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**Citation:** Strumia, F. (2016). New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State (IMC-RP 2016/4). Investment Migration Council Research Papers, ISSN 2504-1541.

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# Investment Migration Working Papers

## New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State

Francesca Strumia

IMC-RP 2016/4

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# Investment Migration Working Papers

## IMC-RP2016/4

### **New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State**

Francesca Strumia\*

**ABSTRACT:** That citizenship is getting lighter is not a new idea. How this is occurring and what its implications are for the fabric of communities is however a question with several facets. This article explores one of these facets. It questions how ‘new generation’ skilled migration policies, with which several states around the globe are experimenting, contribute to altering the role of citizenship and immigration law in identifying the members of a polity. New-generation skilled migration policies facilitate the entry, and in some cases the naturalisation, of high net-worth individuals and innovative entrepreneurs. The article evidences two distinguishing features of these schemes: legal requirements for the entry of these new-generation skilled migrants which focus on talent as their ‘output’; and the state’s role in administering immigration and citizenship law becoming, in the context of these policies, that of a headhunter. Through headhunting for migrants who promise an output, states channel the regulation of citizenship and immigration along a novel trajectory parallel but distinct from traditional ones. A dual-track citizenship model emerges as a result: a heavy, culturalised citizenship for ‘traditional’ migrants, and a thin, cosmopolitan one for the new-generation skilled migrants. The article ultimately argues that these transformations prompt a rethink of citizenship as a web of rights and duties binding different classes of stakeholders and mediated by the state, rather than as a binary relation between individuals and the state.

**KEYWORDS:** skilled migration, start-up visa, investment visa, global citizenship, investor citizenship.

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## 1. Introduction

Viewed from the air on a crisp day, the Mediterranean Sea is a friendly blue basin, dotted with islands of different sizes which vegetation colours in numerous shades of green. This composition of blues and greens has inspired poets, novelists and filmmakers through the ages.<sup>2</sup> Yet this idyllic vision conceals one of the most puzzling contrasts of contemporary migration. Among those verdant islands, some attract, through tailored visa policies, affluent investors and high net-worth individuals.<sup>3</sup> Others regularly collect on their shores the corpses of less lucky migrants, who did not survive hazardous sea-crossings in inadequate boats, at the mercy of ruthless smugglers.<sup>4</sup> This striking contrast of destinies makes the southern boundary of the European Union a symbol of the inconsistent texture of twenty-first century national (and supranational) borders, and of the notions of membership which underpin their regulation.

On the one hand, the myriad political, civil and economic crises in this young new millennium have thrown up borders both exposed and hidden. On the other hand, the simplified communication and transport which have made transnational living a concrete possibility have made borders porous. In part in connection with this latter evolution, skills, capital, qualifications and experience are becoming in some respects passports to a fast-track immigration experience, while the regulation of immigration for ‘standard’ migrants swings between control and repression elements.

These contrasts in the regulation and experience of immigration ultimately mirror into a change in the fabric and texture of community membership. Rationales for community closure and for

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<sup>2</sup> The Mediterranean island of Ithaca is home to one of Homer’s heroes, Ulysses; Ugo Foscolo devoted a poem to the Greek island of Zacinto ‘A Zacinto’; Laura Morante’s renowned novel *L’isola di Arturo* is set on the Italian island of Procida. The Mediterranean is also in the title and in the subject of Giuseppe Tornatore academy award-winning movie ‘Mediterraneo’.

<sup>3</sup> See e.g. Malta Individual Investor Programme, Legal Notice 47 of 2014, available at <http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf>.

<sup>4</sup> The Greek and Italian islands are at the forefront in this respect.

the selection of entrants become diversified, as do requirements for admission and for access to citizenship. Ultimately, citizenship, which had been found to be hard on the outside and soft on inside,<sup>5</sup> becomes soft both outside and inside for some, while hardening further for others. This article explores one facet of this transformation by investigating skilled migration policies, in their most recent configurations, and addressing some of the questions that they raise in terms of changing the boundaries and bonds of community membership. Several states around the globe are experimenting with ‘new generation’ skilled migration policies. These are policies aimed at facilitating the entry, and in some cases naturalisation, of high net-worth individuals and innovative entrepreneurs. The article evidences two distinguishing features of relevant schemes: legal requirements for the entry of these new-generation skilled migrants focus on talent as ‘output’; and the state’s role in administering immigration and citizenship law becomes, in the context of these policies, that of a headhunter. By headhunting for migrants who promise an output, states channel the regulation of citizenship and immigration along a novel pathway parallel but distinct from traditional ones. A dual-track citizenship model emerges as a result: heavy, culturalised citizenship for ‘traditional’ migrants,<sup>6</sup> and a thin cosmopolitan one for the new-generation skilled migrants.

The article ultimately argues that these transformations prompt a rethink of citizenship as a web of rights and duties binding different classes of stakeholders and mediated by the state, rather than as a binary relationship between individual and state. Its findings provide a nuanced understanding of arguments in the literature on immigration regulation which point to the ongoing commodification of membership on the one hand.<sup>7</sup> On the other hand, the analysis in the article adds to debates in the literature on the evolution of citizenship which have long weighed on the implications of citizenship’s devaluation,<sup>8</sup> divorce from nationality,<sup>9</sup>

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<sup>5</sup> Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2008), 119.

<sup>6</sup> On the culturalisation of immigration policy in Europe, see L. Orgad, ‘Illiberal Liberalism-Cultural Restrictions on Migration and Access to Citizenship in Europe’, 58 *American Journal of Comparative Law* 53–106 (2010).

<sup>7</sup> See e.g. Ayelet Shachar and Ran Hirschl, ‘Recruiting Super Talent: the New World of Selective Migration Regimes’, 20 *Indiana J. Global Legal Studies* 71 (2013).

<sup>8</sup> See e.g. Peter H. Schuck, ‘Membership in the Liberal Polity: the Devaluation of American Citizenship’, 3 *Georgetown Immigration L. J.* 1 (1989).

<sup>9</sup> See e.g. Linda Bosniak, ‘Citizenship Denationalized’, 7 *Indiana Journal of Global Legal Studies* 447 (2000); on post-national citizenship see, Yasemin Nuhoglu Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994).

competition with other dimensions of membership.<sup>10</sup> With respect to these debates, the article takes a step back in part, by questioning the very dynamics through which the regulation of immigration and naturalisation mould notions of citizenship; in part, it goes one step further. It not only focuses on the fact that citizenship has come to compete with a number of contextual and alternative dimensions of membership threatening the notion's inner consistency. It rather points to the very alteration in the rights, responsibilities, affiliations that citizenship expresses. Part 1 introduces new-generation skilled migration policies, setting these in their regulatory and theoretical context. Part 2 takes a step back to trace the role of the regulation of immigration and access to citizenship in defining community membership. Through the prism of understanding how this role changes with the advent of new-generation skilled migration policies, part 3 analyses how legal requirements of 'talent' are set in these new policies, as well as the role that states play in their context in designing and implementing immigration and citizenship law. Part 4 builds on this analysis to reflect on the implications for notions of community membership and ultimately for the very nature of citizenship.

## **2. New-generation skilled migration policies in regulatory and theoretical context**

Favouring skilled migrants is a long-established element of immigration policy, informing the immigration laws of several countries. Traditional countries of immigrants,<sup>11</sup> such as the United States, Canada and Australia, have long facilitated the admission and integration of skilled migrants. The US Immigration and Nationality Act encompasses a number of categories of immigrant and non-immigrant visas aimed at skilled migrants: not only the renowned non-immigrant H1-B visa for highly qualified professionals, but also visas for investors and intra-company transferees;<sup>12</sup> a non-immigrant 'genius visa' for persons of extraordinary ability in

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<sup>10</sup> See e.g. Rainer Bauböck, *Transnational Citizenship: Membership and Rights in International Migration* (Edward Elgar Publishing 1994); Willem Maas, 'Multilevel Citizenship', in A. Shachar, R. Baubock, M. Vink and I. Bloemraad (eds.), *Oxford Handbook of Citizenship* (OUP forthcoming 2017).

<sup>11</sup> For the distinction between countries of immigrants and countries of immigration, see Patrick Weil, 'Access to Citizenship – A Comparison of 25 Nationality Laws', in T.A. Aleinikoff and D. Klusmeyer (eds.), *Citizenship Today, Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001), at 21.

<sup>12</sup> S. 101 US Immigration and Nationality Act 1952 (INA) as subsequently amended.

the sciences, culture or sports;<sup>13</sup> and immigrant visas for persons of extraordinary ability.<sup>14</sup> Applicants in the latter category can self-sponsor and do not need to pass the labour certification procedure which applies to most other categories of economic migrants.<sup>15</sup>

The US Act also provides for an immigrant visa for investors, labelled as an ‘employment creation’ visa, the EB-5.<sup>16</sup> Canada has pioneered a points-based scheme for skilled immigration, inaugurated in 1967, awarding points to applicants for various criteria such as education, language knowledge, professional experience and adaptability.<sup>17</sup> While the Canadian policy on skilled migration has been under reform since the mid-2000s, this scheme has provided the main route to permanent residence in Canada for several decades.<sup>18</sup> Australia introduced in 1979 a Numerical Multi-factor Assessment System similar to the Canadian one and managed at the federal level.<sup>19</sup> In the 1990s this was supplemented by the State Specific and Regional Migration Scheme (SSRM), aimed at bringing skilled migrants to areas lagging behind the rest of the country.<sup>20</sup>

In European countries, which are not traditionally countries of immigrants, but have experienced varied histories of immigration in the twentieth century,<sup>21</sup> the regulation of skilled migration has a different connotation. The immigration policies of European countries reflect a range of priorities and are in part a result of colonial histories and of decolonisation. The

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<sup>13</sup> Ibid. Also see US Citizens and Immigration Services, ‘O-1 Visa: Individual with Extraordinary Ability or Achievement’. <http://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-1-visa-individuals-extraordinary-ability-or-achievement>.

<sup>14</sup> See s. 203(b)(1) INA; also see US Citizens and Immigration Services, ‘Employment-Based Immigration: First Preference EB-1’, <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1>. This category of immigrant visa, which leads thus to immediate permanent residence status, is addressed to persons of extraordinary ability, outstanding professors and researchers and multinational managers or executives.

<sup>15</sup> See *ibid.* The ability to self-petition is reserved to the sub-category persons of ‘extraordinary ability’. Outstanding professors and researchers as well as multinational managers and executives need an offer of employment. For a critique of the US system of skilled migrant admission see Shuck and J. Tyler, ‘Making the Case for Changing US Policy Regarding Highly Skilled Immigrants’, XXXVIII *Fordham Urb. L.J.* 327 (2010).

<sup>16</sup> s. 203(b)(5) INA. See US Citizens and Immigration Services, ‘About the EB-5 Visa’, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa>.

<sup>17</sup> See ss. 75–76 Immigration and Refugee Protection Regulations (SOR/2002-227), as amended June 2016, available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-16.html#docCont>. Also see Canada Country Profile, Focus Migration, n.8/2007.

<sup>18</sup> See R. Koslowski, ‘Selective Migration Policy Models and Changing Realities of Implementation’ 52 *International Migration* (2014), at 34–36.

<sup>19</sup> See Migrations Regulations 1994, regulation 2.26 AC and Schedule 6D, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_reg/mr1994227/s2.26ac.html](http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.26ac.html).

<sup>20</sup> See Australia Country Profile, Focus Migration, n. 21/2010. Also see Koslowski (n 18), at 34–36.

<sup>21</sup> For an overview see Craig A. Parsons and Timothy M. Smeeding (eds.), *Immigration and the Transformation of Europe* (Cambridge University Press 2006).

immigration and nationality laws of these countries in any case recognise privileged categories of skilled migrants or take desert or merit into account as grounds for granting citizenship.<sup>22</sup> In the European Union context, the EU common immigration policy, in addition to the regulations of individual countries, has also placed an emphasis on the encouragement of skilled migration. EU legislation adopted within the framework of this policy, offers ‘blue cards’ to highly qualified workers,<sup>23</sup> as well as tailored visas to capable third-country national researchers.<sup>24</sup> The attempt to attract talent actually provides one unifying line among the Member State and EU immigration policies, which overlapping competences and contrasting priorities otherwise tend to dis-align. Immigration laws and policies adopted at the European Union level complement, and in part overlap with, the ones adopted at Member State level.<sup>25</sup> Hence, while EU legislation creates some categories of third country nationals entitled to residence permits under EU law, volumes and requirements for admission, particularly in the field of economic migration, are still largely regulated at Member State level.<sup>26</sup> Further, despite a long perimeter of common external borders and the pledges these have called for,<sup>27</sup> priorities in matters of immigration differ among the Member States, and between individual Member States and the EU as a whole, as the ongoing refugee crisis has clearly underlined. This depends in part on the contrast between the objectives included in meditated policy agendas and those dictated by geographical, economic and political contingencies.<sup>28</sup>

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<sup>22</sup> See e.g. D. Lgs. 286/1998, *Testo Unico delle Disposizioni concernenti la Disciplina dell’Immigrazione e Norme sulla Condizione dello Straniero* (Italian Immigration Act), art. 27. Also see art. 9(2) Italian Law 91 of 1992, *Nuove Norme sulla Cittadinanza* (Italian Citizenship Act); also see Commission Report on the Blue Card Directive, June 2014, <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-287-EN-F1-1.Pdf>.

<sup>23</sup> Council Directive 2009/50, 2009 OJ (L 155) 17.

<sup>24</sup> See Directive 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast), OJ L132, 21.

<sup>25</sup> The Treaty of Amsterdam first made immigration policy a matter of community law. Relevant competences have been expanded with the Treaty of Lisbon, and under the current provisions of the Treaty on the Functioning of the European Union, the European Union is competent to develop a common policy on asylum (art. 77) as well as a common immigration policy, covering, among others, conditions for entry and residence, the rights of legally staying third country nationals, and measures to deal with illegal immigration (art. 79).

<sup>26</sup> See e.g. art. 3(4) Directive 2009/50.

<sup>27</sup> See e.g. European Pact on Immigration and Asylum, 2004.

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013440%202008%20INIT>.

<sup>28</sup> The Treaties refer to the efficient management of migration flows, the fair treatment of third country nationals and the prevention of illegal immigration (art 79). The Stockholm Programme, which enshrined the objectives of the EU immigration policy for the period 2010–2014 also touches upon solidarity and fair sharing of relevant responsibilities among the Member States, reaping the beneficial demographic effects of migration, and building synergies between migration and development. See Stockholm Programme [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010XG0504\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010XG0504(01)). On the other hand, on the emergencies in respect of migrants reaching the borders of Southern EU Member States through the Mediterranean Sea, see <http://frontex.europa.eu/news/assets-deployed-in-operation-triton-involved-in-saving-3-000-migrants-since-friday-xmtkwU>. Also see ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration’ COM (2015) 240 final.

When it comes to scouting for talents, however, distinct sovereign interests as well as their supranational projections seem to converge in a common direction. Convergence, when it comes to skilled migration policies, is not limited to the European context. Regardless of different background histories, states strategies to attract skilled migrants have evolved in similar directions in the last decade. All around the globe, states have come to emulate one another in introducing innovative tools for the recruitment of skilled migrants. Similar practices have yielded ‘new generation’ skilled migration policies. The term is used here to refer to two classes of policies aimed at attracting very specific groups of desirable contributors to a host state economy and job market: investor schemes and entrepreneur programmes.

Under investor schemes, a number of countries offer visas on a fast-track basis, as well as residence permits of varied durations, to high net-worth foreigners who commit to invest a qualifying amount of money in a business established in the relevant country, in bonds issued by its government or in ad hoc public interest funds.<sup>29</sup> Canada,<sup>30</sup> Australia, the United Kingdom, the Netherlands, Ireland, Spain and Portugal, among others, have introduced programmes of this type in recent years.<sup>31</sup> As mentioned above, the US has long offered investors a non-immigrant visa as well as an immigrant visa, which while belonging to a different family of policies, shares some features with the new generation investor visa. Some other countries have pushed favouring foreign investors as far as to provide for the immediate grant of a passport to qualifying applicants, without prior residence requirements.<sup>32</sup>

Entrepreneur programmes have similar features in terms of the facilitations they grant; however, they are aimed at a different class of desirable migrants. These programmes favour entrepreneurs who propose to establish new businesses in their host country, usually as start-

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<sup>29</sup> See e.g. UK Tier 1 (investor) visa, <https://www.gov.uk/tier-1-investor/overview>. Also see Ireland Immigrant Investor Programme <http://www.inis.gov.ie/en/INIS/Pages/New%20Programmes%20for%20Investors%20and%20Entrepreneurs>.

<sup>30</sup> The Canadian Federal Investor programme was however terminated in 2014.

<sup>31</sup> See J. Dzankic, ‘Investment-based citizenship and residence programmes in the EU’ *RSCAS/EUDO Working Paper* 2015/08 (2015).

<sup>32</sup> See e.g. Malta Individual Investor Programme, Legal Notice 47 of 2014, available at <http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf>. Cyprus has also enacted a citizenship by investment programme. See Scheme for Naturalization of Investors in Cyprus by Exception, Council of Ministers Decision of 19 March 2014, available at <http://www.moi.gov.cy/moi/moi.nsf/All/1562764E412F7B6DC2257B80005235CF>. J. Dzankic, ‘Investment-based citizenship and residence programmes in the EU’ (n 31).

ups,<sup>33</sup> and who demonstrate the availability of funding to support the project, an innovative idea and a viable business plan.<sup>34</sup> Chile, Canada, the United Kingdom, Ireland, Italy, the Netherlands and South Korea are a few examples of countries which have introduced start-up or entrepreneur visa policies in recent years.<sup>35</sup>

On the one hand, these novel strategies in immigration are part of a quest for economic growth through innovation in which several countries have become entangled.<sup>36</sup> Attracting talent is a fundamental component of relevant recipes for innovation.<sup>37</sup>

On the other hand, these new policies have prompted new strands of inquiry in the literature on skilled migration. The literature has been dominated for decades by economic debates questioning the relative merits of brain gain and brain drain arguments, and the contrast between the interests of countries of origin and of destination in the context of skilled migrants policies. Earlier arguments in this sense focused on whether the circulation of talent from low productivity to high productivity areas increased global wealth overall, or rather disproportionately disadvantaged the sending countries.<sup>38</sup> In the twenty-first century relevant

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<sup>33</sup> A start-up is defined as a 'temporary organization that searches for a scalable and repeatable new business model'. See Steve Blank, Bod Borf, *The Startup Owner's Manual, The Step-by-Step Guide for Building a Great Company* (K&S Ranch Inc. 2012), at 12–14.

<sup>34</sup> See e.g. UK Tier 1 (Entrepreneur) visa, <https://www.gov.uk/tier-1-entrepreneur/overview>; Italia Start-Up Visa [http://italiastartupvisa.mise.gov.it/pdf/linee\\_guida\\_ISV.pdf](http://italiastartupvisa.mise.gov.it/pdf/linee_guida_ISV.pdf).

<sup>35</sup> In the US the failed 2013 Border Security, Economic Opportunity and Immigration Modernization Act would have also introduced a start-up visa. For Chile, see <http://www.startupchile.org/about/team/>; for Canada, see <http://www.cic.gc.ca/english/immigrate/business/start-up/>; for Italy, see <http://italiastartupvisa.mise.gov.it/about.html>; for the United Kingdom, see UK Tier 1(Entrepreneur) visa, (n 34); for Ireland, see <http://www.inis.gov.ie/en/INIS/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf/Files/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf>; for the Netherlands, see <https://ind.nl/EN/business/Investor-self-employment/Start-up>; for South Korea, see <http://www.avcj.com/avcj/news/2280175/korea-to-grant-startup-visas-to-foreigners>.

<sup>36</sup> The one for innovation and talent has been referred to as a battle in which both countries and firms are involved. See Orly Lobel, *Talent Wants to be Free* (Yale University Press 2013), at 14. On the role of an economy based on innovation in saving jobs lost in current economic trends, see Steve Blank, 'Why the Lean Start-Up Changes Everything' *Harvard Business Review* (2013), at 8. For an alternative, more skeptical account of the enchantment with innovation based on SMEs, see Mariana Mazzucato, *The Economist*, February 2014 <http://www.economist.com/blogs/schumpeter/2014/02/invitation-mariana-mazzucato>.

<sup>37</sup> See Lobel (n 36), at 7 (referring to the 'modern dilemma of how to attract knowledge, intellectual property and human capital').

<sup>38</sup> The former was the argument of the internationalists while the latter was the position of the nationalists. See Andres Solimano, 'Causes and Consequences of Talent Mobility', in A. Solimano (ed.), *The International Mobility of Talent* (OUP 2008), 2–3. More generally on economic approaches to the brain gain versus brain drain debate see Walter Adams (ed.), *Brain Drain* (Macmillan 1968); Herbert Grubel, Anthony Scott, *The Brain Drain: Determinants, Measurements and Welfare Effects* (Wilfrid Laurier University Press 1977) (also questioning policy options to address the imbalances induced by skilled migration, such policies to include compensation schemes among governments, migration restrictions, policies to narrow income gaps); for a more recent study contrasting the perspectives of recipient countries and sending countries, see Tito Boeri (ed.), *Brain*

studies have rather focused on the economic potential of circular migration, as well as on the beneficial effect for sending countries of remittances, technology transfers and diaspora networks.<sup>39</sup>

With the appearance of new-generation skilled migration policies, the focus in the literature has in part shifted from economic analysis to questions on the legal and ethical implications of relevant policies.<sup>40</sup> On the one hand, the ‘race for talent’ underpinning these policies raises concerns at the prospects of traditional notions of citizenship.<sup>41</sup> On the other, it threatens to consolidate a distinction between the opportunities for the professional mobility of the most skilled and well-off and the disentanglement of low-skilled migrants.<sup>42</sup>

In particular, Ayelet Shachar, in examining states’ attempts to benefit from the reflected glory of promising Olympic athletes through rushed grants of citizenship, identifies issues of freedom, fairness and community in the background to the race for talent.<sup>43</sup> Singling out talented individuals for fast-track membership certainly serves their freedom to move well. However, in the case of Olympic athletes, this is arguably unfair to their countries of origin, which invested in training them.<sup>44</sup> The highest threat is, in any case, to the community: in the context of relevant policies, citizenship is no longer a proxy for membership but rather becomes a recruiting tool.<sup>45</sup> Market-oriented considerations – the argument goes – replace the collective identity and allegiance notions which used to be at the basis of the bond of citizenship. As a consequence, membership in the community is commodified and no longer based on a notion

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*Drain And Brain Gain: The Global Competition To Attract High Skilled Migrants* (OUP 2012).

<sup>39</sup> Ibid. 3. Also see Kristian Thorn-Lauritz and B. Holm-Nielsen, ‘International Mobility of Researchers and Scientists: Policy Options for Turning a Drain in a Gain’, in A. Solimano (ed.), *The International Mobility of Talent* (n 38) (for a case study on scientists and researchers, and of the factors that may prompt their return to countries of origin); Metka Hercog and Melissa Siegel, ‘Promoting Return and Circular Migration of the Highly Skilled’, UNU-Merit Working Paper, 15/2011, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1949705](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949705); Ajay Agrawal, Devesh Kapur, John McHale, ‘Brain Drain or Brain Bank? The Impact of Skilled Emigration on Poor-Country Innovation’ NBER Working Paper 14592, <http://www.nber.org/papers/w14592> (2008).

<sup>40</sup> See Ayelet Shachar, Ran Hirschl, ‘Recruiting Super Talent: the New World of Selective Migration Regimes’ 20 *Indiana J. Global Legal Studies* 71 (2013). Also see Koslowski (n 18), at 26.

<sup>41</sup> For a canvas of arguments see A. Shachar and R. Bauböck (eds.), ‘Should Citizenship be for Sale’ *EUI Working Paper, RSCAS* 2014/01.

<sup>42</sup> See Castles, ‘Understanding Global Migration: a Social Transformation Perspective’ 36 *J of Ethnic and Migration Studies* 1565 (2010), 1566–67.

<sup>43</sup> Ayelet Shachar, ‘Picking Winners: Olympic Citizenship and the Global Race for Talent’ 120 *Yale LJ* 2088 (2011), 2107–08.

<sup>44</sup> Ibid. 2121–9.

<sup>45</sup> Ibid. 2131.

of substantial attachment.<sup>46</sup> Other views offer more nuanced accounts of this commodification trend. According to Dora Kostakopoulou, for instance, the facilitations granted to the wealthy and talented are only a problem in the context of a rigid, ethnicised system of naturalisation,<sup>47</sup> while Peter Spiro, speaking specifically about ‘Olympic citizenship’, suggests that what is becoming commodified is residence rather than citizenship, and as long as the two levels are kept distinct, citizenship’s dilution as a notion is limited.<sup>48</sup>

While citizenship, as Spiro emphasises, is the key problem in the context of the above debate, these arguments are relevant also to immigration policies which extend facilitations of residence to a selected group of highly-skilled or otherwise highly-desirable migrants. In both citizenship and residence programmes, talented outsiders are being selected ultimately for membership purposes. Both types of programmes thus potentially contribute to the commodification of notions of membership which Shachar denounces.

The commodification argument presupposes an *a priori* question which the above arguments in part overlook and which can set the underpinning debate on evolving notions of membership into a broader theoretical perspective. This is the question of how new-generation skilled migration policies alter the role of immigration and nationality law in identifying potential community members. In quantitative terms these policies may appear insignificant – the figures for migrants taking advantage of these entry routes are small.<sup>49</sup> However, in terms of signalling what membership and ultimately citizenship are about, such new routes to immigration play a potentially important role.

The question in turn requires a preliminary reflection on the very role of immigration and nationality law in terms of membership.

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<sup>46</sup> Ibid. 2106. Also see Ayelet Shachar and Ran Hirschl, ‘Recruiting Super Talent’ (n 40), 90–92.

<sup>47</sup> Dora Kostakopoulou, ‘Olympic Citizenship and the (un)specialness of the national vest: rethinking the lines between sport and citizenship law’, *International Journal of the Law in Context* 7 (2014).

<sup>48</sup> Peter Spiro, ‘The End of Olympic Nationality’, in Kim Rubenstein (ed.) *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2012).

<sup>49</sup> For instance, the Italian start-up visa has been granted to only twelve applicants since its introduction in 2014, Italian Ministry of Economic Development Data, 2015. The UK granted approximately 1,200 Tier 1 investor visa in 2014; however, the number dropped drastically in 2015 after an increase in the funding requirement for eligibility. Only 102 visas were granted in this category in the first two quarters of 2015. See <http://www.immigrationbarrister.co.uk/Blog/investors/migration-data-reveals-substantial-fall-in-number-of-tier-1-investor-visas-granted.html>.

### 3. Immigration and citizenship law and the designation of community members

Immigration and nationality law serve different functions from a membership perspective. Immigration law sets the legal criteria for admission of foreigners to residence within the territorial boundaries of a state's legal and political community. Nationality law sets the legal criteria for recognition of a person, whether resident or not, as a full member of that same legal and political community. They both say something about how states select their members, and relatedly about the quality of being a member.

With regard to immigration law, a state's power to select new entrants is a corollary of the states' widely recognised claim to legitimate closure.<sup>50</sup> Joseph Carens, in acknowledging this power of selection, also underlines how certain categories of migrants have a heightened claim to entry, which conversely constrains a state's power of selection in their respect. This is the case for the family members of citizens and residents, as states have a moral, if not legal, duty towards those who are already members of the community, to protect family reunification. It is also the case for refugees and asylum seekers, in whose respect humanitarian considerations drive a moral duty of admission.<sup>51</sup> Beyond these categories, however, states are mostly free to select at their discretion.<sup>52</sup> The most common selection criteria in the 'discretionary' band of immigration law include secondary family relationships, language knowledge, other factors of social and economic integration, and the potential for economic contribution.<sup>53</sup>

Nationality law, beyond selecting who has a qualified claim to entry, identifies criteria for national belonging and translates these into rules for citizenship acquisition. These rules mostly rely on criteria which are proxies for affinity and allegiance.<sup>54</sup> Such criteria are taken for

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<sup>50</sup> D. Miller, 'Immigration: the Case for Limits', in A. Cohen and C. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Blackwell 2014). Also see J. Carens, 'Who Should Get in?'

<sup>51</sup> J. Carens, 'Who Should Get in?' at 96–99.

<sup>52</sup> Although some selection criteria would certainly be morally objectionable. See *ibid.* 104–106.

<sup>53</sup> *Ibid.* 106–110.

<sup>54</sup> R. Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' 75 *Fordham L Rev.* (2007), at 2414.

granted in the case of the vast majority of birth-right citizens<sup>55</sup> however, they become requirements needing proof when it comes to non-birth-right citizens. The power of selection which states exercise through nationality law is wielded in different ways and different directions, and it expresses concerns other than the ones underpinning immigration law.<sup>56</sup> Nationality requirements reflect different visions of the ‘nation’ and of the bonds of communal life. The concept of nation and the related meaning of nationality law are at the heart of a vast literature which goes beyond the scope of this article.<sup>57</sup> The discourse of membership and nationality law in this context can thus appear oversimplified. The limited claim here, however, is that there are instances in which the member-selection functions of immigration law and nationality law overlap, justifying a compounded analysis of their role with respect to membership.

There are at least three such instances of overlap between the functions of immigration law and of nationality law. First, the groups of potential members identified respectively through immigration law, and through nationality law, coincide when it comes to resident foreigners qualifying for naturalisation through residence-based criteria and *ius soli* rules. Second, the selection criteria drawn in each set of laws have become in part entangled in several jurisdictions. Relevant legislation in several Western countries has witnessed a flourishing, over the last decade, of integration requirements addressed, albeit in slightly different forms, both to immigrants aspiring to entry and residence, and to residents aspiring to naturalisation.<sup>58</sup> Finally, and most importantly for the arguments explored in this article, nationality law is used in the context of contemporary skilled migration policies, as the long arm of immigration law. It becomes an auxiliary instrument to attract the most desirable migrants, luring them through the prospect not only of residence rights, but of full-fledged nationality.<sup>59</sup>

Because of these instances of overlap, the boundary between the selective function of

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<sup>55</sup> For an argument on the inequality of birthright citizenship, see A. Shachar, *The Birthright Lottery – Citizenship and Global Inequality* (Harvard University Press 2009); for a fascinating historical account of the role of consent in the making of American federal citizenship, see J. Kettner, *The Development of American Citizenship, 1608–1870* (University of North Carolina Press 1978).

<sup>56</sup> For an example see the discourses surrounding the distinction between ‘*Italiani non regnicoli*’ and ‘non-Italian foreigners’ in the context of the post-unification Italian State. Sabina Donati, *A Political History of National Citizenship and Identity in Italy, 1861–1950* (Stanford University Press 2013).

<sup>57</sup> On the concept of nation see e.g. Ernest Gellner, *Nations and Nationalism* (Cornell University Press 1983); Benedict Anderson, *Imagined Communities* (Verso 1991); on the role of nationality law in this sense, see Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

<sup>58</sup> On the culturalisation of requirements for immigration in Europe see L. Orgad (n 6).

<sup>59</sup> See Malta Individual Investor Programme (n 3).

immigration and citizenship law has become blurred to some extent.<sup>60</sup> Ultimately, both sets of laws contribute to set the criteria according to which claims for entry and membership are assessed, thereby creating a pool of potential and actual, new members. Albeit with differences in focus, criteria for entry and membership set out in immigration and nationality law point in a similar direction: they base the assessment of claims for entry and membership in an evaluation of the likelihood that the aspirant member will fit in, integrate, and ultimately flourish and contribute to the recipient community.

In light of these considerations, whether new-generation skilled migration policies alter the traditional role of immigration and nationality law with respect to membership comes to depend on whether the way claims for residence and membership are assessed is changing in any consequential way through these policies. Two peculiarities of new-generation skilled migration policies deserve closer analysis in this respect. First, these policies take on a new approach in defining ‘desirable members’. Second, they carve out new roles for the states and their agents, in reaching out to and selecting these desirable members.

#### **4. A Closer Look at New-generation skilled Migration Policies**

##### **4.1 Legal Requirements for Entry – Talent as Output**

New-generation skilled migration policies seek a new genus of talent. In comparison to traditional policies, they take a novel approach to defining desirable entrants who deserve eased admission, and possibly naturalisation, and they correspondingly alter the focus of relevant legal requirements.<sup>61</sup>

Traditional skilled migration policies target human capital factors such as education and professional experience, as well as adaptability factors, such as language knowledge. These policies rely on employer sponsorship or on cooperation with trade unions and other labour organisations to identify within the broader spectrum of labour market skills, those for which there is a shortage in the local market, and to which migrant work could make a concrete

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<sup>60</sup> See Liav Orgad, ‘Naturalization, Public Culture and Civic Integration Requirements’, in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, Maarten Vink (eds.), *The Oxford Handbook of Citizenship* (OUP 2017).

<sup>61</sup> A differentiation among different types of talent for immigration policy purposes has already been attempted from an economics perspective. See Andres Solimano, ‘Causes and Consequences of Talent Mobility’ (n 38), 4 (distinguishing directly productive talent, academic talent, social and cultural talent).

contribution.<sup>62</sup> Resorting to migration policy to fill specific labour market gaps yielded, over the course of the last century, both European guest workers programmes and admission programmes targeted at specific professional profiles, such as nurses or care workers.<sup>63</sup>

New-generation skilled migration policies shift the focus from a targeted search for human capital factors to a quest for prestige, capital and innovation. Prestige is at the heart of the ‘Olympic’ citizenship models that Ayelet Shachar has carefully described in the context of her analysis of contemporary states’ races for talent.<sup>64</sup> A talented athlete brings glory to her adoptive community and thereby contributes to bolstering national narratives and images which several states are keen on reaffirming.<sup>65</sup> Investor visa and start-up visa schemes aim for more tangible contributions: respectively, capital and innovative ideas and the ability to translate them into revenue and jobs creation.

Investor schemes are addressed at high net-worth individuals who can further the national interest of the host State through the commitment of a significant amount of capital. The oldest among the programmes of this type are the US E-2 non-immigrant investor visa and the EB-5 immigrant visa. The former does not rely on fixed capital or investment figures. It is addressed to persons who have made, or are about to make, a ‘significant investment’ in a US business which they intend to develop or manage. The focus is therefore on the establishment of a viable business, through the commitment of material capital. The EB-5 is more specific in its requirements. It offers a green card to persons who contribute USD 1,000,000 into a new commercial enterprise and who create at least ten new jobs for US workers. Newer schemes beyond the US resemble the EB-5 in the level of specificity of their requirements, although they typically do not offer immediate permanent residence.<sup>66</sup> Instead, they include clear guidelines on capital availability requirements and on the nature and amount of investments required. The UK investor visa programme, for instance, requires an investment of at least GBP 2,000,000 in UK government bonds or into an active and operational UK company.<sup>67</sup> The Irish

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<sup>62</sup> See Koslowski, (n 18) (distinguishing three ideal types of skilled migration policy, human capital driven, demand driven, and corporatist).

<sup>63</sup> For an account of skilled migration policies targeting healthcare professionals and the debate on their effects, see M.A. Clemens, ‘What do we Know about Skilled Migration and Development’, MPI Policy Brief 3/2013. On the guest workers programme in Germany, see Douglas B. Klusmeyer, ‘Aliens, Immigrants and Citizens: the Politics of Inclusion in the Federal Republic of Germany’, 122 *Daedalus* 81 (1993).

<sup>64</sup> Ayelet Shachar, *Picking Winners* (n 43).

<sup>65</sup> *Ibid.*

<sup>66</sup> See US Citizens and Immigration Services, ‘About the EB-5 Visa’ (n 16).

<sup>67</sup> Increased in November 2014 from a previous threshold of GBP 1,000,000. The applicant investor needs to

Immigrant Investor Programme includes both a capital holding requirement (EUR 2,000,000) and a minimum investment requirement. In this latter respect the Irish programme offers a broader range of options in comparison to the UK programme. Aspiring visa holders' options include electing to invest EUR 1,000,000 into an Irish immigrant investor bond yielding no interest; to invest at least EUR 500,000 in one or more Irish companies, other than listed companies; to invest at least EUR 2,000,000 into a Real Estate Investment Trust; or to effect a philanthropic donation of at least EUR 500,000 to support a public interest project in the sports, culture, education, health or arts sectors.<sup>68</sup>

'Talent', intended here in a part-figured sense as the class of requirements warranting the desirability of a migrant in skilled migration policy, is thus defined, in the context of these programmes, as a combination of wealth and ability to commit capital to a project of interest of the host state. Wealth is treated in some programmes as a proxy for business acumen or experience. For instance, the US E-2 visa, while requiring a significant investment, seems to focus on the actual establishment and conduct of a business in the US. However, the most salient requirement in these programmes is the candidate's ability to commit capital. This is the immediate benefit that the visa holder brings to the host country.

The focus of entry requirements in entrepreneur programmes suggests a differently oriented definition of 'talent': relevant schemes do not look for capital *per se*, but rather for innovative business ideas whose viability is warranted by the willingness of qualifying investors to commit capital towards their realisation. Relevant programmes are similar in their basic structure: applicants need to submit a business plan to establish or take over a business in the host country; they also need to provide evidence that they have secured a minimum threshold of funding for their business project through qualified investors, such as angel investors, venture capital funds registered with relevant financial authorities or government-driven seed competitions.<sup>69</sup> Additional requirements, such as residence conditions, language knowledge and income requirements, differ from country to country, as do the precise requirements as to the nature of the funds the entrepreneurs must have secured. The Canadian start-up visa brought out in 2013,

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demonstrate that the funds are held in a regulated financial institution and can be transferred to the United Kingdom.

<sup>68</sup> Further options include an investment of EUR 500,000 into a qualified investment fund and a mixed investment in an immigrant investor bond and in real estate.

<sup>69</sup> See e.g. Irish start-up visa, see <http://www.inis.gov.ie/en/INIS/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf/Files/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf>.

for instance, rewards entrepreneurs with permanent residence if they secure either CAD 75,000 from an angel investor or CAD 200,000 from an approved venture capital fund participating in the programme.<sup>70</sup> Ireland offers a more flexible formula in terms of the origin of the funds that the applicant entrepreneur must have available. These have to be a minimum of EUR 75,000 and may comprise a mixture of own resources, venture capital and angel investors' funding, business loans and funding provided by Irish state agencies. The applicant also needs to present a convincing business plan for the creation of a high potential start-up. In this latter respect the Irish programme is particularly exacting: a high potential start-up is defined as a business which introduces an innovative service or product and which has the potential to generate at least EUR 1,000,000 in revenues and ten new jobs within three to four years of creation.<sup>71</sup> The UK, which offers an entrepreneur visa as part of its points-based immigration system to persons who intend to establish or take over a business in the UK,<sup>72</sup> makes a marked distinction between applicants who are funded by qualified investors and applicants who rely on own funding. The former are required to have secured GBP 50,000, the latter must instead show the availability of no less than GBP 200,000.<sup>73</sup> In some countries selection for admission through an entrepreneur programme requires, in addition to a visa and residence permit, access to incubation and acceleration schemes, whereby qualified institutions host and mentor the start-up entrepreneur/team during the initial phase of their project. This is the case for instance in Chile, which since 2010 has been organising and running an annual competition to identify promising business projects, to which it awards an initial grant of USD 40,000 and the opportunity to participate in a seven-month acceleration and incubation programme in Chile.<sup>74</sup>

While availability of capital is thus also key to entrepreneur programmes, it plays a different role in these programmes compared to investor programmes. The ability to secure qualified venture or angel investor funding may be a proxy for the validity of the business idea that the entrepreneur advances, and the availability of the entrepreneur's own funding also works as a guarantee of his ability to pursue the relevant idea concretely. It is the latter idea, however, that is at the basis of the notion of talent underpinning these policies. These schemes scout for

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<sup>70</sup> See <http://www.cic.gc.ca/english/immigrate/business/start-up/>.

<sup>71</sup> See <http://www.inis.gov.ie/en/INIS/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf/Files/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf>

<sup>72</sup> See UK Tier 1 (Entrepreneur) visa <https://www.gov.uk/tier-1-entrepreneur/overview>. Also see <https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-entrepreneur>.

<sup>73</sup> Ibid.

<sup>74</sup> See <http://www.startupchile.org/> .

innovative and creative entrepreneurs whose business ideas can translate into job-creating and growth-fostering businesses.<sup>75</sup> As a corollary, they reward other skills the applicants may have, such as business judgment, fundraising and networking capabilities, however tangential these latter elements may seem to the main objective of capturing good ideas. The search for capital and innovative ideas in new-generation skilled migration policies suggests that notions of talent underpinning these policies have a different focus compared to those underpinning traditional skilled migration policies. The quest for human capital factors betrayed in traditional policies a search for entrants with the ability to integrate in the host community and succeed as members.<sup>76</sup> The notions of talent in the relevant policies focused, in other words, on the input that a skilled migrant could bring to the host community, and which warranted his ability to fit in.

Traces of talent as input can also be found in new-generation skilled migration policies. While investment programmes often forgo the requirements of language knowledge or minimum income, entrepreneur programmes tend to associate specific programme requirements to more traditional ones. Applicants for the Canadian start-up visa, for instance, are required to prove language knowledge, the availability of sufficient resources and at least one year of prior professional experience.<sup>77</sup> Similarly, applicants to the UK entrepreneur visa need to prove their knowledge of English and their ability to maintain themselves in the UK.<sup>78</sup>

The focus of the definition of talent in new-generation skilled migration policies, however, does not fall on input elements that the immigrant feeds into the host country's economy and society, such as prior education, professional experience, or language knowledge, but rather on a precise output that the immigrant can produce in the host country:<sup>79</sup> the making of a qualifying investment, in the case of investment programmes; or its realisation, to ensure that the applicants deliver on their promised output. For instance, the UK investor programme requires applicants to provide evidence that the funds they are committing are capable of being

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<sup>75</sup> See Steve Blank, 'Why the Lean Start-Up Changes Everything' (n 36), at 8.

<sup>76</sup> Adaptability is for instance an explicit requirement in the context of the Canadian point system. See Canada Country Profile, above (n 12).

<sup>77</sup> See <http://www.cic.gc.ca/english/immigrate/business/start-up/>.

<sup>78</sup> See UK Tier 1 (Entrepreneur) visa <https://www.gov.uk/tier-1-entrepreneur/overview>. Also see <https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-entrepreneur>.

<sup>79</sup> Requirements such as prior education and professional experience may be considered proxies for an output to be produced in the host country, such as economic success or more simply employment in the host country. However, per se, they are input elements, they are assets that the immigrant brings with him or her and that are likely to help in producing an economic output.

transferred to the UK.<sup>80</sup> Entrepreneur programmes require not only evidence of the availability of funding to pursue an entrepreneurial project, but also a business plan which is reviewed by committees of qualified experts.<sup>81</sup>

Talent intended as output drives a part-reconfiguration and reinterpretation of recurring legal requirements in immigration and nationality law,<sup>82</sup> and screening and selecting desirable migrants on this basis leads in turn states and their agents to take on new roles in the context of the design, management and implementation of immigration law.

## 4.2 The state as headhunter in immigration law

While in the context of skilled migration policies, states have always to some extent looked out for desirable entrants,<sup>83</sup> in the context of new-generation skilled migration policies, the role of the state changes in at least three respects: first, in how immigration laws are designed and written; second, in the management and application of these laws; and finally, with respect to the branches of public authority and external actors involved in the process of selecting desirable immigrants.

In the first respect, on the theory that states have a legitimate interest in closure and are thus entitled to police their borders, states have long designed laws to manage the admission and exclusion of aliens.<sup>84</sup> As considered earlier in this article,<sup>85</sup> there are some similarities in the

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<sup>80</sup>See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/477982/T1\\_\\_I\\_Guidance\\_11\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477982/T1__I_Guidance_11_2015.pdf), 10–11.

<sup>81</sup> See e.g. *Italia Start-Up Visa*, [http://italiastartupvisa.mise.gov.it/pdf/linee\\_guida\\_ISV.pdf](http://italiastartupvisa.mise.gov.it/pdf/linee_guida_ISV.pdf).

<sup>82</sup> The most evident is the dispensing with, or reinterpretation in a flexible direction, of residence requirements which typically characterise both immigration and naturalisation laws.

<sup>83</sup> The literature has amply considered the consequences for sending countries in this respect. See e.g. Ajay Agrawal, Devesh Kapur, John McHale, ‘Brain Drain or Brain Bank? The Impact of Skilled Emigration on Poor-Country Innovation’, *National Bureau of Economic Research Working Paper 14592*, 2008, <http://www.nber.org/papers/w14592>. However, with reference to the policies under consideration here, investor visas and start-up visas, the consequences for sending countries initially appear slightly less dire than in traditional debates on ‘creaming’ of highly-needed skills, such as healthcare professionals.

<sup>84</sup> For an overview of the history of early regulation in this sense in US States, see Gerald Neuman, *The Lost Century of American Immigration Law (1776–1875)* 93 *Columbia L Rev* 1833 (1993). Also see A. Aleinikoff, ‘International Legal Norms and Migration: a Report’, in T.A. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms* (T.M.C. Asser Press 2003), 20; David A. Martin, ‘The Authority and Responsibility of States’, in *ibid.*, 31–33; James A.R. Nafziger, ‘The General Admission of Aliens under International Law’, 77 *AJIL* (1983), 817–822. Also see C. Wellman, Cole, *Debating the Ethics of Immigration – Is there a Right to Exclude?* (OUP 2011).

<sup>85</sup> Section 2 above.

types of bonds and qualifications that requirements for admission and for naturalisation take into account. However, immigration and citizenship laws tend to be an expression of a state's sovereign power of self-determination.<sup>86</sup> The rules in these laws and the rationales inspiring them, vary in accordance with a state's external commitments and relations,<sup>87</sup> as well as its internal political and economic circumstances.<sup>88</sup> In the context of new-generation skilled migration policies, states rather appear to monitor and emulate one another in enacting relevant regulatory requirements.<sup>89</sup> This results in a measure of international convergence in the features of relevant policies and of the legal reforms which they feed, regardless of background histories of immigration regulation, on the one hand.<sup>90</sup> On the other hand, it provides a novel example of law-making in a transnational space.<sup>91</sup>

Beyond law-making, the role of the state changes with regard to the management and application of immigration and citizenship law, in conjunction with the new-generation policies. In the frame of traditional immigration and citizenship laws, the state mostly acts as a passive 'border guard'. It sets a quota for the legal entrants it is willing to admit in a given period, and it sets the criteria which qualify an applicant for admission.<sup>92</sup> Most states make entry and settlement of certain desirable immigrants easier than entry and settlement of the generality of immigrants. This is most true with regard to classes of highly talented migrants, such as researchers, artists and sports persons. It is also true of the groups of low-skilled migrants needed to fill specific gaps in the host State's labour market, as was the case of guest

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<sup>86</sup> See Michael Walzer, *Spheres of Justice* (Basic Books 1983).

<sup>87</sup> British law for instance up until 1962 allowed the unrestricted entry and right of abode of Commonwealth citizens; see Rieko Karatani, *Defining British Citizenship – Empire, Commonwealth and Modern Britain* (Frank Cass 2003), 145–165. Along similar lines, Italian nationality law prescribes eased residence requirements for the naturalization of nationals of EU Member States. See art. 9(d) Legge No. 91 of 1992 'Nuove Norme sulla Cittadinanza'.

<sup>88</sup> We are reminded for instance of guest-worker programmes in post-war Germany. For an overview, see S. Castles, Hein de Haas and Mark J. Miller, *The Age of Migration' – International Population Movements in the Modern World* (Palgrave 2014), 107.

<sup>89</sup> See Shachar and Hirschl (n 40).

<sup>90</sup> An example on point are Canada and Italy, whose start-up visa policies are remarkably similar in spite of a widely different history of immigration and immigration regulation.

<sup>91</sup> See Alexander Aleinikoff, 'Transnational Spaces: Norms and Legitimacy', in 33 *Yale International Law Journal* 479 (2008), 485 (on law making in a transnational space); also see Kaarlo Tuori 'On Legal Hybrids and Perspectivism', in M. Maduro, Suvi Sankari and Kaarlo Tuori (eds.), *Transnational Law – Rethinking European Law and Legal Thinking* (CUP 2014), 19 (on transnational norm setting).

<sup>92</sup> Integration criteria, for instance, have become a feature of legal immigration policies in several countries in the last decade or so. See L. Orgad, (n 6). Also see, F. Strumia 'Walking the Blurry Line in EU Immigration: European Citizenship and its Democratic Bridge between the Member States' Power to Exclude and the Third Country Nationals' Right to Belong', *Jean Monnet Working Papers* 2015/15, <http://jeanmonnetprogram.org/wp-content/uploads/JMWP-15-Strumia.pdf>.

worker programmes in Europe and North America in the latter half of the twentieth century.<sup>93</sup> In any case, in traditional immigration policies, the state typically ‘waits at the door’ for somebody to make a claim to enter, and then decides, ultimately at its discretion, whether to grant leave. In new-generation policies the state proactively recruits the immigrants it wants, instead.

It can be argued that the state also acted as a recruiter in the context of twentieth-century guest worker programmes. However, there are some important differences. States in these programmes offered places to classes of workers who were both needed in the host country and in need of migrating to escape unemployment, rather than selecting desirable migrants individually. Guest worker programmes relied on bilateral agreements between the sending and recipient country, or in any case the country of destination tended to be an obvious choice for the migrant for geographical or historical reasons.<sup>94</sup> As a result, host states could *de facto* set the terms of the guest worker’s status, because they were meeting a demand for emigration and because they were not competing with a wide range of other possible destinations. These terms were often rather restrictive, binding the guest worker to a job, limiting rights to family reunification and overall drawing a sharp distinction between conditions for citizens and for guest workers.<sup>95</sup> In new-generation skilled migration policies, host states compete with other states for the talents they are seeking to recruit, and they need to convince the prospective migrant of the desirability of the opportunities they offer. In this sense, they act in many ways as headhunters.

Like headhunters, the state and its agents invite applications by actively promoting their ‘packages’. Government guidelines for relevant programmes adopt the tone of marketing materials. According to the guidelines for the Irish Entrepreneur Programme, for instance: Ireland is a small country that has re-invented itself over the last forty years through the combined force of sheer determination and growing, vibrant ambition. Its young, highly educated workforce has seized the opportunity provided by Foreign Direct Investment and continues to transform Ireland into a dynamic, knowledge based economy for the 21st century.<sup>96</sup>

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<sup>93</sup> For an overview, see Castles et al. (n 88), 220–221.

<sup>94</sup> *Ibid.*, 104–108.

<sup>95</sup> *Ibid.*

<sup>96</sup> <http://www.inis.gov.ie/en/INIS/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf/Files/Guidelines%20for%20Start->

The government website on the Canadian start-up visa is even more explicit. Titled ‘Canada Wants Entrepreneurs!’, it poses a crucial question and suggests an answer: ‘Do you want to build a dynamic company that can compete on a global scale? It starts in Canada’. A list of reasons why Canada should be considered the best place to build a business follows.<sup>97</sup>

Government marketing is even more evident in the context of citizenship and residence by investment programmes. A Maltese governmental website, for instance, advertises Malta’s Individual Investor Programme (IIP) in the following terms:

Malta offers great opportunities to applicants of the IIP and their families, including a high standard of living, a stable political system and a robust economy. The IIP is your chance to be part of Malta’s success story.<sup>98</sup>

Some governments have even outsourced the marketing and design of their programmes to private agents. This is the case, for instance of St. Kitts and Nevis, Grenada and Dominica, which rely on a legal firm to this end.<sup>99</sup>

Beyond the marketing aspect, states also act like headhunters in selecting new-generation skilled migrants. They channel the applications to dedicated screening committees and commissions which perform a pre-selection function. This is the same function that headhunters play in support of the recruitment arms of companies and multinationals. The selected applicants are then fast-tracked through regular admission and background check procedures.

This pre-selection function introduces the third respect in which the state’s role changes in the context of new-generation skilled migration policies: new classes of actors intervene in the process of admission and exclusion of migrants. New actors include branches of government which are not traditionally concerned with the regulation of immigration. For instance, the

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up%20Entrepreneur%20Programme.pdf.

<sup>97</sup> <http://www.cic.gc.ca/english/resources/publications/entrepreneurs.asp>.

<sup>98</sup> The website also specifies that this has been the first citizenship programme in the European Union to be recognized by the European Commission. See <http://iip.gov.mt/> (accessed 30 March 2016).

<sup>99</sup> See CS Global Partners, available at <http://csglobalpartners.com/government-advisory-practice/> (last accessed 19 March 2016).

Italian start-up visa is managed by the Ministry for Economic Development, while other visas are traditionally a competence of the Ministry for Foreign Affairs.<sup>100</sup> They also include *ad hoc* committees of technical experts tasked with screening and selecting applications for relevant programmes. In Chile, while the start-up programme is officially run by the government, a dedicated start-up Chile team has been assembled to manage various aspects of the programme, from launching the calls, to selecting participants, to hosting and providing incubation services for relevant start-ups.<sup>101</sup> In Italy, ministerial representatives coordinate an *ad hoc* committee of national experts tasked with selecting promising entrepreneurs for admission to the country;<sup>102</sup> similarly, in Ireland an Evaluation Committee makes recommendation to the Minister for Justice and Equality on promising start-up projects that should be rewarded with a visa.<sup>103</sup>

States also outsource various aspects of the design and management of relevant programmes to private advisors. This has given rise to a new business field. A few competing global firms specialised in advisory services on business and investment visas, as well as investment citizenship, have rapidly occupied the market in this respect.<sup>104</sup>

Through these novel state roles and outsourced functions, and through the redefinition of talent in skilled migration policies, criteria and processes for assessing new entrants' claims for residence and membership change at least in part. The regulation of immigration, and relatedly of citizenship, begins to follow two distinct paths.

## **5. Membership implications: from new-generation skilled migrants to lighter citizens**

### **5.1. A dual path for immigration and citizenship regulation**

With the advent of new-generation skilled migration policies, and the above described transformations that these bring about, the traditional model of immigration regulation, where

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<sup>100</sup> See *Italia Start Up Visa Guidelines*, [http://italiastartupvisa.mise.gov.it/pdf/linee\\_guida\\_ISV.pdf](http://italiastartupvisa.mise.gov.it/pdf/linee_guida_ISV.pdf). Also see Italian Immigration Act, D. Lgs 286/1998.

<sup>101</sup> See <http://www.startupchile.org/about/team/>.

<sup>102</sup> See *Italia Start Up Visa Guidelines*, [http://italiastartupvisa.mise.gov.it/pdf/linee\\_guida\\_ISV.pdf](http://italiastartupvisa.mise.gov.it/pdf/linee_guida_ISV.pdf).

<sup>103</sup> See <http://www.inis.gov.ie/en/INIS/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf/Files/Guidelines%20for%20Start-up%20Entrepreneur%20Programme.pdf>.

<sup>104</sup> See e.g. CL Global Partners (n 64). Henley and Partners, <https://www.henleyglobal.com/>.

the state acts as a border guard and focuses on the control of admission, comes to be flanked by a novel model. In this latter model, the state acts as a recruiter and focuses on selecting desirable migrants. Whilst the border guard state screens applicants for an input, whether in terms of skills or of family connections, the recruiter state screens them for an output. The bifurcation in the regulation of immigration, and relatedly citizenship, begins here.

The distinction between these two different tracks of immigration regulation is not entirely new. The role of the state in international migration has been characterised in the twentieth and twenty-first centuries by a quest for control.<sup>105</sup> This has resulted in many cases in rules attracting the highly skilled and contextually restricting the entry of the low skilled.<sup>106</sup> Relatedly, it has been observed that the dichotomy between open and closed borders, long discussed in the literature on international migration,<sup>107</sup> has lost traction as most states adopt a dual approach to the management of their borders, both closing and selectively opening them.<sup>108</sup>

This dual approach is however getting more polarised. This can be observed from several different perspectives. From a first discursive and practical perspective, the narrative and practice of attraction and recruitment of desirable migrants stands in stark contrast with the discourse of repression which accompanies the treatment of irregular migration. Government policies in response to the threat of irregular migration vary from the erection of physical anti-immigrant walls along borders (as considered with respect to the border between Hungary and Serbia);<sup>109</sup> to the deployment of fences and metal wires, as in Calais for the purpose of discouraging asylum seekers from entering the Channel tunnel between France and England;<sup>110</sup> to pushing back at boatloads of asylum seekers, as in Thailand, Malaysia and Indonesia with respect to migrant boats from Myanmar;<sup>111</sup> and to the revision of the role and status of border control forces, as in Australia, where in July 2015 the government rebranded the Immigration and Custom agencies as a paramilitary Border Force.<sup>112</sup>

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<sup>105</sup> Castles et al. (n 88), 238

<sup>106</sup> Ibid.

<sup>107</sup> See e.g. Miller (n 50); Joseph Carens, *The Ethics of Immigration* (OUP 2013).

<sup>108</sup> Shachar and Hirschl (n 40), 100–101.

<sup>109</sup> See <http://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia>.

<sup>110</sup> See <http://www.bbc.co.uk/news/uk-33880326>.

<sup>111</sup> See <http://www.reuters.com/article/2015/05/15/us-asia-migrants-boat-idUSKBN0O008S20150515>.

<sup>112</sup> See <http://www.news.com.au/travel/travel-updates/border-force-what-is-it-and-why-do-we-need-it/story-e6frfq80-1227430512610>.

From a second regulatory perspective, the dual approach no longer finds expression simply in the distinction between the treatment of the claims for entry of the high and low-skilled. It is rather reflected in the hardening of two different regulatory trajectories. A first trajectory continues and consolidates the rationale of control which has traditionally informed immigration regulation. On the one hand, even for skilled migrants in the traditional track, the trend is towards the introduction of more exacting requirements for entry, as well as more thorough screening and admission processes. On the other hand, at least in Europe, immigration regulation has become increasingly culturalised.<sup>113</sup> Integration requirements have become a common feature of the legislation on immigration in a large number of European states. In some countries, the relevant requirements take the form of an ‘integration agreement’ that the immigrant is required to sign with the host state upon receiving a residence permit.<sup>114</sup> Failure to fulfil the terms of the integration agreement may lead to revocation of the residence permit and ultimately to expulsion. Other countries have even introduced ‘integration from abroad’ programmes, in which prospective entrants are required to attend courses and take an integration test at the diplomatic representation of the prospective host country. This is the case, for instance, in the Netherlands, where the grant of a visa and residence permit for several categories of immigrants is conditional on successful completion of the relevant integration programme.<sup>115</sup> Beyond the first admission of an immigrant, integration requirements are also a key component in various countries of the path to permanent settlement and to citizenship. The United Kingdom, for instance, administers a ‘life in the UK test’ to applicants for ‘settlement’ or for citizenship.<sup>116</sup> The Italian Council of State has repeatedly emphasised that the socioeconomic integration of the applicant is a fundamental element in the discretionary scrutiny of the administrative authorities tasked with deciding on the grant of Italian

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<sup>113</sup> Orgad (n 6); also see R. van Oers, E. Ersbøll and D. Kostakopoulou (eds.), *A Re-definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff, 2010).

<sup>114</sup> This is the case for instance in France; see arts. 311–19 *Code de l’entrée et du séjour des étrangers et du droit d’asyle*, available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158&dateTexte=20160525>; in Italy, see art. 4-bis Italian Immigration Act (n 44); and in Luxembourg, see *Loi du 16 décembre 2008 concernant l’accueil et l’intégration des étrangers au Grand-Duché de Luxembourg*, available at <http://eli.legilux.public.lu/eli/etat/leg/loi/2008/12/16/n5>; Règlement grand-ducal du 2 septembre 2011 fixant les conditions d’application et modalités d’exécution relatives au contrat d’accueil et d’intégration, available at <http://eli.legilux.public.lu/eli/etat/leg/rgd/2011/09/02/n5>.

<sup>115</sup> See *Wet Inburgering Buitenland*, 15 March 2006, available at <http://wetten.overheid.nl/BWBR0020611/2014-03-29>; also see Dutch Immigration and Naturalisation Service, Civic Integration, <https://ind.nl/EN/individuals/residence-wizard/other-information/civic-integration>.

<sup>116</sup> See <https://www.gov.uk/life-in-the-uk-test/book-life-in-uk-test>.

citizenship.<sup>117</sup> In a milder form, an idea of subscription to and adherence to the cultural and constitutional values of the host country is also at the basis of the oaths of loyalty which surmount the naturalisation process in several countries, *in primis* the United States.<sup>118</sup> The first trajectory to admission and ultimately to membership thus testifies to a state's efforts to exercise some sort of 'cultural' control in assessing claims for entry and membership.

A second path is the one illustrated by new-generation skilled migration policies. The claims for entry and membership of talented migrants in the relevant categories are typically pre-screened and then fast-tracked through the usual checks and procedures. For instance, applicants for the Italian start-up visa enjoy – once their application has been approved by the relevant ministerial committee – several facilitations in the admissions procedure.<sup>119</sup> The way the Italian norm is drafted suggests that there is no exemption for start-up visa holders from the requirement to sign an integration agreement. However, the emphasis in this and other programmes is not on the integration of the entrant. On the contrary, holders of relevant visas are exempted from the requirements and procedural elements which contribute in traditional immigration policies to warranting integration. In Canada, for instance, the start-up visa procedure bypasses the points system which characterises several other routes to permanent residence, and which relies on input elements partly representing a proxy for the immigrant's ability to integrate. Furthermore, all the programmes which grant citizenship directly exempt qualifying applicants from durational residence requirements, which in traditional naturalisation law represent the main guarantee of integration. Accommodating the claims for membership of migrants which promise a defined output thus becomes a leading characteristic of immigration regulation in this path.

A possible explanation for this diversification in the regulation of immigration and access to citizenship relates to the nature of the powers that relevant state legislation ultimately expresses. Controlling borders and selecting entrants is the ultimate manifestation of a state's

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<sup>117</sup> See e.g. *Consiglio di Stato* (Italian Council of State), Judgment No. 3006/2011 of 20 May 2011, available at <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=EYYV6ADYIO7GVOXTUZXQQSEVWI&q=>.

<sup>118</sup> For an overview see Francesca Strumia, *Supranational Citizenship and the Challenge of Diversity – Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff 2013), 53–63.

<sup>119</sup> For instance, under the Italian start-up visa procedure, the committee screening applications is also tasked with obtaining a police certificate of no impediment on behalf of the applicant, a document that an applicant would have to obtain directly from the police under the normal procedure. See *Italia Start-Up Visa Guidelines*, [http://italiastartupvisa.mise.gov.it/pdf/linee\\_guida\\_ISV.pdf](http://italiastartupvisa.mise.gov.it/pdf/linee_guida_ISV.pdf).

sovereignty.<sup>120</sup> This sovereignty is limited on the one hand by the states' moral and legal obligations to admit migrants for humanitarian reasons;<sup>121</sup> on the other hand, it is constrained by obligations in the context of international partnership and cooperation agreements.<sup>122</sup> These sets of obligations erode the state's power to define the perimeter of its community of members. States therefore channel their sovereignty into the grey area between these two sets of obligations, regulating admission and exclusion as the signifier of control.<sup>123</sup> The first path in immigration and citizenship regulation can be seen as a manifestation of this sovereign resilience. The second path is rather the result of the state working as a transnational actor and competing in the global regulatory arena to attract investment, innovation and talent to its community.

Through new-generation skilled migration policies, states ultimately provide an active stir to the pool of potential members that they otherwise passively manage through the screening of economic, family and humanitarian migration, and through the repression of irregular migration. This double trajectory in the regulation of immigration and citizenship, and consequently in how claims for admission and inclusion are assessed, is reflected into a dual-track membership model.

## **5.2. Dual-track membership**

A first membership track results from the first regulatory path. It is addressed to the 'standard' entrants, such as labour migrants and 'old-generation' skilled migrants. As examined in the previous section, these classes of entrants have to comply with legal requirements – first to be admitted, and then settle or qualify for citizenship – ranging from completion of integration courses, to passing citizenship tests and to outright assimilation requirements. The membership status they are asked to earn this way is a heavy, hybrid kind of cultural citizenship. This citizenship to some extent represents the third millennium version of cultural-ethnic citizenship.<sup>124</sup> By imposing relevant requirements on new entrants, states broadcast such

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<sup>120</sup> See Michael Walzer, *Spheres of Justice* (n 89), 61.

<sup>121</sup> J. Carens, 'Who Should Get in? The Ethics of Immigration Admissions', 17 *Ethics and International Affairs* (2003).

<sup>122</sup> It is the case for instance of the provisions on free movement of persons in the European Union treaties.

<sup>123</sup> The argument was introduced and debated at the conference 'Unravelling the Talent Tale', Sheffield University School of Law, 15 September 2015  
[http://www.shef.ac.uk/polopoly\\_fs/1.475888!/file/Draftprogramme22June2015.pdf](http://www.shef.ac.uk/polopoly_fs/1.475888!/file/Draftprogramme22June2015.pdf).

<sup>124</sup> For a distinction between the German and French models of access to citizenship in this sense see R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

cultural citizenship as a signpost of their bounded identity. The relevant citizenship is earned through marked integration processes, and it is lost through dis-allegiance.<sup>125</sup>

A second membership track is the one addressed to the new-generation highly skilled migrants. To them, states are willing to make a lighter-touch version of citizenship available, in exchange for talent ‘as output’, with discounts to the general integration requirements, or simply for a monetary price.<sup>126</sup> This second track of citizenship is obviously for clear integration and allegiance requirements. Its holders become stakeholders of a novel kind in the host community. Rainer Bauböck’s theory of stakeholder citizenship suggests that ‘individuals whose circumstances of life link their future well-being to the flourishing of a particular polity’ should be considered ‘stakeholders’.<sup>127</sup> This theory has been elaborated in a different context. It has a normative focus and aims at testing the claims for political participation of external citizens. However, Bauböck’s stakeholder definition may help here to assess more descriptively how the claims for membership of new-generation skilled migrants compare to those of traditional community members. Is the future wellbeing of new-generation skilled migrants sufficiently linked to the flourishing of their host polity to qualify them as members? Questions on the evolving nature of membership, and its potential commodification, revolve in part around the answer to this question.

The future wellbeing of new-generation skilled migrants is tied to that of their host polity for reasons different to those of traditional migrants and birth-right members. New-generation high skilled visas may attract immigrants who plan to be only half-invested community members, and for whom residence in a host country is a temporary arrangement rather than a life commitment. This does not necessarily deny, however, that investment visa holders and start-up visa holders may be stakeholders in their host countries. The former will care for the common good of their country of residence at least to the extent that this is tied to return on their investment.<sup>128</sup> The latter will care about nurturing their business and making it profitable.

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<sup>125</sup> See e.g. s. 66 UK Immigration Act 2014. Also see Craig Forcese, ‘A Tale of Two Citizenships: Citizenship Revocation for Traitors and Terrorists’ 39 (2) *Queen’s Law Journal* (2014), 551.

<sup>126</sup> S. Wallace Goodman, ‘Controlling Immigration through Language and Country Knowledge Requirements’ 34 *West European Politics* (2011), 235–255 (for an argument that integration requirements are in any case a tool of selective exclusion).

<sup>127</sup> See R. Bauböck, ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’ 75 *Fordham L Rev.* (2007), 2422; Rainer Bauböck, ‘Towards a Political Theory of Migrant Transnationalism’ 37 *Int’l Migration Rev.* 700 (2003), at 713.

<sup>128</sup> See R. Magni-Berton, ‘Citizenship for those who invest into the future of the state is not wrong, the price is the problem’ in ‘Should Citizenship be for Sale’ (n 41) (for an argument in the sense that investment into a host

This in turn will require that they develop networks in the local business community. Start-up visa holders will also develop concrete links through benefiting from incubation and acceleration programmes in the host country.<sup>129</sup> In addition, whether the concrete management of a start-up requires actual residence in the host country on the part of the founding entrepreneur or not, there is evidence that novel kinds of communities develop within start-up ecosystems: not only proper innovation hubs as seen in California or on the US East Coast,<sup>130</sup> but also networks of entrepreneurs willing to share experiences and mentor new venturers voluntarily.<sup>131</sup>

Migrants following the first membership track are, like birth-right members, stakeholders by virtue of personal, family and identity links which qualify their interest in the flourishing of their polity and bind their destiny to the polity's. New-generation highly skilled migrants are instead stakeholders by virtue of their seeking a return on their investment, of their endeavour to realise their innovative idea in the host country, and of their engagement with local networks of entrepreneurs, business angels and the like. The latter kinds of connections may be thinner than the membership links which grew through traditional immigration experiences. They are links nonetheless, perhaps of the kind that substantiates the lightened citizenship that Christian Joppke has most forcefully described.<sup>132</sup> These light citizens that new-generation skilled migration policies produce represent a novel group of cosmopolitan high-flyers which Adrian Favell, speaking with regard to intra-EU migrants in the first decade of the new millennium, has described as 'Eurostars'.<sup>133</sup> New-generation skilled migration policies perpetuate and enlarge, in this sense, a trend that free movement under the umbrella of European citizenship had inaugurated. Favell's Eurostars, other than the new generation highly skilled migrants, do not bring a precise output to their host EU country. As Favell depicts it, these are the highly educated, polyglot professionals, who populate the service sectors of European capitals.<sup>134</sup> The

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country makes the investor a stockholder in the relevant country).

<sup>129</sup> The Italian Start-Up Visa specifically provides for an incubator-driven application process for the start-up visa. See [http://italiastartupvisa.mise.gov.it/pdf/linee\\_guida\\_ISV.pdf](http://italiastartupvisa.mise.gov.it/pdf/linee_guida_ISV.pdf). The Chilean programme also provides an example in this sense.

<sup>130</sup> For instance Silicon Valley and Route 128 in Massachusetts. See 'To Fly, to Fall, to Fly Again' *The Economist* (25 July 2015); also see Orly Lobel, 'Talent Wants to Be Free' (n 36).

<sup>131</sup> See e.g. <http://www.startupbritain.org/>.

<sup>132</sup> 'a citizenship that is easy to access, whose rights do not go much beyond the rights that many non-citizens already enjoy, and whose identity is thin and procedural, incapable of sharply setting apart one nation-state society from other such societies', Christian Joppke, 'The Inevitable Lightning of Citizenship' 51 *European Journal of Sociology* 9–32 (2010), at 12.

<sup>133</sup> See Adrian Favell, 'Immigration, Migration and Free Movement in the Making of Europe', in *European Identity* (J. Checkel and P. Katzenstein eds. 2009).

<sup>134</sup> *Ibid.*

new-generation highly skilled migrants rather belong to two peculiar and discrete categories: high net-worth individuals and innovative entrepreneurs. However, the Eurostars and the new-generation highly skilled migrants have one other aspect in common: they wear their citizenships, whether the ones they bring along in moving to a different EU country, or the ones they leave behind in residing on a highly skilled visa in another country, or the ones they acquire perhaps through an investment in a host country, with a certain casualness. They can fit in without fully belonging, and while they contribute economically and weave networks, the citizenships they potentially gain or lose – or just stretch in the case of Eurostars<sup>135</sup> – are not proxies either for their long-term settlement or permanent expatriation, let alone for a shift in their national identities. They remain, to some extent, ‘highly regarded guests’.

The lightening of these highly regarded guests’ citizenships is not the novelty *per se*.<sup>136</sup> What is new is the active involvement of the state in promoting this novel model of immigration, and the citizenship-type that goes with it. In the case of the Eurostars, it was the exercise of their free movement rights as European citizens which activated their ‘light’ supranational citizenship. The recipient EU Member States were not hunting for them, but rather directed their migration management powers to a new class of denizens, defined by contrast to mobile European citizens.<sup>137</sup> In the case of the new-generation highly skilled migrants, it is the state itself which offers them, in different forms, a lighter form of membership, in exchange for the outputs that their talent can bring.<sup>138</sup>

As a result, communities come to be made up of long-term, life-committed, culturally integrated members, who are either native-born or have gone down the heavy citizenship acquisition track, and of a smaller class of transient albeit dedicated members, who bring defined outputs to the community and who may not remain forever, yet belong in a lighter, more cosmopolitan fashion.

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<sup>135</sup> See F. Strumia, ‘Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground in Trans-Atlantic Perspective’, in D. Kochenov (ed.), *Citizenship and Federalism in Europe: the Role of Rights* (forthcoming CUP).

<sup>136</sup> See Joppke, (n 132).

<sup>137</sup> See ‘European Citizenship: Mobile Nationals, Immobile Aliens and Random Europeans’, in Michael S. Greve and Michael Zoller (eds.) *Citizenship in America and Europe – Beyond the Nation-State?* (AEI Press 2009), 45–70. Also see Favell (n 133).

<sup>138</sup> It can be long-term residence or citizenship itself.

This split in the character of membership offers a first answer to the question of how new-generation skilled migration policies alter the role of immigration and citizenship laws in defining membership. The breaking up of the consistency of citizenship has already been denounced from several sides. Beyond Joppke's finding that citizenship is lightening, others have pointed to its ongoing devaluation.<sup>139</sup> The unity of citizenship is threatened on the one hand by the multilevel character that citizenship assumes in several contexts;<sup>140</sup> and on the other by the plurality of affiliations, as well as the sources of rights and obligations, which have come to challenge the predominant role of nationality as a reference for belonging and membership. Theories of post-national citizenship emphasise how the development of human rights challenges the boundedness of national citizenship;<sup>141</sup> while accounts of transnational citizenship focus on the coexistence of multiple, overlapping circles of membership transcending the territorial boundaries of national belonging.<sup>142</sup> The dual track citizenship that new generation skilled migration policies contribute to yield is in part an expression of these centrifugal tendencies in the domain of membership.

However, the burgeoning distinction that the two tracks reveal between different classes of citizen-stakeholders points to problems other than the ones already touched upon in the literature and raises further conundrums about the future of membership: what is revealed is a change in the very texture of national citizenship, and of the bonds of community membership. One crucial emerging question is how the different classes of stakeholder interact with each other and with the state.

There are two possible perspectives to answering this question. A first perspective focuses on the risks involved in these evolving patterns of membership. Membership is in danger of becoming stratified by wealth. The light citizens and highly regarded guests that states are intent on attracting may turn into a lobby for their own interests. This would harden the divide with 'ordinary' stakeholders, with detrimental effects for the prospects of community and the very role of the state as provider and guarantor of equal membership rights. Through this lens,

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<sup>139</sup> Schuck (n 8). From a further perspective, see G. Davies, "Any Place I Hang my Hat?", or: Residence is the New Nationality' 11 *European Law Journal* 43–56 (2005).

<sup>140</sup> Willem Maas, 'The Origin, Evolution and Political Objectives of EU Citizenship' *German Law Journal*, 15 (2014), 797.

<sup>141</sup> See Soysal (n 9); Seyla Benhabib, *The Rights of Others-Aliens, Residents and Citizens* (CUP 2004).

<sup>142</sup> See e.g. Bauböck (n 10); Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008), 100–122.

membership is becoming commodified and citizenship is losing its meaning in terms of equality of rights.<sup>143</sup>

A second potential perspective looks at the transformative potential that these same patterns entail for the bonds that citizenship expresses. Traditionally, citizenship embodies a two-way relationship between state and individual, governor and governed. In the wake of the emergence of different citizenship tracks, it should rather be looked at as a web of relationships among different classes of stakeholders. The circle of members funding citizenship entitlements and the one of those enjoying citizenship entitlements, as well as the circle of members making collective decisions and the one of those being subject to the same collective decisions no longer necessarily coincide. In light of this, the challenge of citizenship is to come to embody a set of responsibilities, rights and affiliations which cut across the relevant circles. This can be in recognition of the fact that those separate circles of membership embrace classes of stakeholders whose wellbeing, to borrow Bauböck's definition, is linked to the flourishing of the same polity for different but similarly worthwhile reasons. In other words, one way to preserve the unity of citizenship at a novel, different level is by seeking ways to ensure that the investments and ideas of light citizens and highly regarded guests contributes to the bonds of solidarity and mutual provision which justify the heavy citizenship of the more traditional members. Weaving membership bonds along these lines can be a way for light citizens to be invested in the community despite the lightness of their personal involvement and cultural affiliation; and for the 'heavy citizens' to recognise the highly regarded guests as fellow members, despite the different nature of their stake and their detached participation. As to the role of the state, this novel vision of citizenship potentially carves out a novel function, beyond guarding borders and headhunting for desirable migrants. That is mediating between different classes of citizen-stakeholders, between the static and disaffected, and the cosmopolitan and unattached, whose contrast risks bringing communities to breaking point.

This analysis responds in part to the commodification argument. In part it clarifies how the emergence of a new generation of skilled migration policies contributes to altering the role of immigration and citizenship regulation in defining the boundaries of community. The reflections that a dual-track membership calls for also sets out some questions for future research on citizenship to explore: the challenge is to identify the conditions and requirements

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<sup>143</sup> As theorised by T.H. Marshall, *Citizenship and Social Class and other Essays* (CUP 1950).

for different classes of citizen-stakeholders to coexist in the latter rather than in the former manner distinguished above.

## **6. Conclusion**

New-generation skilled migration policies are quantitatively of little significance. Yet conceptually they bring important alterations to existing notions of membership and citizenship. Through these policies, states hunt for casual citizens who bring a defined output to the community, but who maintain a degree of detachment from it. On the one hand, this yields a novel route for immigration and citizenship regulation, parallel but distinct from the traditional one. On the other hand, it leads to a dual track model of membership which challenges the very consistency of citizenship: while national citizenship remains the mantle that most persons wear throughout their lives, the two routes for immigration regulation pull on it at the edges and threaten its coherence at the core. The danger, in particular, is that an invisible wall is gradually built between a cosmopolitan class of borderless people and a static majority of presumptive but possibly disaffected belongers.

The erection of this wall marks in part a fundamental alteration to the scope and fabric of community membership. Arguments about the commodification of citizenship capture resulting concerns. Beyond debates on citizenship and membership, that wall also symbolises a broader malaise which the mismanagement of some aspects of globalisation has exacerbated: disenchantment with traditional models of democratic participation and with established political forces, resulting in the success of populist movements in several countries; resistance to immigration and resurgent nationalist instances; disenchantment with regional integration projects and related secession events. The findings of this article on the membership implications of a rather discrete phenomenon – new-generation skilled migration and its regulation – point on the one hand to ways to rethink the very nature of citizenship to restrain the building up of a similar wall. On the other hand, they also harbour potential clues to dealing with the latter malaise.

A conception of membership and citizenship refocused on the reciprocal rights and duties of different classes of citizen-stakeholders can inspire novel rationales for immigration and citizenship law. It could help rethinking the duties owed by external citizens to

communities of origin along novel lines, as well as the duties owed by internal citizens to migrants on humanitarian grounds. In a broader sense, it also offers a novel lens through which to view the contrasts of interests and the winner-loser dynamics that the transnationalisation of social interactions, and relatedly of law, have generated.

Ultimately, in the wake of new-generation skilled migration policies, citizenship does in some cases become soft outside and soft inside. This need not mark its ultimate hollowing-out, however. It could rather signal a reshuffling in the relationships and bonds between state and individuals, and among individuals, which underpin the very idea of membership. Understanding this reshuffling, and using it as a starting point to re-theorise citizenship, could help avoid its hardening on the inside in a time of vanishing identity bonds and strained solidarity. It could also help soften its outer shell for the benefit of those classes of outsiders for whom the porous borders of the globalised world have remained impenetrable.

## **Publications in the Investment Migration Working Papers**

### **Research Papers**

Gamlen A., C. Kutarna and A. Monk. *Re-thinking Immigrant Investment Funds*, IMC-RP 2016/1.

Fu, Q. *'Internal' Investment Migration: The Case of Investment Migration from Mainland China to Hong Kong*, IMC-RP 2016/2.

Surak, K. *Global Citizenship 2.0. The Growth of Citizenship by Investment Programs*, IMC-RP 2016/3.

Strumia, F. *New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State*, IMC-RP 2016/4.

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