for "territory" is not always straightforward. This is especially important in cases of post-colonial or post-independence redrawing of boundaries. The case of Ireland is particularly interesting. In Ireland, the entitlement to ius soli concerns all people born on the island of Ireland (Ireland and Northern Ireland).[266] The 1956 Citizenship Act clearly specified that extraterritorial ius soli applied "pending the re-integration of the national territory". This explicit irredentist provision survived until the Good Friday Agreement of 1998. With this Agreement, the Irish government formally renounced its territorial claim, and agreed that a future reunification will be contingent on the democratically expressed majority in both jurisdictions. It also recognised "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose". But,

[265] Belgium, Bulgaria, the Czech Republic, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, and Spain.
[266] According to Art. 2 of Irish Constitution, "the national territory" of Ireland encompasses the "whole island of Ireland, its islands and the territorial seas."

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the Good Friday Agreement also resulted in a constitutional entitlement to ius soli citizenship for persons born on the island of Ireland (Republic of Ireland and Northern Ireland). These persons can become citizens simply by performing an "act that only an Irish citizen is entitled to do", e.g. applying for a passport or seeking entry into the register of voters in presidential elections (Handoll, 2010: 10). This applied literally to all children born in these territories, including tourists and temporary residents. To redress the unintended consequences of granting ius soli to mere immigrants, the 2004 reform linked ius soli entitlement to the residential status of the parents – three years of residence in the last four consecutive years prior the child's birth. The extraterritorial clause creates a distinction between "original" in-born residents of the island of Ireland and other in-born residents – the children of newcomers.

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4.5 Chapter Conclusions

The principle of birthright lies at the heart of the actual system of citizenship. Critics point out that birthright citizenship is unjust because it allows the perpetuation of global inequalities. Birthright citizenship is taxed as illiberal because it assigns citizenship by ascription and not by choice. Moreover, using descent as the sole or the main principle of ascribing citizenship can also be seen as an ethno-nationalist method of preserving the purity of the nation.

In this chapter, I argued that birthright membership could be justified in the form of birthright nationality, which falls short of full political citizenship. Birthright nationality is meant to secure a fundamental status of protection for children who are subjected to the authority of the state. It also satisfies the interests of the parents in securing for their children the opportunity of participating in their own political project. Finally, it responds to liberal nationalist concerns about the continuity of national culture.

Birthright nationality creates a presumptive right of access to political citizenship. This is because we can expect that the young children who are entitled to nationality will maintain ties with the political community and will easily satisfy the principle of reciprocal recognition when reaching the age when they will be able to exercise political rights. But this *expectation* of political membership should not be seen as a *confirmation* of political membership. Nationality should also be granted after birth to individuals who are substantially subjected to the coercive power of the state.

Political membership is not inheritable, and it cannot be received automatically. It stands for a direct, personal, and consensual relationship between an individual and a political community. In this view, it makes no sense to talk of birthright *citizenship*. All nationals should have a fundamental right to accede to the status of full political membership. In order to be recognised as full members in the political community, nationals should manifestly commit themselves to political membership.

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5. NATURALISATION

Naturalisation is the major mode of acquisition of citizenship after birth. The political salience and technical complexity of the naturalisation process makes it a good hunting field for theorists in search of ethno-cultural features. Today's heated debates about citizenship tests reveal important questions about the relation between citizenship, social integration, cultural specify and nationalism.

In this chapter, I discuss only rules of regular naturalisation that pertain to the general mode of acquisition of citizenship after birth, which is based primarily on the condition of residence in the country. I do not analyse rules of preferential or facilitated naturalisation that are based on particular grounds or that are aimed at particular categories of people. First, I give a comparative overview of rules of regular naturalisation in EU27 countries. Second, I discuss several major arguments underpinning the doctrine of socio-cultural integration as a prerequisite for admission to citizenship. Third, I propose a shift in the general philosophy of naturalisation from integration towards recognition.

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5.1 Rules of Regular Naturalisation in EU27

In this section, I map the major requirements concerning regular naturalisation in EU27 countries. I classify these requirements in four categories: (1) residence, (2) multiple citizenship, (3) knowledge and skills, and (4) self-sufficiency and good character.

5.1.1 Residence

Naturalisation rules specifying requirements of minimum residence are fairly complex. They account for various types of residence, degrees of continuity, exceptions, delays, et cetera. In the case of EU27 countries, the period of minimum residence prescribed by the law varies as following: 3 years (Belgium), 4 years (Ireland), 5 years (France, Latvia, Malta, the Netherlands, Poland, Sweden, and the United Kingdom), 6 years (Finland, Portugal), 7 years (Cyprus, Greece, and Luxembourg), 8 years (Estonia, Germany, Hungary, Romania, and Slovakia), 9 years (Denmark), and 10 years (Austria, Bulgaria, the Czech Republic, Italy, Lithuania, Slovenia, and Spain).

It is worth noting that, despite variation, none of the EU27 countries maintains minimum residence requirements longer than 10 years.[267] Although some countries are shortening and others are increasing the time period necessary for naturalisation, the major trend is to take into account qualified forms of residence instead of simple residence (Vink and De Groot, 2010: 726). These "minimum" periods of residence are thus only indicative because, in reality, various qualifications with regard to the type of residence, the duration of naturalisation procedures and large degrees of discretion may extend considerably the actual period of residence before naturalisation.

5.1.2 Multiple Citizenship

One of the least disputed trends in the comparative citizenship literature is that of increasing tolerance of multiple citizenship. The main causes behind this trend are: the general acceptance of the principle of gender equality, the simultaneous application of ius sanguinis and ius soli rules on the general background of increased international migration.

A number of states in the survey tolerate multiple citizenship. These states are: Belgium, Finland, France, Greece, Hungary, Italy, Luxembourg, Malta, Portugal, Romania, Sweden, and the United Kingdom. Among those states that reject dual citizenship, many provide for

[267] Article 6(3) of the ECN limits the requirement of lawful and habitual residence to a maximum of 10 years.

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considerable exceptions. For example, in Denmark[268] around 40% of all naturalised foreigners are allowed to retain their original citizenship (Ersbøll, 2010: 26). In Germany, in 2006, 51% of naturalised citizens maintained their previous nationality (Hailbronner, 2010: 27). In the Netherlands, the renunciation requirement was abolished in 1991 but reintroduced in 1997. However, the exceptions provided by the law "concerned the majority of the immigrants that applied for naturalisation"[269] (Van Oers et al., 2010: 16). Considerable exceptions are also made in the Czech Republic, Lithuania, Slovenia, and Spain. In Poland, the authorities have discretionary power to ask for the renunciation of a previously held citizenship.

5.1.3 Knowledge and Skills

Linguistic and socio-cultural requirements in naturalisation procedure constitute the core of the debates about the recent illiberal, culturalist, ethnic, or nationalistic turn in citizenship policies in Europe. The general argument for requiring a certain degree of knowledge of the local language(s) before admission to membership is that such a measure will facilitate the social integration of would-be citizens – for their own benefit and/or for the benefit of the community.

In our survey, Belgium, Cyprus, Ireland, Italy and Sweden are the only countries that do not have linguistic requirements in naturalisation procedure. In all other cases, the assessment of linguistic competence takes different forms (one or more forms for each country): interview (France, Germany, Greece, Slovakia, and Spain), exam (Bulgaria, Denmark, Finland, Germany, Hungary, Latvia, Luxembourg, Portugal, Romania, Slovakia, and Slovenia), certification of education or special language training (Austria, Bulgaria, Latvia, the Netherlands, and Portugal), part of a comprehensive citizenship test (the Netherlands, and the United Kingdom). The minimum level of knowledge of the language varies as follows: A2[270] (Austria, the Netherlands, and Portugal), B1 (Czech Republic, Estonia, Finland, Germany, Latvia, and the United Kingdom), B2 (Denmark), or combinations – B1 (listening)/ B2 (speaking), (Hungary), B1 (listening)/ A2 (speaking) (Luxembourg and Spain). In some cases the law remains vague – e.g. "sufficient" (Greece), basic or elementary (Romania, Slovakia, and Slovenia) –, or it leaves the rule unspecified (Lithuania and Poland).

[268] In Denmark, there are discussions about accepting dual citizenship (July 2012).
[269] In the Netherlands, exceptions from the renunciation requirement apply to: citizens of countries that do not allow for the renunciation of citizenship, refugees, spouses of citizens, second-generation immigrants, and some other categories.
[270] I use the codification of linguistic skills provided by the Common European Framework of Reference for languages.

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Exceptions are generally provided for different categories of persons, including older persons (Denmark, Finland, Latvia, Lithuania, Slovenia, and the United Kingdom), illiterate (Germany), minors under compulsory school age (Austria), refugees (Finland), with health problems (Finland, Denmark, Estonia, Latvia, Lithuania, the Netherlands, Slovenia, and the United Kingdom). In several countries applicants can chose between two languages when taking the examination. This is the case in Finland (Finnish or Swedish), Luxembourg (Luxembourgish and German or French), and Malta (Maltese or English).

Many countries in our survey have provisions concerning the knowledge of certain aspects of the country – generically called knowledge about the country. These provisions include basic knowledge of "democratic order and history" (Austria), "basic constitutional issues" (Hungary), "knowledge of society, culture and history" (Denmark), "knowledge of the rights and duties of nationals" (France), "familiarity with the public order" (Germany), "sufficient knowledge of history and culture" (Greece), knowledge of "the Constitution, the anthem and the history" (Latvia), "elementary notions of culture and civilization, of the Constitution, and anthem" (Romania), aspects of history, law, politics, society and manners (the United Kingdom). Knowledge about the country is assessed by means of interview (France, Greece, and Slovakia), written exam (Hungary, Latvia, Lithuania, Romania), or citizenship test (Austria, Denmark, Estonia, Germany, the Netherlands, and the United Kingdom).

Several countries have also introduced comprehensive citizenship tests as part of the naturalisation procedure. Apart from assessing linguistic competence, these tests aim at measuring particular knowledge about history, laws and culture of the country and practical socio-cultural skills. They differ considerably with regard to design, difficulty, and availability of materials.

5.1.4 Self-Sufficiency and Good Character

The financial situation of applicants of naturalisation is commonly assessed by checking their level of earnings and their dependency on welfare services. Such assessments are conducted in Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. In Germany beneficiaries of welfare or unemployment benefits are not allowed to naturalise, unless they "cannot be made personally responsible for their situation" (Hailbronner, 2010: 12).

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The requirement of good character is usually assessed by checking applicants' criminal record. Criminal record is relevant for naturalisation in all countries but Belgium and Cyprus. In Finland, Ireland, Malta, Romania, Slovakia, Spain, and the United Kingdom this requirement is integrated into a more general clause of good character or integrity.

Many citizenship laws in our survey make reference to vague criteria for determining the worth or the attachment of the applicant to the country. The formulations vary. They include: "affirmative attitude towards the Republic" (Austria), "no serious facts with respect to the person" (Belgium) "good character" (Belgium, Ireland, Malta, the United Kingdom), "respectable life" (Finland), "deemed to be a suitable citizen" (Malta), "decent life and manners" (France), "effective connection to the community" (Portugal), "good civic conduct" and "adaptation to culture and lifestyle" (Spain), "respectable life" (Sweden), and "attachment to the state and people" (Romania). France explicitly requires that applicants for naturalisation prove that they have assimilated. The assessment goes beyond checking linguistic assimilation by including looking into membership to religious groups, family relationship and dress codes (Bertossi, 2010).

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5.2 Socio-Cultural Integration

One of the major theses about citizenship policies in the West is that they are becoming more liberal. Christian Joppke identifies three major liberalizing trends: (1) the extension of legal entitlement to citizenship on the part of second-and third-generation migrants; (2) the introduction of facilitated naturalisation rules – lowered residence time requirements, a lesser emphasis on, if not rejection of, cultural assimilation as a precondition for citizenship, and the constraining of administrative discretion by formal rules; and (3) the increased toleration of dual citizenship (2008a: 4). To these trends, Joppke adds the long-standing liberalizing development towards the removal of gender and racial discrimination from the procedures of acquisition of citizenship.[271]

These liberalisation trends, however, are accompanied by several countertrends. The "restrictive turn" in citizenship policies includes several developments, such as the adoption of more restrictive provisions of ius soli, more qualified rights to family migration, the introduction of integration clauses and citizenship tests in naturalisation procedures (Joppke, 2008a: 6-7). In this new context, naturalisation has been transformed from a prerequisite of integration into the crowning of a completed integration process (Bauböck et al., 2006a: 24), "the end-point of, or reward for, integration" (Joppke, 2008a: 12).

There is no consensus on how to interpret these restrictive changes in Europe. Theorists disagree with regard to both diagnosis and solutions. Most authors argue that we deal with a reversal of liberalization (Joppke, 2008a: 3-4), with some forms of "illiberal liberalism" (Orgad, 2010) in which liberal norms are applied "in an exclusionary fashion" (Adamson et al., 2011: 845). Although the general tone seems critical, there are also voices that defend more restrictive citizenship rules. According to Spiro, for example, "threats to the very project of liberalism justify illiberal responses" (2011: 743).

Unlike in the case of birthright citizenship, in naturalisation the state is actively engaged and holds firm controls of the process of making new citizens. Naturalisation is a complex procedure through which states not only turn foreigners into citizens, but also select and reproduce models of "good citizen." The general philosophy behind the doctrine of socio-cultural integration is that the process of naturalisation should deliver citizens that are sufficiently integrated in the society and the state. This idea can be interpreted and

[271] When Germany changed its highly restrictive citizenship law in 1999 to include conditional ius soli for second-generation immigrants, the liberalization trend seemed to triumph.

implemented in various ways, according to different understandings of what integration entails and what the concepts of society and state stand for. For example, the UK government sees naturalisation as the "completion of the journey"[272] through which immigrants join in with "the British way of life."[273] It matters enormously what "British way of life" is taken to be and what means are employed in order constrain/convince immigrants to join in. At one end, we can distinguish a thin, functionalist idea of integration that operates with a culturally agnostic definition of political community. At the other end, we find a thick, comprehensive version of integration that refers to a highly particularist definition of national community. Obviously, this rough distinction between thin and thick philosophies of integration does not accommodate perfectly actual cases.

Promoting good citizenship is an important, albeit delicate, business of the state. Fostering certain social values, attitudes and dispositions is part of what many public policies do. State policies do not only influence individual behaviour by encouraging or discouraging certain courses of actions. They also promote certain modes of thinking and feeling about actions and things. Educational policies are the most obvious example in this respect. In fact, it can be argued that the state has a "duty to create a certain kind of political culture and to foster certain attitudes and dispositions" (Carens, forth.: Chapter 3). Because immigrants typically arrive in the country as adults and reside there for only a limited period of time, they are not thoroughly exposed to state policies promoting good citizenship.[274] The state seems then justified to use naturalisation process as a fast-track channel of promoting certain values, dispositions and skills that are essential for functioning in a particular society.

There are several assumptions that feed into the social integration thesis. First, the state has the discretionary right to adopt rules of naturalisation and to decide admission in individual cases. Second, the state can assemble a comprehensive model of "good" citizen to serves as a yardstick for measuring social integration. Third, the state can develop viable instruments and mechanism through which social integration can be tested and induced. I address these assumptions in the remainder of this chapter.

[272] Home Office, 2008, "The Path to Citizenship. Next Steps in Reforming the Immigration System", 20.
[273] *Ibid*., 6.
[274] With the important exceptions of children of immigrants who are born in the country, immigrants who arrive in the country at an early age, and immigrants who have resided in the country for long periods of time.

5.2.1 Turning Residents into Citizens

Residence plays an important role in normative arguments for admission to citizenship. Residency works well as a criterion of inclusion that serves a principle of inclusion based on the idea of subjection to coercive power. Because residents are subjected to the state's power, refusing them citizenship amounts to turning them into metics and servants (Walzer, 1983). Some authors have argued that immigrants should be naturalised automatically after a certain period of residence in the country because they are already members of the society (Rubio-Marín, 2000: 60; Carens, 2010: 24-26). Residence is also a key "objective biographical circumstance" (Bauböck, 2007a: 2421) that demonstrate the existence of a stake in a particular political community and thus creates a moral claim of inclusion.

In practice, requirements of residence for naturalisation seem problematic when they specify excessively long periods of time. In some cases, the "relevant" residence is a legal construct that has little to with actual residence. For example, in post-independence Estonia, colonial settlers— who were not granted citizenship in the new Estonian state— could apply for naturalisation only after three years of residence that were counted starting from 30 March 1993. This rule was not inspired by an argument about the socialisation virtues of residence but served as a strategic move, namely that of keeping non-ethnic Estonians from participating in the processes of institutional building in the restored state (Järve and Poleshchuk, 2010).

Generally, there is little we can say about the length of residency from a normative point of view. There are no compelling reasons for choosing a certain length of residence over another. We can perhaps agree that a period of around five years is fair. It must be noted that in our survey only ten countries out of 27 have residency requirements of five years or fewer, although none of the countries provide for residency requirements of more than ten years.[275] Belgium is an outlier because it asks for only three years of residence before naturalisation and because it does not impose additional requirements.[276] This is the only case where citizenship seems, indeed, reduced "to a mere confirmation of one's residence" (Foblets and Yanasmayan, 2010: 25).

[275] Following Howard's analysis that takes five years as an indicator for liberal naturalisation regimes (2006) we reach the troubling conclusion that only 10 out of EU27 countries have liberal regimes. Howards' index, however, brings in other elements.

[276] In Belgium, there are discussions about the introduction of longer residence conditions and language requirements for naturalisation (July 2012).

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The intuition is that providing for harsh requirements of residence in naturalisation may indicate a reluctance to accept "newcomers" as members of the society and possibly an attempt to preserve the ethno-cultural fabric of the community.

The naturalisation process does not only serve the technical purpose of turning residents into citizens. As the socio-cultural integration thesis has it, naturalisation is also supposed to produce certain types of good/integrated citizens. In the following sections, I discuss several models of the "good citizen" that states seem to promote through naturalisation requirements. I identify four major socio-cultural and moral profiles: (a) loyal citizens, (b) skilled citizens, (c) worthy citizens, and (d) ethno-cultural siblings.

5.2.2 Making Loyal Citizens

Many states ask applicants for naturalisation to sign declarations or to take oaths of allegiance.[277] For most people, however, this formal procedure is unlikely to create serious hurdles to naturalisation. Concerns with loyalty in the naturalisation process are mainly related to the question of whether immigrants should be allowed to maintain dual citizenship.

The trend towards increased acceptance or toleration or dual citizenship is an important element in the general thesis of liberalisation of citizenship regimes in Europe (Joppke, 2008a). Apart from liberalization, authors have identified different rationales for the acceptance of dual citizenship. Whereas dual citizenship is instrumental for strategies immigrant integration in Western Europe, in Eastern Europe dual nationality serves mainly as "a tool for expanding the national community beyond state borders" (Bauböck, 2007b: 70). The toleration of dual citizenship is, on the one hand "part of the general trend from ethnic toward territorial citizenship" (Joppke, 2010: 48) and, on the other hand, part of a "counter-trend […] of re-linking citizenship with ethnicity" (Kovács and Tóth, 2010: 11). But this division does not match perfectly the East/West divide. According to Joppke, tendencies towards the re-ethnicization of citizenship are also present in the West, especially in the form of recent efforts of states to strengthen ties with emigrant diasporas. Bauböck notices that, despite the fact that many Western migrant-sending states "allow their expatriates to retain their nationality when they naturalise" (2007b: 72), such cases of external citizenship do not enjoy comparable attention as cases of trans-border dual citizenship in the East.

[277]Taking an oral oath in Austria, Cyprus, Czech Republic, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Slovakia, Slovenia, and Romania satisfies the loyalty requirement. Written declarations of loyalty are required in Belgium, Denmark, Estonia, Finland, Malta, and Spain. The Netherlands and the United Kingdom have also introduced citizenship ceremonies.

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Some authors have pointed out the discrepancy between incoming and outgoing naturalisation,[278] that is, the differential treatment of immigrants (foreigners) who naturalise in the country and emigrants (citizens) who naturalise elsewhere. In our survey, Bulgaria and Slovenia maintain a ban against dual nationality in cases of incoming naturalisation but allow dual citizenship in cases of outgoing naturalisation. Although this differential treatment seems dubious,[279] I think that the two situations should be analysed from different perspectives. In the case of incoming naturalisation, the question is whether allowing immigrants to retain the citizenship of the state of origin is compatible with the process of admission and, generally, with the exercise of the rights and duties pertaining to the citizenship of the state of residence.[280] In the case of outgoing naturalisation, the question is whether allowing citizens to retain their citizenship after they naturalise abroad is compatible with the idea of equal citizenship. From this perspective, it may be the case that a state could accept dual citizenship for immigrants and reject it for emigrants. This view, however, does not take into account state obligations within the international system. In a context in which a state's policy of dual citizenship for outgoing naturalisation is accepted by other states, refusing dual citizenship in cases of incoming naturalisation violates what Bauböck calls the principle of "generalizability" (2006: 158) of citizenship policies[281] and may lead to interstate conflict. Without challenging this argument, my point is that, from a state-democratic perspective, immigrant and emigrant dual citizenship raise slightly different normative concerns.

In our survey, Slovakia and Ireland enforce such rules. In the Slovak case, this is a recent move in order to counteract the Hungarian initiative to offer external dual citizenship to kin minorities in the neighbouring states. In the Irish case, the clause applies only to those who have acquired citizenship otherwise than by birth because citizens by birth cannot lose their Irish citizenship unless they renounce it. Both cases are problematic. Slovakia denaturalises residents[282] who are citizens by birth. It also denaturalises members of a historic ethnic minority, who, in line with actual standards of minority protection, should enjoy more rather than less legal protection and accommodation. Ireland discriminates among citizens on

[278] I use the terminology suggested by Rainer Bauböck.
[279] According to Spiro, this discrepancy will "not be able to withstand antidiscrimination critiques" and "dual citizenship will [soon] be broadly accepted however acquired" (2011: 737).
[280] These concerns are independent from the concerns of the state of origin with the value and scope of the citizenship of their emigrants.
[281] Bauböck argues that "[s]tates should refrain from adopting citizenship laws and policies that would inherently conflict with similar laws and policies adopted by other states" and that "[s]trongly asymmetric policies towards foreign residents in the country and towards a state's own nationals living abroad violate this condition" (2006: 158).
[282] The case is quite atypical because Slovakia denaturalises dual citizens who are residents, whereas Hungary naturalises foreigners who are not residents.

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grounds of particular mode of acquisition of citizenship.[283] It creates objectionable distinctions between original/non-original, or worthy/less-worthy citizens.

The main question is whether states should tolerate dual citizenship in the context of regular naturalisation of immigrants.[284] There are contested normative arguments and indecisive sociological evidence about the role dual citizenship plays in the process of immigrant integration. In a study on democratic theories and dual citizenship, Joachim Blatter argues that liberal democracy is compatible with dual citizenship. Problems of unequal citizenship arise "only when the aggregation of votes and governmental decision-making is connected between the two polities… because a dual national can make his or her preferences counted twice (Blatter, 2011: 776). For a republican democrat, however, "dual citizenship seems to be a mixed blessing" because although "it opens up more opportunities for political participation… it appears to lead to lower levels of participation and civic virtue" (Blatter, 2011: 779).

I agree that membership of a political community requires a certain degree of commitment. But this need not imply exclusive allegiance and mono-membership. In my view, the possession of other statuses of membership should not matter for the purpose of naturalisation. Neither should it constitute the decisive issue in the debate about emigrant dual citizenship. What matters in both cases is the nature and strength of the connection of individuals with the political community. Solely the possession of another citizenship is no evidence that such relevant links are lacking. This is even less obvious in the case of long-term immigrants. Long-term immigrants are owed admission to nationality— and the right to take up full citizenship if they desire it – in virtue of their substantial subjection to the coercive power of the state. As for identity and loyalty, no matter how valuable they may prove to be, states simply cannot "legalise" loyalty and patriotism (Carens, 1998: 146). Admission to membership is not a function of immigrants' identity or loyalty.

5.2.3 Making Skilled Citizens

Requirements concerning sufficient command of language(s) and adequate knowledge about the country's political system, rights and obligations of citizenship can be seen as incentives or vehicles for social integration. In Europe, there is a clear trend towards enforcing or

[283] This type of discrimination appears in other cases where countries do not generally allow citizens to retain citizenship when they naturalise elsewhere but impose a ban on the withdrawal of citizenship if acquired at birth. In our survey, such countries are: Czech Republic, Estonia, Ireland, and Spain.
[284] In the next chapter I discuss external citizenship acquisition, which involves often dual citizenship for non-residents.

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tightening naturalisation rules concerning linguistic and non-linguistic skills. In our survey only Belgium and Sweden have no requirements of this type.

States are justified in worrying about social integration – of immigrants, as well as generally. However, the increased emphasis on social integration in the context of naturalisation does not come without problems. I focus on questions about the aims and means of such rules. First, are tests intended to measure and stimulate social integration or are they intended to hinder applicants from seeking membership? Where tests are too difficult and states make no or little effort to help candidates meet the requirements there is the suspicion that the rationale of testing is to raise barriers rather than encourage integration (Groenendijk et al., 2009). For example, in 2007, Denmark introduced a citizenship test about Danish culture, history and society. Because the test did not pose problems for most applicants, a new test was introduced in 2008 when the Danish Ministry of Integration removed from its homepage materials containing possible questions and answers for citizenship test. These changes caused a fall in the pass rate from 97% to 22% (Ersbøll, 2010: 23). At the same time, Denmark also requires candidates to naturalisation to pass a language test at the highest level in Europe (B2). This has exclusive effects, especially among certain categories of applicants, such as the elderly, persons with little schooling or with learning difficulties (Ersbøll, 2010: 27). The situation is less problematic in the United Kingdom, where the government publishes a 150-page book containing all the knowledge necessary for passing the citizenship test.

Problems also arise with regard to the content of the tests (Michalowski, 2011). The scope and nature of the knowledge and skills required for passing the test vary. One of the most cited cases, in this respect, is the "interview guide" adopted in 2005 by the German state of Baden-Württemberg for applicants from Muslim countries. The guideline was meant to scrutinize applicants' attitude toward delicate socio-cultural issues such as homosexuality, the equality of women, and Islamic terrorism (2008a: 12). A new German federal test was adopted in 2008 and includes questions about German culture that cover broad topics, such as history, geography, constitution, symbols, customs (e.g. Easter customs). The Danish citizenship test includes questions that cover wide aspects of Danish history and culture (from Vikings, football-related performances, Danish Nobel prize laureates, et cetera) (Orgad, 2010: 24-25). Finally, the Dutch citizenship test also asks applicants to be able to behave as Dutch persons when confronted with particular social situations.

In Joppke's view, instruments such Baden-Württemberg's interview guideline constitute a "veritable morality test that is driven by the normatively and constitutionally questionable

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vision of the liberal state as a state for liberal people only" (2008a: 8). Unlike tests that ask for specific factual knowledge that "can be learned and mechanically reproduced", a "citizenship test that scrutinizes a candidate's 'inner disposition' does raise eyebrows, precisely for transgressing the thin line that separates the regulation of behaviour from the control of beliefs" (Joppke, 2008b: 542). These policies seem to disregard the Kantian idea that law should govern only outward behaviour and not the "content of the hearts" (Lister, 2010: 222). Matthew Lister proposes an interesting criterion. He argues that we should accept only those requirements "which an applicant could meet without having to change fundamental aspects of his personality" (Lister, 2010: 220).

Even admitting that states are justified to put illiberal means in the service of liberal goals, doubts remain about whether citizenship tests actually serve their intended purposes. Despite their alleged advantage related to diminishing administrative discretion, formalized tests "do not provide sufficient flexibility in judging relevant skills" (Bauböck et al., 2006b: 13). It is unlikely that asking applicants to learn about some aspects of national culture – through "Blitzkrieg-style" integration courses (Orgad, 2010: 30) – would make them identify with the particular culture, especially when the whole process is set up to discourage rather than foster identification.

It may be true that linguistic and non-linguistic skills are both useful to immigrants and conducive to smoother social relations. However, it is not obvious why such skills should constitute legal requirements for the purpose of naturalisation. Joseph Carens makes the essential distinction between enforceable legal rules, and social aspirations (1998: 142). We could certainly expect and hope that immigrants learn the language and develop certain skills and disposition, but these hopes and expectations cannot be simply translated into legal demands of admission. If admission (nationality) is morally owed to individuals who are significantly subjected to the coercive power of the state, inadequate command of language or lack of certain skills cannot constitute barriers to inclusion.

States could, nevertheless, use the naturalisation process as a window for promoting and encouraging the acquisition of certain linguistic or non-linguistic competences by immigrants. They may also use this opportunity in order to engage with immigrants by acknowledging their "stories", their particular situations and points of view. In this context, states could organize specific pre-naturalisation courses or trainings. They could also administer carefully designed tests under the condition that results in these tests do not disqualify individuals from naturalisation. In order to boost motivation for attending and completing courses, success in

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passing such tests may grant applicants access to a fast track admission procedure. This practice is already present in several countries. In Finland, citizenship may be granted one year earlier than usual if applicants meet the language skills requirement (Brander, 2011). In Germany, the successful attendance of an integration course may lead to the shortening of the residence period necessary for naturalisation from eight to six years if the applicant also proves a high level of knowledge of German language (Hailbronner, 2010: 11).

5.2.4 Making Worthy Citizens

Apart from linguistic skills and particular knowledge about the country, it is common that naturalisation procedures include requirements of economic self-sufficiency, individual contributions and good behaviour. These provisions do not seem to imply only a formal assessment of individual behaviour. They often seem to scrutinize the moral fabric of individuals. Self-sufficiency, for example, does not only refer to productive capacities, but also to individuals' moral dispositions towards work and social cooperation.

It can be argued that we are dealing with a more general move towards a new model of social citizenship in which "realizing self-potential is regarded as a virtue and forms highly scripted expectations about self and others… [and] being productive, creative, and active defines a higher form of life" (Soysal, 2012: 12). In the context of immigration, provisions of self-sufficiency seem to translate widespread fears about the negative effect that increased immigration has over welfare systems. According to the UK government, for example, migrants must "demonstrate a more visible and a more substantial contribution to Britain"[285] and they have to prove that they "earned their right to British citizenship or permanent residence."[286]

Self-sufficiency and contribution are related arguments to the extent that avoiding becoming a burden to the state is, in a way, a contribution to the system. Both sides of the argument are problematic. The assumption behind these requirements is that non-contributors are morally culpable because they free ride the system of social cooperation. However, in cases where individuals are unable to be self-sufficient, disqualifying them from access to citizenship and thus from political voice does, in fact, worsen their situation. Such a measure is more likely a recipe for social marginalization than for social integration. However, the major problem with the contribution/self-sufficiency argument is that it cannot work as a principle of inclusion.

[285] Home Office, 2008, "The Path to Citizenship", 6.
[286] *Ibid*. 21.

Once we admit that immigrants have strong claims to admission (nationality) because they are significantly subjected to the coercive power of the state, considerations about contribution and self-sufficiency cannot justify exclusion.

Moral scrutiny on behalf of the state is even more obvious in the case of requirements about good character. Generally, analysing the criminal records of applicants is sufficient for evidencing good character. The idea is that more serious criminals[287] are not worthy of admission to citizenship. What is the link between crime and citizenship? I agree with Markus Dubber who argues that "crime is an interpersonal event, not an intercitizenal one", "neither as a matter of positive law nor as a matter of normative theory does the concept of citizenship play a role in an account of the nature of crime or of the penal process in general… a crime is not committed by a citizen, nor against a citizen" (2010: 196).

A number of countries provide for the loss of nationality as a result of breaches of criminal or security rules. Criminal convictions of some sort or threatening public or national security can lead to deprivation of citizenship in Austria, Bulgaria, Belgium, Cyprus, Denmark, Estonia, France, Lithuania, Malta, Slovenia, Spain, and the United Kingdom. For example, in Bulgaria citizens can be deprived of citizenship if they commit "grave crimes against the state" (Smilov, 2010). Romanian law provides for the termination of citizenship for citizens "who worked abroad against the interests of the country or who enrolled in an enemy army" (Iordachi, 2010). In the UK, the Secretary of State retains the power to withdraw British citizenship from citizens if this is "conducive to the public good" (Sawyer, 2010). Denaturalisation is either explicitly provided for by specific clauses inserted in the naturalisation "contract", or it results from independent applications of distinct rules. For example, the French *Conseil d'Etat* has the power to withdraw French citizenship from naturalised citizen who commit certain crimes during a period of ten years after naturalisation (Bertossi, 2010). Denaturalisation occurs also when countries provide for the possibility of involuntary loss of citizenship, but maintain exemptions with regard to certain categories of citizens— such as "natural citizens", citizens "by birth", or "by origin."[288] This distinction between different categories of citizens with regard to the security of status is clearly discriminatory.

[287] Provisions vary widely. In some countries, past criminal offences only delay admission for some time. In other countries, committing certain crimes leads to absolute ban to admission.
[288] This is the case in Bulgaria, Estonia, Ireland, Romania and Spain.

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There are several states that suspend or cancel political rights for citizens who have committed certain serious crimes. In some cases, this constitutes part of the punishment for acts that breached the social contract. However, why should states not be allowed to unilaterally withdraw nationality on grounds of criminal conduct?[289] It may be justified to withhold granting nationality to persons who are under criminal investigations or who are serving a sentence. I can imagine situations in which past criminal record can raise doubts about the commitment to political membership. However, access to the legal status of nationality is not based on such commitment. It is based on the fact of substantial subjection to the state. Finally, refusing individuals citizenship because of crimes committed in the past comes close to a double punishment.[290] It goes against the idea of rehabilitation. Penalizing ex-offenders in the context of naturalisation is based on a moral assessment of persons. It is not clear whether states have the ability or whether they should be in the business of assessing the moral worth of individuals.

5.2.5 Welcoming Ethno-Cultural Siblings

Recent tightening of naturalisation rules throughout Europe can be seen as a response to widespread concerns about the social integration and cultural compatibility of immigrant populations. It is one of the major arguments in debates about democratic citizenship that, in order to function, political communities need citizens who possess certain qualities and virtues. To be effective, these qualities and virtues must be defined in particular rather than universal terms. As the argument goes, political communities need to be based on some sort of common-ness. The question is, of course, what kind of common-ness?

Changes towards stricter naturalisation rules – such as the adoption of comprehensive citizenship tests – do not necessarily reflect a re-ethnicization of citizenship. They may rather be interpreted as a shift towards "illiberal civic nationalism" (Bauböck, 2008a: 8). Referring to citizenship tests, Yasemin Soysal argues that they "do not represent a return to nation-centred citizenship projects, but convey an integration and cohesion model that takes individuality, and individuals' capacities and efforts, as its premise" (2012: 52). However, even if most of the tests do not contain ethno-cultural elements – except, perhaps, that of language – the very introduction of these tests tell us something about the shift towards national particularism (Koopmans, 2012: 29). What is at stake is the reassertion of a nativist

[289] Not to mention that they should not add discrimination to such abuse.
[290] The legal principle of *ne bis in idem* ("double jeopardy" in common law tradition) prohibits a legal sanction to be applied twice for the same cause of action.

ideology that opposes "us" to "them" and affirms the discretionary right of the insiders to exclude or "transform" outsiders. This ideology says that only those who are "like us" or who become like us will be accepted as co-citizens.

Although few naturalisation rules refer directly to ethnicity or culture,[291] there are instances in which a concern with ethno-cultural compatibility of applicants looms in the background. France offers an example of an explicit "culturalised conception of nationality" (Bertossi, 2010: 25). In this case, admission to citizenship is directly linked to cultural assimilation. For example, in a decision of 2008 the French *Conseil d'État* sanctioned the government's refusal to grant French citizenship to a Moroccan woman— married to a French citizen and mother of two French children – on grounds that she "adopted a radical practice of her religion, incompatible with the essential values of the French community, notably with the principle of gender equality" (Bertossi, 2010: 26) A fluent French speaker, Mrs. Mabchour made the mistake of attending her assimilation interview wearing a *niqab*.

Liberal nationalists have long argued that some sort of national cultural homogeneity is necessary for the proper functioning of democratic institutions (Mill, 2008; Miller, 1995). Although critics may reject this idea (e.g. Abizadeh, 2002), I take it here at face value. My two questions then are: (1) how do we grasp the cultural character of the nation, and (2) how do we translate this into membership criteria?

In order to assemble a model of cultural citizen that should serve as a standard for making other citizens, we need a preliminary agreement on what *is* national culture. More exactly, we must decide on *whose* version of national should we promote. Taking into account the inherent multicultural character of all national cultures, it is fairly difficult to arrive at a specific definition of national culture. In recent years we have seen several attempts to define national identities through specialist and public debate. What is Britishness?[292] What constitutes French national identity?[293]According to a 2003 Report— "Life in the United Kingdom" –, Britishness is defined by "respect(ing) the laws, the elected parliamentary and democratic political structures, traditional values of mutual tolerance, respect for equal rights and mutual concern" and by "allegiance to the state (as commonly symbolized in the Crown)

[291] I refer here to rules of regular naturalisation. In the next chapter I will discuss particular rules that deliberately refer to ethno-cultural features and groups.
[292] The former Tory chairman Norman Tebbit proposed a "cricket test", according to which immigrants prove they are integrated if they cheer for team of England even when it plays against their country of origin. See BBC News "What is Britishness anyway?" 12 September 2002 <http://news.bbc.co.uk/2/hi/uk_news/1701843.stm>
[293] Le Figaro "Identité nationale : les 200 questions posées aux Français" 11 Novemver 2009. <http://www.lefigaro.fr/actualite-france/2009/11/11/01016-20091111ARTFIG00562-identite-nationale-les-200-questions-posees-aux-francais-.php>.

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in return for its protection."[294] The Commission advised the government to include English language and civics test in the naturalisation procedure. The list offered by the Crick Commission seems to contain only one particular feature that distinguishes the British from other liberal-democratic nations, namely allegiance to the Crown, "which appositely appears only in brackets, subsumed under an anonymous, exchangeable 'state'" (Joppke, 2008b: 537). In this way, "the British state is caught in the paradox of universalism: it perceives the need to make immigrants and ethnic minorities part of *this* and not *that* society, but it cannot name and enforce any particulars that distinguish the 'here' from 'there'" [original emphases] (Joppke, 2011: 165).

But let us admit that we reach a broad consensus regarding the content of national culture. How do we square it with the naturalisation procedure? More importantly, what can justify such a move? In chapter 2, I discussed the perspective of liberal nationalism on issues of admission. When considering concrete (liberal) nationalist proposals regarding admission, I found that they were much more liberal than nationalist. Michael Walzer, for example, accepted that admission to citizenship is owed to individuals who are long-term residents in virtue of their subjection to law.

[294] Report of Crick Commission 2003, p. 11.

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5.3 From Integration to Recognition

In this section, I propose an alternative philosophy of naturalisation. I argue that we should conceptualise the admission of immigrants not in terms of unilateral integration into a static body of citizenry, but as a form of reciprocal recognition. First, I make the case for a right to membership that includes a right to automatic nationality and a right of access to political citizenship. Second, I elaborate the principle of reciprocal recognition in the context of naturalisation.

A basic assumption behind the argument that links social integration and naturalisation holds that states have discretionary powers to adopt rules of admission and thus to select individual according to whatever criteria they see fit. This assumption closely follows international norms in the area of nationality/citizenship.[295] Despite progress towards a right to citizenship (Joppke, 2005a; Spiro, 2011), naturalisation remains, generally, a discretionary procedure. As a spokesman of Danish People's Party put it, "[Danish] citizenship [is] the most *precious gift* from the [Danish] people to foreigners who apply for it and deserve it" [my emphasis] (Ersbøll, 2010: 32). Even in cases where naturalisation entails a right to citizenship, states are free to impose harsh conditions of access, such as a high level of social integration.

It is not my intention to underrate the "astonishing" developments in an area where "state discretion had previously been at its peak" (Joppke, 2005a: 52). We have certainty come a long way. But discretion remains a major feature of actual regimes of citizenship. In our survey, only four countries provide for a general naturalisation procedure based on a right to citizenship.[296] The specialized country reports on citizenship produced by the EUDO Observatory on Citizenship show that a wide range of administrative discretion is to be found in most of the EU27 countries. In the Czech Republic naturalisation is seen as "an act of mercy by the state" (Baršová, 2010: 3). In Estonia the Supreme Court recently confirmed that naturalisation is a privilege not a right (Järve and Poleshchuk, 2010: 9). In the case of Ireland, John Handoll talks about "absolute discretion" (2010: 15). Considerable degrees of discretion are reported in other countries, such as Bulgaria, Cyprus, Denmark, Hungary, Malta, Poland, and the United Kingdom.

Naturalisation procedures often contain vague requirements and delegate extensive powers to administrative agencies – e.g. to assess particular knowledge or general level of integration. Although explicit rules of group discrimination have been removed, the high level of

[295] See chapter 3, *infra*.
[296] These countries are: Germany, the Netherlands, Portugal and Spain.

selectivity at individual level raises questions about the legitimacy of naturalisation procedures.

In Chapter 2, I discussed justifications for the right of states to define boundaries of membership. I concluded that, despite actual international norms and national practice, admission to membership is a matter that falls under important normative constraints. This is not a novel idea. Joseph Carens has argued that "the question of who belongs should not be seen as simply a matter of discretionary choice whether made by political authorities or even by the majority of the citizenry" (Carens, 2010: 40). Michael Walzer (1983) also deplored the exclusion of long-term residents in the Western societies, invoking the argument that democratic people cannot use the idea of democratic self-determination against the principle of inclusion that underpins it. What I add to these views is the argument that the legitimacy of democratic boundaries depends on a commitment to openness. From this commitment to openness, I derive a right to legal membership (nationality) for those persons who are substantially subjected to the coercive power of law. Furthermore, the principle of openness requires that all nationals have a right to political membership (citizenship) if they commit themselves to political membership.

According to Rainer Bauböck, the justification of particular membership arrangements should always "refer to the value of self-government" (2009b: 478). Bauböck has long argued for a concept of citizenship that is closely connected with the idea of democratic self-government. Although "everybody has a right to equal membership in a self-governing political community" (Bauböck, 2009b: 478), this does not imply that everybody has a right to membership in any political community. All those excluded have a right to justification. In this respect, Bauböck has developed the principle of stakeholder citizenship that matches individuals with particular political communities according to the stake these individuals have in particular memberships. With regard to naturalisation of residents, Bauböck acknowledges their strong claim of inclusion. Residence is an important element that indicates the existence of a stake in a particular political community. However, he rejects the idea that naturalisation should be granted automatically solely on grounds of long-term residence. In Bauböck's view, before being recognized as citizens, immigrants should make an explicit gesture of commitment to the political community, they should "visibly link their own future with that of the country of settlement" (2007a: 2419).

I agree with Bauböck that admission to political citizenship should require the expression of an explicit commitment to membership. My worry is about those individuals who refuse or

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fail to express such an explicit commitment. Although long-term residents, these people do not enjoy a secure status of legal protection in the state where they are subjects to law.[297] In my view, they should be granted something more than a status of denizenship. They should be given the status of nationality without political rights. As nationals, they will enjoy more rights – including unrestricted migration rights –, a secure legal status, and, especially, a right to become citizens once they commit themselves to political membership.

In Chapter 4, I argued against the argument of intergenerational citizenship as the basis for granting full citizenship status to children at birth. I proposed a form of generalized birthright nationality for children born in the territory of the state and for descendants of citizens. The fundamental individual interests in legal protection are satisfied by access to the status of nationality. The additional right to *become* citizens by commitment also satisfies the fundamental concerns of democratic communities about continuity and coherence. In the case of birthright nationality, concerns with legal protection seem more serious because of the special circumstances of vulnerability in which young children find themselves. Should adult immigrants be granted automatic nationality, especially if they also enjoy, as many do, another status of nationality/citizenship elsewhere?[298] It is my contention that they should. The important difference is that children receive the status of nationality at birth, whereas adult immigrants only receive it after a period of residence. This residential requirement is necessary in order to prove substantial and continuous subjection to the coercive power of the state.

I do not include a similar[299] residential requirement in the case of nationality at birth for two reasons. First, I choose to be biased towards inclusion in order to avoid the risk of exclusion (and statelessness). Second, I hesitate to impose such a restriction in order to avoid breaking the parity between rules of ius sanguinis and ius soli. Imposing an overly harsh residential requirement for acknowledging the nationality status of descendants of citizens who reside abroad seems counterproductive because it goes against the justification of granting such an award of nationality in the first place. As I argued, birthright nationality for non-resident children offers additional guarantees against statelessness and addresses the interests of the

[297] In some contexts, these persons may enjoy some special status of permanent residence. But such status is often poor and unsecure.
[298] My distinction between nationals at birth and adult immigrants who apply for naturalisation obviously disregards in-between cases, such as immigrants who arrive as children.
[299] I only accepted the possibility of delaying the application of ius soli for a maximum period of one year after the child's birth.

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parents – and, indirectly, of the community – in assuring that their children could become part of their political community.

The problem with the present philosophy of social integration is that it depicts admission to membership as a unilateral process. In this light, "debates over integration quickly become reduced to a question of whether immigrants are adopting the 'right' values rather than one about participation and engagement" (Bloemraad, 2011: 271). Neither automatic admission to citizenship, nor discretionary and unilateral admission is likely to take us beyond this paradigm. Indeed, as Bauböck argues, "what is needed in this regard is not merely a fine-tuning of conditions for naturalisation, but a general change in public philosophies of citizenship" (2008b: 10).

My proposal is to view naturalisation as a process of reciprocal recognition between citizens and would-be citizens. In this process, citizens and would be citizens come together and share their commitment to democratic membership. Since would-be citizens must commit themselves to the political community whereas the citizens are called to register such commitment, one could object that we do not escape the asymmetric relationship of naturalisation. However, in light of the fact that no citizen is a "natural" citizen and that all citizens become citizens by way of commitment, this asymmetry loses force. To a traditional political ontology based on the opposition between "us" and "them", the principle of reciprocal recognition opposes a vision in which all "them" can join "us", if they whish so.

In order to be recognised as member of a particular community, a person should express his or her commitment to membership, which means that he or she accepts the rights and duties of membership and that he or she recognises all other members as equal citizens. What does this entail in concrete terms? The principle of commitment advanced in this thesis includes both a structural and a moral component. The structural component refers to the capacity to express commitment – mental capacity, minimal linguistic skills. The moral component refers to the commitment itself, which is the willingness to take up the "job" of membership.

Nationalists derive commitment from membership in pre-political communities. As Miller sustains, sincere engagement and the willingness to moderate claims are more likely to be guaranteed by shared nationality (1995: 150). Democratic commitment is possible only when cultural assimilation is significant. Once we remove identity from the structural conditions of democracy, the task of generating commitment becomes more difficult but not impossible. I agree with Iseult Honohan that continuous residence in the territory for some time and

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"declared and evident intention to remain living in the country" (2002: 287) constitute a sufficient proof of commitment to membership. Residence creates a reasonable expectation that the person is serious about his or her bid for political membership.[300] This expectation should, nevertheless, be actualised through an explicit act of commitment.

[300] This point inevitably raises the question of freedom of movement and settlement. Although I do not offer an explicit defence of (fairly) open borders, this argument clearly looms in the background A similar principle of structural indeterminacy of borders may lead us to a conditional right to control borders and to a strong duty of justification for any derogation from open borders.

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5.4 Chapter Conclusions

Generally, demanding rules with regard to naturalisation could be interpreted as an ethno-culturally-motivated attempt to make the admission of unwanted aliens as difficult as possible. But such demands can also be seen as expression of a badly-calibrated civic-territorial ideal of political community. According to such an ideal, persons should reside for a sufficient period of time on the territory to arrive at sharing important values and commitments before they become naturalised. Naturalisation rules usually involve a number of pragmatic concerns, such as security, social cohesion and the preservation of welfare institutions. The refusal or reluctance to accept new members may, legitimately or not, be grounded in perceived self-interest rather than ethno-culturalism. There are, however, several naturalisation rules that come very close to an ethno-cultural conception of the community. First, the differential applications of restrictions on multiple nationality reinforce distinctions among persons and/or citizens based on their "original" or "natural" connection with the country. Certain states maintain a ban on multiple nationality only for candidates to naturalisation while allowing their own citizens to keep their citizenship when naturalising elsewhere. Most problematical, in several cases, the law creates different categories of citizens with regard to privileges of multiple citizenship, distinguishing between original (e.g. by birth) and non-original (e.g. naturalised) citizens.

In this chapter, I proposed to switch from a philosophy of naturalisation that is based on socio-cultural integration to a philosophy that embodies a principle of reciprocal democratic recognition. By distinguishing between nationality and citizenship, I aimed at revitalising the concept of political membership (citizenship) without jeopardising individual interests of legal protection. In this view, naturalisation appears as a process of reciprocal recognition between citizens and would-be citizens. Whereas citizens reiterate their commitment to openness by acknowledging the claims of membership of would-be citizen, the would-be citizens commit themself to becoming full member of the political community.

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6. PREFERENTIAL ADMISSION

Citizenship regulations often include provisions of facilitated acquisition of citizenship for specific categories of persons who are considered to have special ties with the state. Such preferential admission to citizenship is justified on grounds as various as: special vulnerability (e.g. stateless people, refugees), exceptional contribution to the state, international reciprocity, cultural-linguistic affinity, and ethno-national identity.

For the purpose of this thesis, I distinguish between two categories of special foreigners: (a) a narrower category of *private relatives*— that includes non-citizens who have family relationships with citizens,[301] and (b) a broader category of *public relatives*— that includes non-citizens who are perceived as significantly related to the community or the state, although they may not be privately related to any particular citizen. The first category of relatives has received considerable attention both in theory and practice. Family reunification has been one of the major channels of immigration in Western Europe after the end of guest worker programs in the 1970s. Human rights standards have played a significant role in circumventing state discretion in this area.[302] Although such standards do not strictly apply to acquisition of citizenship, there is a large consensus that members of citizens' families should have preferential access to citizenship.[303] The European Convention on Nationality, for example, requires that states grant preferential admission to citizenship to spouses of citizens.

In this chapter, I focus on facilitated admission to citizenship for public relatives. What justifies preferential treatment in these cases is not a private/family relationship between particular citizens and non-citizens but broader political, cultural or ethno-national ties between non-citizens and the community or the state. Firstly, I identify provisions of facilitated admission to citizenship for public relatives in the EU27 countries. Secondly, I discuss several major justifications for preferential admission to citizenship. Finally, I focus on one important aspect of preferential admission, namely extra-territorial citizenship.

[301] Strictly speaking, this category should also include children of citizens. *See* Chapter 4.
[302] These standards include, for example, the right to family and private live stipulated by Art 8 of European Convention. *See* Chapter 3, especially Section 3.1.2, *infra*.
[303] One of the important changes inspired by human rights standards was, in fact, the removal of the automatic link between family and citizenship status that implied automatic transfer of citizenship from husband to foreign wife. It is legitimate, however, to maintain rules of preferential admission to citizenship for spouses of citizens, although recently we witnessed a trend towards hardening rules of preferential admission for spouses in line with states' efforts to curb immigration and combat marriages of convenience— marriages for the sake of circumventing immigration control and general naturalisation requirements.

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6.1 Rules of Preferential Admission in EU27

In this section, I survey rules of preferential admission to citizenship that are currently enforced by 27 EU countries. I focus on rules that target public relatives. I do not look into rules of preferential admission strictly based on family ties between non-citizens and citizens (spouses, children, et cetera). I also do not cover all types of facilitated admission, such as those based on special achievement or contribution to the state, or those based on the special status of vulnerability of applicants.

In order to classify rules of facilitated admission to citizenship for public relatives, I distinguish between two categories: (1) political relatives; and (2) ethno-cultural relatives. In this framework, facilitated access to citizenship is based on a *political* link when the trigger for facilitations is the possession, at present or at some point in time, of a particular status of citizenship. This category includes: (a) former citizens of the state and descendants; and (b) citizens of particular states. Facilitated access to citizenship is based on an *ethno-cultural* link when the actual or previous possession of a particular status of citizenship is not required. This category includes: (c) persons who share certain cultural features with the members of the political community/majority; and (d) members of an original ethno-national community.

Table 1: Typology of Public Relatives

Category	Sub-category	Relevant link
(1) Political Relatives	(a) Former citizens and descendants	Possession of formal citizenship of the state
	(b) Citizens of particular states	Possession of formal citizenship of particular states
(2) Ethno-Cultural Relatives	(c) Persons who share discrete ethno-cultural features with the members of the political community/majority	Possession of discrete cultural features (language, religion)
	(d) Members of ethno-national community	Membership in ethno-national community

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The difference between the two subcategories of ethno-cultural relatives is that in the first case (c), what matters is the possession of relevant but discrete ethno-cultural features such as language and religion, while in the second case (d) the emphasis falls on ascribed or self-asserted membership in a relevant ethnic or national community. In case (d), discrete ethno-cultural features may play a role – as part of the assessment of ethno-national membership – but, unlike in case (c), these features alone are insufficient to trigger preferential admission.

The distinction between political and ethno-cultural relatives is not perfect. It is often the case that political relatives former are welcomed as ethno-cultural relatives. Similarly, ethno-cultural relatives are often honoured as political fellows in an imagined political community – a community that ceased to exist or simply failed to come about. Two further issues put stress on this distinction. First, states may allow the indefinite and remote transmission of the link of citizenship beyond the point where the concept of *political* makes sense. Second, states may also restore links of citizenship in order to reconstruct out-dated boundaries of statehood—for example, by reaching out to people living in lost territories.

6.1.1 Former Citizens and Descendants

It is common that countries offer facilitated access to citizenship to persons who have held, at some point in time, the status of formal citizenship of the state.[304] Important distinctions are usually made with regard to circumstances in which the political connection was severed. If the status of citizenship was lost due to unilateral and undue deprivation – such as an act of political persecution – reacquisition is granted as a matter of restitution or redress. In cases where citizenship status was lost due to individual renunciation or through legitimate ways of loss, the offer of facilitated re-acquisition is an invitation to reconnect with the political community.

In our survey, some states provide for the restoration of citizenship to persons who lost their citizenship due to the application of certain rules that no longer apply. These provisions mainly concern persons who lost citizenship due to marriage (Austria, France, Greece, Italy, Luxembourg, the Netherlands, and Portugal), persons who lost citizenship because of the prohibition of dual nationality (France, Portugal, Slovakia United Kingdom, Finland,[305]

[304] The most straightforward type of political link is the possession of formal citizenship. In exceptional cases, however, political connection can also be demonstrated by other forms of legal membership, such as (former) subjection to the monarch.
[305] Finland offered such reacquisition as transitory measure between 2003- 2008.

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Italy,[306] and Sweden[307]), and persons who lost citizenship due to prolonged residence abroad (Finland, France, the Netherlands).

Many countries have legal provisions concerning the restitution of citizenship as a way of undoing wrongs of the past. These countries are: Austria,[308] Bulgaria,[309] the Czech Republic,[310] Estonia,[311] Germany,[312] Greece,[313] Hungary,[314] Latvia,[315] Lithuania,[316] Poland,[317] Romania,[318] Slovenia,[319] and Spain.[320]

In several cases, the restitution of citizenship has played a crucial role in the determination of the citizenry of new or restored states. While in post-independence Lithuania most of the permanent residents were granted citizenship by default (Kūris, 2010), the newly-restored states of Latvia and Estonia granted citizenship only to persons (and descendants) who have held the citizenship of their pre-Soviet states – thus creating a great number of non-citizen residents, many of them stateless (Krūma, 2010; Järve and Poleshchuk, 2010).

Several countries have used citizenship rules in order to counteract the effects of imposed territorial changes. For example, the Romanian policy of restoration of citizenship to former citizens who "were stripped of Romanian citizenship against their will or for reasons beyond their control, and their descendants" can be interpreted as a nationalist attempt to re-create the citizenry of "Greater Romania", a state which included the historical provinces of Bessarabia and Northern Bukovina that were lost in 1940 (Iordachi, 2009: 177). This is despite the fact

[306] Italy offered such reacquisition as a transitory measure between 1992- 1997.
[307] Sweden offered such reacquisition as a transitory measure between 2001- 2003.
[308] Austria has provisions of facilitated reacquisition of citizenship for survivors of the Holocaust and for political emigrants of the Third Reich.
[309] Bulgaria has provisions of facilitated reacquisition of citizenship for persons deprived of citizenship by decrees during the period 1944 to1947.
[310] Czech Republic has provisions of facilitated reacquisition of citizenship for persons deprived of citizenship during the communist regime.
[311] Estonia restored citizenship to all persons who possessed Estonian citizenship before 16 June 1940 and their children.
[312] Germany has provisions of facilitated reacquisition of citizenship for former nationals persecuted during Nazi rule.
[313] Greece has provisions of facilitated reacquisition of citizenship for refugees during the Civil War.
[314] Hungary has provisions of facilitated reacquisition of citizenship for persons deprived of citizenship between 1945 and 1990.
[315] Latvia restored citizenship to all persons who possessed Latvian citizenship before 1940.
[316] Lithuania restored citizenship to all persons deported or who fled after 1940, and descendants.
[317] Poland has provisions of facilitated reacquisition of citizenship for exiles from several republics of the former Soviet Union.
[318] Romania has provisions of facilitated reacquisition of citizenship for persons who were deprived of citizenship by the communist regime and, generally, for persons who lost Romanian citizenship against their will.
[319] Slovenia has provisions of facilitated reacquisition of citizenship for certain persons deprived of Yugoslavian citizens.
[320] Spain has provisions of facilitated reacquisition of citizenship for persons persecuted during the Civil War.

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that, technically, the law concerns all former citizens irrespective of their ethnicity.[321] Recently, Hungary has amended its citizenship law in order to make possible the grant of citizenship to former Hungarian citizens (and descendants) who reside and hold the citizenship of several neighbouring states (Bauböck, 2010b). References to defunct states for the purpose of restoration of citizenship are also present in the citizenship laws of Austria, the Czech Republic, Germany, Italy, Slovenia, and Slovakia.

What is worrying is the fact that several countries maintain rules that restore citizenship to the descendants of descendants without a stopping point (Greece, Ireland, Italy, and Luxembourg) while others maintain very broad limits (Lithuania, Poland, Portugal, Romania, and Spain). An Italian ministerial circular of 1991 provided for the restoration of citizenship to descendants of emigrants, provided their ancestors did not renounce voluntarily Italian citizenship. This led to the odd situation in which "even a person who can prove descent from an Italian who emigrated before the unification of Italy in 1861 is entitled to Italian nationality, provided that the Italian ancestor was alive at the time of the unification" (Margiotta and Vonk, 2010: 8).[322] In the case of Romania, the legislator has recently (2009) extended the pool of eligible applicants for the restitution of citizenship on grounds of unwilled loss to third-degree descendants of former citizens[323] (Iordachi, 2010).

Several states make a distinction between former citizens according to their ethnic origin. Ethnic origin is assessed directly – by ethnic identification, or indirectly – by making references to particular territories or by distinguishing between different types of (former) citizens. Greece grants preferential admission to citizenship to former citizens who are *homogenis* – Greek ethnics. Hungary offers facilitated admission for former citizens who declare themselves to be ethnic Hungarians. Lithuania has special provisions of reacquisition for former citizens of Lithuanian origin. Poland grants special admission to former citizens who demonstrate Polish ethno-national consciousness. Privileged re-acquisition of citizenship is reserved only for former citizens who had been citizens *by birth* or *by origin* in the following countries: Denmark, Italy, Ireland, Lithuania, Luxembourg, Malta, Slovenia, Spain, and Sweden. The Spanish Historical Memory Act of 2007 provided for the restoration of

[321] In 1930 the various ethnic and religious minorities counted for 28.1 per cent of the total population of Romania (Iordachi, 2009: 180).
[322] Between 1998-2004, 537,821 persons re-acquired Italian citizenship in this way. Between 1998-2007 the estimates are 786,000. From 60 million people of Italian descent living around the world at least 30 million could qualify for preferential admission to Italian citizenship (Margiotta and Vonk, 2010).
[323] This reform "coincided" with an unprecedented number of naturalisations— over 11,000 between September 2007 and April 2009 (Iordachi, 2010).

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citizenship to individuals whose ancestors (up to three generations) were Spaniards "by origin" and who were forced to renounce Spanish nationality as a consequence of exile (Rubio-Marín and Sobrino, 2010: 27). The Irish law provides that former citizens who were citizens by birth – born in Ireland and Northern Ireland – and who have renounced Irish citizenship could reacquire their citizenship by declaration.[324] It is estimated that around 30 million Americans could claim "Irish ancestry of some kind" (Honohan, 2010: 817). The 1991 Lithuanian citizenship law provided that descendants of persons who were Lithuanian citizens prior to 15 June 1940 can re-acquire citizenship provided that they are not citizens of any other state and that they or their ancestors did not repatriate. This indirectly excluded from the restoration of citizenship those former citizens of non-Lithuanian ethnic origin who emigrated to their ethnic homeland after 1940 (Kūris, 2010: 22).[325]

What does preferential admission entail? If we think of re-acquisition of citizenship as a special form of naturalisation, we can distinguish between two major types of privileges that are usually included in the offer of facilitated admission: (a) non-residential citizenship, and (b) dual citizenship. The first privilege consists in the possibility to re-acquire citizenship from abroad and without the condition of taking up residence in the country. Forms of non-residential admission to citizenship are available in several countries. These countries are: Austria, Bulgaria, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, and Spain. The second privilege consists in the permission to maintain dual citizenship in cases where renunciation of another citizenship is, as a general rule, demanded by the naturalisation procedure. In our survey, Austria, Lithuania, and Spain exempt some categories of persons who re-acquire citizenship from the requirement of renunciation of another citizenship.

6.1.2 Citizens of Particular States

The second major category of political relatives concerns citizens of particular states. Like in the case of former citizens, what triggers preferential admission is the possession of a particular status of formal citizenship. But unlike in the case of former citizens, privileged access to citizenship is offered indiscriminately to all citizens of particular states and not to particular individuals. Rules of this type may derive from formal inter-state agreements or from unilateral decisions of states. Despite their contractual outlook, these rules are often

[324] Irish authorities retain discretionary powers in restoring citizenship.
[325] This specific condition of non-repatriation was removed in 2006 after the Lithuanian Constitutional Court ruled it unconstitutional.

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based on various forms of solidarity and are meant to reinforce particular political and cultural ties.

Facilitations for political relatives are common in countries with colonial history. Despite successive redefinitions of citizenries following the independence of colonies, most ex-colonial states maintain residual provisions concerning preferential admission to citizenship for citizens of former colonial territories.

In the UK, the British Nationality Act of 1948 created the category of Citizens of the United Kingdom and Colonies. In response to increased immigration from ex-colonies, the 1971 Immigration Act introduced a distinction between citizens of Old and New Commonwealth and established that only *patrials* – persons born in the UK or persons whose parents or grandparents had been born in the UK – had the right to immigrate into the UK. The rule of *patriality* effectively divided subjects between expatriates and their descendants and the rest, along a "dividing line […] of race" (Sawyer, 2010: 9).

France has also taken measures to restrict access to citizenship to people from former colonies. In 1993, the notion of the "French territory" used in the implementation of the rule of ius soli was redefined in order to remove from its scope the territories of former colonies. In 2006, the exemption of residence for citizens from former French colonial territories was also discarded, which put people from former colonies on equal footing with all other candidates for naturalisation (Bertossi, 2010: 24).

In the 1950s, Spain concluded a series of treaties on dual citizenship with many Latin American countries. Although these treaties did not establish dual citizenship, they permitted citizens to switch between Spanish and the other citizenship (of the Latin American state concerned) when changing residence (Rubio-Marín and Sobrino, 2010: 6). Following the decision by the European Court of Justice in the *Micheletti case,*[326] Spain renegotiated these agreements in order to allow for proper dual citizenship. Apart from these arrangements, Spain exempts citizens of Latin American countries[327] from the renunciation requirement when they apply for naturalisation.

[326] See section 3.4.1, *infra*.
[327] These countries are: Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Paraguay, Peru and Uruguay. In addition, this rule applies to citizens from Andorra, the Philippines and Equatorial Guinea, and Portugal.

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In Portugal, the principle of maintaining mutual privileged ties with Lusophone countries[328] is one of the pillars of Portuguese Foreign Policy that is entrenched in the Constitution (Piçarra and Gil, 2010: 29). Citizens of these countries enjoy a wide range of special rights in Portugal, such as local and national voting rights and access to certain professions. For example, if they decide to apply for naturalisation, they face lower hurdles.[329]

Examples of privileged access for political relatives are available also outside the post-colonial context. They often appear in the framework of regional projects of cooperation or integration. The Nordic European states[330] have long worked to coordinate their citizenship policies. In Denmark, former citizens,[331] can reacquire Danish citizenship by declaration if they are citizens of another Nordic state, re-establish residence in Denmark and renounce the other citizenship. A person who has lost his or her Swedish citizenship and has thereafter continuously been a citizen of a Nordic country may recover Swedish citizenship by notification if he or she takes up residence in Sweden. Similarly, a person who, after losing Finnish citizenship, has become citizen of another Nordic country can reacquire Finnish citizenship by declaration after taking up residence in Finland**.** Denmark, Finland and Sweden restore citizenship to former citizens who have lost citizenship but acquired another Nordic citizenship. Finally, several (EU) countries in our survey offer facilitations in the acquisition of citizenship for citizens of other EU states. These countries are: Austria, Germany, Hungary, Italy, Romania, and Slovenia. These facilitations consist mainly in reducing residential requirements and tolerating dual citizenship.

6.1.3 Ethno-Cultural Relatives

The category of ethno-cultural relatives refers to persons who are perceived as related to the state or the community despite the fact that they or their ancestors have not held the citizenship of the state. What qualifies these people for privileged access is the possession of certain ethno-cultural traits, such as language, religion, ethnicity, et cetera.

Quite a few EU countries provide for facilitated acquisition of citizenship based on ethno-cultural traits. While cultural and linguistic features are the qualifying criteria for facilitations

[328] The cooperation between Portuguese speaking countries was formalized in 1996 with the establishment of the Community of Portuguese Language Countries. The Community includes Brazil, Angola, Cape Verde, Guinea-Bissau, Mozambique, Portugal, and São Tomé and Príncipe. East Timor joined in 2002.
[329] Citizens of Lusophone countries have to comply with reduced residential requirement, they do not have to pass a language examination and they do not have to prove effective connection to the Portuguese community.
[330] Denmark, Finland, Iceland, Norway and Sweden.
[331] This rule concerns only Danish (former) citizens who were citizens by birth.

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in Denmark, France, and Germany, references to ethnicity— often in combination with culture and descent – are made in many other cases. Several laws target specific groups or territories. This is the case in Denmark,[332] France,[333] Germany,[334] Greece,[335] Italy,[336] Latvia,[337] Poland,[338] and Slovenia.[339] Special programmes for the repatriation of co-ethnics have been put in place in Germany (for *Aussiedler/Spätaussiedler*), Greece (for Pontic Greeks), and Poland (for Soviet-era deportees).

In the aftermath of the Second Word War, Germany opened its gates to welcome ethnic Germans who fled Eastern Europe. According to the Basic Law (Art 116), and the Federal Expellees Act of 1953, ethnic Germans expelled as a result of post-war measures, including their relatives and descendants, are entitled to repatriation and privileged acquisition of German nationality. Amid criticism about the relevance of these provisions in the post-Cold-War world, Germany has gradually changed its repatriation policy. Following several reforms in 1993, 2000 and 2005, the repatriation policy was redesigned in order to include immigration quotas and stricter entry requirements for claimants – language examination and proof of descent.[340] The only major facilitation that remained is the privilege of dual citizenship (Hailbronner, 2010: 21). Apart from expellees, Germany also granted preferential citizenship to co-ethnics from Polish Silesia. These people were allowed to take up German citizenship without taking up residence in the country and without renouncing Polish citizenship (Kovács and Tóth, 2009: 163).

[332] Denmark offers facilitated admission to persons who were born in the German region of Southern Schleswig and who are "Danish-minded."
[333] France offers facilitated admission to citizens of francophone states, whose primary education was in French.
[334] Germany offers facilitated admission to citizens of Liechtenstein, Austria or other areas in Europe where German is an official or colloquial language. Following the widespread persecution of Germans after the Second World War, Germany has adopted a comprehensive policy of resettlement of ethnic Germans from Eastern Europe.
[335] Greece offers citizens facilitated admission to Pontic Greeks from the Soviet Union, who left Turkish territory before 1924.
[336] Italy offers citizens facilitated admission to ethnic Italians who are residents in the territories assigned to the former Yugoslavia after the 1947 treaty and descendants. In 2000 Italy granted nationality by simple declaration to Italians by origin residing in areas that in the past belonged to the Austro-Hungarian Empire. In 2006 the right to nationality by declaration was granted to people of Italian descent from Slovenia and Croatia (Joppke 2008: 37-38).
[337] Latvia offers citizens facilitated admission to Livs– an indigenous group of Finno-Ugric descent living near the Baltic Sea.
[338] Poland offers citizens facilitated admission to Polish exiles from certain republics of the former Soviet Union. The restoration of citizenship for these people is part of a comprehensive repatriation policy.
[339] Slovenia offers citizens facilitated admission to persons belonging to Slovene minorities in neighbouring countries.
[340] This policy change resulted in a dramatic drop in the number of ethnic Germans who repatriated. In 2006 only 7 626 persons from the former Soviet Union were accepted under these provisions, which contrasts sharply with 35 369 persons in 2005 (Hailbronner, 2010: 18).

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Greek citizenship law distinguishes between two categories of persons: persons of Greek Orthodox descent or *homogenis,* and persons of other descent or *allogenis*. The law contains provisions for automatic acquisition of citizenship by ethnic descendants of Greek citizens *and Greek ethnics* who reside or have resided in particular territories. If descent from a Greek citizen or attestation of residence cannot be proven, applicants may still be eligible for facilitated naturalisation if they can "prove to the competent Greek authorities both that they are of Greek descent and that they 'behave as Greeks'"[341] (Christopoulos, 2010: 1).

A combination of repatriation policy and entitlement to citizenship is used in Poland in order to deal with certain Soviet-era deportations. The Polish Repatriation Act of 2000 entitled former Polish citizens and *ethnic Poles* who were forcefully relocated in several Asian Soviet Republics to immigration and access to citizenship. Apart from descent and territorial origin, the law also asks applicants to prove "attachment to Polish culture" and commitment to Polish language, traditions and customs (Górny and Pudzianowska, 2010: 10).

Several countries maintain rules of facilitated acquisition of citizenship by ethno-cultural relatives without territorial qualifiers. This is the case in Bulgaria,[342] Ireland,[343] Lithuania,[344] Portugal,[345] and Slovenia.[346] For example, the Bulgarian Constitution of 1991 provides that "a person of Bulgarian origin shall acquire Bulgarian citizenship through a facilitated procedure". According to Bulgarian Citizenship Law, a person "of Bulgarian origin" is a person "whose ascendants (or at least one of these) are Bulgarian". We understand that "a person of Bulgarian origin" ("a Bulgarian") is a person who by his or her origin is of Bulgarian "blood" (Smilov, 2010: 11). The main purpose of this policy seems to 'symbolically restore the Bulgarian Exarchate through some modern surrogate, which would institutionalise links with the ethnic Bulgarians abroad'" (Smilov, 2010: 21).

In certain cases, ethno-cultural link is proven by descent from persons who were born or resided on the territory of the state for some time. In Cyprus special admission if offered to descendants of persons born in the country to resident parents. In Luxembourg facilitated acquisition of citizenship is reserved for persons born in the Grand Duchy of Luxembourg

[341] While the number of regular naturalisations is extremely low (fewer than 15,000 in the last 25 years) the numbers of *homogenis* that acquired Greek nationality is estimated at several hundreds of thousands (Christopoulos, 2010: 2)
[342] Bulgaria offers facilitated admission to persons *of Bulgarian origin*.
[343] Ireland offers facilitated admission to persons *of Irish descent or association.* It is estimated that around 30 million Americans could claim "Irish ancestry of some kind" (Honohan, 2010: 817).
[344] Lithuania offers facilitated admission to persons *of Lithuanian origin.*
[345] Portugal offers facilitated admission to persons with *Portuguese ancestry* or members of *Portuguese communities* abroad.
[346] Slovenia offers facilitated admission to persons of *Slovenian descent.*

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before 1 January 1920 and their descendants. In Malta (non-resident) grandchildren of persons born in Malta have preferential access to citizenship.

With regard to the nature of privileges offered to ethno-cultural relatives, two types of exceptions stand out, namely the exception from any residence requirement, and the exception from any renunciation requirement. Eight states in our survey grant citizenship to certain categories of ethno-cultural relatives without requiring them to take up residence in the country. These countries are: Bulgaria, Greece, Ireland, Italy, Lithuania, Portugal, Slovenia, and Spain. Exceptions from the obligation to renounce original citizenship are provided for in Bulgaria, Lithuania, Slovenia, and Germany. In Lithuania the exception from enforcing the prohibition of dual citizenship for descendants of Lithuanians (up to three generations) is upheld even against a ruling of the constitutional court (Kūris, 2010: 38).

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6.2 Ethno-Cultural Preferentialism

Christian Joppke has argued that, in the regulation of citizenship, "the only legitimate group distinction left is that between 'citizens', who have a right to enter and cannot be expelled, and 'aliens', who have no such rights, and who are subject to a state's 'immigration' or 'foreigners' policies" (2005a: 49). However, in our survey we found that citizenship rules further differentiate between categories of citizens and foreigners.[347] Sometimes certain categories of citizens enjoy more privileges than others with regard to citizenship rights[348] and the security or "stickiness" of citizenship status.[349] Equally, certain categories of foreigners often enjoy more privileges than others in admission to citizenship.[350]

Rules of facilitated admission to citizenship based on "affinity" may be seen as "grounded in ethnic conceptions of nationality and sustained by traditions of emigration and recent histories of immigration, pressure from expatriate communities and state policies to support or repatriate ethnic diasporas" (Bauböck et al., 2006a: 34). Of all rules of admission discussed so far, rules of preferential admission for public relatives are the most suitable ones to be labelled "ethno-cultural". In some cases, the law refers directly to ethnicity, ethnic origin or ethno-national identity. In other cases, the link is less straightforward and we may debate whether we deal with ethno-nationalist rules or not.

My primary aim here is not to reach a definite answer as to the appropriate labelling of these rules of admission. I am interested in identifying and analysing possible justifications for rules of preferential admission, regardless of whether they fit partially or perfectly the ethno-cultural template. In this section, I discuss three general justifications: (1) political self-definition, (2) duties of justice, and (3) national survival.

[347] Joppke may argue that these distinctions are not group-based but individual. But this is not always the case—take categories such as "citizens by birth" and co-ethnics. Joppke may also argue that these distinctions do not amount to discrimination, but to mere preference. I will address this point in this chapter.
[348] For example, in some countries access to certain public offices is reserved to citizens by birth or to mono-citizens.
[349] This may include protection against deprivation, privileges of dual citizenship or non-residential citizenship, rights to transmit citizenship to descendants.
[350] This may entail fast-track admission procedures, exemptions from general requirements, privileges of dual citizenship or non-residential citizenship.

6.2.1 Political Self-Definition

According to positive norms, states have a near-absolute right to define and implement rules of nationality.[351] A recent episode in the Hungarian co-ethnic drama shows the limits of these positive norms when it comes to preferential admission. In 2011 Hungary amended its nationality law in order to allow former Hungarian nationals (and descendants) living in the neighbouring states to acquire Hungarian nationality without moving to Hungary. In order to prevent a considerable part of its population – the Hungarian minority concentrated in the border region – from acquiring Hungarian passports, Slovakia outlawed dual nationality and threatened to withdraw nationality from Slovak nationals who acquire another nationality (Bauböck, 2010b). Both, the Hungarian rule of granting nationality to non-residents and the Slovak rule of withdrawing nationality from dual nationals are compatible with international norms. The 1997 Convention, for example, does not prohibit the granting or restoring of nationality to non-residents and enlists the acquisition of a foreign nationality as a valid ground for withdrawal of nationality (Art 7 § 1a).

International law does not *confer* upon the state a right to define its boundaries; it merely confirms and constrains such a right, which is derived from more substantive moral claims. One such moral claim is that states are political communities that enjoy a fundamental moral right to self-determination. According to one reading, the right to self-determination implies that states/peoples can adopt *whatever* citizenship rule they see fit, including preferential rules for particular categories of people. Peter Spiro embraces this argument when he comments that "if the Hungarian people want to define themselves to include those living abroad of Hungarian ancestry, that is Hungary's business" (2010: 7). Spiro invokes Hungarians' right of freedom of association and the right of Hungary to actuate ties with non-residents in order "to better reflect organic social memberships." Others may also argue that preferential admission could be grounded in pragmatic concerns with social integration and prospects of assimilation.

Unfortunately (or fortunately), arguments about freedom of association, natural membership or social integration cannot support a blanket right of states to exclude. Apart from the fact that they cannot justify the original process of boundary making, these arguments must account for several major normative constraints concerning the reproduction of boundaries. In Chapter 2, I argued against the discretionary right of states to self-definition. I asserted that boundaries of political communities gain legitimacy only insofar as admission to membership

[351] *See* Chapter 3.

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is open to all. In the context of preferential admission, I see two major constraints on the right of states to self-definition. The first constraint is related to non-discrimination. The second constraint concerns the proper boundaries of democratic membership.

It is often argued that preferential admission of some does not account to an explicit exclusion of others. In practice, however, hardening the rules of naturalisation for ordinary immigrants while facilitating the admission of "special" foreigners has strong discriminatory effects. My proposal is to shift the burden of justification from people to states. Rather than asking people/foreigners to prove that they are not discriminated against, we should ask states to give sound justifications as to why they prefer some foreigners to others. A simple assertion of a right to self-definition does not suffice.

Apart from a concern with non-discrimination, we should also be worried about the impact of preferential admission to citizenship on democratic membership. If states have duties to include certain people into the political community, they may also have duties to exclude others or, rather, a duty to refrain from including people without proper justification. In this view, preferential admission to citizenship may be problematic even if it does not breach the norm of non-discrimination.[352]

6.2.2 Duties of Justice

The literature on admission is rich in accounts proposing principles of just inclusion. In this section, I focus upon several moral claims of special admission that are based upon duties of justice.

It is common that states offer preferential admission to citizenship to individuals who have been wrongfully deprived of their citizenship status. This is perhaps the most powerful and straightforward claim of restitution of citizenship grounded in considerations of justice. Claims of restitution do not generally challenge the idea of boundaries. They are concerned with the reinstatement of an ex-ante status of membership, regardless of the initial mode of acquisition or actual requirements for regular admission. The relevant factor is the wrongfulness or inappropriateness of the loss of status. As a general rule, it seems just to have citizenship restored if you have been wrongly deprived of it. It is a "a matter of rectificatory justice" (Bauböck, 2007a: 2436). For example, a post-authoritarian state should rightly adopt

[352] In the next section of this chapter (6.3), I discuss the issue of proper democratic boundaries in light of challenges posed by external citizenship.

citizenship rules that restore citizenship to those former citizens who have been deprived of their citizenship on ideological grounds.[353]

It is often the case, however, that rules of restitution of citizenship are contested or contestable. Rules may be contested, for example, when they make references to obsolete polities – such as imperial or colonial states – or when entitlements are extended across several generations. Should former citizens/subjects of colonial empires be granted citizenship in post-imperial states? Is this a matter of restitution? Should descendants of former citizens who live outside the borders of the state be reinstated as citizens in the new state? These questions reveal the limits of the relatively uncomplicated principle of just restitution of citizenship.

A version of the restitution argument is the claim of remedy for past subjection. This claim invokes the special responsibilities of states towards people whom they have affected or coerced in a significant way. According to this argument, privileged admission to citizenship should be granted to people as a remedial action for past domination. Focusing on the identity aspect of the fact of being subjected to state power, Rogers Smith argues that denying membership to those who were coerced is wrong because without such membership former subjects "may find it impossible to lead lives of dignity and freedom" (2008: 145). According to Smith's Principle of Constituted Identities, inclusion is demanded in all cases where "persons' notions of who they are and of what gives their lives ethical worth – their sense of values, purposes, affiliations, and aspirations – have been coercively shaped by a community's laws, policies, and institutions" (2010: 282). The innovation here is the fact that claims of inclusion are triggered by identity-related interests and not by material interests. [354] The inclusion is owed to "all persons whose identities have been pervasively constituted, even if not wholly determined by democracy's coercively enforced governmental measures [emphasis omitted] (Smith, 2011: 13). Smith refers explicitly to cases of extensive colonial governance. He insists, however, that membership should be made available only to persons who "wish to be citizens." The strategies of some ex-colonial states to carefully redraw boundaries of citizenship in order to exclude former subjects from colonies has been rightly criticised as a form of "institutionalized racial discrimination" (Margiotta and Vonk, 2010: 8).

I am generally suspicious about arguments that conceive of political membership in terms of remedy. While a principle of just restitution of citizenship status is theoretically sound,

[353] Such rules exist in many countries in our survey. *See* Section 6.1.1*, infra.*
[354] Smith admits that the principle is not intended to offer "the only source of obligations to include" (2011: 14).

suggestions of using admission to political membership in order to compensate for *something else* seem problematic. It may be the case that states have duties of justice towards people who are affected by state actions, but admission to citizenship should not be seen as a general method of discharging such duties. On the other hand, the status of nationality should be granted on grounds of substantial subjection to state power. This makes sense in the case of long-term residents, but I am skeptical towards arguments that try to extend the category of substantial subjection to include people outside the state territory.

The claims of former citizens and their descendants are, to some extent, easier than those of other categories of public relatives because they generally rely on an identifiable link of formal membership. Although this alone does not automatically provide evidence for substantial subjection or genuine commitment, it can function as an anchor for claims of admission. The questions that arise are: (a) for how long should restoration be available; and (b) what kind of membership is restored?

As in the case of ius sanguinis outside the territory of the state, the endless transmission of entitlement to re-acquisition of citizenship is problematic. Andrei Stavila asks whether the transmission of citizenship is ”endless” “when we are talking about second and third generations” (2010: 11). The answer is certainly contextual. Referring to Hungary’s policy of restoring citizenship, Joachim Blatter answers that “90 years usually would count as ‘over generations’ but we have to take into account the fact that the boundary moved and not the individuals” (2010: 14). I agree that theory alone will not give us a satisfactory answer to such questions. However, I suggest softening this ambiguity by turning to the question about the nature of the entitlement that the restoration of membership entails.

The controversy not only resides in the offer of preferential admission but also in the specific kind of membership that is offered. To refer back to the Hungarian case, the issue at stake is not the facilitated naturalisation of former Hungarian citizens, but the privileged restoration of citizenship *from abroad* and *while abroad*. More recently, Hungary has also changed its electoral law in order to allow non-resident Hungarian citizens to vote in national elections. In this case, the problem is not just about the merits or scope of the restitution of citizenship, but primarily about the appropriate boundaries of democratic membership. In the last section of this chapter, I deal specifically with the issue of external citizenship. For now, I put forward the suggestion that the restitution of status of full citizenship should concern strictly former citizens who were abusively deprived of citizenship status – regardless of whether they are residents were not. This may also apply to their direct descendants who are residents in the

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country. Non-resident descendants of former citizens may be offered the status of nationality (without political membership), which they may turn into a status of full membership if they take up residence in the country and commit themselves to political membership. Although the generational scope is theoretically indeterminate, I generally agree with limiting the right to exceptionally transmit the entitlement of nationality to three generations.

Without relying on a blanket assertion of the right of states to self-definition, claims of restitution or preferential admission to citizenship based on moral duties of inclusion offer substantive grounds for distinguishing between categories of non-citizens for the purpose of admission. If successful, these claims escape the charge of discrimination. However, they still face problems regarding the appropriate boundaries of political membership. My main point is that we can diminish some problematic implications of these claims by stricter control of access to full political membership and by recognising such status only to individuals who actually commit themselves to political membership.

6.2.3 National Survival

Nationalists argue that nations are important moral communities and that we should care for their survival. Liberal versions of nationalism celebrate fundamental individual interests in national culture and identity.[355] Promoting strong national identities may also be instrumental for preserving strong democratic and welfare institutions. Although I agree that culture and identity are important individual interests and that politics cannot happen in a cultural vacuum, I am concerned, however, with the ways in which states undertake to promote and reproduce national cultures.

There are certain nationalist arguments that fall completely outside liberalism. One example is the claim that the national state has a natural or supra-natural mandate to act in a nationalist manner. For example, according to David Ben Gurion – Israel's first Prime Minister – the right of all Jews to immigrate to the Land of Israel[356] "is not *granted* by the authority of the state, but rather, is a *natural right* that exists prior to the establishment of the State of Israel" [emphases in original] (Ernst, 2009: 566). This statement seems to me to be a 'conversation stopper'. There is little we can hope to achieve by using theory to engage with such claims. My attention goes to more earthly arguments.

[355] *See* Chapter 2, section 2.3.
[356] Israel's Law of Return (1950) grants to all Jews the right to immigrate to Israel. Israel's Nationality Law (1952) grants citizenship to every immigrant within the scope of the Law of Return.

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One especially powerful nationalist argument concerns national survival. This is employed when the nation appears weak and vulnerable and when there is an imperative need for remedial action. In this case, the state is mandated "to redress previous discrimination or oppression suffered by the core nation" by taking actions "to promote its language, cultural flourishing, demographic robustness, economic welfare, or political hegemony" (Brubaker, 2008: 18). The case of the Baltic republics is instructive in this respect. Estonia and Latvia proclaimed their independence from the Soviet Union by invoking the "continuity" of their pre-soviet statehoods. Soon after, nationalising policies were put in place in order to regain control over state institutions, hence reversing half a century of Russian "occupation." The pre-Soviet constitutions and nationality laws were reinstated. The new electoral laws have been designed to secure the national control over the political bodies of the state. Difficult language tests set a bar to access to nationality for non-native speakers. This led to the denationalising and disenfranchising of more than 1/3 of the resident populations. The special claim of justice invoked by the two states appeased external criticism and forced international actors to concentrate on side issues, such as the rights of stateless children (Gelazis, 2000).

It is hard to ignore the claims of Latvians and Estonians to regain control over their own polity. However, I think that the debate is wrongly and unnecessarily construed in nationalist terms. It is legitimate for members of a polity to be concerned about the commitment to membership of fellow members or candidates to membership. This is why my principle of democratic recognition puts emphasis on commitment to membership. However, membership in an ethno-national community is not evidence for the existence or the lack of such political commitment. In the case of non-co-ethnic settlers in Soviet Baltic republics, what matters is not their ethnicity but their willingness to share political membership on reciprocal terms. The lack of skills in the local languages may generate suspicions about such willingness to commit. But the major issue in the debate about membership is the fact that these settlers are seen as "occupiers." They seem to have immigrated without caring for or even to the detriment of the interests of the local republican polities. It can be disputed that all or even that the great majority of these settlers were opposed to self-government of the republics. Most of them were probably simple immigrants in search for better economic opportunities. The new rulers of the independent states are justified in denying membership to those who have acted against the interests of the republican polities,[357] but mere immigration into the territory of the pre-independent republics cannot be seen as obstructing such interests.

[357] Such breaches of collective interest are always difficult to define.

Subjection to the political power of the (new) states alone should have triggered the recognition of a status of fundamental legal protection. In the end, these states have recognised a special status of non-citizen for those who did not qualify for full citizenship. This comes close to my proposal for granting the status of nationality to those significantly subjected to state power. The problem remains with the fact that the transition from the status of special protection to the status of full citizenship is still a complicated process, which goes beyond a reasonable interpretation of a principle of democratic reciprocal recognition.

In the Baltic cases, the remedial claim to membership went beyond a perfectly legitimate right to recover republican citizenship for all citizens of pre-Soviet states. It envisaged a more controversial right to recover the national polity that had been altered during the Soviet time. This part of the argument is grounded in a problematic nationalist doctrine about the nation owning the state.

A second major nationalist argument related to national survival is the claim that nation-states have duties to protect co-nationals wherever they are. One way to discharge such duties is to offer kin minorities preferential admission to citizenship.

According to Michael Walzer, states may give preference to those who have stronger "connection to our way of life" (1983: 49). Drawing on the analogy between states and families, Walzer invoked a "kinship principle", according to which states may welcome "particular group[s] of outsiders, recognized as national or ethnic 'relatives'" (1983: 41). Membership in a "national family", which "is never entirely enclosed within their [states'] legal boundaries", creates legitimate claims of inclusion equally for those who ended up "on the wrong side" and for "the children and grandchildren of emigrants" (Walzer, 1983: 41). Walzer admits that special consideration may be given in cases where a state bears responsibility for the flight of the people and if their suffering is related to their association with the state via ideological or ethnic ties. He refers to episodes of historical distress such as the Greek-Turkish transfers of populations and the post-war expulsion of Germans from Eastern Europe. However, his argument for privileged access is not grounded primarily in considerations of remedial justice but in the existence of family-national bonds.

Unlike claims of remedy, claims of minority protection appeal to the responsibilities of the national state even in the absence of a direct state action towards particular individuals or groups. In fact, the claim often relies on the fact of state "inaction," as in the case of alleged *abandonment* of kin nationals when settling new borders. The argument of protection goes

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beyond the mere affirmation of commonality. Its strength derives from the combination between moral duties of justice (assistance) and special duties of nationality. Zsolt Nemeth, a Hungarian Foreign Minister, justified the proposal to grant special benefits to Hungarian ethnics outside Hungary by arguing that "[Hungarian minority individuals] do not get the benefits because they are Hungarians, but because they have problems, stemming from their Hungarianness, to which they expect solutions from Hungarian state" (quoted in Horvath, 2006: 163). The same logic lies behind other policies of preferential admission, such as the German policy towards expellees from Eastern Europe.

Despite laudable goals,[358] initiatives of preferential admissions to citizenship for kin minorities encounter several major difficulties. It matters what kind of preference is offered. If kin minorities are granted citizenship on preferential grounds but with the condition of taking up residence in the country, there are worries that this will, in fact, render more vulnerable those members of minority group that decide to stay put. This is what Bauböck (2007b) calls the trade-off between transnational citizenship and self-government. By granting citizenship and immigration rights to kin minorities, the kin state weakens the claims and prospects of self-government of the kin in their actual territory. The problem does not disappear if kin minorities are offered external citizenship.[359] Formal membership in an external polity for ethnic minorities may be seen with suspicion by the host state, which may pause its efforts to accommodate their minority claims. As Bauböck argues, "successful accommodation of national minorities leads to internally differentiated citizenship, but will generally not involve external citizenship in a kin state." (2007a: 2421).

In the Hungarian case of external dual citizenship, "the claim that dual citizenship will help to protect Hungarian minorities abroad is hypocritical" because members of Hungarian minorities seem confronted with "a dilemma between emigration to Hungary and assimilation" (Bauböck, 2010b: 2). According to Florian Bieber, external citizenship for kin minorities may, in fact, "help to diffuse conflicts" because "it lowers by implication the importance of the citizenship of the country of residence" and it offers minorities "a sort of insurance policy, combined with an exit ticket" for cases when they may find themselves in trouble (2010: 20). This perspective, however, takes a too instrumental approach on citizenship. It also assumes the premise that minority oppression is always likely to occur,

[358] It is interesting to note that kin "minorities" that are offered protection by kin states are not always numerical minorities in their state of residence. For example, "Romania is a kin state for the majority of the population of Moldova, Bulgaria is a kin-state for two-thirds of the population of Macedonia, and Serbia is a kin-state for the majority of the sub-state unit of the Bosnian Serb Republic" (Pogonyi et al., 2010: 4).
[359] This is preferential admission to citizenship without the condition of taking up residence in the country.

which in turn may become a self-fulfilling prophecy (Bauböck, 2010a: 41). In light of recent developments in the Hungarian-Slovak conflict on dual citizenship, it seems that "Hungarians in Slovakia who apply for Hungarian external citizenship may end up with a status that resembles the status of migrants with no effective link to the state of their new de iure citizenship and with their rights as citizens withdrawn in the state of their permanent residence and original citizenship" (Pogonyi et al., 2010: 12). According to Zsolt Simon, a political leader of the Hungarian minority in Slovakia, the Hungarian government "does not understand the situation" of Hungarian ethnics in Slovakia. The Hungarian offer of external citizenship for co-ethnics living in neighbouring countries is intended to bring political advantages to the governing Fidesz party and does not serve well the interests of the Hungarian minority in Slovakia (Popławski, 2012).[360]

The claims that preferential admission to citizenship contributes to the protection of kin minorities are often self-defeating. It seems that combining entitlements to citizenship with repatriation may better help states discharge special duties towards individual members of kin minorities, although this may endanger the national prospects of those kin members who stay behind. Even a liberal nationalist like Yael Tamir rejects the idea of nationalist-based external voting rights. Commenting on the Estonian case, Tamir argues that "the decision to allow Estonians living in Sweden to vote in a referendum on the nature of the emerging Estonian state while excluding inhabitants of Russian origin, is unjustified" (1993: 158).[361]

Finally, we arrive at the problem of discrimination. According to international law, distinctions between non-citizens are legitimate if they do not discriminate against particular groups or if they enable policies of positive discrimination (see chapter 3). The International Convention on the Elimination of all Forms of Racial Discrimination, for example, provides that certain racial or ethnic groups can be treated more favourably if such treatment serves a legitimate goal, if there is proportionality between means and goals, and if the preferential measures are temporary in character. The drafters of the European Convention on Nationality also accepted distinctions in nationality laws based on linguistic competence or nationality of other state.

From a theoretical point of view, the matter is less straightforward. First, we have the problem of targeting people according to ascriptive features. Although many rules of preferential

[360] Zsolt Simon's party, Most-Híd, is depicted by Fidesz as "a threat to the identity and national culture of Hungarians in Slovakia" (Popławski, 2012).
[361] Tamir continues: "although Estonians need not accept individuals of Russian origin as members of the Estonian people, they are not justified in depriving them of citizenship rights."

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admission of citizenship are carefully cast in non-ethnic terms,[362] there are still several laws that unambiguously target co-ethnics. In the report on co-ethnic laws,[363] the Venice Commission found that less favourable treatment of non-citizens based on non-belonging to a specific ethnic or cultural group is "not, in itself, discriminatory, nor contrary to international law."[364] Ethnic preference is legitimate when the targeted group is "genuinely linked with the culture of the State" and the measures ensure that their "genuine linguistic and cultural links remain strong." As shown in the discussion of the Nottebohm case, it is fairly difficult to codify "genuine links." Enikὸ Horvath criticises the position of the Venice Commission for failing to clearly distinguish between ethnic and cultural links. She correctly argues that, while "differentiating among individuals who have actual ties to the given culture that the state promotes is reasonable," "differentiating among individuals because their ancestors were 'Greek' or 'Slovak' on the assumption that this guarantees links, without any further proof of ties required, is not" (Horvath, 2008: 179). While taking as legitimate the aim of preserving strong genuine linguistic and cultural links, one should ask whether granting citizenship status is the right tool for the job.

Notwithstanding positive norms of international law, it is my contention that there are at least two types of discrimination implied by rules of ethno-cultural preferentialism in admission to citizenship: (1) discrimination against non-ethnic citizens, and (2) discrimination against non-ethnic non-citizens.

In the first case, it can be argued that preferential admission of ethnic kin discriminates against those citizens who do not share the ethno-national features of the majority.[365] Coleman and Harding, for example, argued that "policies of family reunification and those permitting access to non-members with cultural or historical ties" are justified as a way of satisfying the interest of actual members (1995: 53). But they did not ponder whether such policies affect negatively the interests of those members who do not share such cultural or historical ties. Christopher Wellman rightly points out that preferential admission (immigration) "would wrongly disrespect those citizens in the dispreferred category" (2008: 139). In the context of modern multi-ethnic democracies, selectivity in admission will make some people feel "second class citizens" while "seeking to eliminate the presence of a given

[362] For example, both Romanian and Hungarian citizenship laws target former citizens, despite obvious signs that they aim at reaching out to co-ethnics.
[363] Report on the Preferential Treatment of National Minorities by their Kin-State, *op. cit*.
[364] Ibidem.
[365] I assume that the ethno-national majority has control over the decision-making, but it may be the case that a powerful minority controls policymaking.

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group from your society by selective immigration is insulting to the members of that group already present" (Blake, 2005: 233).

Joseph Carens (1992) argued that communities (not states!) can select among candidates of entry, provided that they are liberal and their policies are not racial or ethnic prejudice in disguise. But this highly constrained argument of ethno-cultural preservation does not seem to be very practical. As Joppke noticed, a valid case of positive discrimination would require "finding a country with a (minimally) liberal culture and not sought out by any other but the ethnically favoured migrants" (2005b: 15). There is hardly a state in the world that can claim internal ethno-national homogeneity. Policies targeting only specific groups inevitably discriminate against all other ethno-national groups within the state.

According to the liberal concept of neutrality, the state should abstain from enforcing particular conceptions of the good or particular cultures. The argument from state neutrality is a powerful one since it is anchored in the solid ontology of value pluralism that characterizes any modern society. As Joppke argues, "if there is no domestic agreement about the 'good life', related concerns of religion, culture, and customs cannot be made a criterion of immigrant selection" (2005b: 11). I am aware that neutrality is a highly contested liberal norm. Critics have argued that a culturally neutral state is a chimera, both historically and conceptually. As Kymlicka and Norman put it, the classic conception of political citizenship has served as "a cover by which the majority nation extends its language, institutions, mobility rights, and power at the expense of the minority" (2000: 11). Although I share this scepticism with regard to claims of neutrality in the context of domestic citizenship (citizenhood), I think that this ideal makes sense at the level of admission.

The second type of discrimination involved in the practice of ethno-cultural preferentialism in admission to citizenship is discrimination against non-ethnic non-citizens. In the context of increased contemporary immigration and border control, preferentially admitting some will inevitably discriminate against all others willing to enter. According to Bauböck, "inherited external citizenship is a morally arbitrary criterion for allocating opportunities among the pool of potential immigrants" (2009b: 484). David Miller argues that "to be told that they belong to the wrong race or sex (or have the wrong colour) is insulting, given that these features do not connect to anything of real significance to the society they want to join" (2005: 204). Hiding behind arguments of positive discrimination is no solution. Joppke, for example, remarks that the infamous discriminatory policy of "White Australia" was, in fact, also a "positive" form of discrimination. It was intended to privilege the admission of whites

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and not primarily to exclude non-whites (2005a: 46).

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6.3 External Citizenship

One of the most controversial privileges of preferential admission is the possibility of acquiring citizenship from outside the territory of the state.[366] This is particularly problematic when external acquisition of citizenship also involves comprehensive access to political rights. In this section, I discuss the issue of external citizenship. First, I overview rules of extraterritorial acquisition of citizenship and match them with rules of external voting. Second, I discuss justifications of external citizenship.

A great majority of EU27 countries allow for the transmission of citizenship via ius sanguinis abroad. In a limited number of cases, the law requires that parents register or declare the birth of the child.[367] Only in two countries[368] is the transmission of citizenship via birthright abroad effectively limited to one generation.[369] In certain cases, rules concerning the loss of citizenship may function as indirect limitations to the retention of citizenship abroad. In some countries, the retention of citizenship acquired via birthright abroad is conditional upon showing proof of a genuine link upon reaching majority.[370] In other countries, citizenship is lost after a certain period of residence abroad.[371]

As far as rules of preferential admission after birth are concerned, sixteen countries out of the EU27 offer citizenship to certain categories of foreigners (public relatives) without the requirement of residence in the territories. This applies to former citizens and descendants[372] and to co-ethnics.[373] Moreover, these rules often distinguish between different categories of former citizens and descendants, according to some quasi-ethnic criteria. Preferential admission is thus reserved only for former citizens who were citizens "by origin" or "by birth".[374]

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[366] Another notable privilege is the permission to retain dual citizenship. I omit this privilege from my analysis not only because it is less frequent, but mainly because it usually comes together with the privilege of external citizenship.
[367] This is the case in Belgium, Cyprus, Germany (from second generation born abroad), Ireland (from second generation born abroad), Latvia, Portugal, and Slovenia.
[368] This is the case in Malta and the United Kingdom.
[369] Rule of generational limit exist also in the Belgian and German and Spanish laws, but these limitations can be easily overcome by way of submitting formal requests concerning the retention of citizenship.
[370] This is the case in Denmark, Finland, and Sweden.
[371] This is the case in Cyprus (only naturalised citizens), France, Ireland (only naturalised citizens), Malta (only naturalised citizens), the Netherlands, and Spain. In all these cases, laws provide for the possibility to retain citizenship upon request.
[372] This is the case in Bulgaria, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, and Poland Romania, and Spain.
[373] This is the case in Bulgaria, Germany, Greece, Ireland, Italy, Lithuania, Portugal, and Slovenia.
[374] This is the case in Greece, Ireland, Italy, Lithuania, and Luxembourg.

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Table 2: Rules of Extra-Territorial Acquisition of Citizenship in EU27 Countries

	Ius Sanguinis Abroad	**Extra-Territorial Admission**
Austria	Automatic[375]	Survival of Holocaust, Political emigrants
Belgium	Automatic/ Declaration[376]	-
Bulgaria	Automatic	Persons deprived of citizenship, Bulgarians by origin
Czech Republic	Automatic	-
Cyprus	Registration, Limitation—residence[377]	-
Denmark	Automatic,[378] **Limitation—genuine link**[379]	
Estonia	Automatic	Estonian citizens before 16 June 1940 and descendants
Finland	Automatic,[380] **Limitation-genuine link**[381]	-
France	Automatic, **Limitation—residence**[382]	-
Germany	Automatic/ Registration[383]	Former citizens and children, Co-ethnics from Polish Silesia
Greece	Automatic	Former citizens and descendants, Greeks of origin
Hungary	Automatic	Former citizens and descendants
Ireland	Automatic/ Registration,[384] **Limitation— residence**[385]	Former citizens by birth, Persons of Irish descent or association
Italy	Automatic	Persons of Italian descent[386]
Latvia	Automatic/ Registration[387]	Latvian citizens before 1940 and descendants

[375] Except if the child is born to non-citizen mother out of wedlock
[376] If the parent citizens was born abroad, the child acquires citizenship by declaration of parents before the age of 5 or by option at adulthood
[377] In Cyprus the naturalised citizens lose citizenship after 7 years of residence abroad if they do not notify the intention to retain citizenship (unless they are in the service of the country)
[378] Except if the child is born to non-citizen mother out of wedlock
[379] Citizenship lapses if the child is born abroad and has never resided in the country, unless he or she requests to retain citizenship at age 22 (discretionary decision)
[380] Declaration is required if the child is born to non citizen mother and paternity is established before 18
[381] Citizenship lapses if the child is born abroad, possesses another citizenship, and has not resided in the country for at least 7 years, unless he or she requests to retain citizenship at age 22, or complete military or civil service (discretionary decision)
[382] In France citizenship may be withdrawn from citizens born abroad who have never resided in the country, have never been registered for elections, and whose parents had resided abroad for the last 50 years.
[383] In Germany registration is required within 1 year if the child is born abroad to citizens born and resident abroad after 31 Dec 1999.
[384] In Ireland registration is required if both the child and the parent were born outside the country or outside N Ireland (unless the parent is in public service).
[385] In Ireland only naturalised citizens lose citizenship after 7 years of residence abroad, unless they declare yearly the intention to retain citizenship (except if they are in the service of the country).
[386] For example, persons of Italian descent born before 1920 in the territory of Austro-Hungary.
[387] In Latvia registration is required if the child is born abroad to only one parent citizen.

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Lithuania	Automatic	Former citizens and descendants, Persons of Lithuanian descent
Luxembourg	Automatic	*Luxembourgeois d'origine'*— born in the territory before 1920
Malta	Automatic,[388] Limitation—**generational**[389]	-
The Netherlands	Automatic, Limitation—residence[390]	-
Poland	Automatic[391]	Persons deprived of citizenship by specific communist acts
Portugal	Automatic/ Registration[392]	Members of communities of Portuguese abroad
Romania	Automatic	Former citizens stripped of their citizenship against their will, and descendants
Slovakia	Automatic	-
Slovenia	Automatic/ Registration[393]	Persons of Slovenian descent, persons belonging to Slovene minorities in neighbouring states
Spain	Automatic, Limitation—residence[394]	Certain groups of former citizens by origin[395]
Sweden	Automatic,[396] **Limitation-genuine link**[397]	-
The United Kingdom	Automatic, **Limitation—generational**[398]	-

In order to grasp the political implications of these forms of extra-territorial acquisition of citizenship, I provide a brief overview of the voting rights enjoyed by non-resident citizens (external voting).[399]

[388] Except if the child is born to citizen who acquired citizenship by descent, or he or she is born out of wedlock to non-citizen mother.
[389] In Malta only naturalised citizens and citizens by registration lose citizenship after 7 years of residence abroad, unless they declare yearly the intention to retain citizenship (except if they are in the service of the country).
[390] In the Netherlands, dual citizens residing outside the EU for more than 10 years lose their citizenship unless they take up residence in the country (more than 1 year) or apply for identity documents (except if they are in the service of the country).
[391] Except if one parent is citizen of x country and both parents declare within 3 months that the child obtains the citizenship of x).
[392] In Portugal, registration is required if the child is born abroad to a citizen who resides abroad (unless in service).
[393] In Slovenia, registration is required if the child is born abroad to one citizen— declaration between 18-36 years.
[394] In Spain, citizenship lapses if the child is born abroad to citizens born abroad, possesses another citizenship and does not reside in the country at the age of 21, unless he or she declares the intention to retain citizenship (discretionary decision).
[395] For example, persons exiled during the Civil War (1936- 1939).
[396] Except if the child is born abroad to non-citizen mother not married with the father.
[397] In Sweden, citizenship lapses if the child is born abroad, possesses another citizenship, and had not resided in the country (or other Nordic country) for at leas 7 years, unless he or she requests to retain citizenship before reaching the age of 22 (discretionary decision).
[398] In the United Kingdom, citizenship citizens who had acquired UK citizenship by descent cannot transmit their citizenship to children born abroad. These children can acquire UK citizenship if their parents take up residence in the country for at least 3 years and register them.

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The number of countries that grant voting rights to non-resident citizens has increased remarkably in the last decades. According to the IDEA report of 2007, a number of 115 countries and territories in the world have provisions that grant some sort of voting rights to non-resident citizens[400] (Braun and Gratschew, 2007). In the past, it was commonly assumed that citizens are also residents, and thus, that their right to vote is exercised from within the territory of the state. Increased emigration, however, has led to a situation where a large number of citizens are caught outside the borders of the state, and thus find themselves in a danger of being disenfranchised. In an attempt to reach out to these remote citizens, for pragmatic or nationalistic reasons, states have recently adopted various emigrant policies, including the external franchise (Gamlen, 2006).

All EU27 countries but one – Cyprus – make some provision for external voting.[401] In most cases, the entitlement to vote is available for all non-resident citizens. Access to external voting is restricted to certain categories of non-residents only in Denmark[402], Ireland,[403] Malta,[404] Sweden,[405] and the United Kingdom.[406] There are two major systems for the representation of votes cast abroad (for legislative elections). These votes can be assigned to a home district – the district of the last residence in the country of the voter, the district of the capital, et cetera – or they can be assigned to a special diaspora district. The preferred system in the EU27 countries is home district voting. The system of reserved seats in legislative bodies exists in France,[407] Italy,[408] Portugal,[409] and Romania.[410]

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[399] I follow the definition of "external voting" used by the IDEA project that refers to the vote of permanent or temporary non-residents that is also cast abroad. The vote of non-residents that is cast in the country is not counted as external voting (for a different approach, see Collyer and Vathi, 2007).
[400] Except for New Zeeland and Sweden, there are no cases of countries that grant national voting right to non-resident non-citizens.
[401] To this, it may be added Greece where there is a constitutional provision for external voting but the legislator has not yet implemented it.
[402] In Denmark, access to external vote is limited to temporary absentees. However, this category has been gradually expanded to include all employees of the state abroad on official business, employee of Danish firms, international organization (of which Denmark is a member) and humanitarian relief organization as well as to students and those abroad for health reasons.
[403] In Ireland, access to external vote is limited to diplomatic corps and army.
[404] In Malta, access to external vote is limited to temporary absentees.
[405] In Sweden, access to external vote is limited to citizens who were at some point residents in the country.
[406] In the United Kingdom, the entitlement to external voting is conditioned by the period of time spent abroad—not more than15 years.
[407] In France, external citizens elect 12 members of the Senate. This amounts to 3.6% of total seats (331).
[408] In Italy, external citizens elect 18 members of the Parliament. This amounts to 1.9% of total seats (630).
[409] In Portugal, external citizens elect 4 members of the Parliament. This amounts to 1.7% of total seats (230).
[410] In Romania, external citizens elect 6 members of the Parliament. This amounts to 1.2% of total seats (471).

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Table 3: Rules of External Voting in EU27 Countries

	Scope	Type of elections	Representation
Austria	Wide scope	Presidential, legislative, referendums	Home district
Belgium	Wide scope	Legislative	Home district
Bulgaria	Wide scope	Presidential, legislative	Home district
Cyprus	-	-	-
Czech Republic	Wide scope	Legislative	Home district
Denmark	**Restricted**— absentees	Legislative, sub-national, referendums	Home district
Estonia	Wide scope	Legislative, referendum	Home district
Finland	Wide scope	Presidential, legislative, sub-national	Home district
France	Wide scope	Legislative, presidential, referendums	**Reserved seats**
Germany	Wide scope[411]	Legislative	Home district
Greece	Not implemented	-	-
Hungary	Wide scope	Legislative, referendums	Home district
Ireland	**Restricted**— diplomatic corps and army	Presidential, legislative, sub-national, referendums	Home district
Italy	Wide scope	Legislative, referendums	**Reserved Seats**
Latvia	Wide scope	Legislative, referendums	Home district
Lithuania	Wide scope	Presidential, referendums	Home district
Luxembourg	Wide scope	Legislative	Home district
Malta	**Restricted**—absentees	Legislative	-
The Netherlands	Wide scope	Legislative	Home district
Poland	Wide scope	Presidential, legislative, referendums	Home district
Portugal	Wide scope	Presidential, legislative, referendums	**Reserved Seats**
Romania	Wide scope	Presidential, legislative	**Reserved Seats**
Slovakia	Wide scope	Legislative	Home district
Slovenia	Wide scope	Presidential, legislative, referendums	Home district
Spain	Wide scope	Legislative, sub-national, referendums	Home district
Sweden	**Restricted**— former residents	Legislative, referendums	Home district
The United Kingdom	**Restricted**— former residents	Legislative	Home district

[411] Until recently, German citizens living abroad could vote in German elections only if they had resided in Germany for three consecutive months at any time in their lives. In 2012 the Constitutional Court ruled that this condition violates the constitutional principles of the universality of the vote. *See* "German Constitutional Court removes three months residence requirement for external franchise", EUDO Citizenship News,15 August 2012, Available at http://eudo-citizenship.eu/news/citizenship-news/694-german-constitutional-court-removes-three-months-residence-requirement-for-external-franchise>.

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If we combine rules on extra-territorial acquisition of citizenship with rules on external voting, we arrive at an overall picture of external membership policies in the EU27 countries. We find that the great majority of countries allow for both extra-territorial acquisition of citizenship and external voting. The question that arises is how do these generous rules of external citizenship fit with our conceptions of political membership?

There are several possible justifications for external citizenship. I discuss here three main arguments: (1) citizenship equality; (2) special contribution; and (3) genuine ties. Some of these justifications seem to apply only to the issue of external voting – for example, the argument of citizenship equality. However, it is my position that discussions on extra-territorial acquisition of citizenship will inevitably have to confront the question of external voting

Table 4: Rules of External Membership in EU27 Countries

			External Voting		
			Yes		**No**
			Wide scope	**Restricted**	
Extra-Territorial Acquisition of Citizenship	**Ius sanguinis**	**Quasi/ automatic**	Austria, Belgium, Bulgaria, the Czech Republic, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain	Germany, Ireland	Cyprus, Greece[412]
		Restricted	Denmark, Finland, Sweden	United Kingdom	Malta
	Preferential admission		Austria, Bulgaria, Estonia, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Spain	Germany, Ireland	Greece

[412] In Greece, these provisions are not yet implemented.

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6.3.1 Citizenship Equality

The Universal Declaration of Human Rights recognizes a universal human right to vote (Art 21). Apart from this, there are no strong international norms regarding external voting. Article 25 of the ICCPR stipulates that "every citizen shall have the right… to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." However, the rights of the Covenant are guaranteed to "all individuals *within its territory* [that of the state party] and subject to its jurisdiction… without distinction of any kind" (Art 2). The International Convention on the Protection of the Rights of All Migrant Workers provides that "migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation" and that the States concerned "shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights" (Art 41)."[413]

The modern idea of citizenship is driven by a strong ideal of equality. Citizens should enjoy equal rights, and no different classes of citizens are acceptable. This arithmetic version of citizenship equality implies that all citizens, regardless of their place of residence, should be entitled to vote.[414] However, the fact of residing within or outside the territory of the country considerably alters the connection between the citizen and the polity.

Firstly, it does not matter whether non-residents enjoy political rights in the country of residence. Dual citizens do not enjoy "double-voting" rights (Honohan, 2011: 550). Voting entitlements in different countries— if justified— indicate that individuals are presumed to have stakes in different polities. Double voting becomes a problem only "when the aggregation of votes and governmental decision-making is connected between the two polities" (Blatter, 2011: 776).[415]

Secondly, it is not obvious that non-residents[416] are not sufficiently informed in order to vote responsibly (Rubio-Marin, 2006: 134). Increased levels of international communication and the development of complex migration networks make it easier for emigrants to keep contact with their countries of origin. It is probable that at least some emigrants are more informed

[413] Only few countries have not ratified the Migrant Workers' Convention and its provisions concerning external voting are only advisory.
[414] It is commonly accepted, however, that equality is compatible with the disenfranchisement of children.
[415] This is the case with individuals who are citizens of two EU countries when they vote for European elections.
[416] Here and throughout this chapter, I use the terms "non-resident citizens" or "emigrants" to mean long-term external citizens. When necessary, I explicitly indicate whether I refer to temporary non-resident citizens or absentees.

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and more politically active than many resident citizens. Moreover, knowledge and skills do not constitute prerequisites for access to political rights in modern democracies.

The right to vote is not an abstract entitlement, it is always "related to [the] concrete polity where it is exercised" (Bauböck, 2007a: 2410). States are territorial organisations that exercise a great deal of coercive power mainly within their territories. In democratic states citizens use their vote in order to decide on how state power should be exercised. In this view, those who are directly subjected to power should also be those entitled to control it. Because non-resident citizens are less affected by state power, granting them equal voting rights seems unfair towards residents (Fitzgerald, 2006: 114). Arithmetic equality amounts, in this case, to inequality. The question is whether the reduced stakes that emigrants have in the polity still generate moral claims to "reduced" political rights or to other forms of membership.

6.3.2 Special Contribution

The argument of contribution is widely used in the context of emigration for economic reasons. Economic emigrants are usually seen as important contributors to their countries of origin either because they bring direct contributions – such as remittances and investments – or because they galvanise external political support through advocacy and lobbying.[417] The restoration of citizenship and the retention of external political rights seem two gestures through which the states recognise and reward particular people for their contributions.

There are two major problems with this argument – an epistemological one and a normative one. The epistemological problem is that one cannot easily identify or quantify the contributions of emigrants.[418] It is plausible to think that not all external citizens contribute and that they do not contribute equally. Moreover, there may be other people (residents or not) who bring important contributions to the country.[419] Should all investors, do-gooders or exceptionally skilled persons be granted citizenship and political rights? From a normative perspective, the argument of contribution disregards and compromises the political meaning of citizenship. Voluntary contribution is not a normal requirement for residential citizenship. The idea of rewarding contribution with membership implies a form of "illiberal

[417] This argument has a reverse. There are allegations that emigrants bring negative "contributions" by, for example, sponsoring internal conflicts.
[418] The argument about contribution is generally cast in economic terms but there may be other types of contributions, such as artistic, cultural, scientific, et cetera.
[419] In fact, many states have rules of preferential admission to citizenship for persons who bring important contributions for the country. Beneficiaries of these rules are, most commonly, sportsmen. There are also few countries that have schemes of investor citizenship. In the EU27 only Austria and Bulgaria maintain such schemes.

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reasoning" "according to which the economic dependence of the non-migrants offers justification for emigrant participation" (Fitzgerald, 2006: 113).

Rather than awarding specific contributions, "a vote recognises the impact of law and government on citizens' lives, and gives them a chance to bring their government to account and to shape the laws determining their common future" (Honohan, 2011: 547). In this view, "political rights should not be for sale" (López-Guerra, 2005: 230).[420] It may be the case that some recognition for the contributions of emigrants may be warranted but "it is not clear what their relevance should be for the allocation of political rights" (Rubio-Marin, 2006: 133). The association between contribution and citizenship is dangerous because it takes us back to practices of fiduciary citizenship of past eras in which political participation was a privilege of the wealthy.

According to Robert Dahl, democracies should include "all adults subject to the binding collective decisions of the association" (Dahl, 1989: 120), except transients and the mentally defective. The difficulty in the case of non-resident citizens is to establish whether in their case the degree of subjection to the laws of their countries of origin is sufficient in order to warrant inclusion. Claudio Lopez-Guerra, for example, argues that non-resident citizens are not subject to the decisions of the association, therefore they must be excluded from political citizenship (voting) (2005: 234).

According to Ruth Rubio-Marin, the inclusion into membership is compulsory only when individuals have developed social connections and attachments (social membership) while being subject to the authority of the state (2000). External citizens, however, maintain only limited social connections with the country of origin and thus do not have a *right* to full political membership. They are simply not "directly and comprehensively affected by the decisions and policies that their participation would help to bring about" (Rubio-Marin, 2006: 129). Rubio-Marin contends that first generation emigrants have a right to retain citizenship for instrumental[421] and identity-related reasons. External citizenship for first generation emigrants recognises "a sense of intergenerational connectedness and thus transcendence and continuity" (Rubio-Marin, 2006: 136).

Rainer Bauböck has developed a theory of stakeholder citizenship according to which, democratic inclusion is based on the fact of having a stake in the future of the polity.

[420] These arguments have been raised in relation to the claims of non-residents citizens to retain external voting rights in their country of origin.
[421] Citizenship status gives access to consular protection and return rights.

Stakeholder membership is something more than mere subjection to authority or social membership. Political membership is owed to those "individuals whose circumstances of life link their future well-being to the flourishing of a particular polity" (Bauböck, 2007a: 2422). Criteria for membership combine dependency on the community for the protection of basic rights and subjection to the political authority for a significant period of time. As regards external citizens, Bauböck admits that "the idea of citizens giving laws to themselves is difficult to reconcile with letting expatriates cast votes from outside the national territory" (2005: 683). External citizenship is thus only an "additional privilege that may be granted by countries of origin at their own discretion" (Bauböck, 2009b: 476) to the first generation emigrants. This privilege may be justified in light of the past biographical subjection of emigrants and in view of the likelihood that they may return in the country (Bauböck, 2009b: 483).[422] Bauböck also accepts the right of first generation emigrants to transmit citizenship status to their children. However, descendants of emigrants should not be entitled to external political rights.

The argument that external citizens are not sufficiently subjected to the laws of theirs countries of origin is widely shared by theorists. David Owen, however, makes an interesting distinction between subjection to political authority and subjection to coercive power. He argues that "being subject to a collectively binding norm does not require that the norm is coercively enforceable" (Owen, 2011: 642). In this case, external citizens are subject to state power even if the state cannot coercively enforce compliance (Owen, 2011: 643). This alone constitutes sufficient grounds for justifying external voting for first-generation emigrants.

I join the chorus and agree that emigrants may keep their voting rights. I am not convinced, though, that this should be justified by looking at actual or past subjection. In light of my distinction between a status of nationality and a status of full political citizenship, I think that claims of subjection only entitle emigrants to retain nationality. I also disagree that the mere likelihood of return should guarantee emigrants actual and on-going access to political membership.[423] I accept that emigrants should retain full or partial voting rights for prudential reasons. Generally, it seems easier to delay granting certain rights than removing them altogether. Rules that disenfranchise citizens may unnecessarily generate fears about the fragility of the status of citizenship and about possible state abuse.

[422] External voting rights may be further restricted by procedural obstacles such as registration (Baubock, 2009: 487).
[423] In Chapter 4, I rejected a similar argument, according to which children should be granted citizenship at birth because they are likely to grow up and develop social ties in the country.

As with restitution of citizenship, there are special cases in which external voting may be required by duties of justice. These special cases include temporary absentees (Bauböck, 2007a), forced émigrés and exiled people (Beckman, 2009: 78-80). However, these cases should not be widely generalizable (Honohan, 2011: 549). While citizenship and voting rights should be restored to former citizens, their descendants born and residing abroad should only be granted the status of nationality. In our survey, rules of restitution, viewed in the light of rules of external voting, are often too generous and not sufficiently limited in scope.

6.3.3 Special Ties

The last major argument for external citizenship I discuss here is the claim that external membership is intended to recognise and promote special ties between particular people and the state. In a previous section, I analysed several justifications of preferential admission to citizenship based on nationalist arguments. I return here to these claims by looking into their specific implications for external citizenship.

It is often the case that "the electoral inclusion of citizens living abroad is supported by ethnic conceptions of nationhood that conceive of the polity not as a territorial state and its inhabitants, but as a community that may be dispersed over several states" (Bauböck, 2005: 684). Should people who have special ties with the state and the polity be granted extra-territorial citizenship and external voting? I already raised serious doubts about the illiberal and discriminatory character of rules that grant citizenship to people on ethno-cultural grounds. But let us admit that there are good reasons for states to promote special ties with certain categories of people. Why should admission to citizenship be a means for such goals?

According to one argument, "awarding citizenship to descendants in diaspora is an obligation that comes from the cooperative participation of the past generations… their claim of justice is that their ancestors contributed to the state with the reasonable expectation that they would also benefit from being able to partake in the good of that society" (Ernst, 2009: 600). This is a typical argument that turns a quasi-nationalist claim into an argument of justice. I think that we should more specific when ascribing duties of justice. As I showed in Chapter 2, there is no strict correspondence between boundaries of justice, boundaries of national identity and boundaries of citizenship. Membership in a political community is not strictly intergenerational. Citizen parents may have legitimate hopes that their children will take up membership in their own political community. They should also have the right to transmit the

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status of nationality to their children, but it is for the children alone to decide whether they commit or not to a particular political community.

I do not deny that there are a series of important communal ties that develop within or across political communities – of a cultural or national kind. But I disagree that these ties should play a major role in admission to membership – nationality or citizenship. As Iseult Honohan put it, "although, within a democratic state, a shared identity may support a democratic culture, it is not clear that sharing a national identity or sense of belonging itself, without any substantial connection with the state, warrants a right to a say in the future of the polity" (2011: 547). The acceptance of external voting should "depend on individual members' stakes in returning rather than on the ideological claims of their leaders to represent a 'nation abroad'" (Bauböck, 2009b: 481).

Finally, projects of extra-territorial national building that instrumentalise policies of admission also raise important issues related to democratic stability and international relations. Firstly, external voting may be dangerous for democratic politics because "external voters acquire an unduly large influence on domestic electoral outcomes without actually being exposed to most political consequences of their votes" (Pogonyi et al., 2010: 4). The Italian elections in 2006 and the Romanian elections in 2009 are two examples where the external vote has been perceived as crucial for the final results (Dumbrava 2009; Zincone and Basili, 2010). In recent Bulgarian elections, the issue of the "Turkish" vote – votes cast by dual Bulgarian-Turkish citizens who left or fled Bulgaria for Turkey after 1989— has frequently generated hot public debates.[424] Secondly, the issue of external dual citizenship has also generated international tensions. For example, in Eastern Europe, such tensions have emerged between Hungary and Slovakia, Hungary and Romania, Romania and Moldova, Romania and Ukraine, and Bulgaria and Macedonia.

[424] However, this contrasts suspiciously with the tacit acceptance of the "Macedonian" vote— votes cast by dual Bulgarian-Macedonian citizens who have recently received Bulgarian citizenship mainly due to their "Bulgarian origin" (Smilov, 2010: 19-21).

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6.4 Chapter Conclusions

An important number of EU countries enforce rules of preferential access to citizenship for public relatives. Preferential admission usually entails special privileges concerning residence and dual citizenship. A number of citizenship rules also employ problematic and ethno-culturally charged distinctions between categories of foreigners and even between different categories of citizens and former citizens.

Rules of preferential admission have two major problems: (1) a problem concerning the targeting of beneficiaries, (2) a problem about the range of privileges they entail. Not all rules of preferential admission are equally problematic. Rules that target political relatives (former citizens and citizens of other states), for example, become problematic only when they are too wide in generational scope and when they entail too many privileges. Rules concerning the restitution of citizenship to those who were unjustly deprived of citizenship are the least controversial. But it is not always easy to define which destitutions are to be considered "unjust." While deprivation of citizenship during dictatorial regimes can easily qualify as unjust, claims of restitutions based on, say, historical roots of ancestors are less straightforward. Rules that distinguish between people on ethno-cultural grounds or rules that reward certain ethno-cultural traits in the admission process are harder to justify. The most obvious problem is the problem of discrimination. The objection of discrimination constitutes a major challenge to the rules of preferential admission to citizenship. This is especially the case when the preferred groups are defined in ascriptive, ethno-national terms. Attempts to justify preferentialism by invoking the arguments of minority protection or positive discrimination commonly run into serious theoretical and practical difficulties.

Liberal nationalists argue that ethno-cultural links between individuals and the national community may indeed inform policies of acquisition of citizenship. Exceptionally, the existence of such links may justify granting citizenship status even to non-residents. It is often the case that such claims are mixed with considerations of justice that renders them more credible. Take, for example, cases of oppression on grounds of association with a national community or religion. One question is whether full or partial citizenship is the right answer to such situations. It is not clear how *external* citizenship would deliver protection to targeted groups. In seems to me that the best way to deal with these situations is through a policy of repatriation or preferential immigration. If, for some reasons, states find it imperative to extend protection to persons who are not willing or able to immigrate, they

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should, at least, grant only a status of formal nationality without (external) voting. This should also be a transitory measure and it should not create inheritable privileges.

Another question is whether promoting national or cultural links is compatible with the idea of political membership. My own position is that states may carry out policies to recognise and promote special ties with particular groups of people. These policies may range from trans-border or trans-national cultural policies to the recognition of special *non-political* statuses of cultural belonging. The implementation of such policies is bound to be difficult, especially in regions with a historical record of national conflicts. This is why such initiatives should be carefully designed in order to respect international norms and agreements and to take into account the positions of the states and groups concerned. They should resemble the initiatives of the *Organisation internationale de la Francophonie*, rather than the collective naturalisation policies of the Third Reich.

The principle of non-discrimination is not the only normative constraint that concerns admission to citizenship. We can imagine a random ascription of citizenship that satisfies the principle of non-discrimination but still generates concerns about the meaning of political membership. Apart from the issue of the definition of special categories of non-citizens, rules of preferential admission to citizenship raise worries about the privileges they create. One such privilege is particularly troubling, namely the offer of external citizenship.

Often the discussion about acquisition of citizenship is conflated with the discussion on the exercise of political rights of citizens (voting rights). The question of citizenship acquisition in answered together with the question whether this or that category of persons should be accepted as members of the political community (the body of voters). Moreover, the proposed solutions are often driven by a concern with the inclusion of non-citizen residents. In this context, attempts to break the link between legal and political membership are close to anathema in the discipline. There are, however, several suggestion to dissociate between the two forms of membership when it comes to non-residents – particularly, by fading out political rights for non-resident descendants of emigrants.[425] I find that this is a legitimate means of responding to the fact of unequal stakes not only between residents and non-residents but also between once-residents and never-residents.

I have argued that the external acquisition of nationality should be exceptional. Moreover, full

[425] As Honohan suggests, "the conditions for extending citizenship by descent abroad should perhaps be more generous than for voting rights, but citizenship should not be indefinitely extensible in the absence of some genuine connection" (2011: 551).

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external citizenship – which includes external voting – should be granted even more exceptionally. Such privileges should be based on strong claims of restorative justice. They may be exceptionally granted to persons who were directly affected by membership-related injustice. The acquisition of citizenship by residents or non-resident cannot be grounded solely on the existence of ethnic, cultural or national ties. If states aim at promoting special ethno-cultural ties with particular group of non-citizens, they should do so by other means than admission to citizenship.

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7. CONCLUSIONS

Unlike fish that belong naturally in water, people do not belong naturally in states or nations. Membership in political communities is based on socio-legal conventions that should not be taken for granted. Questions regarding who is a citizen and who should become a citizen should preoccupy not only the minds of layers and clerks, but also those of theorists and political philosophers. This is because the legitimacy of political authority relies on a proper answer to the questions of membership.

Why should states differentiate between citizens and non-citizens? Why should there be different citizenships? These are basic questions of membership that reside in the background of this thesis. My point of departure was the puzzling observation that, in matters of membership, states do not only differentiate between citizens and foreigners, but also between different categories of foreigners, as well as between different categories of citizens. Why are certain foreigners better than others when it comes to admission to citizenship? More precisely, what is so special about ethno-cultural relatives to motivate states to award them special privileges in admission?

In the first part of this work, I explored possible justifications for boundaries of membership. I looked into arguments of justice, nationalism, liberalism and democracy in order to identify principles for demarcating boundaries and for assessing various claims of inclusion/exclusion. What I found were several good arguments that justified the inclusion of *some* individuals in *some* forms of membership. Long-term residents in a territory, for example, have good claims of inclusion in the polity of the state that exercises coercion over that territory. However, asserting a right to inclusion of some does not translate into a right to exclude others. Principles of inclusion often take for granted the very existence of political authority and its boundaries. To shift from boundaries of authority to boundaries of identity does not help, because neither of these boundaries is self-justificatory. Whereas I agree that political boundaries may be legitimate and useful, there are no satisfactory principles as to where exactly such boundaries should fall.

How, then, can we reconcile various arguments about bounded political communities with the general normative condition of indeterminate boundaries? My choice was to accept the indeterminacy (arbitrariness) of boundaries as a sort of *original sin* of boundary-making. As a way out of this indeterminacy, I proposed to use admission to membership as a remedial

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mechanism through which boundaries regain normative integrity. The idea is that normatively sound principles of admission could wash away the arbitrariness that affects the actual configuration of state boundaries. I accepted actual boundaries on the condition that states lose their near-absolute power to regulate membership. In order to legitimise what is otherwise only a conventional arrangement, states should commit themselves to the principle of prima facie openness of membership. Admission to membership should comply with normative principles of just inclusion and democratic recognition. The principle of just inclusion responds to individual claims of inclusion into the states in which they are subject to coercive power and should guarantee easy access to the status of nationality. The principle of democratic recognition responds to the community concerns about democratic continuity and requires that nationals commit to political membership in order to become citizens.

My second proposal was to dismantle the paradigmatic model of unitary citizenship that bundles together legal, political and identity memberships. It is often the case that arguments of inclusion or exclusion are plausible when they deal with certain types of membership but not with others. By distinguishing between a status of legal nationality and a status of political citizenship, I tried to attend to different fundamental interests and concerns about membership without sacrificing some for the sake of others. The status of legal nationality attends to the fundamental individual interests in legal protection. The status of political citizenship attends to the collective interests of the community related to democratic continuity. Although I focussed upon these two statuses of membership, I also suggested that a status of identity membership might be envisaged, as long as it is kept sufficiently distinct from legal and political memberships.

In the second part of this work, I explored more specific questions related to the regulation of membership. For this purpose, I relied on an overview of international law norms in the area of nationality and on a set of concrete rules of citizenship presently enforced by 27 EU countries. I structured the discussion around the issue of ethno-cultural preferentialism in order to bring to the fore some complex and controversial claims about membership that involve, among others, considerations of justice, nationalism, and democracy.

The first objective of the analysis was to identify rules of citizenship that could be seen as referring to an ethno-cultural myth of political community. I analysed three modes of citizenship regulation and I identified several instances in which rules of admission seem ethno-culturally charged. In what concerns acquisition of citizenship at birth, I found two such instances: (1) perpetual ius sanguinis – when the transmission of citizenship via ius

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sanguinis is not conditioned by residence in the country and occurs unrestricted across generations; and (2) the absence or inadequacy of ius soli – when no rules of ius soli exist or such rules are improperly qualified. With regard to rules of regular naturalisation, I found three types of ethno-culturally charged rules of admission: (1) differentiated multiple citizenship – when the prohibition of multiple citizenship is applied inconsistently across naturalisation rules; (2) prohibitive testing – when naturalisation procedures include tests that are difficult in form, thick in content, and prohibitive in intent; and (3) procedural discretion – when rules are ambiguous, insufficiently specified, and rely explicitly on the discretion of authorities. Finally, the preferential admission of public relatives is the site where ethno-cultural preferentialism is most obvious. I emphasised, however, those instances in which ethno-cultural targeting is matched with problematic privileges of admission. These instances are: (1) perpetual or multigenerational transmission of privileges – when the transmission of entitlements or privileges in admission continues unrestricted across generations; (2) extensive privileges in admission – when admission comes with important privileges such as the possibility to maintain residence abroad and/or to retain of other citizenship despite general prohibition; and (3) differentiation between individuals on ethno-cultural ground – when ethno-cultural criteria are used to further differentiate between categories of public relatives.

The second objective of the analysis was to assess various modes of admission to membership. First, I discussed the principle of birthright citizenship. I argued that it is possible to overcome criticisms about both the illiberal character and the unjust consequences of this method of ascription of membership by distinguishing between an automatic status of legal birthright nationality and a political status of after-birth citizenship. Generalised automatic nationality (ius soli and ius sanguinis) should be primarily grounded in the interests of newborns in having a fundamental status of legal protection recognised to them in the *closest* state. Secondly, generalised birthright nationality may also serve the interests of parents in securing the possibility that their children join their political community. Unlike nationality, I argued, citizenship should not be granted automatically at birth. It should involve explicit individual commitment to membership of a particular political community.

Secondly, I looked into the procedures and the underlying philosophy of naturalisation. I argued that the claim of sovereign discretion over the boundary of citizenship is not compatible with the commitments to openness that I take to be an essential normative condition for legitimate boundaries. I denounced the normative confusion, present in

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contemporary theoretical and policy discourses, between socio-cultural integration and admission to citizenship, and especially the view according to which access to the status of citizenship should be preconditioned by rock-solid evidence of membership in a genuine socio-cultural community. I proposed to shift from a philosophy of naturalisation based on the idea of socio-cultural integration to a philosophy that is grounded in the principle of democratic recognition. This implies a right of non-nationals to access nationality and a right of nationals to choose citizenship by way of expressing commitment to political membership. Whereas admission to nationality is owed to individuals who are significantly subjected to the coercive power of the state, admission to citizenship is due to those nationals who commit themselves to political membership. Individuals who are born in the territory of the state are granted nationality automatically at birth and they confirm admission to full citizenship at majority by making a commitment to political membership. Basically, nationals should be able to access full political membership by signing a declaration of membership at majority, when they apply for passport or other identity documents. Immigrants should become nationals automatically after a period of time. They may also chose to become full citizens immediately or after they are granted the status of nationality provided that they publicly commit themselves to political membership. I contended that minimal language requirements could be seen as part of the condition of publicity that is attached to the requirement of commitment to political membership.

According to a common view, democratic politics requires a shared public culture. In order to preserve such a public culture, it is argued, democratic states may ask would-be citizens to present proofs of socio-cultural integration. I agreed that certain civic attitudes of citizens are important for the functioning of democracies. I also agreed that politics could not be completely separate from cultural and national aspects. However, I argued that broader concerns about identity and national culture should not govern policies of admission to citizenship. In order to visualise my conceptual map, I proposed a distinction between two normative domains of membership – the inside of membership or citizenhood, and and the domain of the boundary of membership or citizenship. In this perspective, questions about citizenhood (rights, virtues, identity) should not obscure the discussion about admission to citizenship. However, the two domains remain normatively interdependent. Concerns about boundaries limit the scope of citizenhood by trumping the discretionary right of states to exclude persons from membership (nationality). Similarly, certain concerns about democratic citizenhood are relevant for principles of admission (citizenship), as suggested by the

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principle of democratic recognition.

Thirdly, I analysed rules of admission to citizenship that target specific categories of foreigners by virtue of their special public relationship with the state. I regarded this type of preferential admission as symptomatic of the current model of citizenship that bundles together legal, political and identity memberships. Justifications of preferential admission of public relatives usually combine claims as various as positive rights, remedial justice, democratic self-government, national responsibility, and positive discrimination. Generally, rules of admission that target people according to ethno-cultural traits are problematic because they involve multiple types of discrimination. In this respect, I dismissed nationalist claims that states should serve nations and that admission to citizenship should be used as an instrument of nation building. However, the problem of preferential admission not only concerns the way in which people are selected. It also concerns the content and scope of admission privileges that these people enjoy. This is the reason why I paid special attention to the issue of external citizenship – meaning both the extra-territorial acquisition of citizenship by non-resident foreigners and the external exercise of political rights by non-resident citizens. Political theorists have recently shown interest in the issue of external citizenship due to the challenges it poses to the traditional paradigm of territorial democratic citizenship. It is often assumed that citizenship status equates voting rights. In fact, most of the debates about citizenship are debates about "democratic" or "political" citizenship. Many arguments with regard to claims of admission to citizenship thus depend heavily on the equivalence between formal membership in the state (nationality) and political membership in the polity (voting rights). However, I think that this equivalence obscures the different meanings or functions of membership and leads us to criteria of formal membership that are unnecessarily exigent. By separating legal nationality from political citizenship, we may be able to meet the exceptional claims of certain individuals to *some* form of membership without endangering the normative integrity of political membership.

In this thesis, I attempted to overcome the boundary problem by shifting the focus from the constitution of the boundary to policies of boundary making. I affirmed the principle of general openness of membership that was intended to provide normative corrections to the actual structure of political boundaries. Against the common view that perceives citizenship as a fruit soft on the inside and hard on the outside, I argued that citizenship should be seen as soft on the inside and even softer on the outside. In order to respond to different interests and claims of admission, I chose to break up the unitary concept of citizenship and to distinguish

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between legal, political, and identity memberships. This proposal was not meant to weaken or devaluate citizenship, but to reaffirm its essentially political value. By rejecting ideas of automatic and inherited citizenship and by insisting on democratic recognition and commitment to political membership, I intended to recast admission to citizenship as a transformative process through which individuals not merely *receive* membership but *become* members in a political community.

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