Bounded citizenship and the meaning of citizenship laws: Ireland's *ius soli* citizenship referendum[1]

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What is your nation, if I may ask, says the citizen.
Ireland, says Bloom. I was born here. Ireland.[2]

1. Introduction

On 11 June 2004, the week Dublin celebrated the centenary of James Joyce's Bloomsday, a referendum in the Republic of Ireland ratified a constitutional amendment that qualified the right to citizenship according to *ius soli*, through birth on the island of Ireland, which had been established as a constitutional provision only five years earlier. But it had been effectively available under legislation passed since 1935, and, before that, under the union with Britain. Passed by a large majority, the amendment restricted the constitutional right to citizenship by *ius soli* to those with a parent who is an Irish citizen or entitled to be one. This was represented by the government as a minor adjustment necessary to remove a perverse incentive to come to Ireland to give birth, a practice described as 'citizenship tourism'. But critics of the amendment claimed that *ius soli* citizenship expressed a constitutionally guaranteed equality, and they condemned the 'racist referendum' as radically changing the philosophy of Irish citizenship.

The passage of this amendment raises a number of important issues. To what extent *do* different citizenship laws reflect different conceptions of political community? Should we see pure *ius soli* as the fairest basis for the ascription of citizenship? And to what extent is its restriction to be construed as a minor adjustment - or as a measure that significantly alters the notion of membership implicit in the Irish constitution and citizenship law?

Debates on citizenship are often bound up with debates on immigration, and indeed the two are not wholly separable. But access to citizenship, the membership of a specific state, raises certain issues distinct from those concerning the right to travel, live or work in other countries. While the exercise of discretion in regulating immigration is contested in normative theory and somewhat constrained by international measures in practice, states, even in the European Union, are recognised as having the right to determine their own conditions of membership. It might be thought that this means that membership will always tend to be strictly exclusive or conditional. Thus it has been argued that 'in all cases the nationality law expresses and consecrates the conception of the nation and reinforces the homogeneity of national populations'.[3] But, while citizenship laws may express a conception of the nation or political community, such membership may be conceived of in ways that are more and less inclusive and open to diversity. While citizenship laws are by definition necessarily exclusive, since they regulate particular membership, criteria for inclusion and exclusion may be more or less justifiable. The significance of these issues extends beyond the Irish case at a time when,

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[2] James Joyce, *Ulysses*, London, Penguin, 1971 [1922], p.330

[3] Schnapper, D. *Community of Citizens*, New Brunswick NJ: Transaction, 1994, p. 107.

on the one hand, the justification for any kind of bounded citizenship has been challenged, and, on the other, more stringent conditions of integration for membership have been proposed as necessary to sustain political and social solidarity in a number of western states.

In what follows, I examine to what extent *ius soli* expresses a distinct conception of political community and can be seen as a more justifiable criterion for awarding citizenship than others. I first address a number of objections to identifying citizenship laws with conceptions of membership. I then show how, notwithstanding these objections, different conceptions of political membership may favour certain constellations of citizenship laws. I outline a civic conception that, while still particular, entails criteria that are less exclusive and less demanding of homogeneity than other conceptions of membership. Finally I analyse the implications of changes in Irish citizenship laws in the light of these conceptions.

2. Citizenship laws: historical patchwork, convergent or obsolescent?

Normative distinctions between different kinds of citizenship laws have recently been subject to considerable criticism. It has been argued, firstly, that they do not reflect conceptions of citizenship at all; secondly, that in practice they show signs of convergence towards common norms; and thirdly, that specific citizenship is politically irrelevant or normatively undesirable in a globalising world.

The first objection goes as follows: although the grant of citizenship through *ius sanguinis* (based on descent) or *ius soli* (based on place of birth) have often been identified with 'ethnic' and 'civic' conceptions of citizenship respectively, there are no good grounds for this. Thus, for example, the reason that Ireland, Canada and Australia all implemented *ius soli* was that they inherited it from British law, where it represented the claim of the monarch to sovereignty over all born in the territory rather than any egalitarian intent. *Ius sanguinis* was introduced in revolutionary France to represent the right of citizens to pass citizenship to their children; while *ius soli*, often identified as quintessentially republican, was a late nineteenth-century introduction designed to incorporate the children of France's large immigrant population. Existing citizenship laws, rather than constituting systematic programmes, tend to consist of a patchwork of historical accretions influenced by different legal traditions, local social and political circumstances, levels of immigration pressure, and international conventions. So, Joppke argues, "Rather than reflecting particular visions of 'nationhood', *jus soli* and *jus sanguinis* are flexible legal-technical mechanisms that allow multiple interpretations and combinations, and states (or rather the dominant political forces in them) have generally not hesitated to modify these rules if they saw a concrete need or interest for it"[4] On this view, then, it is not surprising that Australia (in 1986) and Ireland (in 2004) have restricted *ius soli*.

It may be true historically that the genesis of existing citizenship regimes cannot be explained entirely in terms of consciously intended and systematically realised conceptions of citizenship, and that the same provision may function differently in different circumstances. But public institutional provisions do carry meaning, and, as with texts and works of art, this depends on their public interpretation as much as their creators' intentions. This is particularly true of constitutional provisions, which have special symbolic value. Moreover, citizenship

[4] Joppke, C., *Citizenship: Between De- and Re-Ethnicisation*, Working Paper 204, Russell Sage Foundation: https://secure1.sc.netnation.com/~russells/working_papers/204joppke.pdf, p. 7 (Accessed 10 Feb 2003).

laws constitute a legal norm that shapes the reality of citizenship. Thus *ius soli* came over time to represent the openness and accessibility of citizenship both in the French republic and in immigration countries such as USA and Canada, and gave rise to a citizen body that was diverse in origin, whatever other pressures to conform may have existed.

A more radical argument suggests that all attributions of citizenship at birth are arbitrary - *ius soli* no less than *ius sanguinis*, since both are based on the accident of birth, whether of place or parentage. This awards an unearned privilege to those who happen to be born in one situation rather than another.[5] This is a crucial privilege, since most people continue to hold the citizenship they acquire at birth; only two percent world-wide are naturalised citizens.[6] Even place of birth always depends in some sense on parentage.[7] Thus we should not exaggerate the egalitarian credentials of *ius soli*.

Yet even if *ius soli* and *ius sanguinis* cannot be directly mapped onto particular conceptions of citizenship, different ensembles of policies dealing with citizenship at birth, provisions for naturalisation and dual citizenship may accord with different conceptions of membership. I will argue that, construed as a reasonable predictor of a common future life, *ius soli*, in conjunction with fair immigration policies and possibilities of naturalisation, may constitute a distinct and less arbitrary basis for citizenship than extended *ius sanguinis*.[8]

A second objection to identifying citizenship laws with different conceptions of citizenship notes an observable tendency towards convergence among nationality laws today. Most regimes now include elements of *ius sanguinis* and *ius soli* in different combinations Thus systems formerly based predominantly on *ius sanguinis* have, like Germany in 2000, introduced elements of *ius soli*, granting citizenship to children born to permanent residents (either at birth or on maturity). Conversely, under immigration pressures, countries formerly adopting simple *ius soli* have almost all have restricted its application in some way, as Britain did in 1981 and Australia in 1986.[9] On this view, the retention of pure *ius soli* in a country such as the United States, is an exception to be explained largely by its constitutional position in the Fourteenth Amendment, and its symbolic and historic role in establishing the equal rights of black people to citizenship. In another convergent process, naturalisation has been made easier in most countries, with shorter residence and more limited cultural requirements. Likewise dual citizenship is now more widely tolerated than previously. It has, for example, been accepted by Ireland since 1956, by Canada since 1977, and by Australia since 2002. Where states retain a greater emphasis on *ius sanguinis*, this reflects particular problems of territorial integrity or unstable borders, which leave significant populations of potential citizens outside the current territory.[10]

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[5] Shachar, A., "Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws", Jean Monnet working paper 2/03 2002, New York: New York University. www.jeanmonnetprogram.org/papers/03/030201.html (Accessed 4 February 2003).

[6] This is higher in immigration countries; in Canada and Australia foreign-born residents are nearer to fifteen and twenty-five per cent of the population.

[7] It may be going too far to say that "A state qua membership is fundamentally an ethnic institution, because membership is usually ascribed at birth." (Joppke, *op cit*., p.6)

[8] The justice of citizenship regimes overall depends not only on laws of access to citizenship, but also on immigration laws, the treatment of asylum claimants and the rights awarded to non-citizens, both residents and applicants. In this paper I address only citizenship laws.

[9] Weil, P,. "Access to citizenship: a comparison of twenty-five nationality laws" in T. A. Aleinikoff and D. Klusmeyer, eds, *Citizenship Today: Global Perspectives and Practices* (Washington D.C: Carnegie Endowment for International Peace/Brookings Institution, 2001, pp. 17-35..

[10] *Ibid*,, pp.25-6.

But we should not exaggerate the extent of this convergence, nor see it as an inevitable or one-way process of evolution. Individual states remain sovereign in determining citizenship laws. In the context of increasing immigration, cultural tensions and political conflict, there have been proposals for more stringent requirements of cultural assimilation as a condition of naturalisation in many countries, including Britain and the Netherlands, hitherto noted for their multicultural accommodations. Likewise, while roughly half the countries of the world now allow dual citizenship, it has also recently been the object of renewed distrust and debate in the light of post- 9/11 concerns about terrorism and divided loyalties among immigrants.[11]

Finally, it has been argued that particular citizenship is increasingly irrelevant or undesirable. As the gap between the rights of citizens and those of non-citizen denisens has been diminishing, some authors have identified and extolled a trend towards post-national membership rooted in human rights discourse, where political rights are envisaged as a more or less transferable dimension of human rights held by individual persons: "In a world in which rights and identities as rights derive their legitimacy from discourses of universalistic personhood, the limits of nationness or of national citizenship become inventively irrelevant."[12]

Yet citizenship still plays a significant role in determining a person's life chances, and its value depends on the state of which they are citizens. In the absence of any immediate prospect of an effective international guarantor of rights, state membership remains a powerful determinant of who does or does not enjoy rights. It determines not only their political powers, but where they can live and work. In most countries only citizens are guaranteed rights to vote and stand at the level of national politics, and they have greater security with respect to rights and benefits of other kinds. Thus, for example, the US Welfare Act 1996 restricted benefits available to non-citizen immigrants, and, within the EU, European citizens of new Eastern and Central European member states, though allowed to enter and to work in Britain and Ireland, initially cannot claim welfare benefits. Finally, citizenship is a symbol of full membership.[13]

It may be argued that this state of affairs is normatively undesirable. But, in response to such criticisms of specific citizenship as unjustifiably particularist, there are good normative arguments for the persistence of bounded polities. Apart from a principled fear of the potential tyranny of a single world government, at any time the locus of possibility of realising any degree of freedom and self-government will be determined by the interconnections arising from factors such as geographical proximity, historical interdependencies, and common environmental and developmental issues. Citizenship is bounded because this is the only way in which politically guaranteed freedom can be constructed. As Benhabib puts it, "the logic of democratic representation … requires closure for the sake of maintaining democratic legitimacy".[14] Even if certain rights arguably can and should be guaranteed without reference to a specific population, that of collective self-government cannot, and world citizenship in

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[11] Cf. Caldwell, C. "The Luxury of Double Loyalty" *Financial Times* December 4 2004. The Canadian Government immigration and citizenship website provides a list of difficulties to be considered if undertaking dual citizenship: http://www.cic.gc.ca/english/citizen/dualci_e.html, accessed 12 September 2005.

[12] Soysal, Y., *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago: Chicago University Press, 1994, p.162.

[13] Carens, J., "The Integration of Immigrants", *Journal of Moral Philosophy,* Vol. 2, no.1, 2005, p.35.

[14] Benhabib, S., *The Rights of Others: Aliens, Residents and Citizens*, Cambridge: Cambridge University Press, 2004, p. 220.

this sense is not yet available to us. Moreover, bounded states may be seen as facilitating experiments in collective living, adopting alternative approaches to, for example, welfare, education or health care provision that may suit specific circumstances or be generalisable approaches from which others can learn. It should be stressed that this argument for specific units of self-government does not entail further arguments that the nation is the necessary basis of the bounded state, that no development towards larger scale or multilevel government is justified or required, nor that all responsibilities of justice are delimited by state boundaries. While a distinction between citizens and non-citizens may be legitimate, the way in which non-citizens are treated is subject to considerations of justice and human rights standards, and certain ways of allocating particular citizenship may be more justified than others.

Thus the citizenship of particular states, apart from any bundle of political rights, is neither practically irrelevant nor normatively insignificant.

3. Models of political community and access to citizenship

Existing states' citizenship laws may not consistently exemplify alternative models of political community. However, we can distinguish theoretically among different conceptions of political membership, and consider the kinds of citizenship laws that in principle flow from, or accord with, each of these. In this section I consider what the logic of a number of conceptions of political membership entails for conditions of access to citizenship. Coming at the question from this direction, we may develop some critical standards by which to assess the ways in which citizenship laws in practice manage diversity.

While the dichotomous contrast between ethnic and civic nationality has been subject to extensive critique,[15] recent analyses of nationality allow us to make more nuanced distinctions between conceptions of political membership.[16] Here I distinguish five models of political community: ethnic nationality; shared-value community, liberal nationality, civic voluntarism and civic republican community. This may help to clarify what is entailed in different conceptions of separate membership. These are all ideal types to which no country corresponds exactly. They represent broad alternatives, however, towards which countries may incline, while often tending to combine elements of more than one.

1) On the first model, 'ethnic nationality', the political community of which citizens are members is an ethnic nation. Citizenship is specifically defined and bounded in ethnic terms. Thus to the extent that a state is based on ethnic nationality it will limit or give preference in admission to citizenship to co-nationals, ethnically defined. This underpins laws through which citizenship is acquired principally on the basis of descent (*ius sanguinis*). Naturalisation will be extremely difficult, and may be granted (if at all) after long periods of residence, on meeting stringent requirements of cultural integration and loyalty, and subject to discretion. Dual citizenship is not consistent with this model. On this view, it is justified to discriminate among

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[15] E.g. Yack, B. 'The myth of civic nationalism' *Critical Review* Vol.10 no.2 1996: pp. 193-211; Brubaker, R., "The Manichean Myth: Rethinking the Distinction between 'Civic' and 'Ethnic' Nationalism" in R. Kriesi *et al*.(eds.) *Nation and National Identity: the European Experience in Perspective*, Chur: Ruegger, 1999, pp. 55-71.

[16] It should be noted that employing these distinctions does not entail any position on the possibility of distinct forms of patriotic attachment, an issue that is not addressed here. The acceptability of forms of attachment may depend not only on their object, but also on the intensity and exclusivity with which they are held, and the actions they are held to justify.

applicants on ethnic or racial lines. Examples include the 'White Australia' policy that prevailed in the mid-twentieth century, and German citizenship policies (up to 2000) that granted citizenship to those of German descent, even without cultural connections. In Germany (up to 1992) naturalisation required 10 years residence, and demanding conditions of cultural integration subject to extensive official discretion.[17] Such citizenship laws have the effect of including or excluding people from membership solely on the basis of descent, and, in the context of immigration, lead to large numbers of people living (even if born) in a country without being members of the political community. The obverse of this is that these laws include as members descendants of emigrants who may have a minimal stake or commitment to the political community.

2) On a second model, 'value-community', citizens are members of a community of shared, pre-political, cultural values or ways of life, rather than ethnicity. Citizenship is bounded because "the distinctiveness of groups depends upon closure, and without it, cannot be conceived as a stable feature of human life".[18] Citizenship laws will be a matter for the community to determine. But we can hazard that the balance of *ius soli* and *ius sanguinis* will depend on assumptions about whether membership of a such a community is transmitted through socialisation in the wider community (favouring *ius soli*), or through the family (favouring *ius sanguinis*). While it is a matter of choice by the community whom to accept and whom to reject, those who have been admitted and have become long-term residents should be granted citizenship through naturalisation, though certain conditions may be required, emphasizing either linguistic and cultural assimilation, or allegiance to community values. Naturalisation will tend to require relinquishing previous citizenship; dual citizenship is regarded as incompatible with being a member of a closed and distinctive group. The limits on dual citizenship in the United States and Germany today, in Canada up to 1977 and Australia to 2002, and the current requirement of the oath of loyalty to Australia and its people could be interpreted as reflecting this conception. But, even if not as exclusive as the citizenship laws flowing from ethnic nationality, these provisions imply a strong degree of cultural assimilation, and in any case impose heavy requirements of belonging to a single community that may well fail to accommodate the plural identities and commitments that members may legitimately bear.

3) On a third model, 'liberal nationality', what citizens share is a public culture, history or institutional practices rather than pre-political culture or values. Citizenship is bounded because of the inherently limited possibilities of extending such a binding political identity (Miller 1995: 188, 2000: 88-9). But this allows for greater diversity of culture and values among citizens than either of the two previous models. Here citizenship can be awarded by *ius soli* as long as there is a guarantee that citizens will be socialised into the *public* culture. Thus French law makes children born in the state of immigrant parents citizens automatically at age eighteen if they have lived continuously in France for five years.[19] *Ius sanguinis* citizenship, by contrast, is quite limited, since those who live abroad are likely to lose their connections with developments in the public culture and politics more quickly than those with the wider culture. Such a liberal nationality does not discriminate on ethnic or cultural lines among candidates for citizenship by naturalisation, but requires commitment to the state and competence in the public culture. The conditions for adult naturalisation may include language and a grasp of history if only as evidence of participation in the public culture. On this view also, citizenship may be understood as essentially singular membership of a sovereign body, but dual citizenship is more easily

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17 Other states with an leaning towards *ius sanguinis* include Israel and Japan (Weil, *op.cit.*).

18 Walzer, M., *Spheres of Justice,* Oxford: Blackwell, 1985, p.39.

19 Naturalisation is also available by choice at age thirteen. This is in addition to the rule of 'double *ius soli'* whereby children born in France to French-born foreign parents become citizens at birth.

accommodated than with the two previous views. Elements of such a view can be found in the oath of loyalty to the country's democratic beliefs and laws in the current procedures for naturalisation in Australia, and the affirmation of intention to observe the laws and fulfil the duties of a citizen in Canada.

While more open to diversity than either of the preceding conceptions, and susceptible to more and less demanding interpretations and implementations, the way that this view grants weight to the existing public culture may not be fully consistent with the equal treatment of all citizens. Apart from the criticism that it is hard to separate the 'public' elements from the wider culture, it tends, like ethnic nationality and value community, to emphasise retrospective features of citizenship, rooted in the grounds of common past connections and experiences.[20]

This raises the question whether it is possible to envisage an alternative 'civic' conception of citizenship founded on a more prospective basis. This more contested conception will require more detailed discussion than those which have just been discussed. .

4) One articulation of such a civic view that I will term 'civic voluntarist', claims that citizenship can or should be based primarily on choice, voluntary consent or forward-looking commitment to shared principles or constitutional structures.[21] This implies that the necessary - and perhaps sufficient - condition of civic citizenship is consent, or adherence to liberal democratic principles. It is then inappropriate to ascribe citizenship involuntarily either at birth, though *ius soli*, or automatically at majority. In contrast, naturalisation may be extremely easy, once one has chosen to live in the country even after a short period, and dual nationality is not particularly problematic.[22]

But adherence to certain principles is not what distinguishes citizens of different states. This reinforces the fact that political membership is not and cannot be a matter simply of rational commitment.[23] Nor is it like membership of a club, in or out of which people can opt at will. Citizenship is inherently rooted in the fact of subjection to a particular common authority. While this cannot be identified with a common past or even with proximity alone, it cannot based primarily on choice either, but derives from the involuntary sharing of this common predicament, in which interdependent citizens share also at least the possibility of calling government to account and establishing some degree of self-determination of their common future.[24]

5) Thus a better formulation of a civic approach, that I term 'civic republican' sees citizens as at most semi-voluntary members of a political community. In contrast to value-community and liberal nationality, on this view membership is defined in terms neither of pre-political nor of public culture. Of course culture cannot be excluded, but the existing culture and values can be awarded less unassailable priority over those that emerge in exchanges among

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[20] Hence the anomaly of repeated references to 'nos ancetres' in the texts of French school children, of whom a substantial percentage have immigrant ancestry.

[21] The idea that citizens may be united by adherence to common principles may be taken to support both membership of specific political communities and the possibility of cosmopolitan citizenship.

[22] This would be consistent with making *ius soli* and *ius sanguinis* take second place to naturalisation on open conditions of choice and residence, perhaps even shorter than the 2 years currently required in Australia.

[23] Thus critics have pointed to the way in which apparently civic arguments implicitly rely on a form of more or less liberal nationality. See Yack, *op.cit* ; Canovan, M., "Patriotism is Not Enough" in C. McKinnon and I. Hampsher-Monk (eds), *The Demands of Citizenship,* London: Continuum, 2001.

[24] I use the term 'future' rather than 'fate', as the latter tends to convey a more deterministic trajectory equivalent to a destiny laid down in the past.

citizens. Common cultural values emerge as the outcome of political interaction, provisionally embodied and open to change. In contrast to civic voluntarism, commitment is specific to a particular community rooted in a common predicament

But this civic account has, like civic voluntarism, a distinctly *prospective* dimension. Thus *ius soli* ascription is justified in so far as it represents the current predicament of political interdependence and participation in a common future life. Birth in a state may be taken as a reasonable predictor of a shared future in the political community. But it is not infallible; thus, if granting citizenship at birth by *ius soli* is seen as arbitrary in certain cases where other connections with the state are absent, it may be reasonable to confirm the citizenship of those continue to live in the state as adults at some point. (Thus while, Britain and Australia have modified *ius soli*, they do grant citizenship to a child born in the country who continues to live there for 10 years.) Conversely, any element of *ius sanguinis*, reflecting the fact that citizens may leave without losing all contact, will be limited in duration and depend on continued interdependence and connection. [25]

This civic republican account of citizenship favours relatively generous conditions of naturalisation. Long-term residents become citizens on a virtually automatic basis, just as natives do - taking residence in the state as a shorthand for interdependence and the sharing of a common future - in virtue of living, working, paying taxes, and sending children to school, for example. This would be neither purely a matter of choice nor subject to discretion. But as the nuances of politics are often one of the last aspects of a country's life to be fully grasped by a newcomer, a somewhat longer prior residence may be appropriate than a consent-based view might suggest. (Any exact period is necessarily arbitrary, but three to five years, as in France, Canada and the United States, are more appropriate than either as short as two years or as long as ten years.) Other conditions may be very limited. A knowledge of language, history or institutions could be required as indicating the capacity for political interaction, rather than cultural assimilation. But more important may be the forward-looking intention to live in the country, rather than acquiring citizenship either as a badge of identity or a flag of convenience. It is not clear that an oath of allegiance should be required that is not required of citizens by birth, since it is sharing a common authority with others rather than loyalty to it that defines citizenship.

On this view dual citizenship is not particularly problematic. Indeed the extension of citizenship to long-term residents tends to give rise to dual nationality. There can be real interdependencies with countries both of origin and of current residence, especially for someone who holds out hope of returning, or who supports relatives there. But dual citizenship of this kind will characteristically apply to individuals moving between countries, rather than being inherited by children over generations.

A civic republican conception of political membership, based on the possibility of self-government by interdependent citizens facing a common future, issues in citizenship laws that grant citizenship predominantly by *ius soli*, and on a more restricted basis by *ius sanguinis*, and allow relatively easy naturalisation and dual nationality. Though bounded, such a conception is less exclusive and less demanding of homogeneity than ethnicity, shared value or liberal nationality. Because the citizenship laws which flow from it do not depend on a shared past or require cultural adjustment as a condition of membership, they are intrinsically more open to

[25] This accords with Shachar's suggestion of the relevance of a '*ius connexio'*, but grants a greater weight to the fact of birth in the state in attributing citizenship than she endorses (Shachar, *op.cit.,* p. 29).

diversity. In practice, liberal nationality tends to be in the ascendant. While citizenship laws in a number of countries today display certain elements common to liberal nationality and civic republicanism, they tend to place more weight on retrospective than prospective grounds for citizenship.

In the next section I examine how this analysis may cast light on the changes in Irish citizenship laws.

4. Ireland's changing citizenship laws

Irish citizenship laws have evolved under the influences of the British legal inheritance, republican ideas of political membership expressed in the state's founding documents, the territorial claim over Northern Ireland, and the fact of emigration. The first three influences contributed to the centrality of *ius soli*, the last to the place of *ius sanguinis* in these laws.

Although everyone resident on the island of Ireland at the foundation of the state was deemed a citizen, Irish citizenship was only gradually determined by legislation, mainly of 1935 and 1956.[26] The 1937 constitution provided for citizenship to be determined by law. In the system that emerged citizenship was granted on the basis of *ius soli* to those born on the island as a whole, and on the basis of *ius sanguinis* to the children and grandchildren of 'natural born' citizens.[27] Thus, alongside a conception inclusive of the resident population, the children of emigrants were granted citizenship on a medium term basis.[28] But what was remarkable in this case was the way in which an unstable border was reflected in an emphasis, not only on *ius sanguinis*, but on a singular version of *ius soli* that applied to a territory extending beyond the recognised jurisdiction of the state.

The foundation of *ius soli* laid the basis for a relatively open conception of citizenship, albeit one that sat uneasily with the more firmly bounded and exclusive ethno-cultural conception of the nation that prevailed in the public consciousness and influenced many areas of policy. Indeed there has been a continuous tension between loosely ethnic and civic conceptions of membership, encapsulated in Joyce's debate between 'the citizen', who defines the nation in ethno-cultural terms, speaks of "our greater Ireland beyond the sea", and says "we want no more strangers in our house" and the Jewish Bloom, who defines himself as Irish because he was born in Ireland, and the nation as "the same people living in the same place".[29]

Other avenues to citizenship were initially derived from and similar to British legal practice. In principle naturalisation was relatively easily acquired by adults with legal residence in five of the previous eight years, and the intention to live in the country. There were no ethnic or liberal-national criteria of language ability or cultural assimilation. Against this, naturalisation was subject to the shared-value community conditions of being deemed to be 'of good character', of swearing an oath of fidelity to the nation and loyalty to the State, and of a high level of

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[26] Cf. Daly, M. "Irish Nationality and Citizenship since 1922" *Irish Historical Studies* Vol. 32, 2001, pp. 377-407.

[27] The current conditions allow those with an Irish-born grandparent to claim Irish citizenship. Those born abroad to Irish citizens born abroad may become citizens on registration.

[28] Nonetheless, compared with the hundreds of thousands of citizens who emigrated after 1922, those claiming citizenship on *ius sanguinis* grounds alone between 1936 and 1986 numbered only 16,500. After 1986 the conditions for *ius sanguinis* citizenship tightened somewhat to apply to descendants only from the time of registration (Daly, *op.cit*:, p. 403).

[29] Joyce, J., *Ulysses*, London: Penguin, 1971 [1922], pp. 328, 322, 329.

ministerial discretion, including the power to dispense with conditions on the basis of Irish descent or associations. In practice until recent years the numbers applying were also rather limited.[30] A significant proportion of non-citizen residents were British, and already enjoyed on a reciprocal basis with the Irish in Britain what has been called 'de facto' citizenship (Hammar, 1990), including rights to live, work and vote in national elections. Dual citizenship was recognised from the 1956 Citizenship and Nationality Act.

Thus these laws embodied quite an open conception of membership, with the combination of *ius soli*, relatively limited *ius sanguinis*, and naturalisation available mainly on grounds of past and future residence. The notion of a shared future influenced perceptions of Irish citizenship. This was well expressed by Ireland's first Muslim TD (member of parliament) - and a naturalised citizen - Mosajee Bhamjee, when he said in an interview, "I am an Irish citizen - of course in one way I will never be Irish, but I will die in Ireland".[31]

It is undeniable that these relatively generous provisions owed their origin and continued existence to the imperial legal inheritance, Ireland's dependence on Britain and the need to retain access to Britain for Irish emigrants, administrative underdevelopment, the absence of immigration pressures before the 1990s, and some degree of lip-service to republican ideals of equality.[32] It may be argued that, above all, it was the territorial claim to the six counties of Northern Ireland that maintained the central position of *ius soli.*. Nonetheless, whatever the intent (or lack of it) that brought this constellation into being, these laws can be seen as striking a balance that inclined towards a civic republican conception of political membership in the prospective sense outlined above, and as giving expression to a conception of membership of the Irish polity that persisted over more than 75 years. The question was whether they could survive the challenge of increasing immigration

A. Constitutional amendments on access to citizenship

From the late 1990s a number of proposed changes made access to citizenship in Ireland the subject of public debate, and for the first time a constitutional issue.

The first change arose in the context of developments in the Northern Ireland peace process, and, in particular, of the dimension of North-South reconciliation in this process. As part of the Good Friday (or Belfast) Agreement, the article embodying the territorial claim to Northern Ireland was removed from the Irish constitution.[33] It was replaced by the following article, passed (with the rest of the Good Friday Agreement) by referendum in 1998:

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30 Applications rose from about 300 in 1995 to 3500 in 2002, though slow processing meant that only 500 were granted between 1999 and 2000, and 1529 in 2002. We do not have figures on the almost certainly greater numbers of citizens born to foreign parents throughout the existence of the state.

31 In an interview with Carrie Crowley on RTE (Irish national radio) in 2002.

32 Apart from the absence of immigration pressure, there was considerable official resistance to admitting immigrants notably in the case of Jews seeking refuge from Nazi-occupied Europe (cf. Keogh, D., *Jews in Twentieth Century Ireland*, Cork: Cork University Press, 1998; O'Halpin, E., *Defending Ireland: The Irish State and its Enemies*, Oxford: Oxford University Press, 1999; Fanning, B., *Racism and Social Change in the Republic of Ireland*, Manchester: Manchester University Press, 2002, Ch 4. In addition, the British-Irish travel area gave the Irish government responsibility for admissions to the British Isles (Meehan, E., *Free Movement Between Ireland and the UK: From the 'Common Travel Area' to the Common Travel Area*, Dublin: Trinity College Policy Institute,.2000, Ch 3.

33 The pre-1998 Article 2 read: "The national territory consists of the whole island of Ireland, its islands and the territorial seas."

> 'It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified by law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.' (Irish Constitution 1998 Article 2.)

This amendment was intended to establish constitutionally what had previously existed on a statutory basis. It granted the right to Irish citizenship to those born in Northern Ireland independently of the claim to territorial sovereignty over Northern Ireland. At the same time, it made a gesture towards the claims of Irish descendants that fell short of any explicit constitutional right to citizenship. It may be noted that this measure ran directly counter to the observed trend for countries with pure *ius soli* to restrict it, and actually gave *ius soli* citizenship additional symbolic recognition by raising it from a statutory to a constitutional right.[34]

A separate train of events led to the restriction of *ius soli* citizenship in 2004. This new measure was introduced in the context of increasing numbers of immigrants and more particularly of asylum seekers.[35] Following the tightening up of procedures in the late 1990s, asylum claims decreased in number, but increasing numbers of applications by non-citizens for residence rights based on parenthood of an Irish born citizen were received,[36] and increasing numbers of mothers were reported as presenting to maternity hospitals for the first time in late stages of pregnancy or even in labour (McKenna, 2003). When, in January 2003, the Supreme Court ruled that parentage of an Irish citizen gave no automatic right to remain, the government suspended the application process they had previously administered.[37] However, some continued to express concern about the number of late maternal arrivals and the proportion of pregnant female asylum seekers. Although parentage of an Irish citizen no longer guaranteed residence in Ireland, it still was a potential ground for a residence claim in other countries of the European Union. Forecast before the referendum, this was later confirmed by the European Court of Justice's ruling in the Chen case, granting the right of residence to a Chinese woman living in Cardiff who had given birth to a child in Belfast.[38] Thus the Irish government introduced the proposal to restrict *ius soli* as a technical change necessary to remove a perverse incentive to give birth in Ireland. The restriction was defended on a number of grounds that included: preserving the integrity of Irish citizenship, coming into line with other European Union member countries, reducing pressure on maternity hospitals, and protecting the health of babies and their mothers induced to travel in late pregnancy.

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[34] Note that it is membership of the nation, not of the state that was specified. On this basis it has been argued that this does not constitute a guarantee of citizenship (e.g. MacEochaidh, C., "Citizen referendum is unnecessary'" *Irish Times*, April 20 2004). But this is not the prevailing view, nor the interpretation of the Government's legal advisors, which took this to constitute a guarantee of citizenship that required restriction through the 2004 amendment.

[35] While returning emigrants at first dominated the net inward migration from 1990, numbers of foreigners then increased, raising their proportion in the population from around two per cent in 1990 to almost five per cent in 2005. Asylum seekers rose to over 11,000 in 2002 (at that time the third highest per capita in the EU), but fell to 4,766 in 2004.

[36] The numbers of requests to remain on the basis of citizen children were: in 2001: 3,153, and in 2002: 4,027. 11,000 outstanding applications remained after January 2003. In early 2005, the Minister for Justice announced that applications to remain would be considered with respect to children born before January 1 2005.

[37] See Lobe v. Minister for Justice, Equality and Law Reform [2003] IESC 1 (23 January 2003).

[38] This effectively gave a right to reside in European countries other than the Republic of Ireland, and under conditions of economic independence (Zhu and Chen v Secretary of State for the Home Department (Case C-200/02)).

Rather than removing or amending the recently introduced Article 2, the proposal inserted a provision in Article 9 (on citizenship), as follows:

> Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and its seas, who does not have, at the time of his or her birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless otherwise provided for by law.[39]

This returned the allocation of citizenship on the basis of *ius soli* to a legislative matter. But constitutionally it retained an element of effective *ius sanguinis* in making constitutional *ius soli* citizenship dependent on the citizenship of a parent. The legislation subsequently introduced (Irish Citizenship and Nationality Act 2005) grants *ius soli* citizenship only to a child whose parent has been legally resident for 3 of the previous 4 years, focusing thus on the *parent's* status and length of prior residence.[40] Both these features strengthen the retrospective dimension of the attribution of citizenship. Not just a technical adjustment, this change effectively tilted the conception of citizenship embodied in the constitution towards *ius sanguinis*.

In the short period of public debate that preceded the referendum the opposition campaign focused preponderantly on denying that any change was necessary or desirable. Rather than proposing alternative terms or provisions, it tended to criticise a lack of consultation and inadequate statistical evidence, to claim that birthright (i.e. *ius soli*) citizenship was implied by constitutional equality, and to cast doubt on claims of pressure from other European member states. Moreover, despite reference to European norms, there was limited public discussion of debates on proposed changes to *ius soli* citizenship that had taken place in the USA and France in the 1990s, debates that featured some parallel arguments and suggested a number of possible alternative courses of action.

In addition to retaining unconditional *ius soli*, alternative constitutional possibilities included: introducing a different amendment, or removing all provision about citizenship. Alternative legislative possibilities included: setting a less restrictive, if still retrospective, period of parental residence, or including a prospective dimension in *ius soli* citizenship.

B. Alternative constitutional measures

1) Retaining constitutional ius soli: The first possibility was to retain the status quo granting simple *ius soli*, as is the position in the United States (and Canada), where similar issues of perverse incentives and 'citizenship tourism' have arisen. There too, it has been determined that the state can deport the parents of citizen children.[41] But proposals to limit *ius soli* citizenship, repeatedly advocated and introduced in Congress in the 1990s, have been unsuccessful. They have been opposed on various grounds, including that equality is central to the values America stands for, that children should not be penalised for the actions of their parents, and that America has always been a country open to incomers.[42] The contrast between the Irish and US positions is noteworthy given the considerable numbers of Irish people with US citizenship derived from

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[39] A further subsection 2.2, applied this restriction only to persons born after the date of the enactment of the amendment.

[40] While those on student visas are specifically excluded, those on short term work permits of yearly duration are merely less likely to qualify.

[41] See.Perdido v. I.N.S., 420 F.2d 1179 (5th Cir. U.S. App 1969)

[42] See e.g. Hsieh, C., "American-born Legal Permanent Residents? A Constitutional Amendment Proposal' *Georgetown Immigration Law Journal* 12, 1998, pp. 511-29.

their birth to parents living there as students or temporary workers. But, it may be argued, there are significant differences between the two countries. Ireland does not describe itself as a country based on immigration, and other comparable countries have already modified *ius soli*. Furthermore, the constitutional entrenchment of *ius soli* has a uniquely symbolic meaning in the USA that makes any change particularly difficult. Of other self-described immigration countries, while Canada has retained pure *ius soli* citizenship, Australia has qualified it. Moreover, Ireland's geographic position and membership of the European Union makes it disproportionately vulnerable to people seeking citizenship as a means of access to the EU.

Thus it can reasonably plausibly be argued that some modification of *ius soli* citizenship was permissible on practical grounds.[43] Nonetheless, once any provision has been embedded in the constitution, it gains a heightened symbolic importance. Introducing and then removing that constitutional provision has a significance that creates a situation quite different from changing the provision by law in the case where it had not been established in the first place.

2) *An alternative constitutional provision:* But alternative forms of constitutional change could have been considered, forms more consistent with the role that constitutions often play in expressing the highest aspirations of the political community. Compare the following hypothetical formulation of Article 9 with the current position (my changes in italics):

> Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and its seas, *or who has,* at the time of his or her birth, a parent who is an Irish citizen or entitled to be an Irish citizen, *is* entitled to Irish citizenship or nationality, *only if* provided for by law.

Though this makes no concrete provision, it preserves the symbolic commitment to grant citizenship to those born in the whole island, as required by the Good Friday Agreement, while putting the two paths to citizenship - through place of birth and citizen parentage - on an equal footing, and leaving the detailed specification of conditions to legislation.

3) *Removing all constitutional provisions on citizenship*: If it is accepted that some change was necessary, another approach would have been to remove *all* reference to citizenship from the constitution and return the matter entirely to legislation. Citizenship was not the subject of constitutional provision up to 1998, and does not have to be. This too would have avoided giving an element of *ius sanguinis* citizenship a privileged symbolic position. While such a change, it may be argued, would involve a unwarranted unilateral departure from the delicate structure of the multinational, multiparty Good Friday Agreement, similar doubts were expressed about the change that was actually introduced.[44]

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[43] As Carens has written, ' From a normative perspective a *ius soli* rule that grants citizenship to everyone born on the territory is considerably broader than justice requires, and the reforms by other common law jurisdictions such as the UK, Ireland and Australia to limit *ius soli* to the children of citizens and permanent residents is morally permissible in my view. I would add two provisos to this, however. First, if children are raised in a society, they should automatically acquire citizenship regardless of the legal status of their parents … (British law recognises this.) Second, it would be morally wrong for the United States to modify its *ius soli* provisions for historical and symbolic reasons that are contextually specific, and it would be a bad practice for Canada to do so in large part because this practice has become so firmly associated in Canadian public discourse with a welcoming stance towards immigrants' (Carens, 2005, p 38).

[44] The Irish government consulted the British Government, and they issued a joint statement agreeing the terms; however, the other parties to the agreement were not consulted. Article 9, as introduced, has, in any case, the effect of overriding the provision of Article 2, if this is understood as a guarantee of citizenship.

C. Alternative legislative measures

In any case, were either of the latter two options taken, and the post-1998 constitutional establishment altered, legislative follow-up on the substance of the question would still be required, and here too other alternatives to the current legislation present themselves.

1) *A shorter period of parental residence*: The three-year period of parental residence necessary for the citizenship of a child is less demanding than the eight years laid down in current German nationality law, where, as in Ireland, the grant of citizenship at birth to children of non-citizens is determined by the retrospective consideration of parental residence.[45] But there are arguments for a still shorter period. First, if the crux of the problem was the incentive to travel in late pregnancy, the period of required parental residence could have been nearer to nine months than three years. This would remove one of the most urgent aspects of the perverse incentive - travel in late stages of pregnancy - without discriminating so much in practice between permanent residents and, for example, shorter-term work permit holders or other recent arrivals.

If the central issue was the incentive to establish a child's citizenship in order to gain residence in the rest of the European Union, any residence period would increase the costs, and thereby potentially reduce the numbers of those attempting to translate the birth of an Irish citizen child into European residence rights. But it would not rule out the utilisation of Irish citizenship in this way. In any case, parental residence requirements grant *ius soli* citizenship on retrospective terms.

2) *Granting prospective ius soli citizenship*: This bias towards a retrospective criterion for citizenship could have been avoided by a provision granting *ius soli* citizenship to the children of non-citizens (or those with temporary resident status) in a prospective manner - on the basis of the child's continuing residence at, say, 10 years old (as in the UK and Australia).[46] This proposal addresses the primary problem of 'citizenship tourism', since it gives no basis for claiming residence directly in other European countries. It is also compatible with a civic republican conception of citizenship as sharing a common predicament and future.

The justification for granting citizenship automatically to the children of immigrants was extensively discussed in France in the mid-1990s in debates over the automatic grant of citizenship at majority to children born to immigrants in France. There parties of the right argued that citizenship should be a matter of explicit choice rather than an involuntary imposition, and should not be awarded to those whose loyalty was not guaranteed. Thus in 1993 citizenship at majority was made conditional on application and an oath of loyalty. Opponents argued that automatic *ius soli* citizenship was fundamental to the republican values of universality and equality, and in 1997 a socialist government reversed the position to more or less the previous attribution of citizenship. These debates, it must be acknowledged, took place in the specific French context of concern about the integration of the children of immigrants, in which the grant of citizenship at majority reflects a principle of liberal nationality, the guarantee of prior socialisation into the public culture. In the hypothetical proposal outlined here, by contrast, the grant of citizenship confirms as citizens those who share a common future with others in the polity, whatever their origin or culture.

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[45] In Germany the child must opt for one citizenship at the age of 23.

[46] Though the Bill includes a provision making possible the naturalisation of minors that was not previously available, it does not provide for any easier access to citizenship for those born in the state.

The contrast between current German and French provisions for *ius soli* citizenship, retrospective and prospective respectively, shows that there are still choices open to states in setting their citizenship laws, and that these may reflect alternative conceptions of citizenship.

5. Conclusion

Different conceptions of political community favour different constellations of citizenship laws. Though most states in practice combine elements of these, they may also incline towards one or another. *Ius soli* is not in itself the only just or fairest way of allocating citizenship, but it forms a fundamental part of the ensemble of citizenship laws favoured by a civic conception of citizenship, in which citizens are seen as sharing a common present and future rather than a common origin. Such a civic conception favours citizenship laws inclined towards *ius soli*, granting relatively easy naturalisation and accommodating dual citizenship.

By the end of the twentieth century Irish citizenship laws embodied significant elements of such a conception of citizenship, more open than the ethno-cultural conception of the nation that prevailed in other areas of political and social practice. This offered an opening to a latent more civic view of what it is to be Irish, a view towards which there appeared to be some movement in recent years. The change introduced with the 2004 citizenship referendum, while not explicitly or necessarily racist, was more than a technical change, and significantly shifted the symbolic balance of citizenship away from this.

Even if some measures needed to be taken to remove perverse incentives for people to give birth in Ireland, the balance of citizenship need not so have been so unreflectively tilted towards *ius sanguinis* and away from *ius soli*. A better solution to the issues that had arisen would have left the constitutional positions of the two principles at least more evenly balanced, rather than privileging an element of *ius sanguinis*; legislation would have required a shorter period of prior parental residence, or more importantly, granted *ius soli* citizenship to children of immigrants on a prospective basis.

In practice, it may be claimed that there is not so great a difference between the alternatives outlined here and the current legal provisions for access to citizenship. But the constitutional reversal and the current constitutional provision have clear symbolic significance that may well make a concrete difference to the integration of the increasing number of immigrants who are coming to live in Ireland. In the case of young people, where having foreign parents, a different language or accent, skin-colour or dress previously implied nothing about their citizenship, these now give a reasonable basis for assuming that they are not members of the political community - one important way at least in which they could claim to be Irish.

But the real concern in Ireland, it may be argued, was not the integration of immigrants (which has yet to arise as a political issue), nor most centrally the number of late maternal arrivals, nor even the alleged abuse of Irish citizenship to claim residence in other European Union countries, but the fact of unregulated immigration, at this point through claiming parentage of an Irish citizen. It should be noted that this was at a time when the economy was performing strongly, and there were significant labour shortages both in high-skilled and less skilled areas. But, while open to migrants from the European Union, the state sought to contain other migrant labour within a system of short-term work permits and work visas. It has not acknowledged that Ireland is becoming an immigration country. Thus it may be that, as has been said of France in the

1990s, a debate that was really about immigration was framed in terms of citizenship.[47] Changing citizenship laws hardly begins to address the issues of managing diversity that increasing immigration will raise for Ireland as it has for the rest of Europe and the wider world.

[47] Favell, A., *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain*, (Second edition), London: Palgrave, 2001, p. 41. At the time of the referendum, opinion polls suggested that many voters interpreted immigration as the issue at stake, and cited the numbers of immigrants as a reason for voting in favour of the referendum.