

2007

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Recommended Citation

Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 Fordham L. Rev. 2393 (2007).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss5/4>

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Cover Page Footnote

Professor of Political and Social Theory, European University Institute, Florence, Italy. I would like to thank the Bellagio Rockefeller Foundation and German Marshall Fund for a one month fellowship that allowed me to work on this paper, as well as Eugene Buttigieg, Jørgen Carling, Dilek Çinar, Marcus Eberhardt, Jeremy Grace, C. G. Gutierrez, Mária Kovács, Jean-Michel Lafleur, Eugene Sensenigg-Dabbous, Gerd Valchars and Harald Waldrauch for helpful hints and comments.

STAKEHOLDER CITIZENSHIP AND TRANSNATIONAL POLITICAL PARTICIPATION: A NORMATIVE EVALUATION OF EXTERNAL VOTING

*Rainer Bauböck**

I. CONCEPTUALIZING EXTERNAL POLITICAL PARTICIPATION

A. Transnational Citizenship

A forthcoming study lists nearly 100 countries and territories, i.e., more than half of all members of the United Nations and a clear majority of democratic states, whose laws permit citizens living abroad to participate in elections.¹ This is a major new development of electoral rights. It reflects a profound change in conceptions of citizenship that has not been sufficiently examined from comparative and theoretical perspectives. How should we conceive of the *demos* in societies whose membership stretches across international borders? A focus on external voting rights seems to be particularly relevant for addressing this question.

First, political participation and representation rights are the core of republican conceptions of citizenship, under which a citizen is a full member of a self-governing political community. Voting rights have generally remained attached to formal citizenship status, whereas most civil and social rights have been gradually extended to all residents independent of their nationality. It is, however, important to emphasize that this is no longer universally true, since many countries nowadays allow noncitizen residents to vote in local elections, and some even grant them electoral

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1. Nadja Braun & Maria Gratschew, *Introduction* to The International IDEA Handbook on External Voting (Int'l Inst. for Democracy and Electoral Assistance (IDEA) & Instituto Federal Electoral (IFE) eds., forthcoming 2007) [hereinafter IDEA Handbook], *available at* http://www.idea.int/elections/upload/External_voting_Preview_withlayout_07june06_final.pdf (posting a preview of the forthcoming report). Among the 100 countries there are five in which provisions for external voting have not yet been implemented.

rights in national elections as well.² Voting by noncitizen residents may be regarded as complementing electoral rights for nonresident citizens. These two methods of expanding political participation illustrate two sides of transnational citizenship.

Second, a focus on external voting rights helps to avoid two misperceptions in the debate about migrant transnationalism. The first error is to confuse transnational citizenship with post-national conceptions of membership, or to believe that the former signals a general trend towards substituting membership-based rights with universal human rights grounded in personhood.³ In nearly all countries, external voting is reserved for formal citizens and is often supported by ethnic nationalist arguments. The second error is to regard migrant transnationalism as either an old or an insignificant phenomenon. It is true that earlier waves of international migration since the industrial revolution have often maintained strong transnational ties. It is also true that transnational orientations and activities are by and large limited to the first generation of emigrants.⁴ Yet what is fundamentally new and empirically significant are institutional responses to transnationalism that enable migrants to claim rights and membership in several polities.⁵ Not all individuals who enjoy such status and rights will also subjectively identify as transnational citizens and engage in corresponding political activities. The proliferation of external voting rights after World War II (in spite of generally very low participation rates) provides convincing evidence for this hypothesis.

Third, external voting rights are a test case for not only the significance, but also for the legitimacy of transnational citizenship. They differ in this respect from the other core rights that external citizens enjoy: the right to diplomatic protection and the right to return. These rights can only be exercised abroad and thus do not raise any concerns about unequal treatment of citizens inside and outside the territory. In contrast, votes cast abroad by expatriates will be counted alongside domestic ones and will co-determine the future of the polity. Thus, votes cast abroad raise difficult questions about how norms of inclusion and equality should apply to transnational citizenship.

2. For an overview of noncitizen voting rights see Rainer Bauböck, *Expansive Citizenship—Voting Beyond Territory and Membership*, 38 Pol. Sci. & Pol. 683-87 (2005); David C. Earnest, *Voting Rights for Resident Aliens: Nationalism, Postnationalism and Sovereignty in an Era of Mass Migration* (May 16, 2004) (unpublished Ph.D. dissertation, George Washington University) (on file with the Fordham Law Review); Harald Waldrauch, *Electoral Rights for Foreign Nationals: A Comparative Overview* (June 2005) (unpublished manuscript, on file with the Fordham Law Review) (paper presented at the Workshop on Citizens, Noncitizens and Voting Rights in Europe).

3. See Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994).

4. Alejandro Portes, *Introduction: The Debates and Significance of Immigrant Transnationalism*, 1 Global Networks 181, 189 (2001).

5. Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism*, 37 Int'l Migration Rev. 700, 701-03 (2003) [hereinafter Bauböck, *Towards a Political Theory*].

Still, such electoral rights are only one manifestation of a broader phenomenon. Before discussing them in detail, transnational citizenship should be defined. I use this term to describe a triangular relation between individuals and two or more independent states in which these individuals are simultaneously assigned membership status and membership-based rights or obligations. Transnational citizenship may thus be graphically depicted as a partial overlapping of political communities between states whose territorial jurisdictions are entirely separate.

In terms of legal status, we can distinguish three categories of transnational citizens. First, and most obvious, there are multiple nationals who are formally recognized as citizens by two or more independent countries. The growing number of countries (both migrant sending and receiving states) that tolerate, or even actively promote, dual citizenship is another strong indication of the normative and institutional change in attitudes towards transnationalism.⁶ It is now also reflected in a corresponding change of norms in public international law, which used to regard multiple nationality as a source of conflict and as an evil to be avoided through bilateral and multilateral agreement.⁷

The second category is now generally called "denizenship."⁸ This term refers to a special legal status of long-term resident foreign nationals who enjoy most of the civil liberties and social welfare rights of resident citizens, often including rights to family reunification, some protection from deportation, and voting rights in local elections, as well as quasi-entitlements to naturalization. In contrast with denizens, the status of short-term resident foreign nationals, or of those long-term residents who are denied denizenship rights, is dominated by their external citizenship. They enjoy, or ought to enjoy, universal human rights as well as specific rights derived from residence or employment. However, these privileges do not amount to quasi-citizenship in the country where they currently reside. Denizenship is usually discussed as a step in the process of immigrant integration in the receiving country. It is therefore rarely regarded as a mode of transnational citizenship. Yet, unless they are stateless, denizens are at the same time foreign nationals who enjoy external citizenship status and rights in another country. It is the combination of internal denizenship

6. See generally T. Alexander Aleinikoff & Douglas Klusmeyer, *Citizenship Policies for an Age of Migration* (2002); *Dual Citizenship in Europe: From Nationhood to Societal Integration* (Thomas Faist ed., 2007); *Towards a European Nationality: Citizenship, Immigration and Nationality Law in the EU* (Randall Hansen & Patrick Weil eds., 2001).

7. See *Rights and Duties of Dual Nationals: Evolution and Prospects* (David A. Martin & Kay Hailbronner eds., 2003) [hereinafter *Rights and Duties of Dual Nationals*]; David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 *Geo. Immigr. L.J.* 1 (1999). Compare, for example, the Strasbourg Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, May 6, 1963, Europ. T.S. No. 43, with the European Convention on Nationality, Nov. 6, 1997, Europ. T.S. No. 166.

8. Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (1990).

with external citizenship that characterizes the legal position of long-term resident migrants in liberal democracies. Their options and choices (for example, with regard to naturalization or return migration) will be determined by the relative weight of the rights, duties, and identities attached to both sides of their citizenship status.

Denizenship is thus a status of residential quasi-citizenship combined with external formal citizenship. The third legal category that we can identify as transnational is in a way the converse of denizenship. It creates an external quasi-citizenship for individuals who are neither citizens nor residents of the country granting that status. Since this status is generally granted to minorities on the basis of ethnic descent and perceived common ethnicity with an external kin state, we could call it "ethnizenship." This phenomenon is less wide-spread than multiple nationality and denizenship, but is growing in importance. A number of Central Eastern European states (among them Hungary, Slovakia, and Slovenia) have recently adopted laws that introduce a quasi-citizenship for minorities of co-ethnic descent living abroad.⁹ Benefits include financial support for maintaining a minority culture and language, privileged admission to the territory or labor market of the kin state, and in some cases, facilitated naturalization. As far as I know, there are currently no countries where ethnizenship includes external voting rights. Yet, just as with denizenship, this external quasi-citizenship can serve as a stepping stone towards full multiple nationality for kin minorities. Apart from the three new EU member states that have adopted so-called "status laws" for external kin minorities, there are several western countries that grant citizens of other countries facilitated or automatic naturalization based on ethnic descent or on previously held citizenship among their ancestors while these persons still reside abroad. Such policies are currently in force in Germany, Greece, Ireland, Italy, Japan, Portugal, and Spain.¹⁰

This essay provides a normative assessment of external voting that fills a gap in the literature. On the one hand, the research perspective of migrant transnationalism has been mainly developed in cultural anthropology and sociology.¹¹ These disciplines are less interested in legal and political arrangements and shy away from explicit normative judgments. On the other hand, normative political and legal theorists who have addressed the challenge of migration focus almost exclusively on immigration control and

9. See generally *The Hungarian Status Law: Nation Building and/or Minority Protection* (Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi & Iván Halász eds., 2004), available at http://src-h.slav.hokudai.ac.jp/coe21/publish/no4_ses/contents.html; *Citizenship Policies in the New Europe* (Rainer Bauböck, Bernhard Perchinig & Wiebke Sievers eds., forthcoming Apr. 2007) (on file with the Fordham Law Review).

10. See generally Christian Joppke, *Selecting by Origin: Ethnic Migration in the Liberal State* (2005); *Citizenship Policies in the New Europe*, *supra* note 9.

11. See generally Linda Basch, Nina Glick Schiller & Christina Szanton Blanc, *Nations Unbound: Transnational Projects, Postcolonial Predicaments, and Deterritorialized Nation-States* (1994); Thomas Faist, *The Volume and Dynamics of International Migration and Transnational Social Spaces* (2000); Peggy Levitt, *The Transnational Villagers* (2001).

immigrant integration and tend to ignore the external relations of migrants with sending states. In the field of comparative electoral studies there have been some recent efforts to document the variety of arrangements for voting from abroad,¹² but so far there have been hardly any attempts to systematically test hypotheses about the causes and consequences of introducing external voting rights. Comparative political scientists could, for example, try to develop an index that compares the different voting arrangements across a large number of countries. This would also make it possible to test various explanatory hypotheses about why certain countries have introduced such rights while others have not. Political scientists should also be interested in analyzing the impact of external voting on election results and on the position of expatriates vis-à-vis their states of origin and residence. The normative discussion of external voting has begun only very recently, and the texts that have been published so far rely on rather limited empirical evidence.¹³ The present contribution is an attempt to address the question of legitimacy in a more systematic manner and to contextualize it by considering a wider range of empirical cases and circumstances.

This essay's conclusion is that external voting rights should be accepted as contingently legitimate. This means that one ought to reject both the proposition that all citizens have an inherent right to equal political participation that they can exercise from abroad in the same way as from within the country, and that territorial residence and presence in the country on election day is a necessary precondition for voting. I will derive this conclusion from discussing general arguments for and against the legitimacy of external voting in Part III. If these arguments are accepted, we must ask more specific questions about the scope of inclusion (who has a right to vote?), the scope of representation (which electoral rights should be granted?), specific contexts of external citizenship in which the case for electoral rights might become weaker or stronger, and the impact of external voting that might again lead to modifying a general normative assessment in specific cases. These questions will be addressed in Parts IV and V. The remainder of this part introduces some terminological

12. See generally IDEA Handbook, *supra* note 1; Votar en la Distancia: La Extensión de los Derechos Políticos a Migrantes, Experiencias Comparadas (Leticia Calderón Chelius ed., 2003); André Blais, Louis Massicotte & Antoine Yoshinaka, *Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws*, 20 Electoral Stud. 41 (2001); Dieter Nohlen & Florian Grotz, *External Voting: Legal Framework and Overview of Electoral Legislation*, 33 Boletín Mexicano de Derecho Comparado 1115 (2000), available at <http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/99/art/art4.pdf>.

13. See generally Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. Rev. 11 (2006); Bauböck, *Towards a Political Theory*, *supra* note 5, at 712-15; Claudio López-Guerra, *Should Expatriates Vote?*, 13 J. Pol. Phil. 216 (2005); Jeremy Grace, *Challenging the Norms and Standards of Election Administration: Standards for External and Absentee Voting* (IFES, Working Paper, May 2004), available at www.ifes.org/files/Grace_absentee_standards_final.pdf.

distinctions and discusses how the global spread of external voting should influence our normative assessment.

B. Defining External Voting

Currently, many different terms are used to describe the phenomena this essay discusses: remote voting, absentee voting, out-of-country voting, expatriate voting, external voting. Often, these terms are used as synonyms, but they can be employed to distinguish related but different phenomena. The following definitions might be useful to avoid conceptual confusion, but also because the voting rights they refer to raise somewhat different normative concerns.

(1) Remote voting refers to any type of voting that occurs outside a regular polling station. It includes, for example, mobile election teams for persons with restricted physical mobility.

(2) Absentee voting occurs outside a domestic electoral district where the voter is registered. Absentee ballots can be cast inside or outside the country where the election is held. Absentee voting normally involves remote voting but can also be exercised at regular polling stations.

(3) Extraterritorial or out-of-country voting (OCV) is a special form of absentee voting outside the territory of the country where the election is held.

(4) Expatriate voting refers to voting by individuals who have a permanent residence abroad and no permanent residence in the country where the election is held. Expatriate voting may be limited to in-country voting (ICV), where expatriates may cast their votes only if they are temporarily present in the country during the election. In most cases, however, expatriates are granted OCV rights.

(5) It is less obvious how to define external voting. A modern state can employ three different political boundaries for determining who is inside or outside the electorate: citizenship, residence, or presence in the territory. The boundary of citizenship itself raises the question of whether noncitizens have a right to vote. This is not this essay's main concern. An act of voting by citizens may be classified as external or internal according to the two other criteria: the residence status of the person casting the vote, or the location where voting takes place. The two types of electoral rights that this essay addresses are expatriate and extraterritorial voting. Since these are not identical, but partially overlapping concepts, we can define external voting as either the intersection of these two concepts or as the union set that includes them both. According to the former definition, external voting would refer only to expatriates enjoying voting rights that they can exercise abroad. This definition, however, is too narrow. Since most objections to the legitimacy of external voting apply to in-country voting by expatriates, but not to extraterritorial voting by temporary absentees, a broader

definition of external voting is needed that includes both phenomena.¹⁴ If the main concern were instead the integrity (i.e., secrecy, security, and reliability) of the voting procedure, which Part II will briefly discuss, then it would make sense to focus on extraterritorial voting and specifically on remote voting mechanisms.

As should be clear from the discussion so far, the term “expatriates” does not refer to former citizens of a country, but rather to citizens who live permanently (or for a long time) outside their country of citizenship. This term stands in for “diaspora,” which is a less precise and more ideologically charged concept than “expatriates.” The notion of diaspora should be reserved for a specific type of collective identity that involves a strong sense of shared commitment to an external homeland and a narrative about a future return to this homeland. A diasporic identity can be sustained across generations and across borders among geographically dispersed groups. This narrow conception of diaspora avoids an inflationary use of the term. It does not apply to all expatriates who merely share a status of external citizenship, nor does it include those first generation migrants whose transnational religious, cultural, or political identities and activities are not passed on to subsequent generations.¹⁵ In other words, calling expatriates a diaspora invokes a specific project of identity formation and political mobilization that may be successful in some cases but will fail in many others.

C. *The Proliferation of External Voting Rights*

Until World War II, external voting was a rather exceptional arrangement. Today, more and more countries adopt such provisions.¹⁶ For example, in the spring and summer of 2006, Italy, Slovakia, and

14. This is why I offer an alternative to two definitions in the literature. Nohlen and Grotz define external voting as “a voting procedure conducted in a territory of a foreign country for citizens living outside their country of origin.” Nohlen & Grotz, *supra* note 12, at 1119 (internal quotation marks omitted). This definition suggests the narrow intersection of OCV and expatriate voting (depending on whether we interpret “living” as permanent residence). The IDEA Handbook definition refers to external voting as “the casting of a vote by an elector who is permanently or temporarily outside the territory of the country in which she/he is entitled to vote.” IDEA Handbook, *supra* note 1, intro. This definition seems to exclude in-country voting by expatriates.

15. Jeremy Grace suggests a different distinction between, on the one hand, expatriates and economic migrants, who generally intend to return to home states, maintain their citizenship, and send remittances, and on the other hand, members of a diaspora, who do not intend to return but maintain abiding interest in the affairs of the state of origin. See Grace, *supra* note 13, at 3. Excluding an intention to return seems to be a counterintuitive definition of diaspora. This categorization also fails to include those expatriates who are permanently settled abroad and retain their citizenship but do not maintain an abiding interest in their country of citizenship (among them many second and third generations of migrant origin who have inherited their citizenship *jure sanguinis*).

16. In 2000, Nohlen and Grotz listed sixty-three countries and the forthcoming IDEA Handbook cited “almost 100.” IDEA Handbook, *supra* note 1, intro.; Nohlen & Grotz, *supra* note 12, at 1122. Since the definitions used in these analyses exclude in-country voting by expatriates, the number should be even higher under my proposed definition.

Mexico held elections in which expatriates could cast their votes for the first time. External voting does not seem to be a regional phenomenon, nor is it linked to specific types of democratic regimes and electoral systems.¹⁷ If one marks on a time line when external voting was introduced in different countries, one does not find distinct clusters either—except for a general acceleration of the process over the last decades. One can, however, identify three main reasons that seem to have motivated legislatures to extend electoral rights beyond territorial borders.

General moves towards more inclusive citizenship and voting rights have often occurred in the context or aftermath of major wars. The desire to encourage or recognize citizens' sacrifices and to reward their loyalty was, for example, the impetus for introducing absentee ballots for military personnel in Canada, New Zealand, the United Kingdom (after World War I), and the United States (after World War II), as well as for overseas citizens in France in 1944.¹⁸

Several countries in Latin America (Argentina, Brazil, and Mexico), Southern Europe (Portugal and Spain), Southern Africa (South Africa and Namibia), and Central Eastern Europe (Estonia, Latvia, Lithuania, Poland, Romania, and Russia) have introduced external voting during the transition to democracy or in the period of democratic consolidation. In these contexts, the justification is that emigrants from an authoritarian regime who had broadly supported democratization have a moral claim to participate in shaping a democratic future.

The third and most important reason for introducing external voting rights is that more and more migrant-sending states have recently changed their initially neutral or negative attitude towards expatriates. They now accept that populations settled abroad will not return, and they want to strengthen economic, cultural, and political links with these groups. Transnational ties with expatriates can help attract remittances and economic investment, spread the language and culture of origin in the country of residence, and promote foreign policy interests in bilateral relations.¹⁹ Granting expatriates dual citizenship and external voting rights is thus often advocated to secure expatriates' economic contributions and their political loyalty.

It is important to explain the proliferation of external voting rights not only in terms of the reasons for introducing them, but also with regard to the reasons for tolerating their exercise in those countries where expatriates have settled. In this respect, the increasing number of stable democracies in the international state system provides a background that greatly reduces

17. Nohlen and Grotz list fifteen Western European, ten Eastern European, sixteen African, seven American, and fifteen Asian/Pacific countries. Nohlen & Grotz, *supra* note 12, at 1122.

18. *Id.* at 1123; Andrew Ellis, *The History and Politics of External Voting*, in IDEA Handbook, *supra* note 1, ch. 2.

19. Bauböck, *Towards a Political Theory*, *supra* note 5, at 708-11.

anxieties in these states about the impact of external voting and election campaigns on domestic security and international relations.

The global trend towards external voting does not imply that it always receives a lot of political attention or has a significant impact. Voter turnout among expatriates is nearly always lower than among the domestic electorate, and after a few rounds of elections, external voting becomes a generally accepted routine feature of the electoral system. The political salience of external voting will be greater where it has been recently introduced, where many expatriates share a diasporic identity, where expatriates' political preferences deviate significantly from those of domestic voters, and where the electoral system provides incentives for campaigning abroad.

The Italian parliamentary elections of April 2006 illustrate the importance of the last of these factors. Expatriates were subdivided into four geographic constituencies (North America, South America, Europe, and the rest of the world) and voted for twelve reserved seats in the lower chamber and six in the senate, for which all of the candidates were themselves expatriates. With 42.07% of 2.7 million eligible expatriates voting, the turnout was quite high compared to external participation rates in other external elections.²⁰

The Mexican general elections of July 2006 provide a striking contrast. Although the introduction of external voting had been prominent on the political agenda until the law was passed in 2005, the eventual turnout was extremely low. Bureaucratic hurdles for voter registration and a prohibition on fund-raising and campaigning abroad have been mentioned as explanations.²¹ In other countries, the high potential impact of external voting on election results has become an obstacle to introducing this reform. In Hungary, a December 2004 referendum on introducing dual citizenship for up to 3.5 million ethnic Hungarians in neighboring countries was defeated due to low voter turnout.²² One of the opponents' main concerns was that external voting rights for dual citizens would be introduced as a next step. In a country of 10 million, the impact of such a large and politically mobilized external vote could be dramatic.²³

20. See Antonella Biscaro, *The Italian Transnational Citizen Casts a Vote and Scores a Goal*, *Metropolis World Bull.*, Sept. 2006, at 15. The Italian law introducing expatriate voting had been promoted by the right-wing *Allianza Nazionale*, which was a member of Silvio Berlusconi's government coalition from 2001 to 2006, and which has traditionally had a strong presence among Italian expatriates. Ironically, however, the external vote turned out to be crucial for the narrow victory of the Union led by Romano Prodi. Five of the six externally elected Senators went to the Union, and the majority of the Prodi government hinges today on these expatriate representatives. *Id.*

21. See Robert C. Smith, *Patterns and Contradictions of Diasporic Institutionalization in Mexican Politics: The 2006 Migrant Vote and Other Kinds of Inclusion* (Jan. 7, 2007) (unpublished manuscript, on file with the Fordham Law Review).

22. See generally Mária M. Kovács, *The Politics of Dual Citizenship in Hungary* 4 (Munk Ctr. for Int'l Stud., Univ. of Toronto, Working Paper, 2005).

23. *Id.*

These contextual variations are important for evaluating external voting. Nevertheless, the global trend to introduce and expand such rights is likely to continue as long as the number of countries with democratic elections and the volume of international migration continue to grow. This expectation cannot settle the question of whether external voting is normatively legitimate, but it should be taken into account in a normative assessment.

First, although international treaty law does not support the conclusion that external voting rights are a universal requirement of public international law, a sufficiently widespread change in state practice might eventually be recognized as constituting a new international standard in customary international law. Second, under normative theories of democracy, the fact that so many democratic states have responded to emigration by extending voting rights should at least be considered as establishing a *prima facie* case for the legitimacy of this practice, although this fact alone cannot determine the outcome of normative reasoning.

Third, even if we arrive at the conclusion that there is not a strong case for further expanding external voting rights, this does not mean that it would be legitimate to abolish them where they have already been introduced. Extensions of voting rights are generally irreversible under democratic conditions. Inclusion in and exclusion from the *demos* are normatively asymmetric. Even if inclusion is not required, exclusion may be impermissible. With regard to the franchise for propertyless classes, such as former slaves and women, such irreversibility is, of course, backed by strong normative arguments that past exclusion had been fundamentally unjust. This argument need not apply to expatriates. The more adequate analogy is with a trend towards lower age thresholds for voting. A decision to reduce the voting age may not be dictated by fundamental normative principles of liberal democracy, but once a certain age group has been included, raising the threshold again for subsequent generations will be objected to on grounds of fairness and stability of expectations. This case for irreversibility of voting rights is even stronger for expatriates. If only a single generational cohort enjoys a right to vote at an earlier age, then no individual voter will be deprived of a franchise that she has previously enjoyed. If, however, external voting rights are first extended and then curtailed, expatriates will lose a fundamental right they had been previously granted.

II. INTEGRITY AND ACCESSIBILITY

A. *Registration Procedures and Voting Mechanisms*

The possibility of external voting depends on the provision of specific opportunities to absentees to participate in elections. The costs of external voting can be considerable for both voters and governments, and technologies that reduce these costs have been developed only recently.

This is one reason why external voting today is much more common than in the past. Apart from considerations of cost, the mechanisms employed also have a strong impact on the integrity and accessibility of external voting, which will be discussed in the following section. The term “voting mechanism” refers to the location and environment where the vote is cast and the technical media through which the vote is recorded.

The standard procedure for internal voting by citizen residents involves automatic or optional registration in a residential voting district and casting a paper ballot in person at a polling station. In external voting, some or all of these standard requirements must be abandoned.

This concerns, first of all, the registration procedure. External voting requires individual applications for registration even in countries with automatic registration for the domestic electorate, since the government has few means of tracking voters who live outside its territory. As comparative electoral studies indicate, automatic registration has a strong positive impact on voter turnout,²⁴ so, depending on how cumbersome it is, an application requirement can strongly reduce participation in external voting.²⁵ In any system with geographically based voting districts, the question of where the expatriate votes should be counted arises. Usually, expatriates who register are added to the electoral roll in their last district of residence, or in their parents’ district of residence if they have never lived in the country. In Indonesia, Kazakhstan, Latvia, and Poland, they are instead assigned to the national capital.²⁶ Where expatriates have special representation through reserved seats in the legislature, they form separate electoral districts.

We can distinguish six different mechanisms for external voting:

(1) In-country voting by expatriates: In Greece, Israel, Turkey, and some other countries, it is not possible to cast a vote outside the territory, but citizens residing abroad can vote if they are present in the country on election day. In the three countries mentioned, political parties use this opportunity by organizing chartered bus tours or flights for their expatriate supporters. As mentioned above, expatriate ICV is often not classified as external voting. This is problematic for two reasons: First, expatriate ICV involves modifying standard procedures, such as special registration methods and setting up of separate polling stations at international airports and train and bus stations; and second, it raises all of the fundamental questions about legitimacy that are addressed in Part III.

24. See generally Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 Am. Pol. Sci. Rev. 1 (1997).

25. A complex bureaucratic registration procedure has been identified as one major cause for the very small number of votes in the 2006 Mexican presidential elections. IDEA Handbook, *supra* note 1, ch. 6. A second cause was a provision in the electoral law that prohibited candidates from campaigning and raising funds abroad.

26. See IDEA Handbook, *supra* note 1, ch. 2. A highly manipulable system exists in Belarus, where external votes are assigned to domestic voting districts with lower than average turnout. Nohlen & Grotz, *supra* note 12, at 1133.

(2) Voting in person at embassies and consulates: A majority of all OCV systems still requires voting in person.²⁷ The main advantage is that embassies and consulates can provide a controlled environment where problems of secrecy of voting and verification of voter identity can be minimized. However, voters in semi-authoritarian regimes may not trust the embassy staff if they see that staff as representing the government rather than as serving as an independent electoral commission.²⁸ The general disadvantage of embassy voting is limited accessibility and greater travel costs for expatriates and temporary absentees who do not live near an embassy or consulate.

(3) Voting in person at polling stations abroad: One way to overcome the restricted access to embassy voting is to set up special polling stations in countries with larger concentrations of expatriates. Examples mentioned in the literature are the Russian presidential elections of 1996,²⁹ the Dominican elections of 2004, or the Iraqi elections of 2005. In each of these, special polling stations were provided for expatriates living in large U.S. cities. Apart from higher costs than for embassy voting, setting up polling stations abroad also presupposes compliance by the authorities in the country of residence, so there may be considerations other than geographical concentration that limit such opportunities to certain countries.

(4) Mail ballots: This is now the most common method in Western Europe and North America. Voting by mail is generally easier and less costly for expatriates. It reduces personnel costs for voting at embassies or polling stations and can be carried out in all countries with a reliable mail system independently of government objections to having foreign elections conducted in their territory.³⁰ The main disadvantage of this mechanism and of those listed below under (5) and (6) is the lack of a controlled environment where the integrity of the vote can be guaranteed.³¹ A specific problem that occurs only with mail voting is that votes may have been cast elsewhere sometime before election day. This consideration requires safe transport and storage of such votes until they are counted. It also means that voters will not be informed about late developments during the election campaign that might have influenced their preferences.

(5) Proxy voting: In this case, a voter who is prevented from casting a vote in person designates another authorized voter to do so on her behalf. Proxy voting is a comparatively rare system, but is sometimes allowed within certain countries, such as Belgium, the United Kingdom, and

27. IDEA Handbook, *supra* note 1, at intro.

28. Grace, *supra* note 13, at 12. In Chad, the external vote was annulled in 2001 after allegations of widespread fraud carried out by embassy staff. IDEA Handbook, *supra* note 1, ch. 11.

29. Grace, *supra* note 13, at 12.

30. *Id.* at 11.

31. *Id.*

France.³² Such wider inclusion comes at a considerable cost with regard to standards for the integrity of the vote.³³ Since in a secret vote there is no guarantee that the elector will vote as instructed, the latter has in fact two or more votes, which violates the basic principle of one-person one-vote.³⁴ This trade-off may be acceptable where it includes citizens who are physically unable to walk to the polling station—although the more expensive method of mobile polling stations is clearly preferable. If, however, domestic electors can cast votes on behalf of external citizens, the incentives for abuse are fairly obvious.³⁵

(6) Remote electronic voting: Electronic voting means that votes are cast on a computer rather than marked on a paper ballot. In contrast to electronically enabled voting in the controlled environment of a polling station, remote e-votes can be delivered from a personal computer via the Internet or a specially created intranet. All types of e-voting involve risks of system failure and fraud.³⁶ Remote e-voting maximizes the advantages of mail ballots while reducing costs, but raises the same problems. It requires specific technologies for verifying the identity of the voter, such as the use of personal identification numbers. Biometric data verification technologies may, in the near future, reduce the risk of stolen identities. Internet voting was employed for the first time in the 2004 European Parliament elections in the Netherlands and in local elections and referenda in Estonia in 2005.³⁷ It has also been tried on a test basis in the United Kingdom, the United States, and Switzerland.³⁸

32. Eur. Comm'n for Democracy Through Law (Venice Comm'n), Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe 8 (2004), available at http://www.wijvertrouwenstemcomputersniet.nl/images/9/96/COE_compatibility_evoting.pdf.

33. See Alan Wall & Louise Olivier, ACE Encyclopaedia, Proxy Voting, <http://www.aceproject.org/ace-en/topics/vo/voa/voa02/voa02e> (last visited Feb. 15, 2007).

34. See Nohlen & Grotz, *supra* note 12, at 1129. The Venice Commission states therefore that proxy voting is permissible only subject to very strict rules and that the number of proxies held by any one elector must be limited. Eur. Comm'n for Democracy Through Law, *supra* note 32, ¶ 5.

35. This should not rule out contextual justifications in exceptional circumstances. For example, in its 1945 general election, Canada introduced proxy voting by family members of prisoners of war. IDEA Handbook, *supra* note 1, ch. 2. For a discussion of proxy voting see Wall & Olivier, *supra* note 33.

36. "The ballot itself should be kept secret and there must be full confidence that the vote cast by a person is recorded accurately in the system. The electronic trace of the vote must not be linked to the voter, but there must still be full trust that each vote is correctly registered and counted." Kåre Vollan, Norwegian Ctr. Human Rights & Norwegian Resource Bank for Democracy and Human Rights, Report No. 15/2005, Observing Electronic Voting (2005), available at <http://www.humanrights.uio.no/forskning/publ/nr/2005/1505.pdf>.

37. *Id.* at 7 (discussing the introduction of electronic voting in Estonia); IDEA Handbook, *supra* note 1, ch. 11.

38. See Vollan, *supra* note 36, at 15.

B. *Three Normative Concerns*

Do the mechanisms of external voting satisfy standards of integrity for democratic election procedures? Do all those who have a right to cast an external vote also have sufficient opportunities to do so without unreasonable costs and efforts? Should citizens who have a permanent residence abroad have a right to participate in elections? These questions raise concerns about the integrity, accessibility, and legitimacy of external voting. This section will briefly discuss the first two questions; the basic concern about legitimacy will be the focus of the rest of this essay.

Integrity problems can be subdivided into several closely related requirements for democratic voting, such as authenticity, secrecy, security, and reliability. The vote should reflect the authentic preference of the voter, i.e., it should be cast in an environment where nobody is able to exercise pressure on the voter or to monitor how she votes. The vote must also be secret in the further sense that, once it has been cast, it can no longer be linked to the individual voter. Electoral security standards require that only registered and entitled voters have an opportunity to vote and that they can vote only once in any election. Moreover, there must be guarantees that votes cannot be manipulated or destroyed after having been cast. Finally, a voting system is reliable only if, in the absence of manipulation attempts, the mechanism for counting and aggregating votes will always produce correct results.

As explained in the previous section, some of the mechanisms commonly used for external voting cannot fully meet all of these electoral standards. Some of these shortcomings can be minimized only in the controlled environment of a polling station. Mail ballots and remote electronic voting raise the most severe integrity problems. These risks are not specific to external voting, but also affect absentee ballots for resident citizens. The difference is that external voters are more likely to make use of an opportunity to cast absentee ballots than are domestic ones. Since the former can be easily identified as a distinct segment of the electorate, their voting rights may come under dispute if there are suspicions about a lack of integrity, especially when these votes have a decisive impact on election results. External voting in an uncontrolled environment requires a general trust that voters, political parties, and electoral authorities will refrain from abusing the system and manipulating the vote. Such trust is likely to exist in consolidated democracies with longtime experience with changes of governments as a result of democratic elections, but may be absent during democratic transition.³⁹

Apart from cost considerations, the main justification for relaxing integrity standards is that doing so will help to achieve a second normative

39. *See id.* at 4.

goal, namely to increase accessibility.⁴⁰ The general principle is that voting rights are not merely negative liberties in the sense that governments and other citizens have no right to interfere with an individual's choice to exercise her franchise. They are rights in the stronger sense of entitlements, which imply a correlative duty of governments to provide opportunities for exercising the right. This is obvious for domestic voting. Governments must organize a voter registry, print ballots, and set up a sufficient number of polling stations so that every voter has a fair chance to participate. Special measures to enhance accessibility for certain groups of voters, such as mobile polling teams that visit physically handicapped voters, may, however, depend on a calculation of cost per additional voter reached. As pointed out above, voting mechanisms that increase accessibility while controlling costs can also jeopardize integrity. Thus, there is a three-way trade-off between the normative goals of integrity and accessibility and the goal to limit public and private expenses for elections.

External voters are certainly a special group whose opportunities to participate in elections depend strongly on targeted government measures. Providing in-country voting for expatriates and extending existing schemes for mail, proxy, or remote e-voting will require comparatively few additional investments beyond those required for the registration procedure. However, providing for a controlled environment in extraterritorial polling stations may involve substantial costs. If governments prioritize the integrity of the vote and maintain that external voters have no claim to higher public expenditures per capita than do domestic ones, then the most likely choice of mechanisms (in-country voting plus embassy voting) will strongly limit accessibility.

In the context of external voting, the goal of accessibility may also be challenged directly without invoking the trade-off between costs and integrity. This challenge can be argued in two ways: A weak version would defend the permissibility of limiting external voters' access, while a strong version would provide positive reasons for doing so. The relative strength of these arguments depends on answering the prior question of legitimacy.

For the weak challenge, we merely have to show that the goal of accessibility is different from the norm of integrity that applies universally in all democratic elections and for all voters. In contrast, one could argue with regard to accessibility that electoral rights are entitlements only in the domestic context and are more like a liberty for external voters. Suppose that external voting is a permissible democratic arrangement but that governments are not obliged to introduce it as a matter of principle: If they do, then providing external voters with sufficient opportunities to participate would also seem a weaker obligation or no obligation at all.

40. "[I]t seems that many countries accept that voting in an uncontrolled environment would be acceptable to groups that would otherwise be disenfranchised, such as voters who are abroad on election day." *Id.* at 10.

The strong challenge starts from positive criteria for answering the legitimacy question about who should have external voting rights. One plausible answer to this question is that the bearers of electoral rights should be limited to those who are reasonably well-informed about the candidates and issues and have an individual stake in the future of the polity.⁴¹ It is safe to assume that citizens residing permanently in the country will generally fulfill these expectations. This presumption may need to be supported by government obligations, for example, to provide all citizens with basic civic education and to regulate election campaigns so that all citizens have a chance to form an unbiased opinion. A presumption of informed voting certainly does not hold for all adult citizens living outside the country. If all of them vote, then many could vote irresponsibly. To achieve a positive selection of well-informed stakeholders among the external electorate, governments could intentionally diminish accessibility. If expatriates have to travel long distances to cast their votes at an embassy or in their country of citizenship, then the few who are willing to make these efforts and bear the costs are more likely to be stakeholders. Reduced accessibility may thus lead to a process of positive self-selection among potential voters that enhances the legitimacy of external voting.⁴²

Both arguments, however, are not fully convincing. In response to the weak challenge, one can argue that even if governments have a choice of whether to introduce external voting, it does not follow that they are similarly free to restrict accessibility once they choose to grant such rights. If I consider offering you a contract under which I promise to provide a certain service, then my initial freedom to withdraw my offer does not diminish my obligations nor does it extinguish your rights once the contract has been concluded. So the question of whether external voting rights should be understood as liberties or entitlements cannot be settled by deciding whether it is generally permissible to either grant or withhold such rights. What we need instead are substantive arguments, such as those suggested by the strong challenge.

Should restricting accessibility be considered legitimate because it indirectly increases the legitimacy of the external vote itself? A pragmatic objection, which needs to be empirically verified, is that the self-selection induced by such hurdles to voting may also negatively impact on democratic fairness and stability. External voters who are undeterred by restrictive efforts and costs are likely to be wealthier, more educated, or more partisan than other expatriates. None of these characteristics disqualifies them from voting and each of these selection mechanisms operates also in the domestic context. However, fair electoral procedures must not be *designed* to enhance the opportunities of rich and highly educated citizens, and democracies will be more stable if they provide

41. See *infra* Part III.

42. Bauböck, *Towards a Political Theory*, *supra* note 5, at 713.

volatile voters, who are not strongly committed to one particular party or candidate, with incentives to participate.

A more principled objection is that it is always preferable to conceive of the democratic franchise as an entitlement, and that doubts about the legitimacy of including specific groups should be dealt with directly rather than indirectly, i.e., by limiting the scope of entitlements rather than intentionally reducing accessibility. If the groups whose participation in external elections satisfies a stakeholder criterion can be defined with adequate precision, then there is no need for a functional equivalent that achieves this goal via self-selection.⁴³ Instead of giving all external citizens restricted access to electoral rights, governments should restrict such rights to certain categories of citizens but provide those to whom the rights are granted with adequate opportunities for political participation.

III. LEGITIMACY

Doubts about the integrity of the external vote and questions about whether it should be made widely accessible are secondary concerns that arise only once we have accepted that external voting is legitimate. This part will consider general arguments regarding this controversy, i.e., those arguments that are stated without considering specific contexts. Parts IV and V will then discuss context-sensitive arguments that differentiate between categories of external citizens, types of electoral rights, country-specific conditions, and consequences of external voting.

Among general arguments for or against external voting we can distinguish between partial and comprehensive ones. The former derive their conclusions from established rights, powers, or moral claims (Part III.A-C), whereas the latter refer to a comprehensive conception of political community (Part III.D-F).

A. *Universal Suffrage*

The first argument for external citizenship is a rather formalistic one that relies on a simple syllogism: (1) All adult citizens have the right to vote, (2) expatriates are citizens; and therefore, (3) expatriates have the right to vote.

At first glance, this conclusion seems to be supported by universal human rights conventions. Article 25 of the International Covenant on Civil and Political Rights declares, "Every citizen shall have the right and the opportunity . . . without unreasonable restrictions . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage."⁴⁴ Article 2 clarifies, however, that each state party undertakes "to respect and to ensure to all individuals *within its territory and subject to*

43. See *infra* Part IV (supporting this solution).

44. International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

its jurisdiction the rights recognized in the present Covenant.”⁴⁵ Therefore, expatriates and even temporary absentees cannot claim equal suffrage under this international treaty.

The only international convention that explicitly demands external voting rights is the 1990 United Nations Convention on the Rights of Migration Workers, whose Article 41.1 reads, “Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.”⁴⁶ This right is, however, immediately qualified in the following subparagraph 41.2, according to which “[t]he States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.”⁴⁷ As of September 2006, this Convention has been ratified by only thirty-four states. It has not been signed by any major country of immigration and is not considered to establish generally recognized norms that would also apply to non-signatories.⁴⁸

A more indirect human rights-based argument for external voting starts from the observation that most states exclude noncitizen residents from all electoral rights. If these foreign nationals also do not enjoy external voting rights in their country of citizenship, they will be deprived of any opportunity to exercise their right to participate in elections. Noncitizen voting rights in national elections are much less common than external voting rights and also clearly not required by human rights conventions. Therefore, sending states may have a human rights-based obligation to provide expatriates with such rights.

The objection against this line of reasoning is that the right to vote is meaningful only in relation to the specific polity where it is exercised.⁴⁹ Individuals do not have an abstract right to vote that is fulfilled if any country grants them the franchise, but rather only concrete rights to vote where they can claim membership status. In other words, if I am deprived of the right to vote in my country of residence, then being granted voting rights in another country cannot compensate for this deprivation. Otherwise, the argument would perversely imply that countries of immigration need not provide immigrants with access to their citizenship as long as they enjoy external voting rights.

The argument that universal suffrage is a right of all citizens fails, therefore, to ground external voting as a human rights-based norm. It has, however, been successfully employed in domestic constitutional law. In 1989, the Austrian Constitutional Court struck down an electoral law that had required ordinary residence in Austria as a precondition for voting in

45. *Id.* art. 2 (emphasis added).

46. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 41.1, G.A. Res. 45/158, Annex, U.N. Doc. A/45/49 (Dec. 18, 1990).

47. *Id.* art. 41.2.

48. Nohlen & Grotz, *supra* note 12, at 1117.

49. See López-Guerra, *supra* note 13, at 228.

federal parliamentary and presidential elections.⁵⁰ The Austrian federal constitution explicitly requires residence in the territory only for provincial and local elections, but not for federal ones.⁵¹ According to the Federal Constitution Act, the Austrian national parliament and the federal president are elected by the *Bundesvolk*, i.e., the “federal people.”⁵² The Constitutional Court has consistently interpreted the “federal people” as being composed of all Austrian citizens, independent of their residence in the country or abroad.⁵³ The only objection against external voting rights considered by the Constitutional Court was the requirement to register all enfranchised citizens in an electoral district where their votes would be counted. Referring to solutions for this problem in other countries, the Court stated that citizens residing abroad can still be assigned to an electoral district roll in Austria based on criteria such as prior residence, birthplace, or birthplace of their parents.⁵⁴ Nowhere does the Court discuss the more fundamental question of whether citizens living abroad who are not subject to Austrian laws can still claim the *same* rights to political participation as those living within the territory. The Court also failed to consider that in many other countries external voting has not been granted to *all* citizens living abroad, but only to certain categories of citizens who are presumed to have maintained stronger ties with their country of origin. The Court’s interpretation is therefore narrowly grounded in the text of the Austrian Constitution and does not rely on any fundamental principle that would also be recognized in most other democratic constitutions.

B. Democratic Self-determination

A second argument about external voting is neutral with regard to the outcome. It has been succinctly stated by Joseph Schumpeter: “Must we not leave it to every *populus* to define himself?”⁵⁵ In this view, determining the external boundaries of the *demos* is a matter of democratic self-determination. It will be legitimately decided through democratic legislation that is not predetermined by any general normative constraints.

50. Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 16, 1989, docket No. G218/88, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 12023 (Austria) [hereinafter VfGH G218/88] (striking down residence requirements for voting rights of Austrian citizens).

51. Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 393/1929, arts. 95, 117(2) (Austria).

52. *Id.* arts. 26(1), 60(1).

53. The same interpretation of federal people as consisting of all Austrian citizens and only of Austrian citizens was also used by the Court in 2004 to strike down a bill that would have introduced voting rights for non-European Union nationals in the city of Vienna at the level of urban district assemblies. Verfassungsgerichtshof [VfGH] [Constitutional Court], June 30, 2004, docket No. G218/03, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 17264 (Austria) (striking down voting rights for third country nationals in Vienna district elections). For a critical discussion, see Gerd Valchars, *Defizitäre Demokratie* (2006).

54. VfGH G218/88, *supra* note 50.

55. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 245 (2d ed. 1947).

Schumpeter's principle applies most obviously to the laws regulating acquisition or loss of citizenship, but it can also be invoked in determining whether external citizens living outside the polity should still be regarded as members of the *demos* in the narrower sense of a community whose members have equal rights to be represented in collectively binding decisions. In this view, the question of legitimacy is reduced to a procedural one. Decisions to grant, withhold, or abolish external voting rights are equally legitimate when they are adopted by a democratic legislature operating within the procedural constraints set by a constitution.

A parallel argument that dismisses the very question of legitimacy could also be made from a "realist" perspective on the domestic political process. In this view, political agents are exclusively motivated by rational interests. They invoke normative principles only when they serve their interests. A political party will therefore advocate external voting when it expects to win relatively more votes from abroad than its competitors. Questions about the substantive legitimacy of including or excluding voters are irrelevant as long as all actors pursue these interests in maximizing their votes within the constitutional framework for the democratic process.

The idea of democratic self-determination of the boundaries of the *demos* generates, however, a number of logical paradoxes as well as practical consequences that undermine liberal versions of democracy.⁵⁶ The logical paradox of self-determination was nicely stated by Ivor Jennings: "[T]he people cannot decide until somebody decides who are the people."⁵⁷ In practical terms, once a boundary has been set, the people or their representatives can of course decide who will be newly admitted or who among the present members will be excluded. And it seems obvious that decisions whether to extend the franchise to external citizens can only be taken by the presently enfranchised citizens, but that external citizens must be represented in a decision to abolish their franchise. Yet, this does not settle the question of whether a *liberal* democratic people can in this way freely decide who are its members without respecting individual *rights* to membership as a constraint on its right to collective self-determination. Can such a democracy decide to expel its own citizens? Can it refuse to naturalize those who have lived in the country since birth? Should it continue to treat those as full citizens who have spent all their lives outside its borders? Such questions cannot be answered procedurally. They refer to substantive conceptions of membership in a political community that I will discuss below.

56. See generally Rainer Bauböck, *Paradoxes of Self-Determination and the Right to Self-Government*, in *Global Justice and the Bulwarks of Localism: Human Rights in Context* 101 (Christopher L. Eisgruber & András Sajó eds., 2005) [hereinafter Bauböck, *Paradoxes of Self-Determination*].

57. W. Ivor Jennings, *The Approach to Self-Government* 56 (1963).

C. Contribution-Based Claims

A frequently cited argument in support of external voting rights is that expatriates contribute in various ways to the flourishing of their home countries and therefore have a claim to be represented in its political decisions. These contributions can be economic (remittances and investments), cultural (support for cultural institutions in the country of residence or of origin), and political (support for democratic transition or consolidation in the country of origin or for that country's interests in the country of residence).

With increasing volume and intensity of transnational activities among migrants, the importance of these contributions has grown dramatically for many countries. As mentioned above in Part I.C, this also provides an explanation for the global trend toward external voting rights. However, an explanation is not yet a justification. There are three problems with a contribution-based claim to voting rights.

First, the contributions in question are voluntary. Voluntary contributions are not like legal duties of citizens to contribute by paying taxes or serving in the army. "No taxation without representation" does not so much appeal to the idea that voting rights are earned by contributions, but rather to the accountability of political authority toward those who are subjected to its decisions.

Second, expatriates' contributions are highly unequal. They depend on individual resources, preferences, and efforts. Some expatriates contribute much while others do not contribute at all. Insofar as contributions depend on income and wealth, it is obvious that the democratic franchise must not be offered in exchange. "[P]olitical rights should not be for sale."⁵⁸ Other contributions that involve personal effort and sacrifice may be meritorious, but democratic voting rights are entitlements derived from membership status rather than rewards based on special merit. If voting rights were conceived as a reward, they would have to be distributed unequally. It is therefore incompatible with universal and equal suffrage to conceive of voting as a reward for contributions.

Third, just as not all who are members contribute, it is also true that not all who contribute are members. In exceptional cases, membership may be granted to individuals who deserve it because of their special efforts.⁵⁹ But outsiders who support a country's economic, cultural, or political development have no general claim to citizenship and voting rights unless they are prepared to link their own fate to that of the country by taking up residence there.

58. López-Guerra, *supra* note 13, at 230; see also Ruth Rubio-Marín, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, 81 N.Y.U. L. Rev. 117, 131-35 (2006).

59. A well-known case is that of Thomas Paine, who was given honorary citizenship in France after the revolution in 1789 and subsequently joined the National Convention as a deputy.

These three objections do not imply that it is wrong to introduce external voting rights as a political response to contributions by expatriates. The reasons for the proliferation of voting rights discussed in Part I.C are all associated with perceived benefits from such contributions. It is quite natural that in democratic deliberations the case for external voting will be stronger in countries that have benefited more from their expatriates. But the contribution argument is relevant only at the aggregate level, not at the individual level. It must not determine who will be entitled to vote and it presupposes that we have prior reasons for the permissibility of external voting that do not rely on the contribution argument.

D. *Ethno-national Community*

Expatriates are outsiders with regard to the territorial jurisdiction of their state of origin. Their claims to participate in this state become stronger if they are simultaneously perceived as insiders with regard to a non-territorial conception of the political community as a nation. If nations are defined as imagined communities of shared language, culture, history, or descent, then membership need not be confined to those who reside in a state where this nation is established. A nation may need a territory, where its culture and tradition is sustained by state institutions, in order to survive as a distinct community, and the discourse of nationhood nearly always involves a claim to a territorial homeland. Yet, once such a homeland has been established as an independent state, the nation can reach beyond its borders and include individuals who are seen to belong to it by virtue of their ethnic descent or cultural affiliations.

For ethno-nationalists, the nation conceptually and morally precedes the state. It is an intrinsically valuable form of community, whereas the state is primarily an instrument for realizing the nation's aspirations of self-determination. Citizenship becomes merely a proxy for membership in the nation and the rules for acquisition and loss of citizenship mirror criteria for national belonging, the most important of which are descent and cultural affinity. This view provides a straightforward justification for including expatriates in the ongoing process of the nation's self-determination through its political institutions in the homeland. It is, however, difficult to square with a liberal commitment to equality and inclusion, since it implies not merely that external citizens can be full members of the political community, but also that immigrants and native minorities who are not seen to belong to the dominant nation have no right to full citizenship. In contrast with alternative conceptions of political community that I will discuss below, ethno-nationalism supports only voting rights for expatriates but rejects entitlements to citizenship and political participation derived from territorial residence.

A number of theorists have attempted to reconcile nationalism with liberalism. One school of thought claims that it is possible to defend cultural nationalism once we dismiss the claim that every nation has a right to a separate state. In this view, realizing the equal claims of each nation to

self-determination requires either non-territorial arrangements with separate cultural institutions for each nation,⁶⁰ or the formation of pluri-national states in which several nations enjoy autonomy in their territorial homelands.⁶¹

Most authors tend to ignore, however, the external dimensions of nationhood. Chaim Gans's work is exceptional in this respect since it also addresses rights of diaspora groups to participate in the self-government of their national homeland.⁶² It is worth quoting his proposal at some length:

These rights are based on the interests that all members of a national group might have in their nationality, and not only on the interests of those who are in fact citizens of the state These rights may also reflect the different character of these interests for members of national groups living in their homeland, on the one hand, and for members living outside the homeland, on the other. For example, voting rights on matters concerning the homeland could be granted only or mainly to those living there. Voting rights on matters of national identity and membership that have little to do with life in the homeland . . . could be granted equally to all members of the national group.⁶³

In order to avoid situations where expatriates can decide domestic political issues when their interests are not affected, external voting rights could thus be limited to matters that concern the diaspora's interest in the maintenance and flourishing of the national culture. But this interesting proposal raises a number of practical difficulties. How can we distinguish which issues fall into the domestic and the pan-national category? And how can we restrict voting rights to specific policy issues? The latter problem could be solved by either limiting external voting rights to referenda on pan-national issues, or by letting the diaspora elect special delegates who have no right to vote on legislation that will not affect the diaspora's interest in the national culture.⁶⁴

Even if one could implement Gans's proposal in these ways, it appears to be too restrictive. In both solutions, external voting would become rather marginal in its impact and highly unequal compared with the electoral rights of domestic citizens. Moreover, the claim for such rights would be limited to communities with a strong diasporic identity, while ignoring the broader interests of expatriate groups in voting that may be derived from a

60. See Yael Tamir, *Liberal Nationalism* 35-36 (1993).

61. See various contributions in *Multinational Democracies* (Alain-G. Gagnon & James Tully eds., 2001).

62. "[T]he right of national groups to self-government should *universally* be conceived of in sub-statist forms." Chaim Gans, *National Self-Determination: A Sub- and Inter-Statist Conception*, 13 *Canadian J.L. & Jurisprudence* 185, 186 (2000). "In the case of groups with a diaspora, the right of these groups to self-government could also take an inter-statist form." *Id.*

63. Chaim Gans, *The Limits of Nationalism* 84 (2003).

64. These solutions have been suggested to me by Chaim Gans in a personal conversation.

concern over how political decisions in their country of origin will affect their family living there or their personal future in case of return.

At the same time, one could challenge the claims of diaspora citizens to participate in exactly those matters that concern the conception of nationhood established in the homeland. As Benedict Anderson has pointed out, groups mobilized as diasporas frequently engage in "long-distance nationalism."⁶⁵ They often preserve an image of the national culture that is frozen in time and does not reflect contemporary changes in the homeland society. And they can sometimes be mobilized in support of radical ethno-nationalists who reject the accommodation of national minorities and the resolution of violent conflicts between domestic factions or neighboring states. Such engagement can be partly explained by the lower risks diaspora members face when they support extremist policies with money and votes without being exposed to the consequences.⁶⁶ This objection against external voting rights cannot be generalized since there are also many examples where expatriate communities have supported democratic transitions and the resolution of ethnic conflicts.⁶⁷ Nonetheless, the question is whether the interests of diaspora members in homeland nation building should be counted equally with those of domestic citizens whose lives will be affected much more directly by such projects and policies.

E. *Territorial Community*

Other conceptions of political community can be characterized as territorial and statist. They include a second school of liberal nationalists, for whom promoting a shared national identity is instrumentally important for a liberal state to create a sense of solidarity and trust among citizens, which is seen as a condition for social justice and welfare policies.⁶⁸ From a perspective that wants to create strong state-based national identities and that broadly limits considerations of social justice to redistribution within a territorial jurisdiction, extending voting rights to external citizens is obviously not a pressing concern. Since the state where expatriates reside has the same legitimate interest in promoting its national identity, a persistence of transnational ties among migrants must also be seen as an obstacle to be overcome through assimilation into the receiving nation. Liberal versions of statist nationalism will not reject ethnic diversity in societies of immigration as long as it does not conflict with a shared

65. Benedict Anderson, *The Spectre of Comparisons: Nationalism, Southeast Asia, and the World* 58-74 (1998).

66. I emphasize "partly" because some mobilized diaspora groups have also accepted high risks for themselves when participating in armed conflicts or settling in occupied territories (for example, expatriate Kosovo Albanians who volunteered to fight in 1999, or American Jews who have settled in the West Bank).

67. See Anderson, *supra* note 65, at 74.

68. See generally David Miller, *On Nationality* (1995).

national identity.⁶⁹ Yet persistent active political participation in a country of origin is hard to reconcile with this conception of political community.

A second argument for rejecting external voting rights can be derived from traditions of civic republicanism that focus on conditions for collective self-government of a body politic. For Aristotle, citizenship meant ruling and being ruled in turn; for Rousseau, it required the active participation of all in legislative assemblies. In Hannah Arendt's theory of action, citizens generate collective power by acting in a public realm and "[t]he only indispensable material factor in the generation of power is the living together of people."⁷⁰ Active political participation requires presence in a political arena. For most participatory theories of democracy, territorial presence seems to be a necessary, but not sufficient, condition for active citizenship.

However, one can object that political participation involves speech acts that do not require physical interaction. When separated by geographic distance, citizens can exchange their views through letters, phone calls, or e-mails. The Internet even makes it possible to create virtual assemblies in which many citizens can deliberate simultaneously. The crucial aspect missing from this argument, which is captured by Arendt's condition of "living together," is that a self-governing polity must also be experienced as a "community of fate," in which citizens will share a common future that they shape through their present political actions. Citizens who have left the country may still retain certain rights and claims to protection (most importantly the right to return), but no matter whether they have left voluntarily or involuntarily, their absence disconnects them (even if sometimes only temporarily) from the ongoing process in which citizens living together collectively determine their future.

Statist liberal nationalism and participatory republican approaches contain important insights that are lost in some mainstream liberal accounts. However, their conceptions of the polity are ultimately too thick and demanding to match the contemporary reality of externally mobile and internally diverse societies with largely passive citizens. The domestically focused perfectionism of these approaches makes it difficult to derive from them a clear criterion for judging the legitimacy of external citizenship claims.

A third conception that requires territorial residence as a condition for voting rights is more explicit in this regard. It focuses on the justification for coercive legislation and on conditions of democratic representation rather than on active political participation. In this view, a democratic state is a territorial government in which those who are governed have political rights to determine the composition of the government. In response to Schumpeter's view on democratic self-determination, Robert Dahl has defended a principle of territorial inclusion: "The citizen body in a

69. *Id.* at 119-54.

70. Hannah Arendt, *The Human Condition* 201 (2d ed. 1958).

democratically governed state must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves.”⁷¹

This principle is often invoked in arguments that permanent resident foreign nationals have a claim to naturalization or to noncitizen voting rights.⁷² Yet, as López-Guerra argues, it also implies that “[b]ecause they are not subject to the laws and binding decisions of the state, permanent nonresidents can rightfully be excluded from the citizen body of a democratic polity.”⁷³ Although López-Guerra does not claim that external voting for expatriates is impermissible, arguments based on a principle of territorial inclusion seem to lead naturally to this stronger conclusion.⁷⁴ Those who will not be bound by a collectively binding decision should not be allowed to participate in making this decision. Individuals who are not subject to a political authority must therefore not participate in electing this authority, since this would unfairly dilute the votes of resident citizens. Letting expatriates vote exposes residents to the risk of ending up with a government that they would not have chosen for themselves, while expatriates can escape the consequences of their own choices.

One way to criticize this argument is by challenging its premise that democratic jurisdictions are strictly territorial. States grant their external citizens not only certain rights, but may also impose a range of obligations. Several countries conscript expatriates for military service⁷⁵ and a few (including the United States) also tax their income earned abroad. Such duties are not easy to enforce outside the territorial jurisdiction, but at least for those expatriates who have a vital interest in the right to return, the threat of losing their citizenship or of being punished upon return can be powerful sanctions that enforce compliance with external citizenship duties. In contrast with the voluntary contributions discussed above, the “no taxation without representation” principle obviously applies here.⁷⁶ The prior question is, however, whether imposing such duties on expatriates is

71. Robert A. Dahl, *Democracy and Its Critics* 122 (1989).

72. See, e.g., Rainer Bauböck, *Transnational Citizenship: Membership and Rights in International Migration* (1994) [hereinafter Bauböck, *Transnational Citizenship*]; Ludvig Beckman, *Citizenship and Voting Rights: Should Resident Aliens Vote?*, 10 *Citizenship Stud.* 153 (2006).

73. López-Guerra, *supra* note 13, at 226.

74. See *id.* at 225.

75. In the context of reforming their policies to accommodate expatriates, some states have dropped or reduced military obligations. For example, Turkey introduced a law in 1980 that allows expatriates to reduce their military service to a short basic training in exchange for paying a substantial fee. Currently the fee is € 5.112 for expatriates under thirty-nine years of age, and the basic training lasts three weeks. Law No. 1111, *supp. art. 1*, (July 6, 2005) (Turk.).

76. The U.S. campaign by expatriate lobbies, which brought about an effective extension of the external franchise from military personnel to civilians in 1975 by requiring states to register expatriate voters, alluded to the Boston Tea Party by sending tea bags to Members of Congress. A Force in the Struggle for Overseas Voting, www.fawco.org/us_concerns/voting_overseas/struggle.html (last visited Feb. 9, 2007).

itself legitimate. Is it not the country of residence that has a stronger claim to tax revenue from economic activities in its territory than an external country of citizenship? And is a policy of conscripting soldiers who are permanent residents abroad not another dangerous source of conflict between states?⁷⁷ These appear to be strong prudential reasons against extending citizenship obligations to expatriates, and most countries that grant external voting rights anyhow do not try to impose and enforce such obligations.

Yet even if states cannot, or should not, subject external citizens to their laws, these citizens will still be included in the political community through a status of membership and external citizenship rights. A strictly territorial conception of political community is not plausible in a world where large numbers of people move across international borders and settle abroad. It would imply that emigrants should automatically lose their citizenship of origin once they have become permanent residents abroad, and that immigrants should automatically acquire the citizenship of their country of residence without being asked for their consent.⁷⁸ This radical solution presupposes that permanent residence means a loss of external affiliations and of interests that migrants have with regard to their countries of origin—a presumption that is frequently made in discourses about immigrant integration but that is sociologically misguided. Instead, migrants should be seen as having a legitimate interest in choosing between different citizenship options, including denizenship and dual citizenship, or renunciation of their previous nationality. And from a perspective of political integration, it is important that immigrants are seen to choose citizenship voluntarily rather than having it imposed on them. Through their voluntary decision to become citizens, immigrants visibly link their own future with that of the country of settlement. This provides a stronger basis for solidarity in societies of immigration than a mere equalization of rights.

An adequate conception would therefore accept the discrepancy between the territorially bounded jurisdiction of states and the wider political community of citizens as a permanent feature of democratic self-government. This does not yet answer the question whether citizens living outside the territorial jurisdiction should also have voting rights.

77. Problems of multiple taxation and of military obligations for multiple citizens are addressed by many international treaties. The general principle for regulating conflicts in this area seems to be that duties towards the country of permanent residence take priority. *See, e.g.*, European Convention on Nationality art. 21, Nov. 6, 1997, Europ. T.S. No. 166.

78. Ruth Rubio-Marín has proposed a halfway model of automatic naturalization without renunciation of a previous citizenship. *See generally* Ruth Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (2000).

F. Stakeholder Community

There are two answers to the question of who should have a right to participate in a collectively binding decision: all those who will be bound by the decision or all those whose interests will be affected by it. Being bound implies being affected, but being affected need not imply being bound. The latter answer thus provides us with a broader criterion for inclusion than the former. If a government decides to build a nuclear power plant next to an international border, the citizens of the neighboring state may claim to be affected by the decision, although they are not subject to the law on which the decision is based. We could make a similar argument about expatriates whose interests may be severely affected by a change in government or by laws passed in their country of origin. Is this sufficient for a claim to voting rights?

Ian Shapiro has suggested that the principle of affected interests requires "defining the *demos* decision by decision rather than people by people."⁷⁹ Yet this would only be possible in a plebiscitary democracy, and even there, the problem remains who decides whose interests are (sufficiently strongly) affected to trigger a right to be included in an issue-specific *demos*. In representative democracy, political decisions are not taken by citizens directly, but by legislators who have been empowered by citizens to make laws on an open range of issues but applying within a specified territory. Such a democratic system requires a clearly bounded *demos* that is stable over time in the sense that its composition does not change with each decision, but only because of demographic factors and the individual entry or exit of members. New members are also not admitted to participate in specific decisions. They join the *demos* for an indeterminate period, which lasts usually for the rest of their lives, and gain rights to vote in all elections.

This does not, and should not, exclude creative thinking about how democratic procedures can respond to problems of negative externalities when a decision taken in one country affects the citizens of other countries.⁸⁰ In the example of the nuclear power plant, referenda could be held simultaneously in both states. However, instead of aggregating the votes and accepting a majority decision among all affected (which would depend on the relative size of the two countries), the obvious solution is to require a concurrent majority in both referenda for a decision to build the plant, i.e., to give the affected external citizens a veto power over the legislation.

Where a group of countries is so interdependent that a broad range of decisions in each state will strongly affect all others, the appropriate answer

79. Ian Shapiro, *The Moral Foundations of Politics* 222 (2003).

80. López-Guerra dismisses this possibility too quickly when he distinguishes sharply between claims to just treatment and to participation in a decision-making process. See López-Guerra, *supra* note 13, at 223. As Ian Shapiro argues, democracy is also a method for settling disputed questions of justice. See generally Ian Shapiro, *Democratic Justice* (1999).

is to create supranational institutions of governance and to make them democratically accountable to all affected by giving all citizens of the supranational union voting rights. As long as the European Union is not transformed into a sovereign state, the *demos* of its member states will remain stable and clearly demarcated, and most joint decisions will involve representatives of the separate *demos*. The point is that expanding democratic procedures to take into account externally affected interests does not require redefining the *demos* for each decision. Taking into account a principle of affected external interests need not therefore lead to a post-national world of vanishing political borders.

None of these considerations about externally affected interests offers an answer to our question about expatriates' voting rights. Unlike the examples of the nuclear power plant and the European Union, expatriates' homeland-related interests are not shared by the other citizens of their countries of residence and so do not call for supranational democracy. And, if they claim to be specifically affected by certain decisions taken in their home country, then this is not a sufficient reason for including them permanently in the *demos*. Many other outsiders could make similar claims, and being affected by a particular decision does not generate a right to elect the government.

We must therefore define the expatriates' interests in a specific way—not as interests in particular decisions but as an interest in citizenship itself. In other words, instead of regarding them as individuals *outside the jurisdiction* whose interests are affected, their interests must be seen to place them *inside the demos* that is represented in all political decisions taken in their country of origin.

An interest of this kind cannot be purely subjective. Emotional attachments or nationalist sentiments do not suffice for qualifying as a voting citizen.⁸¹ A claim to citizenship depends on objective biographical circumstances, such as birth in the territory, present or prior residence, having a citizen parent, or being married to a citizen. These criteria serve as indicators for a presumptive interest in membership.⁸² They apply also when individuals choose to naturalize or to renounce their citizenship. In the former case, they will have to meet one of the above criteria, and renunciation depends generally on first leaving the country and then proving that another citizenship is available.

A principle of affected interests is thus too vague and broad for determining membership in a *demos*. Yet if the *demos* is not identical with

81. López-Guerra, *supra* note 13, at 231.

82. Since these are mere indicators, they may not always categorize people in the right way. For example, a *jus soli* law that gives citizenship to children born to tourists may be overinclusive. Yet the law could be defensible on other grounds, and there are good reasons for having generalized indicators rather than extensive discretion of authorities in assessing a person's interests in citizenship. See generally Joseph H. Carens, *Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States*, 37 U. Toronto L.J. 413 (1987).

the population living in the territorial jurisdiction, then we need another comprehensive conception of political community that provides us with general criteria for membership and a normative justification of its value. In answering this dual challenge, I have suggested that citizenship should be conceived as stakeholding in a self-governing polity.⁸³

Living under a government that respects the rule of law and provides citizens with a range of liberties, rights, and benefits is instrumentally valuable for everybody. Democracy is the form of government that is most likely to produce these results. Yet democracy is not merely government for the people, but also government by the people. Self-government is what makes membership in a democracy intrinsically valuable and provides democratic government with a legitimacy that is superior to even the most benevolent form of nondemocratic government. In this view, the rights of political participation form the core of democratic citizenship.

The notion of stakeholding expresses, first, the idea that citizens have not merely fundamental interests in the outcomes of the political process, but a claim to be represented as participants in that process. Second, stakeholding serves as a criterion for assessing claims to membership and voting rights. Individuals whose circumstances of life link their future well-being to the flourishing of a particular polity should be recognized as stakeholders in that polity with a claim to participate in collective decision-making processes that shape the shared future of this political community.⁸⁴

How can this principle be applied to expatriates and their political rights? Some groups of expatriates can be plausibly described as external stakeholders in their countries of origin, whereas others cannot. External voting is then neither a universal right of all citizens who live permanently abroad, nor in all cases an illegitimate external domination of the domestic citizenry. We could stop our normative inquiry here and leave it to the democratic process and judicial interpretations of a constitutional tradition in each country to settle controversies over this matter. Stakeholding as a criterion for citizenship and voting rights provides, however, a guideline that allows moving beyond the rather uninteresting conclusion that external voting rights are permissible and not required. It serves as a normative yardstick for evaluating particular arrangements in different countries. Such comparative evaluation must proceed on two fronts: First, we have to assess the strength of individual claims, and then we must consider structural conditions for self-government. Both of these aspects have to be

83. See generally Bauböck, *Paradoxes of Self-Determination*, *supra* note 56; Bauböck, *Towards a Political Theory*, *supra* note 5.

84. I have previously emphasized that claims to citizenship are derived from dependency on a particular government for a guarantee of basic rights. See generally Bauböck, *Transnational Citizenship*, *supra* note 72; see also Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* 77 (2001). I believe now that this criterion casts the net too widely. Many people's rights may depend on the actions of an external government, but this need not ground a claim to citizenship and electoral participation. Iraqi citizens' fundamental rights have been deeply affected by U.S. foreign policy, but this does not ground a right of Iraqi citizens to vote in U.S. elections.

considered as contextual variables that require empirical knowledge and a fine-tuning of normative arguments in response to particular circumstances. In Part IV, I consider how external voting rights vary with regard to the range of rights holders and the type of rights granted; in Part V, I discuss different origins of expatriation and the impact of external voting on domestic self-government.

V. THE SCOPE OF EXTERNAL VOTING RIGHTS

A. *Scope of Inclusion*

Most countries that grant external voting rights simply attach the rights to the status of citizenship. Twenty-nine countries, however, restrict eligibility on various grounds so that only certain subcategories of citizens are entitled to vote.⁸⁵

For purposes of empirical comparison, we could construct a scale that measures how inclusive a country's provisions are. At one end would be those countries in which only resident citizens who are present on voting day can participate in elections; at the other end are those where every citizen can vote from outside the country. In between there are five steps of progressively wider inclusion.

(1) In a first step, voting rights are extended to temporary absentees. In Europe, Hungary, and Malta fall into this category.⁸⁶ In these countries, citizens can only vote from abroad if they have a permanent residence in the country; Malta additionally requires a residence in the country of no less than six months within the eighteen months preceding registration as a voter.⁸⁷

(2) At the second step, permanent expatriates are enfranchised but need to travel to the country in order to cast their votes on election day. Israel, Greece, and Turkey are countries that fall into this category; before the elections of 2006, Italy was also in this group.

(3) The third point on the scale concerns countries that give external voting rights only to special occupational categories of citizens, such as members of the armed forces, diplomatic personnel, or external citizens

85. See IDEA Handbook, *supra* note 1, at Case Studies; Nohlen & Grotz *supra* note 12. For details about many countries, see Electoral Knowledge Network, Comparative Data, http://ace.at.org/epic-en/vo/Epic_view/VO04 (last visited Feb. 9, 2007).

86. E-mail from Dr. Eugene Buttigieg, Senior Lecturer, Department of European and Comparative Law, University of Malta, to Rainer Bauböck, Professor of Political and Social Theory, European University Institute (Sept. 25, 2006, 10:39 CET) (on file with author); E-mail from Mária Kovács, Professor in the Nationalism Studies Program, Central European University, to Rainer Bauböck, Professor of Political and Social Theory, European University Institute (Sept. 21, 2006, 11:26 CET) (on file with author).

87. This provision led to a controversy when some political parties tried to remove a prominent member of the Green Party from the electoral register because, as Secretary General of the European Green Party, he was said to have spent too much time in Brussels. E-mail from Dr. Eugene Buttigieg to Rainer Bauböck, *supra* note 86.

employed by government. India, the Irish Republic, and Zimbabwe are in this category, and so were the United States before 1975 and Canada before 1993. Denmark introduced external voting for state employees who are abroad on official business in 1970 and expanded this group in 1988 to employees of a Danish firm or an international organization, students, and those abroad for health reasons.⁸⁸

(4) At the fourth step, out-of-country voting is introduced for all kinds of expatriates but can only be exercised in certain countries of residence. For example, in order to reduce costs, Senegal limits external voting rights to countries where at least 500 voters have registered.⁸⁹ This is a rather rare type of legal restriction. De facto geographic restrictions of access exist in all cases where external voting is only allowed in embassies and consulates.⁹⁰

(5) The fifth step retains individual qualifications referring to residence and citizenship. Prior residence in the country is generally a condition for voting in Norway and in U.S. federal elections, although, in the United States, many states allow U.S. citizens who have never lived in the country to register if one of the citizen's parents resided there.⁹¹ Other countries put limits on voting based on the time of residence abroad. Citizens of New Zealand lose their right to vote after three years abroad, Canadians after five, Australians after six, and U.K. citizens after fifteen years. Germany combines both criteria by requiring three months of continuous residence since 1949 and no more than twenty-five years of residence abroad (except for residence in one of the current forty-six member states of the Council of Europe). The Philippines demands an affidavit from external voters that details their intent to return, and excludes dual citizens or those who have applied for naturalization abroad. Canadian citizens who register to vote also have to declare that they intend to resume their residence in Canada.⁹²

While the steps of this scale make external voting progressively more inclusive, the scale itself is not consistently cumulative. For example, Italy would now be classified in the sixth and most inclusive category, but still does not provide for OCV opportunities for temporary absentees. This is a perverse side effect of a system that treats expatriates as a distinct category with rights to special representation.

88. Harald Waldrauch, *Rights of Expatriates, Multiple Citizens and Restricted Citizenship for Certain Nationals, in* Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries 359 (Rainer Bauböck, Eva Ersbøll, Kees Groenendijk & Harald Waldrauch eds., 2006); see also ACE: Electoral Knowledge Network, Building and Sharing Knowledge on Elections, <http://ace.at.org/electoral-advice> (last visited Feb. 9, 2007).

89. Nohlen & Grotz, *supra* note 12, at 1125-26.

90. A different type of geographic differentiation exists in Germany where expatriate citizens lose their voting rights after twenty-five years of residence outside the Council of Europe region. Waldrauch, *supra* note 88, at 375.

91. See U.S. Dep't of Def. Fed. Voting Assistance Program, Absentee Voting Frequently Asked Questions, <http://www.fvap.gov/pubs/faq.html> (last visited Feb. 9, 2007).

92. IDEA Handbook, *supra* note 1, ch. 2, Case Studies.

I also need to mention briefly two rather exceptional possibilities of enhancing inclusion that are not captured by this scale. One is the extension of temporary absentee voting rights to noncitizens. New Zealand grants the right to cast votes (but not eligibility) in national elections to noncitizens after one year of legal residence.⁹³ Permanent residents can exercise their voting rights from abroad only during their first year abroad, whereas citizens retain the rights for three years.⁹⁴

The second possibility is to make external voting mandatory. In practice, countries with compulsory voting and external franchise do not attempt to enforce their voting laws outside the territory. In Australia, voting is not mandatory for citizens abroad, in Belgium voting is, but registration is not, and in Brazil, although they are obliged to vote, only 5% of temporary and permanent citizens abroad register.⁹⁵ The question of whether mandatory external voting would be legitimate if it could be enforced is therefore hypothetical, although interesting from the perspective of a stakeholder approach.⁹⁶ My conjecture is that a case for mandatory domestic voting must be built on roughly the same arguments that apply to mandatory citizenship status, i.e., that justify denying resident citizens the option to renounce their citizenship as long as they continue to live in the country. Even if an argument for mandatory voting might succeed on such grounds, it could then not be extended to expatriate citizens. Since these expatriate citizens must be free to renounce their citizenship (provided they can acquire another one), they should also be free not to exercise their right to vote.

The scale of inclusion is also relevant for differentiating general arguments about the legitimacy of external voting. López-Guerra, for example, accepts that "citizens who are only temporarily abroad . . . should retain the right to vote in their home country,"⁹⁷ although providing them with this right might be costly. The reason is that after their return they will be subjected to the laws made by a government that was elected when they were abroad. Therefore, they must be included even by a sufficiently flexible territorial conception of political community. Second, an equally strong claim can be made by citizens that are sent abroad by the state rather than going there for their own reasons. These expatriates (diplomats or army personnel) ought to retain their political rights, not because of their special contributions, but because as citizens "on foreign mission" they have a right to participate in the political process that will ultimately determine the content of their missions.

93. Waldrauch, *supra* note 2, at 14, 22.

94. IDEA Handbook, *supra* note 1, ch. 6.

95. *Id.* ch. 10.

96. For good arguments about why mandatory voting may be effective in enhancing the legitimacy of democratic government by making it more representative, see Lijphart, *supra* note 24.

97. López-Guerra, *supra* note 13, at 216.

At the opposite end, as far as the relative strength of claims to external voting rights is concerned, are those citizens who have never lived in their country of external citizenship and are very unlikely ever to return to it. Since most countries do not limit the transmission of their citizenship by *jus sanguinis* to a first generation born abroad, there will be citizens in this group whose parents have even been born outside the country. No plausible interpretation of stakeholdership can defend the assertion that these persons should have external voting rights. The obvious question is why we should accept that they can hold on to citizenship status in the first place. In response, I would suggest that citizenship should indeed not be automatically transmitted beyond the first generation born abroad. Members of this so-called second immigrant generation still have a plausible interest in their parents' citizenship, and virtually all democratic countries therefore have external *jus sanguinis* provisions in their citizenship laws. Yet a right to acquire citizenship status at birth need not entail a right to vote. Benefits of external citizenship, such as diplomatic protection and the right to return to, and to inherit and own property in, the country of citizenship reflect interests of a slightly different kind than those that ground a right to political participation. The former refer to potential interests that a second generation external citizen may activate over the course of her life, whereas the latter should presuppose that some of these interests are currently active.

At this point, one could revert to the proposition that the very act of voting serves as a sufficient indicator of active stakes in the future of the polity where one citizen casts her vote. However, I have already argued in Part II.B that relying on a process of self-selection is undesirable since it gives privileged access to citizens with greater financial and educational resources. A second objection is that those who would not qualify as active stakeholders may still have other motivations to cast their vote if, for example, they have been mobilized to engage in risk-free "long-distance nationalism" without being ready to link their own fate with that of the country concerned.

My conclusion is therefore that second and subsequent generations of citizens born abroad should be granted external voting rights only if they fulfill some additional condition, such as a certain period of prior residence in the country concerned (which would turn them again into first generation emigrants).

The question then is how we should evaluate external voting rights for first generation expatriates. Within this category, my general judgment that external voting rights are permissible but not required applies more specifically. Considering every specific arrangement that we find among democratic countries as a matter of justice would mean overstepping the limits of normative argument. In addition to birth in the country, democracies should have broad freedom to introduce any of the conditions that I have listed under step (5) above, such as length of residence in the country, maximum duration of residence abroad, or an intention to return

(however difficult this may be to verify). Such policy decisions should take into account the overall strength of links between the country and its expatriate communities, and they ought to respect the stability of expectations, i.e., they should generally refrain from depriving external citizens of voting rights they had enjoyed for some time.⁹⁸

The scale of inclusion outlined above also provides us with a positive argument for extending the franchise to permanent expatriates. As explained in Part II.B above, one reasonable objection to external voting regards the costs of setting up an OCV system that is accessible for all enfranchised citizens.⁹⁹ A cost argument is obviously stronger in response to claims that are not based on fundamental entitlements. Since voting for temporary absentees and citizens on foreign mission should be seen as an entitlement, governments capable of doing so ought to devote sufficient resources to enfranchising these groups. Yet once an OCV system has been introduced for these external voters, economies of scale will greatly reduce the costs per vote when the system is extended to also cover groups that have a weaker claim to participation. Admitting permanent first generation emigrants can therefore be regarded as “good policy,” even if it is not strictly normatively required.

B. Scope of Representation

Provisions for external voting vary broadly across countries not merely with regard to who is enfranchised, but also concerning the electoral rights of those who are enfranchised. I will focus here on four issues that raise important normative questions: (1) Should external citizens be allowed to vote in both their country of origin and of residence? (2) In which types of elections in their country of origin should they be enfranchised? (3) Should external citizens also have the right to stand as candidates? (4) Should they enjoy special representation and vote for their own candidates?

1. Multiple Franchise in Different Countries

A growing number of expatriates are dual citizens who can vote in elections both in their country of residence and in a country of origin. Even denizens who have only a single citizenship are now often enfranchised in local elections where they live and in national elections where they come from. There are three possible objections to such multiple voting rights. First, they may be seen as violating a fundamental principle of “one person, one vote;” second, they could be regarded as an unfair privilege for

98. This might be an argument for retaining second- and third-generation voting rights where they already exist. However, where these rights have not been widely used, there are also few expectations about their continuity. The interest in abolishing them in order to adopt a more coherent liberal conception of citizenship would then still be a sufficient reason for a policy reform.

99. The public costs argument is largely irrelevant for expatriate in-country voting as long as transportation costs are borne by voters or political parties.

migrants vis-à-vis sedentary citizens; and third, multiple voting has been interpreted as a problematic sign of split loyalties.

The “one person, one vote” principle is meant to ensure equality between citizens with regard to their basic input in the electoral system. No individual vote is to be given greater weight than any other.¹⁰⁰ The votes of dual citizens cast in the country of origin and of residence are counted only once in each election. A problem of dual voting arises only if these two countries are members of a federal union in which citizens voting twice in member state elections will be represented twice in federal government. Federal democracies therefore generally prohibit horizontal multiple voting at the level of their constitutive units. This problem may eventually arise in the European Union,¹⁰¹ but it simply does not apply to multiple voting in fully independent states.

Is the opportunity to vote in two national elections still an unfair privilege since other citizens have only one vote? This objection rests on a misconception of democratic votes as a resource that can be accumulated like money. We would then also have to say that Swiss citizens who can vote multiple times in local, cantonal, and federal elections as well as referenda on each of these levels are much better off than citizens of other countries. Votes are, however, not individual assets to improve one’s life, but opportunities to participate in electing a government whose decisions will affect the future of all its citizens. In a stakeholder conception of democratic community, persons with multiple stakes need multiple votes to control each of the governments whose decisions will affect their future as members of several *demos*. This applies, on the one hand, to federally nested *demos* where citizens can cast multiple vertical votes on several levels and, on the other hand, to the *demos* of independent states with overlapping membership.

The third objection against allowing multiple votes for expatriates is that it casts doubts on their loyalty towards the country where they have naturalized. The loyalty argument has been supported by Alexander Aleinikoff, who suggests that states should conclude bilateral treaties to prevent dual voting,¹⁰² and David Martin, who proposes that dual citizens should vote only in their country of residence.¹⁰³ As Peter Spiro points out, a zero-sum conception of loyalty is not adequate in a globalizing world with large scale movements of people.¹⁰⁴ Singular loyalty will indeed be

100. This principle does not exclude the possibility that in different electoral systems votes will have unequal impact on election results depending on where they are cast and for which party they are cast.

101. See generally Rainer Bauböck, *Why European Citizenship? Normative Approaches to Supranational Union* (forthcoming 2007) (on file with the Fordham Law Review).

102. See T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 Mich. J. Race & L. 241 (1999).

103. David A. Martin, *Introduction: The Trend Toward Dual Nationality*, in *Rights and Duties of Dual Nationals*, *supra* note 7, at 3, 14.

104. See Peter Spiro, *Political Rights and Dual Nationality*, in *Rights and Duties of Dual Nationals*, *supra* note 7, at 135.

expected in contexts of heightened international conflict between states. Yet it is an unreasonable requirement for immigrant integration in contexts of peaceful interstate relations and intense transnational activities. This can be easily understood when asking whether the United States would subscribe to a universal rule that prohibits external voting not only for Mexican origin dual citizens living in the U.S. but also for American origin dual citizens living in Europe.¹⁰⁵

2. Multilevel External Franchise

In most countries, expatriates can only vote in national elections, and not in regional and local ones. Bosnia and Herzegovina, Finland, France, Norway, and the United States are among those countries where expatriates can also vote in local elections (with more restrictive absentee clauses compared to national elections in the two Scandinavian states).¹⁰⁶ Some countries also differentiate between voting rights in parliamentary and presidential elections, and in referenda.¹⁰⁷ Apart from the intention of limiting the impact of the external vote, some also argue that expatriates will be better informed about presidential candidates than about parliamentary ones, and that in presidential democracies heads of state have foreign policy powers that will be more relevant for the expatriate interests. Another argument for restricting the external franchise to national elections is that expatriates will be less informed about, and much less affected by, regional and local elections.

A stakeholder perspective, however, casts some doubt upon these justifications. It suggests that external stakeholders have long-term interests in domestic politics in addition to their short-term interests in foreign policy. Moreover, global media such as the Internet and satellite television provide interested external voters with all relevant information.

A better argument for differentiating between national and subnational voting rights distinguishes an internal from an external conception of democratic states as political communities. Externally, in their relation to other states but also to their citizens abroad, they appear as unitary polities, represented by their national governments. Internally, however, they are nested polities with institutions of self-government at national and local levels (and in federation also at the regional level). Domestic citizens are multiple members of one political community at each of these levels. Membership in substate polities (autonomous provinces or municipalities)

105. See Stanley A. Renshon, Ctr. for Immigration Studies, Center Paper No. 25, *Reforming Dual Citizenship in the United States: Integrating Immigrants into the American National Community* 15 (2005), available at <http://www.cis.org/articles/2005/dualcitizenship.pdf>.

106. Grace, *supra* note 13, at 8-9.

107. See Phil Green, *Entitlement to Vote as an External Voter*, in IDEA Handbook, *supra* note 1, ch. 4; Nohlen & Grotz, *supra* note 12, at 1126.

is automatically acquired and lost with a shift of residence.¹⁰⁸ A citizen of Connecticut loses her voting rights in state elections when she settles in Rhode Island. A fortiori, a local or regional citizenship should be automatically lost with permanent residence abroad.

This argument helps to explain and to justify why noncitizen voting rights are more frequently granted at the local level, whereas expatriate voting rights are usually granted only at the national level. The adequate principle for determining local citizenship is automatic *jus domicilii*. A self-governing municipality should treat all its residents as local citizens independently of their nationality.¹⁰⁹ In contrast, national citizenship has a sticky quality. It is acquired at birth and does not automatically change with emigration or immigration. Expatriates should thus retain only national citizenship, whereas immigrants should automatically acquire only local citizenship. These conclusions apply, however, only to permanent expatriates who have no residence in the country of origin that would qualify them to vote in local elections. They do not justify disenfranchising temporary absentees who retain their residence in a municipality.¹¹⁰

3. Eligibility as Candidates

In Western Europe, most countries allow external citizens not just to vote, but also to be elected. The three Benelux states, however, permit only resident citizens to stand for election.¹¹¹ In Mexico, candidates must not merely be residents but are now even prohibited from campaigning abroad. The state of Zacatecas, however, changed its constitution in 2003 to create a right for expatriates to be candidates in provincial elections.¹¹²

Citizens must be governed by citizens like themselves. The idea of democratic self-government seems to entail that, apart from different age thresholds, the pool of voters should be identical to the pool of citizens who have a right to be candidates. Therefore, no subset of voters can have an

108. One should, however, distinguish between provinces that are conceived as purely regional subdivisions within a single national polity (such as in the United States, Germany, Austria, or Brazil) and multinational federations in which some provinces are regarded as distinct national polities. See generally *Multinational Democracies*, *supra* note 61. Provinces such as Quebec, Flanders, or Catalonia claim (or in the Flemish case have already achieved) foreign policy powers and external representation. A further claim to external voting rights for citizens of the province can build on their specific powers or recognition claims. I am grateful to Jean-Michel Lafleur for suggesting this point.

109. Rainer Bauböck, *Reinventing Urban Citizenship*, 7 *Citizenship Stud.* 139, 151-52 (2003).

110. One might think that this argument should be extended to permanent expatriates who own real estate property in their country of origin and pay local taxes there. Yet, as I have argued above, owning property in a country should not be seen as a sufficient indicator of stakeholder citizenship. In contrast with taxation of income earned abroad, paying tax on real estate in a country of origin cannot be interpreted as individual subjection to an extraterritorial jurisdiction that might justify external voting rights.

111. See Waldrauch, *supra* note 88, at 377.

112. See Smith, *supra* note 21, at 16.

exclusive right to be candidates. This principle is not violated if expatriates cannot run for office.

One reason is that residence is a reasonable requirement for officeholders. Expatriates can cast their votes from abroad, but they cannot responsibly perform the tasks of legislative and executive government from abroad. This proviso would still allow candidates to have permanent residence abroad as long as they move to the country when elected.

A second consideration is whether those for whom expatriates vote will represent them as a special constituency (in which case it would not make sense to exclude expatriates as candidates) or whether they will represent primarily domestic voters. I will address the issue of special representation below. In most systems, the members of parliament for whom expatriates vote represent a territorial district in the country concerned or have been elected on a party list and are expected to represent a broad constituency of domestic voters. It seems legitimate to require that such candidates be permanent residents in the country (even if not necessarily in the specific electoral district where they run). A residence condition for candidates would also not unfairly exclude expatriates since they have the right to return and could take up residence during the election campaign (rather than after having been elected).

A related question is whether candidates or holders of elective office should be allowed to retain a second citizenship. A requirement to renounce an external citizenship would apply both to naturalized immigrants and to expatriate candidates who have naturalized abroad. I have argued above that there are no convincing reasons for prohibiting dual voting by dual citizens. Yet it is intuitively implausible, and already ruled out by a residence condition, that dual citizens could simultaneously hold elective public offices in two countries. Should they still be allowed to retain an external citizenship while exercising such an office? Or should they have to renounce their external citizenship when running as a candidate?

If we see expatriate and immigrant candidates as primarily representing their own ethnic constituencies, many of whom might be dual citizens like themselves, then it might seem odd to require that these candidates renounce a second citizenship that characterizes the group they represent. The alternative view is that holders of elective office have special responsibilities not only towards their voters, but also towards the political community and all its citizens more generally. Their role is that of agents or trustees and their task demands full devotion. This role, in contrast with that of voters, is hardly compatible with simultaneous commitments towards another country.¹¹³ We might imagine citizens as collective

113. See Martin, *supra* note 7. Australia generally tolerates when naturalized citizens retain a previous nationality but section 44 of the Australian Constitution provides for the disqualification of intending Members of Parliament or Senators who hold the citizenship of another country. Adrienne Millbank, Social Policy Group, Current Issues Brief No. 5 2000–01, Dual Citizenship in Australia (2000), available at <http://www.apf.gov.au/library/>

owners of land and officeholders as managers appointed by these citizens. There is no necessary conflict if some citizens are members of several cooperatives that own different pieces of land. But full-time managers can be expected to be fully committed to developing the one piece of land with which they have been entrusted.

Different from the residence requirement discussed above, the argument for singular citizenship applies only to those elected, not to candidates. Unlike moving one's residence, renouncing one's citizenship cannot easily be reversed in case of electoral defeat. And while domestic voters can expect that expatriate candidates who campaign for their vote also live in their midst, candidates do not yet have any of the special responsibilities that might conflict with retaining an external citizenship. Some countries, however, do not permit expatriates to renounce their citizenship, and even elected officeholders may have a legitimate interest in restoring their external citizenship at the end of their period of activity. The most appropriate solution to enforce singular loyalties among elected officials may thus be to require a declaration that their external citizenship will be dormant and that they specifically waive external voting rights as long as they hold office.

4. Special Representation

Representation of external voters can be provided in two basic ways: Their votes can either be counted together with those of domestic voters or separately. Peter Spiro calls these "assimilated" and "discrete representation" models.¹¹⁴ In the second case, external voters form a separate constituency to elect their own representatives. Currently, only seven states have separate representation for expatriates: Cape Verde, Colombia, Croatia, France, Italy, Mozambique, and Portugal.¹¹⁵ France is a special case because the twelve seats reserved for representatives of the expatriates are elected indirectly by the *Conseil supérieur des Français de l'étranger* (now called *Assemblée des Français de l'étranger*) whose 150 members are, however, directly elected by universal suffrage of all French citizens residing abroad.¹¹⁶ The most extensive expatriate representation exists now in Italy, where twelve deputies of the lower house and six senators have been elected to represent Italians in the four geographic regions of South America, North America, Europe, and the rest of the

pubs/CIB/2000-01/01cib05.pdf. In contrast, the American attitude towards dual citizenship appears quite inconsistent. Candidates for naturalization still have to renounce formally allegiance to all foreign princes and potentates, but there is hardly any debate about the fact that the current Governor of California holds both Austrian and American citizenship.

114. Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. Rev. 207, 210 (2006).

115. IDEA Handbook, *supra* note 1, ch. 6

116. See generally *Assemblée des Français de l'étranger*, <http://www.assemblee-afe.fr/> (last visited Feb. 15, 2007).

world.¹¹⁷ Portugal has only two reserved seats for expatriates: one for Europe and one for elsewhere.

A system of reserved seats can be used to give either greater or smaller weight to the expatriate vote. In domestic election systems based on geographic units, electoral districts must generally contain equal numbers of enfranchised citizens. The same formula cannot be applied to expatriates, since turnout is generally much lower and seats would then become much cheaper for external candidates compared to domestic ones.¹¹⁸ The Croatian Tudjman government had been accused of instrumentalizing the external vote by allocating an excessive number of seats to expatriates.¹¹⁹ The system was reformed in 1999 so that the number of expatriate seats now depends on voter turnout. Since many parliaments have constitutionally fixed numbers of mandates, this solution is hard to implement elsewhere.¹²⁰

How should we evaluate the two models of expatriate representation? Peter Spiro argues for assimilated representation if the number of expatriates is small, but proposes that generally "[d]iscrete representation . . . is preferable insofar as nonresident citizen interests are themselves discrete from those of resident voters."¹²¹ From the perspective of stakeholding in a self-governing polity, however, assimilated representation should be the default model. As I have argued in Part III.F, the claims of expatriates to political participation are legitimate only to the extent that they can be regarded as being *inside* the political community. Insofar as they have a right to be recognized as voting members, they share with domestic citizens the same interests in the future of the polity. For this reason, they should be seen as voting for legislators who will represent the general citizenry.

Of course, since they live outside of the territorial jurisdiction, they also have special interests that are not a priority for citizen residents, such as an effective diplomatic service and good foreign relations with their country of residence. Yet these interests hardly justify giving them a right to elect representatives who will vote most of the time on general legislation that does not affect expatriates. Such special interests are not illegitimate, but they can be taken into account through mechanisms other than legislative representation. In many countries, expatriates form their own associations and lobby the government on issues that concern their members. Governments may also give expatriate interests more formal recognition by

117. Barbara McMahon, *The Expat Factor*, Guardian Unlimited, Mar. 23, 2006, <http://www.guardian.co.uk/elsewhere/journalist/story/0,,1738183,00.html>.

118. IDEA Handbook, *supra* note 1, ch. 6.

119. See Rey Koslowski, *International migration and the globalization of domestic politics: A Conceptual Framework*, in *International Migration and the Globalization of Domestic Politics* 5, 14 (Rey Koslowski ed., 2005).

120. Nohlen & Grotz, *supra* note 12, at 1131; Grace, *supra* note 13, at 9-10.

121. Spiro, *supra* note 114, at 226.

establishing official consultative bodies that have to be heard before passing legislation that affects the expatriates' interests.

The justification for special legislative representation is, however, quite different from that for consultative representation. Unless we adopt a corporatist model of democracy, special legislative representation is only justified if one can show that the members of the particular group would otherwise remain second-class citizens who are not accepted as full and equal members of the polity. Such a case has been plausibly made for women,¹²² for African Americans, and for certain native ethnic minorities who would otherwise not pass a threshold for legislative representation.¹²³ In each case, the argument is that even after formal exclusion from electoral rights has been overcome, informal discrimination in civil society continues and greatly reduces the opportunities for these groups to make political careers and to become members of legislative bodies. Special representation mechanisms, such as drawing electoral district boundaries so that minority members have greater chances to win seats, or providing incentives for parties to nominate members of these groups for winnable seats, are thus justified either as a form of affirmative action that responds to the ongoing effects of historical injustice and exclusion from citizenship, or, in the case of ethno-national minorities, to ensure that the composition of legislative bodies will reflect the multinational character of the polity.

Could these arguments also apply to expatriates? After all, they have previously been excluded from the franchise in most countries, and, without discrete representation, it is generally unlikely that expatriates will win seats in parliament.¹²⁴ The crucial missing element, of course, is historical injustice and its ongoing effects. Over long historical periods, women, as well as racial, religious, and ethnic minorities, were subjected to the law without being represented in the making of the law. The opposite is true for expatriates who enjoy the right to vote. Consequently, their claims must be based on an expanded conception of the political community rather than on their special interests as a minority.

This argument for assimilated representation as the default model does not rule out special representation in all cases. We have seen in the empirical cases listed above how reserved seats can be used either for purposes of affirmative representation (as in Tudjman's Croatia) or in order to reduce the impact of expatriate votes on election results and legislative decisions. As I will discuss in Part V.C below, restrictive rather than

122. Scandinavian countries have been particularly successful in raising the percentages of female Members of Parliament through affirmative policies.

123. For example, the Danish minority in the German province of Schleswig-Holstein has been exempted from a general 5% threshold for legislative representation in German federal and provincial parliaments. *See generally* Wikipedia, Dänische Minderheit, http://de.wikipedia.org/wiki/D%C3%A4nische_Minderheit (last visited Feb. 15, 2007).

124. After the fall of Communism in Central and Eastern Europe, a number of expatriates were, however, quite successful in winning high political offices in their countries of origin. *See* Koslowski, *supra* note 119, at 16-17.

affirmative special representation for expatriates may be the best solution, where the number of expatriates could overwhelm the domestic vote.¹²⁵

V. CONTEXTS OF EXTERNAL CITIZENSHIP

When developing a theoretical normative proposition inductively, i.e., starting from real world cases, it is always useful to ask what the empirical background assumptions are and how a normative judgment would change when the empirical context is different from the presumptive standard case. The context that I have so far assumed as a general background for the normative analysis is that temporary and permanent emigrants have left their country voluntarily and that their numbers (or the numbers of those expatriates who will make use of their voting rights) are small in comparison with the domestic citizen population. In this final part of the analysis I will now consider cases where these background assumptions no longer apply. How should we evaluate voting rights where emigration has been coerced rather than voluntary? And what are the claims of groups that have been separated from their homeland not through emigration but through a redrawing of international borders? Finally, how should we take into account the potential electoral impact of large expatriate communities? Does strength of claims for external voting rights increase or decrease with the relative size of the expatriate community?

A. *Coerced Migration*

The Geneva Refugee Convention defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."¹²⁶ Refugees have effectively lost the protection that citizenship is meant to provide. It seems, therefore, at first glance, strange to consider their political participation rights vis-à-vis their country of origin. Yet the phenomenon of coerced migration is broader than the particular situation to which the Refugee Convention refers. First, people have been forced out of their countries as a result of violent conflict without being individually persecuted. Often such coerced mass emigration is the result of state failure rather than of state persecution. Second, when a repressive regime collapses or when civil war is ended, many refugees may not be able to return because they have found jobs and housing in the country of settlement, while the economy and their homes have been destroyed in their countries of origin. The question that we need to consider here is thus: What are the external political participation rights of coerced migrants in a

125. See Spiro, *supra* note 114, at 207.

126. United Nations Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

post-conflict situation when democracy is being rebuilt in their countries of origin?

Cases where an external franchise has been introduced as part of a post-conflict transition to democracy include Eritrea, Namibia, Bosnia and Herzegovina, Kosovo, East Timor, Afghanistan, and Iraq.¹²⁷ In the Bosnian general elections of 1996 and the Kosovo elections of 2001, the Organization for Security and Cooperation in Europe subcontracted the International Organization for Migration to establish by-mail registration and voting centers in Vienna.¹²⁸ In Afghanistan, expatriate citizens living in Iran and Pakistan could vote in Loyal Jirga and presidential elections in 2002, 2003, and 2004, but no longer in parliamentary elections in 2005.¹²⁹ The 2005 elections in Iraq included extensive arrangements for external voting in fourteen countries for 1.2 million eligible expatriates, of whom 22% participated in the elections.¹³⁰

Although there are no binding norms of international law that would provide conflict-forced migrants with external voting rights,¹³¹ it seems intuitively plausible that those who have been coercively deprived of their rights as citizens have a stronger claim to have them restored than citizens who have left voluntarily. This is not primarily a question of moral recognition of their suffering, which would simply mirror arguments discussed in Part III.C for enfranchising citizens who are owed gratitude because of their individual contributions. Citizenship must be equal for those who deserve it more and for those who deserve it less. The point is that forced migrants would have been citizens with voting rights had the state protected them from violence as it should. Restoring their citizenship rights is thus, first, a matter of rectificatory justice. Second, doing so does not merely satisfy individual claims but simultaneously restores the demographic continuity of the political community in terms of its membership, which had been distorted through the forced exile of some of its members.

The question is whether such restoration can be exclusively achieved through a right to return and to reacquire citizenship status for those who had been deprived of it or had renounced it in order to become citizens of the country that admitted them. What are the political participation claims of those who cannot, or do not want to, return? This will depend on whether their settlement abroad is final or still temporary. Once they are determined to stay for good, their claims are no longer different from those of first generation voluntary emigrants. Often they will be even less

127. Jeremy Grace & Jeff Fischer, *Enfranchising Conflict Forced Migrants: Issues, Standards, and Best Practices* 72 (Int'l Org. for Migration Participatory Elections Project, Discussion Paper No. 2, Sept. 29 2003), available at http://www.geneseo.edu/~iompress/Archive/Outputs/Standards_Final.pdf.

128. *Id.* at 58.

129. IDEA Handbook, *supra* note 1, ch. 11, Case Studies.

130. *Id.*

131. See Grace & Fischer, *supra* note 127, at 6-13.

interested in voting in their country of origin because they have many bad memories and have decided to assimilate fully into the host country. Yet others cling to the hope of eventual return for much longer than those who have left in search of better economic opportunities, and they remain keenly interested in their home country's political future. Because time spent in the country of residence is not a reliable indicator of the extent to which refugees remain stakeholders, it seems preferable to err on the side of inclusion and to establish external voting rights more broadly for all expatriate citizens who emigrated from an authoritarian regime or war-torn country instead of restricting the franchise to those who left during a recent wave of forced mass emigration. However, since the situation of a fully integrated group of former refugees is not fundamentally different from long-term voluntary emigrants, this policy still falls within the recommended rather than the required category.

An immediate post-conflict situation ought to be judged differently. Having been pushed out of the country, external citizens have a strong claim that their rights be restored in every feasible way. And if democratic elections are held in their country of origin while they are still abroad, their votes ought to be counted if this is logistically possible. Not doing so would add injustice to injury. The results of democratic elections are distorted if they exclude those parts of the *demos* that have been forced out of a country "[w]here disenfranchisement has been a motive for one group to displace another."¹³² Consider the case of Bosnia and Herzegovina, where large scale ethnic cleansing has generated a new territorial division within the country and where several hundred-thousand war refugees were abroad during the first post-conflict elections in 1996 and 1997. The 1995 Dayton Agreement provided that citizens should, as a rule, vote in the municipality where they had been registered during the 1991 census before the outbreak of the conflict and interpreted "[t]he exercise of a refugee's right to vote . . . as confirmation of his or her intention to return to Bosnia and Herzegovina."¹³³ The 2001 electoral law expanded this provision from a right of refugees into a general right of citizens who reside temporarily abroad "to register and to vote in person or by mail, for the municipality where the person had a permanent place of residence prior to his or her departure abroad."¹³⁴ Even if implementation of these provisions has been hampered by bureaucratic restrictions of accessibility,¹³⁵ the underlying

132. IDEA Handbook, *supra* note 1, ch. 8.

133. General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.,-Croat.,-Fed. Rep. Yugo., annex 3, art. IV, Dec. 14, 1995, 35 I.L.M. 75.

134. Election Law, art. 1.5 (2001) (Bosn. & Herz.).

135. It appears that *de facto* all Bosnian citizens abroad are considered as temporary residents there, but that the registration procedure for voting in Bosnian elections is extremely cumbersome, which leads today to very low external participation rates. E-mail from Vedran Dzihic, Lecturer, Institute for Political Science, University of Vienna, to Rainer Bauböck, Professor of Political and Social Theory, European University Institute (July 12, 2006, 13:28 CET) (on file with author).

principle is to reestablish as far as possible the continuity of the *demos* by preventing the electoral ratification of the results of ethnic cleansing.

The franchise for coerced migrants provides a test case for the question of whether the *demos* should be strictly defined as those who are currently subjected to a territorial government. López-Guerra rejects special claims of forced migrants by arguing that “[t]he causes of immigration . . . have nothing to do with the reasons for enfranchisement. Voting has the purpose of creating a government for the governed.”¹³⁶ Yet in extreme cases the composition of the governed will be the result not merely of births and deaths or individual decisions about immigration and emigration, but also of coerced population movements within or beyond the state territory. If we derived claims to membership and political participation purely from the fact of territorial subjection we would have to always accept *ex post* the results of coercive manipulations of the composition of the *demos* and would thereby provide incentives for future manipulations of this kind. What we need instead is a conception of the *demos* as a political community whose claim to self-government includes an assertion of its continuity in time. This continuity *may* be emphasized by including voluntary emigrants among the voting citizens, but it *must* be restored whenever possible by inviting those forced into exile to return and by restoring their voting rights until they have a chance to do so. The causes of emigration are thus relevant for determining the moral weight of reasons for external voting rights.

B. *Kin Minorities*

Expatriate populations can be produced in two ways: by people moving across international borders or by international borders moving across people. The latter change often produces ethno-national kin minorities. We can define these as native minorities (not of recent migrant origin) who share a common culture, language, and history with the dominant population of an external kin state and are regarded by that state as belonging to its larger national community or as entitled to external protection. This phenomenon has been particularly common in Central and Eastern Europe, where a landscape marked by profound ethnic and linguistic diversity was carved up into self-proclaimed nation-states in three waves after World War I, World War II, and the fall of the Iron Curtain.

Such kin minorities are in most cases citizens of the state into which their traditional homeland has been incorporated and have lost the citizenship of the country from which they have been separated. There are, however, several exceptions to this rule. The Baltic states restored citizenship automatically only for those who had possessed it in 1940 and their descendants. Large minorities of ethnic Russians in Latvia and Estonia, who settled in these countries while they had been annexed by the Soviet

136. López-Guerra, *supra* note 13, at 231.

Union, were therefore not included among those identified as citizens in 1990. With independence they became stateless and had to apply for naturalization under very demanding requirements.¹³⁷ The formally federal socialist states of Czechoslovakia and Yugoslavia referred to the previously rather insignificant status of citizenship in their constitutive republics for the initial determination of membership after separation. For example, only Czechoslovakian citizens who had previously been registered as citizens of the Czech province enjoyed automatic access to citizenship in the independent Czech Republic established in 1992. Many citizens who resided “on the wrong side” of the new international border could, however, eventually acquire dual nationality.¹³⁸

Even where such kin minorities have not retained formal citizenship of their external kin states, these countries’ governments may strengthen cultural and political ties through granting them either a status of external quasi-citizenship¹³⁹ or dual nationality. Since 2001, Hungary, Slovakia, and Slovenia have introduced “status laws” for their expatriate kin groups.¹⁴⁰ Romania has offered its citizenship to the majority population of Moldavia, while many inhabitants of that country’s seditious Transnistria province have acquired Russian citizenship.¹⁴¹ In Hungary, a referendum on introducing formal dual citizenship for up to 3 million Hungarians in neighboring countries failed in December 2004 because of low participation.¹⁴²

The transnational claims of kin states and their external minorities are complex issues that have hardly been addressed from a normative theory perspective. I will consider here only briefly the question whether such minorities should have external voting rights, which presupposes that they must also be granted external citizenship status.

At first glance, the case for external voting rights of kin minorities seems to be analogous to that of forced migrants. Both groups have been physically separated from their country of citizenship and deprived of effective citizenship rights without consent. There is, however, an important difference when it comes to rectifying this harm. Forced migrants have a claim to return to their homeland or to have their citizenship restored even before they return. In contrast, kin minorities

137. See generally Rogers William Brubaker, *Citizenship Struggles in Soviet Successor States*, 26 Int’l Migration Rev. 269 (1992).

138. For more general discussion, see various contributions in *Citizenship Policies in the New Europe*, *supra* note 9.

139. See *supra* Part I.A.

140. See the respective country chapters in *Citizenship Policies in the New Europe*, *supra* note 9.

141. See generally Constantin Iordachi, *Dual Citizenship and Policies Toward Kin Minorities in East-Central Europe: A Comparison Between Hungary, Romania and the Republic of Moldova*, in *The Hungarian Status Law: Nation Building and/or Minority Protection* 239 (Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi & Iván Halász eds., 2004), available at http://src-h.slav.hokudai.ac.jp/coe21/publish/no4_ses/chapter08.pdf.

142. See *supra* note 22 and accompanying text.

continue to live in their traditional homeland. So rectification could involve two different claims: revising the new international border by reuniting their homeland with the external kin state, or opening that border so that they can emigrate and settle in their kin state. The latter solution will generally meet little resistance from the current state of residence, whose authorities would often be glad if a national minority resettles abroad, while a loss of territory that is regarded as integral to the newly formed state will in most cases be fiercely resisted.¹⁴³ Discussing under which conditions a call for territorial revision may be justified would lead far beyond my present concerns and, in any event, is irrelevant to the question of external voting. So I will assume here that the border itself is legitimate and should not be redrawn. The two constellations that we need to consider are, first, where the kin minority continues to live in its homeland but claims external political participation rights in a kin state; and second, where members of the kin minority migrate to the kin state but subsequently claim external voting rights in their traditional homeland.

In the first case, the question is how we should apply the stakeholding criterion to these kin minorities. Such minorities must be seen as having a fundamental right to continuous residence in their traditional homeland and to full citizenship in the country of residence without facing discrimination because of their ethnic origin, their different religion, or their language. Yet their history of being incorporated without consent into a state dominated by a culturally distinct national majority is likely to generate a sense of being different, which will be reinforced by experiences of discrimination, but may persist even without them.

Minority members react to this situation in different ways. They may come to see their distinctness as a burden of the past and will then opt to fully assimilate into the wider society; they may redefine themselves as a diaspora whose "homeland" is now represented by an external kin state; or they may demand to be recognized as a distinct political community within the country where they live. In the first scenario, their claim to membership in a self-governing political community will be satisfied through equal citizenship in the country of residence. In the second one, it is directed towards both the kin state and the state of residence, so that some form of external quasi-citizenship or dual citizenship could be an adequate solution. In the third one, their claim is that their country of residence should be transformed into a multinational democracy in which they can be nested citizens of the larger state and of an autonomous political community within that state. It is impossible to make a general prediction which of these three basic paths of minority development (alongside a number of intermediate possibilities) will be chosen, since this will depend strongly on the

143. For a theory that predicts that under certain conditions political elites will rationally opt for state shrinking, see Ian S. Lustick, *Thresholds of Opportunity and Barriers to Change in the Right-Sizing of States*, in *Right-Sizing the State: The Politics of Moving Borders* 74 (Brendan O'Leary, Ian S. Lustick & Thomas Callaghy eds., 2001).

contingent outcomes of political mobilization and conflict. I also think that one should not dismiss any of these three citizenship claims as illegitimate. There is a trade-off, however, between the second and the third solution. Apart from exceptional cases, minorities that enjoy political autonomy and full citizenship in their country of residence cannot simultaneously claim to be external citizens with a right to vote in a kin state.¹⁴⁴

The second constellation involving kin minorities is when their members settle in the kin state¹⁴⁵ but retain the citizenship of their country of origin and want to exercise external voting rights there. In 1989, nearly 370,000 ethnic Turks emigrated from Bulgaria to Turkey in response to a coercive assimilation campaign.¹⁴⁶ Many have since returned, but most of those who stayed have retained their Bulgarian citizenship. Turkey has offered them dual citizenship, partly in order to promote their return. In Bulgaria, dual citizenship and external voting rights were adopted in the expectation of mobilizing large numbers of ethnic Bulgarian expatriates.¹⁴⁷ However, in the 2001 parliamentary elections, about 50,000 votes were cast in Turkey and only 4000 elsewhere, and three-quarters of the votes cast in Turkey supported the MRF, which is the party representing mainly ethnic Turks in Bulgaria.¹⁴⁸ Thus, here we have a minority that has been forced out of the country and uses its external voting rights to bolster the representation of the minority remaining in the country.

Building stable democracies in societies shaped by competing nation-building projects requires accommodating such diversity through minority rights ranging from cultural protection to territorial autonomy. Successful accommodation of national minorities leads to internally differentiated citizenship, but will generally not involve external citizenship in a kin state. If a minority has a kin state to turn to, however, its perceived or real oppression will easily spill over into an international conflict between the kin state and country of residence. At this stage, bilateral agreements between the countries involved, which grant the kin state a temporary role as an external protector for the minority, will play an important role in conflict resolution. The ultimate goal should nevertheless be a domestic

144. For a more extensive statement and a discussion of exceptional cases, see Rainer Bauböck, *The Trade-Off Between Transnational Citizenship and Political Autonomy*, in *Dual Citizenship: Democracy, Rights and Identities Beyond Borders* (Thomas Faist ed., forthcoming 2007) (on file with the Fordham Law Review).

145. Another constellation that does not present normative challenges different from the standard voluntary migration case is when emigrants are members of a dominant majority in their state of origin, and there is a cultural and political relation of kinship between sending and receiving countries at the state level. Brazilian immigrants in Portugal provide an example.

146. Darina Vasileva, *Bulgarian Turkish Emigration and Return*, 26 *Int'l Migration Rev.* 342, 347 (1992).

147. Nurcan Özgür-Baklacioglu, *Dual Citizenship, Extraterritorial Elections and National Policies: Turkish Dual Citizens in the Bulgarian-Turkish Political Sphere*, in *Beyond Sovereignty: From Status Law to Transnational Citizenship?* 319, 328 (Osamu Ieda ed., 2006), available at http://src-h.slav.hokudai.ac.jp/coe21/publish/no9_ses/18_nurcan.pdf.

148. *Id.*

settlement under which the minority is permanently accepted as a constituent element of a pluri-national democracy, and accepts in turn that its claims to self-government can be satisfied within the larger polity without external citizenship in a kin state.

C. *The Impact of the External Vote*

The final aspect of contextual evaluation that I want to consider is whether the expected impact of an external vote should change our assessment about its legitimacy. We need to consider such impacts in two different contexts: in the country where the election is held, and in the country where temporary absentee votes are cast or where expatriate voters reside.

In the latter context the impact of external voting is an indirect one. Concerns may arise about a foreign government setting up polling stations, as well as about parties and candidates conducting their campaigns in public arenas. Sometimes, governments are specifically worried that election campaigns may import political and ethnic conflicts and lead to violence between rival factions within an immigrant group. A more general concern is that the option of external voting discourages immigrants from fully identifying with their host country and provides dual citizens with opportunities to vote twice and to promote the interests of their country of origin in both domestic and in external elections.¹⁴⁹

I have already addressed the latter concern in Part IV.B above, and none of the other objections amount to arguments against the general legitimacy of external voting. The test is that most governments raising these concerns do not see any problem with simultaneously promoting the external franchise for their own citizens abroad. There is also no plausible reason why the risk of political violence should be greater in external voting than in domestic elections. But, of course, each government is specifically responsible for maintaining public order in its own territory. Legitimate worries about domestic security can always be taken into account through general laws regulating political campaigning that do not discriminate against specific ethnic groups by depriving them of opportunities to participate in elections in their country of origin. Apart from problematic restrictions of political liberties for immigrants, host countries may also interfere with external voting by exercising foreign policy pressure on source countries in order to prevent them from introducing an accessible external voting system.¹⁵⁰ In the absence of concrete evidence for security

149. Rey Koslowski, *Challenges of International Cooperation in a World of Increasing Dual Nationality*, in *Rights and Duties of Dual Nationals*, *supra* note 7, at 157, 177-79.

150. In response to an amendment to article 67 of the Turkish Constitution, which introduced the possibility of external voting, the German government voiced security concerns about large numbers of Turkish citizens turning up for voting at consulates and lobbied against introducing the implementing legislation, which still has not been passed. Interview with Cem Özdemir, Member of European Parliament, at the Bellagio Study and Conference Center, Bellagio, Italy (June 23, 2006).

threats, however, host countries should not be seen as having a legitimate interest in preventing immigrants in their territory from exercising voting rights granted by their country of original citizenship.

Most of the arguments about the impact of external voting on host countries start from a dual assumption that elections in the immigrant source countries are less orderly and democratic and that the attitudes of external voters will be predominantly shaped by their origins. The first assumption is, again, self-defeating in countries that have, themselves, introduced an external franchise. The second assumption needs to be tested empirically against the opposite hypothesis that immigrants' attitudes in external elections will also be shaped by their experiences in the country of residence. If they have been successfully integrated into a stable liberal democracy, then an import of nondemocratic attitudes through political participation in a country of origin seems to be less likely than an export of democratic attitudes to that country.

With regard to the country where the election is held, external voting rights may have two kinds of impact: a direct one on the outcome of elections and an indirect one on democratic development. I will only briefly address the latter concern, since most arguments have already been considered in Part III above. The optimistic conjecture that expatriates' democratic experiences in the receiving society may be transmitted through external votes into the country of origin and can strengthen democratic development there mirrors a similar hypothesis about the economic impact of remittances on development. We might therefore call it the "democratic remittance hypothesis." As with its economic counterpart, this is a hypothesis rather than a postulate or an undisputed fact. It must therefore be tested empirically against two possible counter-hypotheses: that external votes, just as remittances, may be spent unproductively without significant impact, or that their effect may be negative when they promote long-distance nationalism.

Each of these hypotheses will be confirmed or refuted in different empirical contexts; therefore, none of them can be relevant for judging the general legitimacy of external voting. As in many other instances, a purely consequentialist reasoning would have to rely on contested empirical knowledge about complex and contingent circumstances and can therefore not yield any generalizable normative criterion. This does not, of course, rule out that one can be sufficiently certain about the consequences of external voting in particular cases. Since my deontological argument about state obligations towards citizenship stakeholders has led to the conclusion that external voting is neither required nor illegitimate for permanent first generation emigrants, such knowledge about expected consequences can and should be used to evaluate external voting arrangements in specific contexts.

The problem of unpredictable consequences is greatly reduced when we consider the direct impact of external voting on election results. We cannot make any general forecast about which party or ideology will be supported

by expatriates, but we can measure the overall impact of the external vote by calculating its size in relation to the domestic vote. Is the external vote only legitimate where it is insignificant but illegitimate where it is likely to make a difference? In discussing this proposition, we need to distinguish a swamping from a tipping scenario. In the former, the external vote dominates the domestic vote or is seen to be disproportionately large; in the latter, the external vote's size may be comparatively small, but it is perceived to determine the outcome in a close electoral competition. Both concerns were articulated in the following conclusions of a constitutional reform commission in Belize, which recommended against introducing an external franchise: "When elections in Belize are sometimes determined by one vote, the influence of large numbers of Belizeans not living in Belize voting in Belize's elections is extremely significant."¹⁵¹

A reasonable expectation that expatriate voters may outnumber domestic ones provides a strong argument against enfranchising the former and for restricting the franchise to temporary absentees. A claim of external stakeholders to be included in a wider conception of the political community does not entail that domestic voters should accept that their votes will be structurally dominated by external ones. This argument seems to apply in only very few cases. In spite of a growing volume of migration, only very small countries, such as Belize and some Pacific island states,¹⁵² will have a majority of citizens living outside their borders. Yet the swamping scenario may also be interpreted more broadly by suggesting a negative correlation between the scope of inclusion of an external franchise (measured on the scale that I have sketched in Part IV.A) and the relative share of expatriates in the total citizen population. Countries with particularly large and politically active expatriate communities have often opted for weak inclusion (e.g., by allowing only in-country voting).¹⁵³ Such an empirical correlation can be supported normatively if we accept that fears about external domination may be reasonable even when expatriates do not form a numerical majority.

Of course, a mere fear of swamping the domestic electorate does not provide a justification for constraining external voting rights. One could argue that this fear is analogous to that of male citizens who objected to introducing the female franchise. The difference is, however, that women's

151. Belize Reform Comm'n, Final Report of the Political Reform Commission, ch. 13.25 (Jan. 2000), available at <http://ambergriscaye.com/pages/town/FINALREPORTOFTHETHEPOLITICALREFORMCOMMISSION-complete.htm>.

152. For a discussion about external voting in the Marshall and Cook islands, see Nohlen & Grotz, *supra* note 12, at 1138 and IDEA Handbook, *supra* note 1, at Case Studies.

153. Jeremy Grace has stated,

In general, the larger the diaspora, the less likely the country of origin will offer external voting. Consider Ireland, Greece and Kosovo. All three have well organized diasporas, which are equal in size or even larger than the populations of the home states. In these cases, the extension of franchise to external voters could potentially swamp the electorate at home.

Grace, *supra* note 13, at 5.

claim to an equal suffrage is not based on external stakeholding, but on full subjection within the territorial jurisdiction. Their inclusion is thus required rather than merely permissible, and a potential domination of election outcomes by the female vote is not a relevant objection. In contrast with the case for women's suffrage, or for external voting rights for temporary absentees, the terms of inclusion of permanent expatriates can be legitimately determined by the domestic electorate. In this process, the strength of individual expatriate stakeholdership may have to yield to the stronger collective self-government rights of those citizens who are fully subjected to the government that they elect.

The tipping scenario is different in the sense that even a small number of expatriates may change the outcome of an election if the domestic vote is evenly split between alternative candidates or parties. The 2006 general elections in Italy¹⁵⁴ and the presidential elections in Cape Verde of the same year illustrate this possibility. In Cape Verde, the incumbent candidate Pedro Pires fell twenty-four votes short of his challenger Carlos Veiga in the domestic vote, but won the elections because 65% of external voters supported him.¹⁵⁵ The share of the external vote was only 6.5% and external ballots provided merely 9.13% of Veiga's total vote.¹⁵⁶ There was no external domination on either count, but the impact was still sufficient to change the outcome.

Does the possibility that the external vote may be decisive provide an argument against introducing an external franchise? I do not think so. It is in the nature of democratic elections that small numbers of voters may determine the outcome. And it is not at all obvious how to identify the group that makes the difference. Suppose a majority of women, urban voters, and voters below the age of thirty have all supported a candidate who wins the expatriate vote and the overall election. Why should the fact that she would have lost without the expatriate vote be more significant than the fact that she would also have lost without the female, the urban, or the young vote? Still, the argument cannot be fully dismissed, since the *perception* that the external vote was decisive might indeed undermine the *perceived* legitimacy of external voting.

This consideration is specifically relevant for evaluating the special representation schemes discussed in Part IV.B, above. If expatriates vote only for expatriate candidates and for reserved seats in the legislature, they are clearly marked as a special interest group among the electorate. And if a parliamentary majority hinges then on such reserved seats, as it currently does in the Italian Senate, then this will raise questions of why the interests

154. See *supra* note 20 and accompanying text.

155. These figures reflect my own calculations based on data of the Electoral Commission Web site and provided by Jørgen Carling. E-mail from Jørgen Carling, Researcher, International Peace Research Institute, to Rainer Bauböck, Professor of Political and Social Theory, European University Institute (July 30, 2006, 14:50 CET) (on file with author).

156. *Id.*

of this particular group should be given more weight than others among the domestic electorate that are not highlighted by special quota. In assimilated representation, concerns about a tipping of the vote by expatriates may still arise, but they can be answered by pointing out that expatriates are merely one statistical group among the general electorate and many other groups could be equally identified as providing the crucial vote for a majority.

While the tipping scenario thus reinforces general objections against special representation of expatriates, the swamping scenario provides a positive reason for introducing reserved seats. Where the number of eligible voters who live permanently outside the country is very large compared to the domestic electorate, the threat of perceived external domination may be averted by reducing the weight of expatriate votes. This is hard to do and hard to justify in an assimilated representation system because counting each expatriate ballot as, say, only half a vote would violate the "one person, one vote" principle. When expatriates, however, are not counted within a domestic territorial constituency but in extraterritorial ones, then special characteristics can be taken into account. Given the generally low rates of registration and voter turnout among expatriates, they would be heavily overrepresented if the number of their mandates were calculated on the basis of the number of eligible voters according to the same formula used in domestic constituencies. Legislators should thus be free to determine how many seats they allocate to extraterritorial constituencies, and they may legitimately take into account the overall proportion between external and domestic citizens in order to reduce the impact of the former on election results. This contextual argument for a restrictive form of special representation applies, however, only to expatriates. The external votes of temporary absentees or of conflict-forced migrants should still be counted within their domestic residential districts. The exceptional case of a swamping scenario thus confirms the rule that assimilated representation ought to be the default model for an external franchise.

CONCLUSION

I have argued in this essay that citizenship status and rights should be allocated to individuals who are stakeholders in the future of the political community. This principle should guide our normative evaluation of particular arrangements, but to derive from it specific recommendations or critiques requires contextual specification.

When discussing how a principle of stakeholder citizenship applies to the claims of emigrants towards their countries of origin, we need to consider first the historical and global context that has changed quite dramatically compared with earlier periods of mass migration. I have argued in Part I that the most important change lies in the institutional responses of democratic states to migration. Citizenship is no longer as exclusive as it

used to be, both inside and outside the state territory. If we define citizenship like Hannah Arendt, as “a right to have rights,”¹⁵⁷ then this development must be seen as fundamentally progressive since it provides migrants, whose fundamental rights have always been precarious, with new opportunities of access to a status that entails strong obligations of states to provide such rights.

Citizenship, however, is not merely about rights to protection, but also about a status of membership in a self-governing political community. The core rights of citizenship are therefore those of political participation. These are generally tied to membership. In a representative democracy, citizens elect a government whose laws apply, however, not to members, but within a territorially bounded jurisdiction. This discrepancy between the input and output of democratic self-government is magnified by migration that creates large numbers of noncitizen residents and nonresident citizens.

In this essay I have addressed one particular aspect of this problem: the voting rights of external citizens. I have argued against attempts to justify a universal right of external voting, as well as against its general rejection as illegitimate external interference. The objection that those who will not be subjected to the laws should not be represented in making them is a very strong one. It is, however, ultimately unconvincing because it fails to take into account how migration and the evolution of democratic norms since World War II have generated expanded conceptions of political community that stretch beyond territorial boundaries.

A normative theory of transnational citizenship would be of little practical value if the analysis ended here with the conclusion that democracies should be free to regulate external voting rights in any way they want. The real bite of a stakeholder approach comes only with a second level of contextualization that looks at specific groups of external citizens and particular circumstances that vary across countries. In this vein, I have sketched an argument that opportunities for external voting are required for temporary absentees and conflict-forced migrants, but should generally be ruled out for generations born abroad that have no stake in their forebears' countries of origin. I have also argued that expatriates have no claim to special representation, but that reserved seats in parliament may be used to diminish the impact of external voting where it could otherwise overwhelm domestic self-government. Finally, I have suggested that we need to distinguish the claims of migrants from those of national minorities, whose aspirations to self-government can be better realized through domestic minority rights and political autonomy than through external citizenship in a kin state.

157. Hannah Arendt, *The Origins of Totalitarianism* 294 (2d ed. Harcourt Brace 1966) (1951).

Notes & Observations