Political Rights and Multilevel Citizenship in the EU

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Abstract

The focus of this paper is on the rights of non-nationals to vote in local elections on the basis of residence, rather than nationality. This is already well established in the EU context, as a result of the introduction of local electoral rights as part of the citizenship package contained in the Treaty of Maastricht. A number of Member States go further and confer the right to vote in local elections on third country nationals as well, but this extension has by no means been universal. This paper explores some of the political and legal tensions which arise where there are debates and conflicts within states, across different territorial and political units, about whether or not to extend electoral rights to non-nationals. The paper seeks to explore the types of claims or arguments made for the exercise of regional or local autonomy, e.g. within federal states, in favour of extending electoral rights where the national policy is more restrictive. It emphasises in particular the significance of constitutional barriers in a number of states where experimentation at the subnational level has been attempted, notably Germany and Austria. It suggests also that the case for subnational experimentation can be linked, as it may be increasingly in Scotland as the UK's current devolution scheme continues to evolve, to broader political questions about a state's political and territorial settlement.

Keywords

Citizenship, immigration; federalism; devolution; voting rights; non-nationals; multi-level governance; European Union; Member States.

I Introduction: citizenship and immigration issues in multi-level governance systems

In mature federations, debates often occur about which level of government should regulate (which) immigration issues.[2] The core issue is whether immigration is an

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exceptional case (because of the link to the security of the state and to international diplomacy), or whether it should, in federal systems, be regulated using the same public law principles and applying the same arguments about policy efficiency and legitimacy as those which govern the allocation of powers between different levels of government in other policy fields, taking due account of regional variations within a territorially differentiated jurisdiction. Moreover, states within federations can also act as laboratories, or precursors to wider national trends. As Justice Brandeis famously once said:

> '[I]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'[3]

There is, of course, nothing to suggest that in the case of immigration federalism, this would mean the adoption of policies which are necessarily more 'favourable' to perceived interests of immigrants (Wishnie, 2001). But they might, for instance, be directly reflective of the fact that a particular region or city within a state is more attractive to migrants and thus faces different constellations of issues to other parts of a state (Loobuyck and Jacobs, 2006). Thus the division of powers in the immigration field may be affected by the preferences of both sub-state regions and cities, and of migrants. Regions often view themselves and/or are treated as stateless nations within wider multinational states with specific interests in issues of economic development and demography which may differ from the rest of the state, and cities commonly regard themselves as transnational rather than national actors, whether in federal or unitary states. Cities, in particular, may be the chosen destinations of immigrants, rather than countries as such, not least because newly arrived immigrants often wish to join an established community in the host state of co-ethnics or co-nationals (Vertovec, 1998; DeVoretz, 2004; Bauböck, 2003). The political authorities of those

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2 For the discussion on immigration federalism, see generally Schuck, 2002; Huntington, 2007; Spiro, 2001; Boushey and Luedtke, 2006; Parlow, 2007; Su, 2008.

3 *New State Ice Co* v. *Liebmann*, 258 U.S. 262 at 311 (1932), Brandeis J dissenting.

states, regions or cities will react differently to the political demands stemming from differing levels of immigration 'demand'. Accordingly, a particular case may be made for the individual units within a federation or for large units such as cities to make autonomous decisions on the question of migrant selection as well the issues of post-settlement integration with which they are more often already entrusted, because of political, geographical, demographic, cultural or social conditions.[4]

Leaving aside more general questions about immigration federalism, the specific focus of this paper is on rights to vote and stand in elections as a resident rather than a national of the host state, and in particular the right to vote in local elections. This is just one narrow dimension of the immigration/citizenship complex within multi-level polities, where tensions can arise between the 'federal' authority and the subnational authorities as to which rights could or should be given to which different groups of immigrants and/or non-nationals. The question of the allocation of political participation rights in local elections combines difficult issues about the interface between settlement rights, access to nationality through naturalisation and residence, and integration within the host society more generally. The paper looks at the contestation of such rights across different levels of governance *within* the Member States of the European Union ('EU'), but it places these rights in their wider EU context, taking into consideration relevant EU laws and policies governing the rights of EU citizens and third country nationals.

Thus the paper builds upon an earlier study examining how electoral rights allocated at the EU level to EU citizens interact with the electoral rights granted (or denied) to non-nationals more generally at the national level (Shaw, 2007). The primary focus of the earlier study was the existing framework of electoral rights under EU law, which are applicable only to EU citizens. The rights enjoyed by EU citizens under Article 19 and the implementing directives,[5] which extend to rights to vote and stand under the

[4] E.g. on language grounds, Quebec takes a different approach to Francophone speakers than does the rest of Canada. See DeVoretz *et al*, 2003.

[5] Council Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ 1993 L329/34; Council

same conditions as nationals not only in municipal elections but also in European Parliamentary elections, provide examples of how the various regimes of rights enjoyed by EU citizens are dispersed across the supranational as well as the national levels. They can be seen as important exemplars of the wider principle of equal treatment, which complements the free movement rights enjoyed by EU citizens. The legal framework for this is provided not only by the citizenship provisions of the EC Treaty themselves, but also by other provisions of EC law such as Article 12 EC. The rationale for this legal framework focuses to a considerable extent on the fostering of integration of migrant EU citizens into the society and polity of the host Member State.

In contrast, there is no 'hard' EU law governing the allocation of electoral rights to resident third country nationals at the national level, but there is some soft law encouragement. For example, DG Freedom, Security and Justice of the European Commission has produced a Handbook on Integration for policy-makers and practitioners, which seeks to establish best practice, drawn from examples across the Member States, in areas such as initial reception of immigrants and civic participation. It encourages Member States to extend local political rights to third country nationals using arguments about integration:

> 'The representativeness and democratic legitimation of policies is enhanced by extending formal political rights to immigrants. Where political rights exist, they need to be put into practice with commitment from all sides including political parties…At the local level in particular, electoral rights provide immigrants with political representation in decisions that affect their most immediate interest…Governments should grant electoral rights to all residents at least at local level and minimise obstacles to the use of these rights, such as fees or bureaucratic requirements. Immigrants can be encouraged to make use of electoral rights through information campaigns and capacity building,

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Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ 1994 L368/38.

> relying in particular upon the networks offered by immigrant organisations' (DG Freedom, Security and Justice, 2004: 41).

This, along with other similar statements emanating from the EU institutions,[6] supports the general proposition that electoral rights for non-nationals, at least at the local level, can usefully be seen as part of a *pathway* through a process of integration, rather than as a *reward* for integration already achieved, in the form of the acquisition of national citizenship. It is significant to note that this proposition has achieved recognition in a number of Member States, since around half of the twenty-seven Member States accord some or all third country nationals rights to vote, and sometimes to stand, in local elections, albeit not the states with the largest number of third country national residents (France, Germany, Italy and Spain).

In this paper, the focus is on variation *within* states, rather than *across* them. A number of prominent examples of such variation do exist, such as Canada, Australia and – in a very limited way – United States, there are no examples of geographical variation in relation to local electoral rights for third country nationals amongst the Member States of the EU. The best European examples are to be found in Switzerland, which offers more generally an important example of a system of multilevel citizenship co-existing within a single state. Since citizenship operates at the federal, the cantonal and the local levels in Switzerland, those seeking to acquire Swiss nationality must seek admission at all of those levels, and there are important variations in relation to the acquisition of Swiss citizenship across the 200+ municipalities which have powers in this area (Helbling, 2008). There is variation also in the allocation of political rights. Article 39(1) of the Federal Constitution explicitly devolves the necessary competence to the Cantonal level, providing that:

> 'The Confederation shall regulate the exercise of political rights in federal matters; the Cantons shall regulate the exercise of these rights in cantonal and municipal matters.'

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[6] E.g. Conclusions of the Council and the Representatives of the Governments of the Member States on the establishment of Common Basic Principles for immigrant integration policy in the European Union, Doc. 14776/04 MIGR 105, 18 November 2004; European Commission, *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*, COM(2005) 389, 1 September 2005; European Commission, *Third Annual Report on Migration and Integration*, COM(2007) 512, 11 September 2007.

Some Cantons regulate the matter directly, either by instituting local electoral rights for non-nationals (e.g. Fribourg, Jura, Vaud and Neuchâtel) or by refusing them (e.g. Aargau, Solothurn and Schaffhausen). A number of other Cantonal Constitutions, including those of Appenzell Ausserrhoden and Lucerne allow individual communes to introduce the right to vote, thus creating the possibility for a second level of variation, at the communal level. The issue has been regularly revisited and debated, as initiatives for referendums on the matter are brought before the various Cantons.

In the United Kingdom, there is an interesting example of regional variation of electoral rights for *EU citizens*. EU citizens can vote in the elections for the devolved parliaments/assemblies of Scotland, Northern Ireland and Wales, as well as in the elections for the London Assembly.[7] This is because all of these elections are conducted on the basis of the electoral register that is compiled for UK *local elections*, not the national elections to the Westminster parliament. Pursuant to Article 19(1) EC, EU citizens are on the local electoral register.[8] These electoral rights are, however, emblematic of the UK's emerging asymmetric federal system, because in certain parts of the UK, notably most of England, the analogous elected bodies for which EU citizens can vote (and stand) simply do not exist.

Against the background of these observations, the empirical section of this paper will explore some examples of the contestation of electoral rights for non-nationals in the context of the multiple levels of political and legal authority which exist in the EU. The review does not purport to be comprehensive, but rather it presents a snapshot intended to tease out some preliminary conclusions about the different range of practices which occur in relation to electoral rights. The primary research questions are the following: What types of claims or arguments for the exercise of regional or local autonomy in relation to the political participation of non-nationals have been

7 The London Assembly has considerably fewer powers than the Assemblies in Wales or Northern Ireland. EU citizens can also vote in elections for the Mayor of London and other directly elected mayors in other towns and cities.

8 S.3(1) of the Local Government Elections Regulations 1995 (SI 1995, no. 1948) provides the basic amendments to the local electorate to incorporate the requirements of EU law, and in relation to the inclusion of EU citizens in the 'regional' franchise see s.17 of the Greater London Authority Act 1999; s.11 of the Scotland Act 1998; S.10 of Schedule 1 of the Government of Wales Act 1998; s.2(2) of the Northern Ireland (Elections) Act 1998.

developed in the EU Member States? Who have been the main actors in this context (political parties? NGOs?)? How have these arguments been received both at the subnational level and at the national level? What has been the impact of the broader 'European' context provided by the limited framework of EU competences and activities in this field? And finally, what are the barriers to the experimentation which Brandeis suggests goes to very the essence of a federal system? Are they predominantly political or constitutional/legal in nature?

II Contesting electoral rights at the subnational level in the multi-level 'euro-polity'

This section begins by looking at the link between evolving notions of subnational identity and possible re-definitions of the franchise at the subnational level in the UK, specifically in Scotland. Here the focus is on the general provocations to the definition of citizenship and associated rights which arise where the existing territorial and political settlement within a given state is under pressure from below. The UK is not unique in the EU in this context, and examples could also be drawn from the debate in both Spain and Belgium. The focus then shifts to EU Member States where there have in the last ten to twenty years been active campaigns and/or attempts, at the subnational or regional level to subvert restrictive *national* policies on the inclusion of non-nationals. In each case, the proposed more inclusive policies have faltered, often because of constitutional restrictions as well as the absence of political will at the national level. The paper takes a closer look at the cases of intrastate, intergovernmental competition which have occurred in this context, separating out for particular attention two federal states – Germany and Austria – where a constitutionally defined singular notion of the national *demos* has hindered subnational experimentation with political participation rights for third country nationals at the local level.

a) Scotland in the UK in the EU: what scope for differentiated policies?

The asymmetry in the electoral rights for EU citizens in the UK noted in the introduction raises the question whether there could in future be asymmetric development of electoral rights for third country nationals. At present, the electoral

rights of third country nationals in the UK are limited to the rights of Commonwealth citizens to stand and vote in all elections,[9] thus excluding many large groups of third country nationals in the UK such as Americans. In particular, the question arises as whether local electoral rights for third country nationals could be instituted only on a UK-wide basis, or whether there are circumstances in which Scotland could choose its own policies in this area, but without moving to full political independence and the break up of the historic union with England. To put this question in context, it is useful to look at the broader history of political conflicts between Edinburgh and London since devolution over immigration and citizenship policies. Significantly, these predated the election of the minority Scottish National Party (SNP) government at the Scottish Parliament elections in 2007, and were visible also under the previous Labour-led coalition, albeit it in a more attenuated fashion.

Asylum has been a core battleground in the UK where the issue of decentralisation has arisen. The UK is one of the many states which have used a policy of dispersing of asylum applicants, in the name of sharing the costs and the 'burdens' (Boswell, 2001). In practice, this has created the scope for differences to arise within states over the politicisation of asylum questions. In relation to Scotland, for example, while immigration (and asylum) questions are reserved matters for the Westminster Parliament under the Scotland Act 1998, certain issues about the treatment of asylum seekers, and especially the forced removal of those who have been refused asylum, have been more heavily contested than in other parts of the UK. For example, policy on children falls within the remit of the Scottish Parliament. Political conflict has arisen as to whether so-called 'dawn raids' to remove those who have been refused asylum from the United Kingdom are traumatic experiences which infringe the rights of the child, and whether such removal, however effected, would also be liable to

[9] The Representation of the People Act 1918 established the first truly modern franchise for the UK Westminster Parliament, abolishing property qualifications for men and introducing the franchise for (some) women for the first time. At the time it posited the franchise for 'British subjects', and when Ireland and what are now the countries of the Commonwealth became independent states, the franchise arrangements were preserved and updated, for example in the Ireland Act 1949. The relevant consolidating legislation laying down the general entitlement to vote is the Representation of the People Act 1983, as amended. For a review of the current scope of the franchise, see House of Commons Library Standard Note, *Electoral Franchise: who can vote?*, SN/PC/2208, 1 March 2005.

deny the children certain basic rights, such as the right to an education.[10] The issue led directly to conflict between the Scottish Executive and the UK Labour Government in Westminster. When the Scottish (Labour) First Minister Jack McConnell sought some type of dispensation from the Home Office in London regarding the involvement of Scottish education and social service agencies in the making and implementation of deportation decisions,[11] he was firmly rebuffed. In a political commentary in the *Sunday Herald*, a senior Scottish political commentator noted somewhat gloomily:

> 'If anything, McConnell's brush with the Home Office has confirmed that Holyrood's attempt to project Scotland as a welcoming place for foreigners is increasingly out of step with the clampdown implemented at Westminster.'[12]

More recently the focus has been on the detention of asylum seekers, including children, with Scottish Ministers actively seeking the closure of the only asylum seeker detention facility in Scotland, although so far unsuccessfully.[13] Scottish Government policy is also actively to seek the integration of asylum-seekers into the host community from the day they arrive in Scotland, including giving them the right to work.[14] This is emphatically rejected in current UK policy.

It is arguable that in other fields of immigration policy, while restricted in what it can do, the Scottish Executive (since 2007, renamed the Scottish Government) has been a little more successful. Historically, like Ireland, Scotland has been a nation of emigration. This has involved principally emigration to the rest of the British Isles (including the island of Ireland, especially Ulster) and to North America and elsewhere in the British Empire/Commonwealth. Immigration was largely confined to inward flows from Ireland, Poland and Lithuania especially after the second world war, from Italy, and in more recent years from England. Scotland's population has

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10 'Protest over refugee dawn raids', *BBC News*, 17 September 2005, http://news.bbc.co.uk/1/hi/scotland/4254490.stm.

11 'McConnell seeking asylum protocol', *BBC News*, 22 September 2005, http://news.bbc.co.uk/1/hi/scotland/4269894.stm.

12 'Holyrood Vs Westminster: the battle over asylum', *Sunday Herald*, 27 November 2005; www.sundayherald.com.

13 'After Dawn Raids…the new scandal', *Sunday Herald*, 20 January 2007; 'Dungavel set to close as Holyrood and Westminster pilot new detention scheme', *Sunday Herald*, 3 February 2008; www.sundayherald.com.

14 'MacAskill clashes with immigration chiefs over reforms', *The Herald*, 11 October 2008.

declined severely as a proportion of the overall population of the United Kingdom (as Scotland's dwindled to around 5 million, England's continued to grow), and its population (and population profile) has continued to decline (and to age) because of declining fertility and insufficient immigration to match the continuing emigration. Only in very recent years has the population of Scotland started to grow again, reaching an estimated 5.1 million in 2006. [15] A major contributing factor has been net inflows of EU citizens from the new Member States taking advantage of the UK's decision not to apply transitional restrictions on labour market access.

One of the major initiatives of the Scottish Executive in the early years of managing devolved government after the first Scottish Parliament elections in 1999 was to promote positively the image of Scotland as a migration destination. This has included some specific initiatives, such as the Fresh Talent initiative giving overseas students who have completed university courses in Scotland two year visa extensions to work in Scotland, without need to seek a work permit.[16] Clearly, this was hardly a radical departure from broader UK policy which has long promoted a selective migration policy focusing on skills, especially in shortage areas and on those with entrepreneurial tendencies. Even so, Fresh Talent was a broader and less restrictive programme than what was available more generally in the UK, until it was assimilated into a UK-wide international graduates programme in the middle of 2008. Furthermore, with its promotional and informational website *Scotland Is The Place*,[17] which is also available in Polish and Chinese versions, the Scottish Government has been offering warm encouragement to migration to Scotland which has not been matched by the equivalent UK-wide websites.[18] On the contrary, the public face of

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15 Population statistics are available from both the Scottish Government (http://www.scotland.gov.uk/topics/statistics/browse/population-migration) and the General Register Office for Scotland (http://www.gro-scotland.gov.uk/statistics/population/index.html).

16 See the statement of First Minister Jack McConnell to the Scottish Parliament, 25 February 2004, http://www.scotland.gov.uk/News/News-Extras/191. Scottish Executive, *New Scots: Attracting New Talent to Meet the Challenge of Growth*, February 2004. After two years, however, leave to remain has to be sought on the basis of the 'ordinary' UK rules. See Scottish Executive, *Progress Report on the Fresh Talent Initiative*, Scottish Executive Social Research, 2006.

17 http://www.scotlandistheplace.com/.

18 Compare the highly functional tone and focus of the UK Border Agency's Working in the UK website: http://www.ukba.homeoffice.gov.uk/workingintheuk/.

the UK in relation to employment-related mobility often demonstrates the increasing 'fortress mentality'[19] which now appears to pervade much UK policy in relation to immigration, border controls, and the treatment of foreigners more generally. The rhetoric in Scotland has focused firmly on settlement-based economic migration, whereas in the rest of the UK, especially the South East of England, the focus is increasingly on forms of circular migration with rights to permanent residence becoming ever more restricted.

In the wake of the election of a minority SNP Government at the Scottish Parliament elections in May 2007, the issue of citizenship and immigration has inevitably received some attention. The Scottish Government's consultative paper of July 2007 unsurprisingly had a clear slant towards a solution premised on Scottish independence. Noting that powers relating to citizenship and immigration are powers reserved to the Westminster Parliament, it goes on to say:

> The United Kingdom Government's policies on immigration and citizenship must reflect the situation across Britain, especially in the south east of England and London. In Scotland, there are very different economic, demographic and social issues relevant to population and immigration. Within the United Kingdom, it might be difficult to devolve responsibility for immigration and citizenship to Scotland, but increased powers to attract new migrants could allow the Scottish Government to address Scotland's needs in an appropriate way.[20]

The statement suggests that nothing short of independence will really do. However, it also reflects official SNP policy, which has been to campaign, even before independence, for a distinctive Scottish 'green card' to facilitate immigration.[21] In fact, when the Migration Advisory Committee was established in 2008 to provide independent and evidence-based advice to government on specific sectors and occupations in the labour market where shortages exist which can sensibly be filled

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19 D. Orr, 'Open borders are the only alternative to the erection of a repressive fortress state', *The Independent*, 26 July 2006.

20 Scottish Government, *Choosing Scotland's Future. A National Conversation*, August 2007 at p16.

21 For details of current SNP policy on immigration and citizenship, see the SNP manifesto for the 2005 UK General Election: http://www.snp.org/files/SNP_manifesto_2005.pdf.

by migration, it accepted the principle that regional variation needed to be taken into consideration. When it produced its first list of shortage occupations in the summer fo 2008, the MAC also added a short list of occupations with shortages specific to Scotland. At that level, it could be said that UK policy itself is moving a small way towards the position adopted by the SNP.

Turning to the specific question of electoral rights for non-nationals, a review of the relevant legislative materials suggests at first blush that there is little scope for variation within the UK. Section B3 of Schedule 5 to the Scotland Act 1998 lists the powers reserved to the Westminster Parliament after devolution, so far as pertains to elections. The list reads:

> 'Elections for membership of the House of Commons, the European Parliament and the [Scottish] Parliament, including the subject-matter of-
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> (a) the European Parliamentary Elections Act 1978,
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> (b) the Representation of the People Act 1983 and the Representation of the People Act 1985, and
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> (c) the Parliamentary Constituencies Act 1986,
>
> so far as those enactments apply, or may be applied, in respect of such membership.
>
> The franchise at local government elections.'

This leaves very few powers to the Scottish Parliament in electoral matters, although the reference in the last line to local government elections means that the Scottish Parliament can make certain other arrangements (other than questions of the franchise) for local elections which deviate from the UK norm. Indeed, it did so recently in order to introduce proportional representation for Scottish local elections as of 2007.[22] However, it is notable that a broader commission (the Arbuthnott Commission[23]) which looked at the conduct of elections more generally in Scotland,

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22 Local Governance (Scotland) Act 2004.

23 Commission on Boundary Differences and Voting Systems, *Putting Citizens First: Boundaries, Voting and Representation in Scotland*, January 2006 (available from www.scotlandoffice.gov.uk).

including voter participation and the co-existence of several systems of voting, was established not by the Scottish Ministers, but by the Secretary of State for Scotland – that is a Minister responsible to the Westminster Parliament. In sum, the Scottish Parliament is not permitted to change the franchise for *any* elections in Scotland, and could only be empowered to do so if the Scotland Act were amended. But while any change would indeed require primary legislation from the UK Parliament, there is no other UK constitutional bar to a wider franchise in Scotland. This point is reinforced by the fact that the current arrangements permitting EU citizens to vote in such 'regional' elections in the UK are simply laid down in primary legislation making reference to the local government register.[24]

That the current scope of the franchise should not be regarded as politically immutable in the longer term is confirmed by the fact that the franchise for putative 'Scottish' elections has differed over the years. Under the Scotland Act 1978, which made arrangements for an earlier devolution scheme aborted when the initiative which failed to win sufficient referendum approval in 1979, s.4 provided that the persons entitled to vote as electors at the elections for the putative Scottish Assembly would have been those who had their names on the register of parliamentary electors, plus peers (i.e. members of the House of Lords). Members of the House of Lords are not entitled to vote in Westminster elections although they are entitled to vote in local government elections.[25] Schedule 17 of the same Act laid down that the same groups of electors could vote in the referendum.

A different definition of the franchise was used after 1997, both for the referendum which approved the creation of the Scottish Parliament and the subsequent elections.[26] The issue of the franchise was much discussed in both the House of Lords and the

[24] Section 11 of the Scotland Act 1998.

[25] The Scotland Act 1978 was immediately repealed by the newly elected Conservative Government in 1979, after the failed referendum of 1 March 1979. The referendum was one of the factors contributing to the fall of the Labour Government, after it lost a vote of confidence on 28 March 1979.

[26] The issue of who should be able to vote in devolved Scottish elections was not discussed in the Kilbrandon Report of 1973 (*Royal Commission on the Constitution, 1969-1973*, Cmnd. 5460), which was one of the main sources of inspiration when the devolution scheme of 1997 came to be put in place.

House of Commons in 1997 during the passage of the relevant legislation, especially in relation to the question of who should vote in the referendum which approved the establishment of the Scottish Parliament. These electors were thought to be determining Scotland's constitutional status in a post-devolution Union.[27] Two key developments in relation to the local government and parliamentary registers between 1978 and 1997 should be noted: first, the presence of EU citizens on the former since 1993, and second, the presence of overseas (i.e. expatriate) voters on the latter. Expatriates were enfranchised in Westminster elections by the Representation of the People Act 1983, as amended most recently by the Representation of the People Act 2000. This allows British nationals living overseas to register to vote for up to 15 years after leaving the UK, in the constituency in which they were last registered as residents.

Choosing the local electoral register as the basis for the franchise for elections in Scotland meant a focus on residence within Scotland rather than any other form of affinity with Scotland. It not only avoided the question of the affinity and belonging of those 'expatriates' who had moved outside the UK within the last fifteen years, but also avoided the question of the participation 'rights' of the very much larger Scottish diaspora comprising those who had left Scotland within the last fifteen years in order to reside elsewhere in the UK. To what extent should the 'Scottishness' of either group of expatriates give them a say? Should the expatriates born in Scotland, who have chosen to emigrate whether within or outside the UK, be given a stake in the future of Scotland? Do they have a better right to participate than those English 'incomers' (i.e. those born and formerly resident in England, but now resident in Scotland)? It is not hard to see that such questions of affinity would be precisely those which a government committed to pushing through a referendum on a rather limited and localised concept of devolution in 1997 would want to avoid, given the presence of an active political movement for independence in Scotland. The parliamentary debates in 1997 reveal that the issue about expatriate voters was principally raised by

[27] For examples of debates, see House of Commons Committee stage of the Referendums (Scotland and Wales) Bill, House of Commons Hansard Debates for 3 June 1997, Cols. 247 to 278; House of Lords Debate, 3 July 1997, Hansard Debates, Cols. 321 to 344.

members of the opposition Conservative party in order, perhaps, to muddy the waters about what the significance of a devolution referendum might be for the future of 'Scottishness' and of Scotland. Labour government ministers rather stressed that devolution was about residence and localism. It is clear from those debates that issues about the scope of the franchise have been clearly linked to questions of identity, even in the context of devolution.

The same definition of the franchise, albeit for different reasons, is embraced for the putative referendum on independence which the SNP Scottish Government proposes to hold before the next Scottish Parliament elections in 2011. A draft bill was included in an annex to the *National Conversation* consultative paper[28] and proposed that the local electoral register should be used as the basis for the referendum franchise. The paper justified this as follows:

> 'In the Scottish devolution referendum in 1997 entitlement to vote was based on residence in Scotland, which is the same as for local government elections. The draft Bill follows this model and does not attempt to define categories of people resident outside Scotland eligible to vote in the referendum, nor to exclude any people resident in Scotland from the poll. The draft Bill envisages an independent Scotland based on the territorial and political entity of Scotland, not on place of birth, or ethnic group.[29]

This reflects also the approach of the SNP to citizenship acquisition after independence, whereby all long term residents would be accorded Scottish citizenship unless they opted not to acquire it.[30] This would be combined with full toleration of dual nationality, and the preservation of the residence rights of those who opted not take Scottish nationality, as well as the rights of their children. Of course, not all

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28 *A National Conversation*, above n.20 at pp44-48.

29 *A National Conversation*, above n.20 at p35; the proposition about inclusiveness is clearly incorrect, however, as a minority of residents of Scotland would be excluded from voting in the independence referendum, because a number of (non-Commonwealth) third country nationals are not entitled to vote in local elections. The largest such groups would probably be US and Chinese citizens.

30 See above n.21.

issues of citizenship, nationality and voting would be easy to resolve in the event of independence, as the experience of the new states which emerged in Central and Eastern Europe after 1989 has shown. This is all the more so because Scotland would be creating distinctions between insiders and outsider in the context of continuing EU membership, and in a context where Scotland has received large numbers of EU citizens exercising their free movement rights since 2004. While most of these questions lie beyond the scope of this paper, one difficult question is unavoidable. What would happen to the EU electors in pre-independence Scottish Parliament elections who refuse the offer of Scottish citizenship? At present, these electors have the right to vote for those with the power to determine policies, for example, on schools and hospitals in Scotland. Should they lose that right after independence just because they then would be voting in an election which *also* determined questions about defence and the national currency? Would it be compulsory for EU citizens, in those circumstances, to take up the offer of (dual) citizenship if they wanted to carry on voting, or would Scotland adopt the position that it has at the present time whereby EU citizens can participate in a significant elements of political decision-making, and extend that also to national (Scottish) elections after independence?

Returning briefly to the headline research questions in order to conclude this section, some key points can be made. First, it is clear that the issue of voting rights in Scotland is subsumed within a broader debate about Scottish political futures, and about the future of the Union (i.e. the United Kingdom) more generally. While barriers to further experimentation under the existing legislation are clearly legal in nature, there would be no constitutional barrier as such to a change to the primary legislation establishing the devolution settlement in order to give the power to the Scottish Parliament to define its electorate in different ways to the rest of the UK (i.e. to include third country nationals). Furthermore, since the franchise used in devolved matters has been malleable in the past this indicates that change in the future might occur again. However, despite the heated nature of the debate in the UK about the future of Union and about the possibility of a referendum on Scottish independence, the issue of asymmetry or Scotland-level experimentation has not been the subject of extensive public debate hitherto.

b) Cities and states as laboratories?

In the second part of this empirical section the focus is on cases of local level experimentation which have been driven by dissatisfaction with the prevailing national policy. These are cases where the issue is nested within a contested national debate about immigration and integration, rather than about political futures more generally. All of the cases reviewed are those where a subnational unit is contesting a restrictive national policy. However, quite conceivably, the positions could be reversed.

In France, while the issue of electoral rights for third country nationals is regularly debated, a constitutional amendment which would be necessary to start the process of bringing about local electoral rights for third country nationals remains on the table within the French legislature. It has been consistently supported by forces of the political left,[31] but it has not so far been adopted. The National Assembly adopted a draft law on the matter, but the draft has never completed the necessary legislative process in the Senate.[32] In the light of these blockages, local level experimentation has been mooted as the alternative. Initiatives within municipalities to organise local referendums on giving the right to vote to third country nationals have, like other subnational initiatives examined in this section, been declared illegal as outwith the competence of the relevant subnational authorities,[33] but they have been held on a consultative basis at the municipal level none the less.[34] Civil society organisations

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31 See the Socialist Party 'manifesto', *Réussir ensemble le changement: Le projet socialiste pour la France*, Part III, at 21: 'We will grant the right to vote in local elections to resident non-nationals who have been paying taxes for more than five years in our country', 1 July 2006, www.projet.parti-socialiste.fr.

32 See *The Rights and Responsibilities of Citizenship*, a report drawn up for the Goldsmith Review of citizenship in the UK by the British Institute of International and Comparative Law, at pp154-155.

33 Judgment of the Tribunal Administratif Cergy Pontoise (1st chamber) 23 February 2006, *Préfet de la Seine-Saint-Denis*, req. n° 0511415, reported and briefly noted in *Bulletin Juridique des Collectivités Locales* n° 4/06, 257.

34 A local consultative referendum was held on 26 March 2006 in the town of Saint-Denis; 31% of the electorate participated, and 64% voted in favour of extending the right to vote to third country nationals.

such as the *Ligue des droits des hommes* have also been very active in this context, organising symbolic votes on the issue of electoral rights for third country nationals.[35]

Similar initiatives have been seen at the local level in Italy, in particular during the years of the centre right coalition government of Prime Minister Silvio Berlusconi (2001-2006), which saw few developments at national legislative level in relation to the rights of non-nationals and immigrants. These have reflected the fact that Italy is a state with strong local identities. However, these local initiatives have come into conflict not only with the less generous national policies on immigrants' rights, but also with the limits of current legal possibility. In August 2005, a Presidential decree struck down an amendment to the statute of the municipality of Genoa allowing electoral rights to third country nationals as contrary to the current law (Bencini and Cerretelli, 2005: 6). In an unlikely development, Gianfranco Fini, who was the principal architect of the notorious Fini-Bossi law tightening up Italian immigration law, appeared to put his political weight behind the proposition that third country nationals should have the right to vote in local elections in Italy.[36] He probably knew that this was a largely symbolic gesture as it was hardly likely to come to fruition under Berlusconi's rightwing government. Indeed, it did not. While the centre-left government which was elected in 2006 was notably more positive towards enhancing the rights of resident third country nationals, it fell from power before its proposed immigration law, which would have included local electoral rights for third country nationals, could be adopted. A general election victory then saw Berlusconi return for a third term as Prime Minister. Local/national tensions on the matter of the rights of third country nationals can therefore be expected to continue under this government.[37]

Attempts at subnational experimentation have also been blocked in Germany and Austria. These two countries share a number of common features which make the comparison of the approaches taken particularly interesting. First, both have denied, at least until recently, that they are 'countries of immigration'. Second both share a

35 For more details see http://www.ldh-france.org/actu_nationale.cfm?idactu=1110.

36 E. Povoledo, 'Immigrants in Italy get unlikely aid on voting', *International Herald Tribune*, 17 October 2003.

37 For details of further local initiatives on immigration in Italy see Campani, 2007.

broadly ethnic definition of national citizenship. Third, since they are both federal states, intrastate contestation of electoral rights has occurred in the rather formal arena of the national constitutional court. Finally, in both cases, when faced with the challenge of locally led experimentation, the constitutional court has linked the local electorate firmly to a nationally defined concept of the *demos*, thus ruling out subnational attempts at reform. We will take each case in turn, beginning with Germany.

Opinions have remained divided amongst commentators about the political significance of one of the *causes célèbres* of the constitutionally based distinction between Germans and aliens. These were the rulings handed down in 1990 by the German Federal Constitutional Court, annulling as unconstitutional two legislative schemes introduced at the level of the *Land* by the states of Hamburg and Schleswig-Holstein which would have given electoral rights in local municipalities to non-nationals who satisfied certain types of criteria regarding residence and attachment (Rubio-Marín, 2000: Ch. 8; Benhabib, 2004: Ch. 3; Joppke, 1999: 104-119; Neuman, 1992; Béaud, 1992).[38]

However, legally speaking, the significance is clear. The German Court relied upon a concept of popular sovereignty as the basis for political legitimacy, and linked this to a principle of a bounded *Staatsvolk* (or 'state people'), limited by reference to the holding of national citizenship. It explicitly rejected the principle of affected interests as the basis for a claim to political equality and access to the franchise. The key section of the judgment reads:

> '[the principle of popular sovereignty] in Article 20(2) of the Basic Law does not mean that the decisions engaging state authority must be legitimated by those who are affected by them; rather state authority must be based on a people understood as a group of persons bound together as a unity.'[39]

[38] BVerfGE 63, 37 (Schleswig-Holstein); BVerfGE 63, 60 (Hamburg), 31 October 1990. In Schleswig-Holstein the rights would have been limited by a reciprocity clause.

[39] BVerfGE 63, 37 at 50 (my translation).

It also extended its conclusion about 'state' authority down to the level of local democracy, holding that municipalities, like the elected authorities at the state and federal level, wield state power. Not only did this rule out the Hamburg and Schleswig-Holstein initiatives, but it also meant that the implementation of Article 19 EC subsequently required an amendment to Article 28 of the Basic Law. It confirms that any further steps towards political inclusion for non-nationals would likewise require constitutional amendments. While the possible question of enfranchising EU citizens to vote in *Land* or federal elections is not a live one in Germany at present, the question of enfranchising third country nationals certainly is (Shaw, 2007: 290-306). In the shorter term, the Federal Constitutional Court pointed in the direction of the loosening of the rules on citizenship acquisition as the means of ensuring that in a more diverse Germany, with large numbers of persons not qualifying for German nationality under the historically restrictive conceptions which applied up to, and beyond, the date of reunification, pluralist political representation and voice is assured.

This is what prompted Seyla Benhabib to understand the Court's judgments as a 'swan song to a vanishing ideology of nationhood' (Benhabib, 2004: 207), but equally as the trigger for a set of 'democratic iterations' involving other political and legal forces such as political parties, groups representing immigrants in Germany, and the legislative organs of the state which have resulted in changes to the rules on the acquisition of nationality which came into force in 2000. This perhaps understates the rather fraught nature of the domestic political debates about the amendments to the laws on citizenship and national citizenship acquisition, which resulted in a more limited compromise law being adopted. More recently still, in rules which came into force in 2005, Germany belatedly adopted something approximating to an 'immigration law' for the first time (Bast, 2006: 3). Even that text has been highly contested, not least because of difficulties surrounding adoption. In sum, Germany's 'democratic iterations' have been extremely fraught at every turn in relation to issues of citizenship and immigration.

Against a policy and legislative background dominated by hostility to immigration and a strict definition of the conditions of access to nationality, it is hardly surprising that electoral rights for non-nationals, beyond the confines of EU law, have rarely been on the political agenda in Austria. According to an official of the Austrian Social Democratic Party (SPÖ) speaking in 2000: 'Today there is simply not the political will to address the issue of voting rights at the national level'.[40] Nominally, the SPÖ might be expected to be in favour of widening the suffrage, as is the case with many social democratic parties in the EU Member States. Indeed, they admit that 'Our theoretical goal is close to the Greens, but in practice in the world of politics it is necessary to make compromises'.[41] As the same interviewee indicated, the fear of losing political capital has restricted debate: 'Between 1989 and 1993, with over 120,000 immigrants in Vienna, no one within the SPÖ continued to talk about voting rights for third country nationals'.[42]

Even so, the SPÖ in Vienna has been responsible for a more limited project to support the rights of third country nationals, in the form of the so-called Integration Fund which . This latter body developed a model for the city whereby immigrants could vote for a representative body which was then able to *consult* with the municipal council. The Steering Committee for the Fund was the *Kuratorium*, established by the City but since abolished as integration functions were mainstreamed into the City Council itself, as a specific responsibility of one unit within the city administration. It issued guidelines for the Integration Fund and determined its tasks and goals. It had 15 seats, of which three were reserved for migrants and NGOs. The Greens and the Liberals had wanted this to be seven. The Fund focused on a diversity approach, rather than on the management of minorities, and its principal work was in the areas of social work, youth programmes and language courses (Krahler and Sohler, 2005: 21-27 and 50-56; König and Perchinig, 2003: 13).

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40 Interview with Robert Leingruber, International Secretary of the Austrian Social Democratic Party, Vienna, June 2000.

41 Franz Jerabek, Office of the Fund for Integration and assistant to SPÖ City Councillor and Member of the City Government, Renate Brauner, Vienna, June 2000.

42 For details of Austrian integration policy more generally see König and Perchinig, 2003.

Matters changed somewhat in Vienna after the election of a new SPÖ *Land* and City government in 2002, which formed an agreement with the Greens on a number of matters including a commitment to introduce electoral rights for third country nationals (Perchinig, 2005). This brought Renate Brauner, as the City Councillor responsible for integration matters, to centre stage. Brauner was an SPÖ member who had long campaigned on the issue of electoral rights, but who had previously been a more marginal figure until the coalition agreement with the Greens. An opinion poll amongst potential third country national voters conducted on behalf of Brauner and her colleagues indicated that 70% of potential third country national voters said they would use the vote if granted it (Krahler and Sohler, 2002: 52, referring to Jenny, 2002). This suggested that the vote in municipal elections for third country nationals could effectively be seen as part of a larger integration strategy, binding the non-nationals closer to the Austrian state and public authorities. Amendments were accordingly introduced to the relevant Viennese electoral laws to allow for voting by third country nationals with five or more years of residence in the *Bezirksvertretungen*. These community councils are the level at which EU citizens also participate in municipal governance within Vienna, since the Viennese city council doubles as a *Land* parliament and thus is excluded from the scope of the Article 19 voting rights.[43] Such councils below the level of the city do not exist elsewhere in Austria, and indeed they are not mentioned at any point in the Austrian constitution. This raised the question of whether it was possible to permit third country nationals to vote in these elections under Austrian constitutional law, since it is clear from the constitution that voting for *Gemeinderäte* (the normal level of municipal councils) is reserved for Austrian citizens, with an exception being made for EU citizens pursuant to an amendment to implement the Treaty of Maastricht (Article 117).[44] It is universally agreed, moreover, that voting in national and *Land* level elections is also reserved for citizens.

43 Judgment of the Austrian Constitutional Court of 12 December 1997, B3113/96, B3760/96.

44 For brief notes on the application of Article 19 in Austria, see the regular national country reports for the EU Network of Experts on Fundamental Rights (CFR-CDR), most recently Nowak *et al*, 2005: 113.

In seeking to exploit this constitutional 'space' which it felt it had identified, the Viennese City Government found support for its approach from senior constitutional lawyers in Austria, including Professor Heinz Mayer of the University of Vienna (Mayer, 2002). He argued that as the Viennese *Bezirksvertretungen* are regulated by law at the level of the *Land* rather than the federal state, and since they exercise no legislative competences, they should not be regarded as general representative bodies. As such they would not be subject to the constitutional principle of the 'homogeneity of the franchise', which restricts the right to vote to in all elections to Austrian citizens. After the law was adopted in December 2002, it was subjected to a constitutional challenge before the Austrian Federal Constitutional Court by a number of members of the Christian Democratic (ÖVP) and Freedom (FPÖ) parties, who were sitting in opposition in the Viennese legislative body. The FPÖ, in particular, mounted a political campaign against the amendment, arguing that 'a registration form (i.e. proof of residence) is too little' for the right to vote, which should be reserved only for citizens.[45] Its campaign included the use of posters displayed prominently in Vienna, emphasising that to be a true 'Wiener' or 'Wienerin', regardless of colour or ethnic background, an immigrant had to become an Austrian citizen.

In the event, the Constitutional Court adopted a narrow interpretation of the constitutional possibilities under Austrian law, cutting off what had been put forward by proponents as a promising experiment to see whether third country national voting could contribute to the integration process in Austria (Nowak and Lubich, 2005: 80). As a matter of constitutional text and interpretation,[46] the Court had no difficulty in first confirming that the electorate for national elections to the lower house of parliament (the National Council or *Nationalrat*), for regional elections to the legislatures of the *Länder* (*Landtag*), and for local elections to the municipal councils (*Gemeinderat*) is restricted in principle to Austrian citizens alone, subject to the requirements of Article 19 EC which are referred to in Article 117 of the Constitution.

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45 See the brief report at http://www.wienweb.at:11111/content.aspx?menu=1&cid=47723. Photographic evidence also held on file by the author.

46 VfGH 30 June 2004, G218/03.

However, this is not really an exception built into the Constitution as such, but rather a recognition of Austria's internal national perspective on European Community law, which is to recognise its supremacy *vis-à-vis* Austrian law, even the Austrian Constitution. It emphasised the principle of the 'homogeneity of the franchise' in this context, whereby each level of government should be voted for by an identically defined electorate. Drawing upon what might be described as the ethos of nineteenth century nationalism (Perchinig, 2005: 10), the Court decreed that the rules on the franchise for the national, provincial and municipal levels of government are merely a specific example of the general principle stated in Article 1 of the Constitution whereby 'Austria is a democratic Republic. Its law stems from the people.' This 'people' is the Austrian people, defined by citizenship.[47]

Recognising that Vienna's *Bezirksvertretungen* are not regulated by the Constitution but by state law, the Court none the less found that they are general representative bodies, in the sense that they are established by law to deal with matters in the public interest, not in the interests of particular groups or professions, and fulfil a function as representative organs of a defined territorial entity. Consequently, the principle of the homogeneity of the franchise must apply to them, even though in reality the 'people' or *Volk* which can vote for the *Bezirksvertretungen*, like the *Gemeinderäte* in the rest of the country, is constituted by Austrian citizens plus resident EU citizens from other Member States. Thus the Court gave no intrinsic weight to the re-definition of the 'people' in terms of the impact of EU law, other than to recognise the qualification mandated by Article 19 EC. It stated that the exception to Article 1 brought about in order to give effect to Austria's membership of the EU, whereby the law stems not only from 'the people', but also from the 'organs of the (European) Community', was 'irrelevant' in this context.[48] Consequently, the Court annulled as unconstitutional the amendments to the Viennese law on municipal elections which would have allowed third country nationals with five years settled residence to vote in elections to the *Bezirksvertretungen*.

47 VfGH 30 June 2004, at 47.
48 VfGH 30 June 2004 at 48.

What was notable about the judgment was both the choice to include the *Bezirksvertretungen* within the principle of the homogeneity of the franchise and the paucity of references to EU generally (Nowak and Lubich 2005: 80). It simply dismisses the relevance of EU law to deciding the issue in relation to other groups of 'non-people'. Bernhard Perchinig (2005: 10) deplores the failure to refer to the development of concepts of citizenship in the EU context, including the notion that the rights and status of third country nationals resident in the Member States should be approximated as closely as possible to those of EU citizens resident in another Member State. In any event, the Court's narrow conclusion on the reach of a nationality-defined concept of the 'people' as sovereign means that the *Bezirksvertretungen* elections cannot become a laboratory within which the city authorities in Vienna could experiment with different participatory mechanisms to promote the integration of non-nationals, in addition to naturalized citizens who are already included in the franchise. Indeed, naturalization is the only route to political inclusion in Austria for third country nationals, and unlike the German Constitutional Court, the Austrian Court made no reference to the political possibility of loosening of naturalization requirements as an alternative. On the contrary, the conditions of citizenship acquisition in Austria have tended to become tougher in recent years (Çinar and Waldrauch, 2006).

III Conclusions and assessment

It will be evident from the discussion in this paper that sub-national territorial units with autonomous or semi-autonomous powers and institutions of government, such as Scotland, the German or Austrian *Länder*, not to mention municipal authorities in any of the Member States, may seek to push the boundaries of the suffrage wider than they stand at national level for a variety of principled and instrumental reasons. In some cases, it may be because the party or parties controlling the relevant territorial unit differ sharply in ideology and approach to the national government, and those parties are seeking to use the opportunity of legal reform at the local or regional level in order either to emphasise their local 'difference' or to try to push for reform at the national level by showing an example of good practice. A form of inter-governmental intra-state competition can consequently emerge, and in that context it may well be

decisive how exactly powers are divided according to the relevant constitutional settlement regarding local self-government or devolution, and which organ of the state has the decisive power to determine who decides. Competition between different levels of government has already been a characteristic feature of struggles over electoral rights for non-nationals in several states. It is equally clear that central resistance to subnational variation is strong, and that arguments rooted in the division of powers within a constitutionally guaranteed system are frequently brought forward to justify that resistance and have been – in the case of Germany and Austria – allied to constitutionally defined notions of the *demos*. Thus, while many examples of experimental strategies can be seen in the EU Member States, none have in practice resulted in the type of subnational variation readily seen – and constitutionally mandated – in the Swiss Confederation. On the other hand, at the level of the EU and the Member States, variation is very evident, as the twenty-seven Member States have pursued very different pathways to accommodating immigrants and non-nationals within the political process.

In terms of the different strategies followed by subnational units of government seeking to contest restrictive definitions of the franchise at the national level, two distinct themes can be seen.

Some subnational regions may be consciously creating a space for migration within the polity, either by competing for greater numbers or specific types of migrants. This may or may not be associated with reinforcing a distinctive territorial identity, particularly one which is articulated through an active diaspora engagement programme (e.g. Scotland). Alternatively, such a policy may be limited to articulating a specific conception of how migrants 'fit' within the subnational territorial unit. This also offers a route to understanding the approach of a number of cities and municipalities referred to in this paper, all of which have tried to implement a broader and more inclusive notion of the *demos* through the medium of local electoral rights attaching to residence rather than nationality.

The second theme concerns the question of 'best practice' and the role of intrastate or intergovernmental competition within the state. In this context, the city or the region may lay claim to acting as a laboratory for integration, or it may be seeking specifically to influence the development of policy at the national level. However, we have seen how often such attempts may fall foul of notions of a common 'national' citizenship which has restricted all attempts in EU Member States hitherto to develop local electoral rights for third country nationals through local or regional level action.

While it was never the objective of this paper to make the case for regional differentiation in electoral rights for non-nationals, or to argue for a broader or narrower conception of the franchise more generally, some concluding comments on the normative framework within which subnational variation could occur seem appropriate, by way of a final assessment. Reference was made at the outset to Brandeis' notion of experimentation within federal frameworks, and indeed that spirit of experimentation could be said to be alive and well in the context of the patchwork of electoral rights for third country nationals which exist under *national* law across the EU Member States, especially when viewed against the backdrop of the EU's expanding corpus of soft law measures seeking to encourage Member States to adopt the more inclusive norm. But variation within polities, whether within the EU, the Member States, or the third countries such as Switzerland, always comes at the price of uniformity, and can endanger other principles such as freedom of movement within the polity, or the notion of a common citizenship bond. It might, thus, demand a rethinking of the normative basis for citizenship, other than on a traditional national basis. As to the issue of free movement, this was one reason given for pushing to have a single EU rule on electoral rights for EU citizens after the Treaty of Maastricht (Shaw, 2007: Chapter 4). As to the question of citizenship as a common bond, speaking in the US context about the increasingly sharp debate on immigration federalism, Su reminds us that:

> 'Federalism issues can often be construed as disputes over membership rules. As a result, resolution of these cases often depends on the extent to which national citizenship and the constitutional core of our "Union" trumps the right

> of states to exist and operate as distinct political (if not social or cultural) communities of interest…Under a system of governance based on "we the people," it is difficult to imagine the existence of states as states apart from the membership that constitutes its communal and political existence' (Su, 2008: 20).

Such principles have undoubtedly contributed strongly to a situation in which there is a great deal more *debate* about subnational variation of electoral rights within certain polities than there has been – at least hitherto – formal legislative or constitutional *action*.

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