

# **Balancing the rights and duties of European and national citizens: A demoicratic approach**

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## **Abstract**

How should we conceive of the relationship between European citizenship and national citizenship from a normative perspective? While the Treaties assert the supplementary nature of European citizenship vis-à-vis national citizenship, advocates of trans- and supra-national citizenship perspectives have agreed with the European Court of Justice that Union citizenship will ultimately supplant or subsume national citizenship. By contrast, we draw upon demoicratic and stakeholder citizenship theories to defend the primacy of national over European citizenship. Taking the cases of political and welfare rights, we argue that member states may have special duties to second-country nationals stemming from a European social contract, but that these duties must be balanced against the rights and duties of national citizens stemming from the national social contract.

**Keywords:** Demoicracy; EU Citizenship; political rights; stakeholder citizenship; universal basic income; welfare rights

## **Introduction**

Freedom of movement and non-discrimination on grounds of nationality comprise two of the most distinctive and controversial upshots of European integration. Both elements form central aspects of Union citizenship. Yet, despite citizenship of the Union being formally established so as to be ‘additional to and not replace national citizenship’ (TFEU Art. 20; TEU Art. 9), these core elements of Union citizenship have been regarded as being in tension with national citizenship (Schmidt et al. 2018). Indeed, in 2001, the European Court of Justice famously declared in *Grzelczyk* how ‘Union Citizenship is destined to be the fundamental status of nationals of the member states’ rather than merely supplementing their status as national citizens, a view routinely repeated in subsequent rulings involving Union citizenship rights.

A number of legal and other scholars have explicated and defended the teleological logic behind the Court’s reasoning (Benhabib 2002; Kostakopolou 2007). They regard the link with national citizenship as a transitional stage. In their view, by conferring on resident citizens of another member state equal treatment and rights to national citizens, European citizenship relaxes the boundaries of national citizenship and opens up the possibility for a new post-national form of citizenship. If transnational accounts adopt a flexible and open-ended perspective, in which political communities of new kinds are being constructed across as well as above existing state boundaries (Bohman 2004; Cohen and Sabel 1997; Kostakopolou 2007: 642-46; Pogge 1992), supra-national theorists believe this development points towards some form of European federation in which Union citizenship subsumes or supplants national citizenship (Habermas 1992; 2000). Yet, precisely these possibilities appear to have antagonised many against the EU, with right-wing populists across Europe portraying free movement rights as a licence to free ride, depleting the benefits and jobs available

to poor and unemployed national citizens, and dismantling the structures capable of delivering them in the process (Orr 2017).

Our aim is not to evaluate the empirical accuracy of these concerns – we accept the dominant view that they have been largely unfounded (see Martinsen and Werner 2018), at least in the aggregate, even if at the disaggregate level the influx of second country nationals may have diminished the availability of certain scarce resources for particular localities or groups (European Commission 2014). Our focus lies on whether there are independent normative grounds that might justify balancing the rights of Union citizenship against duties towards regimes of national citizenship, and even regarding the latter as having a degree of primacy over the former. In our view, a democratic conception of the EU (Nicolaïdis 2013) provides a strong case for holding fast to the normative content that we believe animates the Treaty rendering of European citizenship as merely complementary to national citizenship.

The core of our argument is that national democracy continue to be the main source of rights for EU citizens. This includes both those who remain in their home state and the 2.75% of EU citizens permanently resident in a member state other than their own (EC Press Release 2014) who rely on receiving states to secure a large body of rights. Not only do these extant circumstances make it normatively justifiable to protect the capacity of the member states to deliver public goods to their citizens and residents, we claim that these circumstances are themselves desirable. As we go on to explain, the diversity of rights offered by the regimes of different states has a value of its own that provides strong reasons for resisting certain forms of citizenship standardisation across the EU. That is not to deny the normative shortcomings of national citizenship regimes within an interconnected world – the one functional and the other moral. We term these the *sustainability* and the *justifiability* problems. On the one hand, citizens cannot

exercise democratic control over the various powers that shape and influence their lives within political systems that operate solely within national borders. Domestic decision-making is increasingly undercut by externally situated agents and agencies. Acting alone, states can neither reap the full benefits of any positive externalities resulting from their activities nor protect themselves from the negative externalities generated by activities outside their territories. On the other hand, the rules of inclusion and exclusion can be challenged as giving a morally arbitrary advantage to nationals over non-nationals that is every bit as objectionable as discrimination on grounds of race or gender. We agree these are serious problems and argue that for these very reasons national citizenship needs supplementing by something like Union citizenship. So supplemented, it becomes possible to have the advantages of national citizenship while overcoming many of its disadvantages.

The paper proceeds as follows. We start by explaining why national citizenship should be taken seriously as a domestic social contract between individuals within a self-governing political community (section I). We then consider two potential solutions to the sustainability and justifiability problems faced by national citizenship regimes: transnationalism (Section II) and supranational federalism (Section III). These positions are in tension with the domestic social contract in that each seeks in their own way to transform national into Union citizenship. Precisely because of this stark tension with the domestic social contract, which we believe does and should serve as the main locus of citizens' rights, we reject these positions. In their place, we sketch a version of the democratic social contract that confronts the strengths and weaknesses of national and Union citizenship by explicitly combining the dual status of Europeans as national and Union citizens, and the complementary roles that they play (Section IV). From this perspective, the possibility of the arbitrary exclusion of non-national citizens from the

domestic social contract has to be balanced against the equally important possibility of the *arbitrary inclusion* of non-citizens. Finally, we explore how this perspective justifies certain national limits on the citizenship claims of European citizens when such individuals take up the role of second-country national through the exercise of their free movement rights (Section V). Recruiting Rainer Bauböck's (2015) stakeholder approach to our democratic reasoning, we believe normatively valid grounds exist for many of the political and welfare citizenship exclusions for second-country nationals currently practiced in the EU.

**The domestic social contract: national citizenship as the 'right to have rights'**

National citizenship is intrinsic to a number of valuable democratic practices, and a failure to acknowledge its beneficial qualities as well as its many drawbacks risks throwing the baby out with the bath water. For all their faults, democratic nation states, such as the member states of the EU, provide the most effective political systems so far devised for rendering governments accountable to the governed in ways that encourage these same governments to pursue policies aimed at treating the governed with equal concern and respect, and thereby securing their rights (Christiano 2011).

National citizenship plays an important role in the functioning and stability of such an arrangement. On the one hand, the citizens of a national political community are co-participants in a scheme of social and economic cooperation capable of supporting expenditure on a suitable public infrastructure needed to secure rights. Moreover, involvement in such a scheme fosters a degree of trust and solidarity necessary to commit to a common scheme of welfare to guard against social risks. On the other hand, citizens are co-participants in a scheme of political cooperation through which individual rights can be claimed, justified and agreed to on equal terms to others.

Taken together, these two schemes constitute a modern version of the social contract that a long tradition of political thought has envisaged as a model of the relations binding citizens both to each other and to a given political community

Involvement in both schemes renders citizenship the ‘right to have rights’ (Arendt 1958: 296). This context enables rights to be effectively and legitimately claimed (Bellamy 2012a), in ways that allows a system of rights that is sustainable and fair to emerge (Rawls 1999: 63). For involvement in these two schemes generates not only rights but also reciprocal duties. These duties are for the most part prosaic, consisting of paying taxes, voting, respect for the rule of law and civility towards others. As we shall note in the penultimate section, political rights, on the one side, and social rights, on the other, can be related respectively to being a ‘stakeholder’ in the political and social schemes of social co-operation outlined above. That is, they arise from being a party to the domestic social contract at the level of the nation state.

To an important degree, the link between national citizenship and the domestic social contract is recognised in the current supplementary role played by Union citizenship and the limits that are placed upon it. Union citizenship rights are not absolute, but ‘shall be exercised in accordance with the conditions and limits defined in the Treaties and by the measures adopted thereunder’ (Article 20 (2) TFEU). Most of these limiting conditions relate to protecting the integrity of national political and welfare systems and involve distinguishing the rights of national from Union citizens. For example, they include derogations to the right to move and reside on the basis of ‘public policy, public security or public health’ (Articles 45 and 52 TFEU, and see C-64/96, *Uecker* 1997), and make the right of residence for periods of longer than 3 months dependent on having employment in the host member state or ‘sufficient resources for themselves and their family members not to become a burden on the social

assistance system' or possessing 'comprehensive sickness insurance cover' (Article 7 Directive 2004/38), with that right being retained only 'as long as they do not become an unreasonable burden' (Article 14 (1) Directive 2004/38).

Although the Court has tended hitherto to read these conditions and limits somewhat narrowly, it has always taken them into account (Davies 2018). The Case of *Dano* (C-333/13), where the ECJ ruled that second-country nationals who are not working or pursuing work in their country of residence may be excluded from non-contributory social benefits, reveals that these are not negligible constraints. Nonetheless, many commentators view such constraints as at odds with the inner logic of Union citizenship and have sharply criticised moves to reassert them as 'reactionary' (Spaventa 2017; O'Brien 2017).

### **The transnational social contract: citizenship as free movement**

Advocates of the transnational account of Union citizenship imply the existence of a global social contract between individuals that in many ways mirrors the kind of social contract typically applied to the nation-state context (Pogge 1992).<sup>1</sup> Proponents of this view believe that the sustainability problem facing nation-states has set in motion global processes of interconnectedness that makes any partiality towards national citizens hard to justify. They point to the development of international human rights norms and political arrangements beyond the state as suggesting significant if tentative moves towards a more trans- and post- national world order, placing the national social contract and the global social contract in tension.

Transnationalism is an essentially horizontal view that emphasises relationships between individuals and their organisations that transcend vertical relationships between governments and individuals at either the national or supranational level.<sup>2</sup> On

this view, restrictions of free movement and other protectionist regulations that stymie the development of transnational networks (which may rely upon and seek to promote the flow of goods, information, people, etc.) are inconsistent with the idea of individuals as subjects of equal moral worth. In this sense, while vertical EU institutions may be welcomed as lubricating the conditions for cooperation between individuals and their organisations beyond the state, the limitations that the EU places on interactions with third countries is also an obstacle to developing a more cosmopolitan transnationalism.

Operating within the confines of the EU vertical structure, the transnational perspective maintains that EU citizens' rights should not be affected by or secondary to national citizenship. Rather, they should attach to all individuals who may claim them simply through exercising a basic right to move and live with others and participate in supporting and re-constructing the community to which they have associated themselves (Kochenov 2014). As a result, we have a moral obligation to uphold not only the basic human rights of all individuals, but also to treat them with equal concern and respect to our compatriots. Indeed, European law has established, and the Court of Justice progressively extended, a wide range of substantive benefits that Union citizens and their family members can enjoy in a host member state by prohibiting discrimination 'as regards access to employment, remuneration and other conditions of work, and the enjoyment of social and tax advantages, housing, equal access to vocational schools and retraining centres and participation in trade unions and staff associations.' (Kostakopolou 2007: 640). Meanwhile, the rights to vote in local and European elections wherever a Union citizen is domiciled are seen as naturally leading to the right to vote in the national elections of the host state (Kostakopolou 2007: 644-46).



The transnational perspective seeks to uncouple the rights of individuals to pursue their personal goals and interests on an equal basis to others either from economic participation within and a contribution to, or membership of and identification with, the polity in which one resides (Scharpf 2009: 191-198). Consequently, many citizenship rights, including access to important social and economic benefits, get disassociated not just from political citizenship, but also from the standard prerequisites for obtaining the same: namely, an economic stake in the fortunes of the state, membership and a degree of identification with it, and political participation in shaping and sustaining the goods that it provides its citizens. This process has produced what Seyla Benhabib calls the disaggregation of citizenship (Benhabib 2008: 46-47), whereby the synthesis of civic with civil and commercial liberties achieved within the nation state has been pulled apart as the second and third have become detached from the first. Instead, modern civil and commercial liberties have become the trigger of themselves for access to certain civic liberties: notably, the ability to vote and stand in local and European elections when residing in another member state, and admission to social benefits that hitherto have been both privileges of political citizenship and part of their foundation (Bellamy 2012b). While she welcomes this development, we regard it as potentially unravelling the domestic social contract that generates these rights in the first place.

In this regard, we prove critical of ECJ case law that significantly advances the transnational and supranational commitment to a nationally insensitive citizenship regime for the EU. These transformative views are overly sanguine about how the judicialisation of the EU's transnational citizenship provisions by the ECJ has largely occurred as an extension of the *lex mercatoria* of the single market (e.g. Benhabib 2008: 46-7). In a series of judgments, the European Court of Justice has argued that Union

citizenship offers a Treaty based, directly effective right of its own, which undercuts many of the limitations member states sought to expressly build into the relevant directives (notably Directive 2004/38/EC). These decisions have fleshed out a form of market citizenship at the EU level that potentially conflicts with political and social citizenship at the member state level (Everson 1995).

For example, the Court has argued that the restrictions protecting national citizenship have to be applied in a ‘proportional’ manner (C-413/99, *Baumbast* 2002) that do not deprive Union citizens of a right to move and reside that exists independently of their pursuit of any economic activity (C-200/02, *Chen* 2004), thereby creating new rights for non-workers (C-85/96, *Sala* 1998; C-456/02, *Trojani* 2004), students (C-184/99, *Grzelczyk* 2001), and job-seekers (C-138/02, *Collins* 2004), weakening public interest derogations that excluded non-nationals from certain public service jobs (C-405/01, *Marina Mercante Espanola* 2003), and altering what could be considered a ‘wholly internal’ matter for member states (C-148/02, *Avello* 2003; *Chen* 2004; C-135/08, *Rottmann* 2010; C-34/09, *Zambrano* 2011, although see C-434/09, *McCarthy* 2011 which arguably reasserts the internal rule).

In a parallel move, *Grzelczyk* (2001) held that ‘a certain degree of financial solidarity’ now existed between the member states. Yet, though responses to the euro crisis suggest such solidarity is decidedly limited, the Court has consistently refused to treat national fiscal concerns as posing restrictions on the exercise of European liberties. Moreover, there have been a series of judgments that have prioritised EU level economic freedoms over member state level social rights (C-438/05, *Viking* 2008; C-341/05, *Laval* 2008; C-346/06, *Rüffert* 2008 and C-319/06, *Luxembourg* 2008). In these cases, the Court has attempted to impose a uniform, minimum standard of wage

legislation that overrides local collective bargaining agreements, thereby hindering the exercise of Union rights.

True, the legal framework constructed by the Court allows those Union citizens excluded from national political processes to claim certain rights. However, commentators who see this possibility as an equivalent and necessary supplement to democratic participation go too far (De Burca 1995). It shows how the terminology of citizenship rights provides the deployment of litigation by market actors with a false legitimacy. For it allows those actors with an economic interest in further market integration - the majority of which are enterprises rather than individuals - a privileged venue that is biased against, and often inaccessible by, the immobile majority, undermining the relative political equality offered by democratic citizenship (Isiksel 2016: 142-3).

### **The supra-national social contract: federal citizenship**

Supranational theorists also seek to secure the same equality of treatment for individuals and their organisations across states. However, they attempt to overcome some of the difficulties we have identified with transnational perspectives by embracing the need for vertical governance structures that establish transnational political communities (Habermas 2000). The EU is held up as a major step in this regard. On the one hand, it offers a prospective basis for the development of a post-national political community based on universalisable constitutional principles that overcome the shortcomings of the narrow forms of inclusion associated with nation-states (Müller 2008). On the other hand, the creation of an accountable power centre ensures that citizens may retain democratic control over the process of transnationalisation in a way that may not be possible on the transnational view. While the supranational account

does not collapse into an endorsement of a centralised superstate, it sees supranational institutions as the valid locus of power for those competences that ensure the equal treatment of national and non-national citizens.

However, there are reasons to be at least partly sceptical of supranationalism's identity and competence theses. Although there is evidence of an emergent European identity, it is doubtful that this would one day replace national identity, while any such post-national identity may in and of itself be undesirable. On the one hand, it is unlikely that the conditions that brought about the nation-state and established bonds of solidarity among citizens could be replicated at the supranational level. On the other hand, the common history, culture and language that have facilitated the development of nation-states should not be dismissed as simply romantic attachments since they also facilitate the operation of democracy as a mechanism for the public realization of the equal status of citizens. A common language, for example, is not just a marker of identity but also a means of communication that develops in a localised vernacular and can make politics understandable to all within a culturally idiosyncratic polity (Kymlicka 2001).

A similar caution is warranted with regard to the claim that supranational authority should be endowed with those competences required to ensure the equal treatment of all citizens. The evolution of competences to the supranational level generally comes with a trade-off in the ability of member states to pursue goods in accord with their own political culture and constitutional traditions. There is inherent value to this freedom as a condition of democratic self-determination, while the diversity of legal regimes resulting from the pursuit of different projects of self-government among states maintains the right to exit as a meaningful possibility for citizens within the EU. Although there may be good reasons to level up certain

competences to the supranational level, such levelling up should not be assumed to be morally required to ensure the equal treatment of citizens across the Union. On each occasion, the case for upward competence transfer must include a balancing of the interest of states and the preservation of their citizenship regimes.

National citizenship needs to be both sustainable and justifiable. Contrary to transnational and supranational approaches, we believe that is best achieved through supplementing national with Union citizenship in ways that balance their respective advantages and disadvantages. Such a balance implies a democratic framework based on a social contract between both the member states of the Union and their various individual citizens. We turn next to the nature of such a democratic citizenship before exploring the character of the balance it instantiates.

### **The democratic social contract**

While advocates of trans- and supra- national citizenship are right to be concerned about the possibility of domination of one group of national citizens by another group, and of arbitrary *exclusions* of individuals from national citizenship regimes, we have also seen that advocates of national citizenship have a parallel concern with the arbitrary *inclusion* of non-citizens within the benefits of national citizenship. Membership of the EU may offer a way for democratic states to address the sustainability problem by agreeing on ways to regulate both their interactions and global processes that transcend them that are in their mutual interest. However, envisaging an EU where states as the representatives of their national citizens are the only relevant normative subject is bound to produce a system of arbitrary exclusions from the perspective of individuals, thereby raising the justification problem. However, conceiving of an EU where the only relevant normative subjects are Union citizens -

regardless of their citizenship of a given member state - will inevitably produce arbitrary inclusions from the perspective of the national citizenship regimes of states. It is for this reason that, following Cheneval and Schimmelfennig (2013), we interpret the demoicratic social contract as recognising states as the representatives of national citizens, on the one side, and Union citizens, on the other side, whose interests the Union must seek to balance.<sup>3</sup>

In the social contract tradition, a fair society is possible only if all those party to the contract are recognised as autonomous in formulating the agreement and cannot be expected to give up their autonomy in the creation of a new political community. Following this tradition, the demoicratic social contract seeks to ensure that the autonomy of both national citizens within states and Union citizens regardless of their state are preserved in the resulting agreement. In practice, this entails that states cannot be expected to rescind their sovereignty and that of national citizens in favour of empowering a supranational citizenry, any more than Union citizens would fail to ensure that there are institutional provisions under the agreement to secure their individual capacities to pursue an autonomous plan of life throughout the supranational political union.

Although there is not full agreement among those who employ the demoicratic approach on what principles necessarily follow from this agreement between national and Union citizens, there is broad consensus on a number of important points, such as the right of states to unilaterally withdraw from the Union and to confer competences upon it by mutual agreement (see Cheneval and Schimmelfennig 2013; Bellamy 2013; Nicolaïdis 2013; Lacey 2017). A defence of Union citizenship as derivative from national citizenship, involving trans- and supra-national rights that supplement but do not replace or curtail those at the national level, has not been fully articulated by those

developing the normative foundations of democracy.<sup>4</sup> However, we believe that this position naturally emerges from any democratic account.

To proclaim European citizenship as equal to, or taking primacy over, national citizenship could have far-reaching consequences with the potential to undermine the autonomy of states that provide the locus of national citizenship. More important, such a provision would be in direct tension with the right of the national citizens of a member state to withdraw from the Union and to choose which competences they confer upon it. On the one hand, if individuals are European first, then how could they be ever legitimately deprived of this citizenship by a state that decides to exit the Union? On the other hand, the primacy of European citizenship implies the entitlement of European citizens to automatically claim the same entitlements as national citizens wherever they decide to reside within the Union. On the democratic approach, the principle of non-discrimination does not mean that Union citizens should be guaranteed the same entitlements as national citizens across the polity, but merely that they should be guaranteed a circumscribed set of rights and duties that fall within the rubric of European citizenship conceived as supplementary to national citizenship.

In the democratic social contract, it is assumed that all member states are social liberal democracies, with social liberal democratic institutions providing the legal and political freedoms and social and economic protections necessary for national citizens to pursue an autonomous life. Neither the national citizens of democratic states nor the prospective citizens of the union would agree to a political union with other states that are unable to provide these conditions of autonomy for their citizens, either prior to founding the political union or as a likely result of entering into a mutually beneficial common market together. The reason is that such a union would not ultimately expand the space wherein national citizens *qua* union citizens may pursue an autonomous plan

of life across the political union. That is to say, if a member state did not at least demonstrate the *potential* to provide adequate freedoms and protections for its own citizens, there is little chance that it could contribute to a free movement regime where second-country nationals could pursue an autonomous plan of life within its territory.

Applying this view to the EU, there is a priority given to member states in providing the legal and political and socioeconomic bases of autonomy for their own citizens and a presumption that other citizens of the Union should ultimately have access to that scheme of cooperation. As we have suggested, however, full access to the scheme of goods provided by national citizenship is not necessarily an automatic entitlement. Nor is it duty-free. As we explain below, of the three main available answers to the question of when second-country EU nationals should be entitled to the national citizenship benefits of a receiving state, only one follows naturally from a democratic perspective: stakeholder citizenship.

### **Non-arbitrary inclusion in national citizenship regimes**

In political theory, the question of inclusion has been primarily addressed with regard to the rightful use of coercive power. In other words, the key question has been who should be entitled to a say in the decision-making process of a coercive authority? The related yet distinct question of when non-citizens should be entitled to the welfare rights provided by a state is rarely addressed. In what follows, we explain why certain exclusions of European citizens from certain political and social rights of national citizenship are normatively justified. We relate these exclusions to the importance of being a stakeholder in the domestic social contract. However, we note that all the national citizens of different member states are also stakeholders in the democratic social contract and by virtue of this complementary membership are entitled to certain



rights of inclusion that modify these exclusions, overcoming both the sustainability and the justifiability problems of national citizenship in the process.

*The case of political rights*

The two most prevalent views on granting political rights to non-citizens are the all-affected interests principle and the all-subjected to coercion principle. A problem with these principles is that they are so concerned with ensuring that illegitimate exclusions are eliminated that they fail to recognise the problems posed by illegitimate inclusions. As Bauböck (2015) observes, both principles are oriented towards output legitimacy in recommending that the political membership boundaries of existing demoi be redrawn on the basis of how individuals are affected or their subjection to a coercive authority. Moreover, both prove too encompassing in scope. According to the all-affected interests principle, in a globally interconnected world, the demoi would need to be radically redefined on a potentially worldwide scale to ensure that all those who are affected by the decisions of other territories are included with citizens of those territories equally in the decision-making process (Goodin 2008). The all-subjected to coercion principle appears narrower, arguing that the morally relevant feature for inclusion in democratic processes is being coercively subject to obey their decisions (Abizadeh 2012). Yet, this view suggests that anyone on the territory of a coercive authority, including transients like tourists and short-term residents, are entitled to the same political rights as citizens of the polity in question.

By contrast, Bauböck's 'stakeholder' conception of citizenship offers an input account of democratic inclusion. Bauböck contends that the input question, determining who is entitled to authorise a government in making decisions, is logically prior to the question of the material or coercive effects these decisions may have on particular

individuals. On the stakeholder account (Bauböck 2015), the claim to being a citizen of a given sovereign political community belongs to those whose freedom and rights are inherently linked to the collective self-government and flourishing of this polity over time. Such individuals must be credibly pursuing a plan of life over time within the society in question. For those capable, this includes contributing to the production of collective goods through working and the performance of the civic and social duties required to sustain the domestic social contract: from paying taxes to good neighbourliness. Long term residents generally make such contributions and perform such duties, which should be recognised by allowing them easy access to citizenship as a way of committing long term to their host state.

We endorse this stakeholder account as part of a democratic understanding of European citizenship. It provides a robust rationale for the legitimacy of the demos as autonomous subjects with the right to develop their own national citizenship regime. On this view, Union citizenship legitimately grants rights to vote in local and EP elections anywhere within the EU based on residence alone. If a Union citizen moves to another state long enough to register as a resident, they will be participating in the local community sufficiently to be considered a local stakeholder. Of course, they may not intend to stay long-term, but that will be the same for many national citizens who move around their own country. Regardless of where they reside in the EU, Union citizens have an equal interest in influencing how the EU operates. That is to say, by moving from one country to another within the territory of the EU, citizens are still participating within the EU political community and thereby maintain an equal stake in determining how it is governed from within the national context in which they find themselves.

However, national policy-making holds a special place in the process of self-government. It is the arena that not only passes general laws for the entire polity, including providing the framework within which local government operates, but also defines national policy in international and especially EU affairs. As a result, voting in national elections gives individuals an influence over the direction of the internal and external affairs of the entire polity, and so should be limited to those most likely to use their political rights to advance the long-term interests of the community. Therefore, to qualify for a vote in national elections in another member state to their own, it is justifiable that a Union citizen should have to demonstrate that their plan of life is bound up with the prosperity of the host state both through their long-term residency in that state and by undertaking the necessary measures to become full citizens. The obligation of the host state in this regard consists merely in not making their acquisition of citizenship overly complicated for those who have met a reasonable, but not excessively long, residency requirement, which within the EU is standardly five years (Bauböck 2012: 3). Individuals residing abroad, however, ought not to be denied the right to vote in their home state's national elections for at least a certain period, whether by returning home or by postal vote. This common practice is justified by the fact that citizens of a given state may be abroad only for a limited time, intending to return in due course and thereby continuing to have their plan of life significantly invested in that state. In the EU context, though, allowing individuals to vote in multiple national elections is difficult to justify on grounds of political equality as it gives some EU citizens a double say in how member states influence EU policy. By naturalising and maintaining residence in their adopted state, individuals should be precluded from voting in their member state of origin, even if they choose to possess dual citizenship.

None of this is to say that non-citizen residents are morally entitled to little more than participation in local and EP elections. As Bauböck (2015) explains, the all-affected interests and all-subjected to coercion principles do point to valid moral concerns. While the fact of being affected by a political decision does not ground a right to equal inclusion in the decision-making process, it does ground a moral right to a fair hearing and due consideration by those authorised to make the decision by their citizen stakeholders. Similarly, although being coerced by a political authority does not give one the right to a say in the political process, it does ground moral rights to the contestation of decisions. On this interpretation of the principles, the interests of all non-citizen residents have a right to be considered by the national authorities in the decisions that will affect this constituency, while they should maintain equal access with national citizens to courts and to participate in all legal forms of political organisation.

#### *The case of welfare rights*

The question of welfare rights in the EU plays out in a similar way. Two relatively expansive views also frame this debate - what we shall call the equal citizenship principle and the equal residency principle.

From a trans- or supra- national perspective, citizens in a political union require the same set of basic goods to pursue an autonomous life and so should be automatically entitled to claim the social welfare required to meet these conditions of autonomy, wherever they reside. As Habermas (2012: 53) argues, that suggests ‘the Union must guarantee what the Basic Law of the German Federal Republic calls the “uniformity of living standards” (Art. 106, para 3).’ From a democratic perspective, Europe-wide civic solidarity needs to be balanced against the diversity and sustainability of national

social welfare systems. As we remarked above, there are substantial costs to a significant supranational move in this direction that include undermining the flexibility of states to adjust welfare regimes according to their own democratic preferences and socioeconomic circumstances. The example of German medical students in Austria is a case in point (Schenk and Schmidt 2018).

The equal residency approach affirms the value of maintaining social welfare at the national level, but nevertheless follows the equal citizenship principle in recognising that non-citizen residents without gainful employment or other financial support will require access to the same social welfare services as citizen residents if they are to pursue an autonomous life in the receiving state.<sup>5</sup> Such a view, however, fails to explain why the rights of national citizens to welfare are based on their stakeholderhood in the political community, whereas new residents who have never made or do not intend to make such contributions should be automatically entitled to the same provisions. Indeed, it is precisely concerns of this kind that were at stake in the *Dano* case described earlier.

Once again, adopting a stakeholder conception of democratic citizenship provides a more satisfactory criterion for welfare inclusion. We have seen that if a resident non-citizen is to demonstrate themselves as a full stakeholder in a receiving state, and thereby become entitled to full citizenship, it will often take a period of several years. An equivalent period of time before being granted access to the same welfare provisions as national citizens would be undoubtedly too demanding. For example, should a non-citizen resident work for several years before being finally made redundant, precluding them from jobseekers allowance or other social benefits would unfairly negate the contributions to society they have made and that they are willing to continue to make if provided with the opportunity to do so.

For this reason, we suggest that so long as a resident non-citizen has a *perspective on stakeholder*ship, they are entitled to the same social welfare scheme as established stakeholders. Having a perspective on stakeholdership does not mean that one will ultimately become a stakeholder, or is committed to long-term residency in the state in question, but that one has demonstrated a willingness and capacity to contribute to the socioeconomic fabric of the receiving state. Although individuals may so contribute in a number of ways, such as consumption, paying property taxes and the like, the vast majority of individuals require gainful employment to have the resources to make these and similar contributions. As a result, the ability of non-citizen residents to maintain a relatively consistent employment status over a certain period will frequently be the best means of determining whether they have adopted an appropriate perspective on stakeholdership or not.

What it costs to run the social welfare regime in question would seem to be the most relevant, and non-arbitrary, metric for determining what should be the length of this minimum period – regardless of the mix of contributory or universal elements in the system concerned. That is to say, since different member states will have more or less generous welfare regimes that are more or less expensive to run, member states should have a significant degree of flexibility in determining how deep a non-citizen residents’ perspective on stakeholdership must be if they are to be granted equivalent access to social welfare provisions as citizens. To ensure that member states do not impose excessive and unjustifiable limits on access to social services, the principles limiting flexibility in this matter should be agreed by them at the European level and enforced by the ECJ. However, they may be justified in not making this period too short. It can take some time for a second country national to make significant socioeconomic contributions, and thereby offset his potential burden on the state in the

event of unemployment, and to demonstrate their willingness and ability to be consistent and active contributors to the labour force.

In committing to the stakeholder view on welfare rights, we do not discount the validity of the moral concerns for citizens' autonomy raised by the equal citizenship and equal residency principles. While a concern for the autonomy of citizens in other member states does not ground a moral claim for welfare standardization across the EU, it places a moral onus on member states with greater capacity to facilitate the socioeconomic development of less fortunate states so that they may eventually provide the conditions of autonomy for their citizens and second country nationals. Furthermore, although a concern for the autonomy of non-citizen residents does not ground a moral claim to receive the same welfare benefits as stakeholders without having first contributed significantly to the welfare regime, it may ground a moral claim to provide a degree of temporary assistance to non-citizen residents to alleviate some of the harshest consequences of arriving in a new state without employment. Should a second-country national fail to find employment within a relatively short-period, it may be justifiable to halt this assistance.

One way in which a) wealthier states could meet some of their duties to citizens in less fortunate states and b) states generally could meet some of their duties to non-citizen residents seeking work within their territory is to provide a European Social Minimum (Viehoff 2017) or Euro-dividend (Van Parijs and Vanderborcht 2017: 235-42), that is, an unconditional and universal basic income for all European citizens that is assigned relative to the cost of living within states. While wealthier states would be, at least initially, net contributors to this scheme, such a basic income would have the advantage of reducing the likelihood of some negative behaviour that a free movement

regime might engender. For example, it would make ‘social dumping’ less attractive to workers and ‘benefit tourism’ less appealing to potential claimants.

At the beginning of this sub-section, we noted what could be lost if states centralised welfare competences at the EU level. The proposal for a basic income is far less demanding than the transfer of competences required by the equal citizenship principle. Being set at a relatively low level, while claiming no other competences for welfare programmes supranationally, a European basic income would only modestly interfere with the national administration of welfare regimes, providing each state with a wide scope for adjusting its welfare policies.

## **Conclusion**

We have attempted to build a normative case for justifying the complementary status of European citizenship to national citizenship. On the one hand, we have defended the importance of states as cooperative schemes of self-government for their citizens. On the other hand, we outlined the shortcomings of an international order based exclusively on national citizenships, which reduces the capacity of states to fulfil their duties to non-citizens. We proposed the concept of democracy as a normative account that justifies the primacy of national over European citizenship and can balance the two in a way that guards against both under-inclusiveness and over-inclusiveness. Finally, we drew on Bauböck’s stakeholder conception of citizenship to demonstrate how the democratic account balances the rights of national and Union citizens when it comes to granting political rights and welfare rights to non-citizens.

While we argued that non-citizen residents should be entitled to full citizenship and a vote in national elections only after they had established themselves as stakeholders in the political community, we defended their entitlement to a) vote in



local and EP elections, b) due consideration by the authorities in making national legislation, c) contest political decisions and d) vote in the national elections of their country of origin. With regard to welfare rights, we explained that non-citizen residents should only be entitled to equal welfare rights to existing citizen stakeholders when they take on a ‘perspective to stakeholdership’, not least by contributing to the tax base of the political community over a reasonable period of time,. This restriction does not discount the limited duties wealthier states have to citizens of less fortunate states, as well as to unemployed non-citizen residents who have not attained a perspective on stakeholdership. In order to fulfil these duties, and guard against some of the potential abuses of free movement, a modest basic and unconditional income was advocated for all Europeans.

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### **Notes**

<sup>1</sup> By contrast to the IR usage, we follow the usage of EU lawyers and employ

‘transnational’ citizenship to mean a right to the goods associated with citizenship in whatever state an individual happens to move and the potential of a horizontal dispersal of sovereign power. .

<sup>2</sup> Zielonka (2017) identifies two models of the transnationalism view: transnational networks (discussed above) and chaotic pluralism, a more anarchistic version based around the development of new technologies of interconnectedness.

<sup>3</sup> Habermas has recently also argued that the European peoples and individual Union citizens are the co-constitutive subjects of the EU (2012: ix). However, his account remains supranational rather than democratic, denying the legitimacy of domestically authorised national executives playing a key role in EU level decision-making (2012: 6, 12) and regarding the constitutive moment as instituting the primacy of EU legislation over national law (2012: 11).

<sup>4</sup> See, however, Nicolaidis (2013: 364) who points in this direction.

<sup>5</sup> Joseph Carens (2013: 108) stops short of making the equal residency principle a requirement of justice, pointing instead to anything short of this as a potentially reprehensible narrow interpretation of duties to migrants.

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