

Introduction

CITIZEN: A member of a free city or jural society, (civitas) possessing all the rights and privileges which can be enjoyed by any person under its constitution and government, and subject to the corresponding duties. (Black 2004 [1891], 206)¹

Why constitutional citizenship?

It has become rather fashionable to express negative views about citizenship and not to hold it in high regard. If states can put their citizenship on the market in return for what, to high net worth individuals, probably seems like only a relatively small charge or investment, why should everyone else treat citizenship with reverence? Surely, citizenship today is just a matter of passports and mobility, and not a lot else?² What is more, is it not a little odd to focus on something which is just a form of ‘legalized discrimination’ against aliens (Wimmer 2013, 74)?

The alternative view recognizes that citizenship has acquired a fundamental importance in relation to the organization of human affairs into polities. As such, it may be an empty vessel into which many different

¹ I should concede that the more recent editions of the classic work *Black’s Law Dictionary*, edited by Bryan A. Garner, do not contain a definition of the citizen that quite so neatly fits my purposes: ‘A person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all of its civil rights and protections; a member of the civil state, entitled to all its privileges’ (Garner and Black 2009, 278).

² As a reflection on the anticipated ‘drop’ in the ‘value’ of UK citizenship, should a ‘hard’ or worse ‘no deal’ Brexit occur, see M. Skapinker (2019) ‘Is French nationality worth more than British? A country’s stability, freedom and opportunities count for a lot’, *Financial Times*, 26 November (www.ft.com/content/f6a3402c-0d32-11ea-b2d6-9bf4d1957a67).

types of political aspiration can be poured, but its significance cannot be denied. It allows states to choose populations, but also to control them. Some of the most egregious crimes against humanity such as slavery, the Holocaust and apartheid have all involved the stripping and/or denial of ‘citizenship’ (Lewans 2010). Citizenship has also played a role in the breakup of Yugoslavia and in the human suffering that followed thereafter (Štiks 2015), in the violence and persecution that the Rohingya in Myanmar have faced as a people (Parashar and Alam 2019), and in the continued oppression of minorities mainly identified by reference to religion in India, culminating – for now at least – in the denationalization of up to 2 million people in Assam (Jayal 2019a). Lacking or being refused the status of citizen has been part of a rhetoric of depersonalization applied in all of these cases.

Citizenship, as it is applied within states, is the legal mechanism for formal membership within the polity. There is an important external aspect of state-based citizenship, organizing individuals primarily by reference to the territorial and jurisdictional boundaries of states, and reinforcing the legally constructed character of that membership relation. This is widely seen as citizenship’s ‘Westphalian’ core.³ That is to say, as a legal marker, it helps to sustain the still dominant mode of political community in the modern world, namely the system of sovereign states which remain the most important actors within the international legal order (Farr 2005).⁴ States are often quite instrumental in their engagement with citizenship, prioritizing certain groups over others. Citizenship laws pursue the task of setting the boundaries via rules on acquisition and loss, and, in many instances, this takes place against the backdrop of constitutional norms on citizenship and citizenship rights.

Citizenship also has an internal aspect that goes beyond the surface of legal norms and beyond the idea of citizenship as a bundle of rights. Most, if not all, (state) polities have some type of ‘story of peoplehood’ (Smith 2001), or even multiple competing stories. In these stories, the scope and practices of citizenship are treated – implicitly or explicitly – as a product of cultural and/or political processes of nation, or people formation, even if these are incomplete or contested. These aspects of citizenship are closely related to both the dynamics of self-rule and democracy, as well as

³ See also Legomsky (1994, 299). The reference derives from the Peace of Westphalia in 1648, ending the Thirty Years War.

⁴ In what follows, references to *national* citizenship and *state-based* citizenship (or constitutions) should be taken to be synonymous, despite the distinct ‘nation’ reference point of the word ‘national’. This point will be clearer after the discussion of the distinctive usages of ‘nationality’ and ‘citizenship’ below.

to cultural and identitarian questions. Indeed, it is well established that the success of states/societies depends not just on the institutional regulation of citizenship but also ‘on the virtues, identities, and practices of its citizens, including their ability to co-operate, deliberate, and feel solidarity with those who belong to different ethnic and religious groups’ (Kymlicka and Norman 2000, 10). As regards both its external and internal aspects, citizenship is acknowledged to be one of the most important ties that bind communities together.

We cannot, in sum, ignore the importance of citizenship. Instead, we need to know more about it, and how it relates to other fundamental building blocks of modern polities both within and beyond the state, such as constitutions and constitutional law. This is the purpose of this book.

Beginning with an initial focus on states, the first question considered in this book concerns the scope and nature of state or national constitutional law and its relationship to citizenship laws and policies. What does it mean to buttress claims to the legitimacy and authority of state-based concepts of citizenship (a) by reference to a *constitutional concept* of ‘the citizenry’ and indeed ‘the people’ and (b) through the regulation of citizenship (directly or indirectly) via *constitutional law*? These two interconnected questions form the basis of the enquiry in Parts I and II of the book. The chapters in these two parts introduce and then examine in detail the many dimensions of ‘constitutional citizenship’ at state level. In Part III, we explore some of the issues that arise when ‘constitutional citizenship’ is put under pressure, by focusing on the challenges posed by populism and the de-territorialization of citizenship.

The enquiry undertaken in this book depends on isolating and exploring the idea of ‘constitutional citizenship’. In what we now term the ‘Global North’, states have been including provisions on citizenship in their constitutions since the late 18th century. Examples include the first post-revolutionary constitution of 1791 in France, Spain’s short-lived but influential Cádiz Constitution of 1812, and the Constitution of the United States after the adoption of the 14th Amendment of 1868 following the Civil War. As the era of modern states and constitutions dawned, constitutional provisions and laws adopted on the basis of those new constitutions started to build the structure of what we now recognize as a modern citizenship status. Thus, we can see that the linkage between citizenship and constitutional law has a long heritage. But to know more about what it might mean, we will need to dig a little more deeply.

One place to start is by looking at what judges say about this relationship. A good example of a resonant pronouncement about citizenship comes from Lord Justice Laws, when delivering in a judgment in the English

Court of Appeal on the scope of the UK's citizenship deprivation powers.⁵ Despite the fact that these powers are stated in a *legislative* form, he noted that:

The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the *constitution*; for they identify the *constitution's* participants.⁶

From another (Canadian) judge, we hear about 'The intimate relation between a citizen and his [sic] country'.⁷ In these statements from judges, we can see citizenship as an institution flowing into constitutional discourse, and constitutional norms flowing into citizenship discourse. At first sight, this seems to suggest that there may exist a smooth set of interconnections between the conditions of acquisition and loss of citizenship (and thus the task of identifying who the citizens are), 'the identity of the nation state' and the constitution as a political performance with 'participants'. These are the three key elements identified by Lord Justice Laws. All three elements are placed under close scrutiny in this book, both when we consider what might be termed the 'normal incidents' of 'constitutional citizenship', and later when we turn to examine what happens when constitutions are under stress.

The remainder of this chapter comprises the following elements: a synopsis of the whole book; an introduction to the existing literatures examining the interrelationship of citizenship and constitutions; some notes introducing the key terms of 'citizenship', 'nationality', 'constitution' and 'the people'; and an excursus outlining the principal methodological inspirations for the approach taken in the book.

⁵ *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] QB 1008, discussing the interpretation of s. 40 of the British Nationality Act 1981.

⁶ Emphasis added. In UK (English?) constitutional terms, it is interesting to note that Jeff King (2016) believes this to be a 'remarkable passage' on the grounds that, if citizenship touches the constitution then so do many other issues such as residence. It is worth pointing out the context in which the statement was made, which demonstrated an antipathy on the part of the judges to the Court of Justice of the European Union (CJEU) having any jurisdiction in citizenship loss and acquisition cases. We return to this issue in a discussion of the constitutional context of (loss of) EU citizenship in Chapter 4.

⁷ *Justice La Forest in United States of America v Cotroni; United States of America v El Zein* [1989] 1 SCR 1469 at 1480.

Synopsis of the book

There is one further ‘introductory’ chapter in Part I. Starting with the puzzle that explicit and detailed constitutional regulation of citizenship is actually quite rare across the globe, Chapter 2 presents some of the main ways in which citizenship and constitutions/constitutional law can and do iterate with each other at the ‘top level’ (that is, via the texts of the constitution and of constitutional law and in respect of constitutional principles and conventions). We then place these issues into a broader context, exploring issues such as the legacies of colonialism and understandings of citizenship beyond the so-called western world. The chapter also contests some of the presuppositions that lie behind the idea that ‘citizenship of a (nation) state’ could operate as the sole or even central model of citizenship. One short reflection focuses on whether the constitutional question is, in fact, an eccentric one to pose at the present time. This is because of the increasing shift towards treating citizenship as a matter of individual choice and elective affinity, in an ethos of strategy and instrumentalism (Harpaz 2015, 2019) rather than as a quasi-sacred gift of states (as some of the judicial statements quoted above come close to suggesting) or as a fundamental norm of democratic self-governance (Bauböck 2018a).

The next task for the book is to find an appropriate way to organize the main issues that emerge in those cases where citizenship and constitutions abut, in order to make sense of the different dimensions of the relationship between the two. To this end, Part II of the book ‘unpacks constitutional citizenship’ by exploring it from three angles: we look first at the constitutional ideal of citizenship, under which heading we can explore the proposition that the ideal-type of a citizenry is comprised of free, equal and sovereign citizens, underpinned by a notion of dignity; then we explore the direct and indirect impacts of constitutional law on the terms of citizenship as a legal status, including issues of acquisition and loss and the ever-present shadow of statelessness; and finally our focus falls onto the relationship between citizenship rights, constitutional rights and human rights. These discussions form Chapters 3 to 5 of the book.

In Chapter 3, we explore constitutional fundamentals such as constituent power, sovereignty and constitutional identity, and then examine how ideas such as equality and dignity can shape the constitution’s engagement with citizenship. Chapter 4 turns the focus onto the main modes of acquisition and loss of citizenship, considering also associated topics such as dual citizenship. Furthermore, how do higher ‘constitutional norms’ such as equality shape citizenship as a legal status? Chapter 5 closes off this part of the book, with a reflection on how we understand rights in

a constitutional context. The main themes here concern the scope and enforceability of rights, coupled with reflections on how rights can strain the relationships between majoritarian and non-majoritarian institutions in democracies (for example, between parliaments and courts).

Together, the chapters show that even though detailed regulation of citizenship within constitutions is rare, leaving key matters to be decided by legislatures, these texts none the less provide the discursive framework within which the ethics and often the practices of citizenship are debated at the national level. These discursive processes often play out in conflicts between different institutions of the state and the debates can include questions about what sort of 'link' between individual and polity is thought to be embedded in citizenship. Other issues recurring across the three chapters highlight the role of superordinate principles such as equality and dignity which are enshrined as constitutional rights in many countries. In sum, despite the apparent constitutional neglect of citizenship (and the puzzle as to why this is so), we can still learn a great deal once we explore the concept of 'constitutional citizenship' in detail.

This book aims not just to interpret the citizenship/constitution relationship, but also to place the insights so gained into a wider critical framework, and to exploit the current conjuncture in order to highlight *why* the work undertaken in Parts I and II of the book is important. Part III of the book accordingly looks at what we can learn from observing citizenship in a constitutional context when it is put under pressure. There are two apparently opposing movements which are put under the microscope. On the one hand, we can see the existence and, some might suggest, increasing prevalence at the national level, of 'populist' and exclusivist approaches to the boundaries of citizenship (and the rise of the phenomenon of 'populist constitutionalism'). Yet at the same time, and to an unprecedented degree, the governance of citizenship has become fragmented across transnational, supranational, international and subnational axes which place the state itself in question.

Chapter 6 explores the relationship between 'constitutional citizenship' and the rise of populism within political discourse and political practices. Is this leading to the erosion of modern citizenship as an ideal of equality and self-rule, or can we see an effective triangulation of the tensions between the rule of law and the 'rule of people' which, in fact, contributes to the ideals and effectiveness of both citizenship and democracy? The discussion focuses on how populist politics close down the discursive space within which 'constitutional citizenship' can function, leading to outcomes which tend to be exclusionary towards outsiders. It is interesting to note that many populist politicians make extensive use of constitutional amendment processes to reinforce their sense of identity with 'the people'.

Chapter 7 then turns to the phenomenon that Kristin Henrard (2018) usefully terms the ‘shifting spatialities’ of citizenship. It studies the impact on ideas of ‘constitutional citizenship’ of the dispersion of citizenship statuses and rights across vertical and horizontal axes. Under the influence of factors such as mobility and migration, the instability of state boundaries, subnational claims and movements, the creation of supranational/international institutions, including courts, such as the EU and the Council of Europe and cognates elsewhere in the world and the emergence of a body of international law that addresses many issues of citizenship and rights, we can discern a scheme of fragmented citizenship governance. This raises new challenges, for example, in relation to the legitimacy of how international law impacts on domestic constitutions. It cannot simply be assumed that the concerns with global justice and individual rights that stem from many of the international law sources that pertain to citizenship will, in fact, map comfortably onto citizenship in a constitutional context at the national level.

The sorts of tensions around ‘constitutional citizenship’ which emerge in these two chapters highlight that there are some substantial areas for further research that can only be hinted at in the brief Conclusions (Chapter 8) to the book. These also seek to reinforce how the two sets of issues explored in Chapters 6 and 7 articulate with each other, against the backdrop of the examples discussed in Part II and the framework for study elaborated in Part I. On the one hand, we live, many people have argued, in an age of populism; on the other hand, with unprecedented levels of mobility and migration across international borders, and the widespread liberalization of dual citizenship, it becomes ever more difficult to conceive of citizenship regimes operating solely within closed national borders. Practices related to constitution-building and citizenship are not exclusively confined to the (national) state level, but often occur above and below the state, in supranational and subnational institutions, as well as in the spillovers that occur transnationally between ostensibly separate citizenship and constitutional regimes. Citizenship and constitutionalism both operate within and between multilevel and complex transnational governance frameworks. Intersecting with constitutional frameworks both within and beyond the state, the phenomenon that Melissa Williams (2007) terms the ‘citizenships of globalization’ arguably offers the pluralist antidote to the potentially exclusivist conceptions that can emerge from the intersection of citizenship and constitutions at the national level, both as a matter of theory and a matter of practice. What is left hanging within this space, however, are two questions. One concerns how the various conceptions of citizenship fit together, and the other concerns questions of legitimacy and democracy ‘beyond the state’.

What do we already know about how citizenship, constitutions and constitutional law relate to each other?

Echoing the words of Lord Justice Laws quoted earlier, Kim Rubenstein and Niamh Lenagh-Maguire (2011, 143) have suggested that ‘the idea of citizenship, and the ideals it is taken to represent, go to the heart of how states are constituted and defined’. In similar terms, Michel Rosenfeld asserts that:

The citizen is the constituent unit of the constitutional subject in all its multiple identities, chief among them, the *who* that makes the constitution, the *for whom* it is made, and the *to whom* it is addressed. The citizen is at the heart of modern constitutionalism and is the principal actor in its birth, deployment and continuing life. (Rosenfeld 2009, 211; original emphasis)

Yet despite the seemingly obvious relationship between citizenship, constitutions and constitutional law, there exists surprisingly little scholarship that attempts to analyse the relationship in more detail.

Such scholarship is lacking on both sides: both in constitutional studies and in citizenship studies. For example, a recent attempt to formulate an approach to constitutionalism via its constituent principles contains no systematic discussion of the place of citizenship or ‘membership’ within such a scheme, although citizenship is acknowledged to be central in particular to principles of democracy and to the rule of law (Barber 2018). Moreover, the UK provides an instructive example of a pedagogical framework for constitutional law in which nationality or citizenship laws are treated as specialized topics, along with immigration law (largely as issues of statutory interpretation, administrative law and the judicial review of administrative discretion), and not as part of the constitutional core that is covered in detail in the main textbooks and courses (Dummett and Nicol 1990, 1). Lest that point be thought just to reflect a UK-centric perspective, then the words of Marcus Llanque (2010, 162), a constitutional theorist working in a German and comparative tradition, can be used: ‘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.’

In contrast, András Jakab’s (2016) study of European constitutional language takes a broader approach to the identification of ‘constitutional

visions' that explicitly encompasses citizenship. In order to identify these visions, what is needed is an assessment of the relationship between nation(s) and the state, based on a review of materials including the 'constitutional preambles and other provisions, and also by citizenship laws (especially provisions on naturalization) and immigration laws' (Jakab 2016, 241). Together this comment and the methodology that Jakab puts forward suggest that citizenship law is for him by definition an important part of constitutional law.

In the domain of legal studies of citizenship, international law features as a meta-frame of reference much more often than constitutional law.⁸ This is not surprising, as there is a rich corpus of norms of international law that serve a variety of purposes and that together build a picture of some of the most important elements of citizenship as a legal relation. Consequently, the standards set in measures such as the European Convention on Nationality⁹ are quite commonly the reference points for scholarship on the scope and nature of citizenship laws (de Groot and Vonk 2016). There is a substantial body of scholarly work which examines in detail the implications of international law for the discretion of states in a sphere traditionally thought to lie within the domain of national sovereignty.¹⁰ This has latterly involved a particular focus on international human rights law (von Rütte 2018), as well as on specific measures related to stateless persons, minorities and refugees (Vlieks et al 2017), although in earlier years the focus was more likely to be on those international law measures intended to assist in the suppression of dual nationality (Boll 2007). For the most part, however, those latter measures have now fallen into disuse, as the emphasis within international law has shifted towards an accommodation with individual rights away from a focus solely on states' interests. Both public and private international law make widespread use of the concept of nationality for the purposes of determining issues of jurisdiction (alongside concepts such as territory and residence) in areas such as family law, succession and commercial law.

Meanwhile, where citizenship law is studied within a national framework, we find many case studies that delve deep into the intricacies of national laws and into the contexts which drive the particularities of national citizenship regimes, sometimes on a comparative and/or

⁸ For contrasting examples, see Fripp (2016) and Annoni and Forlati (2013).

⁹ European Convention on Nationality (ETS No 166), signed in Strasbourg on 6 November 1997, entry into force 2000 (for the full text, see www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166).

¹⁰ Important examples include Kesby (2012), Spiro (2011) and Henrard (2018).

transnational basis.¹¹ Typically, these will mention constitutional issues only as required for the specific case study or studies rather than taking a broader perspective on the constitutional question *per se*. Citizenship, as Char Roone Miller (2001) notes, is generally ‘tailored’ to its specific national circumstances. Referencing Miller, the point is nicely elaborated by Marcus Llanque:

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 a constitution. In a way, political reality shows that all citizenship is “tailored”. That is, it is modelled after the necessities of a given political system and it changes in accordance with these necessities. (Llanque 2010, 167)

In sum, there exists little work that attempts to thematize the implications of adopting a constitutional framework to examine the scope or content of citizenship as an idea or practice or to critique the meaning of ‘constitution’ or ‘constitutional law’ in this context. This is where this book – at least as regards its first aim – will step in. While the book fills a gap in the literature, it should be noted that the framing of the discussion is indebted to the work of a number of scholars who have wrestled with the relationship between citizenship and constitutions (see, for example, Cohen 1999; Bellamy 2001). As regards the second aim of looking at the wider implications of how citizenship and constitutional law relate to each other, there is already literature that provides significant and useful points of reference for the enquiry, especially in the field of constitutional theory.¹² A notable example is Michel Rosenfeld’s (2009) book *The Identity of the Constitutional Subject*, which uses citizenship as an important exemplar of thinking pluralistically about issues of ‘constitutional identity’ in such a way as to reconcile possible conflicts between the particular (state or individual) and the universal (transnational sphere or community) (see Walker 2010). For example, he argues that ‘Both the imagined community that defines the nation and the one that projects an identity on the constitutional order are anchored in the citizen’

¹¹ For a constitutional framing of a national case study, see, in particular, Elisa Arcioni’s work on Australia: 2014, 2015, 2018; and with Rayner Thwaites, 2020. Examples of comparative work include Shachar (2012) and de Groot (2012).

¹² Several of the chapters in Shachar et al (2017) provide good examples of the rich analysis possible where constitutional theory meets citizenship, notably Walker (2017) and Gans (2017).

(Rosenfeld 2009, 211). Margaret Canovan's (2005) *The People* also lays down much of the groundwork necessary for reassessing the tensions arising from the simultaneity of the 'turns' to populism and to globalism. This book builds on the insights of scholars such as these, and brings the debate up to date by highlighting a number of recent pertinent examples and challenges.

Perhaps one reason for some gaps in the literature is that both of these terms – 'citizenship' and 'constitutions' – are notoriously broad, hard to pin down and contested in academic and political discourse. The dominant ideas behind both citizenship and constitutions are creatures of the emergence of the modern state. Both are artefacts of the demand for governance and governability. They share family resemblances. It is tricky enough to write about citizenship or constitutions separately. The task is much more difficult when one tries to juxtapose the two sets of ideas, especially when additional comparative elements need to be worked in, in order to gain a broader transnational view of the field. Terms like 'citizenship' and 'constitution' operate in densely networked ideational spheres, also occupied by interrelated concepts such as nationality and the sovereignty of 'the people'. The scope and meaning of each of these concepts is contested. The remainder of this chapter sets the scene for the rest of the book by offering some capsule definitions and preliminary notes on these terms and concepts, on which we can build in later chapters. Finally, since the concepts we choose and the way we interpret them necessarily shape matters of research design and the types of analytical lenses applied, the chapter concludes with brief notes about the methodological inspirations for the work.

Brief notes on core concepts

Citizenship

It is a standard tenet of international law, in relation to what is generally termed (in that context) 'nationality', that it is for each state – according to its sole discretion – to determine issues of legal membership *within* that state.¹³ States may in principle apply whatever rules they think fit. Citizenship laws at national level pursue the task of inclusion and

¹³ See the Convention on Certain Questions Relating to the Conflict of Nationality Laws (League of Nations Treaty Series, vol 179, The Hague, 1930) and Advisory Opinion of the Permanent Court of International Justice of 7 February 1923 on Nationality Decrees Issued in Tunis and Morocco, Series B No 4 (1923).

exclusion, in the first instance, via rules on acquisition and loss. The ‘sortation’ aspect of citizenship is quite frequently criticized as arbitrary in character, because the allocation of most individuals to ‘their’ citizenship occurs on the basis of the happenstance of birth, through attachment to territory (*ius soli*) and/or parentage (*ius sanguinis*) (Shachar 2009; Carens 2013). The entire structure is premised on the persistence, however imperfectly, of what is often called the ‘Westphalian’ system of (nation) states (Farr 2005). *National citizenship* (of a Member State) also provides the exclusive access point to ‘citizenship of the (European) Union’, that is, having access to the world’s most developed form of supranational citizenship, that of the European Union.¹⁴

Of course, there are now substantial legal and practical constraints on what states may do in relation to the distribution and terms of citizenship (stemming from domestic constitutional restrictions, from international law and from the laws of other states) (de Groot and Vonk 2018). It is widely assumed among scholars and practitioners alike that the somewhat limited international law ‘right to citizenship’ exists to mitigate the harms caused by statelessness, although there is less agreement about what the meanings or effects of those provisions might be.¹⁵ Chief among the relevant provisions is the ‘right to a nationality’ and the right not to be arbitrarily deprived of his [sic] nationality, contained in Article 15 of the Universal Declaration of Human Rights,¹⁶ although that provision does not decree *which* state must confer nationality, is not binding on states, and has an uncertain scope (Owen 2018). This provision, as with various instruments on statelessness¹⁷ and Article 7 of the UN Convention on the Rights of the Child concerned with the right to identity and nationality (Ziemele 2014), is intended to be a guarantee of the basic ‘right to have rights’ as the bedrock of citizenship, famously articulated by Hannah Arendt (1986, 291). Yet as Rainer Bauböck notes, this is only one of the four goals of international law in relation to citizenship, the others being the resolution of conflicts between states, the setting of minimal standards (beyond the sphere of statelessness alone), and (now largely obsolete) the task of avoiding multiple nationality (Bauböck 2018b).

Despite this body of international law, the fundamental principle of state autonomy still holds true as a starting point. It is states that confer

¹⁴ See Article 20(1) of the Treaty on the Functioning of the European Union (TFEU).

¹⁵ For contrasting approaches, see Fripp (2016), Gibney (2013), Owen (2018) and von Rütte (2018).

¹⁶ Universal Declaration of Human Rights, 1948 (www.un.org/en/universal-declaration-human-rights/).

¹⁷ See the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

citizenship on individuals, as a basic sorting principle, and it is states that are required to recognize the citizenship status conferred by other states, subject to what has been termed the ‘genuine link’ principle articulated by the International Court of Justice (ICJ) in the *Nottebohm* case. Famously, the ICJ postulated that ‘nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’,¹⁸ and argued that this underlying principle was relevant for the purposes of determining whether one state was obliged to recognize the conferring of nationality on a person by another state, and thus to accede to a claim to offer diplomatic protection that could flow from that conferral. With the benefit of hindsight, the *Nottebohm* case can be argued to be problematic from a doctrinal perspective,¹⁹ and scholarly criticism of it has revived in recent years (Spiro 2019). But the idea of a genuine link between the individual and the state has emerged as an enduring and useful reference point for many theories of and conceptual frameworks for citizenship (Bauböck 2018a, 2019a), especially when it comes to developing critiques of hard cases such as discretionary naturalization, including investor citizenship (Džankić 2019a), external citizenship (Pogonyi 2017) and loss of citizenship (Bauböck and Paskalev 2015). One point to watch out for, especially in Part II of the book, is whether there is any evidence of states cleaving to the principle of genuine link, either as a matter of constitutional principle (‘our people are those persons who have links with us’) or as a matter of doctrine.

The comments made so far have been predominantly from a legalistic and top-down perspective, focused in particular on the formal law and on the scope of membership in a rather static sense. This ignores many central political, social and cultural aspects of the concept of citizenship and does not address the ideals of citizenship, such as equality, sovereignty and self-government. It is also a *state-based* perspective and does not address the ‘beyond the state’ aspects of citizenship, generated by the close interconnections between different national citizenship regimes brought about by international migration and dual citizenship, or the emergence of ‘citizenship-like’ statuses at the supranational level, notably citizenship of the EU. Nor does it engage directly with the increasing number of options for a strategic approach for some groups of (generally privileged) individuals in a largely post-exclusive world of citizenship, or the strategic approaches of states, which may even use passport purchase as a way of

¹⁸ *Liechtenstein v Guatemala (Nottebohm)* [1955] ICJ 1.

¹⁹ For detailed analysis, see Sloane (2009), Macklin (2017a) and Thwaites (2018).

evading responsibilities for groups of otherwise stateless people within their borders (Džankić 2019b).

Of course, we must take seriously the formal legal concept of citizenship as a membership status and as a bundle of rights. This legal architecture is important not least for what it gives us when we need to audit the practices of citizenship and when we compare the approaches of different states and indeed of those non-state entities (like the EU) that engage with ‘membership’. There are, however, other ways of understanding citizenship, in particular when it is used as an analytical category. Many of these are pluralist in character, relying on re-conceptualizations of the norms of citizenship that are socio-legal rather than doctrinal, and that adopt a critical perspective on modern citizenship at the same time as observing its paradoxical elements. Drawing inspiration from authors such as Margaret Somers (1993, 1994, 2008; Somers and Roberts 2008) and Claudia Wiesner and collaborators (Wiesner et al 2018), I argue that citizenship is best seen as relational and in flux. According to Wiesner et al (2018, 1), ‘a concept such as citizenship does not have one single meaning, let alone an essential meaning. Rather, it should be regarded as being socially constructed and used in a reflexive way.’

Accordingly, citizenship emerges, both as an idea and in institutional form, as a result of dialogical processes that have no fixed endpoint. Citizenship is contested across time and space (Tully 2008; Cohen 2018). It is not just a status imposed top down by institutional fiat, but also a bundle of rights and responsibilities struggled for by different societal forces, and a window on issues of power and power relations within society (Štiks and Shaw 2014). Above all, citizenship does not have a settled meaning. For example, viewing it as a relation, and as a ‘dynamic ... institution of domination *and* empowerment that governs *who* citizens..., subjects... and objects ... are and *how* these actors are to govern themselves and each other in a given body politic’ (Isin 2009, 371; original emphasis), Engin Isin develops the argument that citizenship is not, in fact, synonymous with membership, but distinct from it, as a field in which groups can claim access to citizenship rights through what he and colleagues have termed ‘acts of citizenship’ (Isin and Nielsen 2008). Indeed, the ‘bottom-up’ idea of individuals and groups acting strategically in relation to citizenship (especially dual citizenship) has become a recognized approach to citizenship not just conceptually, but also from an empirical perspective (Harpaz and Mateos 2019). We shall return to these ideas when we explore the methodological inspirations for this book at the end of the chapter.

While the practice of liberal democracy within relatively stable but porous borders undoubtedly provides a dominant model for citizenship

(although, as a model, it is often only implicitly acknowledged as opposed to being explicitly stated), factors such as human mobility, the survival and security of the polity, the presence of internal cleavages between different majorities and minorities, not to mention relations between states and within and across regional and international organizations all frequently impact on the shape and scope of citizenship regimes at different times and in different places and on the evolution of the concept itself. As we shall see in Chapter 2, it is vital to reflect on the different conditions for building citizenship regimes, which govern the situation in post-colonial states and states in the Global South. There is nowhere in the world where the ‘national’ or ‘state-based’ realm still retains the prize of being the exclusive space within which the status and rights of citizenship can be practised or recognized. However, the complex relations between states in the global order will have different impacts on citizenship regimes depending on how any given state ‘sits’ in relation, for example, to current migration and human mobility trends as well as matters of economic development.

The task of trying to understand patterns and trends across citizenship regimes, laws and policies falls to an emergent interdisciplinary field of comparative citizenship studies (Vink et al 2016; Vink 2017), which relies to a high degree on access to reliable primary sources (citizenship laws, detailed information on how citizenship is regulated and applied at the national level, etc),²⁰ and makes use of a range of quantitative and qualitative methods of research appropriate to the different questions to be researched.²¹ According to Rainer Bauböck (2018b, 501), what gives family resemblance to different citizenship regimes, thus rendering them comparable across state borders, is the dominance of three criteria for determining which individual is a member of which polity: birth, residence and choice. In the sphere of legal scholarship, René de Groot has worked towards framing what could be understood as ‘European nationality law’, binding together evident trends at national level alongside the developing body of international legal standards. His aim is to build a toolbox for assessing nationality legislation (de Groot 2016). In the social sciences, Rainer Bauböck and Maarten Vink have together (Vink and Bauböck 2013) and in collaboration with others, pioneered comparative

²⁰ GLOBALCIT (2017a, b). The GLOBALCIT website also contains databases of full text citizenship laws and international legal norms, as well as case law, and substantial secondary and reflective material in the form of country reports, regional reports, thematic reports, debates or forums and blogs.

²¹ For the quantitative research, the indicators on citizenship law and birthright citizenship developed by the GLOBALCIT team are particularly relevant (see GLOBALCIT, 2016, 2019).

research on the regulation of the acquisition and loss of citizenship initially at the European level and more recently at the global level (Vink et al 2019; Vink et al no date), in particular through the analysis of databases and the development of robust indicators evaluating the different aspects of national citizenship regimes, including electoral rights (Schmid et al 2019). This emerging body of work has probed three key questions that shape the field: ‘along which dimensions can citizenship regimes be differentiated; which factors structure variation in citizenship regimes; and how do citizenship regimes impact on social, economic and political outcomes?’ (Vink 2017, 221).

In contrast, the tools used in this book involve interpretative and evaluative comparisons, which are more common in legal studies, rather than formal data-driven analyses, which many social scientists develop.²² Making interpretative comparisons places different demands on the scholar. For example, because of the complexities of citizenship and of citizenship regimes and because of the facet of contestation, many scholars break the field of study down into smaller and more manageable blocks (for example, by distinguishing, as Jean Cohen [1999] does, between the juridical, the political and the identitarian dimensions of citizenship). In fact, a similar approach to breaking down citizenship into component elements will be adopted as a starting point and heuristic device in Part II. But these divisions do not always map clearly onto either the various recognized modes of acquisition and loss of citizenship, which are central to Bauböck and Vink’s approach, or their interpretation of the various purposes of citizenship laws such as intergenerational continuity or territorial inclusion (Vink and Bauböck 2013).

Finally, it is important to note that Bauböck’s work is rooted in normative political theory, and specifically within a theory of what he terms ‘stakeholder citizenship’ (Bauböck 2018a). This theory articulates what Bauböck argues are the defensible limits of ethical political community within a world that is characterized both by a system of ‘Westphalian’ states (in which the sortation aspects of citizenship are central to its purposes and scope) and also strong dynamics of human mobility, elements of state instability, and supranational and international legal authority. The latter factors generate what Bauböck terms ‘citizenship constellations’ (Bauböck 2010b), in which a plurality of sources of legitimation and authority impact on the citizenship relation. Together these amount to the conditions of ‘strong interdependence and migration flows between autonomous polities’ (Bauböck 2018a, 47). Bauböck’s theory presupposes

²² On some of the challenges across the disciplines for citizenship studies, see Mindus (2014).

an empirical assumption that ‘a plurality of bounded political communities is part of the human condition’ (Bauböck 2018a, 40), and holds that

... citizens are stakeholders in a democratic political community insofar as their autonomy and well-being depend not only on being recognized as a member in a particular polity, but also on that polity being governed democratically. Political legitimacy in a democratic polity is not derived from nationhood or voluntary association but from popular self-government, that is, citizens’ participation and representation in democratic institutions that track their collective will and common good. (Bauböck 2018a, 41)

The details of this and the many other competing ethical theories of citizenship, as the basis for human flourishing in (at least partially) bounded political communities, lie beyond the scope of this book.²³ None the less, any work on citizenship, whether interpretative, analytical or empirical in character, inevitably relies to some extent on normative theory and potentially contributes indirectly to building theories through interpretation and reflection. Such normative theories offer insights, for example, into the ethics of political choices, both relating to the scope of citizenship as a legal status and its transmission across generations and communities, and into the scope of citizenship rights, such as the right to vote. I shall therefore draw liberally on citizenship theories in what follows, as well as on conceptual and theoretical work within constitutional studies.

Citizenship and nationality

It may already be obvious from the usage of terminology in these early pages, that, in common with many other legal scholars, I do not worry unduly about using the terms ‘nationality’ and ‘citizenship’ interchangeably.²⁴ However, if we step beyond the realms of legal doctrine (and the English language), we will discover that there are, in fact, considerable complexities to the relationship between these two

²³ See, for example, Owen (2013), Carens (2016) and the varied contributions to Fine and Ypi (2016).

²⁴ See, for example, Vonk (2015). This statement is not entirely true, as Alison Kesby (2012) draws an analytical distinction between the two for the purposes of her own work.

terms and to the different concepts and meanings they signify. There is also profound variation in precise usage across disciplines, languages and cultures, as well as insights to be drawn from history (Thomas 2002, 325–6; see also Stolcke 1997).

International law scholarship generally uses the term ‘nationality’ when designating the legal status of individuals and the connection between individuals and states, as recognized across the global system of states. Its usage is embedded in the modernist roots of *international* law and in projects of *nation* state building, which are often associated with the period of romanticism and the birth of modern nationalism in the 19th century. According to Rainer Bauböck:

In René de Groot’s description, Westphalian citizenship, which lawyers call “nationality”, is “an empty linkage concept” [*ein leerer Koppelungsbegriff*] ..., in Rogers Brubaker’s words it is an “international filing system, a mechanism for allocating persons to states”. (Bauböck 2019a, 1017)²⁵

The term ‘nationality’ often remains in common legal use at the state level for similar reasons. For example, the UK applies a confusing mix of the two terms: since the British Nationality Act 1948 (and now under the British Nationality Act 1981, as subsequently amended), the status conferred on members of the polity is that of ‘citizen’, where previously they were ‘subjects’ (of the Crown). Public-facing government guidance refers, for the most part, to ‘British citizenship’, whether it is acquired by birth, by naturalization or by registration.²⁶ So those who naturalize go through a ‘citizenship ceremony’, where the status – with its civic connotations (as well as its pledge of allegiance to the Crown) – is formally conferred (Prahbat 2018). Yet the operational guidance aimed at Home Office decision-makers is termed ‘Nationality Guidance’, and ‘nationality’ is a term widely used in those materials. Furthermore, in the English criminal courts there is now a statutory requirement that the defendant state his or her ‘nationality’.²⁷ In the US, however, where citizenship is constitutionally regulated, it is this term that dominates the airwaves, the legislation, the case law and the scholarship. This is

²⁵ The references are to de Groot (1989) and Brubaker (1992, 31).

²⁶ See the relevant Government Gateway site (www.gov.uk/browse/citizenship/citizenship).

²⁷ The Criminal Procedure (Amendment No 4) Rules 2017 (2017 No 915 (L 13)).

the republican heritage.²⁸ Furthermore, in a multinational state such as Canada, with more than 600 First Nation communities, considerable ethnic diversity across the country, and a subnational linguistic ‘national community’ in Québec, no one would use the two terms interchangeably in a domestic context.

Historically, and in many national contexts, the term ‘nationality’ is not just a synonym for citizenship; it can mean either more or less (Stolcke 1997). In France, also holding a republican and revolutionary heritage at the heart of its conception of modern citizenship, both the terms *nationalité* and *citoyenneté* are used, but in different contexts. It is *nationalité*, for example, in the *code civil* where (Westphalian) citizenship is regulated. But the constitution refers to *citoyens*. Michel Troper (1998) argues that since the French Revolution a distinction has been drawn between nationality and citizenship in order to reinforce that it is the *citizens*, not the nationals, who are privileged with (and obligated to exercise) political rights.²⁹ Citizenship has an important connotation of shared rule and civic purpose. A similar perspective is also evident in Latin America, where a historical distinction between nationality and citizenship along those lines evolved through the process whereby ‘communities’ became ‘nations’ as part of the separation of Spanish America from Spain (Herzog 2007; Acosta 2018). The distinction is preserved in many of the constitutions from the region, and Luicy Pedroza and Pau Palop-García (2017) explain how it remains legally significant, in particular for the rights and status of emigrants.

Disciplinary perspective may also be important. Some political theorists, such as David Miller (1993), embrace nationality in a way that arguably conflates state and nation in order to recover the acceptability of ‘nationality’ (and a certain form of liberal nationalism). Meanwhile, sociologists David McCrone and Richard Kiely (2000, 25) (focusing on the UK) are clear that they are analytically separate concepts that ‘belong to different spheres of meaning and activity.’ ‘Nationality’, in English, can be used to denote a set of concepts more closely linked to ideas of the nation, of ethnicity and of common cultural affinities via language, territory and history, as well as the connection between the state and the individual as recognized in law. This is what leads to the confusion about the use of the term ‘nationality’ in criminal proceedings in the UK. British citizens will often state that they are ‘English’ or ‘Scottish’ because these are widely understood, along with Wales and Northern Ireland, to

²⁸ One important exception to this concerns the recognition of ‘national origin’ as a protected characteristic under federal civil rights legislation.

²⁹ For further historical analysis, see Gosewinkel (2001).

be the ‘nations’ of the UK.³⁰ In fact, in that context they are being asked to state whether they are British citizens, or citizens of some other state.

The two terms ‘nationality’ and ‘citizenship’ obviously have quite different roots (the *natione* or *natio* and the *civis*), and this is frequently also the case also in other languages, including those without strong Latin or Greek foundations (de Groot 2012, 601). South Slav languages, for example, already have two words (*državljanstvo* and *građanstvo*) for ‘citizenship’, with the former referring to the link between the citizen and the state, with no ethnic connotations, and the latter holding a stronger civic and political meaning, in that it may also refer to the residents of a city. Completely separate terminology and meaning attach to the words for ‘nationality’, which are *nacionalnost* or *narodnost* (from *narod*, or ‘people’), which have powerful ethnic connotations, but could not ever be used to designate the link between a citizen and a state (Štikš 2015, 11–12).

Indeed, there were ‘nationalities’ recognized within the Austro-Hungarian empire, and in some cases these have been the forerunners of the citizenships of states that have eventually emerged from that empire (for example, Slovak or Slovenian, albeit via two multinational states which have since disintegrated: Czechoslovakia and Yugoslavia). In other cases, these nationalities remain stateless ‘national identities’, which cut across the boundaries of modern nation states or correspond to modern ‘regions’ such as Galicia or Transylvania. Sometimes there are ‘lost identities’, such as that of ‘Yugoslav’, which was the basis for citizenship for more than 50 years, but never more than a minority ‘identity’, as census outcomes demonstrated (Sekulic et al 1994). More recently, in Israel, which is widely understood as an ethnic and not a liberal democracy, the Israeli Supreme Court has resisted the argument made by groups of Israeli citizens that their ‘nationality’ should be entered in the population register not as ‘Jewish’ or ‘Arab’, but as ‘Israeli’. There is, said the Supreme Court, a difference between citizenship, which gives the right to vote, for example, and ‘nationality’. According to the Court, this latter concept is characterized by the ‘feeling of unity that prevails among the members of the national group.... Members of the national group are infused by a sense of interdependence, which also means a sense of common responsibility.’³¹ It is a solidaristic concept. These concepts, ideas and practices are obviously ripe for comparative investigation, much

³⁰ ‘In the British legal terminology, autochton non-English ethnic communities are recognised as “nations”’ (Jakab 2016, 277).

³¹ See CA 8573/08 *Ornan v Ministry of Interior* (2 October 2013), Nevo legal database. For a critique, see Brandes (2018a).

of which makes use of established analytical categories such as ethnicity and race rather than the term ‘nationality’ as such, as well as the polyvalent idea of ‘identity’.

In this book, the main focus is on the citizenship relation, understood to encompass a number of different elements of status, rights and belonging, as articulated within the framework of a national constitution or in a ‘beyond-the-state’ scenario. There is less discussion of other affinities based in ethnicity or culture, although these will be touched on especially when discussing how citizenship relates to national and other identities. To that end, the terms ‘citizen’ and ‘citizenship’ will generally be used, except where common usage, especially in legal circles, would be to use ‘nationality’ (for example, in discussing international law) or where, as in regions such as Latin America, the distinction is still commonly, and strongly, made. Where ‘nationality’ is being used in the context of its relationship to historic ‘nations’ or ethnicities, this will be made clear.

Constitutions and constitutional law

In its plainest terms, according to the *Oxford English Dictionary*, a constitution is a ‘body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed.’ It is worth noting that the historic pre-modern usage of the term ‘constitution’ was not fixated on the idea of a constitution being a paramount or governing law. That usage is traced by most scholars to the American Revolution, building on a political doctrine that had taken root gradually in the English common law in the 17th and 18th centuries (Buratti 2019). According to Rainer Grote:

The constitution in the modern sense is no longer descriptive, but prescriptive. It is a set of legal norms which is set apart from other legal norms, the ordinary law, by its specific purpose and its specific characteristics. The purpose of the constitutional norms is to regulate the way in which legitimate public authority is constituted and exercised. (Grote 2018)

Nowadays, rules and principles feature heavily in most legal accounts of constitutions and constitutionalism, along with powers and procedures, focused especially on the institutions of government, the separation of powers, the rule of law and the protection of rights (Galligan and Versteeg 2013a, 6). Many constitutions also invoke the more or less mythical concept of ‘the people’, often as the originator of the constitution or

‘constituent power’. Constituent power is one of the core reference points for the claimed legitimacy of a constitution.

Most constitutions are ‘documentary’ in the sense of being contained, more or less, in a single document, perhaps combined with a body of authoritative interpretations, typically by a constitutional or supreme court. Even in such cases, there often exist further norms beyond the written constitution which fill out the gaps left by the constitution, and that are part of constitutional law. A minority of constitutions are entirely composite in character. Famously, the UK is said to have an ‘unwritten constitution’, but obviously in such an advanced legal order many of the materials that make up the constitution, such as case law (for example, interpreting constitutional conventions or the increasing range of acknowledged constitutional principles) and those legislative measures widely acknowledged to have some constitutional character are, of course, ‘written’. It is clear that our study of citizenship and constitutions/constitutional law needs to encompass all of these different types of constitutional frameworks. Adopting a broad perspective on the different types of constitutional norms and constitutional law that impact on citizenship as status, rights and identity is essential for the purposes of offering an effective overview of the constitutional story of citizenship. Identifying the distinctive domain of ‘the constitutional’ requires us to consider the purpose and function of norms, rather than just taking a linguistic or conventional approach. Clearly the dividing line between ‘constitutional’ and ‘non-constitutional’ public law is just as hard to pin down as the dividing line between ‘constitutional’ and ‘ordinary’ politics. The book will err on the side of inclusiveness in its approach to that dividing line.

The process for adopting or amending constitutions will be specific to each country, although certain general principles can be discerned. In Chapter 3 we will discuss the importance of the idea of the ‘constituent power’ – the notion of a pre-political authority to adopt a new constitution for a state. Conventional wisdom holds that as constitutions are a special type of law in each country, they ought somehow to last longer and be harder to change. As the US Constitution was effective from 1789 (on ratification) and has relatively rarely been amended, in particular in recent decades, this may give a misleading impression of the durability of constitutions. In research published in 2009, Zachary Elkins et al (2009)³² calculated that since 1787, the average lifespan of any given constitution has been only 17 years, and in 2017, the World Bank (2017, 91) highlighted the intensification and increased

³² See also Ginsburg et al (2009).

frequency of ‘constitutional events’, especially amendments, since the Second World War.

Beyond the bare bones of what is likely to be found in most, if not all, constitutions, scholars do not always agree about the purposes of constitutions, about their social and political foundations (Galligan and Versteeg 2013b) or about their proper normative dimensions. That is to say, there is debate and contestation over the concept of ‘constitutionalism’ and over the state of ‘constitutional democracies’, with the practices of constitutional democracy currently seen as being somewhat in retreat since the moment of triumph after the end of the Cold War and the collapse of the Soviet Union. Today, in an era of populist politics, with increasing numbers of semi-authoritarian and illiberal regimes in many parts of the world, constitutions have not so much been overthrown as diluted or degraded as instruments of democracy, while retaining most of the formal institutional trappings (Graber et al 2018).

While it is clear that there is generally a relatively comfortable pairing between the liberal and republican forms of constitutionalism and democratic principles, it is also the case that we should not ignore how citizenship is dealt with under constitutional frameworks that lack some or all of these trappings. To give a different sort of example, which helps to make the same point, when it comes to the issue of statelessness, which is clearly related to citizenship (or rather, its absence), even states with weak democratic credentials may be committed to engaging with the basic humanitarian norms that push back against statelessness, for example, by offering access to citizenship to refugees or by pursuing more effective birth registration.³³ Of course, this is often because international donors and agencies make so-called development aid conditional on such efforts. Whatever the motivation, the result should be an improvement in the life chances of those affected. As, in some cases, these issues are affected by constitutional norms, the mapping of the citizenship/constitutional law relationship in Part II will include examples from different types of constitutional scenarios stretching well beyond the established and stable democracies.

Part III addresses two major challenges that confront the idea of the constitution and the role of constitutional law, in particular in the context of its relationship to citizenship. In assessing the relationship between citizenship and ‘the people’ in Chapter 6, via the contested idiom of populism, we will face front on the values embedded in many constitutions: the ‘isms’ of democratic and liberal constitutionalism,

³³ EIN News (2019) ‘Angola ratifies human rights treaties’, 1 August (www.einnews.com/pr_news/492377697/angola-ratifies-human-rights-treaties/).

embodied in principles such as equality, the rule of law and fundamental rights. In Chapter 7, when considering the practices of citizenship (and citizenship rights) beyond the state, we must necessarily also consider the possibilities and challenges of transnational, supranational and even global constitutionalism (Rosenfeld 2014; Lang and Wiener 2017). What types of non-state polities can legitimately lay claim to be ‘constitutionalized’ and thus to have a ‘constitutional law’? To what extent does this imply that such polities have some sort of ‘touch of stateness’ (Shaw and Wiener 2000) or can such polities ever truly claim to be constitutionalized in a way that escapes normative ‘statism’ or methodological nationalism?

The people

At the beginning of this chapter, I noted that citizenship has an internal aspect, reflecting the ‘stories of peoplehood’ that offer a binding element in most, if not all, polities (Smith 2001). Indeed, it is practically impossible to imagine citizenship – both in the formal legal sense and especially in the wider senses of political membership and community identity – without also considering the relevance of fundamental ideas about ‘the people’ and attachment to the polity (including the dimensions of loyalty, patriotism and allegiance) that often feature prominently in constitutional texts which lack liberal trappings or pretensions (Thio 2012), as well as in many of the more liberal variants. As Dennis Galligan has pointed out, the idea of sovereignty within a constitution is logically prior to the concept of democracy, which is why explorations of the place of ‘the people’ in the constitution can also encompass constitutional frameworks that are lacking in democratic credentials (including historical examples) (Galligan 2013a; see also Galligan 2013b). All of these elements are the essential raw material for normative models of ‘citizenship as community membership’ developed by political theorists; on the side of studies of constitutionalism, many of the same ideas inform the extensive body of theoretical work that probes the notions of ‘constituent power’ and sovereignty as providing the ultimate legitimacy for polity formation and evolution (see Chapter 3).

Further discussion of the concept of ‘the people’ will appear in subsequent chapters: in Chapter 2, where we re-consider the relationship between state and nation and then sketch out the concept of the ‘constitutional citizen’; throughout Part II, as we consider in detail how citizenship and constitutions interact, but especially in Chapter 3, which is focused on the constitutional ideal of citizenship; in Chapter 6, where we turn our attention specifically to the task of understanding the potential relevance of populism and populist politics for the citizenship/

constitutional law relationship; in Chapter 7 when we consider whether the concept of ‘the people’ can stretch beyond national borders; and finally when we draw the threads of the argument together in Chapter 8, the concluding chapter. To underpin these later discussions, here we need to outline the basic contours of a slippery and difficult concept.

Different scholarly traditions take contrasting positions on how the concept of ‘the people’ comes about in any given constitutional context: is it a pre-political culturally defined concept, or does it arise politically in the context, say, of a revolution that dramatically forms or reforms a polity (Tushnet 2017; White and Ypi 2017)? ‘The people’ could refer to at least six different sets of ideas that have ebbed and flowed historically and politically, in line with the growth and sometimes the demise of concepts of sovereignty, constitutionalism and democracy (Canovan 2005; Galligan 2013b). Each is closely related to almost all of the others.

In the first place, we can think of the people as sovereign, but at the same time often, indeed almost always, in reserve and invisible, or ‘sleeping’, as Thomas Hobbes would have it (Walker 2019a). That is, the people almost never exercise their sovereignty, except on rare occasions where they are asked to take a truly ‘constitutive’ step, for example, at a revolutionary moment, in the case of independence referendums or at a moment of consensual constitutional renewal. The people can also be understood as the rulers in a democracy and as a political people, although in its earlier forms this concept of the people generally took a corporate and limited form and was certainly not to be understood as ‘all of the people’. Many groups (based on criteria of property, gender and race) were conventionally excluded from the franchise of evolving democracies such as the United States and the United Kingdom (and its colonial dominions) up until the 20th century (Galligan 2013b, 147). For Rogers Smith, what is special about the political people is that these are associations, groups and communities ‘that are commonly understood to assert that their members owe them a measure of allegiance against the demands of other associations, communities, and groups’ (Smith 2015, 2). They build this sense of allegiance not only by reference to economic and political themes common to that group, but also by reference to constitutive themes of race, gender and religion. Furthermore, just as they are when conceived of as the sovereign, so as the ‘rulers’ the people are mainly hidden, in this case behind the frontage offered by representative democracy.

Another element closely associated with the concept of the people as rulers is the idea of the ‘common people’. This is an idea that comes much closer to a universalistic concept of ‘the people’ and in that sense the idea of the ‘common people’ was feared by many power brokers during the

early stages of the emergence of democracy. Eventually, of course, the common people were enfranchised, as so-called universal suffrage became the norm in democracies. Nowadays, this idea of the ‘common people’ (in contradistinction to the elite) is one of the animating forces behind populist political movements, as populists claim to represent the interests of the common people as embodying the ‘real’ people. The idea of the people is thus weaponized against the ‘elite’.

The idea of the people as ‘the nation’ must also be considered. Here we need to face the question of the boundaries between inside and outside. How do we set those boundaries on an ethically, economically and politically defensible basis, while respecting principles of self-determination (Fine and Ypi 2016)? The immediate ‘shadow’ of the people as nation is the universalistic idea of ‘the people’ as humanity, where nations become irrelevant. Yet no state or polity – *pace* Linda Bosniak’s (2007) principle of ethical territoriality – in practice stands ready to admit all those who seek to enter.³⁴ But states do not stand alone. As both Rogers Smith and Rogers Brubaker acknowledge, it is not only states that can have ‘stories of peoplehood’. So too can other sorts of groups. According to Brubaker (2017a, 797), the term ‘people’ can be understood ‘as a group that is (relatively) stable, enduring, distinctive, encompassing, self-reproducing, and (at least ideally) self-governing.’ Articulating these conditions helps to show how closely related the various concepts of ‘people’ in fact are. Smith’s particular focus, or contribution, is on the ‘constitutive themes’ (in the US case of race, religion and gender) (rather than political or economic themes of peoplehood) that can come to the fore in stories of peoplehood, and which can have an exclusionary force: ‘when the ideas, institutions, and practices expressive of established constitutive themes are threatened’ (Smith 2015, 65). These are the moments to watch out for, and Brubaker suggests that at a ‘populist moment’ we should take particular care to look out for them because of the exclusionary effects they are likely to have. We will return to these themes in Chapters 6 and 8.

Methodological inspirations and approach

This book is a study of citizenship in its various constitutional contexts, viewed from a socio-legal perspective. The methodological starting point is that of comparative constitutional law, in a field where (national) public law and both private and public international law intersect (Jenkins

³⁴ On the human right to immigrate, see Oberman (2016).

et al 2014, 2). The subdiscipline of comparative constitutional law is a relatively new kid on the block, at least in terms of it receiving sustained attention from scholars. For a long time, mainstream comparative law rather disdained the task of comparing constitutional or public laws, on the grounds that they were just too *local* and *particular* in terms of values, cultures and contents (Ginsburg and Dixon 2011, 2). Since the possibilities of transplants, at least between established democracies, have seemed remote, much of the classical rationale for comparative law tended to fall away. The emergence of a distinctive subdiscipline has benefited from the creation of effective interdisciplinary frameworks based on institutionalist accounts of legal and political change, such as historical institutionalism and sociological institutionalism, combined with an explosion of constitution-making activity, especially after 1989, which has provided many a new laboratory for study. These ‘institutionalisms’ emphasize the relationship between individual agents, such as courts, and wider institutional environments, such as ‘the constitution’, and have also promoted a space within politics to understand both the role of ideas and the power of law’s normative force.

This work is inspired by these developments, and it embraces, in particular, the sociological turn in constitutional studies. As Dennis Galligan and Mila Versteeg (2013a) make clear, it is important to look at the social and political foundations of constitutions. This is hardly new. It can be traced back to Abbé Sieyès’ account of the emergence of constituent power and constituted power in the 18th century. According to Galligan, Sieyès’ account is that of ‘the social scientist describing a constitution as a necessary element of a modern nation, an element whose properties and functions can be analysed and generalized’ (Galligan 2013b, 148). But one important claim of those, such as Chris Thornhill (2017) or Günther Teubner (2017), who promote the idea of sociological constitutionalism, is that the core promise of the idea lies in the postulation that it is anachronistic and inappropriate to limit the range of phenomena that are studied from a constitutionalist perspective to states alone. This is crucial, as although this book takes as its starting point a mapping of the interactions between citizenship and state-based constitutions, in the latter chapters of the book close attention will be paid to the transnational, supranational, international and indeed subnational dimensions of citizenship and constitutionalism. It is straightforward to observe that the relationships between citizenship and constitutions are profoundly influenced by transnational legal sources: international law and EU law; the laws and constitutions of other states; non-state sources such as international organizations and non-governmental organizations (NGOs). However, it is less easy to understand or explain these

phenomena. Examples will appear from time to time throughout Part II, while the shifting spatialities of citizenship in the context of globalization and substate pressures will be the particular focus of Chapter 7 and one theme picked up in Chapter 8. Alongside receptiveness to ideas of global constitutionalism, the book also draws inspiration from the opening out of comparative constitutional law towards the Global South, which provides a different perspective on relations between states and between state law and international law.³⁵

The field of citizenship studies has also experienced something of a sociological turn, as may be evident from the discussion of citizenship as a relational concept earlier in this chapter (see, for example, Bloemraad 2015, 2018). But studying concepts and norms sociologically does not necessarily mean departing from adopting a legal, or socio-legal, approach (Cotterrell 1998). The legal status as well as the rights of citizens can be understood sociologically, as Somers has shown. The two perspectives can be combined. Accordingly, citizenship instantiates ‘a set of institutionally embedded social practices’ (Somers 1993, 589). Drawing on the work of Polanyi, Somers defines citizenship as an ‘instituted process’. What is important is that classical and doctrinal legal approaches need to be revised, because ‘citizenship cannot be explained by looking for rights granted “ready-made” by states’, but must be struggled for at specific times and in specific places. In a key phrase, Somers has argued that citizenship ‘laws are free-floating forms of empowerment and cultural resources, whose practical meaning depends on relationships, not individual autonomy’ (Somers 1993, 611).

The advantage of adopting such a sociologically informed approach is that it enables us to take a close look at the fundamentals of the legal status of citizenship while exploring other aspects of citizenship that are not as effectively captured purely by a formal legal approach to membership, such as issues of identity and community. To put it another way, constitutions bring with them not only a rule-of-law perspective on the norms of citizenship, but also certain types of ‘baggage’ that help us to fill out the notion of citizenship, by providing the context and history that underpin the formal rules. Ideas of citizenship and constitutionalism are commonly underpinned by ‘thicker’ norms rather than just by formal legal frameworks. This makes it harder to understand how citizenship and constitutionalism interact without taking both a

³⁵ See the blog posts collected at <https://voelkerrechtsblog.org/category/symposium/global-south-in-comparative-constitutional-law/>, as part of a symposium on the Global South in comparative constitutional law, which resulted in the publication of an edited volume: Dann et al (2020).

contextual approach and a critical approach. The approach is contextual as it takes seriously the political and social context in which law operates; it is critical because it acknowledges that examining case studies of how citizenship and constitutions interact in practice inevitably feeds back into our understanding of these concepts and helps to reconstruct the classical ideas of modern citizenship and modern constitutionalism with which we started.

There is also space to combine top-down and bottom-up approaches. One strong axis of scholarship within citizenship studies has been that which has placed the primary emphasis on what states do, how they do it, why they do it, and how the actions of states can be justified against norms of justice, equality and legitimacy, and so on. Pragmatically, this has also been combined with a heavy focus on access to citizenship for immigrants and other vulnerable groups, such as refugees, as these have frequently been the subject of major political debate in many of the countries where scholarship on citizenship has hitherto most often been produced. More recently, the focus has shifted to recognize also the importance of debating citizenship and citizenship rights for emigrant communities, diasporas and other groups of external 'ethnic kin'. But citizenship is not just something that is 'given' (or denied) by states. It is also struggled for, and citizenship operates as much as a (constantly changing) relation as it does as a status (Somers and Roberts 2008). We can illustrate this point by zooming in to observe how citizenship status and citizenship rights have evolved over time. For example, neither the status nor the rights have been remotely universally allocated in most states at least until the beginning of the 20th century and in some cases much later. In all cases, social movements and changes within political parties are important parts of the story, alongside the individual strategies and claims-making of putative citizens and their allies (Przeworski 2009). We need a sociologically embedded critical method in order to understand these changes in the wider context of the evolution of power relations within and across states.

In sum, citizenship is not a static concept, but one which changes by reference to changing geographical coordinates and also over time, both in relation to what are viewed as the legitimate boundary conditions for polity memberships and in relation to what is seen as the 'best-case' scenario in relation to the quality or nature of polity membership. In this book, the enquiry is primarily interpretative and frequently observational in nature, taking into consideration the contestation of citizenship in respect not just of its practices, but also of its underlying meaning and scope as a membership relation. That is to say, normative perspectives on the scope of membership represent an important backdrop to the

analysis, but the relationship is iterative in the sense of contributing also to normative reconstruction. The process of the transformation of citizenship can be observed both in the diffuse, gradual and incremental changes in the formal institutional arrangements that govern various forms of citizenship, and in the contestations, conflicts and debates about definitions of, and rights and obligations of, polity membership (Shaw 2007, 84).

This observational and interpretative approach is inspired by the ‘constitutional ethnographies’ approach to comparative constitutional law, pioneered by Kim Lane Scheppele (2004). Sociologically informed ethnographies endeavour to give us the lived details of citizenship regimes in constitutional settings, offering new perspectives, for example, on how constitutions naturalize, channel and/or legitimate power (Scheppele 2017). The point is not to highlight the abstract characteristics of different systems or to compare them using formal or quantitative methods of analysis in order to predict or explain processes of change, or similarities and differences. Rather, it is to explore the themes that emerge when two dimensions such as ‘citizenship regimes’ and ‘constitutional laws, practices and ideas’ are put into conversation with each other by means of deeply contextualized ‘thick’ readings and descriptions of many dimensions of the issue. This differs from the task of studying variation between systems or regimes. In addition, in common with the ethos of Scheppele’s approach, which eschews methodological nationalism, the book allows the ‘global’ to emerge alongside the ‘national’, by acknowledging as an important cross-cutting theme, as well as one dimension to be explored in more detail, the nestedness of national citizenship regimes within an international order of states (Scheppele 2004, 391). Accordingly, in her words, constitutionalism emerges:

... as a set of practices in which the transnational ambitions of legal globalization flow over and modify the lived experiences of specific local sites, and as a set of practices in which local sites inescapably alter what can be seen as general meanings. (Scheppele 2004, 394)

It is, therefore, a pluralist approach to citizenships and constitutions (with an emphasis on the plural of both words). Such an approach, by responding flexibly to the different types of phenomena that we call ‘law’, makes it possible to retain a strong focus on ethnographies of citizenship as an exercise of comparative constitutional law. As Katharine Young comments, when considering the enterprise of comparative constitutionalism as an interpretative exercise:

Law is social, humanist, and unscientific (at least, compared with the natural sciences). Law is normative, prescriptive, and it demands justification. Law is language, it is interpreted, and it is constituted through interpretation. These messy, unruly facets of law ... suggest a different enterprise for comparison. (Young 2016, 1383)

Where, however, this book departs from many of the worked-through examples of ‘constitutional ethnographies’, including Scheppele’s own work, is in its approach to examples and case studies. It strays rather far away from the ethos of anthropology, including legal anthropology, with its use of rich case studies or vignettes. In view of the breadth of topics to be covered, along with the endeavour to use material drawn from beyond the standard scripts of western Europe, North America and the various settler colonies that are now states of immigration, the focus is on using the empirical material illustratively, rather than in order to show depth or to offer comprehensive coverage. Moreover, this book recognizes that some of the most interesting encounters between citizenship and constitutional law lie not in the present but in the past.³⁶ There are certainly dangers in taking this line, as a synoptic approach can miss the subtleties of and differences between the different regions of the world that are studied, as well as the deep context of the national case studies or historical encounters. If words from constitutions are cited, then it should be remembered that these are precisely what they are: just words. Context is indeed everything, and both small changes and the bigger picture could be missed in such a static approach.³⁷ But with those risks also come the advantages of developing an approach that cuts across the legal, political and sociological divides within scholarship and that offers a comprehensive stock-taking of relevant themes and discourses on ‘constitutional citizenship’ globally. The ambition of this book is to identify and to articulate a clear understanding of the frequently contested nature and significance of constitutional citizenship, and its relationship to contemporary pressures and tensions within and across states in the modern world.

³⁶ For an excellent example, see Constantin Iordachi’s detailed study (2019) of the insertion of citizenship clauses in the 1866 Constitution of Romania.

³⁷ This approach is mirrored in Nicola Lacey’s (2019) analytical exploration of the interface of the rule of law and populism, especially in her contextually driven reflections on the rule of law, which can have very different meanings depending on time and location.