

On Constitutional Membership

Marcus Llanque

I. INTRODUCTION

The allegiance that moderns feel towards the democratic nation state is now being placed in question by the claims of postnationalism, supranationalism, and cosmopolitanism. But what does affiliation to the democratic nation state actually mean? Although the term used to mark this affiliation is commonly that of ‘citizen’, modern constitutions tend to neglect the concept: they often employ the term to point out a distinction between people and citizens, but rarely define what citizenship entails. Constitutions only hint at the role of the citizen, and the entire picture is revealed only through a mosaic consisting of legislative acts and executive orders as well as constitutional laws. The task must be to draw a more complete picture of what constitutional democracies have in mind when they refer to individual actors as ‘citizens’. The underlying idea of this chapter is that the model of citizenship applied by modern constitutions has emerged from the republican tradition of political thinking, and this can best be described as the constitutional membership model.

II. THE PEOPLE, CITIZENS, NATIONALITY

One role of modern constitutions is to identify the actors who are entitled to play a part in the political process. Modern constitutions lay down different types of political actors. First, there are institutional actors, whether individuals, such as the head of state, or collective entities, like the government or the judiciary. Establishing these institutional actors is usually the major concern of constitutions. Such types of actor possess artificial personality. Without the constitution they would not make much sense: they are defined by the constitution and integrated into the political system created by the constitution. In reality, political systems may have actor types of their own, such as political parties which often are not mentioned in constitutions, even though they are invariably recognised by constitutional law and practice.

Besides institutional actors, modern constitutions also refer to non-institutional individual actors. These form collective bodies, commonly called the ‘people’ or the ‘nation’. ‘The people’ is a concept which extends from the entire population of a given

territory to the idea of a collective body that consists of certain characteristic features different to other comparable groups. Because constitutions refer both to the people as well as citizens, the two terms would appear to be connected. This is not strictly accurate, however, since the people includes children and other parts of the population who are not accorded specific rights and duties and it also includes individuals who have lost some of their civil rights and duties due to their mental condition (being declared legally incapable) or to their behaviour (such as criminals disenfranchised due to the severity of their deeds). The citizenry or demos, then, consists only of a section of the people.¹ Furthermore, the people may even include individuals who are not present, such as those who are already dead or who are expected to live in the future.

Use of the term ‘the people’ therefore carries with it certain ambiguities of meaning, and similar semantic difficulties have arisen as a result of confusion between the terms nationality and citizenship.² In order to avoid these problems, I propose to use the term ‘constitutional membership’ to denote the citizen as the individual actor in modern democratic constitutional states.³ The term has previously been deployed by Aleinikoff to describe all persons who are under the jurisdiction of the US Constitution, including aliens as well as citizens.⁴ But here the term is used to emphasise the membership aspect of citizenship. This membership aspect needs to be borne in mind in all discussions about the connection between constitutionalism and democracy, not least because constitutionalism tends to incorporate a membership approach to citizenship, whereas democracy often regards all individuals as belonging to the demos or nation.

The term ‘constitutional membership’, then, is intended here to refer to the provisions a constitutional state makes for the purpose of defining what is expected of citizens in terms of behaviour and actions, rights and duties. This citizen is a member of the citizenry, the principal political group within a population. To speak of membership stresses the functional aspect of those individual actors who are expected to operate the constitution’s idea of the political system. The term underlines the difference to any approach which defines the citizen in a more substantive

¹ D. Colas, *Citoyenneté et nationalité* (Paris: Gallimard, 2004), 11: ‘The demos is just “une fraction de population”.’

² On the different meanings of citizenship contrasting it with subjecthood and nationality, see D. Gosewinkel, ‘Citizenship, Subjecthood, and Nationality: Concepts of Belonging in the Age of Modern Nation States’, in K. Eder and B. Giesen (eds), *European Citizenship: Between National Legacies and Postnational Projects* (Oxford: Oxford University Press, 2001), 17–35. On different paths that lead to the idea citizenship, see M. R. Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge: Cambridge University Press, 2008).

³ For a similar perspective on citizenship, see M. Koessler, ‘“Subject”, “citizenship”, “national”, and “permanent allegiance”’ (1946) 56 *Yale Law Journal* 58–76, at 61: ‘the possession ... of the highest or at least of a certain higher category of political rights and (or) duties, established by the nation’s or state’s constitution.’

⁴ T. A. Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Cambridge, Mass.: Harvard University Press, 2002), 172.

way, in which individuals are believed to be citizens because of their characteristics as forming part of a collective body like a nation or of the people defined in terms of history, collective experience, language, ethnicity, or even race. In this substantive definition, the individual *belongs* to something, rather than simply being a *member* of something. And this leads to a debate on aspects of identity building or identity politics, which focuses on how individuals acquire a specific identity that provides them with the competence to be a citizen of a political system and to show allegiance to that system.⁵

A similar discourse has also arisen with respect to immigration policy, in which some authors assume that nationality and citizenship are interchangeable terms.⁶ Nationality makes sense only as a term designating the belonging of an individual to a state, which belonging must be recognised by all other states. Citizenship, by contrast, designates the relationship of an individual to that state and to their status within the citizenry. That is, nationality deals with belonging to collective bodies such as the nation or the people. It treats the individual as a part of that collective body, a body which is identifiable by attributes and characteristics that are not changeable by constitutional provisions. Nationality generally refers to cultural, territorial, historical, linguistic, and often ethnic attributes.

The belonging aspect of citizenship is not meaningless. The community one belongs to is no fictitious trick of ideology. It may be the result of an intergenerational effort to develop and maintain a political system, including its cultural, historical, linguistic, and ideological heritage.⁷ In one sense, even constitutional membership is the result of a specific political culture. The cultural aspect of membership consists of the intentional disregard of attributes of belonging for the sake of the institutional approach to citizenship understood not in terms of belonging to communities but as membership of associations.

⁵ V. Broch-Due (ed), *Violence and Belonging: The Quest for Identity in Post-Colonial Africa* (London: Routledge, 2005); J. DeBernardi, *Rites of Belonging: Memory, Modernity, and Identity in a Malaysian Chinese Community* (Stanford, Calif.: Stanford University Press, 2004); A. Harneit-Sievers, *Constructions of Belonging: Igbo Communities and the Nigerian State in the 20th Century* (Rochester: University of Rochester Press, 2006); N. Yuval-Davis (ed), *The Situated Politics of Belonging* (London: Sage, 2007). Cf T. A. Aleinikoff and D. Klusmeyer (eds), *From Migrants to Citizens: Membership in a Changing World* (Washington, DC: Carnegie Endowment, 2000).

⁶ U. K. Preuß, 'Probleme eines Konzepts europäischer Staatsbürgerschaft', in H. Kleger (ed), *Transnationale Staatsbürgerschaft* (Frankfurt am Main: Campus, 1997), 249–70, at 251; R. Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the US* (Cambridge: Cambridge University Press, 2000), 19. The terms nationality and citizenship are perhaps so often confused precisely because they are so closely connected (A. M. Boll, *Multiple Nationality and International Law* (Leiden: Nijhoff, 2007), 57–8). On separating the terms nationality and citizenship from each other, see Koessler, above n 3.

⁷ K. L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven, Conn.: Yale University Press, 1989); Aleinikoff, above n 4, 178.

A great deal of confusion that characterises these debates on citizenship and nationality concerns the status of the concept of the citizen: is it a relationship in which individuals are members of something in which they act, or does it refer to individuals as parts of something? If we talk about members of nation states or members of specific democracies, we should refer to them as associations and consider citizenship along the lines of membership. The constitution provides the framework of the association and it defines how and when a person becomes a citizen acting in the name of and as part of the citizenry. If we talk of individuals as belonging to the people or to a nation characterised by specific attributes and if we think of these individuals as part of the people or the nation by sharing these attributes acquired through socialisation or identification, then we should refer to them not as citizens but as nationals.

III. THEORIES OF CITIZENSHIP WITHOUT THE CONSTITUTION

If constitutions refer to their individual actors as citizens it seems appropriate also to apply the general discourse on citizenship in law, philosophy, and social sciences to the constitutional setting. Most of the debate on citizenship does not discuss the meaning of the citizen in terms of a constitution.⁸ The constitution is considered as something citizens should have faith in,⁹ or as something they should feel patriotic about.¹⁰ But what constitutions actually say about the role of citizens is largely neglected. In such debates, the constitution is taken to be a synonym for liberalism. But without having a theory of citizenship and without identifying the institutional context of citizenship, such conceptions of citizenship may well come close to wishful thinking. There is a variety of answers to the question of what a citizen should be, starting with the citizen who calculates his interests in a most rational way and ending with the one who, because he identifies himself with the political community, is dedicated to the common good without considering his immediate personal benefit. One might even write lists of attributes of a good citizen, which may include showing solidarity, obeying the laws, not evading taxes, forming one's own opinions, and being self-critical.¹¹

In any case, the concept of citizenship is linked to the framework in which the citizen is placed. This framework can be philosophical in a sense that higher norms like

⁸ Cf the typology given by Thomas in which constitutional provisions as such have no part (E. Thomas, 'Who Belongs? Competing Conceptions of Political Membership' (2002) 5 *European Journal of Social Theory* 323–49).

⁹ S. Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988).

¹⁰ On the concept of 'constitutional patriotism' as an alternative to national patriotism, see J.-W. Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2009).

¹¹ B. Denters, O. Gabriel, and M. Toscal, 'Norms of Good Citizenship', in J. W. van Deth, J. R. Montero, and A. Westholm (eds), *Citizenship and Involvement in European Democracies: A Comparative Analysis* (London: Routledge, 2007), 88–108, at 95.

justice or the philosophical concept of human rights give the concept of citizenship its significance. Some prominent theorists like Michael Walzer discuss citizenship in terms of *membership* understood as a *public good* that can be distributed.¹² This brings the concept of distributive justice into the picture. But more often theorists who look at citizenship through the lens of justice do this in a universalistic way. Globally orientated thinkers in particular regard the idea of universal justice as a complementary concept to a universalistic world, each being justified in the same way. Being universalistic they are of more importance than particular or cultural approaches to justice.

Since the cosmopolitan approach does not take into account membership aspects of citizenship, it can easily argue for an *all-inclusive citizenship*. Insofar as cosmopolitanism is mainly a normative approach, any unequal treatment of human beings is seen as normatively unacceptable and unjust.¹³ In addition, cosmopolitans consider it unacceptable to refuse human beings the share of recognition connected with their citizenship as a relationship between equal individuals.¹⁴ For many authors the treatment of *foreigners*, especially *immigrants* as residents, denizens, or citizens is the test case for future concepts of citizenship in terms of transnational democracy.¹⁵ The cosmopolitan approach *separates citizenship from the nation state* and identifies universal mankind as the relevant community to which all individuals belong.

Authors who seek to justify restrictions on granting citizenship to permanent residents often invoke the language of faith and allegiance.¹⁶ These are expectations based on an intense relationship of the citizen to the state and this intensity of relationship exists only with respect to citizens who dedicate themselves to the political community, such as office holders, whether holding a permanent position or elected for a specific period of time. Such office holders must show dedication so long as they perform activities on behalf of the citizenry. New citizens are supposed

¹² M. Walzer, 'The Distribution of Membership', in P. Brown and H. Shue (eds), *Boundaries: National Autonomy and its Limits* (New York: Rowman & Littlefield, 1981), 1–36. Cf R. van der Veen, 'The Adjudicating Citizen: Equal Membership in Walzer's Theory of Justice' (1999) 29 *British Journal of Sociology* 225–58.

¹³ S. Benhabib, 'Citizens, Residents and Aliens in a Changing World: Political Membership in the Global Era', in U. Hedetoft and M. Hjort (eds), *The Postnational Self: Belonging and Identity* (Minneapolis: University of Minnesota Press, 2002), 85–119; R. Rubio-Marín, above n 6.

¹⁴ L. Bosniak, 'Denationalizing Citizenship', in T. A. Aleinikoff and D. Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Washington, DC: Carnegie Endowment, 2001), 237–52; L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006).

¹⁵ B. Honig, *Democracy and Foreigner* (Princeton, NJ: Princeton University Press, 2001).

¹⁶ N. J. Pickus, *True Faith and Allegiance: Immigration and American Civic Nationalism* (Princeton, NJ: Princeton University Press, 2005).

to take an oath of allegiance to the constitution,¹⁷ which would appear to invoke the constitution as the institutional background to citizenship. But in this case the constitution is referred to more as a symbol than a system of laws which frames a model of citizens. If faith and allegiance are supposed to be the major attributes of citizens, should not naturally born citizens who inherit their citizen status from their parents be deprived of it once they prove to lack the degree of loyalty and allegiance expected of new citizens? That is, if a complete picture is to be drawn, not only the ways of acquiring citizenship but also the ways of being deprived of it should be discussed. This rarely happens.¹⁸

There exist a number of more complex models which divide citizenship into active and passive parts.¹⁹ The active part of citizenship includes the right to act 'behind the law', which means having one's share in all powers, legislative as well as judicative and executive. In this model, citizenship is not only a bundle of rights but incorporates an entire programme including rights, civic consciousness, allegiance to the state and to one's fellow citizens, and to the capacity and right to participate as a full and equal member within the polity.²⁰

IV. MEMBERSHIP AND BELONGING

Another way of looking at citizenship as categorically distinct from the normative approach is to understand constitutional citizenship in terms of membership. The membership approach regards citizenship as a special relationship between individuals which are treated as members of the political system seen as an association. Social as well as political associations have statutes making the structure of their organisations explicit. The roles individuals play in those associations are defined by their statutes.

Membership is not exclusively a constitutional concept. Collective bodies such as churches, political parties, voluntary associations, and states all have statutes, some of them called constitutions, which not only define their purposes and their organisational features, but also provide a concept of membership in terms of rights and duties, expectations and entitlements. There is no 'natural' or abstract concept of citizenship which can determine the grounds and limits of a citizen's role without having regard to its place in the institutional setting of

¹⁷ S. Levinson, 'Constituting Communities through Words that Bind: Reflections on Loyalty Oaths' (1986) 84 *Michigan Law Review* 1440–70.

¹⁸ T. A. Aleinikoff, 'Theories of Loss of Citizenship' (1986) 84 *Michigan Law Review* 1471–503.

¹⁹ B. Turner, 'A Theory of Citizenship' (1990) 24 *Sociologia* 189–217; P. Riesenberg, *Citizenship in the Western Tradition: From Plato to Rousseau* (Chapel Hill, NC: University of North Carolina Press, 1992).

²⁰ R. Bellamy, 'The Making of Modern Citizenship', in R. Bellamy, D. Castiglione, and E. Santoro (eds), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation-States* (Houndmills: Palgrave, 2004), 1–21, at 6–7.

a constitution. In a way, political reality shows that all citizenship is 'tailored'.²¹ That is, it is modelled after the necessities of a given political system and it changes in accordance with these necessities. The association defines what individuals are expected to do to be citizens. Membership is a relationship of individuals who form associations,²² whereas belonging is related to individuals who live in communities.

Individuals act not only on behalf of themselves but also in groups. The individuals' relation to groups may be the major motivation for their activities. The contents as well as the limits of individual rights may be defined or at least influenced by the interpretation which is common in the group to which the individual is related. So the relationship individuals have to each other in the framework of a certain group and in the light of the values individuals share becomes a vital factor in the reality of individuals.

Individuals can belong to many different communities, of which the nation is just one among others. Individuals belong to mankind as well as to religious communities, neighbourhoods, voluntary associations formed as parts of greater populations, and such like. Belonging to many different groups may cause some problems for individual identity. In a way communities compete with each other for the commitment of individuals. No society is neatly divided between groups. The plurality of groups causes conflicts of divided and overlapping loyalties among individuals. Political communities owe their emergence to the effort to create a certain level of cooperation to solve conflicts arising from group plurality and the different demands on their loyalty.

To live in a world of divided and overlapping loyalties is not an entirely modern phenomenon; it was a common feature of political communities in ancient times, which competed with familial, gentile, and all sorts of client communities. Republics and states also competed with churches and other social powers. The genuinely political solution has always been to make it clear that, in the case of conflicting loyalties, citizens owe their prior loyalty to the political system. The question is whether political systems should be treated as communities and therefore individuals as belonging to them or whether they should be organised as membership associations treating individuals as members.

Dual citizenship offers a clue to the general problem of understanding citizenship in terms of membership.²³ For many authors dual citizenship is no longer seen as a

²¹ C. R. Miller, *Taylored Citizenship: State Institutions and Subjectivity* (Westport, Conn.: Praeger, 2002).

²² On membership as an associational feature among very different social and political organisations and communities, see N. L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton, NJ: Princeton University Press, 1998).

²³ P. H. Schuck, 'Plural Citizenships', in R. Hansen and P. Weil (eds), *Dual Nationality, Social Rights, and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (New York: Berghahn Books, 2002), 61–99.

major challenge for the concept of citizenship.²⁴ But many authors who conceptualise the nation state as a political community instead of an association have difficulties with dual citizenship. They want to restrict multiple citizenship and raise doubts whether dual citizenship—seen as the first step to a postnational citizenship—may be able to tie human beings to a political order the same way it did in the era of national citizenship.²⁵ If we think of citizenship as a matter of belonging and self-identification, and if we think that active citizenship concerns value systems and loyalties supported by feelings and beliefs, we are approaching a highly problematic terrain. States may then manipulate the self-images of their citizens by means of propaganda and mass communication.

If individuals are not expected to identify themselves with the political system any longer, it does not follow that the state to which they are attached becomes meaningless. In associations, all members have certain expectations of one other, they owe each other specific attention and consideration. How should a member of an association regard the fact that another member wants to also be a member of the competing association? Is it tolerable to be a member of all political parties competing for votes in the political process? Does it matter what kind of membership is at stake? Are there differences between ordinary members and office holders on the representative level of that association? It may be possible to vote in two or three countries without getting involved in conflicts of loyalty. The task of balancing these different demands is mainly up to the individual himself; it is mainly a problem of ethics and practicability. But if one becomes a member of parliament of one country it would be a major concern for the citizenry if it was not evident to which country the individual is committed. The more a citizen is obliged to act in the name of the people, the more he can be expected to focus on the association in question, being faithful to the constitution and respecting his allegiance not only passively but actively.

The clearer the duties are defined, the more transparent the process of definition is, and the more it is open to the citizens themselves to adjust the rights and duties of citizenship, then the easier it becomes to appeal to these duties not only to call themselves citizens but also to act as citizens regardless of their individual motivation. So citizenship in political associations is a model in which individual rights and duties are balanced. Constitutional membership makes these rights and duties explicit.

²⁴ K. Rubinstein and D. Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 *Indiana Journal of Global Legal Studies* 519–48; T. Faist (ed), *Dual Citizenship in Europe: From Nationhood to Societal Integration* (Aldershot: Palgrave Macmillan, 2007); A. M. Boll, *Multiple Nationality and International Law* (Leiden: Nijhoff, 2007).

²⁵ D. Miller, 'Bounded Citizenship' in K. Hutchings and R. Dannreuther (eds), *Cosmopolitan Citizenship* (Basingstoke: Macmillan, 1999), 61–80; D. Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000); N. J. Pickus, *True Faith and Allegiance: Immigration and American Civic Nationalism* (Princeton, NJ: Princeton University Press, 2005).

V. THE DUTIES AND RIGHTS OF CITIZENSHIP

The liberal approach to citizenship tends to overlook the aspect of duties.²⁶ The efforts constitutions make to bring citizenship into a balance between rights and duties are somewhat obscured by liberalism. The liberal political language is a language of rights, not of duties. One of the reasons for this can be traced back to the seminal approach of T. H. Marshall, which even today gives the citizenship debate its structure. In his essay of 1950, 'Citizenship and Social Classes', he focused on the rights aspect of citizenship, or rather on the evolution of rights.²⁷ Marshall's influence on the sociological debate cannot be overestimated. But, unnoticed by many of his commentators,²⁸ Marshall was also convinced of the importance of the duties of citizenship, declaring that 'if citizenship is invoked in the defence of rights, the corresponding duties of citizenship cannot be ignored'.²⁹ Marshall insisted on the importance of loyalty to the state and went so far as to suggest that the role of propaganda in achieving that goal should not be ignored. But he was not overly optimistic that this aim could be realised. In his view, the role of duty in the practice of citizenship in general is limited by the fact that 'the national community is too large and remote to command this kind of loyalty and to make it a continual driving force'.³⁰ This statement shows that Marshall thought of citizenship in its relation to communities rather than to associations and that he looked at duties as something corresponding to right.

Modernity is often attributed to the language of rights. But the language of duties is still present in modern constitutions.³¹ Many constitutions mention duties of citizens to defend their country, to undertake jury duty, or define the right to vote as a duty (compulsory voting). Some duties are so basic that many constitutions fail even to mention them. But this does not mean they do not exist as a matter of constitutional law. The most basic duty, for example, is the duty to obey the law including those laws an individual may personally not know or think of as unconstitutional. Another general duty is to pay taxes. The interesting aspect of both these duties is that they are binding not only on nominal citizens but non-citizens as well. The active duties are reserved for citizens only.

²⁶ For a modern discussion of duties in terms of a rights philosophy, see J. Waldron, 'Special Ties and Natural Duties' (1993) 22 *Philosophy and Public Affairs* 3–30. For a natural rights approach see K. Greenawalt, 'The Duty to Obey the Law' (1985–6) 84 *Michigan Law Review* 2–62.

²⁷ T. H. Marshall, *Citizenship and Social Classes: Alfred-Marshall-Lecture 1949* (Cambridge: Cambridge University Press, 1950).

²⁸ J. M. Barbalet, *Citizenship: Rights, Struggle and Class Inequality* (Minneapolis: University of Minnesota Press, 1988), 82.

²⁹ Marshall, above n 27, 112.

³⁰ *Ibid* 119.

³¹ For a comparison of constitutions with regard to the concept of duty, see H. van Maarseveen and G. van der Tang, *Written Constitutions: A Computerized Comparative Study* (Dobbs Ferry, NY: Oceana Publications, 1978), 121–4.

Liberal authors seem to have both in mind when they speak of the 'rights and duties' of citizens. The leading metaphor here is the coin of which rights and duties form its two sides. The metaphor suggests a complementary relation between rights and duties which justifies the focus on the rights side alone. In fact liberalism tends to ignore the categorial difference that exists between both concepts.

It is a short but nevertheless wrong step to leap from universal rights to universal duties. Rights are politically senseless without individuals possessing duties corresponding to these rights. Duties are burdensome and oblige individuals to do something that may not be in their personal interest.³² Duties exist between citizens and they are designed in a reciprocal fashion.³³ These aspects of the concept of duty are best grasped by republican political theory; here citizenship is seen as a set of obligations more than of rights, as an office more than a status.³⁴

By understanding citizenship as some kind of actorship which is required for running a political system we shift the focus on citizenship from the bundle of rights that individuals can claim against the state to a role of citizenship defined by a number of rights and duties including behaviour and actions. Some of these duties are implicit while others are explicitly mentioned in constitutions and are required by law to the extent that the state may force the individual to fulfil his duties as a citizen. To understand this shift it is essential that not only the liberal tradition with its language of rights, but also the republican tradition with its language of duties, maintains an adequate description of citizenship.

VI. REPUBLICAN CONSTITUTIONALISM

Citizenship has a long history.³⁵ A major part of it had been discussed in a discourse we today call republican. It is in republican discourse that the duty aspect of citizenship is most clearly developed. It is no coincidence that constitutionalism emerged from the republican city states in early modern times, and that within republican

³² H. Shue, 'Mediating Duties' (1988) 98 *Ethics* 687–704, at 689: 'We have no reason to believe ... that everyone has burdensome duties toward everyone else even if everyone else has meaningful rights.'

³³ R. E. Goodin, 'What is so Special about our Fellow Countrymen?' (1988) 98 *Ethics* 663–86, at 674: 'When we say that compatriots may have their income taxed, their trucks commandeered, or their liberties curtailed by conscription, that is surely to say little more than that people may be required to do what is required in order to meet their special duties toward their fellow citizens—duties born of their fellow citizens' similar sacrifices to benefit them.'

³⁴ R. Bauböck, 'Changing the Boundaries of Citizenship: The Inclusion of Immigrants in Democratic Polities', in R. Bauböck (ed), *From Aliens to Citizens: Redefining the Status of Immigrants in Europe* (Aldershot: Avebury, 1994), 199–232, at 213–14; A. Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (London: Routledge, 1990); H. van Gunsteren, *A Theory of Citizenship: Organizing Plurality in Contemporary Democracies* (Boulder, Col.: Westview Press, 1998).

³⁵ J. G. A. Pocock, 'The Ideal of Citizenship since Classical Times', in R. Beiner (ed), *Theorizing Citizenship* (Albany: State University of New York Press, 1995), 29–52; D. Heater,

discourse the concept of the citizen was discussed primarily in terms of duties owed to the republic. While the genealogy of constitutionalism is complex, its republican roots are well known,³⁶ though not everybody is aware of it.³⁷ Republicanism aims at founding a 'constitutional authority',³⁸ a legitimate power to regulate and control the affairs of its citizens according to the constitution.

The idea of the constitution had always been at the centre of the republican discourse. The constitution was used to describe analytically the structure of a political system. To speak of the constitution of the Roman Republic or the constitution of Venice or the constitution of England thus meant the whole political system, no matter whether this system was defined by law or by custom, whether by the hierarchy of offices or the religion of the people, as long as it had the most decisive impact on the political reality.

The founders of what we now call the constitutional state referred to the constitution of Venice and England without arguing that the written constitution marked the major difference between the older and the newly established political systems. To them written constitutions simply made explicit what was often implicitly found in the older political systems, and which at the end of the eighteenth century were still used as examples of the constitutional state. Since then the narrower meaning of the constitution, understood as the singular document which codifies the constitutional law, started its career.

Republicanism did not promote the concept of the constitution for its own sake, but with respect to the individuals and their capability to bear the burden of free self-government. Is man created for being a citizen, or does this attribute belong only to a small elite? The classical republican concept that addressed this point was the concept of virtue.³⁹ Two major approaches within the republican discourse that connect individual virtue and the political constitution can be discerned. The first assumes that in order to establish and maintain a proper constitution, individuals must already be virtuous. Consequently, only exceptional personalities are able to realise this action, and Machiavelli and Rousseau discussed this type of personality in relation to such historical personalities as Lycurgus or Moses. The second approach considers virtue

Citizenship: The Civic ideal in World History, Politics, and Education (Manchester: Manchester University Press, 3rd edn, 2004).

³⁶ J.-E. Lane, *Constitutions and Political Theory* (Manchester: Manchester University Press, 1996), 31–2; M. van Gelderen and Q. Skinner, *Republicanism and Constitutionalism in Early Modern Europe, Vol. 1: Republicanism: A Shared European Heritage* (Cambridge: Cambridge University Press, 2002); N. Buttle, 'Republican Constitutionalism: A Roman Ideal' (2001) 9 *Journal of Political Philosophy* 331–49.

³⁷ S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, Mass.: Harvard University Press, 1999).

³⁸ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 67.

³⁹ For the theory and history of republicanism see I. Honohan, *Civic Republicanism* (London: Routledge, 2002); I. Honohan and J. Jennings (eds), *Republicanism in Theory and Practice* (London: Routledge, 2006).

to be a consequence of the effect that institutions have on individuals: moral excellence was promoted by institutional arrangements.⁴⁰ Here the concept of virtue is embedded within the institutional setting and not beyond it.⁴¹ Individuals become virtuous by following the procedures and respecting the contents of the constitution. Respect for the constitution is a necessary habit, a political culture secured by such auxiliary aspects of political life as education and ceremonies. What each approach shares in common, however, is the underlying idea that men need to go through a process of transformation to become a citizen. Citizenship is the expression of the full meaning of being a person, the individual who lives the model of *vita activa*, achieved by living under a jurisdiction of self-government.⁴²

The concept of duty forms a major component of the *vita activa* model. The concept of duty derives from the Roman *officium*, which is not identical with the modern, more institutional idea of office. The catalytic work was Cicero's *De officiis*, one of the most studied books up to the founding of the constitutional state at the end of the eighteenth century.⁴³ Office means the whole complex of duties a person owes to others, starting with friends and relatives and reaching to the entire citizenry and the obligations laid down by law. Republican thinking does not treat citizenship as a relationship between individuals and the state but between citizens among each other. In a strict sense, all entitlements of individuals to participate in the running of a republic relate more to duties than rights. Even the right to vote can be understood as a duty everyone owes his fellow citizens to start the political process of the republic by electing individuals into offices. This does not mean necessarily that voting rights should be made compulsory, as is the case in countries such as Belgium and Greece today. But it does mean that political participation cannot entirely be discussed only in terms of personal rights.

The notion of actors fulfilling their duties is part of the broader concept of the republican 'rule of law' principle, classically defined by James Harrington.⁴⁴ In the

⁴⁰ J. T. Kloppenberg, *The Virtues of Liberalism* (Oxford: Oxford University Press, 1998), 8–9.

⁴¹ Especially D. Höchli, 'Zur politischen Sprache Giannottis', in Donato Giannotti, *Die Republik Florenz* [1534], trans A. Riklin (Munich: Fink, 1997), 76–116, at 91–6.

⁴² W. Vogl, *Aktion und Kontemplation in der Antike: Die geschichtliche Entwicklung der praktischen und theoretischen Lebensauffassung bis Origines* (Frankfurt am Main: Lang, 2002); J. Krayer, 'Moral Philosophy', in C. B. Schmitt and Q. Skinner (eds), *The Cambridge History of Renaissance Philosophy* (Cambridge: Cambridge University Press, 1988), 303–86, at 334–8.

⁴³ M. Llanque, 'Die politische Rezeptionsgeschichte von Cicero', in E. Richter and R. Voigt (eds), *Res Publica und Demokratie: Die Bedeutung von Cicero für das heutige Staatsverständnis* (Baden-Baden: Nomos, 2007), 223–42.

⁴⁴ James Harrington, *Oceana*, ed J. G. A. Pocock (Cambridge: Cambridge University Press, 1992), 8–9: 'government (to define it *de jure*, or according to ancient prudence) is an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest; or, to follow Aristotle and Livy, it is the empire of laws, and not of men.' Harrington refers to Aristotle (*Politics*, iii. chs 6 and 11), Livy (*Histories*, ii. ch 1, pt 1) as well as Machiavelli (*Discorsi*, preliminary of ii.). See further, L. Baccelli, 'Machiavelli, the Republican Tradition, and the Rule of Law', in P. Costa and

republican discourse this principle differs from the liberal one. In full it reads ‘rule of laws and not of men’ and aims at avoiding arbitrary power. It is the law which should define the individual’s role in running the republic and not their personal wish, or their belonging to a community. Harrington had a major influence on the development of republican discourse, especially in shaping the language which was used by the authors of the *Federalist Papers* and other framers of the US Constitution.⁴⁵ As Article 30 of the constitution of Massachusetts in 1780 shows, the constitutions of the American colonies also imitated that language,⁴⁶ and modern constitutional adjudication also began by referring to the same principle.⁴⁷

The weakness of republican discourse was that it tended to oscillate between these two concepts of virtue: virtue as a certain constitution of the character, and virtue understood as the product of the institutional setting (or what we nowadays call the modern constitution). By focusing only on virtue as the character of the individual, some parts of republicanism supported the emergence of a more totalitarian approach which integrated individuals into the political system whether they liked it or not. Because most individuals are not virtuous in themselves before the political transformation, their personal will is without significance. Individuals are only able to judge their real interests and preferences once they have become integrated into the republic as citizens. And then they will have no other will than that of the republic. This is Rousseau’s paradox of republicanism. Thus, the republican idea could turn into the kind of educational dictatorship Robespierre promoted and many socialists had in mind when they thought that emancipation could be seen as the logical result of a sometimes violent process of transformation of men into the citizens of the socialist society.

As a result, liberalism emerged as a kind of counter-ideology to the republican concept of virtue and to some extent absorbed the institutional branch of republicanism. This institutional branch of the republican discourse takes individuals as they are: with all their faults and limits in their energy to behave like full citizens, in need of support by a proper institutional setting to pass many temptations to act corruptly and not virtuously, especially those who hold offices and have special

D. Zolo (eds), *The Rule of Law: History, Theory, and Criticism* (Dordrecht: Springer, 2007), 387–420.

⁴⁵ J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975). The ‘definition of republic is an empire of laws and not of men’ ((John Adams) Novanglus, Boston Gazette, 6 March 1775 in: *The Papers of John Adams*, ii. 314, John Adams, ‘Thoughts on Government’, January 1776 in *Works of John Adams*, vi. 415).

⁴⁶ ‘In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men’ (Massachusetts Constitution Art 30).

⁴⁷ *Marbury v Madison* (1803) 1 Cranch, at 137: ‘The government of the United States has been emphatically termed a government of laws and not of men.’

powers which help to promote their particular interest at the cost of the common good of the citizenry. The common good is expressed in constitutionalism by adding general norms and values like basic rights to the organisational part of the constitution.

This institutional branch of republicanism provides the background for constitutionalism and aims at the regulation and moderation of political power by organising it, mostly in terms of balance: balancing political and social powers, interests of the entire population and individual interests, balancing the collective and the individual will, responsibility for actions and discretion, all branches of political power, and last but not least balancing rights and duties. Thus understood, constitutionalism rose not as a consequence of democracy but with republican political systems. This fact has important consequences for the understanding of the concept of the citizen.

In terms of the genealogy of the modern democracy,⁴⁸ the ideas of constitutionalism and democracy are believed to be symbiotically connected. Modern democracies started as constitutional states at the end of the eighteenth century. The people on both sides of the Atlantic took power and immediately framed their newly gained power through constitutional texts. But a closer look reveals that republics rather than democracies had initiated the modern life of the constitutional state. Republics are not the same as democracies: not every naturally born individual living under the legislation of the republic's laws was considered to be a citizen of the republic. The tension between the constitution and democracy is mirrored in the competition between different political actors in a constitutional democracy: on the one side we have representatives who act in the name of, and on behalf of, the people and, on the other, guardians of the constitution who act in the name of, and on behalf of, the constitution.⁴⁹

The modern constitutional state started as a republic and then turned into a democracy, gradually and sometimes convulsively forced by wars and civil wars, in this way including more and more parts of the regular population into the people. Constitutionalism and democracy differ not only in their genealogy, but also with respect to their purposes. The autonomy as well as the freedom of decision making of a collective body is bound by the constitution, a binding which is legitimate because it is intended autonomously. Democracy is the dynamic element in constitutional democracies, whereas the constitution is the static element. Some

⁴⁸ For the genealogy of the term, see M. Llanque, *Politische Ideengeschichte: Ein Gewebe politischer Diskurse* (Munich: Oldenbourg-Verlag, 2008); id, 'Das genealogische Verhältnis der konstitutionellen Demokratie zur kosmopolitischen Menschenrechtsidee', in A. Brodacz, M. Llanque, and G. Schaal (eds), *Bedrohungen der Demokratie* (Wiesbaden: Verlag für Sozialwissenschaft, 2008), 311–33.

⁴⁹ M. Tushnet, *Taking the Constitution away from the Courts* (Princeton, NJ: Princeton University Press, 1999); R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

actors act on behalf and in the name of the people, others in the name and on behalf of the constitution. The constitution may be the result of the people's will and often needs the approval of the people to come into force. But once established, the constitution stands above the will of the people unless it is changed by the people or swept away in a revolutionary process. So constitutionalism and democracy are not identical, and they sometimes operate against each other.

As already mentioned, the republican roots of constitutionalism differ from those of liberalism. The language of liberalism is the language of rights whereas republicanism prefers the languages of duties. Rights focus on an individual's protection from interferences by others. Duties are closely linked to the cooperation evoked by the aims and necessities of the association formed by citizens. Constitutional membership means that the grounds, reasons, and limits of membership of the political association are defined by law and can therefore be adapted to changing historical circumstances and different institutional demands.

In most constitutional systems not every citizen is entitled to all roles of constitutional membership. Voting is the most fundamental activity of citizens and has the lowest level of preconditions, such as age and mental capacity. But others, such as jury duty, demand additional years of experience, and sometimes an oath is required. These are formal requirements to grant the knowledge necessary to fulfil the citizen's duties as a citizen on the jury bench. Exams and taking an oath are required for civil service. And office holding, the most prestigious role a citizen can play, encounters further restrictions, especially through the need to find the support of fellow citizens who elect the candidate into office. There is, in short, no unitarian model of citizenship; rather, there are different levels and grades of citizenship with which a citizen *de nomine* is confronted while striving for full citizenship.

Some duties apply to all residents, such as obeying the law and paying taxes, so they may be regarded as constitutional members without being nationals. Membership in the citizenry can start long before individuals acquire full citizen status. Often naturalisation laws require a certain time period of residency as the major prerequisite for applying for naturalisation. This is not only necessary for getting acquainted with the particularities of a people, its political culture, and political communication, but is also a test for readiness to obey the law, one fundamental duty of all citizens. If we expect citizens to act as members of the political association instead of individuals belonging to a community we may consider all permanent residents to be potential candidates for citizenship; it would not be contrary to the idea of constitutional membership to make that clear and combine it with certain rights and duties. The right to vote on the communal level for all European Union members in any state of their residence is such a kind of membership right without having full citizenship at all. Even naturally born descendants from citizens are supposed to grow into the role of a citizen. Some countries make it possible to deprive citizens of their political participation rights in cases of severe violation of the laws. Others make residence a prerequisite even for born citizens to exercise their voting rights.

Republicanism as the greater intellectual background for the emergence of constitutionalism and the concept of the citizen enables us to get a more complete

picture of what citizenship means in terms of modern constitutional democracies. The republican perspective provides a sense of the conditions and opportunities of constitutional membership seen as a flexible balance of rights and duties.

VII. THE FUTURE OF CONSTITUTIONAL MEMBERSHIP

The major advantage of the constitutional membership approach to citizenship is that it is open to more complex political systems than the classical unitarian nation state with its sovereignty claims.

A more globalised world makes cosmopolitan prospects more plausible. The question is whether belonging to the world can be balanced with the requirements of membership in the world political association once it comes to conflicts with other political entities like nations, regions, transnational communities of regional composition, and so on. It is not 'belonging to the world'⁵⁰ that matters, but how we construct membership in a world association. A future constitution of the world must take membership into account. It cannot simply focus on the belonging scheme in which every human being is considered to be a citizen of one world. That approach is not complex enough to deal with the political problems at stake.

There is a theory of federal citizenship which leans on membership rather than belonging, and therefore offers more possibilities of devising a complex citizenship with different levels of activities.⁵¹ If identity is considered to be necessary for federal citizenship, then federal systems would appear to be unable to establish a full sense of citizenship; the mostly artificial character of federal systems would prevent any attitude of belonging to it. But if we shift the focus to membership, we are able to concentrate on matters of functionality and levels of citizenship, including more or less intensity required for individual actors.

Constitutional membership can thus serve as a means for clarifying the ongoing struggle to understand citizenship in times of transcending the nation-state paradigm. It is one thing to try to overcome the traditional nation state to clear the path for a more cosmopolitan approach. But in the course of doing so cosmopolitan and democratic discussions should not forget that citizenship is a relationship between individuals and the political system as well as between individuals among each other. Even if the nation state vanishes the problem of citizenship will not.

The task is to define constitutional membership of a future polity which is able to balance national as well as transnational, supranational, postnational, or cosmopolitan claims of allegiance and loyalty. The potential conflicts involved here cannot be

⁵⁰ S. L. Croucher, *Globalization and Belonging: The Politics of Identity in a Changing World* (Lanham, Md.: Rowman & Littlefield, 2004), 185–96.

⁵¹ P. H. Schuck, 'Citizenship in Federal Systems' (2000) 48 *The American Journal of Comparative Law* 195–228. Regarding the special case of the European Union see A. Follesdal, 'Union Citizenship: Unpacking the Beast of Burden' (2001) 20 *Law and Philosophy* 313–43 and C. Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Perspektive* (Tübingen: Mohr, 2005).

solved by mere declarations of which identity individuals should consider to take on as world citizens. There must be a way of determining how to solve such conflicts as members of a world association. Across their diverse and plural belonging to different communities a world constitutional membership should give all individuals the scheme to react as citizens to conflicts which arise from difficulties of maintaining loyalty to different communities at the same time. The model of constitutional democracy on the level of nation states is not an obstacle to that development. It can be an example for it, but only if we define constitutional democracy not in terms of national belonging but in terms of constitutional membership, an artificial institutional setting in which citizens are enabled to act independently from their belonging to communities including the nation.

If we acknowledge that in genealogy as well as in principle, the idea of constitutionalism is not identical with the idea of democracy and the nation state, and that constitutional membership is always rooted in the republican discourse in which the citizen is defined by a system of duties, then we can find in constitutional membership a model for a more complex and advanced political system, which in the end may be of world scale. This world constitution will not replace the constitutional democracy: it adds another level of citizenship to the already existing ones, starting with the communal association and perhaps ending with the stratum which acknowledges the fact that all men are residents of the world, wherever they live.