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### **Transnational Citizenship and Rights of Political Participation**

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# Transnational Citizenship and Rights of Political Participation

by David Owen

The past thirty years have seen dramatic changes to the character of state membership regimes in which practices of easing access to membership for resident non-citizens, extending the franchise to expatriate citizens as well as, albeit in typically more limited ways, to resident non-citizens and an increasing toleration of dual nationality have become widespread.<sup>1</sup> These processes of democratic inclusion, while variously motivated, represent an important trend in the contemporary political order in which we can discern two distinct shifts. The first concerns membership as a status and is characterised in terms of the movement from a simple distinction between single-nationality citizens and single-nationality aliens to a more complex structure of state membership in which we also find dual nationals and denizens (Baubock, 2007a:2395-6). The second shift relates to voting rights and is marked by the movement from the requirement that voting rights are grounded in both citizenship and residence to the relaxing of the joint character of this requirement such that citizenship or residence now increasingly serve as a basis for, at least partial, enfranchisement.<sup>2</sup> In the light of these transformations, it is unsurprising that normative engagement with transnational citizenship – conceived in terms of the enjoyment of membership statuses in two (or more) states – has focused on the issues of access to, and maintenance of, national citizenship, on the one hand<sup>3</sup>, and entitlement to voting rights, on the other hand.<sup>4</sup> Yet this framing of debates on transnational citizenship comes with three sets of costs attached. First, the identification of full political membership with national citizenship elides an important distinction between these concepts in ways that is, I'll argue, consequential for a conflict within normative debates on transnational citizenship which I'll refer to as *the antinomy of incorporation*. Second, the focus on voting rights – for all their symbolic and practical

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<sup>1</sup> For recent overviews of these changes and the reasons for them see Baubock 2005 & 2007, Joppke 2010, and chapter 6 in Stoker et al. 2011 (of which I was lead-author).

<sup>2</sup> See Baubock 2005 & 2007 and chapter 6 of Stoker et al. 2011

<sup>3</sup> See Rubio-Marin 2000, Carens 2005, Baubock 1994, 2003, 2005 & 2007.

<sup>4</sup> See Beckmann 2006, Rubio-Marin 2007 and Baubock 2007

significance – occludes the more general terrain of rights of political participation. Third, the restrictive understanding of membership invoked in this discussion means that it fails to address adequately the issues raised by the standing of non-resident non-citizens whose morally significant interests are adversely affected by the decisions of states. The task of this essay is to try to reframe the debate on transnational citizenship in a way that takes account of these costs and thereby allows for a more nuanced account of different modes of membership, one that acknowledges that distinct grounds of entitlement to participation in political society can legitimate differentiated sets of rights of political participation and, hence, diverse modes of membership.

### **On Political Participation**

We can begin by briefly distinguishing two types of reasons – *protective* and *expressive* - for valuing political participation and their implications for how we conceive of rights of political participation.

*Protective reasons* which emphasise the instrumental value of political participation as the primary medium through which the governed seek to express, in various idioms and registers, their consent to, or dissent from, the ways in which they are governed and attempt to shape how they are governed, that is, the form and content of the regime of rule to which they are subject. From the perspective of protective reasons, *rights* of political participation are instrumentally valuable insofar as they protect the governed against tyrannical rule by securing the basic institutional conditions of those legitimate and effective forms of political participation through which those who are governed can govern how they are governed.

*Expressive reasons* stress the non-instrumental value of political participation insofar as it is constitutive of the (intrinsic) good of belonging to the political community; a good which is manifest in the relations of civic friendship (for example, bonds of trust and solidarity) among the members of the political community. Within the framework of expressive reasons, *rights* of political participation may be seen as instrumentally valuable insofar as they secure

the conditions for the governed to engage in political participation and so realise the good of political community, but they may also be seen as themselves non-instrumentally valuable insofar as they are understood as a form of civic recognition which is expressive, and partially constitutive, of the good of belonging to a political community. The thought here is that just as the good of personal friendship is partly constituted by the acknowledgement of the relevant parties of rights and duties that they owe to each other, so too is the good of civic friendship; the distinction between the two forms of friendship is that in the civic case, (some of) these rights and duties are given public institutional expression.

These are not the only reasons that may be adduced for valuing rights of political participation but they are the most central to my concerns and help to draw attention to two distinct aspects under which we conceive of the state, namely, as a regime of rule and as a form (or site) of community. In the case of the democratic constitutional state, this gives rise to specific characteristics. On the one hand, it is a regime of rule in which the governed also govern. Democracy is a form of *reflexive authority* in which those who are subject to authority are those who authorise the authority to which they are subject. On the other hand, the form of democratic political community is that of a free community of equals for whom the good of belonging to a political community is comprised of the relations of liberty, equality and fraternity that are constitutive of a democratic political community.

The presumption of normative democratic theory has been that national citizens of a democratic state will typically share both protective and expressive reasons for valuing political participation. Such citizens will have a legitimate interest in, and claim to, membership of the democratic state as a regime of rule and also have a legitimate interest in, and claim to, membership of the democratic state as a political community. However, in the context of transnational citizenship, this presumption becomes problematic because the class of habitual residents of the state is not identical to the class of national citizens of the state. Resident non-citizens may have protective reasons for valuing political participation that express their claim to

membership of the democratic state as a regime of rule to which they are subject without having expressive reasons for valuing political participation. In contrast, non-resident citizens may have (largely) expressive reasons for valuing political participation that express their claim to membership of the democratic state as a political community. In other words, reflection on transnational citizenship directs us to a concern not merely with *degrees* of political membership but also with *modes* of political membership in the democratic state. One way of characterising the central claim of this article is that it represents the contention that the question of what constitute legitimate degrees of political membership for transnational citizens in the states to which they belong cannot be adequately addressed separately from discussion of the different modes of membership at issue in their relationship to these states.

### **Normative Framings of Transnational Citizenship**

Within discussions of transnational citizenship, the articulation of grounds of entitlement to full political membership (typically construed as national citizenship) have clustered around the principle that all persons who are subject to the coercive authority of the democratic state (or, to accommodate the EU, the polity) should be entitled, at least after a limited period of residence (for example, the EU norm of 5 years), to membership of the state. We can distinguish three positions that cluster around the *all subjected persons* principle: the all-subjected persons principle itself, the social membership principle and the stakeholder principle. I'll address each in turn.

The classic argument for the incorporation of habitual residents is provided by Robert Dahl's argument for the 'principle of full inclusion': '*The demos must include all adult members of the association except transients and persons proved to be mentally defective*' (1989: 129), where 'adult members of the association' refers to '*all adults subject to the binding collective decisions of the association*' (1989: 120). In the context of a democratic polity characterised in part by authority over a territorial jurisdiction, Dahl's account implies that any competent adult who is habitually resident within the territory of the polity and, hence, *subject to* the laws and policies of its government is

entitled to full inclusion within the *demos*.<sup>5</sup> Such an argument can be taken to underwrite Walzer's claim that the denial of full political rights to legally-admitted habitual residents amounts to *citizen tyranny* (Walzer, 1983:55).<sup>6</sup>

It has been contended by Lopez-Guerra that, given Dahl's formulation of the principle of full inclusion, 'the demos of a democratic polity must exclude all individuals who are not subject to the laws, together with transients and persons proved incapable of taking part in the decision-making process' (2005: 225). Lopez-Guerra's grounds for this claim are based on the view that, given the territorial jurisdiction of the state, being resident on the territory of the state is a *necessary* (as well as sufficient) condition for being subject to the collectively binding decisions of the state. Consequently, he argues that:

Debates so far have focused only on the necessity of granting political rights to all residents. They have ignored the implication that this *requires* the exclusion of long-term expatriates. (2005: 234, my emphasis)

Unsurprisingly, this required exclusion encourages the view that citizenship should be granted on a *jus domicile* basis.

The fundamental problem with the interpretation of the all subjected principle that Lopez-Guerra offers is that being present on the territory of a state is *not* a necessary condition for being subject to its collectively binding decisions. To illustrate this, consider the following (real) examples:

- 1) The event that motivates Lopez-Guerra's own article, namely, the Mexican referendum on expatriate voting.
- 2) The current UK Coalition government proposal to introduce a decent flat rate state pension which is payable only to UK citizens who are resident in the UK.

Who is subject to these collectively binding decisions? The answer is obvious: all citizens, irrespective of the residential status. Hence, while habitual

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<sup>5</sup> Although Dahl talks of the principle of all affected interests, I agree with Lopez-Guerra (2005: 222-5) that since it is being governed that is the normatively relevant issue for Dahl, the relevant principle is that of being *subjected to* rule rather than *affected by* rule.

<sup>6</sup> Walzer links this claim to one in which the polity has the right to determine its own entry criteria as an element of its right to self-determination; for an excellent analysis of the difficulties that this conjunction generates, see Bosniak (2006).

residence is a sufficient condition of subjection to the political authority of the state, it is not a necessary condition. More generally, states are a form of polity which combine authoritative rules that are conceptually dependant on residency, rules that are conceptually dependant on non-residency and rules that are conceptually independent of one's residential status (though they may be residence-sensitive)<sup>7</sup>. Thus, for example, the relationship between a state and its national citizens involves some rights and obligations that are necessarily dependent on residence (i.e, those arising from any law that pertains to actions involving the physical presence of the person with the state), some that are necessarily dependent on non-residence (i.e., the right to re-entry and to diplomatic protection) and some that are residence-indifferent (e.g., paying tax on property owned in the state). One of the political choices that a state can make with respect to issues that are not conceptually tied either to presence on, or absence from, the territory of the state is whether or not to treat them as residence-neutral. So the fact that Joe lives in state F rather than in state H of which he is a national citizen, while his brother and co-national Fred resides in state H does not mean that Joe is not, while Fred is, subject to the authoritative decisions of state H regarding the entitlements, privileges, powers and immunities (and their correlatives) that make up the legal character of citizens of state H. On the contrary, Joe and Fred are both subject to the political authority of state H. What differentiates them is, rather, the specific laws, rights and duties that currently *apply* to them in virtue of their distinct residence statuses.

Notice though that this argument only establishes that citizens are subject to the political authority of the state whose nationality they hold. Yet since it is only in virtue of the fact that, under current citizenship rules, national citizenship is retained by expatriates that they are subject to political authority of the state, the argument thus far is unable to account for *why* expatriates should be entitled to retain national citizenship of this state. A *jus domicile* rule

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<sup>7</sup> A residence-sensitive rule is one that while not conceptually tied to residence is practically related to residence in terms of its application. Thus, for example, in the 19<sup>th</sup> century, the inability of expatriates to stay up to date with the politics of their home states and participate at a distance in its public political discussions would have reasonably grounded the claim that voting rights should be tied to residence even though it is not conceptually tied to residence. I am grateful to Rainer Baubock for pressing this point on me.

such as Lopez-Guerra favours would equally meet the basic normative requirement that everyone is entitled to equal membership in a self-governing political community. The same type of objection is made by Baubock who argues that “‘all subjected persons’ is too conservative in presupposing the legitimacy of given boundaries’ (2009: 480-1) The limitation of the all-subjected persons principle exposed by these critical remarks is that it addresses the question of who should be entitled to political membership given an existing structure of political authority and allocation of citizenship, not the question of who should be entitled to national citizenship in the first place. If we are to develop a criteria for entitlement to national citizenship, the all-subjected persons principle needs supplementation. This limitation is, in part, a product of the fact that the all-subjected persons principle represents an exclusive focus on the democratic state as a regime of rule. In different ways, the *social membership* and *stakeholder* principles may be seen as attempts to overcome the problem posed by this limitation in ways that acknowledge the value of the democratic state as a site of political community. In the case of the stakeholder principle, this is done directly by specifying the idea of stakeholding in terms of a relationship between the autonomy and/or well-being of an individual and the future of the polity. In the case of the social membership principle, with which I begin, it is done indirectly through an appeal to the salience of social membership.

The *social membership* argument is advanced by Rubio-Marin (2000) and Carens (1989 & 2005) as asserting the principle that people have a moral right to be citizens of any society of which they are members’ (Carens, 1989: 32). The basis of this claim is twofold. First, the general social fact that living in a society makes one a member of a society since as one forges connections and attachments, one’s interests become interlinked with those of other members of the society (Rubio-Marin, 2000: 21 & 31-34; Carens, 2005: 33 & 39). Second, in living in given society, one is subject to the political authority of the state and, consequently, on democratic grounds, should have access to full political rights within the political community of that state (Rubio-Marin, 2000: 28-30; Carens, 2005: 39).

These arguments are, in several respects, compelling. Moreover, they give rise to the claim – implied by Walzer (1983), advanced by Rubio-Marín (2000) and now accepted by Carens (2005) - that neither the conferral nor the acquisition of such rights should be optional. The former element rules out selective practices such as citizenship tests on the grounds that while a society can legitimately entertain the reasonable expectation that immigrants will acquire its language and knowledge of its political institutions, it is unreasonable to make acquisition of civic rights conditional on meeting what can only be reasonable expectations given, for example, the differential linguistic abilities of persons.<sup>8</sup> The latter element rules out the possibility of choosing not to acquire such rights on the grounds that such a choice represents voluntary subjection to a condition of political servitude and, hence, is incompatible with the autonomy-valuing character of liberal democratic states.<sup>9</sup>

Further, although the social membership argument was developed in relation to resident non-citizens, it can be extended to address wider issues of membership. It is in this extension that its acknowledgement of the non-instrumental value of membership comes to the fore. Thus, for example, drawing on the *social* dimension of the argument, Rubio-Marín (2006) has argued that, in respect of states of origin, expatriates should have a right to retain their nationality of origin even when they naturalise in their state of residence on the basis that, generally speaking, membership of the state of origin is a source of non-instrumental value for them as well as its instrumental value in terms of visiting family and supporting the possibility of return migration. We can extend this argument to reasons for the state of residence also to accept a right to retention of the original nationality when naturalising, namely, that precisely because membership of the state of origin is typically a significant source of non-instrumental and instrumental value for its emigrant population, requiring them to surrender it will generate an unfair distribution of burdens between native citizens and immigrants in terms of

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<sup>8</sup> For a defence of citizenship tests, see Miller (2008) and for critiques see Carens (2005: 38-9) and Seglow (2008)

their capacity to enjoy the social attachments that matter to them – and, consequently, undermine social cohesion (cf. Rubio-Marin, 2006: 138).

The second supplementary alternative to the all-subjected persons principle is the *stakeholder* principle proposed by Baubock which expresses the claim that ‘self-governing political communities should include as citizens those individuals whose circumstances of life link their individual autonomy or well-being to the common good of the political community.’ (Baubock, 20089: 479).

This principle of inclusion is based on the following thought:

... in a self-governing polity, each individual member has a stake in the future of that polity in a dual sense. First, each individual’s autonomy or well-being depends to a large degree on how well political institutions work in guaranteeing equal liberties and in providing equal opportunities for all subjected to their authority. Second, citizens can collectively shape the future course of the polity through political participation and by holding political authorities accountable. (Baubock, 2009: 479)

In practical terms, Baubock proposes that those ‘persons and only those persons have a claim to citizenship in a particular political community who (a) depend on that community for long-term protection of their basic rights (dependency criterion) or (b) are or have been subjected to that community’s political authorities for a significant period over the course of their lives (biographical subjection criterion).’ (Baubock, 2009: 479) We can notice first that since first generation migrants are generally stakeholders in both their countries of origin and of habitual residence, this principle supports dual nationality. Given the role of family in socialisation, it is plausible to argue that second generation migrants are also stakeholders, however by the third generation, this claim is harder to sustain independent of specific actions on the part of the third generation migrant (such as going to live in the state of their grandparent’s origin). Thus, the stakeholder principle would extend the *automatic jus sanguinis* transmission of citizenship to second generation migrants but not further (Baubock, 2007a).

In contrast to the social membership argument, the stakeholder principle does not appeal to social ties and attachments but to directly political ties. Baubock offers two reasons for rejecting the social membership argument in favour of the stakeholder principle. The first concerns the increasing problems faced by the concept of a bounded state society in contexts of migrant transnationalism and global interactions. Baubock comments that it may appear 'somewhat circular if we derive claims to political membership from factual societal membership, but then have to refer to given political boundaries in order to define societies in the first place.' (2009: 482) The second is that while the social membership argument 'would substantiate immigrants' claim to citizenship, it cannot account for long-term external membership' when conducted in terms of a statist conception of society, while opening out the notion of societal membership beyond such a statist outlook through appeals to notions like family ties 'begs the question why other networks across borders, such as business connections, should not also be regarded as forms of societal membership.' (Baubock, 2009: 482). Even if we accept the first of these criticisms, it is not clear that the two points suffice to knockdown the social membership argument as opposed to provide reasons for its reformulation. Hints towards such a reformulation can already be seen in Rubio-Marin's reflections on dual nationality and we can offer the following restatement of the social membership argument:

*social membership* is characterised by non-instrumentally valuable social attachments and ties that arise from one's (past or present) residence within the territory of the state (or by way of socialisation through parents who were residents of the state in question) and which link one's well-being to the well-being of the (typically transnational) society comprised of all persons characterised by non-instrumentally valuable social attachments and ties that arise from their (past or present) residence within the territory of the state (or by way of socialisation through parents who were residents of the state in question).

This reformulation of the social membership argument does not appeal to the problematic concept of a bounded state society but simply to the non-instrumental value and site of genesis of those social relations that comprise a

form of social solidarity, yet since the state remains central to the well-being of this society, the social membership argument may still ground claims to political inclusion. Such a reformulation avoids Baubock's criticisms and, hence, we may take both the revised social membership principle and the stakeholder principle to represent live positions in the debate on transnational citizenship.

### **Citizenship, Membership and Resident Non-Citizens**

Notably both advocates of the social membership and the stakeholder principles align political membership with national citizenship – and this gives rise to a further dispute between their respective advocates which is more immediately consequential for the concerns of this article. The issue at stake in this dispute concerns whether the resident non-citizen who has legally abided in the state for the relevant period should be automatically entitled to take up national citizenship or automatically required to adopt national citizenship. Arguments for automatic mandatory citizenship have been advanced by Rubio-Marín and Carens which, albeit on slightly different grounds, stress the problem of citizen tyranny, while Baubock has argued that there are good sociological reasons for thinking that it is important for social and political integration that immigrants make a public voluntary commitment to naturalise and, thereby, 'visibly link their own future with that of the country of settlement'. Both of these arguments have considerable force. But rather than attempt to resolve this dispute by demonstrating the rational superiority of one position over the other, I would like to try the tactic of *dissolving* the dispute by showing that we can endorse both positions. The central pivot for this tactic is the fact that this *antinomy of incorporation* arises precisely because both identify political membership with national citizenship. Consequently, one way of negotiating this conflict is thus to drop this identification and note that neither the all-subjected persons principle or its supplemental variants strictly entail naturalization as the route to political membership, they simply entail political membership – and there is a non-trivial distinction between *political membership* and *national citizenship* since the latter, but not the former, automatically includes the 'external rights' of diplomatic protection and automatic right of re-entry to the state as well as the automatic entitlement to

pass nationality on to their children via the *jus sanguinis* provisions that states have almost universally and justifiably adopted as part of their nationality laws. Thus, we may hold both that there is a compelling argument for the mandated acquisition of full political rights or *political membership* (which ought, in the case of resident non-citizens, to confer an automatic entitlement to the acquisition of the status of *national citizenship*), but also that the acquisition of national citizenship itself should involve a voluntary act on the part of the immigrant. The additional features of national citizenship fit the rationale for a voluntary act since their value is immanently related to the immigrant's seeing their relationship to the state as not simply instrumental valuable in protecting them against domination but also as non-instrumentally valuable and, hence, as providing reasons for linking one's own future well-being with that of the state. However, two significant objections have been proposed to this method of dissolving the antinomy of incorporation.<sup>10</sup>

The first objection concerns mandated membership and points out that denizens are not non-citizens but combine a bundle of extensive quasi-citizenship rights in the country of residence with external citizenship rights in a country of origin. Their denizenship rights include a right to optional naturalisation. The objection is thus that this bundle should sufficiently secure their political autonomy. Under this condition, not to make use of their right to naturalisation can be seen as akin to enjoying voting rights but not making use of them. To put this point the other way round, an argument for mandatory naturalisation would have to meet the same objections as arguments for mandatory voting. Paternalistic arguments for mandatory naturalisation or voting are not necessarily illiberal, but they should be grounded on contextual evidence that sufficient inclusion cannot be achieved otherwise.

In response to the first objection, it is important to distinguish between conditions of political autonomy and exercises of political autonomy. In the example of mandatory voting, the argument against the practice swings on

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<sup>10</sup> I am grateful to Rainer Baubock for raising these objections and I draw on his formulations of them in presenting them here.

the fact that in non-mandatory systems, both voting and not voting are expressions of political autonomy and, hence, while argument for mandatory voting may be plausible, their normative force won't be grounded directly on an appeal to political autonomy (though it may be indirectly so grounded). By contrast, on the account I offer, political membership is a condition of political autonomy, the decision whether to acquire or not acquire political membership may both be expressions of individual autonomy but they are not exercises of political autonomy. Hence, on this view, the question is whether people should be entitled as a matter of personal autonomy to place themselves in conditions of political servitude. I see no reason to accept that claim.

This initial response, however, depends on the claim that full political membership is a necessary condition of political autonomy – and it is not clear that this claim is sustainable. While it is reasonable to take the claim to hold in the case of 'birthright' citizens who hold no other nationality or 'stateless' residents, the condition of the denizen is quite distinct. The objection suggests that the quasi-citizenship enjoyed by denizens combined with their external citizenship rights in their country of origin suffice for political autonomy, that is, they have external rights of diplomatic protection and of return combined with local voting rights and, typically, some general rights of political participation. If this is the case, it would seem perverse to deny that denizens enjoy some degree of political autonomy and to insist that full political membership is a necessary condition of political autonomy as such. Admitting this point does not settle the argument though since once we admit that there are degrees of political autonomy, the pressing question becomes what counts as an acceptable threshold.

Here I think it is worthwhile to return to Dahl's argument concerning the strong principle of equality. The relevant point is that Dahl's argument makes no reference to citizenship; the criterion for membership to which it appeals is subjection to the collectively binding decisions of the polity. While it is the case that resident non-citizens are not subject to *all* the collectively-binding decisions of the polity, it is also true that, given the territorial dimension of the state, a large (and consequential) array of residence-based laws are binding

on resident non-citizens. In this respect, one way of reflecting on the issue of the threshold of political autonomy is to note that denizens are situated in different contexts of political autonomy – that of the state of origin and the state of residence – and although some very basic features of political autonomy in the state of residence may be protected through the right of diplomatic protection granted by the state of origin (and the spread of human rights norms), this is hardly sufficient to secure a relevant degree of political autonomy in the context of the state of residence. Considering a related issue raised in relation to dual nationals who have voting rights in both states of their nationality may help to clarify this point. Here the question is raised as to whether this practice breaches the principle of equality since these dual nationals have two votes. The appropriate response is that although they have two votes, the votes are cast in distinct electoral contests and, hence, the principle of equality is not breached since, as long as the votes do not both contribute, directly or indirectly, to the selection of representatives from both states to a supra-national level of governance (as in the case of the EU), the relevant context of application of the principle of the equality is a specific polity (cf. Baubock, 2007: 2428). By the same token, as long as the relevant states are not linked in a supra-national union, the appropriate threshold for political autonomy in a state of residence is given by the application of the principle of equality in that polity – and this, at the very least, supports a strong presumption in favour of full political membership for resident non-citizens.

Even if we admit that there may be forms of political incorporation that are sufficient to secure the relevant conditions of political autonomy but fall short of full membership, this does not undermine the argument for mandatory inclusion. On the contrary, it simply revises the principle to state that whatever degree of incorporation in the political community is necessary for securing political autonomy can legitimately be a matter of automatic mandatory inclusion. If it is the case that the quasi-citizenship enjoyed by denizens combined with their external citizenship rights in their country of origin suffice for political autonomy, then the relevant membership rights (e.g., local voting rights and, typically, some general rights of political participation) are not

optional (and it is notable that the objection assumes that these rights are not optional.) If it is the case, as I have suggested, that full membership rights are required, then these are equally not optional.

The second objection applies to the proposed solution, that is, the distinction of mandated political membership and voluntary national citizenship, as paradoxical on the grounds that it suggests that migrants ought to express their commitment to the polity through naturalisation but the incentives for choosing a status of national citizenship are to gain rights that can be exercised from abroad rather than from within, and civil rights and liberties in which individuals have clearly instrumental interests rather than political participation rights whose exercise would express a commitment to the polity.<sup>11</sup> This is, I think, slightly point-missing. To see this, note that a migrant may have two quite different relations to the polity in which it is seen as either instrumentally valuable (as a regime of rule) or non-instrumentally valuable (as a political community) from the first person standpoint. On my account, if the migrant's relationship to the polity is instrumental, then the migrant has an interest in, and claim to, adequate conditions of political autonomy but has no interest in binding his future well-being to the fate of the polity which is precisely what is expressed in the additional rights and obligations involved in national citizenship. On the other hand, if the migrant's relationship to the polity is such that it is not only instrumentally valuable but also non-instrumentally valuable, then this grounds an interest in, and claim to, national citizenship. It is not here a matter of providing incentives, but rather of allowing for two different modes of membership of the polity, acknowledging the legitimate claims of each, and marking that distinction in a way that respects the difference.

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<sup>11</sup> Notice that this objection can entertain the thought that rights to return and diplomatic protection should not be an exclusive privilege of national citizenship but could be included in denizenship and thus acquired automatically instead of having to be chosen through naturalisation. (On Baubock's view, such external denizenship rights would, however, not be for life, so that national citizens would still enjoy a specific recognition as permanent stakeholders.) The objection is also compatible with resisting the claim that national voting rights ought to be granted only to born or voluntarily naturalised citizens, since if the defense of optional naturalisation as a choice to be made by first generation migrants is successful, then the question of which rights remain attached to full citizenship can be answered in different ways.

Reflecting on these objections does not then, in my view, undermine the cogency of the distinction between mandatory political membership and voluntary national citizenship as a way of dissolving the tension raised by the advocates of the social membership and stakeholder principles. What it may do, however, is point to a need to distinguish different degrees of political membership – and this is a topic to which I will return in raising the issue of the need to move beyond reflection on voting rights. However, before we turn to that topic, it is relevant to address the disjuncture between political membership and national citizenship from the standpoint of a concern not with resident non-citizens but with non-resident citizens.

### **Citizenship, Membership and Non-resident Citizens**

Intriguingly, theorists of transnational citizenship are more willing to entertain the salience of the distinction between political membership and national citizenship in the case of non-resident citizens. This is, I think, essentially because while the case of expatriates has also focused around national voting rights, the debate here has been structured not by the question of whether democratic exclusion of residents can be justified (as in the case of resident non-citizens) but whether democratic inclusion of non-resident citizens can be justified. I have already discussed and rejected Lopez-Guarra's claim that expatriates are not subject to the political authority of their state of origin and, hence, should be automatically excluded from the demos. But the fact that the exclusion of expatriates is not required does not entail that their inclusion – in terms of national voting rights – is required. So what position is defensible? I will critically consider two leading arguments.

The first is offered by Rubio-Marin who argues that:

Democratic legitimacy and popular sovereignty require that the people subject to the law and state authority be included, as a matter of right, in the process of shaping how that authority will be formed and exercised. The exercise of public authority affects mostly those who live subject to the jurisdiction of such authority. Since states are geographically bounded communities and their borders express the

limits of their jurisdictions, democratic states generally have good reasons to restrict participation in the political process to those who reside within their territorial borders. This would then justify the exclusion of expatriates from the political process as they are not directly and comprehensively affected by the decisions and policies that their participation would help to bring about even if they are likely to be affected by some of those decisions, such as those concerning remittances, nationality, and military service laws. (2006: 129)

This argument is curiously constructed since it moves between appeals to being subjected to law and being affected by law. On the one hand, Rubio-Marín claims that those subject to the political authority of the state should, as a matter of right, be included. On the other hand, she then moves to address the topic purely in terms of affectedness.

To make sense of this movement, it may help to return to the point that expatriates are subject to the political authority of the state of origin. Consider that since expatriates are subject to the collectively binding decisions of the state, Dahl's principle of strong equality would *prima facie* require their inclusion within the demos. This is because the principle treats subjection in a *non-scalar* way, that is, it is not a matter of how much you are subject to collectively-binding decisions (the extent of the range of laws that apply to you) but, rather, that you are subject to collectively-binding decisions. Yet Dahl's principle was formulated against the background assumption that individuals are broadly equally positioned in terms of the range of laws to which they are subject and this assumption is simply not valid in the context of non-resident citizens. If we drop this assumption, it becomes reasonable to argue that scalar considerations can enter into the argument which address both the extent of the laws to which you are subject and the consequentiality of these laws for your autonomy and well-being. It is, I think, something like this argument which can make coherent and cogent Rubio-Marín's contention that it is the fact that expatriates are not 'directly and comprehensively affected' by the policies of the state of origin that legitimates their exclusion from national voting rights.

However, while Rubio-Marin's argument provides a basis for the claim that expatriates can be legitimately excluded, it does not entail their exclusion (2006: 134). The most plausible construal of Rubio-Marin's point is that under conditions in which it is possible for expatriates to engage in informed and up-to-date decision-making to be made, for ongoing ties to be maintained and for return to be a real option (and hence it is possible for expatriates to satisfy the conditions of responsibility and consequentiality in relation to voting), democratic inclusion of expatriate citizens is a legitimate way of recognizing the non-instrumental attachment to the society of their home states that she takes to be a widespread and typical feature of first-generation emigrants (2006: 142). The justification would be that even though expatriates are not 'directly and comprehensively affected' by state policies, they are subject to its authority and since their individual well-being is non-contingently related to the well-being of the society of the home state, its policies are consequential for them. Notice though that this argument leaves unaddressed the question of *who* is entitled to make the decision concerning who is to be included in the demos (or, more precisely, national franchise) in effect simply assuming that this is a matter for the current demos (however constituted).

The second argument is offered by Baubock who also claims that expatriate voting is neither required nor forbidden by justice. Consider two sets of remarks. In the first remarks Baubock reiterates the stakeholder principle:

The notion of stakeholding expresses, first, the idea that citizens have not merely fundamental interests in the outcomes of the political process, but a claim to be represented as participants in that process. Second, stakeholding serves as a criterion for assessing claims to membership and voting rights. Individuals whose circumstances of life link their future well-being to the flourishing of a particular polity should be recognized as stakeholders in that polity with a claim to participate in collective decision-making processes that shape the shared future of this political community. (Baubock, 2007: )

This passage suggests that stakeholders have a legitimate claim to participate, although this does not rule out either that the reach of this claim (i.e., the

extent of participation it legitimates) may vary or that it may be defeated by other legitimate concerns. In the second set of remarks, Baubock comments:

In a stakeholder conception of democratic community, persons with multiple stakes need multiple votes to control each of the governments whose decisions will affect their future as members of several *demos*. This applies, on the one hand, to federally nested *demos* where citizens can cast multiple vertical votes on several levels and, on the other hand, to the *demos* of independent states with overlapping membership. (Baubock, 2007: )

This suggests a stronger view, namely, that the stakeholder principle supports a requirement of inclusion in the *demos* for stakeholders, where we may surmise this requirement would be legitimately subject only to (a) the basic constraint that such inclusion does not threaten the stability of the state (i.e., its capacity to reproduce itself as a self-governing polity over time) and (b) feasibility constraints. This stronger view is more in line with the my remarks concerning contexts of political autonomy advanced in the previous section, yet Baubock does not adopt this stance, remaining content with the view that expatriate voting is permissible but not required, although acknowledging the normative salience of existing state practices of expatriate enfranchisement as having constructed reasonable expectations which it would be unjust to frustrate given the normative permissibility of the practice. Overall, the most one can say is that, for Baubock, the stakeholder principles broadly supports a presumption in favour of such rights for first generation migrants but acknowledges that this presumption can be either supported or defeated by a wide range of factors relating the specific circumstances of the polity (Baubock, 2007).

However, a problem arises in relation to Baubock's stance on permissibility in which it is simply up to the democratic state to determine whether or not to allow expatriate voting, while, in addition, Baubock also argues that democratic states should have the freedom to introduce conditions 'such as length of residence in the country, maximum duration of residence abroad, or an intention to return (however difficult this may be to verify)'. (Baubock, 2007:)

This implies that the current demos has the right to determine not only whether non-resident stakeholders are to be granted national voting rights but also, if such rights are granted, which of these stakeholders is entitled to them. But what justifies that view? After all, all national citizens, resident or not, will be bound by the decision.

The basic limitation in the arguments of both Rubio-Marin and of Baubock is that they don't focus on the question of *who* is entitled to determine whether or not expatriates are included in the national franchise. They both assume that this is, practically speaking, a matter of whatever contingent specifications of the demos currently hold but provide no normative basis for the legitimacy of this view. What is required is a principled (i.e., non-arbitrary) basis on which to determine who is entitled to decide on this question. Here it is worth noting that there is one type of decision by any polity which not only binds all citizens irrespective of residence but also directs concerns their very status as citizens, namely, constitutional laws that specify the entitlements and obligations of citizens – such as, for example, laws on nationality and expatriate voting rights. Moreover, since it concerns the status of citizenship itself, in the case of such decisions concerning the fundamental character of the civil association to deny any (competent) citizen or group of citizens the right to participate as an equal member of the democratic community in the decision-making process is to deny their status as a citizen, it is to subject them to an alien form of rule. The only legitimate basis for such decision as decisions on expatriate voting is, thus, that all citizens are entitled to inclusion irrespective of their residential status (although this does not rule out that considerations of feasibility and cost may legitimately allow the requirement that votes are cast within the territory of the home state). This universality rule provides the principled basis that is lacking from Rubio-Marin's and Baubock's arguments.

Does this rule also apply to Baubock's further reflections concerning discriminations within the class of non-resident citizens? If such discriminations are permissible, the rule will apply. However, whether the

discriminations are permissible hangs on whether we conceive them as contextual determinations of the abstract stakeholder principle by distinct democratic communities or as discriminations within the class of emigrant stakeholders. In the former case, they are permissible since the abstract stakeholder principle does require democratically legitimate contextual determination; in the latter case, they may not be permissible since presumptively they breach the principle of equality with respect to the class of emigrant stakeholders. While we may have hold reasons for accepting that the principle of equality is compatible with different political entitlements for resident and non-resident stakeholders, it is not obviously the case that we also have reasons to accept that the principle of equality is compatible with different political entitlements for different classes of emigrant stakeholders. This is not to rule out this possibility but merely to note that a compelling argument would need to be made to justify the permissibility of the relevant inequality.

### **Widening the Scope**

Having addressed the issue of voting rights for both resident non-citizens and non-resident citizens, let me now offer some reasons for widening the scope of consideration from voting rights to rights of political participation more generally, where by rights of political participation I refer additionally to such core rights as freedom of expression, freedom of assembly and protest, freedom to join, and form, political associations and freedom to stand for public office. Having presented these reasons, I will go on to consider the relationship between different modes of membership and the degrees to which those exhibiting these modes should enjoy rights of political participation.

The most obvious reasons for widening the focus to engage the general terrain of rights of political participation are twofold. The first is that political autonomy in democratic states cannot be reduced to voting rights. Since political autonomy concerns having at the very least effective opportunities for publicly communicating (and reflecting on) views and arguments, and for

influencing the political agenda, it will require a wider range of rights of political participation. The second can be drawn out by reflecting briefly on the two cases of resident non-citizens and non-resident citizens. Suppose that we take the view that the political autonomy of denizens can be secured short of full political membership. In such a context, the immediate question concerns what rights of political participation are sufficient to secure their political autonomy and, if more than one answer to this question is possible, the further question of the relative merits of different possible bundles of rights of political participation for that end. In the case of expatriate citizens, there are two issues: first, what rights of political participation should they be entitled to independent of whether they are permitted to vote and, second, should the decision on whether they are enfranchised affect the rights of political participation to which they are entitled?

If we consider the case of resident non-citizens who choose not to naturalise in contexts where such an option is easily accessible and bears no additional burdens (i.e., dual nationality is permitted), we can reasonably presume that these residents stand in a broadly instrumental relationship to the democratic state as a regime of rule and, hence, have protective reasons to engage in political participation as well as a legitimate claim to engage in political participation grounded on their subjection to the political authority of the state. Does this mode of membership have any implications for the range of rights of political participation to which they are entitled? I think that there are grounds for suggesting so. In general, an instrumental relation to the state entitles individuals to those rights that are fundamentally concerned with the formation, expression and defence of their legitimate interests which include, minimally, rights of free political speech, rights of association and rights of assembly and protest. I have already argued that, in the case of resident non-citizens, it extends to national voting rights in legislative elections but it should be added that the same argument leads to the view that resident non-citizens must be excluded from constitutional referenda that address fundamental relations between citizens and presumptively excluded from executive elections. What of joining and founding political associations and political parties? There are good protective reasons for resident non-citizens to be able to join political

associations (though some may reasonably be reserved for citizens) and found political associations (which may reasonably be restricted to resident non-citizens) to represent their interests effectively in the polity. For the same reason, they should enjoy a right to join political parties but not, I think, to found political parties unless and until it can be shown (before a court) that the existing political parties will not be reasonable representatives of their interests. I advance this claim on the basis that political parties are not simply carriers of sectional interests of various kinds which they express through programmes of domestic legislation but also intended as offering competing substantive visions of the political community and its future between which that community may choose. In this respect, a political party should be seen as both a vehicle for protection of political interests within a regime of rule and a medium of expression of political values within a political community. For much the same reasons, I do not think that resident non-citizens should be entitled to stand for national election unless and until it is demonstrable that their interests are being systematically ignored by the national legislature and even here it may be more suitable to adopt mechanisms of judicial review.

Turning to the case of first and second generation non-resident citizens, we can note that there are some limited (though significant) instrumental relations to the state of origin as a regime of rule and, typically, a non-instrumental attachment to this state as a form of political community. A significant feature of this mode of membership is that the majority of domestic law will not be consequential for expatriates in terms of their interests. Given that expatriates stand in both a (limited) instrumental and non-instrumental relationship to the democratic state and, hence, have both (some) protective reasons and expressive reasons to engage in political participation as well as a legitimate claim to engage in political participation based on their subjection to the political authority of the state and the interdependence of their individual well-being and the flourishing of the state, what implications follow for the rights of political participation which they are owed? In general, this mode of membership supports entitlement to rights of free political speech, rights of association and rights of assembly and protest which play both protective and expressive roles. I have also already argued that expatriate citizens must be

entitled to participate in constitutional referenda and that there is at least a presumption in favour of their enjoying national voting rights, although here I should make clear that I think that this presumption applies to both national executive elections and legislative elections, albeit that the reasons for this are different in each case and, in my view, stronger in relation to the former type of election. In the case of electing a President, the same reasons that support the exclusion of resident non-citizens support the inclusion of expatriate citizens. In the case of national legislative elections, while it is the case that these express both instrumental and instrumental dimensions of the expatriate citizen's relationship to the state, the claim is significantly qualified by the non-consequentiality (from an instrumental standpoint) of much of the legislation debated and enacted within national legislative settings. In relation to joining and founding political organisations and political parties, it seems that the specific mode of membership of expatriate citizen's should entitle them to join and found political associations and to join but not found political parties. The reason for this restriction is the flipside of the related restriction on resident non-citizens, namely, that political parties not only articulate a substantive ethical self-understanding for the political community but also seek to articulate and protect the interests of a diverse range of sectoral interests through programmes of domestic legislation. A similarly mirrored relationship to the resident non-citizen is exhibited in the right to stand for national office. Here it is not simply the fact that the practical requirements of the role involve residence (which is a contingent constraint) but that, as a representative, the expatriate citizen would not bear the consequences of much of the legislation which they were involved in enacting. In the case of founding political parties and standing for national election, it seems reasonable that the joint requirements of residence and national citizenship are met.

Thus far in considering rights of political participation, essentially two grounds for such rights have been in play – being subject to the rule of a state and having one's well-being non-contingently bound to the fate of the state – but there is a further ground on which claims to rights of political participation may legitimately be based, namely, having one's morally significant interests

affected by the decisions of the state and I will conclude this discussion by attending to the fundamental issue raised for transnational citizenship by this principle, namely, the inclusion of non-resident, non-citizens. In taking up the all affected interests principle, I will begin by briefly clarifying why this principle has not been itself considered as a ground for claims to full inclusion within the demos, that is, as a principle of transnational citizenship, before noting that the rejection of this principle as a criterion of membership of the demos does not entail its rejection as grounding a specific mode of membership in the democratic state.

Why should the fact that one's morally significant interests are affected by a decision of a polity of which one is neither a resident nor a citizen ground a right to inclusion within the demos? On Goodin's argument, the all-affected interests principle is grounded on the importance of the intermeshed interests of persons, arguing that 'common reciprocal interests in one another's action and choices are what makes these groups [e.g., territorial, historical, national] appropriate units for collective decision-making' (Goodin, 2007: 48). But what work is done by this appeal to interlinked interests? Ironically, this view entails that having an interest in membership of a polity or structure of governance is not predicated on one's interests being affected by some decision of *that* polity but, rather, on one's interests being intermeshed with the interests of others such that one has a common interest with these others of being a member of a legal and/or political community that regulates the relations between the members of this community. This appeal to interlinked interests is a *recursive* principle in the sense that while persons whose interests are affected by a decision made by a given polity do not thereby have an interest in membership of that polity, in virtue of having an interest affected by a decision of that polity they do have a common interest with all other persons affected by that decision in membership of a legal and/or political community that has powers to regulate the decision made by the interest-affecting polity. This does not however provide a normative basis for the all affected interests principle. As Baubock notes, the all affected interests principle 'builds on the plausible idea that democratic decisions have to be justified towards all whose who are affected by them, but implausibly derives from such a duty of

justification a criterion of participation and representation in the decision-making itself.’ (2009b: 15) Thus, while discussions of the all-affected principle are right to highlight the significance of intermeshed interests, the politically indiscriminate nature of the principle cannot do what is necessary for a consideration of the fundamental question of entitlement to political membership, namely, specify the type of interests whose intermeshing generates a claim to membership of a political community. Put another way:

the “all affected interests” principle substantiates ethical duties for democratic legislators to take externally affected interests into account, to seek agreements with the representatives of externally affected polities and to transfer some decision on global problems to international institutions, but ... it cannot provide a criterion for determining claims to citizenship and political participation.’ (Baubock, 2009b: 18)

However, that it cannot provide such a criterion does not mean that it does not provide a ground for a specific mode of membership in the democratic state, that is, for certain rights of political participation.

To consider this claim, it is worth reflecting on what is involved in the thought that states should consider the morally significant interests of non-resident, non-citizens when involved in decision-making and owe a duty of justification to all whose morally significant interest are affected by their decisions. Notice that considering these interests entails both that those who are liable to be affected are aware of the various options being considered by a state in relation to a given policy-choice and that the decision-making state is aware of the interests of those whose interests are liable to be affected. The former imposes a duty of publicity on the decision-making state and correlative right to information for the relevantly affected parties; the latter generates a duty on those affected to make the decision-making state aware of the ways in which particular policy choices are likely to impact upon them. In the case of democratic states, in which sovereignty lies ultimately with the people, this duty on external affected parties entails a right not only to communicate with the representatives of the state (e.g., diplomats and politicians) but to communicate directly with the people themselves and to make arguments and

representations to them. Where the external affected parties are members of other states, it may seem that this right is accommodated through inter-state diplomatic relations but two points hold against taking this to be sufficient. First, the external affected parties may be scattered across several states in such a way that their affected interests are not a major concern for any particular state. Second, even if the external affected parties represent a significant body within a given state, that state may be part of the problem insofar its government pursue policies without regard to (or even with counter-regard to) its peoples interests. Moreover, given the practical relationship between the right to freedom of political speech, the right to found political associations to represent one's interests and the right to engage in peaceful protest (when on the territory of the decision-making state) in modern politics, it would seem that external affected parties should enjoy these rights of political participation as conditions for enabling the decision-making state adequately to take into account external affected interests. Since practically, however, democratic states make a large range of decisions which generate morally significant affects on external parties and the practical specification of who will be affected is often hard to determine with any precision, it seems plausible to suggest that this feature of modern political life is best dealt with through the existing system of international diplomacy in conjunction with a general right of non-resident, non-citizens to freedom of political speech across borders, the founding of political associations in the decision-making state and a territorially-conditional right to engage in peaceful protest. The right to freedom of expression declared in Article 19 of the UNDHR is a good example of just such as rights:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and *regardless of frontiers.* (my italics)

This is a mode of political membership because, even if it is practically instantiated through human rights, it represents a relationship of entitlement and obligation between a given state and those whose interests are affected by its decisions.

These reflection on the all affected interests principle not only further support the point that widening the scope of reflection from voting rights to rights of political participation is needful for an adequate normative account of transnational citizenship, they underscore this point by directing us to the need to expand the concept of transnational citizenship to include a specific mode of membership which encompasses externally affected parties who have a claim to participate in certain ways in the political life of a self-governing state in which they are neither residents nor citizens.

## **Conclusion**

Transnational citizenship represents a fundamental reconfiguration of political membership and normative theoretical accounts of this phenomenon, most prominently in the work of Baubock, Carens and Rubio-Marin, have focused on the most central practical policy areas impacted by this phenomenon, namely, membership and voting rights. My concern in this article has been to argue for a refocusing of attention on modes of membership and political participation. First, I have argued that general considerations of political participation suggest that we need to think not only about degrees of membership but about modes of membership, and indeed I have claimed that we cannot adequately address the former with attending to the latter. Second, and integral to this refocusing of attention of attention on modes of membership, is a shift from voting rights to the wider range of rights of political participation. In making this argument, I have both been concerned to review the leading arguments within the field of normative political theory and to show both how some tensions and problems within existing debates can be overcome, and to argue for a more expansive conception of transnational citizenship. Although this article does not engage in the more detailed and specific contextual work that would be needed for a full account of the rights of political participation appropriate to a specific mode of membership in a given democratic state, it does, I hope, establish the value of, and provide some guidance for, the generation of such an account.

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