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New Generation Skilled Migration Policies: Talent as Output, High Regard Guests and Citizens in Absentia

Francesca Strumia*

Introduction

Seen from the air on a crisp day, the Mediterranean sea is a friendly blue basin, dotted with islands of different sizes that vegetation colors in numerous shades of green. This composition of blues and greens has inspired through the eras poets, novelists and film-makers.¹ Yet, the idyllic vision conceals one of the most puzzling contrasts of contemporary migration. In the first 20 years of the new millennium, among those verdant islands, some have attracted, through tailored visa policies, affluent investors and high net worth individuals.² Others have repeatedly collected on their shores the corpses of less lucky migrants who did not survive hazardous sea-crossings in inadequate boats, under the threat of ruthless smugglers.³ This striking contrast of destinies makes the southern boundary of the European Union a symbol of the inconsistent texture of 21st century national (and supranational) borders, and of the notions of membership that underpin their regulation.⁴ As Europe receives, at the time of writing, the largest wave of displaced persons since the second World War escaping the conflict in Ukraine, this inconsistency is all the more glaring.⁵

On the one hand, the myriad political, military, civil and economic crises of this young new millennium make borders both exposed and guarded. On the other one, eased communications and transports which have made transnational lives a concrete possibility make borders porous, and as life under pandemic restrictions has taught, increasingly virtually porous. In part in response to these transformations, sovereign states engage with borders in novel ways, shifting and bending them to the service of their sovereign objectives and reinventing territoriality in the process while

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¹ 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'.

² See e.g. Maltese Citizenship Act, Chapter 188, <https://legislation.mt/eli/cap/188/eng/pdf>; Individual Investor Programme of the Republic of Malta Regulations, Legal Notice 47 of 2014, , SL188.03, <https://legislation.mt/eli/sl/188.3/eng/pdf>.

³ For an overview of the figures and responses, see Council of the European Union, 'Saving lives at sea and targeting criminal networks', <https://www.consilium.europa.eu/en/policies/eu-migration-policy/saving-lives-at-sea/>.

⁴ For an examination of the troubling role of the EU in (at best) failing to enforce a rights-protective system of handling migration and (at worst) in facilitating these tragedies see Barbara Grabowska-Moroz and Dimitry Kochenov 'The Loss of Face for Everyone Concerned - EU Rule of Law in the Context of the 'Migration Crisis' in Vladislava Stoyanova and Stijn Smet (eds) *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge 2022); also see Ian Urbina 'The Secretive Prisons that Keep Migrants out of Europe', *The New Yorker*, 28 November 2021.

⁵ See Mario Savino and Francesco Luigi Gatta 'On the Brink of a New Refugee Crisis: Temporary Protection as a Paradigm Shift?', *Verfassungsblog*, 10 March 2022, <https://verfassungsblog.de/on-the-brink-of-a-new-refugee-crisis/>; also see International Organization of Migration 'IOM Ukraine Response - Neighbouring Countries Surveys with Ukrainian Nationals and TCNs crossing to Ukraine', Displacement Patterns, Needs and Intentions Surveys, Data Collected on 16 April – 31 May 2022, https://displacement.iom.int/sites/g/files/tmzbd11461/files/reports/IOM_DTM_Crossing%20into%20UKR_neighbouring%20countries_as%20of%202022.05.31.pdf.

maintaining its ‘gravitational force’.⁶ The new forms of admission to residence and admission to citizenship that are at the heart of the inquiry in this volume and that aim at facilitating the entry and in some cases the naturalization of high net worth individuals and innovative entrepreneurs have emerged as a result. I refer to these as ‘new generation skilled migration policies’.

This chapter focuses on distinguishing these ‘new generation skilled migration policies’ from traditional policies for the selection of skilled migrants. The chapter evidences two distinguishing features of the ‘new generation’ schemes: legal requirements for the entry of skilled migrants focus on talent as ‘output’ rather than as an ‘input’; and the state’s role in administering immigration and citizenship law becomes, in the context of these policies, the one of a headhunter. These shifts in the notions of talent underpinning the selection of skilled migrants and in the role of the state in performing the relevant selection harbor implications in terms of changing boundaries and bonds of community membership. Through headhunting for migrants that promise an output, states channel the attribution of the privilege of citizenship on a non-birthright basis along a novel regulatory trajectory.⁷ This trajectory is parallel but distinct from traditional ones. A dual track non-birthright citizenship model emerges as a result: heavy, culturalized citizenship for the ‘traditional’ migrants;⁸ thin citizenship, possibly independent of any cross-border movement and held even ‘in absentia’, for the beneficiaries of ‘new generation’ policies.⁹

The chapter findings provide on the one hand a nuanced understanding of arguments advanced in the burgeoning literature on investment migration that point among others to the commodification of membership,¹⁰ and to the relation between membership and meritocracy.¹¹ On the other hand the analysis in the chapter adds to debates in the literature on the evolution of citizenship as a concept, its relation to migration and mobility, its strategic and compensatory value, its gradual hollowing out as well as its colonial legacies.¹² In respect to these latter debates, the chapter takes

⁶ Ran Hirschl and Ayelet Schachar, ‘Spatial Statism’ [2019] *ICON-s* 387, 393; also see Ayelet Schachar, ‘Beyond open and closed borders: the grand transformation of citizenship’ [2020] *Jurisprudence* 1, 6.

⁷ For the conceptualization of birthright citizenship as a privilege see Ayelet Schachar, *The Birthright Lottery: Citizenship and Global Inequality* (HUP 2009); Dmitry Kochenov, *Citizenship* (MIT Press 2019)

⁸ On the culturalization of immigration policy in Europe, see Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (OUP 2017).

⁹ For the fact that investment migrants are often not looking for immediate relocation options see Kristin Surak, ‘Millionaire mobility and the sale of citizenship’ [2020] *JEMS* 116.

¹⁰ See e.g. Ayelet Schachar and Ran Hirschl, ‘Recruiting Super Talent: the New World of Selective Migration Regimes’ [2013] *Indiana Journal of Global Legal Studies* 71; Ana Tanasoca, *The Ethics of Multiple Citizenship* (CUP 2018) 1; Jelena Dzankic, *The Global Market for Investor Citizenship* (Palgrave Macmillan 2019) 1; also see Lior Erez, ‘A Blocked Exchange? Investment Citizenship and the Limits of the Commodification Objection’ in Dmitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (CUP 2022); Suryapratim Roy, ‘The “Streetlight Effect” in Commentary on Citizenship by Investment’ in Kochenov and Surak, *Citizenship and Residence Sales*.

¹¹ See Odile Ammann, ‘Passports for Sale: How (Un)Meritocratic are Citizenship by Investment Programmes?’ [2020] *European Journal of Migration and Law* 309, 337. See also Ammann’s chapter in this volume.

¹² See e.g. Marloes De Hoon, Maarten Vink and Hans Schmeets, ‘A ticket to mobility? Naturalization and outmigration of refugees in the Netherlands’ [2020] *Journal of Ethnic and Migration Studies* 1185, 1203; Yossi Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset* (Princeton University Press 2019); Christian Joppke, ‘The Inevitable Lightning of Citizenship’ [2010] *European Journal of Sociology* 9; Christian Joppke, ‘The Instrumental Turn of Citizenship’ [2018] *Journal of Ethnic and Migration Studies* 858; Rainer Bauböck, ‘Genuine

in part a step back, by questioning the very association between citizenship, settlement and mobility that the traditional literature takes as starting point; 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 alteration in the nature of the rights, responsibilities, affiliations that citizenship itself expresses.

Part 1 introduces new generation skilled migration policies, setting these in 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. In the optic of understanding how this role changes with the advent of new generation skilled migration policies, part 3 analyzes the way legal requirements of 'talent' are set in these new policies, as well as the role that states take on 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.

1 New Generation Skilled Migration Policies in Regulatory and Theoretical Context

Favor for skilled migrants is a long established element of immigration policy, informing the immigration laws of several countries. Traditional countries of immigrants,¹³ 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 visa for investors and intra-company transferees;¹⁴ a non-immigrant 'genius visa' for persons of extraordinary ability in the sciences, culture or sports;¹⁵ and immigrant visa for persons of extraordinary ability who can self-sponsor themselves and do not need to pass the labor certification procedure that applies to most other categories of economic migrants.¹⁶ The US Act also provides for an immigrant visa for

links and useful passports: evaluating strategic uses of citizenship' [2019] *Journal of Ethnic and Migration Studies* 1015. For a critique of citizenship as a colonial and racist concept, see Kochenov, *Citizenship* (n 7), at 96-104; Manuela Boatacã, 'The Colonial Institution of Citizenship and Global Capitalist Dynamics', in Kochenov and Surak, *Citizenship and Residence Sales* (n 10).

¹³ For the distinction between countries of immigrants and countries of immigration, see Patrick Weil, 'Access to Citizenship - A Comparison of 25 Nationality Laws' in Douglas B Klusmeyer and Thomas Alexander Aleinikoff (eds), *Citizenship Today, Global Perspectives and Practices* (Washington 2001) 21.

¹⁴ US Immigration and Nationality Act 1942, s 101.

¹⁵ Ibid.; Also see US Citizens and Immigration Services, 'O-1 Visa: Individuals with Extraordinary Ability or Achievement' (*U.S. Citizenship and Immigration Services*, 21 January 2022) <<http://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-1-visa-individuals-extraordinary-ability-or-achievement>>.

¹⁶ US Immigration and Nationality Act 1942, s 203(b)(1); also see US Citizens and Immigration Services, 'Employment-Based Immigration: First Preference EB-1' (*U.S. Citizenship and Immigration Services*, 1 March 2022) <<http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1>>. 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 migrants' admission see Peter H Schuck and John E Tyler, 'Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants' [2010] *Fordham Urb. L.J.* 327.

investors, labeled as an ‘employment creation’ visa, the EB-5.¹⁷ Canada pioneered in 1967 a point-based scheme for skilled immigration, awarding points to applicants for various factors such as education, language knowledge, professional experience and adaptability, and providing for several decades the main route to permanent residence in Canada.¹⁸ Current skilled immigration policy relies on an ‘Express Entry’ system for three distinct classes of skilled workers, distinguished by the type of work experience of the applicants, whether in Canada or abroad, and whether in a skilled trade.¹⁹ The skilled stream of Australia’s migration program relies on a combined list of eligible skilled occupations that is periodically updated and in whose respect skilled independent visa, skill nominated visa, and employer nominated visa are available.²⁰ The award of these visa relies on a point-based system assigning points to applicants on the basis of a range of eligibility factors such as language, age and education.²¹

In European countries, which are not traditionally countries of immigrants, but have experienced varied histories of immigration in the 20th century,²² 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 de-colonization. In many cases their citizenship and immigration policies have indeed been used to restrict or control migratory flows from colonial to metropolitan areas.²³ The immigration and nationality laws of these countries recognize in any case privileged categories of skilled migrants or take into account desert or merit as a ground for granting citizenship.²⁴ In the context of the European Union, in addition to the regulations of individual countries, the EU common immigration policy has also placed an emphasis on the encouragement of skilled migration. The Pact on Migration and Asylum proposed by the European Commission in 2020 envisages the creation of talent partnerships and includes as action points the

¹⁷ US Immigration and Nationality Act 1942, s 203(b)(5); see US Citizens and Immigration Services, ‘About the EB-5 Visa’ (*U.S. Citizenship and Immigration Services*, 17 March 2022) <<https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa>>.

¹⁸ See Rey Koslowski, ‘Selective Migration Policy Models and Changing Realities of Implementation’ [2014] *International Migration* 26, 34.

¹⁹ See Immigration and Refugee Protection Regulations (SOR/2002-227), s 72-87 available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-16.html#docCont> accessed 23 March 2022; also see Government of Canada, ‘Immigrate to Canada’ (*Government of Canada*, 9 March 2022) <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada.html>>.

²⁰ See Australian Government, ‘Skilled Migration Program’ (*Department of Home Affairs*, 17 March 2020) <<https://immi.homeaffairs.gov.au/what-we-do/skilled-migration-program/recent-changes>> accessed 23 March 2022.

²¹ See Australia Migration Regulations 1994, Compilation 218 of 26 June 2021, <https://www.legislation.gov.au/Details/F2021C00613> accessed 23 March 2022. Also see Koslowski, (n 18), at 34-36.

²² For an overview see Craig A. Parsons and Timothy M. Smeeding, *Immigration and the Transformation of Europe* (CUP 2006).

²³ See Manuela Boataă, ‘The Colonial Institution of Citizenship and Global Capitalist Dynamics’ (n 12), at 12-13.

²⁴ 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 Italian Law 91 of 1992, Nuove Norme sulla Cittadinanza (Italian Citizenship Act), art. 9(2). France also awards a ‘passeport talent’ residence permit to a broad class of talented individuals, including persons of national or international reputation, performers, authors of literary and artistic work, and highly qualified employees. See <https://france-visas.gouv.fr/en/web/france-visas/international-talents-and-economic-attractiveness> accessed 23 March 2022.

proposal of a ‘Skills and Talent package’ and the pondering of options to form a EU talent pool.²⁵ EU legislation adopted in response to the goal of attracting talents offers ‘blue cards’ to highly qualified workers,²⁶ as well as tailored visas to capable third country national researchers.²⁷ EU measures corroborate the efforts of individual Member States immigration policies in this sense. In general, the EU common immigration and asylum policy is but a complement of national ones.²⁸ The need to manage a long perimeter of common external borders has increasingly called for commitment to solidarity and shared responsibility as part of that policy.²⁹ But the concrete pursuit of these commitments has been hampered by the conflicting priorities of Member States that are differently positioned in respect to those shared external borders and in respect to global migration streams.³⁰

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 recruitment of skilled migrants. Similar practices have yielded the schemes referred to in this chapter as ‘new generation’ skilled migration policies. The term is used to refer to two classes of policies aimed at attracting some very specific groups of desirable contributors to a host State economy and job market: investor schemes and entrepreneur programs.

Under investor schemes, a number of countries offer visa 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. Australia, the Netherlands, Ireland, Spain and Portugal, among

²⁵ Communication from the Commission on a new Pact on Migration and Asylum COM(2020) 609 final

²⁶ Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382.

²⁷ 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) [2016] OJ L132.

²⁸ See Treaty on the Functioning of the European Union, Arts 77-79.

²⁹ See Communication from the Commission on a new Pact on Migration and Asylum COM(2020) 609 final; also see Council of the European Union, Video conference of home affairs ministers 14 December 2020, [Presidency progress report on key elements of a European migration and asylum policy](#) accessed 23 March 2022.

³⁰ The unanimous decision in February 2022 to activate a temporary protection mechanism under Directive 2001/55/EC in response to the humanitarian crisis prompted by the Russian invasion of Ukraine is a first sign of concrete political willingness to make good on this promise of solidarity and shared responsibility, after the debacle in handling the 2015 refugee crisis. See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71. For an overview of the conflict between EU values and the management of migration in European countries, see Vladislava Stoyanova and Stijn Smet (eds) *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press, 2022).

others, have introduced programmes of this type.³¹ As mentioned above, the US have long offered to investors a non-immigrant visa as well as an immigrant visa that albeit belonging to a different family of policies share some features with the investor visa of new generation. Some other countries have pushed the favor for foreign investors as far as to provide for the immediate grant of citizenship to qualifying applicants, without prior residence requirements or with significantly reduced residence requirements in comparison to naturalization tracks that are considered ordinary.³²

Entrepreneur programmes have similar features in terms of the facilitations that they grant, however they are aimed at a different class of desirable migrants. These programmes favor entrepreneurs who propose to set up a new business, usually in the form of a start-up,³³ in the host country and who demonstrate availability of funding to support the project and/or the endorsement of a recognized business organization in the host country, an innovative idea, and a viable business plan. Chile, Canada, the United Kingdom, Ireland, Italy, the Netherlands and South Korea are a few examples of countries that have introduced start-up, or entrepreneur visa policies, in recent years.³⁴

³¹ The UK had introduced a Tier 1 investor visa in 2008. This has been discontinued as of 17 February 2022 over security concerns. Canada also used to run a Canadian Federal Investor programme. This was however terminated in 2014. For a classification of existing programmes see Jelena Dzankic, *The Global Market for Investor Citizenship* (n 10) 91-135. For an empirical analysis of supply and demand dynamics, as well as programme outcomes, see Kristin Surak, 'Investment Migration: Empirical Developments in the Field and Methodological Issues in its Study' in Kochenov and Surak, *Citizenship and Residence Sales* (n 10). Also see Kristin Surak's chapter in this volume.

³² See e.g. Malta Individual Investor Programme, (n 2). Cyprus also runs a similar scheme. See Council of Ministers (Cyprus) Decision of 19 March 2014, Scheme for Naturalization of Investors in Cyprus by Exception. The scheme has been amended in 2016 and 2018 and has been suspended in 2020. For an overview see Jelena Dzankic, *The Global Market for Investor Citizenship* (n 10) 191-194. For the elusiveness of the idea of an 'ordinary' naturalization track see Hans Ulrich Jessurun d'Oliveira's chapter in this volume, at [2-3]

³³ A start-up has been defined as a 'temporary organization that searches for a scalable and repeatable new business model'. See Steve Blank and Bob Dorf, *The Startup Owner's Manual: the Step-by-Step Guide for Building a Great Company* (Wiley 2020) 12-14.

³⁴ For the Start-Up Chile program, Corfo, 'Start-Up Chile' (*Start-Up Chile*) <<https://startupchile.org/en/>> accessed 23 March 2022; for the Canadian Start-Up Visa Program see Government of Canada, 'Start-Up Visa Program' (*Government of Canada*, 3 June 2021) <[Start-up Visa Program - Canada.ca](https://start-upvisa.gc.ca/)> accessed 23 March 2022; also see Miriam Cohen's chapter in this volume; for the Italian Start-Up Visa, see Ministry of Economic Development, 'Italia Startup Visa' (*Ministry of Economic Development*) <<https://italiastartupvisa.mise.gov.it/#homepage>> accessed 14 March 2022; the United Kingdom, after discontinuing its Tier 1 Entrepreneur visa now offers both a two-year non-renewable Start-Up visa, and a three-year renewable Innovator Visa that also qualifies for settlement in the UK, see UK Government, 'Start-Up Visa' (*UK Government*) <<https://www.gov.uk/start-up-visa>> accessed 14 March 2022; UK Government, 'Innovator Visa' (*UK Government*) <<https://www.gov.uk/innovator-visa>> accessed 14 March 2022; for Ireland see Department of Justice, 'Start-Up Entrepreneur Programme (STEP)' (*Department of Justice*, 23 July 2021) <<https://www.irishimmigration.ie/coming-to-work-in-ireland/what-are-my-options-for-working-in-ireland/coming-to-work-for-more-than-90-days/start-up-entrepreneur-programme-step/>> accessed 14 March 2022; for the Dutch Startup Visa see Government information for Entrepreneurs, 'Startup Visa' (*Business.Gov.nl*) <<https://business.gov.nl/coming-to-the-netherlands/permits-and-visa/startup-visa/>>, accessed 14 March 2022; for the South Korean Overall Assistance for Startup Immigration System (OASIS) see Global Start-up Immigration Center, 'Startup Visa (D-8-4), Corp' (*Global Start-up Immigration Center*) <[OASIS \(oasisvisa.kr\)](https://oasisvisa.kr/)>, accessed 14 March 2022.

These novel strategies in immigration are part of a quest for economic growth through innovation in which several countries have become entangled.³⁵ Attracting talent is a fundamental component of relevant recipes for innovation.³⁶ In quantitative terms these policies may appear insignificant – the figures for migrants taking advantage of these entry routes are small.³⁷ In conceptual terms they raise however important questions that have shifted the attention in the literature on skilled migration, and prompted novel strands of inquiry.

This 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 those of destination countries 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 overall increased global wealth, or rather disproportionately disadvantaged sending countries.³⁸ In the 21st century relevant 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.³⁹

With the appearance of new generation skilled migration policies the focus has in part shifted from economic analysis to questions on the legal and ethical implications of relevant policies.⁴⁰ Attention has been paid to the risk of abuse of these schemes, and to the connected security

³⁵ 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) 14.

³⁶ By way of example the Australian Global Talent Visa Program and Global Talent Employer Sponsored Visa Program are labeled by the Australian government ‘Visas for Innovation’. See Department of Home Affairs, ‘Visas for innovation’ (Australian Government) <<https://immi.homeaffairs.gov.au/visas/working-in-australia/visas-for-innovation>> accessed 23 March 2022.

³⁷ For instance, the Italia Start-Up visa has been granted in the five years between its introduction in 2014 and 2019 to 250 applicants (out of 481 applications). See Italian Ministry of Economic Development ‘Italia Startup Visa Report’ (Italian Ministry of Economic Development, 2020). In the year ending March 2020, the UK granted 729 visa under the now closed Tier 1 (investor visa) route, out of a total of 194,557 work-related visa awarded in that year. See Home Office, ‘Why do people come to the UK? To work’ (Gov.UK, 21 May 2020) <<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2020/why-do-people-come-to-the-uk-to-work>> accessed 23 March 2022.

³⁸ 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 Andres Solimano (eds), *The International Mobility of Talent: Types, Causes, and Development Impact* (OUP 2008) 2-3. More in general on economic approaches to the brain gain vs brain drain debate see Walter Adams, *The Brain Drain* (Collier Macmillan Ltd 1968); Herbert Grubel and Anthony Scott, *The Brain Drain: Determinants, Measurements and Welfare Effects* (Wilfrid Laurier University Press 1977); for a more recent study contrasting the perspectives of recipient countries and sending countries, see Tito Boeri, Herbert Brucker, Frederic Docquier and Hillel Rapoport, *Brain Drain and Brain Gain* (first published 2012, OUP 2012).

³⁹ Ibid., 3. Also see Kristian Thorn-Lauritz, B Holm-Nielsen, ‘International Mobility of Researchers and Scientists: Policy Options for Turning a Drain in a Gain’ in Solimano (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’ (2011) UNU-Merit Working Paper 15/2011, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949705> accessed 23 March 2022; Ajay Agrawal, Devesh Kapur and John McHale, ‘Brain Drain or Brain Bank? The Impact of Skilled Emigration on Poor-Country Innovation’ (2008) NBER Working Paper 14592, <<http://www.nber.org/papers/w14592>> accessed 23 March 2022.

⁴⁰ See Ayelet Shachar and Ran Hirschl, ‘Recruiting Super Talent: the New World of Selective Migration Regimes’ [2013] *Indiana Journal of Global Legal Studies* 71; also see Koslowski (n 18), at 26.

concerns that they bring along.⁴¹ The ‘race for talent’ underpinning these policies has raised concerns for the prospects of belonging and political membership ideas that are traditionally linked to citizenship.⁴² It has also been seen as threatening to widen and entrench a distinction between the opportunities for international mobility of the most skilled and well-off and the disenfranchisement of unskilled migrants.⁴³

In particular, Ayelet Shachar, in examining states’ attempts to benefit from the 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.⁴⁴ Singling out talented individuals for fast-track membership certainly serves well their freedom to move. However, in the case of Olympic athletes this is arguably unfair to their countries of origin that invested in training them.⁴⁵ The highest threat goes, in any case, to community: in the context of relevant policies, citizenship is no longer a proxy for membership but rather becomes a recruiting tool.⁴⁶ Market-oriented considerations -the argument goes- replace the collective identity and allegiance notions that used to be at the basis of the bond of citizenship. And as a consequence, membership in the community is commodified and no longer based on a notion of substantial attachment.⁴⁷ The commodification argument has had ample resonance in the literature on investment migration, attracting both endorsers and detractors.⁴⁸ Some views qualify the scope of the argument. According to Dora Kostakopoulou, for instance, the facilitations granted to the wealthy and talented are only a problem in the context of a rigid, ethnicized system of naturalization;⁴⁹ whilst 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.⁵⁰ Moreover, as Dimitry Kochenov forcefully reminds, any critique of the commodification or instrumentalization of citizenship is premised on the idea that citizenship is a

⁴¹ See Džankić, *The Global Market for Investor Citizenship* (n 10), 1-4; M Sumption ‘Can Investor Residence and Citizenship Programmes be a Policy Success?’ in Kochenov and Surak (n 10), 21-22; M Corrado and K Marsh, ‘Investment Migration and the Importance of Due Diligence: Examples of Canada, Saint-Kitts and Nevis, and the EU in Kochenov and Surak (n 10).

⁴² For a canvas of arguments see Ayelet Schachar and Rainer Bauböck, ‘Should Citizenship Be for Sale?’ (2014) EUI RSCAS Working Paper 2014/01, <SSRN-id2380665.pdf> accessed 23 March 2022; also see Samantha Besson, ‘Investment Citizenship and Democracy in a Global Age. Towards a Democratic Interpretation of International Nationality Law’ [2019] *Swiss. Rev. Int’l & Eur. L.* 525.

⁴³ See Yossi Harpaz, ‘Citizenship and Residence Rights as Vehicles of Global Inequality’, in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (CUP 2022); Odile Ammann, ‘Passports for Sale: How (Un)Meritocratic Are Citizenship by Investment Programmes?’ [2020] *European Journal of Migration and Law* 309-337.

⁴⁴ Ayelet Shachar, ‘Picking Winners: Olympic Citizenship and the Global Race for Talent’ [2011] *The Yale Law Journal* 2107-08.

⁴⁵ *Ibid.*, 2121-2129.

⁴⁶ *Ibid.*, 2131.

⁴⁷ *Ibid.*, 2106. Also see Ayelet Shachar and Ran Hirschl, ‘Recruiting Super Talent’ (n 10), 90-92.

⁴⁸ See e.g. Džankić (n 8); Lior Erez, ‘A Blocked Exchange? Investment Migration and the Limits of the Commodification Objection’, in Kochenov and Surak (n 10).

⁴⁹ Dora Kostakopoulou, ‘Olympic Citizenship and the (un)specialness of the national vest: rethinking the lines between sport and citizenship law’ [2014] *International Journal of the Law in Context* 1, 7.

⁵⁰ Peter Spiro, ‘The End of Olympic Nationality’, in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalized World* (CUP 2012).

just and rational condition. This premise lays a mantle however over the random and in many cases arbitrary nature of citizenship status.⁵¹

This latter distinction points to a fundamental question that the debate so far has somewhat overlooked. What is the relative role of residence by investment programs, and of citizenship by investment programs in altering existing notions of membership? Both types of programs award to talented or wealthy outsiders a form of membership. In both types of programs membership is a reward for either a promising business plan and the ability to source the necessary funds to realize it, or for a material monetary contribution to the economy of the host state. In the case of citizenship by investment programs, the award of membership is in the form of a passport. In the case of residence by investment programs, the award of membership is in the form of a residence permit, initially for a limited time, but typically renewable, and qualifying the holder, subject to compliance with additional requirements, for naturalization.⁵² Does it matter, then, for purposes of our understanding of what membership entails, whether this form of membership is a full-fledged citizenship status, as in the citizenship by investment programs, or whether it is a ‘high-regard guests’ status, as in the residence by investment programs?

Answering this latter question requires clearing the ground around an analytical one. This is the question of how new generation skilled migration policies alter the role of immigration and of citizenship law, both individually and in their reciprocal interaction, in selecting community members. This question in turn requires a preliminary reflection on the very role of immigration and citizenship law in drawing the boundaries of community membership.

2 Immigration and Citizenship Law and the Designation of Community Members

Albeit in different ways, both immigration and citizenship law contribute to govern the way states select their members. They both say something, thus, about the quality of being a member. Immigration law sets the legal criteria for admission of foreigners to residence within the territorial boundaries of a state’s legal and political community. Citizenship 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.

The state power to select through immigration law is a corollary of the state widely recognized claim to legitimate closure.⁵³ 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 family members of citizens and residents, as states have a moral, if not legal, duty towards the already members of the community to protect family reunification. It is also the case for refugees and asylum seekers, in

⁵¹ See Dimitry Kochenov, ‘Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price’ in Rainer Bauböck (ed) *Debating Transformations of National Citizenship* (Springer 2018).

⁵² For further elaboration on this distinction, see Francesca Strumia and Asha Kaushal, ‘Opening the Ranks of Constitutional Subjects: Immigration, Identity, and Innovation in Italy and Canada’ [2017] *German Law Journal* 1657, at 1674-75

⁵³ See e.g. David Miller, ‘Immigration: the Case for Limits’ in Andrew I. Cohen and Christopher H. Wellman (eds), *Contemporary Debates in Applied Ethics* (Blackwell 2014); Also see Joseph Carens, ‘Who Should Get in? The Ethics of Immigration Admissions’ [2003] *Ethics and International Affairs* 95, 110.

whose respect humanitarian considerations drive a moral duty of admission.⁵⁴ Beyond these categories, however, states are mostly free to select in their discretion.⁵⁵ 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.⁵⁶

Citizenship 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 that are proxies for affinity and allegiance. Such criteria are taken for granted in the case of the vast majority of birth-right citizens, however they become requirements to be proved when it comes to non-birth-right citizens.⁵⁷

The powers of selection that states exercise respectively through immigration law and through citizenship law are wielded in different ways and different directions, and they express distinct concerns.⁵⁸ Nonetheless, those powers overlap in part. As Catherine Dauvergne has observed immigration law performs ‘the dirty work of citizenship law’.⁵⁹ Immigration and citizenship law operate in this sense in a continuum.⁶⁰ This continuity is clearly visible in two instances. First, 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 the flourishing, over the last decade, of integration requirements addressed, albeit in slightly different forms, to both immigrants aspiring to entry and residence, and to residents aspiring to naturalization.⁶¹ Finally, and most importantly for the arguments explored in this article, nationality law governing non-birth right citizenship and immigration law have traditionally drawn from the same pool of people. That is, non-birth right citizens are typically former migrants. There is a sequence between the status of migrant and the status of non-birth right citizen that both immigration law and citizenship law typically take for granted.

New generation skilled migration policies, whether it is residence by investment schemes, or citizenship by investment schemes do not follow this pattern as neatly. Research suggests that several investment citizens are not actually looking to move to the country of their acquired

⁵⁴ Carens (n 53) 96-99.

⁵⁵ Although some selection criteria would certainly be morally objectionable. See *ibid*, 104-106.

⁵⁶ *Ibid*, 106-110.

⁵⁷ For an argument on the inequality of birthright citizenship, see Ayelet 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 James Kettner, *The Development of American Citizenship* (University of North Carolina Press 1978) 1608-1870.

⁵⁸ 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).

⁵⁹ Catherine Dauvergne, *Making People Illegal – What Globalization Means for Migration and Law* (CUP 2012) 96.

⁶⁰ See Asha Kaushal, ‘The Migration Footprint: Sex Equality, Competing Identities, and the Migration Continuum’ [2016] *Journal of Law and Equality* 89-126.

⁶¹ See Orgad (n 8).

citizenship.⁶² Investors and entrepreneurs who benefit from residence by investment schemes, on the other hand, may be looking for a temporary basis of operations rather than for a path to formal citizenship.⁶³ The sequence that immigration law and citizenship law postulate between the fact of migration and the fact of the acquisition of non-birthright citizenship is thus altered with the advent of new generation skilled migration policies. Immigration law comes to select a pool of high regard guests who are not necessarily meant to become citizens. And citizenship law comes to select a pool of non-birthright citizens who will not necessarily have immigrated to the country. This per se is not an absolute novelty. Guest-worker programmes have been extensively used throughout the 20th century and still are.⁶⁴ Citizenship by ancestry can also be awarded to external members who were neither born citizens nor have ever migrated to the country of their ancestry.⁶⁵ However what is different in the context of new generation skilled migration policies is the way these pools of guests and of distant citizens are formed. First, the criteria to be selected into those pools differ from traditional skilled migration policies. Second, the role of the state, and of its agents, in administering relevant policies is transformed in comparison to traditional patterns. The relevance of these policies for existing understandings of membership must be questioned in the context of these combined transformations.

3 A Closer Look at New Generation Skilled Migration Policies

3.1 Talent as Output

New generation skilled migration policies search for a new genus of talent. In comparison to traditional policies, they take a novel approach to defining desirable entrants who deserve eased admission, or citizenship, and they correspondingly alter the focus of relevant legal requirements.⁶⁶

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 labor organizations to identify within the broader spectrum of labor market skills, those that are in shortage in the local market, and in whose respect migrant work could make a concrete contribution.⁶⁷ Resort to migration policy to fill specific labor market gaps yielded, during the

⁶²Kristin Surak, 'Investment Migration: Empirical Developments in the Field and Methodological Issues in its Study', in Kochenov and Surak (n 10).

⁶³ See Dimitry Kochenov and Kristin Surak, 'Introduction: Learning from Investment Migration' in Kochenov and Surak (n 10).

⁶⁴ A recent example is the UK temporary visa scheme for poultry workers, pork butchers and HGV driver introduced in October 2021. See Home Office, 'Recruit a poultry worker, pork butcher or HGV food driver with a temporary visa' (Gov.UK, 1 January 2022) <<https://www.gov.uk/guidance/recruit-a-poultry-worker-or-hgv-food-driver-with-a-temporary-visa>> accessed 23 March 2022.

⁶⁵ For an argument on the use of these programmes in a compensatory fashion see Yossi Harpaz, *Citizenship 2:0* (n 12).

⁶⁶ A differentiation among different types of talent for immigration policy purposes has already been attempted from an economics perspective. See Andres Solimano, (n 38) 4 (distinguishing directly productive talent, academic talent, social and cultural talent).

⁶⁷ See Koslowski, (n 18) (distinguishing three ideal types of skilled migration policy, human capital driven, demand driven, and corporatist).

course of the last century, both European guest workers programmes and admission programmes targeted at specific professional profiles, such as nurses or care workers.⁶⁸

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 models of ‘Olympic’ citizenship that Ayelet Shachar has carefully described in the context of her analysis of contemporary states’ races for talent.⁶⁹ A talented athlete brings glory to her adoptive community and thereby contributes to bolster national narratives and images that several states are keen on reaffirming.⁷⁰ 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 a national interest of the host State through 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 that they intend to develop or manage. Hence the focus is 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 level of specificity of the requirement, although they typically do not offer immediate permanent residence.⁷¹ They include instead clear guidelines on capital availability requirements and on the nature and amount of required investments. The 2012-born Irish Immigrant Investor Programme (IIP), for instance, includes both a capital holding requirement (2,000,000 Euro) and a minimum investment requirement. Aspiring visa holders may elect, among others, to invest 1,000,000 Euro into an Irish immigrant investor bond yielding no interest; to invest at least 500,000 Euro in one or more Irish companies, other than listed companies; to invest at least 2,000,000 Euro into a Real Estate Investment Trust; or to effect a philanthropic donation of at least 500,000 Euro to support a public interest project in the sports, culture, education, health or arts sector.⁷²

‘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 of the programmes as a proxy for business acumen or experience. For instance, the US E-2 visa, while requiring a significant investment, seems to focus

⁶⁸ See Michael A Clemens, ‘What do we Know about Skilled Migration and Development’, (MPI Policy Brief, 3/2013); On the guest workers program in Germany, see Douglas B. Klusmeyer, ‘Aliens, Immigrants and Citizens: the Politics of Inclusion in the Federal Republic of Germany’ [1993] *Daedalus* 81.

⁶⁹ Ayelet Shachar, *Picking Winners* (n 44).

⁷⁰ *Ibid.*

⁷¹ See US Citizens and Immigration Services, ‘About the EB-5 Visa’, (n 17).

⁷² See Irish Department of Justice, ‘I Want to Invest in Ireland’, (*Irish Department of Justice*, 14 March 2022) <<https://www.irishimmigration.ie/coming-to-live-in-ireland/i-want-to-invest-in-ireland/>> accessed 14 March 2022.

on the actual establishment and conducting of a business in the US.⁷³ 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 realization. Relevant programmes are similar in their basic structure: applicants need to submit a business plan to set up, 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.⁷⁴ Additional requirements, such as residence conditions, language knowledge, income requirements differ from country to country; as do precise requirements as to the nature of the funds entrepreneurs must have secured. The Canadian start-up visa, for instance, rewards with permanent residence entrepreneurs who have secured either 75,000 Canadian dollars from an angel investor or 200,000 Canadian dollars from an approved venture capital fund participating in the programme.⁷⁵ 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 in a minimum amount of EUR 50,000 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 has the potential to generate at least EUR 1,000,000 in revenues and ten new jobs within three to four years of creation.⁷⁶ Eligibility conditions for the new UK start-up visa include having a realistic business plan to establish a start-up that is innovative, viable and scalable, and having the endorsement of a qualifying body in the UK.⁷⁷ In some countries, selection for admission through an entrepreneur programme entails, in addition to a visa and residence permit, also 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, of Chile, which since 2010 has been selecting promising business projects, to which it awards an initial equity-free grant of between USD 30,000

⁷³ It should be noted that the E-2 visa is not available to all nationalities, which itself drives a secondary market for the passports that qualify for a E-2 visa.

⁷⁴ See Irish Department of Justice, Start-Up Entrepreneur Programme (STEP) (n 34).

⁷⁵ See Government of Canada, 'How Can I Qualify for the Start-up Visa Program?' (*Government of Canada*, 29 September 2021) <<https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=645&top=6>> accessed 14 March 2022.

⁷⁶ See Irish Naturalization and Immigration Service, Start-Up Entrepreneur Programme, Guidelines, January 2018, <https://www.irishimmigration.ie/wp-content/uploads/2020/01/STEP-Guidelines.pdf> accessed 23 March 2022, 4-5.

⁷⁷ See UK Home Office, 'Immigration Rules Appendix Start-up' (*Gov.UK*, 17 February 2022) <[Immigration Rules Appendix Start-up - Immigration Rules - Guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-start-up)> accessed 23 March 2022.

and 100,000 depending on the programme, as well as the opportunity to participate in acceleration and incubation programmes in Chile.⁷⁸

While availability of capital is thus key also to entrepreneur programmes, it plays in these programmes a different role in comparison 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 works otherwise as a guarantee of his ability to concretely pursue the relevant idea. It is the latter idea, however, that is at the basis of the notion of talent underpinning these policies. These schemes scout for innovative and creative entrepreneurs whose business ideas may translate into job-creating and growth-fostering businesses. As a corollary, they reward other skills the applicants may have, such as business judgment, fundraising and networking capabilities, however these latter elements seem tangential to the main objective of capturing good ideas. The search for capital as well as innovative ideas in new generation skilled migration policies suggests that notions of talent underpinning these policies have a different focus in comparison to those underpinning traditional skilled migration policies. In traditional policies, the quest for human capital factors betrayed a search for entrants who had the ability to integrate in the host community, and succeed as its members.⁷⁹ The notions of talent in relevant policies focused, in other words, on the input that the skilled migrant could bring to the host community, and that warranted his ability to fit in.

Traces of talent as input can be found also in new generation skilled migration policies. While investment programmes often forgo 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 and the ability to bring enough money to settle.⁸⁰ Similarly, applicants for the UK start-up visa need to prove their knowledge of English and their ability to maintain themselves in the UK.⁸¹

The focus of the definition of talent in new generation skilled migration policies, however, falls not 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:⁸² the making of a qualifying investment, in the

⁷⁸ See the overview of the 'Build', 'Ignite' and 'Growth' Programmes offered by Start-Up Chile, Corfo, 'Start-Up Chile' (*Start-UP Chile*) <[Aceleradora de startups equity-free Start-Up Chile \(startupchile.org\)](https://startupchile.org/)> accessed 14 March 2022.

⁷⁹ Adaptability is for instance an explicit requirement in the context of the Canadian point system. See Government of Canada, 'Six Selection Factors – Federal Skilled Workers Program', (*Government of Canada*, 3 September 2020) <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html#adaptability>> accessed 14 March 2022.

⁸⁰ See Government of Canada, 'Immigrate with a Start-Up Visa: Who Can Apply' (*Government of Canada*, 16 January 2019) <[Immigrate with a start-up visa: Who can apply - Canada.ca](https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-up-visa/who-can-apply.html)> accessed 14 March 2022.

⁸¹ See UK Home Office, UK, Immigration Rules Appendix Start-Up, (n 77).

⁸² 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,

case of investment programmes; or the realization, through the planning, funding and setting up of a business, of an innovative entrepreneurial idea in the case of entrepreneur programmes. Requirements in relevant policies are tailored to ensure that the applicants will deliver on the promised output. For instance, entrepreneur programmes require not only evidence of availability of funding to pursue an entrepreneurial project, but also a business plan which is reviewed by committees of qualified experts, as well as proofs of income and activity after a first period of enjoyment of the relevant visa.⁸³

Talent intended as output drives a part reconfiguration and reinterpretation of recurring legal requirements in immigration and nationality law.⁸⁴ 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.

3.2 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, in the context of new generation skilled migration policies, the role of the state changes in at least three respects. First, in the way immigration laws are designed and written; second, in terms of the management and application of these laws; and lastly, with regard to the branches of public authority and external actors that are 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.⁸⁵ While, as considered in the previous sections, there are some continuities in requirements for admission and for naturalization in the laws of different countries, immigration as well as citizenship law tend to be an expression of a state's sovereign power of self-determination.⁸⁶ The rules in these laws, and the rationales inspiring these rules, vary in accordance

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.

⁸³ See e.g. Ministry of Economic Development, Ministry of Foreign Affairs, Ministry of the Interior, Italia Start Up Visa Guidelines, 20 March 2018, https://italiastartupvisa.mise.gov.it/media/documents/Guidelines%20ISV%20ENG%2020_03_2018%20def.pdf accessed 23 March 2022, 31-32.

⁸⁴ The most evident is the dispensing with, or reinterpretation in a flexible direction, of residence requirements that typically characterize both immigration and naturalization laws.

⁸⁵ 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)' [1993] Columbia L Rev 1833. Also see Alexander Aleinikoff, 'International Legal Norms and Migration: A Report' in Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (T.M.C. Asser Press 2003); 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', [1983] AJIL 817-822; also see Christopher H. Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (OUP 2011).

⁸⁶ Anticipating several other supreme domestic courts and international courts, the US Supreme Court held in 1892 that the power to restrict the entrance of foreigners is 'inherent in sovereignty and essential to self-preservation'. US Supreme Court, *Nishimura Ekiu v. US*, 142 US 651 (1892). For self-determination as an argument for community closure, also see in general Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

with a state's external commitments and relations,⁸⁷ as well as its internal political and economic circumstances.⁸⁸ In the context of new generation skilled migration policies, states rather appear to monitor and emulate one another in enacting relevant regulatory requirements.⁸⁹ This makes on the one hand for a measure of international convergence in the features of relevant policies, and of the legal reforms that they feed, regardless of background histories of immigration regulation.⁹⁰ On the other hand, it provides a novel example of law making in a transnational space.⁹¹

Beyond law making, the role of the state changes also with regard to the management and application of immigration and citizenship law. In the frame of traditional immigration and citizenship law, the state mostly acts as a passive 'border guard'. It sets the quota of legal entrants that it is willing to admit in a given period of time, and it sets the criteria that qualify an applicant for admission. Most states make entry and settlement of certain desirable immigrants easier than entry and settlement of the generality of immigrants. This is mostly true with regard to classes of highly talented migrants, such as for instance researchers, artists, sports persons. And it is also true of groups of low skilled migrants who are needed to fill specific gaps in the host State's labor market, as was the case of guest worker programs in Europe and North America in the second half of the 20th century.⁹² In any case, in traditional immigration policies, the state typically waits at the door for somebody to raise a claim for entry, and then decides, ultimately in its discretion, whether to grant leave to enter. In new generation policies, the state, instead, proactively recruits the immigrants it wants.

It can be argued that the state acted as a recruiter also in the context of 20th century guest worker programs. However there are some important differences. In these programs, states rather than selecting desirable migrants tendered a place to classes of workers that were both needed in the host country and in need of migrating to escape unemployment. Guest worker programs relied on bilateral agreements between 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. As a result host states, because they were meeting a demand for emigration and because they were

⁸⁷ 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* (Routledge 2003), 145-165. Along similar lines, Italian nationality law prescribes eased residence requirements for the naturalization of nationals of EU Member States. See Law n.91 of 1992 'Nuove Norme sulla Cittadinanza' (Italian Nationality Act), art. 9(d).

⁸⁸ Thoughts go for instance to guest-worker programs in post-war Germany. For an overview, see Stephen Castles, Hein de Haas and Mark J Miller, *The Age of Migration' – International Population Movements in the Modern World* (Palgrave 2014) 107.

⁸⁹ See Shachar and Hirschl, 'Recruiting Super Talent' (n 10).

⁹⁰ 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. See Strumia and Kaushal, (n 52).

⁹¹ On law making in a transnational space see Alexander Aleinikoff, 'Transnational Spaces: Norms and Legitimacy' [2008] Yale International Law Journal 479, 485; also see Kaarlo Tuori 'On Legal Hybrids and Perspectivism', in Miguel Maduro, Suvi Sankari and Kaarlo Tuori (eds), *Transnational Law – Rethinking European Law and Legal Thinking* (CUP 2014), 19; Dimitry Kochenov, 'Interlegality – Citizenship – Intercitizenship' in Jan Klabbbers and Gianluigi Palombella (eds) *The Challenge of Inter-Legality* (Cambridge University Press, 2019) 133-155.

⁹² For an overview, see Castles et al., *The 'Age of Migration'* (n 88) 220-221.

not competing with a wide range of other possible destinations, could de facto set the terms of the guest worker's status. These terms were often rather restrictive, binding the guest worker to a job, limiting rights to family reunification and overall marking a sharp distinction between the condition of the citizen and the one of the guest worker.⁹³ In new generation skilled migration policies, host States compete with other states for the talents that 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.⁹⁴

Like headhunters, the state and its agents invite applications by actively promoting their 'packages'. Governmental guidelines for relevant programmes have 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.'⁹⁵

The governmental 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.⁹⁶

Beyond the marketing aspect, states also act comparably to headhunters in selecting new generation skilled migrants. They channel the applications to dedicated screening committees and commissions that 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 that are not traditionally concerned with the regulation of immigration. For instance, the Italia Start-Up visa is managed by the Ministry for Economic Development, while visa are traditionally a competence of the Ministry for Foreign Affairs.⁹⁷ They also include ad hoc committees of technical experts tasked with screening and selecting the applications for relevant programs. In Chile, while the start-up programme is run officially by the government, the Start-Up Chile team relies on an extensive network of volunteer mentors.⁹⁸ In Italy, ministerial representatives coordinate an ad hoc

⁹³ Ibid, 104-108.

⁹⁴ Shachar and Hirschl, 'Recruiting Super Talent' (n 10) 87.

⁹⁵ Irish Naturalization and Immigration Service, Start-Up Entrepreneur Programme, Guidelines, (n 76).

⁹⁶ Government of Canada, 'Canada Wants Entrepreneurs!', (*Government of Canada*, 16 October 2018) <<http://www.cic.gc.ca/english/resources/publications/entrepreneurs.asp>> accessed 14 March 2022.

⁹⁷ See Italia Start Up Visa Guidelines, (n 83) 5.

⁹⁸ See Start Up Chile, 'Nuestros Mentores' (*Start-Up Chile*) <<https://startupchile.org/networks/mentores/>> accessed 14 March 2022.

committee of national experts tasked with picking promising entrepreneurs for admission to the country.⁹⁹ 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.¹⁰⁰

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 global competitor firms specialized in advisory services on business and investment visa, as well as investment citizenship have rapidly occupied the market in this respect.¹⁰¹

Through these novel state roles and outsourced functions, and through the redefinition of talent in skilled migration policies, the regulation of immigration, and relatedly of citizenship, begins to follow two distinct trajectories.

4 Towards Dual Track Membership

4.1 Two Trajectories 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 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 two different tracks of immigration regulation is not entirely new. The role of the state in international migration has been characterized in the 20th and 21st century by a quest for control.¹⁰² This has resulted in many cases into rules attracting the highly skilled and contextually restricting the entry of the low skilled.¹⁰³ Relatedly it has been observed that the dichotomy between open and closed borders, long discussed in the literature on international migration,¹⁰⁴ has lost traction as most states take a dual approach to the management of their borders, both closing and selectively opening them.¹⁰⁵

This dual approach is however getting more polarized. 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 stand in stark contrast with the discourse of repression that 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

⁹⁹ See Italia Start Up Visa Guidelines (n 83) 31-32.

¹⁰⁰ Irish Naturalisation and Immigration Service, Start-Up Entrepreneur Programme, Guidelines (n 76), 5-6.

¹⁰¹ See J Džankić, The Global Market for Investor Citizenship (n 10) 147-157.

¹⁰² Castles et al., (n 88) 238.

¹⁰³ Ibid.

¹⁰⁴ For a sample of a vast debate see Miller, 'Immigration: the Case for Limits' (n 47); also see Joseph Carens, *The Ethics of Immigration* (OUP 2013).

¹⁰⁵ Shachar and Hirschl, (n 10) 100-101. Also see Shachar and Hirschl, 'Spatial Statism', (n 6).

borders;¹⁰⁶ to pushing back at sea boats of asylum seekers;¹⁰⁷ 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.¹⁰⁸

From a second regulatory perspective, the dual approach no longer finds expression just 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 that 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 culturalized.¹⁰⁹ Integration requirements have become a common feature of the legislation on immigration in a large number of European states. In some countries, 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.¹¹⁰ 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’ programs, whereby 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 for several categories of immigrants, the grant of a visa and residence permit is conditional upon successful completion of the relevant integration program.¹¹¹ Beyond the first admission of an immigrant, in various countries integration requirements are also a key component 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.¹¹² The Italian Council of State has repeatedly emphasized that the socio-economic integration of the applicant is a fundamental element in the discretionary scrutiny of the administrative authorities tasked with deciding on the grant of Italian

¹⁰⁶ For an overview, see Ron E. Hassar and Jason Wittenberg, ‘Who Builds Barriers to Entry and Why?’ [2015] *International Security* 40(1), 157.

¹⁰⁷ Push-backs to Lybia on the part of Italy were at the heart of the European Court of Human Rights judgment in *Hirsi Jamaa, Hirsi Jamaa v. Italy*, Appl no 27765/09 (ECHR 23 February 2012).

¹⁰⁸ See Australian Border Force, ‘Who we are’ (*Australian Border Force*, 8 June 2021) <<https://www.abf.gov.au/about-us/who-we-are>> accessed 15 March 2022.

¹⁰⁹ Orgad (n 6); also see Ricky van Oers, Eva Ersbøll and Dora Kostakopoulou, *A Re-definition of Belonging? Language and Integration Tests in Europe* (Nijhoff Publishers 2010); Liav Orgad, ‘The Citizen-Makers: Ethical Dilemmas in Immigrant Integration’ [2019] *ELJ* 524.

¹¹⁰ This is the case for instance in France where entrants are required to sign the ‘contrat d’intégration républicaine’ (CIR), see Code de l’entrée et du séjour des étrangers et du droit d’asile, as amended by Decree 1734/2020, art. R-413-2-7; in Italy, see Italian Immigration Act (n 24), art. 4-bis; and for Luxembourg, see Loi du 16 décembre 2008 concernant l’accueil et l’intégration des étrangers au Grand-Duché de Luxembourg, art. 8.

¹¹¹ See Dutch Ministry of Social Affairs and Employment, ‘Basic Civic Integration Examination Abroad’ (*Ministry of Social Affairs and Employment*) <<https://secure.cdn.vellance.com/naarnederland/website/brochure/Engels.pdf>>, accessed 15 March 2022; also see Overheid.nl, ‘Wet Inburgering 2021’ (*Overheid.nl*, 2 February 2021) <<https://wetten.overheid.nl/BWBR0044770/2022-01-01>> accessed 23 March 2022.

¹¹² See UK Government, ‘Life in the UK Test’ (*Gov.UK*) <<https://www.gov.uk/life-in-the-uk-test>> accessed 23 March 2022; See UK Government, Life in the UK Test, <https://www.gov.uk/life-in-the-uk-test>; also see Thom Brooks, *Reforming the UK's Citizenship Test: Building Barriers, Not Bridges* (Bristol University Press 2022).

citizenship.¹¹³ In a milder form, an idea of subscription to and adhesion to the cultural and constitutional values of the host country is also at the basis of the oaths of loyalty that coronate the naturalization process in several countries, in primis the United States.¹¹⁴ The first trajectory to admission and ultimately membership testifies thus to the states' attempt to exercise some sort of 'cultural' control in assessing claims for entry and membership.

A second trajectory 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, once their application has been approved by the relevant ministerial committee, enjoy several facilitations in other passages of the admission procedure.¹¹⁵ In all the programs that grant directly citizenship, qualifying applicants are even exempted from, or subject to significantly reduced durational residence requirements, which in traditional naturalization law represent the main guarantee of integration.¹¹⁶ In this second trajectory thus, accommodating the claims for membership of migrants that promise a defined output, regardless of their integration, becomes a leading element of immigration regulation.

One possible explanation for this diversification in the regulation of immigration and access to citizenship relates to the nature of the powers that relevant lawmaking on the part of the state ultimately expresses. Controlling borders and selecting entrants is the ultimate manifestation of a state's sovereignty. This sovereignty is limited on the one hand by the states' moral and legal obligations to admit migrants for humanitarian reasons. On the other hand, it is constrained by obligations in the context of international partnerships and cooperation agreements. These sets of obligations erode the state's power to define the perimeter of its community of members. Hence states channel their sovereignty in the grey area in-between these two sets of obligations, regulating admission and exclusion in the insignia of control. The first trajectory in immigration and citizenship regulation can be seen as a manifestation of this sovereign resilience.¹¹⁷ The second trajectory is rather the result of the state working as a transnational actor and competing in a global regulatory arena to win to its community investment, innovation and talent. It is an expression of the state as a new type of sovereign actor wielding its power through international engagement. From this perspective the two trajectories can be seen as expressing a tension between two ways of being of the sovereign state, a traditional one inspired to a Westphalian and monolithic conception of sovereignty, that equals sovereign power to the ability to exclude others, whether other sovereigns or other individuals, from one's sovereign sphere; and a novel one rather propelled by a relational idea of sovereignty that interprets sovereign power as the ability to engage

¹¹³ See e.g. *Consiglio di Stato* (Italian Council of State), Judgment no. 3006/2011, of 20 May 2011.

¹¹⁴ 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.

¹¹⁵ For instance, under the Italian start-up visa procedure, the committee screening applications is also tasked with obtaining on behalf of an applicant the police's certificate of no impediment, a document that an applicant would have to obtain directly from the police under the normal procedure. See *Italia Start Up Visa Guidelines* (n 83) 19.

¹¹⁶ For a typology of these programs, see J Džankić, *The Global Market for Investor Citizenship* (n 10) 91-132.

¹¹⁷ On immigration as the 'last bastion of sovereignty', see Dauvergne, *Making People Illegal* (n 59) 47-48.

in the international arena.¹¹⁸ These two ways of being coexist increasingly uncomfortably in the DNA of the 21st century sovereign state, expressing its very own bipolar disorder. The two emerging tracks of immigration regulation can be seen as a sign of that disorder.

A second explanation for this bifurcation in the regulation of immigration pertains rather than to an attitude of the sovereign state, to a fact of international movement. This is the altered sequence between migration and the holding of citizenship that, as suggested earlier, these policies reveal. The traditional regulatory track is addressed to migrants who want to establish themselves as citizens in a host country. The conditions they are asked to meet in order to naturalize treat non-birth right citizenship as a version of birthright citizenship. The emerging regulatory track addresses a different phenomenon: citizenship without movement, or movement without citizenship. It sets admission and belonging requirements for a novel class of members that comprises both present high-regard guests and citizens ‘in absentia’.

The double trajectory in the regulation of immigration and citizenship thus ultimately points to a dual track model of membership.

4.2 Two Models of Membership

A first membership model results of the first trajectory of regulation. It is addressed to the ‘standard’ entrants, such as, for instance, labor migrants and ‘old generation’ skilled migrants. As examined in the previous section, these classes of entrants, in order to be admitted first, and then settle or qualify for citizenship, have to comply with legal requirements ranging from completion of integration courses, to passing citizenship tests, to outright assimilation requirements. The membership status that they are asked to earn this way is a heavy-type, hybrid cultural citizenship. This citizenship represents to some extent the third millennium version of cultural-ethnic citizenship.¹¹⁹ By imposing relevant requirements on new entrants, states broadcast such 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.¹²⁰

A second membership model is the one addressed to the new generation high skilled migrants. To them, states are willing to make available citizenship in a lighter touch version, in exchange for talent ‘as output’, with discounts on the general integration requirements, or simply at a monetary price. This second membership model is oblivious to clear integration and allegiance requirements.

The future well-being of new generation skilled migrants is tied to that of their host polity for reasons different than in the case of traditional migrants and birth-right members. New generation high skilled visa may attract immigrants who plan to be only half invested community members,

¹¹⁸ For a relational account of state sovereignty see Jean Cohen, *Globalization and Sovereignty, Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012), 67.

¹¹⁹ For a classic distinction between a German and a French model of citizenship along these lines see Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

¹²⁰ Under UK law for instance a naturalized citizen can be deprived of citizenship ‘if he has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom’. See British Nationality Act 1981, s 40, as amended by the UK Immigration Act 2014, s 66. Also see Craig Forcece, ‘A Tale of Two Citizenships: Citizenship Revocation for Traitors and Terrorists’ [2014] *Queen’s Law Journal*, 551.

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 have an interest in the flourishing of their host country and its community. 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.¹²¹ The latter will care about nurturing their business and making it profitable. 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. In addition whether the concrete management of the start-up requires actual residence in the host country on the part of the founding entrepreneur or not, there is evidence that within start-up eco-systems novel kinds of communities develop: not only proper innovation hubs as seen in California or on the US East Coast, but also networks of entrepreneurs willing to share experiences and mentor new venturers on a volunteer basis.¹²²

Migrants following the first membership track are, like birth-right members, members by virtue of personal, family and identity links that qualify their interest in the flourishing of their polity and bind their destiny to the one of the polity. New generation highly skilled migrants are instead members by virtue of their seeking a return on their investment, of their endeavor to realize their innovative idea in the host country, and of their engaging with local networks of entrepreneurs, business angels and the like. Making sense of the ties they respectively have to their community of belonging requires renouncing a certain idea of citizenship as a settled form of membership. It requires embracing the idea that membership, and citizenship as its formal expression, can be based in a settlement paradigm or else in a mobility paradigm: members can be citizens who have always been here and have always been citizens; they can be guests who are just passing by, have never been citizens, and never will be; they can be citizens who have naturalized at the conclusion of an experience of migration; or they can be citizens who have become such without ever properly being here.¹²³

The connections that ‘high-regard guests’ and citizens in absentia have to their host polity may be thinner than membership links that 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.¹²⁴ These light citizens that new generation skilled migration policies produce represent a novel group of the cosmopolitan high-flyers that Adrian Favell, speaking with regard to intra-EU migrants in the first decade of the new millennium, had described

¹²¹ In this sense 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 42).

¹²² For an example see Start-UP Chile, ‘Mentores’ (*Start-UP Chile*) <[Mentores - Start-Up Chile \(startupchile.org\)](https://mentores.startupchile.org)>, accessed 16 March 2022.

¹²³ On this Francesca Strumia, ‘The State and the Citizen-as-Migrant: How Free Movement Changes the Social Contract’, (2021) Globalcit, EUI Working Papers 2021/79, <[The state and the citizen-as-migrant : how free movement changes the social contract \(eui.eu\)](https://www.globalcitizensociety.org/wp-content/uploads/2021/07/The-state-and-the-citizen-as-migrant-how-free-movement-changes-the-social-contract-eui.eu)> accessed 23 March 2022.

¹²⁴ Christian Joppke, ‘The Inevitable Lightening of Citizenship’ [2010] 51 *European Journal of Sociology* 9, 12.

as ‘Eurostars’.¹²⁵ New generation skilled migration policies enlarge, in this sense, a trend that free movement under the umbrella of European citizenship had inaugurated first.¹²⁶ Favell’s Eurostars, other than the new generation highly skilled migrants, do not bring a precise output to their host EU country. In Favell’s portrait, these are the highly educated, polyglot professionals, who populate the service sector of the European capitals.¹²⁷ The new generation high 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 yet the ones they acquire ‘in absentia’ 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 memberships they potentially gain or lose, or just stretch in the case of the Eurostars, are not proxies either for their long-term settlement or permanent expatriation, let alone for a shift in their national identities.

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 through the traditional citizenship acquisition track; as well as of a smaller class of transient members, who bring defined outputs to the community and who may not stick forever, and can only belong in a lighter, more cosmopolitan fashion.

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 law in defining membership. The breaking up of the consistency of citizenship has long been denounced from several sides. Not only it is lightening, it is losing value and turning instrumental.¹²⁸ Some of these arguments may have lost some traction at a time when the Covid-19 pandemic has pushed citizens and residents under the protective wings of their own states, and when the specter of war threatens the liberal international order. Yet the distinction between a settled and a mobile, or unsettled conception of membership to which new generation skilled migration policies point still holds. And the distinction raises one crucial question that theories of membership and citizenship need to address: how do those different classes of members, the traditional settled citizens on the one hand, and the high regard guests or citizens in absentia on the other hand, interact with one another and with the state?

¹²⁵ Adrian Favell, ‘Immigration, Migration and Free Movement in the Making of Europe’ in Jeffrey Checkel and Peter Katzenstein (eds), *European Identity* (CUP 2009); also see Adrian Favell, *Eurostars and Eurocities Free Movement and Mobility in an Integrating Europe* (John Wiley & Sons. 2011).

¹²⁶ Access to a system of free movement, and to enhanced global mobility options more in general, may be the very pull factor for some of the users of European new generation skilled migration policies. See Harpaz *Citizenship 2.0* (n 12); for a perspective on the use of EU citizenship as a ‘ticket to mobility’, Marloes de Hoon, Maarten Vink and Hans Schmeets, ‘A ticket to mobility? Naturalisation and Subsequent Migration of Refugees after Obtaining Asylum in the Netherlands’ [2020] 46 *Journal of Ethnic and Migration Studies* 1185.

¹²⁷ Favell ‘Immigration, Migration and Free Movement’ (n 125).

¹²⁸ See e.g. Joppke ‘The Instrumental Turn’ (n 12); Bauböck ‘Genuine Links and Useful Passports’ (n 12); Peter Spiro ‘Stakeholder Theory Won’t Save Citizenship’, in Rainer Bauböck (ed), *Democratic Inclusion*. Rainer Bauböck in Dialogue (Manchester University Press 2017)

There are two possible perspectives to answer 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 high regard guests that states are intent in attracting may turn into a lobby for their own interests. This would harden the divide with ‘ordinary’ members, 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, membership is becoming commodified and citizenship is losing its meaning in terms of equality of rights.

A second potential perspective leads to question the reciprocal responsibilities of these two types of members and rewrite the social contract around their coexistence. Traditionally, citizenship embodies a two-way relation 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 relations among different classes of members. 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 that cut across the relevant circles. In other words, a way to preserve the unity of citizenship at a novel, different level is seeking ways to ensure that the investments and ideas of the light citizens and high regard guests contribute to the bonds of solidarity and mutual provision that 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 recognize the high regard guests as fellow members despite 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-members, between the static and disaffected, and the cosmopolitan and unattached, whose contrast risks bringing communities to a breaking point.¹²⁹

Conclusion

New generation skilled migration policies are quantitatively of little significance and as at the time of writing many of them are already falling out of fashion. Yet the very engagement of the machinery of the state in the context of these policies, regardless of their limited impact in practice, conceptually brings 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 maintain a degree of detachment from it. This yields on the one hand a novel trajectory of immigration and citizenship regulation, parallel but distinct from the traditional one. On the other hand, it makes it possible to conceive of a dual model of membership that challenges the very consistency of citizenship: while national citizenship remains the mantle that most persons wear throughout their lives, the two trajectories of 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

¹²⁹ In this sense see Francesca Strumia, ‘The state and the Citizen-as-Migrant’ (n 123).

built between a cosmopolitan minority of people living life as remote or mobile members and a majority of static citizens who are presumed to belong but may well be disaffected.

The rising of this wall marks a fundamental alteration in the scope and fabric of community membership. Arguments about the commodification of citizenship capture in part resulting concerns. Beyond debates on citizenship and membership, this wall also reflects what could be called the 21st century state ‘bipolar disorder’ in a global, and increasingly post-global, era: its contextual responding to two conflicting drives, reclaiming predominant and exclusive responsibility for the interests of a bounded national community on the one hand, and embracing on the other hand the role of participant in a global, interdependent system of states. The findings of this chapter on the membership implications of a rather discrete phenomenon –new generation skilled migration and its regulation– invite to rethink citizenship so as to contain the building up of a similar wall and to deal with the state’s disorder. The dual track membership model that the chapter has described requires a conception of citizenship refocused on the reciprocal rights and duties of different classes of citizen-members: for instance, the duties owed by external citizens to communities of origin, as well as the duties owed by internal citizens to migrants. It also requires a conception of the state as a mediator between those different classes. Embracing this latter role more openly may help the 21st century state make sense of its own malaise. And it may be the best legacy yet of new generation skilled migration policies and their uncertain fortunes.

Ultimately, through scouting for talent as output new generation skilled migration policies contribute to add two novel profiles to the identikit of the community member: high regard guests and citizens in absentia. It is these two novel classes of members that problematize, and force to interrogate from novel perspectives existing conceptions of citizenship, as well as the role of the state in excluding, admitting, and selecting members.