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Independence Referendums: Who Should Vote and
Who Should be Offered Citizenship?

edited by Ruviz Ziegler, Jo Shaw and Rainer Bauböck

European University Institute
Robert Schuman Centre for Advanced Studies
European Union Democracy Observatory on Citizenship

**Independence Referendums:
Who Should Vote and Who Should be Offered Citizenship?**

Ruvi Ziegler, Jo Shaw and Rainer Bauböck

EUI Working Paper **RSCAS** 2014/90

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Abstract

In this EUDO CITIZENSHIP Forum Debate, several authors consider the interrelations between eligibility criteria for participation in independence referendum (that may result in the creation of a new independent state) and the determination of putative citizenship ab initio (on day one) of such a state. The kick-off contribution argues for resemblance of an independence referendum franchise and of the initial determination of the citizenry, critically appraising the incongruence between the franchise for the 18 September 2014 Scottish independence referendum, and the blueprint for Scottish citizenship ab initio put forward by the Scottish Government in its 'Scotland's Future' White Paper. Contributors to this debate come from divergent disciplines (law, political science, sociology, philosophy). They reflect on and contest the above claims, both generally and in relation to regional settings including (in addition to Scotland) Catalonia/Spain, Flanders/Belgium, Quebec/Canada, Post-Yugoslavia and Puerto-Rico/USA.

Keywords

Citizenship, independence, secession, referendum, franchise, Catalonia, Scotland, Québec, Puerto Rico.

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Kick-off contribution

Ruvi Ziegler*

Imagine that you are a Scottish-born recent graduate, fortunate enough (certainly in today's economy) to be offered a job in Amsterdam, working for a multinational company. You relocated from Edinburgh to Amsterdam in 2012, and most of your family continues to reside in Scotland. You take a great interest in the [Scottish independence referendum](#) on 18 September 2014, when voters will be asked whether Scotland should 'become an independent country', and are concerned about its ramifications. If Scotland votes to stay part of the UK, you intend to vote from abroad in the UK general election in May 2015. The Scottish government pronounces that, if Scotland becomes independent, you will be automatically considered a Scottish citizen. Yet, in the referendum itself, you will not have your say: Scottish-born expatriates are excluded. In this kick-off contribution, I make the case for resemblance between the category of persons entitled to participate in an independence referendum and the initial citizen-body of a new state created by such a referendum.

The scope of my claim concerns only independence referendums which may result in 'Succession of States'. This term is defined in Article 2 of [the International Law Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States](#) as 'the replacement of one state by another in the responsibility for the international relations of territory'.

Independence referendums may result in the dissolution of an existing state, namely '[w]hen a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States' (Article 22); see, for instance, the breakup of Czechoslovakia (albeit without referendums). More commonly, perhaps, independence referendums may lead to the separation of part(s) of the territory of a predecessor state while the latter state continues to exist; recent examples include the two (unsuccessful) independence referendums in [Quebec](#), as well as the cases [of the Republic of South Sudan](#), and [Timor-Leste](#). Scotland is the most pressing case thought to conform to the latter definition (see e.g. James Crawford and Alan Boyle, [Referendum on the Independence of Scotland: International Law Aspects](#) and House of Lords, Constitutional Committee, [Scottish Independence: Constitutional Implications of the Referendum](#)).

Article 1 of the ILC Draft Articles stipulates that '[e]very individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned [predecessor and/or successor]'. In the event of dissolution, all citizens of a predecessor state are affected by a successful referendum, whereas in separation cases the legal status of many citizens of a predecessor state may not be affected.

A previous debate in this forum [concerning electoral rights of 'second country nationals' in their EU state of residence](#) provides a helpful context for normative questions posed in relation to the link between citizenship and the franchise. Notably, this debate concerns political membership and electoral participation in an existing political unit. Independence referendums are different: they may create new political entities, and require the attribution (as per the terminology employed by the ILC Draft Articles) or offer of citizenship to individuals.

Let's leave aside for now the moral or political legitimacy of particular independence referendums and indeed the legality of referendums under particular national laws (though other contributors may wish to engage with these issues). Instead, following Article 3 of the ILC Draft Articles, my starting point is arguably less demanding, namely that the 'succession of States [is] occurring in conformity with international law' (note, in this regard, the International Court of Justice's [Advisory Opinion](#)

* University of Reading.

[Regarding the Unilateral Declaration of Independence in Respect of Kosovo](#)). As the [27 March 2014 UN General Assembly resolution regarding the ‘Territorial Integrity of Ukraine’](#) demonstrates, when referendums fail to meet the above criterion, international non-recognition may ensue.

In this introduction, my (main) point of reference is the Scottish Independence Referendum and the criteria for attributing citizenship on ‘day one’ of an independent Scotland. Other contributions will no doubt broaden the geographic scope of this debate, perhaps to [Catalonia](#) and elsewhere.

I wish to put forward two propositions.

The first proposition is that putative *ab initio* citizens of a putative state (the initial citizen-body of a new state), whether its nationality is attributed to them or they are given the ‘right of option’, are clearly stakeholders (borrowing Rainer [Bauböck’s seminal characterisation](#)) in an independence referendum that may bring that putative state into being.

Moreover, as Bauböck argued (id) in support of external voting in national elections ‘[b]y virtue of their permanent membership, citizens have a life-long interest in the future of the polity, its survival and success’. The rationales for expatriate voting in national elections (in contradistinction from local elections) apply a fortiori to independence referendums in light of its fundamental nature and the long-term effects of its outcome.

Citizens enjoy internationally recognised rights, most prominently the [right to return to and reside in their state of citizenship](#). This and other rights will be directly and meaningfully affected by the outcome of the referendum. The lives of putative citizens may be directly affected by subsequent electoral processes in the putative state (see e.g. the language employed by the EU Commission in its [29 January 2014 recommendation](#) regarding EU citizens residing in another EU member state). In the context of the Scottish independence referendum, one only needs to point to uncertainties regarding EU membership, the UK/Irish common travel area, currency, and taxation to start appreciating the extent to which a ‘Yes’ vote may meaningfully affect the lives of putative Scottish citizens.

The establishment of a new state whose citizenship they may hold from day one, which triggers this life-long interest, follows the referendum as a constitutive act. Indeed, it could be argued that, even if there is an inclusive franchise in national elections of an existing state, ‘[\[s\]elf-government, whether direct or through representatives, begins by defining the scope of the community of the governed, and thus the governors as well](#)’. As Cormac Mac Amhlaigh recently [noted](#), the decision to exist as an independent political entity is a political question with a capital ‘P’: it involves an existential choice in the life of the nation beyond small ‘p’ politics.

Turning to Scotland, the 2013 [Scottish Independence Referendum \(Franchise\) Act](#) determines eligibility for participation in the referendum. The Act lowers the voting age to 16, and disenfranchises all serving prisoners ([discussed here](#)). Crucially, the eligibility criteria do not mirror the criteria for participation in the UK general election, set in [Section 1 of the Representation of the People Act 1985](#). According to the latter Act, UK citizens who have left the UK in the last fifteen years are eligible to vote in UK general election; their vote is cast in their last place of residence; for those formerly resident in Scotland, this means their Scottish constituency (the plausibility of the arrangements under this act are also questionable, not least regarding the 15 year rule challenged e.g. in the [Shindler](#) case, and the selective access to the national franchise that is given to qualifying Commonwealth and Irish citizens).

By contrast, the franchise for the Scottish Independence referendum follows the criteria employed to determine eligibility for local government elections, set in [Section 2 of the Representation of the People Act 1983](#). Hence, in addition to UK citizens habitually resident in Scotland, to Irish citizens, and to qualifying Commonwealth citizens (all of whom are also eligible to vote in general UK elections), EU nationals habitually resident in Scotland (see [2011 census data](#)) are eligible to vote in

the referendum. UK citizens formerly resident in Scotland are excluded wherever they currently reside (namely in [Rump-UK](#) or elsewhere) and regardless of the duration of their absence from Scotland.

I assert that the franchise in independence referendums ought to reflect the fact that the types of question addressed in such referendums are qualitatively different from the issues raised in elections for sub-units of a state, such as local government elections. Independence referendums share the fundamental and long-term characteristics of national elections, and their significance is enhanced by their capacity, from both a national and an international law perspective, to alter the legal landscape for individual citizens.

The second proposition is that congruence between eligibility for participation in independence referendums and eligibility for citizenship *ab initio* is highly desirable. Under-inclusiveness (exclusion of putative citizens) may undermine the legitimacy of the referendum, not least for disenfranchised persons affected by a new legal reality. Over-inclusiveness (inclusion of persons ineligible for citizenship *ab initio*) suggests that perhaps such persons ought to be offered citizenship of that putative state.

Achieving congruence is no mean feat: a putative state would have to determine *ab initio* citizenry at the time of the referendum. Indeed, beyond the category of citizens of the predecessor state habitually resident in the territory affected by the succession of states (who according to the ‘presumption of nationality’ in Article 5 of the ILC Draft Articles are presumed to acquire the nationality of the successor state on the date of such succession), the picture is rather complex.

As Jo Shaw [helpfully noted](#), states have followed several models for determining their citizenship *ab initio*: the ‘zero option’ model, where citizenship was given to all permanent residents at the moment of independence; the ‘restored state’ model, recognising a historic statehood; the ‘mixed’ model, drawing on elements of each; and the ‘federal upgrading’ model, where a previous ‘republican’ or ‘provincial’ citizenship was upgraded to state citizenship at the moment of independence. Hence, it may be queried whether citizenship should be offered to all habitual residents of the putative state, and/or to expatriates of the predecessor state formerly residing in the successor states, regardless of the length of time they have been away and of their current place of residence.

As noted above, the ILC Draft Articles distinguish between citizens of the predecessor state, who must be offered citizenship of at least one of the successor state(s), and citizens of third states, towards whom such an obligation in international law does not arise, though the provisions stipulate that the status of such citizens as habitual residents should not be affected by the succession of states (the latter issue may be particularly pertinent regarding rights of residence of citizens of other EU member states, were an independent Scotland to remain temporarily or long-term outside the EU). Hence, from an international law perspective, while a putative state could extend an offer of citizenship to such persons, it would not be required to do so.

In contradistinction, the ILC Draft Articles stipulate (in Articles 22 and 24 regarding dissolution and separation, respectively) that citizens of a predecessor state habitually resident elsewhere who have ‘an appropriate legal connection’ to a successor state should be offered citizenship of that successor state. The ILC opted for an arguably less demanding ‘test’ than the International Court of Justice’s stipulation in its 1955 [Nottebohm](#) (*Lichtenstein v. Guatemala*) case concerning the exercise of protection by Lichtenstein, Nottebohm’s state of nationality. In that case, the Court held that ‘nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’. The choice to move away from Nottebohm can be explained by the reverence of a protection-enhancing rights-based approach to the link between the citizen and her state.

The ILC Draft Articles mandate that an offer of citizenship should be subject to a ‘right of choice’. Importantly, the choice is between two or more citizenships, most likely between retaining the

citizenship of a predecessor state and obtaining the citizenship of a successor state. However, while international law has historically been hostile to multiple citizenships (see [the Preamble to the 1930 Hague Convention on Certain Questions Related to the Conflict of Nationality Laws](#)), it is presently considered to be neutral on this matter. An independent Scotland and Rump-UK may agree that their respective citizens may hold other nationalities, including that of the respective state north/south of the border. However, it takes two to tango: while the Scottish government has announced in its White Paper entitled ‘Scotland’s Future’ (published on 27 November 2013) its intention to follow ‘[a\[n\] inclusive model of citizenship for people whether or not they define themselves as primarily or exclusively Scottish](#)’, the current position of the UK government *is less clear*, and it is not implausible that putative citizens of Scotland may be forced to exercise a right of choice between obtaining Scottish citizenship and keeping their Rump-UK citizenship.

Fraught with genuine difficulties as it may be, a determination of state citizenship *ab initio* is unavoidable: without entering the [debate](#) over the status in international law of the [1933 Montevideo Convention ‘criteria’ for statehood](#) (a permanent population; a defined territory; government; the capacity to enter into relations with the other states), it may be legitimately expected that a putative state adopt (non-arbitrary) criteria for its *ab initio* citizenry. It stands to reason, then, that these criteria may be defined at the time of the referendum, and serve as the basis for its franchise.

Indeed, the Scottish government agrees that determination of citizenship *ab initio* is required: Chapter Seven of the Scottish government’s White Paper offers a clear blueprint. In a helpful [table](#), it stipulates under the heading ‘at the date of independence’ that ‘British citizens habitually resident in Scotland on day one of independence’ (projected for 24 March 2016) as well as ‘British citizens born in Scotland but living outside of Scotland on day one of independence’ will automatically obtain Scottish citizenship. In contradistinction, ‘after the date of independence’, migrants residing in Scotland legally and citizens of any country who have spent at least ten years living in Scotland at any time and have an ongoing connection with Scotland ‘may apply for naturalisation’. Intriguingly, the paper suggests that attribution of citizenship to children (and grandchildren) will follow a mixed model combining elements of *ius sanguinis* and *ius soli*.

Set against the proposed congruence model, the franchise for the Scottish Independence Referendum is both under and over-inclusive. It excludes ‘British citizens born in Scotland but living outside of Scotland on day one of independence’, whom the Scottish government clearly considers to be Scottish enough to be attributed citizenship on ‘day one of independence’, that is, to be part of the constituent body-polity that in due course will adopt a ‘[modern \[written\] constitution](#)’ for Scotland (following a constitutional convention). Concurrently, it enfranchises some residents in Scotland: those who happen to be citizens of other EU member states, Irish and qualifying commonwealth citizens. The latter persons are, apparently, well-placed to decide whether Scotland should be an independent country, but that does not make them part of ‘the people of Scotland’.

The Scottish government’s blueprint for the *ab initio* polity of an independent Scotland, while *prima facie* compliant with the ILC Draft Articles’ framework, is by no means immune from critique, which other contributors may wish to mount. Notwithstanding the question which criteria should have been proposed for citizenship *ab initio*, the claim that the determination of the franchise for the Scottish independence referendum was ill-conceived is underscored by the Scottish government’s vision of the people of an independent Scotland being so markedly different from the electorate that will determine in less than four months the coming into being of that polity. While in the Scottish case ‘the deed is done’, perhaps lessons can be learnt and applied to determine the franchise in future independence referendums.

The Scottish referendum franchise: Residence or citizenship?

Bernard Ryan*

Introduction

Eligibility to vote in the 18 September 2014 referendum on Scottish independence will be based on the franchise currently used throughout the United Kingdom for devolved and local matters. Accordingly, the voters will be persons resident in Scotland who are British citizens, qualifying Commonwealth citizens, Irish citizens, or other EU citizens. With the Scottish case in mind, Ruvi Ziegler's kick-off contribution to this forum develops two propositions: that the "*ab initio* citizens of a putative state" are "stakeholders" in an independence referendum; and, that there should be "congruence" between the franchise for an independence referendum and the initial citizenship of a potential new state.

As Ziegler's contribution focuses on the Scottish case, my remarks will do so too.¹ I will firstly point to tensions between Ziegler's two propositions in the Scottish case. I will then suggest that the residence-based franchise chosen for the Scottish referendum deserves respect because it was chosen by the main protagonists, and is calculated to ensure the legitimacy of the referendum. At the same time, the content of a future Scottish citizenship law is too indeterminate to provide the basis for the franchise in a referendum.

Internal tensions

Drawing upon his wider perspective, Ziegler offers two general comments on the Scottish referendum franchise. His first proposition leads to the claim that

"the franchise in independence referendums ought to reflect the fact that the types of question addressed in such referendums are qualitatively different from the issues raised in elections for sub-units of a state, such as local government elections. Independence referendums share the fundamental and long-term characteristics of national elections..."

His second proposition leads to criticism of a mismatch between those eligible to vote and those expected to become Scottish citizens at independence. From the perspective of "congruence", the franchise is under-inclusive in not providing a vote for non-residents who are British citizens who can expect to acquire Scottish citizenship automatically, and over-inclusive in granting a vote to other resident EU and Commonwealth citizens.

It is notable that Ziegler's two propositions with respect to the Scottish referendum franchise point in somewhat different directions. One tension arises from the fact that the United Kingdom does not confine the right to vote in parliamentary elections to British citizens, but instead extends it to resident Commonwealth and Irish citizens. It might be thought to follow from Ziegler's first proposition that Commonwealth and Irish residents should have a vote in the referendum, as that is the position for United Kingdom parliamentary elections. Yet, his second proposition suggests otherwise, as these persons are not British citizens, and are unlikely to become Scottish citizens at independence.

A second issue concerns votes for British citizens who are resident outside Scotland and who would probably acquire Scottish citizenship at independence. Ziegler's comment about national elections suggests one of two answers. If the parliamentary franchise in Scotland is the reference

* University of Leicester.

¹ For the avoidance of doubt, I do not take a position as to the merits of an independent Scotland. My view is rather that unnecessary obstacles - intellectual or otherwise - ought not to be put in its way, if that is the wish of the Scottish population, determined in accordance with a fair process.

point, a vote should be available to expatriate British citizens outside the United Kingdom for up to fifteen years, provided they are registered in a Scottish constituency. Alternatively, if the reference point is the parliamentary franchise for the United Kingdom as a whole, one might conclude that British citizens resident in the rest of the United Kingdom should also have a vote in the first fifteen years. Neither approach however does enough to meet Ziegler's test of "congruence". That would suggest a vote for all British citizens who are on course for Scottish citizenship, wherever in the world they live, and without a requirement of residence in Scotland in the previous fifteen years.

The actual franchise

These tensions within Ziegler's position show that it is one thing to set out a general position, and another to apply it coherently on the ground. In my view, a better approach would be to start, not from general principles, but from the United Kingdom's constitutional order.

In the absence of a written constitution for the United Kingdom, the ground rules for the referendum were necessarily defined in the political sphere. Despite their different views on the substantive question, in the [Edinburgh Agreement of October 2012](#), the United Kingdom and Scottish Governments reached a consensus concerning the terms on which the referendum would take place.² That paved the way for enabling legislation at Westminster, after the approval of both Houses of the United Kingdom Parliament, and of the Scottish Parliament.³

In relation to the franchise, the Edinburgh Agreement provided that all persons entitled to vote in devolved and local elections should also have a vote in the referendum. The Agreement permitted the extension of the franchise to others, if that was the decision of the Scottish institutions. That option was then used by the Scottish Parliament to grant a right to vote in the referendum to 16 and 17 year olds, something which was in line with the SNP's policy more generally, and which has specifically been mentioned in the Edinburgh Agreement.⁴

A significant reason for basing eligibility to vote on the Scottish devolved franchise was that that franchise had been used in the 1997 devolution referendum. This argument from precedent appeared consistently in the consultation documents of both the Scottish and British Governments.⁵

A second reason, offered by the Scottish Government, was that the devolved franchise made residence in Scotland central to the right to vote.⁶ Among its reasons for supporting a residence-based approach were that that principle was "internationally accepted...for constitutional referendums", and that "sovereignty lies with that Scottish people". It could equally have argued that residents, as a general rule, have the greatest stake in the outcome of the referendum decision.

A further argument, put forward in the United Kingdom Government's consultation in 2012, was that it was essential to start from a pre-existing franchise in order to avoid the "the perception that changes were being made to favour one or other outcome."⁷ That argument might be thought especially relevant to the conferral of eligibility to vote upon some British citizens resident outside Scotland. Had that been done, it would have led to suggestions that voters likely to favour the Union

² Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, signed at Edinburgh on 15 October 2012.

³ Scotland Act 1998 ([Modification of Schedule 5](#)) Order 2013, SI 2013 No. 242.

⁴ Scottish Independence Referendum (Franchise) Act 2013.

⁵ Scottish Government, [Scotland's Future: Draft Referendum \(Scotland\) Bill Consultation Paper](#) (February 2010), pp 24-25; Scottish Office, *Scotland's Constitutional Future* (January 2012), Cm 8023, pp 16-17; Scottish Government, *Your Scotland: Your Referendum* (January 2012), para 2.10.

⁶ Scottish Government, *Your Scotland: Your Referendum* (January 2012), para 2.10.

⁷ Scottish Office, *Scotland's Constitutional Future* (January 2012), Cm 8023, pp 17.

were being added, and would have risked raising doubts about the legitimacy of the referendum, with problematic implications in the event of a close ‘no’ vote.

The Scottish referendum franchise was therefore arrived at through a process of constitutional decision-making led by the Scottish and United Kingdom Governments. That process, and the precedent- and residence-based outcome that it produced, are calculated to deliver a legitimate referendum. For these reasons, the franchise chosen must be considered robust to a critique which favours models based on the United Kingdom parliamentary franchise and/ or future citizenship.

Scottish citizenship

The discussion so far has assumed that there is an identifiable category of persons who would be what Ziegler terms “citizens *ab initio*”, from which a credible franchise could be constructed. The position is though more complex and indeterminate than that.⁸ The Scottish Government’s plan is that a Scottish citizenship law would be elaborated in the eighteen-month period of transition to independence which would follow a positive vote in the referendum.⁹ It is true that the Scottish Government outlined its own position as to the content of the citizenship law in Scotland’s Future, published in November 2013. But that position must be considered provisional, and anyway lacks detail in many respects.¹⁰ A franchise based on future citizenship would therefore be difficult to operationalise in the Scottish case.

Consider first the two groups whom the Scottish Government’s intends would acquire citizenship automatically: those habitually resident in Scotland on the date of independence, and those who were born in Scotland, irrespective of their place of residence. Ziegler is clear that these groups should in principle have a right to vote in the referendum. Even in these cases, however, the post-referendum disposition of the British Government is a complicating factor. The current British Government has indicated that it might seek to withdraw British citizenship from those persons resident in Scotland at independence upon whom Scottish citizenship was conferred automatically.¹¹ As that prospect crystallises in a post-referendum context, the Scottish Government and Parliament might decide to narrow the category of those who acquired citizenship automatically, in order to permit others to retain British citizenship.

Beyond the ‘automatic’ cases, it is uncertain what Ziegler contemplates for those persons who would be eligible for Scottish citizenship around the time of independence, but upon whom it would not be conferred automatically. In his contribution, he suggests that persons given the “right of option” to become citizens are “stakeholders”, who ought to have a say over independence. He also hints that other EU and Commonwealth citizens should be normatively entitled to participate if they are “offered citizenship of [the] putative state.”

Two questions of principle may be posed here. First, which kinds of “option” or “offer” are sufficient to bring someone within the normatively favoured group? Secondly – however the first question is answered – what is the justification for denying a vote to some persons who are residents but who are not eligible for citizenship (or not eligible in the right way)? Ziegler does not offer a clear position on either of these points.

⁸ The discussion here draws upon B. Ryan, ‘At the Borders of Sovereignty: Nationality and Immigration Policy in an Independent Scotland’ (2014) 28 *Journal of Immigration Asylum and Nationality Law* 146, 147-151.

⁹ Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland* (November 2013), p 340.

¹⁰ *Ibid*, pp 271-273 and 495-499.

¹¹ Home Secretary, Theresa May, declared in the House of Commons on 10 June 2013 that “Decisions on UK citizenship are for the UK Government. Any decisions on the retention of UK citizenship by Scottish citizens after independence would be affected by future Scottish Government policy decisions.” See too the discussion in HM Government, *Scotland Analysis: Borders and Citizenship* (Cm 8726, January 2014), p 9.

In the Scottish case, there is in any event uncertainty as to who would have an option over Scottish citizenship around the time of independence. For example, Scotland's Future stated that any person with "a parent or grandparent who qualifie[d] for Scottish citizenship" could register as a Scottish citizen – but it is unclear how many generations that would cover, or how it would apply to those born before independence. Scotland's Future also recognised that persons of "good character" would be able to naturalise through residence in Scotland, but neither the qualifying period(s) nor any other requirements were specified. A further ill-defined possibility is that others could naturalise if they had "spent at least ten years living in Scotland at any time", and had an "ongoing connection" to it. Finally, it is possible that some British citizens might be free to decline automatic Scottish citizenship: this was accepted in outline in Scotland's Future, but the details would depend upon the interaction of British and Scottish law at the time of independence.

Final thoughts

In conclusion, I found Ziegler's attempt to devise a general theory of entitlement to vote in independence referendums admirable, rather than compelling. In the Scottish case, Ziegler's approach runs up against the enduringly pragmatic character of the United Kingdom's constitutional arrangements. The right to vote is not generally limited to British citizens, even for parliamentary elections. The constitutional architecture gave the flexibility to the two main protagonists to agree upon a precedent and residence-based approach to the franchise. Equally, the content of a Scottish citizenship law remains uncertain, and would not be defined until after a referendum vote.

Viewed in the abstract, it may make sense to class an independence referendum as a 'national' matter and/or to aim for the equation of the franchise with a future citizenship. The lesson I would draw for other cases, however, is that it may be difficult to apply that approach in a real situation. This will be especially true if there are many non-citizen residents with a legitimate expectation – based on precedent - of a say over independence.

Regional citizenship and self-determination

Rainer Bauböck*

In his kickoff contribution, Ruvi Ziegler argues that those who would become citizens on 'day one' of an independent Scotland should also be enfranchised in the referendum that will decide whether or not Scotland will become independent.

Ziegler suggests that “putative *ab initio* citizens of a putative state (the initial citizen-body of a new state), whether its nationality is attributed to them or they are given the ‘right of option’, are clearly stakeholders ... in an independence referendum that may bring that putative state into being.” Since I have defended a stakeholder principle for determining who should be offered citizenship and the franchise (Bauböck 2009), I need to explain why I disagree with Ziegler’s proposition. I arrive at the same conclusion as Bernard Ryan, whose objections are based on legal norms and pragmatic reasons. My argument will instead be based on democratic principles that I consider as normatively coherent and attractive even if they are not fully recognised by current laws, academic scholars or political actors.

The short version of my objection is that independent states and autonomous regions within states are polities of different kinds. What it means to be a citizen in a polity depends not only on whether a person has a genuine link to that polity, but also on its nature. The Scottish referendum will decide whether the nature of the Scottish polity will be radically changed by transforming it from a self-governing region within the UK into an independent state. The outcome of this decision must not be preempted by enfranchising those who would become citizens of an independent Scotland. Instead, the only legitimate franchise is the existing one for Scotland as an autonomous territory of the UK.

Consider first the puzzle why UK citizens who are born and reside in England, Wales and Northern Ireland do not have a vote in the referendum. They are certainly stakeholders in the UK-wide polity. If Scotland became independent, this polity would be quite radically changed. Isn’t an independence referendum exactly the kind of constitutional transformation in which all citizens have to be enfranchised, including those living permanently abroad, as David Owen has cogently argued (Owen 2010)? Ziegler points out how “a ‘Yes’ vote affects the lives of putative Scottish citizens” on Scottish independence. But doesn’t it at least equally affect the lives of citizens in what has somewhat prematurely been labelled rUK (the rest of the UK). Without Scotland on board, it is more likely that Conservative governments will stay in power in London and that a future referendum on UK membership in the EU will result in Brexit. Why is this not enough to give them a vote in the referendum?

One answer is that if independence depends on a majority of all British citizens voting for it, then Scotland has of course no effective right to self-determination, since its residents will be outvoted by an overwhelming majority of rUK citizens. This leads to the crucial follow-up question: why does Scotland have a right to self-determination that excludes votes from UK in the first place?

Legally, the answer to this question is clear: because Westminster has accepted that Scotland can decide unilaterally on its territorial status. The Scottish right to self-determination has thus been agreed to by democratically elected representatives of both sides in the dispute: the British and the Scottish governments. This is a rare case. More frequent are conflicts in which the central government denies the right to self-determination of an autonomous territory, as the Spanish government currently does in response to Catalan demands for an independence referendum. The fact that the Spanish constitution rules out unilateral self-determination by any part of the “indivisible Spanish nation” does not settle the matter from the democratic perspective. If Scots can unilaterally determine the future

* European University Institute.

status of their territory, why shouldn't Catalans have the same right? In other words, in the absence of a consensus, what else could ground a right of self-determination through a democratic vote?

The case of Kosovo provides an answer to this question. Unilateral secession from a state can be legitimate if the central government of a state violates fundamental rights of the inhabitants of a province, abolishes their previous rights of self-government or tries to change the demographic basis of their autonomy through ethnic cleansing and settlement policies. Self-determination becomes then a remedial right that can be exercised against the will of the central government.

I do not think that self-determination claims in Catalonia, Quebec, Flanders and other provinces that enjoy robust autonomy qualify as remedial. This does not settle the issue since it is possible to argue that the Madrid, Ottawa and Brussels governments ought to consent to self-determination referendums for the same pragmatic reasons as London. In Quebec two such referendums were held in 1980 and 1995 and in 1998 the Supreme Court of Canada stated that, although Quebec does not have a right to self-determination under international law or the Canadian Constitution, the federal government would have to enter negotiations if another referendum resulted in "a clear majority vote in Quebec on a clear question in favour of secession."¹² I leave it to other contributors to further explore such non-consensual and non-remedial cases and will instead focus on how this distinction bears on the first question asked in this forum debate: Should the franchise in independence referendums depend on whether self-determination is remedial or consensual?

Where an independence referendum is clearly remedial, as the one held in 1991 in Kosovo in response to Milosevic's abolition of Kosovo autonomy was, the solution proposed by Ziegler seems the right one. When a constitutionally guaranteed right of a political community to self-government is abolished, those who would become citizens of an independent state should have the right to decide on whether they support this outcome. There are several qualifiers to this proposition: it may be practically difficult to create a voter registry that includes those driven into exile some time ago, especially in a situation where a central government tries to prevent the referendum from happening. And even a remedial right to self-determination does not imply a right to exclude residents from the franchise and future citizenship on ethnic or other discriminatory grounds. If secessionists claim jurisdiction over a certain territory, they must grant the franchise and future citizenship to all legitimate residents in this territory – which still allows for the exclusion of recent settlers brought in to change the demographic composition of the population. But the normative reason remains clear: the decision about the future independence of a region need not be taken exclusively by those previously enfranchised in regional elections, if there is no more effective regional self-government and citizenship as a legitimate basis for this franchise.

Whereas remedial self-determination involves a decision whether to **replace** an abolished regional citizenship with citizenship in an independent state, consensual self-determination involves a decision whether to **upgrade** an existing regional citizenship into that of an independent state. And this decision should be taken by those who are currently voting citizens of the region. It seems to me illegitimate to preempt the outcome of such a decision by enfranchising putative citizens who do not have a right to vote in regional elections now and who will also not gain a future right to vote in case of a 'No' outcome. My concern is not how enfranchising persons born in Scotland who reside in London, Brussels or Boston would affect the referendum result. It may well be that a majority of these putative Scottish citizens would prefer Scotland to remain in the UK so that they do not risk losing their EU passports. I am raising a principled objection: The putative demos of an independent Scotland should not replace the existing demos of Scotland as part of the UK in a decision about independence because currently only the latter but not the former can be considered as democratically legitimate.

This brings me to the second question asked in this forum: Who should be the citizens of newly independent states? Our previous discussion would be pointless if the answer were: exactly the same

¹² Cf. re Secession of Quebec, [1998] 2 S.C.R. 217.

as the current regional citizens. But regions and independent states are polities of different kinds and their membership rules differ accordingly. All citizenship laws of independent democratic states are based on birthright (i.e. some mixture of *ius soli* and *ius sanguinis*) and provisions for naturalisation and voluntary renunciation of citizenship. These rules create often large discrepancies between residents and citizens with significant numbers of non-resident citizens and non-citizen residents. By contrast, the citizens of autonomous regions in democratic states are in most cases the citizens of the wider state who take up residence in the region. There is no birthright, naturalisation, or renunciation, and thus also no external citizenship that would allow emigrants originating in the region who do not maintain a residence there to cast votes in regional elections.

The Scottish case is slightly unusual because the franchise in Scottish Parliament elections includes not only British, Irish and qualifying Commonwealth citizens who can also vote in Westminster elections, but even citizens of other EU member states. As Ziegler points out, the latter would not automatically become Scottish citizens in case of independence but would have to opt in through naturalisation. Is this a problem for the legitimacy of the Scottish referendum? I do not think so. It is certainly not illegitimate for a region to extend its citizenship to residents who are not citizens of the larger state. We find this extension in local elections in fourteen European states where the franchise is granted to all residents independently of their nationality. If all of the currently enfranchised citizens of Scotland as a region of the UK have a legitimate vote in regional elections, it would be wrong to exclude them from the decision on a fundamental change of the territorial status of the region.

Who should then become citizens of an independent Scotland? On this point, I do not have any major disagreement with Ziegler's helpful discussion of international legal norms for initial determination of citizenship in case of state succession or with the respective proposals in the Scottish government's White Paper. What we need to understand is that these norms address the specific task of setting up a birthright citizenship regime for a newly independent state that necessarily differs from whatever rules had previously existed within an autonomous region. Just as we must distinguish the initial collective determination of automatically included citizens on day one of an independent state from the ongoing individual determination under a regular citizenship law, so we ought to distinguish existing regional citizenship from initial determination at independence. Independence referendums are procedures that provide democratic legitimacy to the transition from regional to independent-state citizenship. But they must not blur this distinction. If the moral basis for self-determination exercised in this way is consent rather than remedial justice, then the vote belongs to the regional citizens who should decide on whether they want to change their region's status through secession.

A Matter of legitimacy?

Dimitrios Kyritsis*

Democratic rule aspires to an ideal of universal political participation. Within national political communities, this ideal has historically manifested itself in a demand for the extension of the franchise. But outside that framework the ideal is fraught with ambiguity.

One of these ambiguities concerns procedures that aim to establish a national political community from scratch, as illustrated by debates about the franchise in the Scottish independence referendum. As things stand, if you were born and grew up in Scotland but reside elsewhere, say in England, you do not have a right to vote in the referendum. This is so despite the fact that, were Scotland to become independent, the Scottish government has committed to granting you citizenship *ab initio*. I do not doubt that the interests of political expediency and national myth-making might recommend that the franchise be extended to you. But it strikes me that no duty is breached if this does not happen. In his kick-off contribution, Ruvi Ziegler claims otherwise. He not only contends that giving the right to vote to potential *ab initio* citizens who are non-residents is ‘highly desirable’ but that not doing so ‘may undercut the legitimacy of the referendum’. The latter statement suggests that, for Ziegler, something in the vicinity of a mandatory norm will have been breached. Here, I shall offer some arguments against this thesis.

Ziegler advances two reasons for his view. First, he says, we ought to extend the franchise to all potential *ab initio* citizens because independence referendums ‘meaningfully and directly’ affect their legal options. Granted, this feature of independence referendums may serve to distinguish them from political procedures that have no similarly momentous effect. But the principle that we ought to participate in all the political decisions that profoundly affect us is not a sound one. That principle would give Venezuelan citizens a say in US energy policy, for instance. It would require that (many) citizens of Central American states participate in the design of US immigration policy. Notice that in both examples US policy is foisted upon someone. The situation is markedly better for those potential *ab initio* citizens of an independent Scotland who are not eligible to vote in the referendum. According to the ILC Draft Articles, they must be given the right to accept or reject Scottish citizenship. Thus, if the principle is not valid in the case of the Venezuelans, surely it cannot be for the disenfranchised Scots-to-be. That is not to say that the latter have an easy choice to make. Some of them may face the dilemma of trading one nationality for another. Still, there is no general duty to give people easy choices, especially when those choices basically add new - morally permissible - options to the ones that existed before.

Second, Ziegler maintains that the extension is required to remedy the mismatch between the group of people who will decide on independence and the group of *ab initio* citizens. Arguably, the mismatch smacks of arbitrariness, and arbitrariness is the kind of thing that ‘undercuts’ political legitimacy. But it is not clear why this particular mismatch is arbitrary in a sense that is crucial for legitimacy. Consider a restriction on the right to vote in the referendum along racial lines. What makes it illegitimate is its illicit ground. Ziegler owes us an analogous argument. Perhaps he thinks that the status of *ab initio* citizenship is a sufficient (though not necessary) condition for the right to vote on independence. I beg to differ. If anything, it is those who will become systematically subject to the coercive force of the new state from day one just by virtue of their residence that have the most pressing interest to decide on independence, whether they will be citizens or not. Conversely, for the non-residents who can become *ab initio* citizens, this status is - given their right to choose - little more than some sort of premium membership. You can throw in the right to vote if you want, but you don’t have to.

* University of Reading.

Where do these arguments leave us? Even if I am right that Ziegler does not dent the legitimacy of the Scottish independence referendum, his proposal touches on an important issue. Ours is a world of states whose existence, boundaries and membership (not to mention relative wealth and power) are to a large extent the product of force and historical contingency. This raises a host of challenges, which we encounter time and again in debates about immigration, global justice, humanitarian intervention, the obligation to obey the law and so forth. Understandably, we want to ensure that at least new states will be built on more rational foundations. Ziegler's proposal focuses our attention on this worthwhile project.

Who votes in a referendum? General comments and some facts concerning Québec

Guy Laforest and Eric Montigny*

In critical essays on constitutional referendums, Patrick Taillon and Stephen Tierney have argued that the crucial difficulty is to identify the People, the Demos.¹ In other words, the first question is to determine who is substantively concerned by the ballot question (who are the legitimate stakeholders, as argued by Rainer Bauböck in his own commentary in this forum). In light of its own experience with referendums, Québec is a good case study. The aim of this contribution is to comment on some of the larger issues debated by Ruvi Ziegler and others in this forum, and further to explain the rules that are currently in place in Québec on voter eligibility.

General comments

On matters of referendums, consistent normative logic does not always work. To give but one example from the current debate, Rainer Bauböck in his own contribution recalls that, beyond the issue of the franchise, unilateral secession can be rendered legitimate if the central government of a state has violated the fundamental rights of the inhabitants of the seceding province or abolished their previous rights to self-government. Sometimes, reality can be more complex. It is possible to imagine a situation whereby the central government has substantially reduced, rather than abolished, the rights to self-government of the inhabitants of the seceding jurisdiction. Context, here, would require further normative reflections. On the issue of the franchise at the heart of the current debate, our core argument is as follows: gaining consensus between central and sub-state government is more important than maintaining consistency between pre- and post- independence enfranchisement.

Ruvi Ziegler, examining the Scottish case, argues that those who will be offered Scottish citizenship after independence should also be entitled to vote in the referendum in which the matter will be decided. He argues on the side of normative clarity and consistency. Bernard Ryan replies by siding with the pragmatic political and constitutional arrangements at work in the United Kingdom, which apply to the upcoming Scottish referendum the rules allowing European Union and Commonwealth citizens to vote at devolved and local elections. In the end, we believe that consistency between past and present democratic rules should prevail in this case over consistency about matters as they stand and democratic citizenship rules for the future. Rainer Bauböck makes a similar point in his comment, arguing that the rules guiding normal sub-state elections in Scotland should also apply to an independence referendum. However, the foundations of his reasoning are different from ours. Bauböck starts from the idea that the sub-state demos is substantially different from the demos of an independent state, before moving to the issue of consistency. We would rather argue that the most important dimension, on the issue of the franchise and on many others, has to do with the existence of an [overall agreement between the British and Scottish governments](#), arrived at on 15 October 2012. Concerning independence referendums, nothing is more important than reciprocal consent and respect between the existing state and secessionist authorities. At least in part for reasons of consistency, we believe that the provision allowing young people, 16 and 17 years of age, to vote in the upcoming Scottish referendum, is wrong. This is, however, the kind of inconsistency we can live with because it was one element in the contours of the compromise between British and Scottish authorities. We will reformulate our core argument after having looked at the case of Québec.

* McGill University and Université de Laval.

¹ Patrick Taillon, [Le référendum expression directe du peuple : Essai critique sur la rationalisation de l'expression référendaire en droit comparé](#), Paris : Dalloz, 2012. See also Stephen Tierney, [Constitutional Referendums : The Theory and Practice of Republican Deliberation](#), Oxford: Oxford University Press, 2012.

Referendums in Québec and the electoral system

Over time, Quebecers have experienced different types of referendums (always non-binding, following the logic of Westminster-based parliamentary democracy); three were initiated by the Canadian federal parliament and four by their own legislature. The two most famous ones dealt with sovereignty-association in 1980 and with sovereignty-partnership in 1995.

As citizens of the Canadian federal state residing in the province of Québec, Quebecers are entitled to vote at both regional and national levels². Jurisdiction over the electoral process is shared by both levels of government, under the umbrella of the judiciary, including the Supreme Court of Canada which sits as Canada's final court of appeal.

Two main laws stemming from the National Assembly of Québec govern the electoral system in the province. Adopted in 1978, the [Québec Referendum Act](#) is still in force. It includes provisions regarding the obligations to form a Yes and a No 'camp', to establish a Referendum Council, and to regulate financing. For other matters, such as the eligibility to vote, the Referendum Act refers to the [Québec Election Act](#).

Qualified electors

According to the Québec Election Act, mentioned above, in order to be able to vote in a referendum in Québec, one has to be a qualified elector. The act applies age (18 years) and Canadian citizenship requirements.

To be a qualified elector, one must also have been domiciled in Québec for six months. For most electors, this is easy to demonstrate. This provision could face interpretive difficulties for newcomers or for students born elsewhere in Canada. The domicile of a person is the domicile established under the Québec Civil Code.³ It means that it has to be one's main address and that this person has expressed in practice her or his intention to consider it as such. A [debate on the status of residency](#), initiated by McGill University students, occurred in Court before the 2014 election. Most of the cases submitted to the Court [were rejected](#). Moreover, one year after the referendum of 1995, students of Bishop University were [found guilty of voting without being Québec residents](#). Robert Ghiz, currently Premier of Prince Edward Island, was studying at Bishop University at the time and [admitted to voting in the 1995 referendum](#). In that respect, a person who is deprived of voting rights pursuant to Québec laws (Election Act, the Referendum Act, the [Act respecting elections and referendums in municipalities](#) or the [Act respecting school elections](#)) is not allowed to vote.

A permanent list of electors

Since 1995, Québec has chosen to put in place a permanent list of electors. This list consists of the information contained in the register of electors and the register of territories. According to the Election Act, this information shall include the name, domicile-based address, gender and date of birth of each elector.

The information relating to electors is updated on the basis of the information transmitted to the Chief Electoral Officer. This information could come directly from electors, from the school boards, the Public Curator, the Chief Electoral Officer of Canada and the Department of Citizenship and Immigration of Canada. In practice, it comes essentially from the Régie de l'assurance-maladie du Québec. This agency has to notify the Chief Electoral Officer of any change in the name, address, date

² Note that many electors in Québec consider their province to be the "national" level.

³ See [articles 75 to 83 of Québec's civil code](#).

of birth or gender of a person whose name is entered on the permanent list of electors, as well as the date of the person's death. The same applies for a person who has informed the Régie that he or she has acquired Canadian citizenship or who is about to reach 18 years of age, at least six months before the person's eighteenth birthday.

Alternative voting procedures and voting outside Québec

The Québec Electoral Act provides many different ways for electors to express their vote beyond the regular practice of voting in one's residential neighborhood. First, electors can vote at the returning officer's main office or branch offices. Second, the practice of early voting is gaining in popularity.⁴ Since 2014, it is possible to vote on the campus of a vocational training centre or a post-secondary educational institution. Finally, postal voting is permitted. The latter method is available to electors who are incarcerated but also to electors residing outside Québec. The latter case is crucial to our current discussion.

Voting by electors residing outside Québec was in force for both the 1992 and 1995 referendums. Electors that register to vote outside Québec were deemed to be domiciled at their Québec address. They had to demonstrate that they had left Québec temporarily after being domiciled in Québec for 12 months. They were able to vote outside Québec for two years after their date of departure.

This two-year limit did not apply to an elector, and her or his spouse, posted outside Québec working for the governments of Québec or Canada, or to an employee of an international organisation of which Québec or Canada is a member and to which it pays a contribution. An elector who wished to vote outside Québec had to file and sign a request including the following elements: name, sex and date of birth; domiciled address in Québec or last domiciliary address in Québec; date of departure from Québec; projected date of return to Québec; and postal address outside Québec. In addition, the person had to complete a declaration stating that he or she intended to return to Québec.

As shown on table 1, no more than 3,000 electors registered to vote outside Québec in the 1992 referendum. In 1995, 15,000 electors registered. Their [participation rate was close to 80%](#) in both referendums.

Referendum of	1992	1995
Number of constituencies	124	125
Number of electors	3,086	14,818
Yes option	1,343	2,533
No option	1,089	9,016
Number of valid votes	2,432	11,549
Number of rejected votes	32	168
Total of votes	2,464	11,717
Participation rate	79,8%	79,1%

⁴ [19% of electors used the early voting option](#) in the Québec election that was held on 7 April 2014.

Conclusion

Since 1980, Québec's democracy has experienced three referendums on its constitutional future. The Referendum Act and Election Act are permissive regarding eligibility. If one is a Canadian citizen, one can vote even if one has been a resident for only six months. Postal voting is also available for electors residing temporarily outside Québec. Nevertheless, to be a qualified voter, one must demonstrate that one has the will to contribute to the future of Québec and to be a member of the political community. In summary, one has to be a Quebecker, and this notwithstanding a temporary residence outside Québec. For normal elections and for referendums, those are the rules of the game.

However, the legal and normative rules of the game are not everything in matters of referendums. Issues of political culture, dimensions related to the existence of a form of mutual respect and trust, however thin and limited, between key players, are of fundamental importance. At the time of the two secession referendums in Québec, there was no such trust and respect between the governing authorities of Québec and of Canada.⁵ This is the greatest difference between the current Scotland-UK case on the one hand, the past Québec-Canada case and the current stalemate in Catalonia-Spain on the other hand. The politics of referendums requires consistency and as much consent as possible in the circumstances.

⁵ See [Tierney](#), p.144 and p.297, for a discussion of the background of the Québec referendums and of the 1998 Belfast ('Good Friday') Agreement.

A Catalan perspective: franchise in a forbidden referendum

Jaume López*

My contribution to this debate will offer what might be called "a Catalan perspective" in light of the impending 9 November 2014 vote on the political future of that region/nation.

Let me note at the outset that I agree with [Rainer Bauböck's position](#) on the question who should vote in a referendum on the political future of a region or stateless nation (which includes the decision whether or not to become an independent state). Persons who participate in the regional elections of the territory that aims to change their political status should vote, not potential future citizens of a possible new state.

I agree with his reasoning, and I think it could be also applied to a referendum on the future of Catalonia, even if it is neither a classic case of remedial self-determination, nor of a consensual one. I do think it is a question about upgrading the status of a polity, for the question in Catalonia is a double one: 1) Do you want Catalonia to become a state (which can include a federal or confederal relation in/within Spain); 2) If the first question is answered affirmatively: Do you want Catalonia to become an independent state? The present autonomy can thus be upgraded in different ways. I also think that it has remedial features, for only the continuous negative response of the Spanish state to federal reform and its failure of recognition of the Catalan identity explain the massive increase in support for a referendum and also for independence (about the 50% of the Catalan population, [see here](#)). In Albert Hirschman's terms, the Catalonian voice has repeatedly been ineffective in bringing about reform and this has strengthened the exit option (Hirschman 1970).

The inclusion of two questions locates the Catalan case in between an internal self-determination process that would create a federal state and an external one that would create an independent state. The right to decide as a vague concept has played the main role in all the social and political demands. It has been at the centre of some of the most important demonstrations ever held in Catalonia. From my point of view we cannot simply equate an external right to self-determination with a right to decide. I think that the Advisory Opinion of the International Court of Justice on Kosovo's independence provides a better theoretical and legal basis for this new concept of the right to decide. I disagree on this point with Bauböck. Although it is true that Kosovo was a case of remedial secession, the ICJ opinion offers three exhaustive bases of legitimation: non-productive negotiations, democracy, and peaceful ways, all of which are clearly present in the case of Catalonia. The Catalan sovereignty demands can be better understood as a right of the present demos to decide on its future rather than as a more traditional right to self-determination of peoples and nations. But this is certainly another debate.

Is the view defended by Bauböck the one that is going to be applied in Catalonia in order to define who is entitled to vote in the upcoming referendum? Possibly not. 'Possibly', because Catalonia has not yet adopted legislation defining who will be able to vote in the impending referendum. 'Not', because a draft bill was tabled on 16 July 2014 with a view to a parliamentary debate in the Catalan Parliament at September, and this draft bill does not draw a clear distinction between regional voters and future citizens.

The fact that, four months before such an important referendum, enabling legislation has not yet been passed by the Catalan Parliament reflects in part the particularity of the Catalan sovereignty process. At present, it is unclear whether a referendum will be held, in view of the Spanish government's objection which it has repeatedly voiced in the Spanish parliament. The difference between the UK-Scotland and the Spain-Catalonia processes is remarkable and explains, in part, why

* Pompeu Fabra University.

the Catalan Parliament wants to pass an act authorising 'political consultations'. This strange name is due to the fact that, the Spanish constitution reserves the power to hold referendums to the Spanish state, and prohibits the holding of referendums by regional governments, including Catalonia's. On 8 April 2014, the Spanish Parliament voted against authorising the Catalan Parliament to legislate for a referendum.

Article 2 of the Spanish Constitution proclaims 'the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards', on the one hand, and 'recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed', on the other hand. The unresolved tension between these two principles has hampered full recognition of Spain as a plurinational democracy. In his recent coronation speech, the new King Philip claimed that Spain is a 'united and diverse nation', emphasizing the common idea that Spain is a nation, and not a multinational state.

It is clear that the distinction between holding a consultation and holding a referendum is confusing and can only be explained by the current political context. On the one hand, according to the Spanish Catalan Statute, approved by Catalans in referendum in 2006 and amended by the Constitutional Court four years later, the Catalan government can develop ways to improve democracy and consultation with Catalans. On the other hand, according to the Spanish Constitution, only the Spanish Parliament can hold binding and non-binding referendums (as, for example, the 2005 referendum on the EU Constitutional Treaty). The question is: what does a 'political consultation' mean in the Spanish legal landscape? Is it in fact a non-binding referendum that cannot be called a referendum, but could have strong binding effect? This would be the case if a majority of Catalans clearly express their desire for Catalonia to become a new state.

These elements affect the franchise. First, legislators must try to distinguish between a consultation and a referendum. Thus, the proposed eligibility for participation in the November consultation is not based on the general electoral register (which is 'owned' by the Spanish government), but on a new register that draws from all the municipal registers, basing the franchise on residence rather than citizenship. In addition, persons above the age of 16 will be able to vote, whereas in constitutionally regulated referendums and representative elections only those who are 18 years or older are entitled to vote.

Furthermore, according to the draft bill, apart from regional electors (Spanish citizens ordinarily resident in Catalonia), citizens of other EU states resident in Catalonia for more than a year and registered therein would be eligible to vote, whereas citizens of non-EU states must satisfy a three years registration period from the day they have obtained a residence permit in Catalonia. Catalans residing abroad may vote in the consultation if they register in a voluntary registry, while Catalans who live and are registered in the rest of Spain will not be able to vote. Catalan MPs may have been inspired by the arrangements made for the Scottish referendum. Drawing a distinction between residents (the requirement of one or three years' residence) based on their nationality (EU/non-EU) seems very questionable.

I would argue that the proposed franchise is fundamentally mistaken. On the one hand, it seems clear that the nature of a vote on the political future of Catalonia (which includes the possibility of independence) is very different from other types of referendums. On the other hand, it makes no sense that someone who cannot vote for the regional parliament can decide if Catalonia should change its present status.

Although there is no Catalan citizenship as such, the legal status of Catalans is clearly defined in Article 7 of the Spanish Catalan Statute: '1. Spanish citizens legally resident in Catalonia benefit from the political status of Catalans or citizens of Catalonia. Their political rights are exercised in accordance with this Statute and the law. 2. Spanish citizens resident abroad whose last legal place of residence was Catalonia also enjoy, as Catalans, the political rights defined by this Statute; their descendants, who maintain this citizenship, shall also enjoy these rights, if they so request, in the

manner determined by law.’ Article 7 defines who is entitled to vote in the regional elections. In other words, the Catalan demos. Not the Catalan nation. Not putative citizens of a Catalan state. It is this demos which should have the possibility to vote on any upgrading of the current status as an autonomous community of the Kingdom of Spain, including the possibility to become a new independent state.

Polish migrants in Scotland

Derek McGhee and Emilia Pietka-Nykaza*

The Scottish Independence referendum is a historic event, as an independence referendum being held in an existing EU member state is unprecedented (Shaw 2013: 13). Independence referendums are unlike other sub-national elections, as they address questions that as Ziegler notes in this Forum ‘are qualitatively different from the issues raised in elections for sub-units of a state’. The fact that the outcome of the referendum could disrupt Scotland's and the UK's continuing EU membership is of particular concern for EU migrants living in Scotland. We will return to concerns over continuing EU membership and other related issues (including the link between sub-national election rights and naturalization) at the end of the contribution.

This contribution primarily concerns a particular aspect of what Bauböck (2005) might call EU migrants’ sense of having ‘a stake’, or being ‘stakeholders’. Thus, we examine how some of the Post-Accession¹ Poles in Scotland (it should be noted that Post-accession Poles are Scotland's largest minority group²) we interviewed³ perceive their eligibility to vote in this referendum. What we were particularly struck by in our interviews was the number of our participants who referred to their inclusion as eligible voters in this referendum either as a privilege or as a burden. Both of these perceptions offer opportunities for deepening our appreciation of the experience of being a ‘stakeholder alien’ in this historic referendum.

The participants who perceived their voting rights as a burden struggled with the decision whether to vote in the referendum. There were two main reasons that a number of our participants gave for this contemplation. The first reason was related to the question whether migrants in Scotland have a moral right to vote and decide about independence of a nation state they are not citizen of. The second reason was that migrants did not want to exercise a right that might contribute to an outcome that their hosts might not desire. Thus, their response was a matter of taking on the role of the considerate guest who does not want to be seen to be abusing their host's kindness and hospitality:

“I know that I have a right take part in referendum, but do I have a moral right to do so? (...) If someone is asking about my personal opinion whether Scotland should be independent, I would say no, I think it should remain in the UK. But if someone is asking me do I feel that I should decide after 7 years of living in this country? I think I don't. I think I won't be voting because I can contribute to the decision that could make them [Scots] unhappy.”

Jan, age 57, warehouse worker, Glasgow

In a sense, participants such as Jan are exhibiting a sophisticated understanding akin to Derrida's (2000a, 2000b, 2005) insistence on the impossibility of 'pure' or 'absolute' hospitality. For Derrida, hospitality is precarious and conditional. That is, conditional on the host's continuing favourable attitude to their guest(s). As well as exposing the migrants' perception of the precariousness of hospitality, Jan is also articulating what Richard Sennett calls a code of honour. Following Bourdieu, Sennett considers honour to suppose that 'an individual who sees himself through the eyes of others, who has need of others for his existence, because the image he has of himself is indistinguishable from

* University of Southampton.

¹ Post-accession migrants are the citizens of the eight countries that joined the EU in 2004 (the Czech, Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia).

² According to the 2011 Census for Scotland, the number of Polish migrants living in Scotland was 55,231. See [National Records for Scotland](#).

³ This was a small-scale mostly qualitative study. We do not intend to generalise findings, nor do we claim that outcomes are representative of all Polish migrants in Scotland. We conducted an online survey, 250 participants completed the survey between April-June 2014, and 24 individual in-depth interviews with Polish Adults, 12 in Glasgow and 12 in Edinburgh, between May and June 2014. We anonymised the names of all participants.

that presented to him by other people' (Bourdieu, in Sennett 2003: 55). In this context, being honourable and honouring the host is an expression of gratitude which acknowledges a conditional welcome and the risks of appearing ungrateful (to one's host), as such gratitude has 'survival value' (Komter 2005: 57). From Jan's perspective, his decision not to vote is in a cycle of gift (the vote) and counter-gift (deciding not to vote) that from Jan's perspective is essential in sustaining social ties and social cohesion (Komter 2005: 57) in his adopted country.

In contrast, other participants viewed their inclusion in the referendum as a more straightforward and unconditional gift or privilege. That is, as something Scotland has given EU migrants voluntarily without them asking or demanding this right. For a number of participants, this gift or privilege was seen as 'form of gesture' and recognition of migrants' presence and contribution to hosts communities.

"I think it's a form of gesture and a way of showing one's trust, because, on one hand, I think if one has lived here for a number of years, one should be considered a citizen of this country (...). I think it was a very valid and positive gesture, because no matter how you look at it, the immigrants who come here not only join the army of labour but also settle down here and contribute to the economy, plan their lives here and shape the culture of the country, and so I think they should totally have the right to vote as well."

Marta, 28, Web developer, Glasgow

The gift or privilege of being eligible to take part in the referendum was also associated with the need to reciprocate, 'give back'. This sentiment was expressed by Anna:

"I feel that taking part in referendum is my privilege because I am not a citizen of this country. In Poland this is my duty, but here this is my privilege (...) the implications of this referendum are huge, thus this is huge decision. Because I'm eligible to vote I want to learn and know more and be able to decide wisely and responsively."

Anna, 42, Teacher of German language, Glasgow

Here, the perception of Marta's and Anna's right to vote in the referendum is regarded 'as a sign of honour, respect, and appreciation' (Komter 2005: 45). This was articulated by another participant thus:

"...it makes me feel appreciated that Scots decided that because I live in this country I am eligible to take part in the referendum."

Marek Psychotherapist, 44, Edinburgh

There are some similarities between the Polish Migrants who have decided to honour or show respect to their hosts through not voting, and others who feel 'honoured' by what they perceive as the gifted privilege (rather than the right) to vote in the referendum. Both responses feature the necessary ingredient of inequality in the gifting or exchange process which, from a Maussian perspective, leads to those who benefit from the gift wishing to give something back even if they cannot give back an equivalent (Wise 2009: 11). Thus, they reciprocate through voting or not voting, depending on what they perceive to be the proper way of honouring the gifted privilege they believe the Scots have bestowed on them. What is common to both responses is they want to 'do the right thing' with these gifts. According to Wise's reading of Mauss, these exchanges have the effect of turning people outward of producing a more general disposition of trust (Wise 2009: 17). Cheal takes this one step further when he says that the circulation of gifts underpins the moral economy, that is, a 'system of transactions which are defined as socially desirable (that is, moral) because through them social ties are recognized, and balanced social relationships are maintained' (Cheal 1988: 15 and 19). That being said, Jan's response to the situation is more complex than Marta's, Anna's, and Marek's. Jan did not want EU migrants' participation in the Scottish Independence Referendum to impact negatively on what he perceives to be the current pro-migration attitudes in Scotland. Jan's response presents a degree of anxiety and powerlessness, which evokes the other side of the migrant experience where, there are concerns that conditional hospitality can turn to hostility, in the context of the unstable pairing of hospitality/hostility (Derrida 2000: 3).

Many of our participants perceive what they consider to be the potential 'strings attached' to their inclusion in the referendum electorate. Just as Caplow observed, in terms of interpersonal gifts, the majority of gifts are given in order to ascertain and fortify relationships that are deemed important but have not yet been stabilized (Caplow, in Komter 2005: 47). Although we have found that, for a number of our participants who feel the warmth of recognition, honour and being part of this historic process, reciprocation of the perceived gift or privilege of referendum electorate inclusion could well have a stabilising effect, we note that this stabilising effect in terms of the obligations and the compulsion to 'give something back' to Scotland for those who intend to honour the perceived privilege of election right inclusion by voting in the referendum was not in turn articulated in longer-term naturalisation plans. What did emerge in our interviews was a yearning for clarification and certainty in the context of the uncertainty the referendum has generated for EU citizens as to what their status as EU citizens of an independent Scotland will be. Thus, clarification of their 'long-term alienage' (Shaw 2007: 70-71) was more salient than naturalisation for these particular stakeholders in this referendum.

What we observed was that the Poles' 'stakeholdership' as migrants did not seem to follow Bauböck's assumptions that limited (sub-national) voting rights should lead to naturalization by application (Bauböck 2005: 686).⁴ Shaw notes regarding Bauböck's definition of stakeholder citizens that 'long-term alienage' seems to be excluded as a possibility for migrants (Shaw 2007: 74). On the whole, our participants are intent on and content with remaining EU citizens living in Scotland. With regard to the referendum, they desire to have their legal status (in terms of rights and responsibilities) as EU citizens living in a potentially independent Scotland more clearly articulated in the future.

⁴ According to the White Paper, applications for naturalisation will be possible for migrants who can prove they have resided in Scotland for ten years at any time and have an on-going connection with Scotland ([Scotland's Future 2013: 496](#)). It may well be that for those who are resident the qualification period may be shorter, e.g. five years.

Scotland's independence referendum, citizenship and residence rights: Identifying 'the people' and some implications of *Kurić v Slovenia*

Jure Vidmar*

Writing in 1956, [Ivor Jennings](#) famously stated: “On the surface...[the right of self-determination] seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide unless somebody decides who are the people” (Jennings 1956: 56). This statement can also be read more broadly and the question can be asked whenever we refer to the democratic ideal of decision-making in accordance with *the will of the people* – who is that? Voting results can be distorted if the concept of the people is either too exclusive or too inclusive. Ruvy Ziegler argues that in the case of Scotland it is both. In contrast to Ziegler, I will argue that there are in fact two concepts of the people of Scotland: one for the purposes of voting in the referendum, the other one for the purposes of obtaining Scottish citizenship. They regulate inclusion and exclusion differently.

To illustrate Ziegler's point, Hamish, who has just graduated in his native Scotland, packed up his bagpipes and moved to Amsterdam, *cannot* vote at the independence referendum. Nevertheless, should Scotland become independent, Hamish will become its citizen. On the other hand, Slawomir, a Polish plumber who has recently moved to Glasgow, *can* vote at the referendum. Yet, even if Slawomir wholeheartedly supports Scotland's independence, he will not automatically become a citizen of the new state. Hamish and Slawomir belong to the people of Scotland for different purposes. I do not think that this differentiation is a bad thing or even uncommon in international practice. I will discuss the Scottish identification(s) of the concept of the people in light of this practice, and also pick up on Ziegler's point on the implications of the vote for EU citizenship rights.

By reference to Jo Shaw, Ziegler mentions several [models of awarding citizenship](#) that have been followed in the wave of post-1990 new state creations. In the territory of Yugoslavia, for example, citizenship was generally extended to all permanent residents of a certain former federal republic. This conclusion needs to be qualified, though. Yugoslavia was a federation that also knew the concept of the so-called 'internal citizenship'. The latter was not awarded territorially but by bloodline. Slovenia may be a particularly instructive example in light of the 2012 European Court of Human Rights (ECtHR) decision in *Kurić v Slovenia*. I will first present possible implications of this decision for Scotland and then develop an argument against an overlap between the two concepts of 'the people' of Scotland.

In the 1990 independence referendum, Slovenia enfranchised both its 'internal citizens', wherever they lived, and all permanent residents of Slovenia. The outcome was that 88.5 per cent of all those eligible to vote favoured independence. When Slovenia became independent, it automatically extended citizenship to any person who had been its 'internal citizen'. Permanent residents were given the opportunity and a window in which they could *opt* for citizenship, but they did not acquire it automatically. Those who did not apply or missed the deadline were simply erased from the registry of permanent residents. The group of the so-called erased residents was thus created, that is, people who lost their previously-acquired residency rights in Slovenia.

It was Slovenia's argument in Strasbourg that members of this group were offered full citizenship rights, and that failing to take up the offer was their fault. The Court did not accept this argument and held in [para 357](#):

“[A]n alien lawfully residing in a country may wish to continue living in that country without necessarily acquiring its citizenship. As shown by the difficulties faced by the applicants, for many years, in obtaining a valid residence permit, the Slovenian legislature failed to enact provisions aimed at permitting former SFRY citizens holding the citizenship of one of the other republics to

* University of Oxford.

regularise their residence status if they had chosen not to become Slovenian citizens or had failed to do so. Such provisions would not have undermined the legitimate aims of controlling the residence of aliens or creating a corpus of Slovenian citizens, or both.”

Following this logic, once you have legally established permanent residency, you keep the right of residence, even if the legal status of either your home or your host state changes and, as a result of this change, your new citizenship status alone would no longer give you a right to residence. What matters is that you had the right *at the moment of* the change of the territorial status. It is notable that the Court established that non-citizen residents enjoy this guarantee under [Article 8 of the European Convention on Human Rights \(ECHR\)](#) (the right to private and family life) in their own right; it does not depend on, for example, a family relationship with a citizen of the host state.

In the context of the Scottish referendum vote, this decision has implications for the following groups: (i) potential future Scottish citizens residing in rUK (the rest of the UK); (ii) potential future Scottish citizens residing in other EU member states; (iii) UK citizens residing in Scotland who will not opt for Scottish citizenship; (iv) non-UK EU citizens residing in Scotland who will not qualify or opt for Scottish citizenship. As I argue [elsewhere](#), by declaring independence, Scotland would *prima facie* also exit the EU, unless negotiated otherwise (Vidmar 2014: 25). It is thus not pre-guaranteed that the residency status of these groups would continue to be protected by EU citizenship. However, following the *Kurić* doctrine, it appears that these categories of people retain their present residence rights as an effect of the ECHR and regardless of what happens with Scotland’s EU membership. The *Kurić* doctrine thus answers Ziegler’s point that the referendum would also have meaningful effects on the citizenship rights due to uncertainty surrounding Scotland’s EU membership. Regardless of whether Scottish citizenship would carry EU citizenship and whether Scottish citizens would also keep UK citizenship, Hamish will be able to continue to reside in Amsterdam and Slawomir in Glasgow. It is true, however, that the ECHR-effect would only freeze the *existing* rights. EU citizenship as such would not be retained via *Kurić* If Scotland remains outside of the EU and Hamish does not retain his UK citizenship, he will only be able to continue to reside in the Netherlands, but will no longer be entitled to exercise EU free movement rights in e.g. Germany.

What does this analysis mean for Ziegler’s point on enfranchisement being at the same time too inclusive and too exclusive? First of all, Scotland is not entirely comparable to dissolutions of socialist federations where the concept of internal citizenship existed. Where it exists, internal citizenship is a point of reference which identifies the core of the people who decide. As shown above, this core can be expanded by permanent residents. International practice is somewhat contradictory and there are no settled rules of (customary) international law that would govern the procedural standards of independence referendums. In the absence of internal Scottish citizenship in the UK, other means of enfranchisement had to be employed. Certainly, it would be possible to argue that everyone born in Scotland should be entitled to vote, especially if this person is ultimately entitled to become a citizen. However, even this solution could be challenged with ‘hard cases’.

Imagine a person whose parents are both English, she has always lived in England, yet she was coincidentally born in Edinburgh. Why should this person be entitled to vote more than a Polish national who actually lives in Scotland, whose children go to school there and who intends to remain indefinitely? In essence, when you need to identify a group, you inevitably need to draw certain boundaries which can always be challenged by borderline examples. In some instances, the group will be too inclusive and in others it will be too exclusive. What is important, in my view, is that there is no deliberate manipulation of enfranchisement, that the rules of the game are not written in such a way that enables one football team to play with eleven players while the other team plays with only ten players. Scotland’s enfranchisement is defensible. In the absence of the concept of internal citizenship, a variant of a territorial approach appears to be a fair choice. Giving the right to vote to those born in Scotland and in residence elsewhere could also lead to problems.

Ziegler specifically points to the discrepancy between ‘the people’ for the purpose of voting at the referendum and ‘the people’ for the purpose citizenship. However, this is not unusual in international

practice. For example, many new states tend to extend eligibility for citizenship to the diaspora, immigrants and their descendants. As non-residents of the new state and often non-citizens of the predecessor state, these individuals are usually excluded from voting in the independence referendum. Yet, they qualify as citizens later. Once a state is created, it may wish to throw the 'citizenship net' broadly and catch non-residents with links to the new state, albeit these links can often be rather loose. Nascent states feel somewhat vulnerable when they first come out of their cocoons and try to keep ties with the diaspora for a number of reasons, political, economic and cultural. Awarding (dual) citizenship to such groups is a way of doing so.

I would even go as far as to say that a complete overlap between future citizenry and the scope of the franchise at the independence referendum can be problematic. In principle, nothing is wrong if the citizenry ultimately includes people living abroad with loose ties to the (new) state. But including the diaspora too generously in the decision-making process on the future legal status of a territory can distort the results. At the end of the day, it should be, in principle, for the people who live in a certain territory to determine the destiny of that territory. Would it really be legitimate for the future of Scotland to be decided by a Scottish-born person, who feels very Scottish otherwise, but has lived in London or Sydney for 40 years? Should Scotland become independent, good reasons may exist to indeed give this person an option to claim Scottish citizenship. At the same time, good reasons exist why this person should not vote in the referendum. Certainly, Ziegler's example of Hamish who has just moved to Amsterdam may tempt us to conclude otherwise and say this is different than being abroad for 40 years, but the line needs to be drawn somewhere. Arbitrariness can never be completely avoided, yet it seems reasonable to enfranchise on the basis of slightly modified voting eligibility rules in local elections. Enfranchisement in local elections is territorial, combined with a qualifying citizenship. An independence referendum is an eminently territorial question, so its rules of enfranchisement should also be, in principle, territorial.

In the end, I do not think that 'the people' for the purposes of the independence referendum should entirely overlap with 'the people' for the purposes of the citizenship of the future state. The decision who are the people is ultimately arbitrary and, on the first sight, illogical: Hamish can be Scottish for some purposes but not for others, and Slawomir the other way around. In fact, good reasons exist for such inconsistencies. In my view, two concepts of the people of Scotland exist: one concept for the purposes of the referendum, another concept for the purposes of future Scottish citizenship. They should be seen as two separate categories.

Not all who Are enfranchised need participate

Ben Saunders*

Drawing democratic boundaries is always difficult, but this difficulty is particularly clear when the decision is one that potentially alters these boundaries, creating a new demos. Ruvi Ziegler's proposal is that the franchise for the independence referendum ought to correspond to the proposed Scottish citizenship. If there are people who will be offered citizenship, then it seems that they have a stake in the issue and ought to have a say in the referendum. Conversely, if people are given a say in the referendum, then it seems that they have a good claim to citizenship as well.

Though this seems *prima facie* attractive, I share the worries voiced by others, notably Rainer Bauböck. Further, Ziegler's proposal seems to assume that citizenship and the right to vote should go hand in hand, yet there is no logical nor obvious moral reason why this should be the case (Lardy 1997). The particular package of rights traditionally associated with citizenship is essentially a historical accident. We may wish to give the vote to some who will not be given citizenship, because we do not wish to accord them other rights that would be afforded by citizenship.

Some hold that everyone affected by a decision should be enfranchised in it, though this has radical consequences. A less radical proposal, which [Dimitrios Kyritsis](#) seems to accept, is that only those who will be subject to coercion as a result of a decision need be enfranchised. Both the 'all affected' and 'all coerced' principles suggest a franchise wider than current citizens or residents (Song 2009). However, neither principle requires that we grant these people other rights that are usually attached to citizenship, such as the right to enter and remain within our community.

I am inclined to think that residency is more important than citizenship in determining who should be enfranchised. Those who are long-term residents in Scotland should have a say over its future, since they will be part of that future, even if they are not (at least immediately) offered citizenship. If this is correct, then the Polish immigrants interviewed by [Derek McGhee and Emilia Pietka-Nykaza](#) need not feel that it is not their place to participate in the decision; provided that they are settled indefinitely in Scotland, and are not merely transient visitors, then they have a right to be included.

What McGhee and Pietka-Nykaza's survey does highlight, however, is that we may distinguish between those who should be given the right to participate and those who should actually participate. Clearly, it makes no sense to say that someone ought to vote if she is not afforded the opportunity to do so, but it is possible that someone afforded the opportunity to vote ought not to exercise it.

Consider someone who moved to Scotland for a one-year work contract (or perhaps a Master's degree) in October 2013. Suppose that she will definitely leave in October 2014 and has no intention of ever returning. This person, if an EU or a qualifying Commonwealth citizen, will be entitled to vote in the September 2014 referendum, yet it seems plausible to say that she has no business doing so, given that she does not expect to have anything to do with an independent Scotland (which, by the Scottish Government's own timetable, will not emerge until 2016 even if the vote is for independence).

I am not suggesting that she ought not to be given the vote. It would be difficult for government officials to determine who should and who should not be given the vote on grounds such as these. Rather, my suggestion is that, even if she is given the vote, perhaps she ought not to exercise it, on principled grounds. This is not an absolute or all things considered judgement; it might be that other reasons make it at least defensible for her to vote. But, absent other considerations, it may be that she ought not to participate in the vote, even though she has the right to do so (and perhaps even ought to have this right). Though low levels of democratic participation are frequently lamented, it has been

* University of Sterling.

argued that we ought to abstain, on principled grounds, when we are indifferent to the alternatives on offer (Sheehy 2002).

It might be objected that this argument unreasonably assumes that voters are motivated solely by consideration of their own interests. If voting is better understood as an attempt to identify what justice demands, then there may be no objection to including more people in the vote if they help us to succeed. However, it is not clear that Scottish secession is a case where justice demands one particular answer. Further, even if justice does dictate what should be done, it need not license others to interfere in a community's decision-making, any more than I can interfere with your conduct whenever it is immoral. Sometimes interference may be justified, but sometimes people have a right to act wrongly.

Robert Goodin has argued that we ought, ideally, to enfranchise every individual in every decision, in order to be sure of including those affected (Goodin 2007). Over-inclusiveness, he suggests, is less troublesome than under-inclusiveness, since if those who are unaffected vote randomly then they are likely to cancel out, leaving the matter to be decided by the votes of those who are affected. Unfortunately, unaffected voters cannot be trusted to vote randomly or to abstain; there is a danger that if we extend the franchise too widely then some will use the political power they are given to impose their preferences on others. Nonetheless, perhaps it is better to err on the side of generosity when allocating voting rights, since those with the right can always abstain, while those without it may be deprived of a legitimate voice.

Different boundaries - different meanings

Vesco Paskalev*

Ruvi Ziegler initiated this forum debate with two claims – that all prospective citizens of a putative state should be considered as stakeholders in its coming into being, and that there should be congruence between them and the persons enfranchised to vote in the independence referendum itself. While the stakeholding claim seems more or less acceptable to most subsequent contributors, the congruence claim was intensely contested by almost everyone. This is surprising, since the latter seems intuitively appealing, supported by international law Ziegler quoted, and also fits well into the mainstream normative theory. On the other hand, the argument of Rainer Bauböck and others that the consensus behind the current franchise should be respected is very powerful too. From the beginning of the debate I felt that both sides are right, each with regard to a different referendum, and this was made obvious by the dilemma of the Poles resident in Scotland discussed by McGhee and Pietka-Nykaza.

Bauböck emphasises the normative significance of the difference between "the putative demos of an independent Scotland" and "the existing demos of Scotland as part of the UK". He argues that, currently, only the latter can hold a referendum which is democratically legitimate. There is a difference indeed, but this means that the referendum question: "Should Scotland become an independent country?" can be interpreted in two different ways. "Shall the Scottish nation become independent?"; Or: "Shall Scotland decide upon its future status independently of the UK?" I suspect that the independence movement aims to ask the former question.¹ The vote for independence of *Scotland* is a matter of self-determination of certain people, and not merely as an upgrade of the status of certain territory, in the way that a referendum in say, Yorkshire, would be. Further, Scottish *independence* is qualitatively different from devolution, which is a good reason *not* to enfranchise the same people for both decisions. However we define 'people' in general and 'the Scots' in particular, if the referendum is to determine whether such a subject should become independent, it is precisely for the putative members of this subject to decide. This question is ontological and the putative demos comes into being by the act of the vote itself. If this is the question, the franchise should be narrowly tailored to minimise the discrepancy between the people for the purpose of self-determination and the people for the purpose of subsequent politics. On the other hand, the upgrade of the status of a territory is mostly utilitarian question – whether it would be better for an existing unit to separate or not. In such a referendum it is the people living in Scotland rather than the Scottish people that should be enfranchised. The questions may be similar, but the make-up of the enfranchised population would be identical only if the 'Scottish people' are defined as the 'people living in Scotland'. If this were the present case, all current residents should become prospective Scottish citizens automatically and not merely given opportunity to naturalise. Thus, whichever of the two questions the SNP intended to ask at the referendum, it got it wrong.

The odd position of the Poles resident in Scotland who have found themselves enfranchised reveals the flip side of the same coin: if a significant number of people who are not (and do not aspire to be) Scottish can vote, the answer which the referendum will yield on 18 September 2014 will be irrelevant for the ontological question. When too many putative Scots are excluded and too many putative non-Scots are included, the referendum can no longer be a legitimate act of self-determination of a people.

* University of Hull.

¹ I would attribute the agreement of the SNP which initiated the referendum to this enfranchisement scheme to either failing to notice the difference, or – more likely - strategic calculation with regard to the outcome. Yet, according to Jo Shaw, many documents of the Scottish government support the interpretation that the question is one of territorial upgrade and its aim is not to break all of the 'unions' that hold the UK together, but only the political union and some aspects of the economic union. As the two questions were not explicitly distinguished, the different voters may be actually answering different questions.

However it will be still a legitimate answer to the territorial upgrade question. It turns out that the boundaries of the franchise determine the meaning of the result, and – given the necessarily cryptic wording on the question on the ballot – which of the questions is being asked. Who can vote effectively determines what exactly they are voting for. While presumably the Scots want to vote on the self-determination question, they are given the opportunity to answer on a territorial upgrade question.

One may wonder if the distinction makes any practical difference at all. It certainly matters for the future determination of Scottishness, but as Bernard Ryan noted, for the most part this would be decided not by the referendum itself but by the prospective Scottish constitution and other foundational documents afterwards. Yet, at the very least, it may affect whether people would vote and how they would vote. For example some hard core nationalists may boycott and denounce a referendum if 'all those Poles' are included, while liberals may vote 'yes' if foreign residents are included and 'no' if they are not. The framing of the question is not only a theoretical concern, and as we saw, the Polish themselves are actually thinking hard over it.² With regard to this, movements for self-determination are well advised to make explicit which of the two questions they would like to put to test, and enfranchise the respective persons accordingly. This is a matter of political choice too.

² While I am sympathetic to the distinction Saunders makes between those who are entitled to vote, and those who ought to do so, I think that the very fact that certain people are enfranchised while others are not is already meaningful and affects the others, even if the former actually abstain.

Types of membership, types of processes and types of politics

Dora Kostakopoulou*

Ruvi Ziegler makes an important as well as interesting point in his kick-off contribution. By reflecting on the actual membership of the ‘single issue demos’ which will decide the future of Scotland on the 18th of September 2014, on the one hand, and the putative, and rather sketchy at this point, membership of an independent Scottish commonwealth, on the other, he notices the incongruence between the two. He has fully grasped the historical and political context, which Bernard Ryan also eloquently outlines, but he is convinced that the franchise in the Scottish independence referendum should not have reflected the criteria deployed for political participation in local government elections (Section 2 of the Representation on the People Act 1983). Instead, it should have followed other criteria since ‘independence referendums share the fundamental and long-term characteristics of national elections, and their significance is enhanced by their capacity, from both a national and international law perspective, to alter the legal landscape for individual citizens’ ([kick-off contribution](#)).

Why congruence?

Ruvi Ziegler furnishes two arguments in favour of congruence. The first is that the principle that ‘all affected interests should be considered’ is not complied with since individuals who will be deemed to be ‘*ab initio*’ citizens should Scotland become independent are excluded from casting their vote on the 18th of September 2014. The second argument is that the under-inclusive character of the present arrangement undermines the legitimacy of the referendum – an argument that [Dimitrios Kyritsis does not share](#). Ziegler notices the paradox that the ad-hoc referendum demos excludes persons who will be eligible for citizenship on day one of independence while the proposed citizenry of a future state will exclude those persons who are eligible to participate in the constitutive political act of establishing the new state. This leads him to argue that ‘the determination of the franchise for the Scottish independence referendum was ill-conceived’ ([kick-off contribution](#)).

Ziegler’s reasoning is both plausible and insightful. It is plausible because we are confronted with a paradox. It is also insightful because, notwithstanding the special role of political contexts and historical processes, it is conceivable that political scientists and lawyers can develop clear and normatively justified criteria for franchise in independence referendums. Having said this, however, Ziegler’s argument also rests on two presumptions which may not be universally shared. I will call these i) the time-continuum; and ii) the desirability of monism presumptions.

The time-continuum presumption projects a linear temporal line among the independence referendum, day one of independence and everyday political life post-independence. By so doing, it underscores the different political acts, processes, stages and politics that are involved in the transition of a political unit from regional self-determination to state formation to polity functioning and state maintenance. It thus subsumes multiplicity into an overarching monism; one type of political process, one type of politics, and one type of membership and electoral participation.

Types of process, types of politics and types of policy

Neither historical manifestations of a political unit’s secession nor imaginative constructions of state formations in contractarian political theory, such as, for example, the Hobbesian formation of a sovereign state, conflate the constitutive act of the formation of a state with law and policy making by,

* University of Southampton.

and within, the (new) state. The former is a state-generative act or an act of constitutive politics since it emplaces a political structure. Following the establishment of a state, a different political process, which could be either inclusive or elitist in character, normally commences with a view to designing a complex array of policies and their generative structures. Foreign policy and external action, distributive policies, regulative policies and constituent policies will be enacted thereby shaping the state's functioning and maintenance. Defining who will be a citizen, or will be worthy to become citizen, is a constituent policy. And it is normally politics (and ideology) which will determine the scope of policies, including the scope of constituent policies, such as the citizenship policy of the new state. In other words, there is no continuum between 'the constitutive' and 'the constituent' and there is a lot of writing, a lot of re-writing and a lot of creativity in institutional design and policy formulation and implementation post-independence.

All this is to say that 'framers', that is, those who will vote in the independence referendum, do not have to be identical with 'the deciders' in an independent Scotland. Similarly, having chosen the residence-based option for franchise on the 18th of September 2014, there existed no obligation on the part of the Scottish Government to outline the scope and content of future policies in detail in a document. The legitimacy of the referendum would not have been undermined if Scotland's Future: Your Guide to an Independent Scotland, which was published by the Scottish Government in November 2013, contained no explicit, or very ambiguous, references to the content of the citizenship law of the newly independent state. Nor do any putative claims for inclusion into the body of citizens by qualifying Commonwealth citizens and EU citizens resident in Scotland derive their normative force and political weight from the fact that these persons will take part in the independence referendum. Such claims would have to be premised on the normative force of democratic considerations which make residence and participation in the socio-economic life generative of the entitlement to participate fully in the political sphere and to authorise the laws which govern one's affairs. Their right to vote in the referendum stems from the above premise and could thus be a supplementary ground in favour for their inclusion into the permanent Scottish demos following independence.

In the light of the foregoing discussion, the different political processes and politics involved in polity transitions must be put in proportion and perspective. True, a discussion of who should be part of the people of Scotland is rather premature at this point for the reasons that both [Rainer Bauböck](#) and [Bernard Ryan](#) outline in their contributions, but if predictions or a critical examination of what has been suggested thus far can be made at an institutional level, then one has to recognise the possibility of more than one pattern or policy option as well as the possibility that what might be chosen in the eighteen-month period that will follow a 'yes' outcome on the 18th of September 2014 might contain significant variations from what was proposed in November 2013. This is how politics works and almost any generalisation concerning policy design often proves to be inapplicable to most of the cases of concrete policy formulation.

This is not to say that academics and policy practitioners should not engage with questions concerning the (rightful) membership of the Scottish demos and provide advice about the content of the future Scottish citizenship law and policy. Rather, one needs to recognise that any such intellectual endeavour will be unavoidably normative in the same way that any really good citizenship theory is unavoidably normative. And while scholars are mainly interested in neat designs and are attracted to settled patterns and the elimination of framework ambiguities, real politics is messy, complex and unpredictable. The making of a real law is almost never a linear path from point A to B, but an act of producing a mosaic where multiple models and different patterns are brought together in a single design. And the Scottish citizenship law mosaic remains yet to be configured.

Different membership criteria for different demoi?

The different political moments involved in the Scottish independence story, the different political processes and types of politics unavoidably yield different types of ‘we, the people’ for the purposes of state formation and state functioning or maintenance following formation. While congruence between the membership criteria of the referendum demos, on the one hand, and the Scottish demos is not necessary since the connection between the types of demoi is a loose one, it is still desirable and important to reflect on the existing criteria of membership, characterise policy choices as good or bad and, generally speaking, to consider important questions about political membership, inclusion and democracy. This is precisely what Ziegler has invited us to do. If we value consensual and inclusive political processes and open and democratic politics, the choice of policies (of a citizenship policy in this case) becomes more limited. I fully agree with Ziegler that in formulating policies, governing elites need to: a) be inclusive; b) be as consistent as possible; and c) give a political voice to all those who have made Scotland the hub of their lives and will be subject to Scotland’s jurisdiction on day one of independence – thereby according priority to democratic, as opposed to ethnocentric, considerations. Congruence between the different demoi would thus be normatively desirable; the Scottish citizenship law and policy should mirror the residence-based approach of the Scottish referendum franchise.

Puerto Rico: the referendum strategy and its discontents

Jaime Lluch*

Although I have some expertise on Canada (Quebec), the U.K. (Scotland), Spain (Catalonia), and Italy (South Tyrol and Valle d'Aosta), I want to discuss in this forum the case of Puerto Rico.

On 6 November 2012, creative politicians in Puerto Rico arranged to hold a plebiscite on the territory's future constitutional status. In the civil law tradition of Puerto Rico, the term used is "plebiscite," not referendum. This was the fourth plebiscite of this sort following those held in 1967, 1993, and 1998. Politicians in Puerto Rico are now engineering a fifth plebiscite to be held sometime in the next two years. These have all been constitutive referendums in the sense that they sought to invoke the constituent power of the people to (potentially) adopt a very different constitutional status. Contrary to the upcoming referendum in Scotland, or the two ones that were held in Quebec, these plebiscites were not strictly speaking "independence referendums." As defined by Ruvi Ziegler, the latter are referendums that may result in the succession of states, i.e., the "replacement of one state by another in the responsibility for the international relations of territory." Instead, we can call them self-determination referendums, since the question posed to the voters has always presented all three major constitutional status options. Also, one of the constitutional options (and one which has been gathering electoral strength in the last few decades) involves asking the central state to accept Puerto Rico as one of the constituent units of the federation. From the point of view of the U.S. state, this involves state expansion, not state contraction, and thus the potential political effect is the opposite of a successful independence referendum.

Finally, at no point has the choice for the voters been "independence yes or no" or "federation yes or no." In that sense, the Puerto Rican plebiscites are more like the proposed Catalan referendum than the Scottish one. In Catalonia, the proposed text of the referendum is: "Do you want Catalonia to become a State?" and "In case of an affirmative response, do you want this State to be independent?" Although the first question is rather unclear and ambiguous, it would seem that the two questions taken together would offer voters the chance to vote for either the current Spanish State of Autonomies, federation, confederation, or independence. Jaume Lopez seems to recognize this in his contribution, although he casts a less critical eye on the ambiguity of the first question than I do. By contrast, the referendums in Puerto Rico have been straightforward and clear in the choice presented to the voters. However, there has always been considerable political jostling regarding who defines the constitutional status options, and how the different formulas (federalism, autonomy, or independence) are defined.

The most vital issues in Puerto Rico regarding these referendums have involved culture and national identity (both in the USA and Puerto Rico), the nature of the federal political system of the USA, the rigidity of U.S. constitutionalism, the nature of the post-1952 political status and its limitations, and the procedural aspects of these referendums, in particular whether the U.S. Congress is willing to provide for a federally-sponsored, binding vote, with the constitutional formulas pre-approved by Congress.

After four plebiscites, nothing has fundamentally changed in Puerto Rico's political status since 1952. For several years now, there has been an emerging consensus among political and social elites in Puerto Rico that the criollo plebiscite route is probably exhausted. Elites from all the political persuasions are now converging on the idea that instead of a plebiscite, a Constitutional Assembly on Status should be convened. Such an assembly would serve as a deliberative body, representing the people of Puerto Rico. It would seek to elaborate clear formulas for the three major constitutional

* University of Pennsylvania.

options and would then demand from the U.S. Congress a clear commitment to the three formulas it is willing to support and eventually to follow through with a federally-sponsored solution.

Surprisingly enough, the issue of the franchise for the vote in these referendums and the question of who would qualify for citizenship *ab initio* in the case of a victory of the independence option have not been prominent in the discussion either in the public sphere or in academic commentary on these issues. Nevertheless, the two issues that are discussed in this forum regarding who should have the right to vote (i.e., the legitimate franchise) in such referendums, and who should be the citizens of a newly independent state, are intrinsically interesting and relevant to Puerto Rico.

Regarding the first question, I agree with Rainer Bauböck that, where self-determination has been agreed between a territory and the central government, the only legitimate franchise in constitutive referendums is the currently existing one for the territory in question. Indeed, in the plebiscites held in Puerto Rico, the enfranchised persons have been those residing on the island and who are registered on the rolls of the Electoral Commission of Puerto Rico, usually because they participate in local elections.

In these plebiscites, there has been of course a rich discussion in the public sphere, and one of the questions posed has to do with who should have the right to participate in such momentous occasions. There are more than four million first and second-generation Puerto Rican immigrants in the USA, and it has been suggested that perhaps they should be included in the franchise. However, as a matter of law, this has never been accepted and the Puerto Rican demos has been defined as consisting of those U.S. citizens who reside in Puerto Rico. Thus, Cuban immigrants, Dominican Republic immigrants, a sprinkling of European immigrants, and mainland U.S.-born immigrants, can vote and have voted in these plebiscites, as long as they are U.S. citizens registered in the electoral rolls of the Electoral Commission. The situation might be different if the demographics in Puerto Rico were similar to those in Hawaii: by the time Hawaii was accepted as a state in 1959, the native Hawaiians were a minority, and the majority were continental U.S.-born residents.

No one has even tried to suggest that the other 317 million U.S. citizens living in the 50 states of the federation should be entitled to vote in these plebiscites. Yet in Spain this position has been seriously put forward by the Popular Party and its think tank FAES. They have argued that if they were to allow a referendum on the future of Catalonia, all 47 million Spanish citizens should be able to vote. In the case of Puerto Rico, at least three of the four political status options that Puerto Ricans have, require the consent of U.S. Congress: becoming a state of the USA federation, acquiring a free association status or some kind of enhanced autonomy would have to be approved by Congress. Even a negotiated form of independence would depend on the U.S. legislature's good will and consent as a practical matter. Thus, no matter what Puerto Ricans decide in their criollo plebiscites, their collective will is subject to whatever substantive conditions and procedures the U.S. Congress decides to impose.

This is not surprising, since Puerto Rico's history is one of back-to-back colonialism. Spain created this state of affairs in 1493 and the U.S. took over at the close of the 19th century. Many would say that the status inaugurated in 1952 continues to be "colonial". From a social science perspective, this is correct in my opinion. Thus, Puerto Rico has an inalienable right to self-determination.

Moreover, as in Scotland, Catalonia, Euskadi, and Quebec, it would be a mistake to refer to these territories as mere regions, when in fact they have all the accoutrements of nationhood: a large proportion of the population in these nations exhibits national consciousness. As the president of the Puerto Rican Independence Party Rubén Berríos Martínez expressed it in a testimony before U.S. Congress: "The problem of Puerto Rico... is not a problem of disenfranchisement of a minority or an issue of civil rights, as some people believe. It is not a problem of individual rights. It is a problem of national rights, of the inalienable rights of a nation, of a people, to govern themselves."

Regarding the second question, who should be the citizens of a newly independent state, this question has not been very relevant in recent years in Puerto Rico. Independentism was an important force during the first half of the 20th century but in the last few decades independentism has been at an all-time low point, barely reaching 5% of the electorate. Debate in the public sphere and academic commentary has tended to ignore this issue of who should be the citizens of a newly independent Puerto Rico.

A related question is more relevant for contemporary Puerto Rico. If Puerto Ricans were to choose a form of genuine free association as their preferred constitutional status, would the residents of Puerto Rico be able to maintain their U.S. citizenship and transmit it to the next generations? Puerto Ricans hold U.S. citizenship by virtue of a 1917 federal statute: theirs is not the usual Fourteenth Amendment citizenship. The Report by the President's Task Force on Puerto Rico of 2005 cast doubts on whether they could do so¹, while a leading constitutional law scholar in Puerto Rico has argued that Puerto Ricans could retain their U.S. citizenship, could probably hold dual citizenship under a formula of free association and could continue transmitting their U.S. citizenship to their offspring (González and Julián 1990).

Below, I give some further background on these plebiscites and the existing autonomy of Puerto Rico.

Background: The territorial autonomy of Puerto Rico

Since 1898, Puerto Rico has been an “unincorporated territory” of the United States, and the nature of its relationship with the U.S. has been set by federal statutes, especially the Foraker Act of 1900, the Jones Act of 1917, and the Federal Relations Act of 1950-1952. Although the U.S. Constitution provides for “states” and “territories,” the category of “unincorporated territory” was sculpted by the U.S. Supreme Court. Puerto Rico has a very peculiar form of territorial autonomy within the United States. It is part of the wider U.S. federal political system, but it is not one of the constituent units of the U.S. federation. Its autonomy is called “Estado Libre Asociado” (ELA), or free associated state, but it is neither free nor associated nor a state. There are now less than 4 million people on the Island and another 4 million plus Puerto Ricans on the U.S. mainland, many of whom circulate back and forth. Puerto Ricans are U.S. citizens by virtue of the 1917 federal statute, but they cannot vote in U.S. federal elections.

Autonomies such as Puerto Rico are non-federal arrangements because they are constitutionally subordinate to the center.² The “shared rule” component between the central state and the autonomous unit is weak or practically non-existent. The power to terminate or modify the Puerto Rico-USA relationship rests squarely within U.S. Congress. During 1952-53 the U.S. succeeded in getting Puerto Rico off the agenda of the UN Decolonization Committee in part by arguing that the Estado Libre Asociado was a compact of a bilateral nature whose terms may only be changed by common consent. However, soon thereafter Congress and the Executive branch started to behave “as if no compact of any kind existed and as if Puerto Rico continued to be a territory or possession of the United States, completely subject to its sovereign will. Puerto Rico leaders would spend the rest of the century unsuccessfully trying to convince the United States to allow full decolonization” (Trías Monge 1997). Supporters of the ELA have tried on several occasions to negotiate a “culminated ELA,” starting with the Fernós-Murray bill of 1959, but they have been unable to obtain the consent of U.S. Congress. However, Congress continues to assume that it can unilaterally exercise plenary powers over Puerto

¹ President's Task Force Report on Puerto Rico (Washington DC, Government Printing Office: 2005).

² For further discussion of this point, please see Jaime Lluch, 'Autonomism and Federalism', in *Publius: the Journal of Federalism*, Vol. 42(1) Winter (2012).

Rico under the territorial clause of the U.S. Constitution, and the U.S. government contends that sovereignty over Puerto Rico resides solely in the U.S. and not in the people of Puerto Rico.

For well over a century, politics in Puerto Rico has not been about political economy or the relation between the state and society. Instead, it has mainly been a debate about how the territory will relate to the U.S. federal political system and about how different conceptions of national identity shape this debate. These debates are dominated by three well-defined political orientations in the political party system: independentist, autonomist, and federalist (in the sense of becoming the 51st state of the USA).

Previous plebiscites of 1967, 1993, and 1998

In all the previous plebiscites, the choice offered to the electorate has been to decide between independence, autonomy or federalism. In 1967, autonomism won with 60% of the vote, while the independentists boycotted the event. In 1993, 48.6% voted for autonomism, 46.3% for federalism, and 5.1% for independence. In 1998, 46.6% voted for federalism, 2.6% for independence, 0.3% for free association and 50.5% voted for “none of the above.”

The plebiscite of 6 November 2012

Several years ago the independentist party offered a proposal for holding a plebiscite with two rounds. In the first round, the people would be asked whether they wanted to continue living under the present (colonial) “unincorporated territory.” If the answer chosen by a simple majority was “No”, then there would be a second round (months later) in which the people would be asked to choose among the three non-status-quo options, following an educational campaign. The idea was to narrow down the options to the ones that would decolonize the polity, given that the U.S. Congress had never shown an interest in doing so, or even in holding a federally-sponsored plebiscite in Puerto Rico.

In 2012, the federalist party in power in Puerto Rico at that time modified the idea of a two-step referendum and proposed instead a two question referendum, to be held on the same day as the regular elections for selecting both the new Governor and the new legislature (with a view to boosting their support in the regular elections).

Thus, in the plebiscite of 6 November 2012, the people were asked two questions. The first was: “Do you agree that Puerto Rico should continue to have its present form of territorial status?” In the second question, they were asked to choose between federalism, independence, and a “sovereign ELA”, which is a light version of a genuine status of free association. The autonomist party actively and energetically campaigned for a Yes vote on the first question, and on the second question for a “blank vote.” The results showed that 54% of the people voted No on the first question – a No vote in this context suggesting a vote for change. For the first time in their history, Puerto Ricans voted to show their disapproval of their present political status. This was the most important result of this event.

Among the choices offered by the second question, federalism received 61%, sovereign ELA 33.3%, and independence 5.5%, but there were 480,918 blank votes, so if those votes were to be counted, federalism received only 46% of the vote.

The U.S. Congress, as the legislative branch of the central state government, needs to take up its responsibility to end the current territorial status of Puerto Rico. In light of these results, another vote should be taken among these three options, but this time in a Congressionally-sponsored plebiscite.

Every single one of the four plebiscites that have been held in Puerto Rico has been a locally-sponsored one. The U.S. Congress has never agreed to provide for a binding referendum. This is not just a matter of respecting and implementing the result of the vote, but of exercising its responsibility

as the dominant power. Moreover, only the U.S. Congress can define what sort of conditions would be imposed if the people want to join the federation, what kind of transition period there would be were independence to be chosen, or what sort of expansive model of autonomy U.S. Congress would be willing to grant Puerto Ricans.

Who can vote on a referendum and who can be granted nationality of new states? Theory, practice and interests

Vincent Laborderie*

In this contribution, I will move away from the Scottish case and generalise about who is entitled to vote in the context of an independence referendum. I shall therefore discuss different theoretical possibilities and see how they were applied in previous referendums in Quebec and Montenegro). Unlike most contributors on this subject, I will not focus on what attitude is normatively preferable, but rather on the feasibility of different options and their impact on the referendum outcome. These two questions are, as we will see, closely linked.

The last section of this contribution will deal with the issue of citizenship eligibility. In disagreement with Ruvi Ziegler's kick-off contribution, I will argue that this question should not be linked with the referendum franchise.

Theory about franchise in independence referendums

In this contribution, I will use the phrase “host state” to identify the state in which a regional independence referendum took place or will be organised. This region will be referred to as a “secessionist region”.

Concerning the franchise issue, the question at stake could be the following:

Should the most pertinent criteria be residence in the secessionist region (including foreigners) or citizenship (including “nationals” living abroad)?

Basically we can distinguish three groups of people concerned by the question at stake. The first one relates to citizens of the host state living in the secessionist region. This group must, without any question, be able to vote in an independence referendum. They represent the core of the electoral body. Participation of the two other groups is more questionable. The second group consists of people living in the secessionist region but who are not citizens of the host state. The third group is formed by citizens of the host state who are linked to the secessionist region but who live abroad or in another part of the host state. Including the second or third groups in the electoral body of an independence referendum depends on which criterion is taken into account: nationality or residence.

Further criteria could specify which members of these two groups are allowed to participate in the referendum. For foreigners living in the secessionist region, a certain period of residence in the region could be required. The nationality of these foreigners could also be a criterion – as it is, for example, in the Scottish referendum where only EU and Commonwealth citizens could vote.

Concerning nationals residing outside the secessionist region, time and space criteria could be applied. For having the right to participate, one must have left the secessionist region for less than a certain time. Current residence can also be a criterion. The most relevant distinction here is certainly between people who live in the host state but not in the secessionist region and people who live abroad.

Franchise practice in Quebec, Montenegro and Scotland

Far from being only theoretical, the scope of the franchise can determine the outcome of the referendum and, therefore, the future of host states, secessionist regions and of their inhabitants. I will

* Université Catholique de Louvain.

refer to the franchise criteria used in referendums that occur in a context comparable to Scotland and Catalonia (or any other part of the European Union), i.e. in economically developed and democratic countries. Historically speaking there are very few instances. The old cases of Norway (1905) and Iceland (1944) will not be of any help. The questions being debated in this forum were irrelevant at the time of these votes. But taking these cases into account helps us to realize that questions about the franchise are closely linked with the process of globalisation and of massive migration that can be observed all over the world and especially in Europe.

Recent cases are limited to the two Quebec referendums (1980 and 1995) and the Montenegro referendum (2006).¹ We can add the two referendums scheduled for 2014 in Scotland and Catalonia. But only the former will take place for sure and franchise questions have already been settled there.

Concerning citizens of the secessionist region residing elsewhere, we observe that they get the right to participate in an independence referendum only in Quebec. But criteria are restrictive. As pointed out by Guy Laforest and Eric Montigny in their contribution, “they have to demonstrate that they left Québec temporarily” and for less than two years. The main reason for this situation is probably the difficulty to distinguish between “citizens” of the secessionist region and those of the rest of the host state. As Jure Vidmar points out in his contribution, internal citizenship was specific to socialist federations, such as Yugoslavia and the USSR. For nationals living abroad, the criterion would be their last residence in the host state. For nationals living elsewhere in the host state it is less obvious how to take into account this criterion. Should persons who were born in the secessionist region be considered? How about those who left their region for less than a certain period or those who have relatives there?

Before the Montenegro independence referendum (2006), Serbia presented to the Venice Commission a list of 260.000 “Montenegrin citizens” living in Serbia. The majority of them would have probably voted against independence. Since only 460.000 voters were recorded in Montenegro, participation of these “Serbian-Montenegrins” could have had a decisive effect (Cattaruzza 2010: 32).

We touch here upon an important issue: advantages for “yes” and “no” camps to include different groups of voters. Coupled with the difficulty to determine who among citizens of the host state should count as a citizen of the secessionist region, this is probably the reason why people outside secessionist regions are so rarely authorised to participate in the referendum.

Whereas in most cases the majority of people living elsewhere in the host state would vote against independence of the secessionist region, the preferences of people living abroad are more uncertain. But here one faces the problem of material and practical organisation. Most secessionist regions do not have facilities abroad to organise the vote of expats and would be able to build such capacities only in a few countries. So they would be obliged to use facilities of the host state. Even if, as in the Scottish case, an agreement with the host state exists, there might not be enough confidence to let central state authorities organise the vote.

Concerning non-citizen residents in a secessionist region, other contributions offer various arguments for and against offering the franchise to them. I will not enter this discussion but rather underline that, also in this case, independentist forces would be better served by a restrictive approach. This is illustrated by the second Quebec referendum in 1995. The franchise in the independence referendum was restricted to Canadian citizens. Indeed, the Quebec government, organising the referendum without any participation of federal authorities, assumed that foreigners would vote against independence. It seems that the Canadian government shared the same belief as it offered the

¹ Other recent referendums took place in countries that we cannot qualify as “democratic” (South Sudan, East Timor and Eritrea). Taking the democratic criterion into account also excludes referendums organised in former Soviet or Yugoslav republics in the early 1990’s. Even if these referendums could have met democratic standards, they did not take place in well-established democracies. We can recall that there was no referendum in Kosovo before declaration of independence in 2008 nor before the Czechoslovak “velvet divorce” in 1993.

Canadian nationality to an unusually large number of foreigners residing in Quebec just before the referendum.² This is partly reflected in the outcome. Only 33% of voters in Montréal, favoured independence in the 1995 referendum whereas the ‘yes’ option got a total of 49.5% for the entire Quebec province. Even if the Anglophone community represents a substantial proportion of the population of Montréal, it is obvious that the large number of immigrants living in the city played a decisive role in this outcome. In his famous and shocking speech after the referendum, Jacques Parizeau, leader of the “yes” camp, proclaimed that they had been defeated “essentially by money and the ethnic vote”.

This very pragmatic empirical observation can be supported by research which points out that support for independence is closely linked to level of identification with the secessionist region.³ We can assume that newcomers and non-citizens identify less with a secessionist region than natives of that region.

Decisions about the franchise are strongly influenced by the advantage each camp could gain. If there is no agreement with the host state, the government of the secessionist region will organise the referendum itself and will obviously choose a franchise that favours the vote for independence. If there is an agreement between authorities of the host state and of the secessionist region – as in the Scotland and Montenegro cases – the franchise criteria result from a negotiation in which both involved parties would logically try to favour their preferred outcome.

As a conclusion concerning the franchise, we can stress two elements. The first is that there are many options how to determine the scope of the franchise. The second is that, in most cases, independentists have better chances if they narrow the right to participate in the referendum to official citizens of the host state living in the secessionist region. The less restrictive the criteria are, the more difficult to obtain a majority of votes in favour of independence. Far from being only a theoretical or normative question, the scope of the electoral body is of paramount importance in determining the outcome of a referendum. As the Quebec and Montenegro cases show, both parties are generally aware of it. In this respect, it will be very interesting to study the vote of non-UK citizens in the Scottish referendum on 18 September 2014.

The citizenship issue

I disagree with Ruvy Ziegler’s argument about the desirability of congruence between the criteria for the franchise in independence referendums and those determining who will obtain the nationality of the new state in case of independence.

In fact, it seems natural that the group of people who would automatically obtain citizenship on day one of independence remains smaller than the group allowed to vote in the referendum. The difference between these two groups – those who could vote but not automatically obtain the new citizenship – would consist of foreigners living in the secessionist region. As many other contributors have already argued, it is appropriate that they can participate in the referendum if they have lived in the region for a certain period of time and/or want to remain here. But there is no reason that this participation is sufficient for their claim to citizenship status.

² Federal government always denied there was a planified policy to accelerate naturalization. But it was noticed that the number of new canadian citizens in Quebec was 87% higher in 1995 than in 1993 to reach 43.850. This figure drop by 40% in 1996. During the month before referendum, 11.500 people were naturalized. Federal civil servant were requested to work on weekends to obtain these results.

³ Van der Zwet, Arno and Craig McAngus, ‘How Different are Assessments of Independence and Devolution Max? An Analysis of the Role of National Identity and Party Affiliation’, *Scottish Affairs* 23, no 1, 2014, pp. 1 26 ; Jérôme Couture and Vincent Laborderie, ‘Identité régionale et soutien à l’indépendance dans quatre États subnationaux (Québec, Écosse, Catalogne, Flandre)’, paper presented at 23rd World Congress of Political Science (IPSA, 2014).

I would insist on the fact that a government of a secessionist region must be cautious about the citizenship issue. If a secessionist government promises to offer citizenship to everybody living in the region's territory – or adopts very inclusive rules for acquiring it – and also gives the right to foreigners to vote for independence, there is a risk that this could be seen as buying votes. In other words, non-citizens would be encouraged to vote for independence, not because they want it but because of the promise of citizenship.

In an EU context, giving nationality to a large number of non-EU citizens could also create a problem with other member states. Indeed, every citizen of a member state possesses rights in all other member states, such as the right to settle and to work there. As a consequence, if a new country is too permissive in granting citizenship, it could complicate relationship with other EU members. Ultimately, its recognition or new accession as EU member state could be threatened.

For all these reasons, I suggest that the citizenship issue and the right to participate in a referendum on independence should be disconnected. Concerning the former issue, it seems essential to distinguish citizens of the host state who live in the secessionist region from other groups. This first group of people should be offered the new nationality on day one of independence.

For non-nationals, a new naturalisation policy could be implemented later, after the new country becomes independent and the new national government holds the possibility to define new criteria for acquiring citizenship. These criteria can differ from those of the host state. They can be more or less restrictive. But it is important that they are legally disconnected from the independence referendum. Indeed, it is generally agreed that a decision taken by referendum must be as clearly stated as possible. An essential aspect of this clarity is that there is only one question at stake. Adding immigrant integration and citizenship issues to the question of independence in the same referendum certainly will not favour clarity.

In a secession referendum the franchise should depend on what you do, not what you are

Daniel Weinstock*

Imagine that the government of a federated entity with recognized borders launches a referendum to secede from the federation to which it belongs. The argument I want to make in this very short intervention is that citizenship in the federation, and residency in the potentially seceding entity, are individually necessary, and jointly sufficient conditions for participation in the referendum vote. This conclusion places me at odds with some of the contributors to this forum, including Ruvi Ziegler, whose excellent contribution kicked it off.

Many proposals have been made to specify who the demos should be in order to determine the democratic franchise. At one extreme lies what some have called the all affected principle. That principle, as its name indicates, suggests that all those who are affected by a democratic decision should have some say in the decision-making process.

This principle is clearly over-inclusive in the case of a secession referendum. After all, all citizens of the federation in question will be affected in substantial ways by the decision of a federated entity to secede. But it seems inappropriate to give them all a right to vote. After all, the desire to secede is most often born of the sense on the part of a substantial number of those living in the federated entity that all is not as it should be in their relations with their federal partners. To give those federal partners an effective veto would be simply to import the logic of the problems that have triggered the desire for secession into the decision-making process itself (Arrhenius 2005).

At the other end of the spectrum lies the nationalist principle, according to which all those people who trace their origins back to the “founding people” of which the territory of the federated entity is seen as the national homeland should be allowed to make such an existential decision as whether to secede or not.

This principle would on broadly liberal-democratic grounds be unacceptable, by ruling in people who oughtn’t to have a say, and by ruling out people who ought to have one. Let me explain.

The defender of a nationalist principle would consider that someone who traces his origins back to the founding national group should have a say in whether secession should occur or not, even if he has not resided on the territory for years, indeed even if his parents or grandparents had not done so. It would, however, rule out people who reside on the territory, even though they have only arrived recently, and/or are not members of the founding national group.

It seems to me that excluding “blood nationals”, even blood nationals who are still citizens of the larger federation, is a requirement of liberal democratic ethics. The basic idea is that the right criterion to use in order to determine who gets to vote in secession referendums is a commitment to contribute to the (economic, political, cultural) life of the putative new country, and that simply being related by blood to the founding national group constitutes no evidence of that.

The case of blood nationals who are still citizens of the federation is a difficult one, and my exclusion of them might seem to put me in contradiction with an argument that I have put forward elsewhere, according to which dual nationals should be allowed to vote in elections of the country or countries of residence of which they are not residents at time of election.

There is, however, a principled reason to include such people in national and sub-state election, and to exclude them from secession referendums. My argument for the former claim is, in a nutshell, that diversifying epistemic perspectives can help a polity get it right in choosing between political parties’

* McGill University.

policy proposals. Citizens who live outside the polity making a decision may be able to “see” aspects of policy questions that are overlooked or under-emphasized by people inside.

But there is no “getting it right” in the case of a secession referendum. Assuming that the group that is considering secession is not doing so frivolously (and what that standard involves is a vexed question indeed!), it is an existential one, about the kind of polity that they want to be. That the group may or may not come to regret a decision does not mean that secession should be treated as a question to which there is a right answer.

Citizens of the federation who are residents, where that term denotes a legal status, rather than a merely factual one, are in virtue of their satisfaction of the criteria for the granting of the status of resident those who best satisfy the criterion that I am putting forward as most appropriate for the granting of the right to vote in secession referendums. The granting of that status is the best index we possess to track the willingness and commitment to contribute to the society in the requisite ways. It is, like any institutional criterion, an imperfect one. But it is, I would argue, as close as we can get.

Two categories of persons constitute interesting limit cases. They are, first, those who have been accepted as immigrants, and who have thus been received as candidates for citizenship, but who have not yet acquired that citizenship, either because they have not satisfied a temporal criterion, or because they have not yet undertaken steps to acquire it in cases in which they have satisfied that criterion. And second, there are those who possess international mobility rights within the potentially seceding territory, and who reside there in virtue of those rights, rather than in virtue of having been accepted as immigrants. The clearest example of this latter category would be citizens of the European Union when they find themselves in one of the EU states of which they are not citizens. I think that there is no “right” answer as to whether these two groups should be enfranchised in secession referendums or not. For what it’s worth, I would opt for enfranchising the first group before I would the second, because the process of applying for immigration is a more demanding sign of one’s commitment to one’s new home than is simply availing oneself of one’s mobility rights. But I don’t think that a grave injustice is committed if the reverse prioritization were to be made (as is the case in the Scottish referendum).

At basis, my view is that for existential questions such as whether to form a new country or remain a part of an already existing one, participation in secession referendums should be determined by what you do, rather than by what you are. Legal residency tracks that moral idea tolerably well.

Catalonia: Will Catalans be permitted to hold a legally binding referendum on independence?

Montserrat Guibernau*

It feels a bit odd to write on who should be entitled to vote in a referendum on Catalan independence at a time when the Spanish State, invoking the Spanish Constitution, strictly forbids it. The key arguments invoked by the State are: [Article 2 of the Constitution](#) that reads: ‘the Constitution is based upon the indissoluble unity of the Spanish nation, common and indivisible patria of all Spaniards’, and Article 8 which states that ‘the Army’s mission is to guarantee the sovereignty and independence of Spain, to defend its territorial integrity and the constitutional set up’.

Currently, the Spanish Constitution strongly emphasizes the ‘unity’ of Spain, this is a point that unavoidably brings about references to the historical background of contemporary Spain including the heritage and memories of the civil war, the dictatorship, the transition to democracy and the coups d’état against the new democratic Spain, taking place as late as the 1980s. It also brings to the fore images of the continuous repression of Basques, Catalans and Galicians as national minorities that managed to obtain some political and cultural recognition in the new democratic Spain; that was a condition for the country to be regarded as a Western liberal democracy by the EU and other international organizations.

Spain has traditionally displayed a ‘centralist view’ of the State in direct confrontation with the aspirations of its national minorities, in particular Catalonia, and attempts to foster a plural image of Spain have not been successful. For instance, former Prime Minister J.L. Rodriguez Zapatero sought to defend the idea of a ‘plural Spain’ thus emphasizing diversity within a progressive Spain. But probably Spain was not as progressive as he had envisaged, since he obtained limited backing for his views within his own party (the Spanish Socialist Workers Party or PSOE) and little support outside Catalonia – the community that overwhelmingly had supported his view.

Will Catalans be permitted to hold a legally binding referendum on independence?

In Spain, national minorities have a voice – access to Congress and the Senate – however, they have no veto power, and only acquire distinctive relevance whenever one of the main political parties is short of a majority and needs their votes to form a government.

The 1979 Statute of Autonomy of Catalonia was approved in a legally binding referendum on 25th October 1979. The Preliminary Section of the Statute defines Catalonia as a nationality which ‘in order to accede to self-government, constitutes itself as a Self-Governing Community in accordance with the Constitution and with this Statute’ (Article 1.1) (it should be underlined that the sovereignty of Catalonia is implied in this declaration) and the Generalitat as ‘the institution around which the self-government of Catalonia is politically organized’ (Article 1.2).¹

The powers of the Generalitat ‘emanate from the Constitution, this Statute and the people’ (Article 1.3). These provisions make clear that the Constitution defines the scope and number of devolved powers and confirms the existence of a single sovereign demos in Spanish democracy, constituted by all Spanish citizens, including the Catalans. This interpretation considers the Catalan people to be a ‘sub-group’ of the demos formed by all the citizens of Spain. For instance, it is precisely this interpretation that is invoked by those arguing that all Spanish citizens should be able to vote in an

* Queen Mary University of London.

¹ See *The Catalan Statute of Autonomy* (1979) 3rd edition, Generalitat de Catalunya, Barcelona, 1986. Preliminary section, Article 1.

eventual referendum on Catalan self-determination; a view that, if effected, would reinforce further the status of Catalans as a ‘constant minority’ within Spain.² Although this may work from a normative point of view, it will not from a democratic perspective.

The most important issue is how to unlock the current situation and introduce dialogue between the Spanish and the Catalan governments at a time when Catalan society continues to display a strong bottom up social movement in favour of the so called ‘right to decide’, this is, Catalans demand the right to hold a legally binding referendum on whether Catalonia should become independent or not. The date for this referendum, supported by a range of Catalan civil society associations, is 9th November 2014. At present, it looks unlikely that the Catalans would be permitted to hold a legally binding referendum on that date, however the strength and number of people participating in the forthcoming 11th September 2014 (Catalan Day) demonstration could play a key part in contributing to the unlocking of the current situation. Democracy is by nature a dynamic process, it is not fixed, and is the outcome of a constant dialogue: it is not possible to justify a continuous lack of engagement in dialogue while upholding democratic credentials.

Who should vote and who should be offered citizenship?

Rainer Bauböck highlights a fundamental difference between ‘independent states’ and ‘autonomous regions within states’ as polities of different kinds. In my view, this is very important because ‘independent states’ are able to decide on who should and who should not be allowed/entitled to vote in an eventual binding referendum on self-determination affecting a part of that state. In contrast, ‘autonomous regions within states’ usually lack the power to call for a referendum on self-determination unless this is endorsed by the state. This tension is illustrated by the current imbalance of power between Catalonia and Spain and reflects the continuous relevance of the nation-state as key political actor.

According to Article 7 of the Catalan Statute of Autonomy, all Catalans as well as all Spanish citizens who are legally resident in any of the municipalities of Catalonia are Catalans and in my view, they should be offered ‘Catalan citizenship’ on day one of an independent Catalonia. Participation in a binding referendum on Catalan independence should be limited to Catalan citizens. A new naturalisation policy for long-term residents should make citizenship available after 5 years of residence. Further details should be the outcome of dialogue and debate among political forces in the Catalan Parliament, after the referendum takes place. If possible, steps should be taken towards a common EU policy on these matters so that similar policies could be implemented at the EU level.

Who is a Catalan? A former president of Catalonia, Jordi Pujol, defined as ‘Catalan’ a person ‘who lives and works in Catalonia and wishes to be a Catalan’³, a definition that encompasses lieu of residence, workplace, and the ‘will’ to become a member of the Catalan nation as a modern, strongly pro-European prosperous polity. This definition points at some expectations regarding Catalonia as a particular type of nation –diverse, open and inclusive, where civil society has traditionally played a key role. It also highlights the ‘will’ of the individual to belong to that nation and often engage in the construction of a shared collective identity⁴.

² I have first developed the concept of ‘constant minority’ in ‘*Catalan Secessionism: Young People’s Expectations and Political Change*’, The International Spectator, DOI 10.1080/03932729.2014.952955.

³ Pujol, J. *Tot compromís comporta un risc*, Edicions 62, Barcelona 1977 p. 25.

⁴ Pujol, J. *La Força Serena i Constructiva de Catalunya*, Generalitat de Catalunya, 1990.

Why Flanders is unlikely to have a referendum on independence anytime soon

Dirk Jacobs*

Belgium does not have particularly fond memories of organising a referendum on its political future. In March 1950, a referendum was held about the potential return of exiled King Leopold III, who had surrendered to German forces during World War II against the will of the government. In this referendum on the so-called ‘King’s question’, Flanders and rural parts of Wallonia in majority accepted the return, while a majority of the population in the industrial areas of Wallonia rejected it. When the King returned to the country in July 1950, a general strike broke out (mainly in Wallonia), bombs exploded and protestors were shot by the police, bringing the country to the brink of civil war. The government forced the King to abdicate in favour of his son, in order to avoid a potentially violent march on Brussels and to counter a serious attempt to form a separatist Walloon government. These events are part and parcel of the collective memory of the Belgian political elites and have for decades made the idea of organising a national referendum a no-go zone.

Sixty-five years later, the memories of the ‘King’s question’ have faded, the Flemish nationalist movement is thriving, and Walloon separatism has almost disappeared. The Flemish nationalists explicitly support the Scottish and Catalan causes for independence and applaud the referendums, but do not call for a referendum on independence of Flanders.¹ For outsiders, this might seem strange, as politically Flemish nationalists have never been in a stronger position. In June 2014, the N-VA, the “new Flemish alliance”, a right-wing nationalist party striving for Flemish independence, had a landslide victory in the national elections. In the elections for the Flemish parliament, the nationalists obtained 32% of the vote, and the N-VA is now leading the Flemish government, in coalition with Christian-democrats and right-liberals. In the federal parliament, the N-VA obtained 33 of the 150 seats, making it the largest party in the hemicycle. N-VA is currently negotiating the formation of a federal government with the Flemish Christian-democrats, the Flemish right-liberals, and the Francophone right-liberals. Even if the N-VA has at several occasions expressed their support to the Scottish and Catalan initiatives for a referendum on independence, they are not employing a similar strategy in Belgium. Organising a referendum on the future of Belgium and the independence of Flanders is not on the negotiating table.

There are several plausible reasons for this reluctant attitude of the Flemish nationalists towards the idea of a referendum. The most important reason is perhaps that all opinion polls consistently show that a majority of Flemish voters are not in favour of independence (Abts et al. 2014). Even among the electorate of the N-VA, there is insufficient support for independence. Indeed, even though the first article of the party statutes of the N-VA clearly states that the goal of the party is Flemish independence², the party leadership has downplayed the urgency of independence, partly in an attempt to attract right-wing voters not holding nationalist views. In the last election campaign and during current government formation, the nationalists have made it crystal clear their priority is establishing a fiscally conservative government and keeping left-wing parties out of government. This does not mean they have given up on their nationalist agenda, but it is no longer centre-stage. N-VA keeps repeating the mantra that the Belgian federal state is an artificial construction bound to fail, but at the same time are stating that they prefer a gradual ‘evolution’ rather than a ‘revolution’. They believe that Belgium is to gradually evaporate in a process of devolution of powers to sub-federal entities and further transfer of competencies to the European level. They wish to replace the current complex system of

* Université Libre de Bruxelles.

¹ See for instance the text “No Rules, Great Scotch!” on the [N-VA official homepage](#).

² [The first article of the party manifesto](#) literally states that N-VA opts for an independent Flemish Republic.

Regions and Communities by so-called ‘confederalism’ instead of immediately pushing for independence.³ Independence will come, but slowly.

A major obstacle for any quick separation is that there is no clear-cut scenario for the federal capital of Brussels. The Brussels Capital Region is an officially bilingual territory, where both the Flemish and the Francophone community governments have prerogatives. It is geographically an enclave surrounded by municipalities that are part of the territory of the Flemish Region, and where Dutch is the official language (even if the majority of inhabitants of the Flemish municipalities surrounding Brussels are French speakers). Flemish independence would in theory remain relatively easy if it were to be limited to the territory of the Flemish region, but then the Flemish would have to give up their shared capital. Given that Brussels is historically a Flemish city, and that the Flemish minority of Brussels is heavily protected as a result of decades of political struggle along linguistic lines, for parts of the Flemish movement it would be considered treason to give up the capital city. Now that the ‘soft power’ of the Flemish and the status of the Dutch language has considerably increased in the capital compared to some decades ago, entirely giving up on Brussels would be a severe blow to the ‘Flemish cause’. Integrating Brussels in an independent Flanders is, however, unimaginable for Francophone political elites and for large parts of the Brussels population. Brussels, in other words, is the glue that keeps Belgium together and a clear ‘solution’ for Brussels, which would be acceptable for all, is not within reach in case Belgium would disappear as a country (Jacobs 2007).

Organising a referendum and launching debates on the phrasing of questions would be opening up a Pandora’s box. None of the major linguistic groups can afford to give up on Brussels, but Flemish independence is probably only realistic if they would give up the capital. This ‘sacrifice’ would, however, not remove all obstacles. Even if the referendum were limited to independence of the current Flemish regional territory, large regional discrepancies in voting patterns might arise, in particular in municipalities in the Brussels periphery where sizeable groups of francophones live in Flemish territory. The fact that the linguistic border fixed in 1963 no longer corresponds to sociological reality has been an ongoing source of conflict. Organising a referendum on Flemish independence would fuel demands in the Brussels periphery to be disconnected from Flanders and linked to Brussels. It would put at center stage again the demands of Francophones living in Flanders to be recognised as a ‘national minority’ and be granted all rights foreseen in the Framework Convention for the Protection of National Minorities which Belgium has signed but never ratified. Until now, the official discourse is that Belgium only has ‘national majorities’ which all have their own “turf” and that the current language legislation hence makes it obsolete to think in terms of national minorities.⁴ The Flemish can defend this reasoning in the Belgian framework, but will no longer be able to do so in a credible way in an independent Flemish state.

In sum, a referendum on Flemish independence would just make things more complicated for Flemish nationalists. Tough choices would have to be made about secession scenarios and deals would have to be struck with Francophone compatriots, leading to the necessity to give up on Brussels and taking risks of losing parts of current Flemish territory in the bid for independence. Most importantly, as polling shows, finding a majority in Flanders for independence seems to be close to impossible. That is why federal Prime Minister Elio Di Rupo, a francophone socialist, in December 2012 challenged the Flemish nationalists to call for a referendum on Flemish independence. That is why Flemish nationalists stress they do not want a revolution and see no need for a referendum: it is a battle they cannot win.

³ This discursive strategic framing is well illustrated in [the English FAQ page of the N-VA website](#).

⁴ A justification in English on the non-ratification of the treaty by Belgium, under pressure by the Flemish, is provided on the [website of 'De Rand'](#). This is a *quasi* non-governmental organisation sponsored by the Flemish government which has as a mission to defend the Flemish character of the Brussels periphery.

Voting in the referendum on Scottish independence: some observations from the front line

Jo Shaw*

Ruvi Ziegler's elegantly worded argument for the congruence of the referendum franchise and of the initial determination of the citizenry in a new independent Scotland, aka iScotland, along with his thorough rejoinder to the responses of a variety of commentators coming from different territorial and disciplinary backgrounds, may not offer the final word on this important question, but they certainly go a long way towards airing most of the key points that need to be made. Moreover, I have had the privilege of reading Ziegler's rejoinder before writing this short text, and this has confirmed my view that my own contribution to the debate should take another angle. For I should confess that I have thought a lot more about this issue since Ziegler initiated this debate, having originally broadly subscribed to the 'hey ho, it's just a messy model like the rest of citizenship issues in the UK' school of thought, when it came to the question of how the Scottish referendum franchise was conceived in the Edinburgh Agreement and instantiated in legislation adopted by the Holyrood Parliament in the summer of 2013. But Ziegler has not only provoked some further thinking on the franchise, but also broader reflections on the matter of the Scottish referendum vote (and the campaign leading to the vote).

Of course, the conception of the franchise adopted for the referendum on Scottish independence, largely based on the regional franchise and including, as a peculiar emanation of UK constitutional law not only qualifying Commonwealth and Irish citizens but also EU citizens, but excluding non-residents whatever their citizenship, has been contested. The strongest contestation has come from persons born in Scotland but now living elsewhere in the UK, rather than those - such as Ziegler's example of the Scottish born graduate working in Amsterdam as an EU citizen - who live outside the UK altogether. This is hardly surprising, since they represent numerically by far the largest group who could lay claim to be disenfranchised. Many of them will have noticed that at the same time they have been 'offered' future citizenship in the various Scottish government documents that have come out which sketch the outlines of the initial determination of the citizenry. Indeed, it would seem that they become automatically Scottish citizens, although one would assume that those who are resident in rUK will retain UK citizenship, even if rUK were to decide to redefine its citizenry to exclude some groups of new Scottish citizens resident in Scotland (e.g. those born in Scotland who have never resided elsewhere in the UK).

It is worth noting that the settlement of the franchise was - as Lord Kerr of Kinlochard (a distinguished Scottish former diplomat, occasional commentator on EU affairs, and member of the disenfranchised UK-based Scottish-born (and educated) diaspora) put it - a 'casual concession' by David Cameron to Alex Salmond, and it was a concession with considerable repercussions. The casualness of that concession, which received no public debate, is regarded by many resident in Scotland as typical of the casualness with which 'Westminster' deals with most Scottish matters, and thus has provided further fuel for the independence movement.

The disenfranchisement of the group of 'non-resident Scots' - against the promise that they would be *ab initio* citizens of iScotland - was, however, probably the only workable outcome, since drawing up a register of electors based on either birth in Scotland or previous residence there (for how long?) would have been an extraordinarily expensive and possibly rather inaccurate exercise. If you accept the power of its premise of congruence, what Ziegler's argument does achieve, however, is that it shines a light on the perhaps over-inclusive *ab initio* citizenship condition of birth in the territory as a UK citizen (with no additional connections to the territory being necessary). But [as Dora](#)

* University of Edinburgh.

[Kostakopoulou has pointed out](#), the contestation of that is to come later, and will not occur unless there is a Yes vote on 18 September 2014. My experience with trying to generate interest [in my earlier research](#) has shown that, while people are a bit puzzled about who would be Scottish citizens in the event of independence, it has definitely not been an animating factor in the debate. It seems likely that the relatively over-inclusive scope of the *ab initio* definition, not to mention the proposal for a vaguely specified group of 'citizens by connection', who can apply to be naturalised even if they are not resident, tells us something about the main audience for documents such as Scottish government consultation papers on these matters, and that there would be a quietly supportive external diaspora who may prove to be rather influential in an iScotland.

This leads me to the main comment I would like to make in this short contribution, and that concerns my observations from the front line. I wrote this note on the last day (2 September 2014) when qualifying referendum electors could apply to join the electoral register. We do not yet know the final tallies, but [anecdotal evidence](#) suggests that a lot more people will be registered to vote in Scotland for the referendum than were for the latest elections using approximately the same franchise, namely the Scottish Parliament elections of 2011. Of course, part of that surplus will stem from the additional 16 and 17 year olds who have been enfranchised in the referendum, but it is also clear that a large number of people who have allowed their voter registration to lapse (or who have never been registered) have now sought to make sure they will be able to vote. Some of the new registrations will also include EU citizens who were the subject of the research reported by Derek McGhee and Emilia Pietka-Nykaza, some of whom undoubtedly feel burdened by this 'privilege' of participating in the referendum, although [others have been animated by this opportunity](#) to contribute to a potentially life changing decision. One must presume that this surge of late registrations is also likely to signal a very high turnout, perhaps even between 80-85%. Speaking personally, I should state that I have never in my lifetime experienced anything akin to the political engagement which has been engendered by the opportunity that the independence referendum has given people in Scotland to discuss their future. Confirmed postal voters (an increasingly large percentage of middle class middle aged people who are likely to vote but are often not available on polling day) report on social media having rescinded their postal votes for this one time, just so they can experience the thrill of going to the voting booth.

Much of the public politics of the referendum debate has been rather uninspiring, especially the two set piece televised debates between male, macho leaders (First Minister Alex Salmond and Alastair Darling, representing the 'Better Together' campaign). But I concur with others who say that this hardly represents the true tenor of the debate, which has been largely carried on outside the normal realms of political debate in the modern world, in families, workplaces, streets, town meetings, and festivals. And of course on social media where debate has been, in turns, both 'shouty' and quite inspiring. The engagement with the Yes campaign of a large number of independent grassroots groups often aligned with the political left has been responsible for much of this change from the normal fodder of political party dominated local, regional, national, and European parliamentary elections. Much of the 'new politics' has been animated by people involved in the cultural sectors, and has been tinged with a high degree of whimsy and humour. Perhaps the best example is offered by the series of conversations animated by the Scottish playwright David Greig, all through the Edinburgh Festival Fringe in August 2014, being an ironic tribute to David Bowie's intervention in the debate to suggest that Scots should vote no in the referendum: [All Back to Bowie's](#). As the website states:

"In response to [David Bowie's famous declaration at the Brit Awards](#), a group of Scottish artists are setting up camp in Bowie's (metaphorical) living room for an irreverent lunchtime show exploring the 2014 Scottish independence referendum, and what it might mean for the country to stay with - or leave - the UK."

If this is the 'regional electorate' which [Rainer Bauböck in his contribution](#) argues is best placed to consider whether or not to upgrade a regional citizenship into the citizenship of an independent state, then anecdotally I would concur that confining the electorate by reference to residence has been successful. It has given a powerful sense of common destiny to Scottish residents, even if, of course,

we are making a decision which affects many more people than that group alone, for all the reasons that the contributors to this debate have made clear. To what extent that sense of destiny would carry over into iScotland, or back into a continuation of the 307-year Union of the Parliaments which must, surely, even in the event of a no vote, be ripe for radical constitutional reform, remains to be seen.

Independence Referendums and citizenship *ab initio* – A rejoinder

Ruvi Ziegler*

I am most grateful to all the contributors for taking the time to engage with the topic and offer eye-opening and thought-provoking perspectives on contexts ranging from Catalonia/Spain, Flanders/Belgium, and Scotland/UK to Quebec/Canada and Puerto-Rico/USA. The nature of this rejoinder makes it challenging to address the many incisive points raised in the contributions. My aim is to address principal points of contention – and agreement – that emerged from the debate, and to clarify several issues pertaining to putative citizenship claims from an international law perspective.

In my kick-off contribution, I argued that it is normatively desirable for the enfranchised population in independence referendums to resemble the citizenry on ‘day one’ of a successor state that may come into being following an affirmative vote. I also submitted that, citizens *ab initio* of a successor state are significant stakeholders in an independence referendum that may bring that state into being. The distinction between the initial determination of the citizenry and the rules of acquisition (naturalisation) and loss of citizenship after independence should be emphasised: my claims concerned only the former. Notably, the above claims are not derived from an expressed preference for one of the models for attribution of successor state citizenship *ab initio* (see e.g. [Jo Shaw’s research](#)), as long as the selected model is compliant with international law standards as per the [ILC Draft Articles](#).

Independence referendums: background conditions

My contribution steered clear of determining the legitimacy of particular external self-determination claims (see this [encyclopaedic entry](#) for select sources on self-determination in international law). However, as became evident during the debate, three background conditions need to be satisfied before such claims are brought forward by way of an independence referendum, and an additional condition may be critical for its implementation.

First, a sufficiently determined political movement possessing the will to pose the independence question. [Dirk Jacobs’ contribution](#) demonstrated the implications of the absence of such a political will in Flanders. [Jaime Lluch](#) explained that previous ‘plebiscites’ in Puerto Rico were not strictly speaking ‘independence referendums’ as three of the four political status options involved remaining within the U.S. constitutional framework. Second, a defined territory. The considered case-studies (Catalonia, Quebec, Scotland, Puerto Rico, and Flanders) indicate that an interim stage of self-governance (be it devolution, federalism, and/or regional autonomy) is likely to precede an independence referendum. This legal and political reality may affect the question of eligibility, both for participation in the referendum and for citizenship *ab initio*. Third, and perhaps most critically for this debate, an identified ‘people’ on behalf of whom the claim for external self-determination is made. Finally, even though the acquiescence of the state from which secession is sought is not necessarily normatively required ([Rainer Bauböck’s observation](#)), its absence is a recipe for uncertainty. Note [Jaume Lopez’s and Montserrat Guibernau’s](#) portrayals of current tensions between the Spanish State and the Catalan Government, leading the Catalan Parliament to refer to the 9 November 2014 vote as a ‘political consultation’ and asking a modular two-stage question rather than a straightforward independence question.

I readily concede that my claims are normative; even if, as [Guy Laforest and Eric Montigny observed](#), ‘on matters of referendums, consistent normative logic does not always work’, I believe that we should not give up on trying. I also acknowledge [Dora Kostakopoulou’s insightful remarks](#)

* University of Reading.

regarding the dynamism of political processes: it may very well be that the White Paper's framework for citizenship *ab initio* will be altered following an affirmative vote and that, politically, the referendum would have probably gone ahead even if the SNP had refrained from setting out a citizenship agenda. However, despite my critique of the incongruence between the blueprint for citizenship *ab initio* and the referendum franchise, I think we ought to appreciate the fact that a plan has been presented; at least in this aspect, a standard has been set for future independence referendums.

The franchise in independence referendums and putative citizenship: four categories

In the main, the contributions addressed questions arising in the context of potential separation of a territory from an existing state rather than dissolution thereof. Hence, from an international law perspective, citizenship of the predecessor state remains unaffected. In contrast, dissolution of a predecessor state affects all its citizens. Against this background, the eligibility of persons belonging to the following categories of persons to vote in an independence referendum was considered: First, citizens of the predecessor state habitually resident in the putative successor state (including persons temporarily absent). Second, non-citizens habitually resident in the putative successor state. Third, citizens of the predecessor state formerly resident in the putative successor state or having other 'appropriate legal connection' with the successor state. Fourth, other citizens of the predecessor state.

A consensus has emerged that persons in the first category form the 'core' electorate in an independence referendum. Indeed, such persons will be considered citizens *ab initio* of a successor state (unless they choose to decline the offer): according to Article 24(a) of the [ILC Draft Articles](#), concerning separation of a territory, a successor state shall attribute its nationality to persons concerned [defined as citizens of the predecessor state] habitually resident in its territory, subject to granting them the right of option (Article 26 thereof). [As Jacobs noted](#), the reluctance of Flemish leaders to pose the independence question stems in part from the (electoral) implications of enfranchising Francophones currently residing in Brussels.

A similar consensus has emerged that, although persons in the fourth category will be affected in substantial ways by secession, it would be inappropriate to enfranchise them in an independence referendum, as this would effectively grant the majority of the predecessor state veto power over secession (a point which [Guibernau](#) highlighted in relation to Catalonia). I contend that it would arguably be (at least equally) implausible to consider such persons as citizens *ab initio* of a successor state.

Contributors diverged as to whether persons belonging to the second and third categories should be enfranchised and/or be considered/offered citizenship *ab initio*, offering normative, pragmatic, strategic, and (national) law arguments to support their position.

Debate themes

The following (non-exhaustive) themes have emerged from the debate: (1) external self-determination; (2) the 'core electorate' option; (3) the challenge of the regional franchise (4); Scotland: a tale of two unfitting franchises; (5) over-inclusiveness and abstention; (6) stake-holding and putative citizenship; (7) strategic ex/inclusion; (8) the significance of an agreement with the central government. I shall address them below.

Whose external self-determination is it, anyway?

International documents refer to the (external) self-determination of peoples. Article 1(2) of the [UN Charter](#) considers the development of 'friendly relations among nations based on respect for the

principle of equal rights and self-determination of peoples’, and the identically worded Article 1 of the ICCPR and ICESCR refers to peoples’ right to self-determination, by virtue of which ‘they freely determine their political status...’ In line with [Vesco Pakalev’s contribution](#), I contend that a ‘people’ (or a ‘definable group’, to borrow the term used by the Canadian Supreme Court judgment, in [Re Secession of Quebec](#), [138]) making a self-determination claim needs to be self-defined, so that it can plausibly answer this question: in the name of whom is external self-determination sought? The answer to this question should determine the category of persons entitled to participate in the referendum, since ‘the application of the right to self-determination requires a free and genuine expression of the will of the people concerned’ (International Court of Justice, [Advisory Opinion concerning Western Sahara](#), 16 October 1975, [55]).

Hence, when external self-determination is sought via an independence referendum, inclusion and exclusion therein are not just symbolically significant: a flawed designation of the electorate may cast a normative shadow on the legitimacy of the referendum which, in turn, may affect the extent to which the outcome is recognised. Notwithstanding Jennings’ paradox of self-determination with which [Jure Vidmar](#) opened his contribution, self-definition is an inevitable part of an external self-determination process.

I further assert that, consistently with international law, a putative state should have an initial body-polity at the moment of coming into being. By setting a blueprint for citizenship *ab initio*, the Scottish government attempted to define the people of Scotland on behalf of whom external self-determination is sought. It could have made other choices reflecting different encapsulations of ‘the people’; however, unlike Kostakopoulou, I believe that, acting in good faith, the Scottish government had to make a choice and duly present it for public scrutiny. [Lopez’s contribution](#) noted that the Catalan government has not yet presented a similar blueprint; nevertheless, absent contrary indications, it may perhaps be presumed that the definition of a ‘Catalan’ in [Article 7 of the 2006 Statute of Autonomy of Catalonia](#) (which, in its preamble, refers to self-government of ‘the Catalan people’) reflects the category of persons whose external self-determination the independence movement seeks: Spanish citizens legally resident in Catalonia (subsection 1) and Spanish citizens resident abroad whose last legal place of residence was Catalonia (subsection 2).

Herein lies the rub of my congruence claim: that, normatively, the designation of a ‘people’ whose external self-determination is sought should be reflected both in the franchise of a referendum on independence and in the initial citizen-body of a putative state.

The ‘core electorate’ option

[Daniel Weinstock](#) posited that (in a federation) citizenship of the predecessor state and habitual residence in the putative successor are individually necessary, and jointly sufficient for enfranchisement in an independence referendum; namely, that the franchise should not extend to persons in the second or third categories outlined above. Following my earlier discussion, Weinstock’s argument suggests that ‘the people of X’ for the purpose of external self-determination is coterminous with its citizen-residents, and that the franchise should be based on both criteria. I submit that the same logic, if adopted, suggests that this should be the initial body-polity on day one of a successor state.

Weinstock observed that this proposition puts him at odds with mine. Now, this may be the case insofar as he views the exclusion of “‘blood nationals’, even blood nationals who are still citizens of the larger federation’ to be ‘a requirement of liberal democratic ethics”, whereas my position is contingent on whether non-residents will be considered citizens *ab initio*. Hence, Weinstock opposes enfranchisement of non-residents in an independence referendum; in contrast, I believe that it depends on whether they are considered part of ‘the people of X’ for the purposes of external self-determination, and that there may be sound reasons to include non-residents who have ‘an appropriate

legal connection' with the seceding territory. Indeed this is why the [ILC Draft Articles](#) encourage successor states to give such persons the option to opt for their citizenship *ab initio*.

Nevertheless, it is noteworthy that, at least on my reading, Weinstock's proposition is compatible with my congruence claim. Moreover, notwithstanding the above, his proposition is compatible with the minimum requirements of [the ILC Draft Articles](#). Article 8(1) states that 'a successor state does not have the obligation to attribute its nationality to persons concerned [read: citizens of the predecessor state] who have their habitual residence in another state and also have the nationality of that or any other state'.

The challenge of the regional franchise

[Bauböck](#) (with whom several other contributors concurred) argued that, when a region which enjoys a degree of self-governance is considering external self-determination, the independence referendum franchise should be based on the regional franchise, which is ([according to Lluch](#)) the only legitimate franchise in a constitutive referendum. Notably, while the scope of Bauböck's contention is limited to non-remedial secession, classification of some cases may be challenging (note [Lopez's](#) different characterisation of Catalonia).

Bauböck's claim is two-fold: first, the existing regional franchise enjoys constitutional legitimacy. Second, 'the [independence] vote belongs to the regional citizens who should decide on whether they want to change their region's status through secession'. The first argument is important for obtaining the acquiescence of the central government; however, as independence operates outside the state's existing constitutional order, it carries limited weight.

The second leg of the argument is compelling, yet it too has limited force: the regional franchise ought to be the *prima facie* basis for determining the referendum franchise insofar as it defines 'the people' in the name of whom external self-determination is sought. This will often be the case when 'people' of that region are defined as a subset of the body-polity of the state, as seems to be the case in Catalonia, where Article 7 of the Catalan Statute defines and enfranchises all 'Catalans'. Here, it seems plausible to base both the independence referendum franchise (rather than the over-inclusive franchise that is currently proposed) as well as citizenship *ab initio* on the regional franchise, a position which [Lopez](#) and [Guibernau](#) endorsed. Bauböck, however, argued that the regional franchise should not determine citizenship *ab initio* of the successor state, since 'regions and independent states are polities of different kinds and their membership rules differ accordingly'. But why should citizenship on 'day one' (as opposed to naturalisation and voluntary renunciation) reflect a different polity than that which exercised external self-determination? I remain unconvinced.

The more challenging scenario is when the regional franchise reflects considerations that suit local (rather than national) elections. This is, arguably, the case of Scotland, as the franchise for UK regional assemblies, including the Scottish Parliament, is identical to the franchise for local elections. Being both over and under-inclusive, the Scottish regional franchise is a misfit, bearing insufficient correlation to 'the people of Scotland'. In such circumstances, both options are unfavourable: one can either adopt the regional franchise, thereby weakening the external self-determination claim (see [Vesco Pakalev's cogent analysis](#)); or, alternatively, adopt a different franchise which reflects 'the people of X' but which could suffer from an internal legitimacy deficit. In the UK, a layer of complication is added by the fact that the general election franchise would not be a suitable option either, for reasons which I discuss below.

Scotland: a tale of two unfitting franchises

Although the claims in the kick-off were intended to be of general applicability, the emphasis I placed on the Scottish franchise and *ab initio* citizenship prompted defences thereof by [Vidmar](#) and [Bernard](#)

[Ryan](#). Vidmar argued in reference to Scotland that ‘a variant of the territorial approach appears to be a fair choice’; it baffles me how a variant that is based on select list of nationalities among Scotland’s residents is considered a fair choice (see also [Lopez’s critique](#) of the proposed franchise for the Catalan vote on 9 November 2014 which favours EU residents over other migrants in terms of their residence eligibility requirement).

[Bernard Ryan](#) pointed to a supposed tension between my two propositions with respect to the Scottish referendum franchise; this may be accurate had I proposed the UK general election franchise as the basis for the independence referendum franchise. However, the kick-off does no such thing. In fact, it points out two follies of the latter franchise: the (arbitrary) 15 year out-of-country residence rule that disenfranchised many UK external citizens, and the enfranchisement of qualifying Commonwealth and Irish citizens. Rather, my proposition is that *because* certain non-resident UK citizens will be considered citizens *ab initio* of an independent Scotland, their exclusion from participation in the referendum is incongruent.

[Ryan](#) argued that my general approach “runs up against the enduringly pragmatic character of the UK’s constitutional arrangement”. Yet, enfranchisement of qualifying Commonwealth and Irish citizens is a peculiar feature of the UK and its colonies’ shared imperial past. Even if the UK chooses to retain this historical anomaly in future elections (notably, the 2008 Goldsmith report entitled ‘[Citizenship: Our Common Bond](#)’ proposed “limiting in principle the right to vote in Westminster elections to UK citizens”; page 75, [17]), I struggle to see the logic and utility behind ‘exporting’ this arrangement to the franchise and citizenship arrangements of a newly established state.

Over-inclusiveness and abstention

[Ben Saunders](#) argued that “we may wish to give the vote to some who will not be given citizenship, because we do not wish to accord them other rights that would be afforded by citizenship.” I submit that, an election cycle and an external self-determination referendum determining the international legal status of a territory are qualitatively different electoral processes; while Saunders’ rationale may be applicable in the former, small ‘p’ politics processes, it is not appropriate in the latter, because it understates the legal significance of the creation of a new independent state, including with regard to the right to enter and remain.

[Saunders](#) suggested that “[t]hose who are long-term residents in Scotland should have a say over its future.” Now, perhaps a claim for self-determination of X could theoretically be made by ‘the people living and working in X’ (as long as no arbitrary distinctions are made between residents). Why, then, should only some of these people be considered the initial members of the independent political community which their collective act of participation in an independence referendum has brought into being? According to Saunders, non-citizens ‘will be part of that future [of the successor state] even if they are not (at least immediately) offered citizenship’. From an international law perspective, this proposition is ill-advised: if the territory remains part of the larger, predecessor state, then their future in that territory (and in the country as a whole) depends on their immigration status in the country. In the event of an affirmative vote, the question whether they will be part of the future of that successor state will be determined by their immigration status in that state which, in turn, will be determined by the body-polity of that state.

[Vidmar](#) cited the ECtHR [Kurić](#) judgment which should presumably calm the anxieties of Polish migrants in Scotland. However, this case involved the residence rights of citizens of the predecessor state (the Socialist Federal Republic of Yugoslavia); indeed, Article 14 of the [ILC Draft Articles](#) enunciates that “the status of persons concerned as habitual residents shall not be affected by the succession of states.” From current international law perspective, the security of residence of non-citizens of the predecessor state, even long-term residents, may be a different matter altogether

(although, like Vidmar, I would like to see the logic of the judgment extended in these situations in future).

It is quite tempting to share Saunders' intuition that 'it is better to err on the side of generosity when allocating voting rights', since over-inclusiveness guarantees that all putative citizens *ab initio* are enfranchised, and eligible voters may abstain. However, independence referendums may have a pass threshold, in which case failing to vote (or abstaining, where voting in a referendum, like in elections, is considered mandatory) is effectively a vote against independence; in such referendums, there is no neutral position. More fundamentally, the decision to enfranchise (certain) non-citizens or (certain) non-residents is a symbolic public statement that they are considered part of the people seeking self-determination. It carries normative weight and affects behaviour. It is hardly surprising that the Polish migrants in Scotland (surveyed by [Derek McGhee and Peitka-Nykaza](#)) are unsure whether to participate, as they have been sent conflicting messages: on the one hand, they are invited to take part in a historic referendum potentially terminating a 307-year union. On the other hand, they are not considered part of the initial citizen-body of a putative Scotland, and (as noted above) their security of residence is indeterminate. No wonder many of them refer to their inclusion as a 'privilege' or a 'burden' (rather than as a right or an entitlement) and some of them see themselves as guests who ought to vote in a manner that would satisfy the wishes of their kind hosts lest hospitality turns to hostility; the problem being, of course, that these wishes are hardly uniform. One could anticipate similar dilemmas arising for EU and other migrants in Catalonia, should the franchise follow the proposed model.

Stake-holding and putative citizenship

In his 'mid-debate' summary, [Paskalev](#) observed that most contributors have not contested the claim that putative citizens of a successor state are significant stake-holders. [Kyritsis](#) offered a limited normative challenge, arguing that even if it were unproblematic (perhaps even desirable) to enfranchise citizens *ab initio*, their exclusion does not dent the legitimacy of an independence referendum. He argued that, the stake-holding of *ab initio* citizens is not qualitatively different from that of citizens of neighbouring states who may be vicariously affected by electoral results (e.g. citizens in Latin America affected by U.S. elections). [Bauböck](#) made a similar claim with respect to citizens of rUK (persons in the fourth category outlined above). Now, it is possible that the discernible, daily effect of a change in U.S. administration on a citizen of Venezuela may be greater than the effect of Scottish independence on our (now famous) Amsterdam-based former Scottish graduate. However, from an international law perspective, the individual status and citizenship-contingent rights of the former Scottish graduate are meaningfully affected. Kyritsis was right to note that, according to Article 8(2) of the [ILC Draft Articles](#), a successor state shall not confer its citizenship on our graduate against her will, seeing that she is a UK citizen habitually resident elsewhere. Yet the independence of Scotland may force her to choose between UK and Scottish citizenships, and that choice may in turn affect her life and work possibilities in the territory to which she has an 'appropriate legal connection' (elsewhere, [Nick Barber](#) discussed some of the challenges that non-residents may face in the event of independence).

[Kyritsis](#) further argued that 'there is no general duty to give people easy choices'; this is undisputed but beside the point: it is not the fact that our graduate will be faced with the choice that is at stake here, but the fact that she is excluded from the process that may bring about this scenario. Kyritsis' analogy to premium membership fails to encapsulate the significance of exclusion. A more suitable analogy would be that of children being faced with (hard and/or exciting) choices that were pre-determined by their parents. The ability to choose ex-post does not compensate for the symbolic harm caused by exclusion ex-ante. Do those seeking external self-determination consider the Amsterdam-based Scottish graduate merely a potential beneficiary of a decision made in her (electoral) absence, or part of the 'people' on behalf of whom self-determination is sought? I submit that, like the Polish migrant, she has been receiving a mixed message from the independence movement.

Strategic ex/inclusion

Vincent Laborderie’s contribution endorsed adopting an effectively over-inclusive franchise in order to discourage political calculations: he proposed that ‘the group of people who would automatically obtain citizenship on day one of independence remains [sic] smaller than the group allowed to vote in the referendum’. He asserted that the prospect of citizenship *ab initio* may entice a non-citizen resident (e.g. the Polish migrant in the Scottish independence referendum) to favour independence, and so the independence movement may be seen to be buying votes; hence, the migrant should be enfranchised, but should not constitute part of the initial citizen-body of a successor state. I contend that, the normative dilemma whether non-citizen residents should participate in a referendum should not be resolved by predictions regarding their voting intentions; surely, no-one would argue that the citizenship *ab initio* of resident citizens should be dependent on their voting intentions, and it is not a principled basis for denying membership to others.

Similarly, Vidmar’s caution against “including the Diaspora too generously” lest it “distort the result” is unconvincing: if, as he posited “an independence referendum is an eminently territorial question”, then *this* should be the reason to exclude non-residents (and enfranchise residents), rather than the way they are predicted to vote. Interestingly, it has been suggested that the extension of the franchise in the Scottish referendum to 16 and 17 year olds may have been driven by a nationalist preference (see [this response](#)); however, not only can predictions backfire but, critically, the important question is whether it is right to extend the franchise.

The significance of an agreement with the central government

The question whether the referendum - and the referendum franchise - is agreeable to the self-determination movement and to the central government (as in the case of Scotland via the [Edinburgh agreement](#)) is no doubt politically significant, and may determine the likelihood that an affirmative vote in an independence referendum will result in independence, *de facto* and *de jure*. Laborderie observed that, absent an agreement, the independence movement may have an incentive to try to tweak the franchise so that it suits its purposes, implying that the need to reach an agreement with the central government increases the chance of a genuinely representative referendum. This seems intuitively plausible. Indeed, all else equal, an independence referendum that takes place pursuant to an agreement is preferable. Laforest and Montigny argued that “gaining consensus between central and sub-state government is more important than maintaining consistency between pre- and post-independence.” From a realpolitik perspective, this is very sensible. However, while the [Edinburgh agreement](#) facilitated the smooth running of the referendum, a different franchise could have been pursued and agreed between the parties. Saying that consensus trumps consistency is question-begging. More fundamentally, I maintain that a normatively flawed franchise is not saved by the fact that it is endorsed by the central government. Ideally, this examination ought to be conducted before an agreement is concluded, should be transparent, and open to public scrutiny.

In closing

A historical glimpse may be quite insightful on this occasion. The UN ‘Future Government of Palestine’ resolution ([General Assembly resolution 181/II of 29 November 1947](#)), commonly known as ‘the Partition Plan’, set out a clear blueprint for participation in the elections of the constitutive assemblies of the prospective Jewish and Arab states, and for citizenship thereof (section B, entitled ‘steps preparatory to independence’). Like the [ILC Draft Articles](#), the base-layer for citizenship was (Mandate) Palestine citizens resident in the respective states. In turn, the resolution enunciated [10] universal suffrage for adult citizens of both genders. The franchise was also intended to include non-citizen residents, provided that they have “signed a notice of intention to become citizens of such State.” As is all too well-known, the arrangements in the partition plan (including partition itself) have not materialised, but the blueprint for participation and membership is noteworthy.

Ruvi Ziegler

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Bibliography

- Abts, K. Swyngedouw, M. Billiet, J. & Meuleman, B. (2014) Vlaanderen kiest. Trends in stemgedrag en opvattingen over politiek, staats hervorming en kerk. Leuven: LannooCampus.
- Álvarez, G. and Julián, J. (1990) 'The Empire strikes out: Congressional ruminations on the citizenship status of Puerto Ricans', *Harvard Journal on Legislation* (27): 309.
- Arrhenius, G. (2005) The boundary problem in democratic theory. *Democracy Unbound: Basic Explorations I*, 14-28.
- Bauböck, R. (2005) Expansive citizenship - Voting beyond territory and membership; PS online: 683-687.
- Bauböck, R. (2009) "The Rights and Duties of External Citizenship." *Citizenship Studies* 13 (5): 475-499.
- Cattaruzza, A. (2010) *Territoire et nationalisme au Montenegro*, Paris: L' Harmattan: p. 132.
- Cheal, D. (1988) *The Gift Economy*, Routledge: London.
- Day, S. and Shaw, J. (2002) European Union electoral rights and the political participation of migrants in host polities, *International Journal of Political Geography*, vol. 8:183-199.
- Derrida, J. (2000a) Hospitality, *Angelaki: Journal of the Theoretical Humanities*, 5(3): 3-18.
- Derrida, J. (2000b) *Of Hospitality*, Stanford University Press: Stanford.
- Derrida, J. (2005) The Principles of. Hospitality, *Parrallax*, 11 (1): 6-9.
- Goodin, R. (2007) 'Enfranchising all affected interests, and its alternatives' *Philosophy & Public Affairs* 35(1): 40-68.
- Hammar, T. (1990) *Democracy and the Nation State*, Avebury: Aldershot.
- Hirschman, A. (1970) *Exit, Voice, and Loyalty*, Cambridge, Mass., Harvard University Press
- Jacobs, D. (2007) "Brussels, do you speak-a my language?", in *Waar België voor staat. Een toekomstvisie*, edited by Buelens, G., Goossens, J. & Van Reybrouck, D. (Antwerpen: Meulenhoff/Manteau: 223-38.
- Ivor Jennings (1956) *The Approach to Self-Government*, Cambridge University Press.
- Komter, A. (2005) *Social Solidarity and the Gift*, Cambridge University Press: Cambridge.
- Lardy, L. (1997) 'Citizenship and the Right to Vote' *Oxford Journal of Legal Studies* 17(1): 75-100.
- Owen, D. (2010) "Resident aliens, non-resident Citizens and voting Rights", in *Citizenship Acquisition and National Belonging*, edited by Calder, G., Cole, P. and Seglow, J., London: Palgrave: 52:73.
- Sennett, R. (2003) *Respect: the formation of character in a world of inequality*, Penguin: London.
- Shaw, J. (2007) *The transformation of citizenship in the. European Union*, Cambridge University Press: Cambridge.
- Shaw, J. (2013) *Citizenship in an independent Scotland: Legal status and political Implications*, CITEES Working Paper Series, 2013/34, University of Edinburgh.
- Sheehy, P. (2002) 'A Duty Not to Vote' *Ratio* 15(1): 46-57.
- Song, S. (2009) 'Democracy and Noncitizen Voting Rights' *Citizenship Studies* 13(6): 607-20.
- Trías Monge, J. (1997) *Puerto Rico: The Trials of the Oldest Colony in the World* (New Haven: Yale University Press.

- Vidmar, J. (2014, forthcoming) The Scottish Independence Referendum in an International Context, Canadian YBIL (51), SSRN Version, p. 25.
- Walker, N. (2008) *Denizenship and the deterritorialisation in the EU*, European University Institute, EUI LAW 2008/08.
- Wise, A. (2009) “Everyday multiculturalism: Transversal crossings and working class cosmopolitans”, in *Everyday Multiculturalism*, edited by Wise A. and Velayutham, S., Palgrave: Basingstoke: 21-45.

Editors:

Ruvi Ziegler

University of Reading, School of Law

Foxhill House, Whiteknights Road

Reading

RG6 7BA

United Kingdom

Email: r.ziegler@reading.ac.uk

Jo Shaw

University of Edinburgh, Law School

Old College, South Bridge

Edinburgh

EH8 9YL

United Kingdom

Email: jo.shaw@ed.ac.uk

Rainer Bauböck

European University Institute, Department of Social and Political Sciences

Via dei Roccettini 9,

I-50014 Fiesole Florence

Italy

Email: rainer.baubock@eui.eu

EUDO CITIZENSHIP contact and submission of working papers:

Email: eudo.citizenship@eui.eu

<http://eudo-citizenship.eu>

