

The boundaries of “democratic inclusion”: some questions for Rainer Bauböck

Joseph H. Carens

I have been exchanging ideas with Rainer Bauböck for over twenty years, and I have always gained a great deal from these exchanges. Reading this essay is no exception. Bauböck has a rare gift for constructing illuminating typologies and analytical frameworks. He is able to map out the logical structure of the relationships between different conceptions, principles and practices in ways that are useful to philosophers, empirical researchers and policy-makers alike. Those gifts are clearly on display here as Bauböck explores the virtues and limitations of three different principles of democratic inclusion: all affected interests (AAI), all subject to coercion (ASC) and all citizenship stakeholders (ACS). Bauböck argues that the three principles complement one another, with each providing legitimation for a different set of democratic institutions and practices.

Bauböck has many illuminating things to say about these three principles, including the ways in which they are derived from different but compatible conceptions of democracy. I agree with him that it is important for many of the purposes of collective democratic decision-making to have stable political units with clear jurisdictional authority over a wide range of issues within a specific territorial space; and that for this reason AAI, at least in a stark and singular form, does not provide suitable guidance for organizing human political affairs democratically, although, as Bauböck himself says, AAI does draw our attention to morally relevant concerns that we should take into account in whatever democratic institutional arrangements we adopt. I also agree with

Bauböck that questions about who ought to have legal rights within a jurisdiction and what rights they ought to have should be distinguished from questions about membership, so that ASC cannot be used *tout court* as a guide to the allocation of citizenship. Finally, I share many of Bauböck's views about who ought to be granted citizenship in a democratic political community and why. He prefers the language of stakeholderhood (ACS) and I prefer the language of social membership in exploring these issues, but in substantive terms our views of what democratic principles entail with respect to who is entitled to citizenship and why are very close. Let me add that I applaud the fact that, unlike many political theorists, Bauböck does not view the political world solely through the lens of the modern state. He explicitly regards municipalities and other entities exercising extensive jurisdictional authority over a territorial space as "polities" or "political communities" whose members should be seen as citizens engaged in the important task of collective self-government.

Despite its many virtues, this essay also leaves me puzzled in some important respects. In my response to Bauböck, I propose to ask a series of questions about what he is trying to accomplish and about how the different parts of his discussion fit together. I recognize that he will not be able to answer all of these questions in his reply, but my hope is that he will be able to take up a few of them and that the questions themselves will help to advance the conversation. One central theme of Bauböck's essay is that questions about boundaries are central to any discussion of democratic inclusion. One way to capture the central theme of my response is to say that I would like Bauböck to say more about the boundaries of his project. What is included and what is excluded in the way that he discusses democratic inclusion?

As I see it, Bauböck is offering an interpretive and critical account of democratic inclusion. On the one hand, it is interpretive because Bauböck is starting from a commitment to democratic principles and trying to understand what they entail or how they are best understood. In that respect, it differs from an approach that would seek to justify democracy itself on the basis of some other foundation. On the other

hand, Bauböck's discussion is also critical. He does not simply accept existing democratic practices or existing understandings of democratic principles but subjects both the practices and the principles to critical scrutiny.

So far, so good. Still, there are many different ways to develop this sort of interpretive and critical analysis. Every inquiry has to bracket some questions in order to pursue others. It is important for the reader to know when a line of investigation has been excluded simply as a way of limiting the discussion and keeping it within manageable bounds and when it has been excluded on the grounds that it is irrelevant or has been found wanting. What limits has Bauböck imposed on his inquiry and why has he imposed these limits? For example, does a concern for feasibility or practical relevance play an important role in limiting what questions he asks or in how he answers these questions?

Some passages in the text suggest that the answer to this question is “no”. Bauböck is sometimes at pains not to restrict the potential critical range of his inquiry in advance. See, for example, the second paragraph of his essay or his critical remarks on “methodological statism” on p. 57. On the other hand, he says on p. 6 that he wants to identify normative principles that could guide public policies with respect to actual problems of inclusion as they arise in contemporary democratic states. For example, he says that the discussion of principles should help us to address practical questions about access to legal citizenship, voting rights, and so on.

This generates a first set of questions for Bauböck. Might not these two tasks stand in deep tension? Is it not possible that democratic principles, if understood correctly and taken seriously, would require such fundamental changes in current policies and institutions that they cannot provide much guidance for how we should respond to practical problems that arise from contexts shaped by the morally problematic institutions and policies that exist now? Indeed, might there not be some policies or practices that seem morally desirable now only because of background features of current arrangements that are morally problematic? Does Bauböck's commitment to a single account that both

illuminates basic principles and provides practical guidance permit him to consider with an open mind all of the fundamental questions that can emerge from a concern for democratic inclusion?

Global democracy

Consider now something that Bauböck wants to exclude in the name of democratic inclusion: global democracy. He says explicitly at the end of section 2.1 that the ideas advanced in that section “exclude the vision of a *self-governing* global demos” (p. 12). I must say that I am somewhat perplexed as to the nature of the argument against global democracy. Is Bauböck making a conceptual claim, a normative claim, an empirical claim or perhaps some combination of all three? Does he think that the idea of a self-governing global demos is conceptually incoherent? Or is he saying instead that a self-governing global demos would be a bad political arrangement in principle from a democratic perspective? Or is he arguing on empirical grounds that a self-governing global demos would work less well from a democratic perspective than a global political order that divided power among multiple polities? I am inclined to think that his main focus is on conceptual arguments against the idea of a global demos, although, as we shall see, there are countervailing indicators.

Early on Bauböck says, “Since inclusion conceptually presupposes an external boundary, a theory of legitimate inclusion claims depends on a theory of legitimate boundaries” (p. 4). One sometimes hears the claim that the very idea of global democracy is intrinsically flawed because inclusion implies exclusion, and a global demos does not exclude anyone. So, it might seem as though Bauböck is going to construct that sort of argument against the idea of global democracy. But then in his discussion of the first reason why boundaries are necessary for democracy, Bauböck says, “even if every human being were included in a single global polity ... there would then still be a political boundary between human beings and other animals that could potentially be included”

(p. 8). That observation seems to provide a basis for rejecting the inclusion/exclusion conceptual argument against global democracy. So, is Bauböck therefore intending to reject the inclusion/exclusion conceptual argument against global democracy?

If he is, I am with him. I am not persuaded by the claim that inclusion always implies exclusion (as distinct from the conceptual possibility of exclusion), but even if one does accept that claim, I doubt that it can ever do much substantive work. As Bauböck's comment shows, it is usually possible to find some category of beings that is excluded no matter how the polity is identified.

We could elaborate Bauböck's point further. A global demos that includes animals as well as humans would still exclude other life forms (both in the world and potentially outside it) as well as inanimate beings like mountains and lakes that some think ought to have moral and legal standing. Later in his essay Bauböck introduces a distinction between the citizenry and the demos in which the demos is that subset of the citizenry who are able to participate and entitled to do so. Given this distinction, we could say that it would be wrong to describe a global demos as including all humans, since the demos excludes those humans who are incapable of participation. A global demos may or may not be a good idea, but Bauböck's discussion shows that it is a mistake to imagine that one can rule it out on the conceptual grounds that inclusion implies exclusion and a global demos excludes no one.

While this conclusion seems to be an implication of Bauböck's analysis, it is less clear to me that it was the goal of his discussion of boundaries in section 2.1, since he does ultimately seek to exclude the vision of a self-governing global demos. What is the purpose of his discussion of the first reason why boundaries should be seen as one of the circumstances of democracy? How is that discussion related to his exclusion of the idea of a global demos?

Although Bauböck rejects the inclusion/exclusion conceptual argument, in his subsequent discussion in section 2.1 it seems as though he is advancing other, somewhat different conceptual arguments against global democracy. In presenting his second reason for seeing boundaries

as one of the circumstances of democracy, Bauböck says that “in the absence of political boundaries there is no distinction between intra- and inter-polity relations” (p. 8). This distinction, he says, is “constitutive for the political as a distinct sphere of human activity” (p. 8).

What does this mean? Is Bauböck trying to say that the idea of global democracy makes no sense because there could be no inter-polity relations between a global polity and other polities? Because of the abstract character of the argument, I find it hard to know precisely what Bauböck has in mind here. Taken at face value, it seems like an implausible claim. Even if there were no inter-polity relations, why would that imply the absence of the political? For example, suppose we were to learn about some human community, past or present, that had no contact with any other human community but did have internal conflicts and mechanisms for resolving those conflicts. (In fact, we could probably come up with some actual examples of such communities.) Would we be obliged to say that such a community’s decision-making and dispute-resolving activities were not “political”? Why should we accept the claim that inter-polity relations are “constitutive for the political”? Isn’t that a rather arbitrary definition of what should count as “political”?

Even if we did accept the claim that inter-polity relations are constitutive for the political, why would that rule out global democracy? After all, as Bauböck himself acknowledges, advocates of global democracy “generally do not imagine a single undifferentiated polity encompassing all human beings” (p. 10). No one (or almost no one) favours a global political order in which one polity exercises exclusive jurisdiction over everything, sets all agendas and makes all policy decisions. So, even if there were some sort of global democracy, would there not still be inter-polity relations between the global polity and other polities, as Bauböck himself understands the term “polities”?

Another quasi-conceptual argument against global democracy comes in Bauböck’s positive citation of this passage from Arendt: “A citizen is by definition a citizen among citizens of a country among countries ... The establishment of one sovereign world state... would be the end of all citizenship”(p. 9). While it is true that if one defines citizenship in

the way that Arendt does, it can be used to exclude global democracy on conceptual grounds, the passage itself gives no reason why we should accept that definition. More to the point here, this definition of citizenship seems incompatible with the way Bauböck himself uses the terms “citizen” and “citizenship”. He is at pains to deny that the term “citizen” is appropriately restricted to membership in a sovereign state. He talks explicitly about the varieties of democratic polities and the different ways in which citizenship is and ought to be constructed in each: municipalities, provinces, regional organizations, and so on. So, aren’t Arendt’s definition and the conceptual argument it supports problematic from Bauböck’s own perspective?

Another variant of what seems to be a conceptual argument against global democracy can be found in Bauböck’s third reason for seeing boundaries as one of the circumstances of democracy. He contends that “the existence of boundaries is a precondition for the democratic feedback mechanisms of voice and exit (Hirschman 1970)” (p. 9). I worry that here, as elsewhere in this section, conceptual stipulations are being substituted for arguments that ought to be both substantive and qualified. Bauböck says, “In the absence of any boundary, exit is by definition impossible” (p. 9). What are the implications of this conceptual claim? Is there some concrete political arrangement that it is designed to challenge? If exit is impossible by definition where there are no boundaries, does it follow that democracy is also (by definition?) impossible where exit is impossible? Why?

Perhaps Bauböck is not trying to make a conceptual argument about the impossibility of global democracy but rather an empirically informed argument about why it would be a bad idea in practice. The statement that boundaries are a precondition for democratic feedback through voice and exit sounds like an empirical claim, not a conceptual one. Hirschman’s work, which Bauböck cites, is indeed based on empirical research but I don’t think that it supports the kind of sweeping claim that Bauböck makes.

Bauböck acknowledges (following Hirschman) that easy exit may actually reduce voice, but then he insists, “the absence of any possibility

of exit fatally undermines the effectiveness of voice” (p. 9). To me, this sounds like an empirical claim that cries out for specificity and evidence. What are the factors that enhance or reduce the effectiveness of voice in democratic polities? How important is the possibility of exit compared with other factors in enhancing democratic feedback mechanisms? Does the absence of exit possibilities render democratic voice entirely ineffective, and, if so, why? Or does it only reduce the effectiveness of democratic voice, and, if so, by how much? Or does it only create a risk that democratic voice will be stifled, and, if so, how great is that risk and how does that risk compare with the risks of other arrangements?

It seems to me that if one wanted to argue against global democracy on the basis of an empirical claim that the absence of exit is harmful to democracy, one would have to ask “harmful compared to what alternative?” For example, is it worse from a democratic perspective to have a democratic polity in which one can participate but from which one cannot exit or to have no access at all to collective democratic decision-making about important issues that affect one’s life? If a global polity can be portrayed as the former, the absence of a global polity can be pictured as the latter. Which is worse from a democratic perspective?

I do not doubt that the possibility of exit is one important factor under some circumstances in enhancing democratic voice, but on any plausible account it is only one factor, and, for that matter, the effectiveness of feedback is only one consideration in assessing the democratic character of a polity. Perhaps there will turn out to be tradeoffs between the availability of exit and other factors that enhance democracy, and on balance it would make sense to accept the absence of exit for the sake of these other factors. Or perhaps not. The point is that an empirically unsupported claim that the absence of exit fatally undermines the possibility of democratic feedback does not seem to me to be a good argument for the claim that global democracy is intrinsically impossible.

Perhaps these comments reflect a misunderstanding of Bauböck’s project. What is the nature and purpose of this discussion in section 2.1?

Let's approach this from another perspective. Why might people think that some sort of global democracy would be a good idea, perhaps even something required as a matter of justice from an ideal perspective? Climate change is one obvious reason. Here is a global phenomenon that is affecting everyone on the planet and will affect everyone in the future even more profoundly. So, some might say, everyone ought to be able to participate in decisions about how to deal with this problem. Of course, as Bauböck rightly argues, democracy requires more than issue-specific participatory decision-making. It requires stable jurisdictional authority over a wide range of issues and some relatively stable understanding of who is a member and entitled to participate in decision-making. But climate change is not the only global problem. It is merely an example of the type of problem that seems to require a global polity if it is to be addressed democratically.

Is it conceptually impossible to imagine the existence of global democratic institutions for dealing with a wide range of global problems (including the relationships among these problems)? For example, could we not imagine a global political assembly with powers (including agenda-setting powers) specified by a constitution, representatives elected by universal suffrage on a global basis, and so on?

Let me be clear. I am not recommending global democracy as just outlined as an ideal or arguing that it is a necessary feature of a just global order. One can certainly raise challenges to such an idea from many different perspectives, even as an ideal. And from a practical perspective, the challenges are much stronger. Global democracy seems to me to be a non-starter as a way to address most urgent global problems (like climate change) in the near term. If climate change and other global problems are to be addressed now, it will have to be done primarily through the cooperation of states, as in the recent Paris Treaty (though I do not mean to understate the important role of global civil society actors in pushing for global solutions). By the way, this is an illustration of the potential tension between ideals and practical problems that I identified above. One might think that global democracy is the ideal institutional arrangement and required as part of a just global order

but also that this does not help much in deciding how best to deal with current global problems. It does not seem to me, however, that these reasons for challenging global democracy – its normative flaws as an ideal or its practical limitations in the world as it is – are Bauböck's reasons for excluding it from his discussion of democratic principles after section 2. Again, perhaps I have misunderstood. If Bauböck does intend to exclude global democracy on conceptual grounds, I encourage him to clarify that argument in light of the questions I have raised in this section. If his arguments against global democracy have some other basis, I encourage him to be more explicit about what that is.

AAI and the global political order

We turn now to Bauböck's discussion of the principle of all affected interests. In section 3.1 when discussing AAI, Bauböck says that the "current international state system is deeply flawed" because "it is designed to reduce the duty of states to justify their decisions towards those on whom they impact outside their territorial borders" (p. 24). Notice how this formulation implicitly accepts many of the features of the current international system, even while criticizing others. If we take the interests of all human beings seriously, we might think that the biggest flaw in the current state system is not that it fails to require states to take external interests into account in policy decisions but rather that the way the entire system is constructed favours the interests of the few – mainly those living in rich states – over the interests of the many – most of those living elsewhere in the world. In any event, that is my own view. Is Bauböck willing to entertain this sort of fundamental challenge to the current global order or is that something that he seeks to exclude, at least in this essay?

I am not sure of the answer to this question. At a number of points, starting with the second paragraph of the book, Bauböck explicitly criticizes the idea of accepting the moral legitimacy of the current

international order as a starting point. He offers occasional sharp criticisms of that order in the course of his essay, and he seems to want to subject the entire global political order to critical scrutiny from the perspective of a commitment to democratic inclusion as reflected in the three principles of AAI, ASC and ACS. And yet, so far as I can tell, Bauböck does not seem to think that these three principles raise any fundamental questions about the justice or legitimacy of the current global political order.

I find that puzzling. Let's set aside the question of global democracy and assume here what I previously challenged, namely that Bauböck's discussion of the circumstances of democracy establishes the case against the idea of a single political community exercising some form of territorial jurisdiction over the entire world. So, following Bauböck, we take the plurality of polities as a fundamental requirement of a global political order based on democratic principles. What does this tell us about how the world should be organized politically? Very little, actually.

It does not follow from the fact that democracy requires plurality that these plural polities have to be like modern states in the powers and privileges they possess or in their relationships with one another and with the members of other polities. Bauböck's own discussion of municipalities and regional associations shows that it is a mistake to think of the modern state as the only possible way to organize political life democratically, even if one accepts the need for distinct polities with territorial jurisdictions and agenda-setting powers. And the concept of a self-governing people is not self-explanatory, especially if one rejects, as Bauböck does, an essentialist account of nations. To say that self-governing peoples “cannot be merely functional aggregates of individuals who happen to share an interest in a particular political decision or public good” (p. 11) does not tell us very much about what powers and privileges are necessary for a people to be self-governing or about the extent to which individuals should be free to change their membership in one self-governing people for membership in another. Bauböck wants to argue, I think, that hypermigration is incompatible

with a polity functioning as a self-governing people, but that still leaves open a very wide range of alternative arrangements regarding movement into and out of polities and peoples.

Let's return to the principle of AAI and ask what that entails in a context where we are not starting with any presupposition about the existing global political order except the need for a plurality of polities and perhaps the desirability of self-governing peoples. Doesn't this abstract principle require us to ask what ways of constructing polities and their relationships with one another and with individuals inside and outside their jurisdictions are most likely to serve the interests of all most effectively over time and thus to satisfy the requirements of democratic inclusion?¹

There are, of course, many different ways to answer such a question. Here is mine. Even if we accept that a just global order will include distinct polities and self-governing peoples, we should try to bind these different polities and peoples together in various ways. One desirable form of mutual binding would be the acceptance of procedures for the peaceful resolution of conflicts. Another would be a commitment to mutual economic support that would prevent the emergence of large economic differences between polities and peoples. A third would be a commitment to permit individuals to move freely from one polity to another, leaving their people of origin and joining a new one, at least so long as the overall level of movement into a polity was not so high that it undermined a people's capacity for self-government. I would add that if individuals do want to move at rates that would interfere *to some extent* with a people's capacity for self-government, a just global order from an AAI perspective would have to weigh the negative effects of such interference on the interests of those within

¹ I deliberately used the term "all" rather than "all humans" in this sentence to leave open the possibility that a concern with democratic inclusion obliges us to ask how alternative arrangements serve the interests of animals as well as humans. For the sake of simplicity, however, and because I am confident that Will Kymlicka and Susan Donaldson will explore that issue more effectively than I could, I will hereafter refer only to humans in my discussion.

the polity against the negative effects of exclusion on those outside a polity trying to get in. There are few normative absolutes. Degrees matter morally.

I recognize, of course, that not everyone would share my view of what a morally desirable global political order would be, and I am not trying to develop a positive case for that view here. I present this just to illustrate the possibility that someone might think that a commitment to taking the interests of all seriously would require a fundamental transformation of existing arrangements, even if one accepts a plurality of polities as a starting point. What is Bauböck's stance towards this sort of view? Does he think that the principle of AAI does *not* have these sorts of far-reaching implications? If so, does he think that his analysis explains why it does not? Or is he intending to bracket this sort of fundamental question in order to concentrate on questions with more immediate practical relevance?

There are some indications in the essay that Bauböck is indeed interested in exploring fundamental questions about what a just global political order would require from a democratic perspective. For example, early on in the essay he says that the ideas he has developed about the circumstances of democracy "are fully compatible with the project of cosmopolitan constitutionalism and the building of a global *legal* community" (p. 12). That seems close to the first form of mutual binding of polities that I suggested we should see as part of a just global political order, and far from the current state of affairs. It suggests that Bauböck is open in principle to a fundamental examination of the requirements of a just global order. Moreover, in section 4 of the essay Bauböck does touch briefly on questions about global justice in connection with his discussion of birthright citizenship, and there he makes some assertions about the kinds of inequalities between polities that are and are not justifiable.

On the other hand, Bauböck's discussion of these sorts of fundamental questions is limited, taking the essay as a whole. His mention of the possibility of a global legal community is made in passing, not offered as the conclusion of his own arguments. The discussion of global

justice in section 4 is very brief and is somewhat peripheral to his primary focus in that section. Moreover, at many points in section 3, including his discussion of AAI, Bauböck seems to assume that it makes sense to proceed without addressing questions about the ways in which distinct polities are or should be related to one another. In his discussion of AAI, he seems to presuppose that he is exploring the implications of that principle for a world organized politically much like the one in which we live today. Is that a correct understanding of how Bauböck is proceeding, and if so why has he chosen that approach?

Let me be clear. I am not arguing that Bauböck ought to transform his essay on democratic inclusion into a general discussion of global justice. Rather I am trying to get him to clarify what questions he is pursuing and what questions he is setting aside. In particular, I am asking him to explain why he is not pursuing some questions that seem to flow from his own stated concerns. As I noted early on in my comments, I think there can be a tension between the goal of pursuing an analysis with practical relevance and the goal of pursuing an analysis of fundamental principles. I have no objection if someone chooses to accept the constraints of the current international system as a way of limiting the scope of a particular discussion so as to make it more useful for addressing immediate issues. Indeed, I think it is legitimate to set some questions aside simply on the grounds that one cannot discuss everything, even everything relevant to one's topic. But I do think that it is important to acknowledge such restrictions explicitly if that is how one chooses to proceed. I don't see that Bauböck has done this. On the other hand, if Bauböck does actually think that, apart from the problem of external affected interests, the principle of AAI is largely compatible with the way the current global political order assigns power and responsibilities to different polities and orders both the relationships among polities and the relationships between any given polity and members of other polities, and if he wants this assessment to play a role in his analysis, I think he should explain more fully the reasons for his holding this view.

ASC and equality of rights

Turn now to the second principle that Bauböck considers: the idea that being subject to government coercion entitles one to democratic inclusion (ASC). As Bauböck notes, many people use this as a principle for determining who is entitled to citizenship. Bauböck argues that those who are within a polity’s jurisdiction are normally subject to its coercive powers in ways that those outside it are not. This does give rise to special claims to inclusion, he says, but not, as some argue, to membership in the political community itself. Rather, those subject to governmental authority are entitled to equal rights and liberties, to equal protection of their rights and liberties under the law, and to opportunities to contest the exercise of governmental authority. Bauböck explores a number of interesting issues in this section (3.2), and I agree with much (though not all) of what he says. I want to focus again, however, on what he leaves out – the questions that he does not pursue and whose non-pursuit he does not explain. I have two concerns in mind: (1) questions about the background economic and social conditions that must be satisfied in order for this sort of democratic inclusion to be meaningful; and (2) questions about the extent to which different categories of people may be entitled to different legal rights because of their legal status within the polity.

In discussing what ASC requires, Bauböck says the following:

the institutional devices for securing equal protection of the law and opportunities for contestation are conventional and do not have to be newly invented. They include constitutional protection of fundamental rights and judicial review of ordinary legislation by constitutional courts as well as institutionalized complaints and contestation procedures for individuals in courts and ombudsman bodies and, finally, the rights to protest against governments and their decisions through political speech and activities.

On the one hand, I certainly agree that all of these institutional devices are necessary. On the other hand, it seems equally obvious that they

are not sufficient. Reading this passage I could not help but recall Anatole France's famous remark about the law forbidding both rich and poor to beg bread in the streets and sleep under bridges at night, thus drawing attention to the limitations of formal equality under the law.

Shouldn't an essay on democratic inclusion say something about the economic and social prerequisites of democratic inclusion, or at least acknowledge that this is an important set of issues that is being set to one side for reasons of time and space and not because they are irrelevant? In my discussion of AAI, I have already tried to indicate why questions about economic arrangements might be relevant to an assessment of the moral legitimacy of the global political order. ASC ought to bring those questions sharply into view within the boundaries of particular polities. It is a longstanding egalitarian critique of liberal theory that it focuses too much on formal rights and so neglects the social and economic conditions that determine how formal rights affect people's lives. I fear that Bauböck's discussion here is open to that critique. Let me add that it is clear from Bauböck's other writings that he accepts the argument that we should be concerned with substantive, not purely formal, equality. So, I regard the absence of attention to this topic in this essay as an oversight rather than a reflection of his actual views. Nevertheless, I think it is worth elaborating the point just a bit further.

Anatole France's comment draws attention to the ways in which the content of the law itself can be discriminatory or unfair because of its differential impact on those subject to it. But even if one focuses only on the protection of fundamental rights – which, to be fair, is Bauböck's primary concern – we cannot ignore questions about the social and economic conditions that determine what those rights mean in practice. I write at a moment when the Black Lives Matter movement has gained prominence in the United States and, to a lesser degree, in other states as well. This movement reminds us that some people have a daily experience of not enjoying equal protection of their most fundamental rights under the law, simply because of the colour of their skin, even though they are formally entitled to equal protection. The problem may be worse in the United States than elsewhere, but it is

certainly a serious problem in Canada as well (where indigenous people are also particularly subject to this reality) and I think it is safe to say that neither are European states immune.

Now think also about the role that money can play in determining how formal legal rights function in practice in any arrangement that permits individuals to hire legal representation. If we were really committed to equal rights under the law, we would have to devise mechanisms to ensure that rich and poor were equally secure against (and equally vulnerable to) governmental coercion. From a North American perspective at least, that would entail the development of some new “institutional devices” in addition to those mentioned by Bauböck.

These brief examples only scratch the surface of the ways in which social and economic factors affect democratic inclusion. As in my discussion of the possibility of a radical challenge to the current global political order, I am not arguing here that Bauböck should have addressed questions about the economic and social prerequisites of equal subjection to coercion. Rather, I am asking whether he would agree that these are questions that do flow naturally from ASC as a principle of democratic inclusion, that he should explicitly explain his decision not to address them, and that he should acknowledge the ways in which leaving them aside might qualify any conclusions reached in the essay.

I can address my second concern much more briefly. There is a tendency in discussions of ASC to lump together questions about who is subject to government coercion with questions about who is entitled to legal rights, and to focus on those who are within the territorial jurisdiction of a state. That approach works well enough when what is at issue is the protection of basic liberties such as religious freedom, protection against arbitrary detention, and so on, but it is rather misleading if one tries to ask how legal status should or should not affect the legal rights that a person possesses. Not all legal rights are basic liberties, and even some pretty fundamental legal rights, like the right to work, are normally not granted to everyone who happens to be within the jurisdiction of the state at a particular time, but are allocated on the basis of one’s legal status.

Bauböck skims over this problem. At one point he says,

The duty of equal protection for all within the jurisdiction needs to track the impact of being subject to coercive legislation on individuals' freedom. While tourists will hardly qualify, temporary migrants may experience significant restrictions of their autonomy, especially if they do not enjoy the same freedom of movement and legal protections as long-term residents. (p. 31)

Notice what this obscures. Tourists do qualify for the protection of their basic rights and liberties, but they do not have the right to work or the right to access most social programmes that the state provides. That may be justifiable, but it requires an argument. The very category of "tourist" (or "visitor") serves a function in allocating legal rights, defining those within that category as people who are not entitled to some of the important legal rights enjoyed by residents, including, for example, the right to stay as long as one wants and to seek employment. So, here some contestable background features of the current global order are simply presupposed.

The sentence about temporary migrants seems to suggest that temporary migrants should enjoy the same legal rights as residents. As it happens, I largely agree with this claim but it is hardly uncontested and it requires qualification. In any event, there is a literature advocating sharp differences between the rights of temporary migrants and the rights of residents, and lots of actual programmes that limit the rights of temporary migrants. So, one cannot simply assume that everyone will accept this way of interpreting the requirement of equality under the law.

A bit further on in the section Bauböck says, "From an inclusion perspective the important question is who should be protected and have access to contestation opportunities. If the answer is: all subjected to government jurisdiction, then citizens and non-citizen residents must enjoy these rights equally" (p. 34). He goes on to cite a famous American Supreme Court decision that extended the Fourteenth Amendment to irregular immigrants. But that decision did not entail the conclusion that irregular immigrants were constitutionally entitled to all the legal

rights that authorized legal residents enjoy. Leave aside questions of constitutional interpretation. Is the correct moral position for someone committed to equality of rights as a principle of democratic inclusion that irregular migrants should enjoy the same legal rights as permanent residents? I happen to think that it is, but even I add some qualifications to the claim, and I recognize that I am somewhat of an outlier in my view of this question. Lots of people would argue that one can be committed to equality of rights and democratic inclusion without embracing this view of the legal rights of irregular migrants.

As before, I am not arguing that Bauböck should have discussed these issues in his essay. I am suggesting that he should have added a few qualifications to what he did say and noted the existence of a genuine debate about what rights different categories of immigrants should enjoy.

ACS and the importance of self-government

I turn finally and even more briefly to Bauböck's discussion of his third principle, the democratic requirement that all those who have an important stake in citizenship be recognized as formal members of the political community (ACS). As I indicated at the outset, I am largely in agreement with Bauböck's discussion of who ought to have access to legal citizenship in the world as it is today and how that access ought to be provided. As I read the essay, that is the main function of ACS as a principle. Nevertheless, Bauböck also tries to connect ACS to deeper questions and, as with his discussion of AAI, I am unclear about the extent to which he is open to basic challenges to current political arrangements.

There are points in his essay at which Bauböck seems to want to advance a claim about the fundamental moral importance of membership in a self-governing political community. In section 2.1, for example, he distinguishes between justice and legitimacy: “popular self-government is a fundamental and intrinsic value, the pursuit of which must be constrained by requirements of justice, but which is at the same time

a free-standing value that cannot be entirely derived from what justice requires. The primary purpose of democracy is to provide legitimacy to coercive political rule through popular self-government” (p. 10). This precedes the discussion of ACS, of course, but it is intimately connected to that principle, as becomes apparent later in the essay in section 3.3 where he says in the course of his discussion of ACS that “membership in a polity is a necessary condition for human autonomy and well-being” (p. 40).

These sorts of statements invite an inquiry into more fundamental questions. Here are some that occur to me. What sorts of powers must a polity have to count as self-governing and why? Are these absolutes or questions of degree? How well does the existing international state system do in providing human beings with the kind of political membership needed for human autonomy and well-being? What are the requirements of justice and how should they constrain the pursuit of popular self-government? What are the other necessary conditions for human autonomy and well-being besides membership in a polity? How well does the existing international state system do in providing human beings with the various conditions required for human autonomy and well-being? Can we imagine better ways of organizing the global political order that would do better in meeting the various requirements of human autonomy and well-being?

Does Bauböck actually intend to raise these questions or would he prefer to rescind the invitation I found in some of his statements? Does the principle of ACS depend upon how those questions are answered? I pose these as genuine, not rhetorical, questions. But the main questions I want to pose to Bauböck in this regard are those I have been pursuing throughout my comments: What questions is the discussion of ACS intended to address? What questions is he leaving aside in this discussion and why is he leaving them aside? If Bauböck addresses my questions about his questions, I think that his readers will gain a much clearer sense of the boundaries of “democratic inclusion”.