

The Rights of Others. Aliens, Residents and Citizens

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I

Democratic Citizenship and the Crisis of Territoriality

Modern liberal democracies owe their stability and relative success to the coming together of two ideals which originate in distinct historical periods: the ideal of *self-governance* which defines freedom as the rule of law among a community of equals who are “citizens” of the polis, and who thus have the right to rule and to be ruled. This ideal emerges in 5th century Athens and is revived throughout history in episodes such as the experience of self-governing city-states in the Renaissance; the Paris commune of 1871, the anarchist and socialist communes of the Russian Revolution, and the Spanish civil war.

The ideal of the territorially circumscribed nation-state, by contrast, conceives of the citizen first and foremost as the subject of *state-administration*, or more positively, as *the subject of rights and entitlements*. Originating with the experience of the transition from feudalism to the absolutist state, this experiment with good governance in a self-regulating civil society has been the defining conception of the early liberal social contract in the works of Thomas Hobbes and John Locke.

Since the 17th century democracy and the consolidation of the modern nation-state have marched together – at times contradicting and at times supplementing each other. The democratic struggles of propertyless males, artisans, farmers, and workers to win the suffrage and political inclusion, gave way in the course of the early twentieth-century to the struggle of women, non-Christian and non-White colonial peoples to be

included within the boundaries of the demos. Along with the formal expansion of citizenship rights, the enrichment of the scope of rights from civil to political and to social rights took place.¹ In this process, the ideal of self-governance was increasingly interpreted as the formal equality of the citizens of the demos who now sought to realize the equal value of their liberty in terms of an equivalent schedule of rights and entitlements. The civic-republican ideal of self-governance, the exercise of freedom among equals in a public space, is connected – and I would argue inevitably and necessarily – to the liberal ideal of citizenship as the practice and enjoyment of rights and benefits. Modern democracies seek to integrate these republican and liberal ideals into the practices of “public” and “private autonomy.” While the private autonomy of citizens presupposes the exercise and enjoyment of liberty through a rights-framework which undergirds the equal value of their liberty, public autonomy is realized through the institutions of democratic self-governance in increasingly complex societies.

This relatively successful synthesis of republican and liberal-democratic ideals, or of public and private autonomy is today in crisis. The crisis, I want to suggest, is not the crisis of democracy in the first place but rather the crisis of the territorially circumscribed nation-state formation.

The modern (nation-) state in the West, in the course of its development from the 16th to the 19th centuries, struggled to attain four goals: territorial dominion; administrative control; consolidation of collective cultural identity, and the achievement of political legitimacy through increasing democratic participation. Yet contemporary

¹ T.H. Marshall. *Citizenship and Social Class and Other Essays*. (Cambridge University Press: London, 1950).

developments—such as the rise of a global economy through the formation of free markets in capital, finance, and labor; the increasing internationalization of armament, communication, and information technologies; the emergence of international and transnational cultural networks and electronic spheres, and the growth of sub- and transnational political actors, among other factors—herald the fragmentation of these state functions.

It has now become commonplace in normative political thought as well as the social sciences to discuss “the end of the nation-state” and “the demise of Westphalian conceptions of sovereignty.” But I want to argue that contemporary developments are much more complicated than is suggested by these phrases, for even in the face of the collapse of traditional conceptions of state-sovereignty, monopoly over territory is exercised through immigration and citizenship policies. Yet neglecting the normative and empirical dimensions of the cross-border movements of peoples is equally widespread in contemporary thought.

All pleas to develop ‘post-Westphalian’ conceptions of sovereignty² are ineffective if they do not also address the normative regulation of peoples’ movement across territorial boundaries. From a philosophical point of view, transnational migrations bring to the fore the constitutive dilemma at the heart of liberal democracies as between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other. I will argue that practices of political

² Allan Buchanan, “Rawls’s Law of Peoples: Rules for a Vanished Westphalian World.” *Ethics* 110 (July 2000): 697-721, and A Buchanan, “From Nuremberg to Kosovo: The Morality of Illegal International Reform.” *Ethics* 111 (July 2001): 673-705.

membership may best be illuminated through an *internal reconstruction* of these dual commitments.³

It is estimated that whereas in 1910 roughly 33 million individuals lived in countries other than their own as migrants, by the year 2000 that number had reached 175 million. During this same period (1910-2000), the population of the world is estimated to have grown from 1.6 to 5.3 billion, that is by threefold. Migrations, by contrast, increased almost sixfold over the course of these ninety years. Strikingly, more than half of the increase of migrants from 1910 to 2000 occurred in the last three decades of the twentieth-century, between 1965 and 2000. In this period 75 million people undertook cross-border movements to settle in countries other than that of their origin. (*UN International Migration Report 2002*)

While migratory movements in the latter half of the twentieth-century have accelerated, the plight of refugees has also grown. There are almost 20 million refugees, asylum seekers and “internally displaced persons” in the world. The resource-rich countries of Europe and the northern hemisphere face growing number of migrants, but it is mostly nations in the southern hemisphere, such as Chad, Pakistan, Ingushetia, that are home to hundreds of thousands of refugees fleeing from wars in the neighbouring countries of Central African Republic, Afghanistan, and Chechnya.⁴

As one thoughtful student of world-wide immigration trends has observed, “Over the past one hundred years, international migration has often been at the center stage of

³ I have developed these arguments more extensively in: Benhabib, *The Rights of Others. Aliens, Residents and Citizens*. The John Seeley Memorial Lectures. (Cambridge University Press, Forthcoming. 2004).

⁴ David Rieff, “Displaced Places. *New York Times Sunday Magazine*. September 21, 2003. Section 6, 36-41.

major events that reshaped the world. The twentieth-century began with a decade where transatlantic migration reached unprecedented levels and it has closed with one in which migration from developing to developed countries and from Eastern bloc countries to the West has been at a high.”⁵

To ascertain such trends need not commit one to exaggerated claims about the ‘end’ of the state system. The irony of current political developments is that while state sovereignty in economic, military, and technological domains has been greatly eroded, it is nonetheless vigorously asserted, and national borders, while more porous, are still there to keep out aliens and intruders. The old political structures may have waned but the new political forms of globalization are not yet in sight.

We are like travelers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are traveling on, the world-society of states, has changed our normative map has not. I do not pretend to have a new map to replace the old one, but I do hope to contribute to a better understanding of the salient fault-lines of the unknown territory which we are traversing. The growing normative incongruities between international human rights norms, particularly as they pertain to the “rights of others” --immigrants, refugees and asylum seekers --and continuing assertions of territorial sovereignty are the novel features of this new landscape.

⁵ Hania Zlotnik, “Past Trends in International Migration and their Implications for Future Prospects.” In: *International Migration into the 21st Century: Essays in Honor of Reginald Appleyard*. Edited by M.A.B. Siddique. (Boston, MA: Edward Elgar Publishing, 2001), pp. 227-262. Here, p. 257.

Since the 1948 Declaration of Human Rights an international human rights regime has emerged. By an 'international human rights regime' I understand the development of interrelated and overlapping global and regional regimes that encompass human rights treaties as well as customary international and international soft law. Yet states' sovereignty to disregard treaties, to abide by them or not to implement them, goes unchecked.

The Universal Declaration of Human Rights recognizes the right to freedom of movement across boundaries -- a right to emigrate-- that is to leave a country, but not a right to immigrate, a right to enter a country. (Article 13) Article 14 anchors the right to enjoy asylum under certain circumstances, while Article 1 of the Declaration proclaims that everyone has a "the right to a nationality." The second half of Article 15 stipulates that "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." (<http://www.unhchr.ch/udhr/lang/eng.htm>)

The Universal Declaration is silent on states' *obligations* to grant entry to immigrants, to uphold the right of asylum, and to permit citizenship to alien residents and denizens. These rights have no specific addressees and they do not appear to anchor *specific* obligations on the part of second and third parties to comply with them. Despite the cross-border character of these rights, the Declaration upholds the sovereignty of individual states. Thus a series of internal contradictions between universal human rights and territorial sovereignty, are built right into the logic of the most comprehensive international law documents in our world.

The Geneva Convention of 1951 Relating to the Status of Refugees and its Protocol added in 1967 are the second most important international legal documents

governing cross-border movements. Nevertheless, neither the existence of these documents nor the creation of the United Nations High Commissioner on Refugees have altered the fact that this Convention and its Protocol are binding on signatory states alone and can be brazenly disregarded by non-signatories, and at times, even by signatory states themselves.

Some lament the fact that as international human rights norms are increasingly invoked in immigration, refugee and asylum disputes, territorially delimited nations are challenged not only in their claims to control their borders but also in their prerogative to define the “boundaries of the national community.”⁶ Others criticize the Universal Declaration for not endorsing “institutional cosmopolitanism,” and for upholding an “interstatal” rather than a truly cosmopolitan international order.⁷ Yet one thing is clear: the treatment by states of citizens and residents within their boundaries is no longer an unchecked prerogative. One of the cornerstones of Westphalian sovereignty, namely that states enjoy ultimate authority over all objects and subjects within their circumscribed territory, has been delegitimized through international law. My question then is: how can the project of democracy be sustained in view of the obsolescence of Westphalian models of sovereignty? How can the boundaries of the demos be redefined in an increasingly interdependent world?

⁶ David Jacobson, *Rights Across Borders. Immigration and the Decline of Citizenship*. (The Johns Hopkins University Press. Baltimore and London, 1997), p. 5.

⁷ Onora O’Neill. *Bounds of Justice*. (Cambridge University Press. Cambridge, 2000), p. 180.

In contemporary political philosophy two lines of thinking have emerged in response to these questions: the “law of peoples” model defended by John Rawls⁸ and the model of cosmopolitan citizenship centered around a new law of nations, as suggested by Juergen Habermas.⁹ Whereas the Rawlsian law of peoples makes tolerance for regimes with different understandings of the moral and religious good its cornerstone and compromises universal human rights claims for the sake of achieving international stability, Habermas envisages the expansion of such universalistic claims in ever-widening networks of solidarity. Rawls takes the nation-state framework for granted;¹⁰ Habermas seeks to transcend it along the model of the constitutionalization of international law. Both models, however, have said relatively little about the dilemmas of democratic citizenship in a post-Westphalian world. My claim is that today the most pressing question concerning democratic citizenship is access to citizenship rights, or the attainment of political membership rights by non-members.

⁸ John Rawls. *The Law of Peoples*. (Harvard University Press. Cambridge, MA. 1999)

⁹ Juergen Habermas, “The European Nation-State: On the Past and Future of Sovereignty and Citizenship.” In *The Inclusion of the Other: Studies in Political Theory*. Ed. by Ciaran Cronin and Pablo De Greiff. (MIT Press. Cambridge, MA., 1998). Most recently, *Der Gespaltene Westen. Kleine politische Schriften* (Suhrkamp: Frankfurt, 2004)

¹⁰ See Rawls’s astonishing comment: “a democratic society, like any political society, is to be viewed as a *complete and closed social system*. It is complete in that it is self-sufficient and has a place for all the main purposes of life. It is also closed ... in that entry into it is only by birth and exit from it is only by death... Thus, we are not see as joining society at the age of reason, as we might join an association, but as being born into a society where we will lead a complete life.” John Rawls, *Political Liberalism*. (Columbia University Press. New York, 1993), p. 41. (My emphasis.) Even if Rawls uses the model of a “complete and closed social system” as *counterfactual* step in a thought experiment, designed to justify the principles of political liberalism, this initial step of abstraction has significant consequences for the rest of his argumentation. I have discussed this more extensively in “The Law of Peoples, Distributive Justice, and Migrations,” in: *The Rights of Others*, ch. 3.

The crises of the nation-state, along with globalization and the rise of multicultural movements within the nation-state, have shifted the lines between citizens and residents, nationals and foreigners. Citizenship rights today must be resituated in a transnational context. How can private and public autonomy be reconfigured in this context? How can we do justice both to the republican ideals of self-governance and the liberal ideal of the equal value of liberty?

There is not only a tension, but often an outright contradiction, between human rights declarations and states' sovereign claims to control their borders as well as to monitor the quality and quantity of admittees. There are no easy solutions to the dilemmas posed by these dual commitments. I will not call for the end of the state system nor for world-citizenship. Rather, following the Kantian tradition of cosmopolitan federalism¹¹ I will underscore the significance of membership within bounded communities and defend the need for 'democratic attachments' that need not be directed only toward existing nation-state structures. Quite to the contrary: as the institution of citizenship is disaggregated and state sovereignty comes under increasing stress, sub-national as well as supra-national spaces for democratic attachments and agency are emerging in the contemporary world, and they need to be advanced with, rather than in lieu of, existing polities. It is important to respect the claims of diverse democratic communities, including their distinctive cultural, legal and constitutional self-understandings, while strengthening their commitments to emerging norms of cosmopolitical justice.

¹¹ See Benhabib, "On Hospitality. Rereading Kant's Cosmopolitan Right," in: *The Rights of Others*, ch.1; for an earlier discussion, see Benhabib, *Transformations of Citizenship. Dilemmas of the Nation-State in the Era of Globalization*. The Spinoza Lectures (Amsterdam: Van Gorcum, 2001).

Let me begin by outlining briefly transformations in the institutions of citizenship (II), and suggest that the reconfiguration of private and public autonomy must take place in this new institutional context. I will describe these developments as ‘the disaggregation of citizenship’ or the ‘unbundling of citizenship rights.’ The enjoyment of political rights is increasingly dissociated from that of social and civil rights, but nationality and democratic voice are still coupled in problematic ways.

Is disaggregated citizenship compatible with the project of democracy? As a second step, I will suggest a model of ‘democratic iterations,’ through which the values of private and public autonomy can be rearticulated. Democratic iterations are complex ways of mediating the will- and opinion-formation of democratic majorities with cosmopolitan norms. (III)

In conclusion, I will return to democratic justice in a post-Wetsphalian world. (IV and V)

II

Disaggregation of Citizenship within the European Union

The concept of citizenship in the modern state can be analytically divided into three components: the collective identity of those who are designated as citizens along the lines of shared language, religion, ethnicity, common history and memories; the privileges of political membership in the sense of access to the rights of public autonomy; and the entitlement to social rights and privileges. What we are witnessing today is an ‘unbundling’ of these components . One can have political membership rights without

sharing the common identity of the majority; one can have access to social rights and benefits without sharing in self-governance and without being a national.

Within the European Union, in which this disaggregation effect has proceeded most intensively and which I have examined in detail in other writings,¹² the privileges of political membership now accrue to all citizens of member countries of the Union who may be residing in territories other than those of their nationality. It is no longer nationality of origin but EU citizenship which entitles one to these rights. Citizens of the EU can vote and stand for office in local elections in their host countries; they can also participate in elections to the European Parliament. If they are long-term residents in their respective foreign countries, on the whole they are also entitled to an equivalent package of social rights and benefits.

The condition of the EU's third-country nationals, whose countries of origin do not belong to the EU, is of course different. While European Union citizenship makes it possible for all EU citizens to vote and to run for and hold office in local as well as Union-wide elections, this is not the case for third-country nationals. Their entitlement to political rights remains attached to their national and cultural origins. Yet in this respect as well changes are visible throughout the EU: in Denmark, Sweden, Finland and the Netherlands, third-country nationals can participate in local and regional elections; in

¹² See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002), chap. 6; and Benhabib, *The Rights of Others: Aliens, Citizens and Residents. The John Seeley Memorial Lectures* (Cambridge: Cambridge University Press: forthcoming 2004), chap. 4; Benhabib, "Transformations of Citizenship: The Case of Contemporary Europe." The Leonard Shapiro Memorial Lecture. *Government and Opposition. An International Journal of Comparative Politics*. Volume 37, No.4 (Autumn 2002): 439-465.

Ireland these rights are granted at the local but not the regional level. In the United Kingdom, Commonwealth citizens can vote in national elections as well. In Spain and Portugal as well, reciprocity rights grant certain third-country nationals (mainly from South America) local voting rights.

The most important conclusion to be drawn from these developments is that the entitlement to rights is no longer dependent upon the status of citizenship; legal resident aliens have been incorporated into civil and social rights regimes, as well as being protected by supra- and sub-national legislations. The condition of undocumented aliens, as well as of refugees and asylum seekers, however, remains in that murky domain between legality and illegality. Until their applications have been approved, refugees and asylums seekers are not entitled to choose freely their domicile or to accept employment. A resolution to permit those whose application is still in process the right to work after three months of residency has recently been approved by the EU Council of Ministers. In some cases, children of refugees and asylees can attend school; on the whole, asylees and refugees are entitled to certain forms of medical care. Undocumented migrants, by contrast, are cut off from rights and benefits and mostly live and work in clandestine. The conflict between *sovereignty* and *hospitality* has weakened in intensity but it has by no means been eliminated. In fact, the EU is caught in contradictory currents which move it toward norms of cosmopolitan justice in the treatment of those who are within its boundaries, while leading it to act in accordance with outmoded Westphalian conceptions of unbridled sovereignty toward those who are on the outside. The negotiation between insider and outsider status has become tense and almost warlike.

The decline of the unitary model of citizenship, therefore, does not mean that its hold upon our political imagination or that its normative force in guiding our institutions have grown obsolete. It does mean that we must be ready to imagine forms of political agency and subjectivity which anticipate new modalities of political citizenship. In the era of cosmopolitan norms, new forms of political agency have emerged that challenge the distinctions between citizens and long-term residents, insiders and outsiders. The spread of cosmopolitan norms, under whose aegis the disaggregation of citizenship proceeds, has led to contestations of the boundaries of the demos. Using the concepts of ‘jurisgenerative politics’ and ‘democratic iterations,’ I would like to propose an analytical grid for thinking about the interrelationship of cosmopolitan norms and democratic politics.

III

Democratic Iterations

‘Iteration’ is a term which was introduced into the philosophy of language through Jacques Derrida’s work.¹³ In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it,

¹³ Jacques Derrida, “Signature, Event, Context” [1971], in *Limited Inc.* (Evanston, Ill.: Northwestern University Press, 1988), pp. 90 ff. I am indebted to the insights of Judith Butler and Bonnie Honig in highlighting the significance of iterative practices for democratic politics. See Judith Butler, *Excitable Speech: Politics of the Performative* (New York and London: Routledge, 1997); Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), and Honig, “Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic,” *American Political Science Review* 85, no. 1 (March 1991): 97-113,

enriches it in ever-so-subtle ways. In fact, there really is no “originary” source of meaning, or an “original” to which all subsequent forms must conform. It is obvious in the case of language that an act of original meaning-giving makes no sense, since, as Wittgenstein famously reminded us, to recognize an act of meaning-giving as precisely this act, we would need to possess language itself.¹⁴ A patently circular notion!

Nevertheless, even if the concept of ‘original meaning’ makes no sense when applied to language as such, it may not be so ill-placed in conjunction with documents such as laws and other institutional norms. Thus, every act of iteration might be assumed to refer to an antecedent which is taken to be authoritative. The iteration and interpretation of norms, and of every aspect of the universe of value, however, is never merely an act of repetition. Every iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositied and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well. Iteration is the reappropriation of the “origin”; it is at the same time its dissolution as the original and its preservation through its continuous deployment.

‘Democratic iterations’ are linguistic, legal, cultural and political repetitions-in-transformation, invocations which are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent. Robert Cover, and following him, Frank Michelman,

¹⁴ Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Blackwell, 1953).

have made these observations fruitful in the domain of legal interpretation by developing the concepts of “jurisgenesis” and ‘jurisgenerative.’ In “*Nomos and Narrative*,” Robert Cover writes:

. . . there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. *The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must “have meaning,” but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.* Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.¹⁵ (Emphasis added)

I want to suggest that we think of “jurisgenesis” as occurring through iterative or destabilizing acts through which a democratic people, who considers itself bound by certain guiding norms and principles, reappropriates and reinterprets them, thus showing itself to be not only the *subject* but also the *author of the laws* (Frank Michelman).

Whereas natural right doctrines assume that the principles which undergird democratic politics are impervious to transformative acts of popular collective will, and whereas legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign legislature, jurisgenerative politics signals a space of interpretation and intervention between universal norms and the will of democratic majorities. The rights claims which frame democratic politics, on the one hand must be viewed as transcending the specific enactments of democratic majorities under specific circumstances; on the other hand, such democratic majorities *re-iterate* these principles and incorporate them

¹⁵ Robert M. Cover, “*Nomos and Narrative*,” *Harvard Law Review* 97, no. 1 (1983): 4-68. Here p. 18; Frank Michelman, “*Law’s Republic*,” *Yale Law Journal* 97, no. 8 (July 1988): 1493-1537.

into democratic will-formation processes through argument, contestation, revision and rejection.

Since they are dependent on contingent processes of democratic will-formation, not all jurisgenerative politics yields positive results. Thus one ought not make the *validity of cosmopolitan norms* dependent upon jurisgenerative and democratic iterations. This validity must be based on independent normative grounds. But productive or creative jurisgenerative politics results in *the augmentation of the meaning of rights claims* and in *the growth of the political authorship of political actors*, who make these rights their own by democratically deploying them.

Sterile, legalistic or populist jurisgenerative processes are also conceivable. In some cases, no normative learning may take place at all, but only a strategic bargaining among the parties may result; in other cases, the political process may simply run into the sandbanks of legalism or the majority of the demos may trample upon the rights of the minority in the name of some totalizing discourse of fear and war.

I would like to illustrate what I mean by ‘democratic iterations’ by focusing on a German Federal Constitutional Court decision from the early 1990’s concerning the rights of long-term resident aliens to vote. I choose this case because it illustrates the imperatives of sovereignty as well as the realities of an interdependent world in which the line between aliens and citizens is increasingly erased quite well. One of the first challenges to the restrictive German understanding of citizenship, which had been based upon *jus sanguinis* until its reform in January 2000, came as a request from the city-state of Hamburg and the province of Schleswig-Holstein to permit non-citizen but long-term resident foreigners to vote in municipal and district-wide elections. The German Federal

Constitutional Court rejected their request through a resounding declaration on the role of the nation and national belonging in a democracy. Although the Maastricht Treaty (1992) eventually superseded this decision by granting all nationals of EU member states who are residents of Germany the right to vote in and run for municipal elections, the earlier decision remains one of the most philosophically interesting, even if conceptually troubling, interpretations of democratic sovereignty and the identity of the demos.

IV. Who Can be a German Citizen? Redefining the Nation

On October 31, 1990, the German Constitutional Court ruled against a law passed by the provincial assembly of Schleswig-Holstein on February 21, 1989, that changed the qualifications for participating in local municipal (*Bezirk*) and district-wide (*Kreis*) elections (BVerfG, vol. 83, II, Nr. 3, p. 37; in the following, all translations from the German are mine).¹⁶ According to Schleswig-Holstein's election laws in effect since May 31, 1985, all those who were defined as German in accordance with Article 116 of the Basic Law, who had completed the age of eighteen and who had resided in the electoral district for at least three months were eligible to vote. The law of February 21, 1989, proposed to amend this as follows: all foreigners residing in Schleswig-Holstein for at least five years, who possessed a valid permit of residency or who were in no need of

¹⁶ A similar change in its election laws was undertaken by the free state of Hamburg such as to enable those of its foreign residents of at least eighteen years to participate in the election of local municipal assemblies (*Bezirkversammlungen*). Since Hamburg is not a federal province (*Land*) but a free city-state, with its own constitution, some of the technical aspects of this decision are not parallel to those in the case of Schleswig-Holstein. I chose to focus on the latter case alone. It is nonetheless important to note that the Federal Government, which had opposed Schleswig-Holstein's electoral reforms, supported those of Hamburg. See BVerfG 83, 60, II, Nr. 4, pp. 60-81.

one, and who were citizens of Denmark, Ireland, the Netherlands, Norway, Sweden and Switzerland, would be able to vote in local and district-wide elections. The choice of these six countries was made on the grounds of reciprocity. Since these countries permitted their foreign residents to vote in local, and in some cases regional elections, the German provincial legislators saw it appropriate to reciprocate.

The claim that the new election law was unconstitutional was brought by 224 members of the German Parliament, all of them members of the conservative CDU/CSU (Christian Democratic and Christian Social Union) party; it was supported by the Federal Government of Germany. The Court justified its decision with the argument that the proposed change of the electoral law contradicted “the principle of democracy,” as laid out in Articles 20 and 28 of Germany’s Basic Law, and according to which “All state-power [*Staatsgewalt*] proceeds from the people” (BVerfG 83, 37, Nr. 3, p. 39).

Furthermore,

The people [*das Volk*], which the Basic Law of the Federal Republic of Germany recognizes to be the bearer of the authority [*Gewalt*] from which issues the constitution, as well as the people which is the subject of the legitimation and creation of the state, is the German people. Foreigners do not belong to it. Membership in the community of the state [*Staatsverband*] is defined through the right of citizenship. . . . Citizenship in the state [*Staatsangehörigkeit*] constitutes a fundamentally indissoluble personal right between the citizen and the state. The vision [or image—*Bild*] of the people of the state [*Staatsvolkes*], which underlies this right of belonging to the state, is the political community of fate [*die politische Schicksalsgemeinschaft*], to which individual citizens are bound. Their solidarity with and their embeddedness in [*Verstrickung*] the fate of their home country, which they cannot escape [*sich entrinnen koennen*], are also the justification for restricting the vote to citizens of the state. They must bear the consequences of their decisions. By contrast, foreigners, regardless of however long they may have resided in the territory of the state, can always return to their homeland. (BVerfG 83, 37, Nr. 3, pp. 39-40)

This resounding statement by the Court can be analyzed into three components: a. a disquisition on the meaning of *popular sovereignty* (all power proceeds from the people); b. a *procedural* definition of how we are to understand *membership* in the state; c. a philosophical explication of the nature of the bond between the state and the individual, based on the vision of a “*political community of fate*.”

Ad. a The Court argued that according to the principle of popular sovereignty, there needed to be a “congruence” between the principle of democracy, the concept of the people and the main guidelines for voting rights, at all levels of state power—namely, federal, provincial, district and communal. Different conceptions of popular sovereignty could not be employed at different levels of the state. Permitting long-term resident foreigners to vote would imply that popular sovereignty would be defined in different fashion at the district-wide and communal levels than at the provincial and federal levels. In an almost direct repudiation of the Habermasian discursive democracy principle, the Court declared that Article 20 of Germany’s Basic Law does not imply that “the decisions of state organs must be legitimized through those whose interests are affected [*Betroffenen*] in each case; rather their authority must proceed from the people as a group bound to each other as a unity [*das Volk als eine zur Einheit verbundene Gruppe von Menschen*]” (BVerfG 83, 37, II, Nr. 3, p. 51).

The provincial parliament of Schleswig-Holstein challenged the Court’s understanding and argued that neither the principle of democracy nor that of the people excludes the rights of foreigners to participate in elections: “The model underlying the Basic Law is the construction of a democracy of human beings, and not that of the collective of the nation. This basic principle does not permit that one distinguish in the

long-run between the people of the state [*Staatsvolk*] and an association of subservients [*Untertanenverband*]” (BVerfG, 83, 37, II, p. 42).

Ad. b. The German Constitutional Court eventually resolved this controversy about the meaning of popular sovereignty by upholding a unitary and functionally undifferentiated version of it, but it did concede that the sovereign people, through its representatives, could change the definition of citizenship. Procedurally, “the people” simply means all those who have the requisite state membership. If one is a citizen, one has the right to vote; if not, not. “So the Basic Law . . . leaves it up to the legislator to determine more precisely the rules for the acquisition and loss of citizenship and thereby also the criteria of belonging to the people. The law of citizenship is thus the site at which the legislator can do justice to the transformations in the composition of the population of the Federal Republic of Germany.” This can be accomplished by expediting the acquisition of citizenship by all those foreigners who are long-term permanent residents of Germany (BVerfG 83, 37, II, Nr. 3, 52).

The Court here explicitly addresses what can be called “the paradox of democratic legitimacy,” namely that those whose rights to inclusion or exclusion from the demos are being decided upon will not themselves be the ones to decide upon these rules.¹⁷ The democratic demos can change its self-definition by altering the criteria for admission to citizenship. The Court still holds to the classical model of citizenship according to which democratic participation rights and nationality are strictly bundled together, but by signaling the procedural legitimacy of changing Germany’s naturalization laws, the Court also acknowledges the power of the democratic sovereign to alter its self-definition such

¹⁷ For further elucidation, see Benhabib, *The Rights of Others*, ch. 1.

as to accommodate the changing composition of the population. The line separating citizens and foreigners can be renegotiated by the citizens themselves.

Ad. c. Yet the procedural democratic openness signaled by the Court stands in great contrast to the conception of the democratic people, also adumbrated by the Court, and according to which the people is viewed as “a political community of fate,” held together by bonds of solidarity in which individuals are embedded (*verstrickt*). Here the democratic people is viewed as an *ethnos*, as a community held together by the power of shared fate, memories, solidarity and belonging. Such a community does not permit free entry and exit. Perhaps marriage with members of such a community may produce some integration over generations; but, by and large, membership in an *ethnos*—in a community of memory, fate and belonging—is something that one is born into, although as an adult one may renounce this heritage, exit it or wish to alter it. To what extent should one view liberal democratic polities as *ethnoi* communities? Despite its emphatic evocation of the nation as “a community of fate,” the Court also emphasizes that the democratic legislator has the prerogative to transform the meaning of citizenship and the rules of democratic belonging. Such a transformation of citizenship may be necessary to do justice to the changed nature of the population. The *demos* and the *ethnos* do not simply overlap.

Written in 1990, in retrospect this decision of the German Constitutional Court appears as a swan song to a vanishing ideology of nationhood. In 1992 the Treaty of Maastricht, or The Treaty on the European Union, established European citizenship, which granted voting rights and rights to run for office for all citizens of the fifteen signatory states residing in the territory of other member countries. Of the six countries

to whose citizens Schleswig-Holstein wanted to grant reciprocal voting rights—Denmark, Ireland, the Netherlands, Norway, Sweden and Switzerland—only Norway and Switzerland remained non-beneficiaries of the Maastricht Treaty since they were not EU members.

In the years following, an intense process of democratic iteration unfolded in the now-unified Germany, during which the challenge posed by the *BundesVerfassungsGericht* to the democratic legislator of bringing the definition of citizenship in line with the composition of the population was taken up, rearticulated and reappropriated. The city-state of Hamburg, in its parallel plea to alter its local election laws, stated this very clearly: “The Federal Republic of Germany has in fact become in the last decades a country of immigration. Those who are affected by the law which is being attacked here are thus not strangers but cohabitants [*Inlaender*], who only lack German citizenship. This is especially the case for those foreigners of the second and third generation born in Germany” (BVerfG 83, 60, II, Nr. 4, 68). The *demos* is not an *ethnos*, and those living in our midst and who do not belong to the *ethnos* are not strangers either; they are rather “cohabitants,” or as later political expressions would have it, “our co-citizens of foreign origin” [*auslaendische Mitbuerger*]. Even these terms, which may sound odd to ears not accustomed to any distinctions besides those of citizens, residents and non-residents, suggest the transformations of German public consciousness in the 1990’s. This intense and soul-searching public debate finally led to an acknowledgment of the *fact* as well as the *desirability* of immigration. The need to naturalize second and third generation children of immigrants was recognized and the new German citizenship law was passed in January 2000. Ten years after the German

Constitutional Court turned down the election law reforms of Schleswig-Holstein and the city-state of Hamburg on the grounds that resident foreigners were not citizens, and were thus ineligible to vote, Germany's membership in the European Union led to the disaggregation of citizenship rights. Resident members of EU states can vote in local as well as EU-wide elections; furthermore, Germany now accepts that it is a country of immigration; immigrant children become German citizens according to *jus soli* and keep dual nationality until the age of 24, at which point they must choose either German citizenship or that of their country of birth. Furthermore, long-term residents who are third-country nationals can naturalize if they wish to do so.

V

A Dialectic of Rights and Identities

Democratic iterations attest to a dialectic of rights and identities. In such processes, both the identities involved and the very meaning of rights claims are reappropriated, resignified and imbued with new and different meaning. Political agents, caught in such public battles, very often enter the fray with an established understanding of who they are and what they stand for; but the process itself frequently alters these self-understandings. Outsiders are not only at the borders of the polity, but also within. In fact the very binarism between nationals and foreigners, citizens and migrants is sociologically inadequate and the reality is much more fluid, since many citizens are of migrant origin, and many nationals themselves are foreign-born. The practices of immigration and multiculturalism in contemporary democracies flow into one another.¹⁸

¹⁸ See Benhabib, *The Claims of Culture*, pp. 165-177.

The German Constitutional Court's decision shows that there may often be an incongruity between those who have the formal privilege of democratic citizenship (the demos) and others who are members of the population but who do not formally belong to the demos. In this case, the challenge posed by the German Court to the democratic legislature of adjusting the formal definition of German citizenship such as to reflect the changing realities of the population, was taken up and the citizenship law was reformed. The democratic people can reconstitute itself through acts of democratic iteration so as to enable the extension of democratic voice. Aliens can become residents, and residents can become citizens. Democracies require porous borders.

The constitution of "we, the people" is a far more fluid, contentious, contested and dynamic process than either Rawlsian liberals or decline-of-citizenship theorists would have us believe. The Rawlsian vision of peoples as self-enclosed moral universes is not only empirically but also normatively flawed.¹⁹ This vision cannot do justice to the dual identity of a people as an ethnos, as a community of shared fate, memories and moral sympathies on the one hand, and as the demos, as the democratically enfranchised totality of all citizens, who may or may not belong to the same ethnos, on the other. All liberal democracies which are modern nation-states exhibit these two dimensions. The politics of peoplehood consists in their negotiation. The people is not a self-enclosed and self-sufficient entity. The presence of so many *Gastarbeiter* in Germany is a reflection of the economic realities of Germany since WWII. Some would even argue that without

¹⁹ John Rawls, *The Law of Peoples* (1999), pp. 23-35, and my critique in Benhabib, *The Rights of Others*, chap. 3.

their presence, the post-WWII German miracle would not have been conceivable.²⁰

Peoplehood is dynamic and not a static reality.

Decline-of-citizenship theorists, such as Michael Walzer and David Jacobson,²¹ are just as wrong as Rawlsian liberals, in conflating the *ethnos* and the *demos*. The presence of others who do not share the dominant culture's memories and morals poses a challenge to the democratic legislatures to rearticulate the meaning of democratic universalism. Far from leading to the disintegration of the culture of democracy, such challenges reveal the depth and the breadth of the culture of democracy. Only polities with strong democracies are capable of such universalist rearticulation through which they refashion the meaning of their own peoplehood. Rather than the decline of citizenship, I see here the reconfiguration of citizenship through democratic iterations.

VI

Democratic Citizenship in a post-Westphalian World

Let me conclude by returning to democratic citizenship. Democratic sovereignty is based on three regulative ideals: first, public autonomy, that is, that the people are the author as well as the subject of the laws; second, the ideal of a unified *demos*; and third,

²⁰ James F. Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Cambridge and London: Harvard University Press, 1992).

²¹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (1997).

the idea of a self-enclosed and autochthonous territory over which the demos governs. I have argued that the latter two ideals are indefensible both on normative and on empirical grounds. The unity of the demos ought to be understood not as if it were a harmonious given, but rather as a process of self-constitution through more or less conscious struggles of inclusion and exclusion. The ideal of territorial self-sufficiency flies in the face of the tremendous interdependence of the peoples of the world – a process which has been speeded up by the phenomenon of globalization.

The core of democratic self-governance is the ideal of public autonomy. How can democratic voice and public autonomy be reconfigured if we dispense with the faulty ideals of a people's homogeneity and territorial autochtony? Can democratic representation be organized along lines going beyond the nation-state configuration? The new reconfigurations of democratic are giving rise to sub-national as well as trans-national modes of citizenship. Within the European Union in particular, there is a return to citizenship in the city and in the transnational institutions of the EU. "Flexible citizenship," particularly in the case of Central American countries, is another such attempt to multiply voice and the sites for the exercise of democratic citizenship.²² What all these models have in common though is that they retain the principle of territorial membership for undergirding representation. Whether it is residency in cities such as Amsterdam, London or Frankfurt, or dual citizenship between Mexico, El Salvador, the Dominican Republic, and the USA, the model of democratic representation is dependent upon access to, residency upon and eventual membership within a circumscribed territory.

²² Aihwa Ong, *Flexible Citizenship: The Cultural Logic of Transnationality*. (Duke University Press. Durham, North Carolina, 1999).

Non-territorially based models of representation are certainly possible: one can be represented by some individual or a body of individuals in virtue of one's linguistic identity; ethnic heritage (as was proposed by Otto Bauer for the nationalities of middle and central Europe after WW I); religious affiliation or professional activities. Representation can run along many lines besides territorial residency. Yet there is a crucial link between democratic self-governance and territorial closure. Precisely because democracies enact laws that are supposed to bind those who legitimately authorize them, the scope of democratic legitimacy cannot extend beyond the demos which has circumscribed itself as a people upon a given territory. Democratic laws require closure precisely because democratic representation must be accountable to a specific people. Imperial legislation, by contrast, was issued from a center and was binding as far as the power of that center to control its periphery extended. Empires have frontiers; democracies have boundaries. I see no way to cut this Gordian knot linking territoriality, representation and democratic voice.

Certainly, representative institutions based on other principles will exist and they ought to proliferate. In a well-functioning democracy there will be a contentious dialogue, a series of contested iterations, between the demos and such representative bodies about their jurisdictional limits and authority. While no one instance within the separation of powers can claim ultimate authority for itself, all democracies need to recognize some instances which have the final say. But, as in the case of the German Constitutional Court's decision, finality does not mean irreversibility or infallibility. The complex dialogue between the democratically elected representatives of the people, the judicial instances, and other civil and politic actors is a never-ending one of complex and

contentious iterations. Within such dialogues, the demos can reconstitute itself by enfranchising groups without voice or by providing amnesty for illegal migrants. While the scope of the authority of the law can be reflexively altered, it is inconceivable that democratic legitimacy can be sustained without some clear demarcation of those in the name of whom the laws have been enacted.

Why did Kant claim that a world-government would be a “universal monarchy” and a “soulless despotism”?²³ Montesquieu’s model of political rule may have played a role here. Montesquieu argued that empires were compatible with vast territories, while republics required countries of moderate size.²⁴ In empires, only one was free, while the rest obeyed; in republics all would be free. The more extensive the territory, the more frayed interconnections among individuals would become, the more indifferent they would grow to each other’s lot. In contemporary language, we may say that interest in democratic voice as well as solidarity with others would disappear.

The intuition that there may be a fine link between territorial size and form of government is old in the history of Western political thought, and it is one that I accept. Unlike communitarians and liberal nationalists, however, who view this link primarily as being based upon a cultural bond of identity, I am concerned with the logic of democratic

²³ Immanuel Kant, [1795] 1923 “Zum Ewigen Frieden. Ein philosophischer Entwurf.” In *Immanuel Kants Werke*. Ed. by A. Buchenau, E. Cassirer and B. Kellermann. Verlag Bruno Cassirer. Berlin, p. 453. [Kant, Immanuel. [1795] 1994. “Perpetual Peace: A Philosophical Sketch,” trans. H. B. Nisbet. In *Kant. Political Writings*, ed. by Hans Reiss. Cambridge Texts in the History of Political Thought. Cambridge, UK. Second, and enlarged edition.] See also Immanuel Kant. *Critique of Practical Reason and Other Writings in Moral Philosophy*. Translated and edited with an Introduction by Lewis White Beck. (The University of Chicago Press. Chicago, Illinois, 1949), p. 328.

²⁴ Baron de Montesquieu, [1748] *The Spirit of the Laws*. Trans. By Thomas Nugent. Intro, by Franz Neuman, 2 vols. in 1. (Haffner. New York, 1965). Vol I, 19-28; II, 10-11.

representation, which requires closure for the sake of maintaining democratic legitimacy. Certainly, identification and solidarity are important but they need to be leavened through democratic attachments and constitutional norms. In the spirit of Kant, therefore, I plead for moral universalism and cosmopolitan federalism. I do not advocate *open* but rather *porous* borders; I plead for first admittance rights for refugees and asylum seekers but accept the right of democracies to regulate the transition from first admission to full membership; I also advocate that laws governing naturalization and citizenship be subject to human rights norms and international law. State sovereignty is not a prerogative that can bar naturalization and the eventual citizenship of aliens in our midst. The new democratic politics is about negotiating this complex relationship between the rights of full membership, democratic voice and territorial residence.