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Transformations of Citizenship: The Case of Contemporary Europe*

IN THE MID-MORNING HOURS OF 11 SEPTEMBER 2001, SHORTLY AFTER the second Twin Tower of the World Trade Center had collapsed, amidst the fog surrounding us all – who, when, why – I heard a brief item of news on the radio. Canada had closed its airspace to all American planes still en route; since US airports were also closed for several hours on that day, these pilots would have no choice but to return to their destinations or to circle the air in search of ‘safe haven’. This news was not repeated. Canada eventually did permit US airplanes to land and many transatlantic passengers found safety in Iceland’s Reykjavik airport for a period of time, up to several days in some cases.

This small incident is one among the many in recent years that have made increasingly transparent the fragility of the territorially bounded and state-centric international order. For a few brief hours, the passengers of the airplanes that could not obtain landing permission were like refugees without first admittance claims. The same logic that permits states to deny first admittance to certain refugees and asylees, and often contrary to the Geneva Convention on the Status of Refugees, was operative in this instance as well. Invoking national security concerns, the USA’s closest neighbour could, even if briefly, follow the imperatives of sovereign statehood and close its airspace as well as landing privileges to passengers who had now become ‘refugees in orbit’ in the heavens.

Countless other similar dramas have unfolded before our eyes: illegal aliens crossing the Channel at Dover and perishing in meat

* This is a revised and expanded version of the Leonard Schapiro Memorial Lecture delivered at the London School of Economics on 7 May 2002. I am currently at work on a book which examines hospitality and political membership in the light of the history of political thought, as well as formulating a discourse-theoretic model of postnational citizenship; see S. Benhabib, *Citizens, Residents and Aliens. Political Theory and Membership in a New World*, The Seeley Lectures, Cambridge, Cambridge University Press, in preparation.

trucks through sub-zero refrigeration; Mexicans, misled by the instructions of 'coyotes' who abandon them in the desert stretches along the US–Mexican border and who perish of dehydration; Kurdish asylum seekers, swimming to safety from a ship docked outside the waters of Marseilles . . . The peoples of the world are on the move across continents, oceans and borders. Although in absolute numbers, contemporary migration movements have not reached the level of migratory movements of the latter half of the nineteenth century, today's migrations pose institutionally as well as normatively different challenges than those of the nineteenth century.¹ We are in the midst of developments which challenge the territorially bounded state-centric model which was re-established in Europe and elsewhere in the world after the Second World War; yet claims of sovereign statehood over bounded territories are still the guiding normative and institutional principles in the international arena.

FORMS OF POLITICAL GLOBALIZATION

There is widespread consensus that the modern nation-state system, characterized by the 'inner world' of territorially bounded politics and the 'outer' world of foreign, military and diplomatic relations, in short the 'state-centric' system of the nineteenth and early twentieth centuries, is, when not at an end, undergoing changes which amount to its deep reconfiguration. James N. Rosenau captures these changes in brief and dramatic terms:

The international system is less commanding, but it is still powerful. States are changing, but they are not disappearing. State sovereignty has been eroded, but it is still vigorously asserted. Governments are weaker, but they can still throw their weight around . . . Borders still keep out intruders, but they are also more porous.²

¹ Aristide R. Zolberg and Peter M. Benda, *Global Migrants, Global Refugees. Problems and Solutions*, New York and Oxford, Berghahn Books, 2001; Rainer Bauboeck, 'The Crossing and Blurring of Boundaries in International Migration', in Rainer Bauboeck and John Randall (eds), *Blurred Boundaries: Migration, Ethnicity, and Citizenship*, Vienna, Ashgate Publications, 1998.

² James Rosenau, *Along the Domestic–Foreign Frontier. Exploring Governance in a Turbulent World*, Cambridge, Cambridge University Press, 1997, p. 4.

To ascertain these new trends toward the 'deterritorialization of politics,'³ as David Held and his colleagues have named them, need not commit one to exaggerated claims about the 'end' of the nation-state system. In fact, the irony of current political developments is that while state sovereignty in economic, military and technological domains has been 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. The emergence of international human rights norms, and the frequent conflicts, in theory and practice, between such norms and national sovereignty claims, are the clearest harbingers of new forms of political globalization.

We are witnessing this development in at least three related areas: *humanitarian interventions*; *crimes against humanity*; *transnational migrations*. *Humanitarian interventions* deal with the treatment by nation-states of citizens or residents within the boundaries of their territory: when a sovereign nation-state violates the rights of a segment of its population on account of its religion, race, ethnicity, language and culture, there is a generalized moral obligation on the part of the international community to end genocide and ethnic cleansing. *Crimes against humanity* concern relations among enemies or opponents in nationally bounded as well as extra-territorial settings: there are certain norms in accordance with which state officials as well as private individuals ought to treat one another, even, and precisely, under conditions of extreme hostility and war. The refrain of the soldier and the bureaucrat – 'I was only doing my duty' – is not acceptable for abrogating the rights of humanity in the person of the other. *Transnational migrations*, by contrast, refer to the rights of individuals, not insofar as they are considered members of concrete bounded communities but rather insofar as they are viewed as human beings *simpliciter*, who come into contact with, seek entry into, or want to become members of territorially bounded communities. As international human rights norms are increasingly invoked in immigration, refugee and asylum disputes, territorially delimited nations are being challenged in their claims to control their

³ David Held, with Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations. Politics, Economics, and Culture*, Stanford, Stanford University Press, 1999, p. 32.

borders but also in their prerogative to define the 'boundaries of the national community'.⁴

What should be guiding normative principles of membership in a world of increasingly deterritorialized politics? Which practices and principles of civil and political incorporation are most compatible with the philosophical self-understanding and constitutional commitments of liberal democracies? I use the term 'political membership' broadly to refer to the legal, political, economic, cultural and social practices concerning the admittance, incorporation and eventual naturalization of immigrants as well as refugees and asylees. Despite growing scepticism about the validity of these distinctions to help us think through contemporary problems,⁵ the status of these three groups is distinct one from another in international as well as domestic law. Individual states' obligations toward refugees and asylees are specified by the 1951 Geneva Convention on the Status of Refugees and its various Additions. However, these obligations are only binding for the states which are signatories to the Convention. Non-signatory states are exempt from compliance, and till now there has been no incidence of the international community imposing sanctions or otherwise penalizing a sovereign state for the way it has treated refugees and asylum seekers.

From the standpoint of moral philosophy, since Kant's formulation of the universal right to hospitality which is due to every human person,⁶ we assume that there is an imperfect moral duty to help and offer shelter to those whose life and limb are endangered. This duty is 'imperfect', i.e. conditional in that it can permit exceptions, and can be overridden by legitimate grounds of self-preservation. There is no obligation to shelter the other when doing so would endanger one's own life and limb. It is disputed in moral philosophy as to how widely or narrowly the obligation to the other should be

⁴ David Jacobson, *Rights Across Borders. Immigration and the Decline of Citizenship*, Baltimore and London, The Johns Hopkins University Press, 1997, p. 5.

⁵ See Gill Loesher, 'Protection and Humanitarian Action in the Post-Cold War Era', in A. Zollberg and Peter M. Benda (eds), *Global Migrants*, pp. 173-205.

⁶ Immanuel Kant, [1795] 'Zum Ewigen Frieden. Ein philosophischer Entwurf', in A. Buchenau, E. Cassirer, and B. Kellermann (eds), *Immanuel Kants Werke*, Berlin, Verlag Bruno Cassirer, 1914; 'Perpetual Peace', trans. Lewis White Beck, in L. W. Beck (ed.), *On History*, Indianapolis and New York, The Library of Liberal Arts, 1957.

interpreted,⁷ and it is equally controversial how we should understand legitimate grounds of self-preservation: is it morally permissible to turn the needy away because they dilute our cultural mores? Does the preservation of culture constitute a legitimate basis of self-preservation? Is it morally permissible to deny asylum when doing so would cause a certain amount of decline in our standard of living? And what amount of decline in welfare is morally permissible before it can be invoked as grounds for denying entry to the persecuted, the needy and the oppressed? In formulating their refugee and asylum policies, governments often implicitly utilize this distinction between perfect and imperfect duties, while human rights groups, as well as advocates of asylees and refugees, are concerned to show that the obligation to show hospitality to help those in dire need should not be compromised by self-regarding interests alone.

In this article, I will focus primarily on *political incorporation through immigration*, and I will not address debates in moral philosophy about the rights of hospitality. I will argue that there is a tension at the heart of the norms and practices of liberal democracies around the world with regards to political incorporation. This is the tension, and at times outright contradiction, between the commitments of liberal democracies to universal human rights on the one hand and sovereign self-determination claims on the other; the latter are invoked to control borders as well as to monitor the quality and quantity of those who are admitted across these borders.

There are no easy solutions or answers to the dilemmas posed by these dual commitments.⁸ I will not call for the 'end of the nation-

⁷ Cf. Henry Sidgwick: '... but those who are in distress or urgent need have a claim on us for special kindness. These are generally recognised claims: but we find considerable difficulty and divergence, when we attempt to determine more precisely their extent and relative obligation: and the divergence becomes infinitely greater when we compare the customs and common opinions now existing among ourselves in respect of such claims, with those of other ages and countries'. In *The Methods of Ethics*, Chicago and Toronto, The University of Chicago Press, [1874], 1962 edn, p. 246. For some recent treatments, see Onora O'Neill, *Towards Justice and Virtue. A Constructive Account of Practical Reasoning*, Cambridge, Cambridge University Press, 1996; Samuel Sheffler, *Boundaries and Allegiances. Problems of Justice and Responsibility in Liberal Thought*, Oxford, Oxford University Press, 2001.

⁸ I have examined these issues at greater length with reference to the philosophies of Kant and Hannah Arendt in S. Benhabib, *Transformations of Citizenship. Dilemmas of the Nation-State in the Era of Globalization. The Spinoza Lectures*, Amsterdam, Van Gorcum, 2001.

state', although I will plead for the world-wide recognition of the universal status of the personality of each human being. Following the Kantian tradition of cosmopolitan right I will underscore the significance of membership within bounded communities and defend the need for 'democratic attachments'. Such democratic attachments need not only be directed toward existing state structures: sub-national as well as supranational spaces for democratic attachments and agency are emerging in the contemporary world, and they need to be furthered, alongside rather than in lieu of, existing polities. I want to respect the claims to democratic diversity of human communities, including their distinctive cultural, legal and constitutional self-understandings, while strengthening their commitments to emerging norms of cosmopolitical justice.

The first part of this article examines political membership from the standpoint of normative theory; the second half develops a sociological model of citizenship and examines the 'disaggregation' of citizenship within the contemporary European Union in the light of these normative concerns.

POLITICAL MEMBERSHIP IN LIBERAL DEMOCRACIES

Political membership, that is, the principles of incorporating aliens and strangers, immigrants and newcomers into existing polities, has rarely been considered an important aspect of contemporary theories of domestic and international justice. The one exception is Michael Walzer's *Spheres of Justice*, published in 1983. In this work, Michael Walzer pointed out that membership was the first social good that needed to be distributed, in that the distribution of all other goods, like income and positions, benefits and opportunities, depended upon individuals being recognized as members of a polity who would subsequently be entitled to these.⁹ Yet ten years later in his *Political Liberalism* John Rawls would still assume that:

. . . 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 human 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 seen as *joining society at the age of reason, as we might join*

⁹ Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, New York, Basic Books, 1983, pp. 50 ff.

*an association, but as being born into a society where we will lead a complete life.*¹⁰

Surely, Rawls meant to use the model of a closed society as a counterfactual fiction, as a convenient thought-experiment in reasoning about justice; yet by not granting conditions of entry and exit into the political community a central role in a liberal-democratic theory of justice, he assumed that the state-centric model of nations, with fairly closed and well-guarded borders, would continue to govern our thinking in these matters.

This was made amply clear in the subsequent *The Law of Peoples*:

An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population.¹¹

Rawls adds in a note that 'This remark implies that a people has at least a qualified right to limit immigration. I leave aside what these qualifications might be . . .'.¹² Rawls assumes that once a reasonable conception of the law of peoples has been established and accepted by the nations of the world, there will be no reason for transnational migrations. The causes of migration like persecution by one's own government, political injustice at home, the unequal and discriminatory treatment of women, will have been eliminated. Rawls is curiously silent about immigration resulting from economic disparities among nations, suggesting, at several points, that the poor nations of the world are morally responsible for their economic plight.¹³ Migrations remain an aspect of *non-ideal theory* and are considered a normatively as well as an institutionally insignificant aspect of the law of peoples.

Transnational migrations, however, and the constitutional as well as policy issues generated by the movement of peoples across borders, are central to interstate relations. It is not so much Rawls's claim that there 'must be boundaries of some kind'¹⁴ which is problematical,

¹⁰ John Rawls, *Political Liberalism*, New York, Columbia University Press, 1993, p. 41 (emphasis added).

¹¹ John Rawls, *The Law of Peoples*, Cambridge, Mass., Harvard University Press, 1999, pp. 38–9.

¹² *Ibid.*, p. 39.

¹³ J. Rawls, *The Law of Peoples*, op. cit., pp. 117–19.

¹⁴ J. Rawls, *Political Liberalism*, op. cit., p. 39.

but rather the disregard of the rights and claims of 'others' as they relate to and affect the identity of the liberal democratic polity that is questionable. In not articulating explicit conditions of entry and exit in liberal democracies, Rawls is misconstruing the nature of membership in such associations. From a philosophical point of view, these issues bring to the fore the constitutive dilemma between sovereign self-determination claims on the one hand and universal human rights principles on the other. I maintain that the normative puzzles raised by practices of political membership can best be analysed through an *internal reconstruction* of the dual commitments of liberal democracies to human rights and collective self-determination. My argument differs in this regard from several contemporary approaches to these issues: namely, moral cosmopolitanism; deterritorialized and post-national citizenship, and the decline of citizenship.

Advocates of open borders and cosmopolitanism, like Joseph Carens and Martha Nussbaum respectively, align themselves with the Kantian legacy of a world republic in order to articulate the transformative potentials of the present. From a moral point of view, national borders are historically contingent and the only morally consistent position would be one of open borders.¹⁵ The borders, which circumscribe our birth and the papers to which we are entitled are morally arbitrary, since their distribution among individuals does not follow any clear criteria of moral achievement and moral compensation. Therefore liberal democracies should practise policies which are as compatible as possible with the vision of a world without borders.

Cosmopolitanism, as advocated by Martha Nussbaum, entails not so much a political practice but rather a moral attitude of not placing the affairs and concerns of one's immediate community ahead of those others who may be strangers to us, residing in faraway worlds. In Nussbaum's version, cosmopolitanism is a universalistic ethic that denies the claims upon us of what are referred to in moral theory as

¹⁵ Joseph Carens, 'Aliens and Citizens: The Case for Open Borders', in Ronald Beiner (ed.), *Theorizing Citizenship*, Albany, State University of New York Press, 1995, pp. 229–55. For some modifications to these early arguments which retreat from the open borders position, see Carens's later *Culture, Citizenship, and Community. A Conceptual Exploration of Justice as Evenhandedness*, Oxford, Oxford University Press, 2000.

'special obligations'.¹⁶ These are obligations which emerge out of our being situated in concrete human communities of descent or sympathy, genealogy or affiliation. Nussbaum argues that 'patriotism', or a privileged commitment to a specific territorially bounded national community, even if emotionally compelling, cannot trump the obligations generated by a universalistic morality.¹⁷

I agree with Martha Nussbaum that a cosmopolitical moral attitude lies at the core of moral universalism, and must compel the moral agent to mediate the demands of the universal with the draw of the particular;¹⁸ yet it is unclear to me what *political*, as opposed to *moral*, practices cosmopolitanism would assume, and which institutions, if any, would correspond to these moral principles. It is also interesting to note, as I have argued elsewhere,¹⁹ that this was not the meaning of cosmopolitanism for Kant himself. Kant was opposed to a world-state; for him cosmopolitanism was ultimately a federalist project, which did not detract from legitimate commitments to individual civil polities. More significantly, Carens's and Nussbaum's approaches avoid or skirt the paradox of democratic legitimacy; in doing so, it fails to illuminate the internal contradictions of liberal democracies and of an international order based upon territorially-circumscribed state sovereignty.

James Rosenau²⁰ and Yasemin Soysal,²¹ who advocate post-national modalities of membership, see the rise and spread of a new human

¹⁶ Martha Nussbaum, 'Patriotism and Cosmopolitanism', in Joshua Cohen (ed.), *For Love of Country. Debating the Limits of Patriotism*, Boston, Beacon Press, 1996; Martha Nussbaum, 'Kant and Cosmopolitanism', in James Bohmann and M. Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, Cambridge, Mass., MIT Press, 1997, pp. 25–59.

¹⁷ M. Nussbaum, 'Patriotism and Cosmopolitanism', op. cit., 1996, pp. 12–17.

¹⁸ I have presented my own version of a dialogic universalist ethics, which builds upon Juergen Habermas's theory of discourse ethics, in *Situating the Self. Gender, Community, and Postmodernism in Contemporary Ethics*, New York and London, Routledge and Polity Presses, 1992. In this work I have named the problem of mediating the universal and in particular that of reconciling 'the generalized' with the 'concrete other', pp. 148–78.

¹⁹ See S. Benhabib, 'Of Guests, Aliens, and Citizens: Rereading Kant's Cosmopolitan Right', in *Pluralism and the Pragmatic Turn. The Transformation of Critical Theory. Essays in Honor of Thomas McCarthy*, Cambridge, Mass., MIT Press, 2001, pp. 361–87.

²⁰ J. Rosenau, *Along the Domestic–Foreign Frontier*, op. cit.

²¹ Yasemin Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, Chicago, University of Chicago Press, 1994.

rights regime, despite all its pitfalls and hypocrisies world-wide, as heralding a new political consciousness and new forms of political identities. The nation-state is waning; the line between human rights and citizens' rights is being corroded. New modalities of deterritorialized citizenship are emerging. Especially within the European Union, argues Soysal, national identities and allegiances are being scrambled rapidly, and it would be hypocritical to want to make 'good Germans' out of Turks when contemporary Germans themselves are hardly sure of what their own collective identity consists. Multicultural enclaves in large cities everywhere in the world are harbingers of new faces of citizenship that is no longer based upon exclusive attachments to a specific land, history and tradition.

I agree with advocates of 'deterritorialized citizenship' that political identities need not be conceived in state-centric terms: the boundaries of the civic community and the boundaries of the national state are not coterminous. Nonetheless, democratic commitment to locality which may be smaller or larger than the nation-state is significant, and as I shall argue, democratic governance implies drawing boundaries and creating rules of membership at some locus or another. Even if we grant that the boundaries of communities of self-governance and those of the nation-state are not coterminous, this does not alleviate the burden of articulating principles of political membership.

The decline-of-citizenship school, which includes civic republicans as well as communitarians — Michael Sandel, David Jacobson, Michael Walzer — considers the waning of the nation-state, whether under the impact of the rise of international human rights norms or through the spread of attitudes of cosmopolitical detachment to have resulted in the devaluation of citizenship as institution and practice.²² Citizenship entails membership in a bounded community; the right to determine the boundaries as well as identity of this community

²² Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy*, Cambridge, Mass., Harvard University Press, 1996; David Jacobson, *Rights Across Borders. Immigration and the Decline of Citizenship*, op. cit.; Michael Walzer, *Spheres of Justice*, op. cit., ch. 2 and 'In Response: Support for Modesty and the Nation-State', *The Responsive Community*, 11:2 (2001), pp. 27–31. This is a response to my article, 'Dismantling the Leviathan: Citizen and State in a Global World', in *ibid.*, pp. 14–27. I should point out that these writers would not consider themselves a 'school' of thought. I am using the term in its broadest sense to refer to certain affinities in argumentation and reasoning.

are fundamental to democracy; therefore, the argument goes, economic and political globalization threaten to undermine citizenship. While these theorists do not preclude immigration, they tend to favour the incorporation of those foreigners who 'are like us', and who can become the 'model citizen'.²³

These attempts to suggest new modalities of political membership in a global world have been invariably vague. The institutional and normative practices that need to accompany deterritorialized and cosmopolitan citizenship have not been articulated. More significantly, all three approaches avoid or skirt a paradox – namely the paradox of democratic legitimacy. Advocates of deterritorialized and cosmopolitan citizenship hardly face this paradox. Defenders of civic republicanism refuse to acknowledge that there is a paradox at all, in that they simply subordinate universal human rights to self-determination claims.

THE PARADOX OF DEMOCRATIC LEGITIMACY

Ideally, democratic rule means that all members of a sovereign body are to be respected as possessors of human rights, and that the consociates of this sovereign freely associate with one another to establish a regime of self-governance under which each is to be considered both author of the laws and subject to them.²⁴ This ideal of the social contract is a heuristically useful device for capturing the logic of modern democracies. Modern democracies, unlike their ancient counterparts, conceive of their citizens as right-bearing consociates. The rights of the citizens rest upon the 'rights of man'. 'Les droits de l'homme et du citoyen' do not contradict one another; quite the contrary, they are complicated. This is the idealized logic of the modern democratic revolutions following the American and French examples.

The democratic sovereign draws its legitimacy not only from its act of self-constitution, but equally significantly, from the conformity

²³ See Bonnie Honig, 'Immigrant America? How "Foreignness" Solves Democracy's Problems?', *Social Text*, 3 (Fall 1998), pp. 1–27.

²⁴ For a forceful restatement of these principles in discourse theoretic terms, see Juergen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Politics*, trans. William Rehg, Cambridge, Mass., MIT Press, 1996.

of this act with universal human rights that are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself.²⁵ 'We, the people' refers to a particular human community, circumscribed in space and time, sharing a particular culture, history and legacy; yet this people establishes itself as a democratic body by acting in the name of the 'universal'. The tension between universal human rights claims and particularistic cultural and national identities is constitutive of democratic legitimacy. Modern democracies act in the name of universal rights which are then circumscribed within a particular civic community. This is the 'Janus face of the modern nation', in the words of Juergen Habermas.²⁶

Since Rousseau, however, we also know that the will of the democratic people may be legitimate but unjust, unanimous but unwise. 'The will of all' may not correspond to 'the general will' either in theory or in practice. Democratic rule and the claims of justice may contradict one another. The democratic pre-commitments

²⁵ Two separate claims need to be distinguished: i) In the tradition of natural rights-based social contract theories, such as those of Hobbes, Locke, and even Rousseau, rights claims were often conceptualized along the lines of naive moral realism. They were often considered psychological or anthropological attributes of human beings, such as the rights to self-preservation, to life, limb and property. This equivocation between facts and norms, description and justification, was aided by the language of 'natural law' and 'natural rights'. Kant was the first to clarify the status of rights claims within a discourse of justification and a teaching of the state based upon the rule of law. See, I. Kant, [1797] *The Metaphysical Elements of Justice*, trans. and with an Introduction by John Ladd, New York, The Bobbs-Merrill Company Inc., 1965, pp. 48–75. ii) Unlike previous social contract theorists, and even unlike Kant, I do not presuppose that rights have a specific material content which 'antedates' the will of the democratic sovereign. I am assuming that democracy is based upon the rule of law and that the rule of law entails that we treat each other as 'consociates' of a common normative order but that furthermore, the laws which we obey must also be underwritten by our collective will. 'We', as the sovereign people, are the subject as well as the author of the laws and precisely because in a democracy the people is the author of the law as well as its subject, there need to be boundaries circumscribing those in the name of whom norms are issued. Democratic norms, unlike imperial, theocratic and authoritarian ones, evolve through a transparent chain of representation and authorization, and bind the will of those whose representatives legislate in their name.

²⁶ J. Habermas, 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship', in *The Inclusion of the Other*, trans. by Ciaran Cronin and Pablo de Greiff, Cambridge, Mass., MIT Press, 1998, p. 115.

expressed in the idealized allegiance to universal human rights – usually listed as life, liberty and property – need to be reactivated and renegotiated within actual polities as the consciously willed democratic intentions of citizens. Potentially, there may always be a conflict between an interpretation of these rights claims, which precede the declared formulations of the sovereign and the actual enactment of the democratic people who could potentially violate such interpretations. In the history of political thought, this conflict has been discussed as that between liberalism and democracy (there are and will be illiberal democracies), or as the conflict between constitutionalism and popular sovereignty.²⁷ In each case the logic of the conflict is the same: the democratic sovereign should uphold certain constraints upon its will in virtue of its pre-commitment to certain formal and substantive interpretation of rights. Liberal and democratic theorists disagree with one another as to the proper balance of this mix: while strong liberals want to bind the sovereign will through ‘precommitments’ to a list of human rights, strong democrats reject such a prepolitical understanding of rights and argue that they must be open to renegotiation and reinterpretation by the sovereign people – admittedly within certain limits.

Yet this paradox of democratic legitimacy has a corollary that has been little noted: self-legislation also implies self-constitution. ‘We, the people’ who agree to bind ourselves by these laws, are also defining ourselves as a ‘we’ in the very act of self-legislation. It is not only the general laws of self-government which are articulated in this process; the community which binds itself by these laws defines itself by drawing boundaries as well, and these boundaries are territorial as well as civic. The will of the democratic sovereign can only extend over the territory that is under its jurisdiction; democracies require borders. Empires have frontiers, while democracies draw boundaries. Democratic rule, unlike imperial dominion, is exercised in the name of some specific constituency and binds that constituency alone. Therefore, at the same time that the sovereign defines itself territorially, it also defines itself in civic terms. Those who are full members of the sovereign body are distinguished from those who ‘fall under its protection’ but who do not enjoy ‘full membership rights’. Women and slaves, servants and propertyless white males, non-Christians and non-white races were historically excluded from membership in the

²⁷ See Bruce Ackerman, *We, The People*, Cambridge, Mass., Harvard University Press, 1991.

sovereign body and from the project of citizenship. They were, in Kant's famous words, 'mere auxiliaries to the commonwealth'.²⁸

The boundaries of the civil community are of two kinds: in the first place, these boundaries define the status of those who enjoy *second-class* or *passive citizenship* status within the polity but who are considered members of the sovereign people in virtue of cultural, familial and religious attachments. Women, as well as non-propertied males before the extension of universal suffrage, fell under this category; secondly, however, are groups not only of unequal status but who also do not *belong* among the sovereign people in virtue of relevant identity-based criteria, but nonetheless fall under its dominion. Such was the status of African-American slaves until after the Civil War and the declaration in 1865 of the fourteenth Amendment to the US Constitution which conferred US citizenship upon Black peoples; such was also the status of American Indians who were granted tribal sovereignty. The status of those of Jewish faith in the original thirteen colonies of the US can be described as one of transition from being 'a mere auxiliary to the commonwealth' to being a full-fledged citizen.

In addition to these groups, are those residents of the commonwealth who do not enjoy full citizenship rights either because they are members of some other commonwealth or because they choose to remain as outsiders. These are the 'aliens' and 'foreigners' amidst the democratic people. Their status is distinct from second-class citizens like women and workers, as well as from slaves and tribal peoples. Their status is governed by mutual treaties among sovereign entities, as would be the case with official representatives of a state-power upon the territory of the other. If they are civilians, and live among citizens for economic, religious or other cultural reasons, their rights and claims exist in that murky space defined by respect for human rights on the one hand and by international customary law on the other.²⁹ They are refugees from religious persecution,

²⁸ Immanuel Kant, [1797] *The Metaphysics of Morals*, trans. by Mary Gregor, Cambridge, Cambridge University Press, 1996, p. 92.

²⁹ Jews in pre-modern and pre-revolutionary Europe, before so-called 'emancipation' and being granted citizenship rights, were considered foreigners who were dependent upon the good will and beneficence of various sovereigns who had granted them immunities and privileges of settlement, freedom of commerce and the exercise of their religion and culture. For a masterful analysis, see Jacob Katz, *Exclusiveness and Tolerance. Jewish-Gentile Relations in Medieval and Modern Times*, New York, Schocken Books, 1973, 3rd printing.

merchants and missionaries, migrants and adventurers, explorers and fortune-seekers.

I have circumscribed in general theoretical terms the paradox of democratic legitimacy. The paradox is that a self-determining collectivity should undertake to bind its will by a series of pre-commitments to a set of formal and substantive norms, usually referred to as 'human rights'. The rights and claims of others, be they 'auxiliaries to the commonwealth', such as women, slaves, and propertyless males were considered to be, whether subjugated peoples or foreigners, are then negotiated upon this terrain flanked by human rights on the one hand and sovereignty assertions on the other. Despite the recent development of international human rights norms, decisions concerning immigration and the incorporation of foreigners into democratic polities are still circumscribed by the logic of this democratic paradox.

Nowhere are the challenges posed to democratic sovereignty by the worldwide migration of peoples more evident today than within the newly emergent institutions and practices of the European Union. Institutional developments within the EU have led to a new reconfiguration of human rights and sovereignty claims. What is emerging at the present is 'disaggregated citizenship' and differential rights regimes for different groups. Increasingly, entitlement to rights is dependent upon residency rather than citizenship status. Entitlement to social rights is replacing the exercise of democratic citizenship and, ironically, this situation is legitimizing the increasingly anti-liberal immigration policies of many of the member states, who see immigrants, but also refugees and asylees, as social burdens whose social entitlements outweigh their contributions. A pacified and bored democratic citizenry in affluent countries is indifferent to the plight of others less fortunate than themselves, and less inclined to exhibit the civic comity and virtues of hospitality necessary to incorporate foreigners into their midst. I would like to suggest a sociological model of citizenship as a heuristic device to help analyse these institutional developments.

A SOCIOLOGICAL MODE OF CITIZENSHIP

Citizenship in the modern world has meant membership in a bounded political community, which was either a nation-state, a multinational-state or a federation of states. The political regime of territorially-bounded sovereignty, exercised through formal-rational administrative procedures, and dependent upon the democratic will formation of a more or less culturally homogeneous group of people, could only function by defining, circumscribing and controlling citizenship. The citizen is the individual who has membership rights to reside within a territory, who is subject to the state's administrative jurisdiction, and who is also, ideally, a member of the democratic sovereign in the name of whom laws are issued and administration is exercised. Following Max Weber, we may say that this *unity of residency, administrative subjection, democratic participation and cultural membership* constitutes the 'ideal typical' model of citizenship in the modern nation-state of the West.³⁰ The influence of this model, whether or not it adequately corresponds to local conditions, extends far beyond the West: modernizing nations in Africa, the Middle East and Asia, which entered the process of state-formation at later points than their West European counterparts, copied this model wherever they came into existence as well.

What is the status of citizenship today, in a world of increasingly deterritorialized politics? As a normative category as well as institutional practice, which has so far defined political membership in the state-centric world, how is citizenship being reconfigured under contemporary conditions? How has the fraying of the various functions of the state, such as territoriality, administrative control, democratic legitimacy and cultural identity, affected the theory and practice of citizenship?

The practice and institution of 'citizenship' can be disaggregated into three components: collective identity, privileges of political membership and social rights and benefits. The idea that citizenship can be viewed as a status that confers upon one benefits as well as

³⁰ Max Weber, [1922], *Economy and Society. An Outline of Interpretive Sociology*, ed. and trans. by Guenther Roth and Claus Wittich, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, Berkeley, University of California Press, 1978 edn, pp. 901–26.

obligations, derives from T. H. Marshall. In his classical essay, 'Citizenship and Social Class' Marshall listed civil, political and social rights as being fundamental to the status of the modern citizen.³¹ Marshall's catalogue of rights is based upon the cumulative logic of struggles for expanding democracy in the nineteenth and early part of the twentieth centuries.

To be sure, there are difficulties with Marshall's framework, and one has to utilize it with caution. In particular, there is a teleological structure to the Marshallian classification, according to which social rights are the last to be attained, and fulfil the promise of modern citizenship more than do political and civil rights. As Yasemin Soysal, among others, has noted, however, the irony of current citizenship and immigration practices in most liberal democracies in the world, including the United States, is that whereas social rights and benefits (like unemployment compensation, retirement benefits, some form of health insurance, and in some cases educational and housing subsidies) are granted to citizens as well as legal aliens and residents, the transition to 'political rights' and 'the privileges of membership' remains blocked or is made extremely difficult.³² One can have one set of rights and claims without the other: one can have political rights without being a national, as is the case of the EU; more commonly, though, one has social rights and benefits, in virtue of being a foreign worker, without sharing in the same collective identity or having the privileges of political membership. The danger in this situation is that of 'permanent alienage', namely the creation of a group in society that partakes of property rights and civil society without having access to political rights. I want to illustrate this disaggregation effect with reference to the European Union, in which the rights of EU citizens are sharply delineated from that of third country nationals, within a patchwork of local, national and supranational rights regimes.

³¹ T. H. Marshall, 'Citizenship and Social Class', *Citizenship and Social Class and Other Essays*, London, Cambridge University Press, 1950.

³² Y. Soysal, *The Limits of Citizenship*, op. cit.; Riva Kastoryano, *Negotiating Identities*, trans. by Barbara Harshav, Princeton, NJ, Princeton University Press, 2001; Seyla Benhabib, 'Citizens, Residents, and Aliens in a Changing World: Political Membership in the Global Era', *Social Research*, 2:3 (1999), pp. 709-44.

POLITICAL MEMBERSHIP IN THE EUROPEAN UNION

The Treaty of Maastricht makes provisions for a 'Union citizenship'.³³ Nationals of all countries who are members of the European Union – the UK, France, Germany, Italy, Austria, Denmark, Belgium, the Netherlands, Sweden, Finland, Ireland, Greece, Portugal, Spain and Luxembourg – are also citizens of the European Community. What does being a citizen of the Union mean? What privileges and responsibilities, what rights and duties does this entitle one to? Is citizenship of the union merely a status category, just as membership of the Roman Empire was? Does membership in the Union amount to more than a passport that allows one to pass through the right doors at border crossings?³⁴

Clearly, Union membership is intended to be more than that. Not just a passive status, it is also intended to designate an active civic identity. Members of the Union states can settle anywhere in the Union, take up jobs in their chosen countries, and can vote, as well as stand for office, in local elections and in elections for the European Parliament. As European monetary and economic integration progresses, Union members are debating whether or not Union citizenship should also entail an equivalent package of social rights and benefits, such as unemployment compensation, health care and

³³ See Article 8 of C. Part Two. '1. Citizenship of the Union is hereby established. Every Person holding the Nationality of a Member State shall be a citizen of the Union.' Facsimile reproduction on file with the author. A more extensive discussion of these issues appears in my book, *The Claims of Culture. Equality and Diversity in the Global Era*, Princeton, NJ, Princeton University Press, 2002, ch. 6.

³⁴ The institution of citizenship among individuals who do not share a common language, a common public sphere and effective channels of participation has given rise to a number of debates in political theory and jurisprudence. Some see European citizenship as a fig-leaf intended to cover the considerable divestment of the democratic powers of sovereign peoples to an anonymous 'Eurocracy' sitting in Brussels, and still more others warn of the growing 'democracy deficit' in the Union. Citizenship without participation looms on the horizon, they argue. See Ulrich Preuss, 'Problems of a Concept of European Citizenship', *European Law Journal*, 1:3 (November 1995), pp. 267–81; Etienne Balibar, 'Is European Citizenship Possible?', *Public Culture*, 8 (1996), pp. 355–76; Percy B. Lehning and Albert Weale (eds), *Citizenship, Democracy and Justice in the New Europe*, London and New York, Routledge, 1997. This case has been made most recently and forcefully by Joseph Weiler, *The Constitution of Europe. Do the New Clothes Have an Emperor? and Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999.

old age pensions, which members of EU states can enjoy wherever they go.

The obverse side of membership in the Union is a sharper delineation of the conditions of those who are non-members. The agreements of Schengen and Dublin were intended to make uniform practices of granting asylum and refugee status throughout member states.³⁵ Referred to as 'legal harmonization', these agreements have made the granting of refugee and asylum status in the Union increasingly difficult. If an individual seeks refugee and asylum status in a member country, this individual is not permitted to apply in another country of the Union until the first application is resolved. Although this is left unsaid, the presumption is that once such an application has been denied in one member country, it is unlikely to succeed in another. The decision of the European Council of Ministers to erect a Union-wide office to deal with refugee and asylum issues, while creating legal and bureaucratic homogenization and standardization, by the same token, intends to make Europe's borders less and less porous by preventing individuals from seeking multiple venues of aid and rescue.

Since the Treaty of Amsterdam, signed on 1 May 1997, EU member countries have been aware of the need to harmonize conditions of entry and naturalization in member countries. According to the Treaty of Amsterdam, naturalization, immigration, refugee and asylum policies within the EU are placed in the Third Pillar. In other words, although EU member countries retain sovereign discretion over their immigration and asylum policies, the Treaty of Amsterdam embedded immigration and asylum policies within an EU framework.³⁶

The resolutions of the European Council, reached in Tampere, Finland, during 15–16 October 1999 reiterated this commitment to European integration, which should be based on respect for human rights, democratic institutions and the rule of law. The Council emphasized that these principles cannot be seen as the exclusive preserve of the Union's own citizens.

³⁵ See Gerald L. Neuman, 'Buffer Zones Against Refugees: Dublin, Schengen, and the Germany Asylum Amendment', *Virginia Journal of International Law*, 33:5 (1993), pp. 503–26. The Dublin Convention and the Second Schengen agreement were signed in June 1990. Both agreements contain rules for determining a 'responsible state' which agrees to process an applicant for asylum from a non-EU country.

³⁶ Peter van Krieken (ed.), *The Asylum Acquis Handbook. The Foundations for a Common European Asylum Policy*, The Hague, Asser Press, 2000, p. 25.

It would be in contradiction with Europe's traditions to deny such freedoms to those whose circumstances led them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organize it and commit related international crimes.³⁷

Despite these wishes for a coherent immigration and asylum policy at the intergovernmental level of EU institutions, legal and institutional conditions for immigrants and asylees vary widely among member countries. Neither the public nor politicians are clear about how these issues are related to the foundations and well-being of liberal democracies. As political changes in Austria, Italy, Denmark, Portugal, Spain and the Netherlands have made amply clear since 2000, immigration and asylum remain time-bombs in the hands of demagogues and right-wing politicians, ready to explode upon very short notice.

The recent summit of the European Council of Ministers in Seville in June 2002 is a clear indication that the declarations of Amsterdam and Tampere are at risk, and that the open method of coordination in immigration, refugee and asylum matters hitherto practised will be replaced by more restrictive and intolerant policies on the part of member countries. Far from projecting the ideals of cosmopolitan citizenship, current institutional developments in the EU herald a swing of the pendulum back from human rights commitment to the assertion of political sovereignty, be this at the national, inter-governmental, or supranational level.

While admittance policies into EU member countries get stricter, for those foreigners who are already in the EU, the progress of Union citizenship has given rise to discrepancies between those who are foreigners and third-country nationals, and those who are foreign nationals but EU members. A two-tiered status of foreignness has evolved: on the one hand there are third-country national foreign residents of European countries, some of whom have been born and raised in these countries and who know no other homeland; on the other hand are those who may be near total strangers to the language, customs and history of their host country but who enjoy special status and privilege in virtue of being a national of an EU member state. EU citizens, who are residents in countries other than those of their nationality, can vote, as well as run for and hold office in municipality elections and in elections for the European Parliament. These rights

³⁷ *Ibid.*, p. 305.

are as a rule not granted to third-country nationals, but Denmark, Sweden, Finland and Holland, who are EU members, and Switzerland and Norway, who are not, permit foreigners who have fulfilled certain residency requirements to vote in local, and even some cases, regional elections.³⁸

The consequence of these developments is a mixed picture, in which different practices hold in different countries; a situation has emerged in which divergent normative principles are at work in different contexts. The disaggregation of citizenship within the EU proceeds along several axes:

1. The entitlement to rights is no longer dependent upon the status of citizenship. Legal resident aliens have been incorporated into human rights regimes, as well as being protected by supra- and sub-national legislations.

2. The condition of illegal resident 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 asylum seekers are not entitled to choose their domicile freely or accept employment. A resolution to give those whose application is still in process the right to work after three months of residency is currently debated by the EU Council of Ministers. In some cases, children of refugees and asylees can attend school; and on the whole, asylees and refugees are entitled to certain forms of medical care. Illegal migrants, by contrast, are cut off from rights and benefits and mostly live and work clandestinely.

3. The determination of entry condition into member countries of the European Union, despite the declarations of the Treaties of Amsterdam and Tampere, remain in the Third Pillar of EU law, and are defined by the national legislatures of member states, within the limits set by common EU guidelines, and adherence to the Geneva Convention on the Status of Refugees.

4. Because access to entry is still determined by individual states, however, the status of third-country nationals is subject to considerable variation across individual EU borders. Rights of mobility, domicile and employment are not Union-wide; in this respect the extension of civil rights to third-country nationals remains incomplete.

5. Throughout the EU a decoupling of national and cultural origin from the privileges of political membership is visible: European

³⁸ <http://europa.eu.int/scadplus/citizens/fr/d7.htm>

Union citizenship makes it possible for all the EU citizens to vote, 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.

6. In this respect, too, changes are visible throughout the EU: in Denmark, Sweden, Finland and Holland third-country nationals can participate in local and regional elections; in Ireland these rights are granted at the local but not the regional levels. In the UK Commonwealth citizens can vote in national elections as well.

Contemporary developments within the European Union both reveal the disaggregation of various dimensions of citizenship and their continuing problematic coupling of cultural identity with political privileges.³⁹ While throughout the EU a dissociation of cultural identity from the privileges of political citizenship can be observed for EU citizens, for third-country nationals the ties between identities and institutions, between national membership and democratic citizenship rights are reinforced. The dominant model is access to political rights through naturalization, i.e., through assuming the nationality of the host country.⁴⁰

³⁹ Turks and ethnic Kurds, in most cases who are themselves Turkish citizens, are the largest group of foreigners, not only in Germany, but in Western Europe in general. In 1993, they numbered 2.7 million. Of that number, 2.1 million live in Germany and as of 1999 make up 2.86% of the population. The second largest group of foreigners consists of members of former Yugoslav states, many of whom enjoy either full or temporary refugees status: 1.8 million Croats, Serbians, Bosnian Muslims and Albanians.

This picture is complicated by the presence in countries like France of former colonials, such as the Algerians. As of the 1990 census, France counted 614,200 Algerian-born individuals among its population, and 572,200 Moroccans. In 1996 third-country national foreigners made up 6.3% of the population in France; in 1999 this number declined to 5.6%, and according to the 2002 figures, it hovers around 6.1%. These figures are based on SOPEMI Publications (the OECD Continuous Reporting System for Migration), Paris, 1998.

⁴⁰ With the exception of Austria, Luxembourg and Greece, most EU countries permit citizenship by naturalization. After the reform of Germany's *jus sanguinis* citizenship law as of January 2000, most EU countries practise a form of more or less liberalized *jus soli*. The one exception to 'political participation through naturalization' is the policy of the city of Amsterdam. The Dutch model is quite unique in that foreign residents of Amsterdam are granted city-citizenship and voting rights after 5 years of legal residence, and are then permitted to take part in municipal elections as well as form political parties. The granting of political rights to residents of Amsterdam does not alter their status within the EU; nevertheless, this is a model which may become popular throughout large European cities with foreign populations.

The existing discrepancy between the political participation rights of EU citizens and third-country nationals *across* the EU, and *within* each member country, is one aspect of the two-tiered status of membership that is currently developing. Equally significant are the restrictions on the mobility and employment opportunities of third-country legal residents. Given the totally unclear status of European citizenship as distinct from national membership, EU-wide residency for third-country nationals is still inconceivable.

It is evident, therefore, that European expansion in 2003 and 2007, if and when it comes to pass, will do little to alter the legal status of most third-country nationals since neither Turkey, nor the former Yugoslav states with the exception of Slovenia, nor Algeria, nor Morocco nor Albania are to become members of the European Union in the foreseeable future. On the contrary, given that the largest number of third-country nationals within the EU are also from Muslim countries, we can expect that after the events of 11 September 2001 there will be less sympathy for these groups and less interest in bringing their juridical status in line with that of other residents.

CONCLUSION: THE AMBIVALENT POTENTIAL OF DISAGGREGATED CITIZENSHIP

Should we view disaggregation and the end of the unitary model of citizenship with dismay? Are these developments indicators of the 'devaluation' of citizenship, a trend toward 'lean citizenship',⁴¹ insofar as one no longer need be a citizen to have access to some coveted social rights? Or are these developments indicators of a new sense of global justice and harbingers of new modalities of political agency, heralding perhaps cosmopolitan citizenship?

The European Union reproduces at the supranational level the internal tensions which have accompanied the birth of modern nation-states, while also showing their evolution along a different path. The modern nation-state fused together *identitarian* and *democratic* understandings of the citizenry through processes of

⁴¹ See Winfried Thaa, 'Lean Citizenship'. The Fading Away of the Political in Transnational Democracy,' *European Journal of International Relations*, 7:4 (2001), pp. 503–25.

contestation, struggle, cooperation as well as cooptation. Marshall focused on citizenship rights in the modern state in order to analyse how a capitalist state which rested on the sale of wage-labour through contract, could nonetheless win the allegiance of the working classes by granting them a 'status' – the status of citizenship. Marshall saw in these developments a reversal of Sir Henry Maine's well-known typology, 'from status to contract', in that citizenship had to be considered a status whose value could not be affected by the wage-labour contract. Citizenship remedied and rectified the indignities of capitalist inequality by giving the working classes access to the material conditions necessary for a 'civilized existence' – a very important category in Marshall's essay. Yet this compensatory achievement of the status of citizenship was dependent in crucial ways upon the presence of those who did not have access to citizenship and upon whom were heaped not only the indignities of wage-labour but that of not being full members of the commonwealth as well. Marshall could not admit, as Kant so blithely could, that 'there were mere auxiliaries to the commonwealth'. It is poignant in retrospect to read the naivety with which Marshall neglects the relationship of republic and empire; the insiders and the outsiders, and has nothing to say on the presence of those foreigners whose cheap labour in part subsidized the glories of the British welfare-state.

Trends toward the disaggregation of citizenship⁴² are an inescapable aspect of contemporary globalization. But is disaggregated citizenship also democratic citizenship? Disaggregated citizenship permits individuals to develop and sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as transnational contexts. Cosmopolitanism, the concern for the world as if it were one's *polis* is furthered by such multiple, overlapping allegiances which are sustained across communities of language, ethnicity, religion, and nationality. However, such networks are conducive to democratic citizenship if, and only if, they are accompanied by active involvement with and attachment to representative institutions, which exhibit accountability, transparency and responsibility toward a given constituency which authorizes them in its own name. Transnational

⁴² For a compelling analysis of similar tendencies within a non-European context see Aihwa Ong, *Flexible Citizenship. The Cultural Logic of Transnationality*, Durham, NC, Duke University Press, 1999.

networks without democratic attachments can enhance fundamentalism as well as terrorism. It may be uncomfortable, but nevertheless necessary, to recall that international terrorism is also a transnational phenomenon which manipulates and undermines existing nation-states; but international terrorism is not reconcilable with democratic attachments.

At a deeper level, there is a tension between the model of democratic legitimacy which I have outlined above and the realities of disaggregated citizenship. Insofar as the self-constitution of 'we' the people is understood as if it were the unilateral act of a homogeneous citizenry, this idealized model of democratic legitimacy does not only distort historical facts but cannot do justice to the normative potential of democratic constitutionalism as well. The human rights principles which are invoked by democratic constitutions have a context-transcending, cosmopolitan character. They extend to all of humankind. Their territorial delimitation is a process which involves war as well as conquest, negotiation as well as bargaining. The democratic people constitutes itself as sovereign over a territory only through historically contingent processes, and these attest to the violence inherent in every act of self-constitution.

Democratic sovereignty entails three legal fictions: 1) a homogeneous people; 2) a self-enclosed and autochthonous territory and 3) that the people are not only the subjects but also the authors of the law. I will name this third principle that of 'democratic voice'. The first two legal fictions are not defensible; it is only the third which reaches to the heart of democratic sovereignty, and which now needs to be reconfigured under conditions of disaggregated citizenship. Democratic attachments and membership are important because they enable voice. Whether democratic voice needs to be housed in the territorially circumscribed nation-state is the challenge we face.

If we focus on the cosmopolitan content of rights claims and on the principle of democratic voice, we need to move away from the legal fictions of homogeneity and self-enclosure toward reflexive acts of constitution-making which are cognizant of the fact that political entities function in an environment crowded by other political actors, and that acts of self-constitution are not unilateral gestures — although very often they have been understood to be just that. Policies of immigration, refuge and asylum affect other

political entities as well as being affected by them. As Max Pensky points out:

All modern constitutions offer membership according to a schedule of rights, and these rights are justified in terms of universal, rather than merely local or parochial attributes of members . . . Modern constitutions therefore tend to make normative claims that they cannot possibly fulfill. This is one way of describing the problem of constitutional scope. The normative force of democratic constitutions coherently demands the extension of inclusion to all persons while simultaneously retracting that inclusion to all members of a set of arbitrarily designated persons in order to actually succeed in *constituting* a polity.⁴³

The evolution of disaggregated citizenship has the virtue of making all too apparent the internal tensions of democratic constitutions. Aware of the cosmopolitan potential of rights, which transcended historically contingent political borders, Kant therefore argued that a republican constitution, one that would not be based on simple majority rule, would lead toward a federation of world republics.⁴⁴

Cosmopolitan federalism suggests that between trans- and international norms of international law and the actions of individual democratic legislatures, multiple 'iterations' are possible and desirable. The two are not mutually exclusive. Cosmopolitan norms can become, and in today's world are in the process of becoming, an aspect of the political and legal culture of individual polities. Transformations of citizenship, through which rights are extended to individuals in virtue of residency rather than cultural identity requirements, are clearest indicators of the emergence of such cosmopolitan norms. Nonetheless, insofar as those whose membership status remains unresolved, such as illegal migrants, refugees and asylees whose applications are in process, are treated as if they were criminals by existing polities, cosmopolitanism in the international arena has not been attained. The right to universal hospitality is sacrificed on the altar of self-interest. We need to decriminalize the worldwide movement of peoples, and treat each person, whatever their political citizenship status, in accordance with the dignity of universal personality. This implies acknowledging that the right to cross borders and to seek entry into different polities is not a criminal

⁴³ Max Pensky, 'Constitutional Exclusion? EU Constitution, Human Rights, and the Problem of Scope'. Paper delivered at the European Constitutionalism Conference, Johann-Wolfgang Goethe University, Frankfurt, 11-13 June, 2002. On file with the author (emphasis in the text).

⁴⁴ I. Kant, 'Perpetual Peace', op. cit.

act, but an expression of human freedom and the search for human betterment in a world which we have to share with our fellow human beings. First admittance does not imply automatic membership. Democratic peoples will still have to devise rules of membership at the national, subnational, regional and municipal levels. But it is the people themselves, through processes of legislation and discursive will – and opinion-formation, who must adopt policies and laws consonant with the cosmopolitan norms of universal hospitality. Defining the identity of the democratic people is an ongoing process of constitutional self-creation. While we can never eliminate the paradox that those who are excluded will not be among those who decide upon the rules of exclusion and inclusion, we can render these distinctions fluid and negotiable through processes of continuous and multiple democratic iterations.