Foreigners, Citizens and the Tyrannical Edges of the 'Vox Populi'

Empirical and Normative Evidence from Switzerland

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Abstract

The debate on the tyrannical consequences of direct democratic rule on minority rights is almost as old as democracy itself. Yet, it has regained considerable vigour in recent years, as the 'plebiscitarian turn' widely observed in Europe and North America has shaken to the core the very foundations of representative democracy as laid out since 1945. The article examines the issue in the case of immigrant minorities in Switzerland, that concentrates about half of referendums worldwide. It proceeds in two steps. First, based on an original dataset compiling all forty-three referendums and popular initiatives on migration-related issues held in Switzerland at federal level between 1848 and 2017, it examines through a rational-choice institutionalist lens whether direct democratic instruments have contributed to 'expand' or 'restrict' the rights of immigrants. The results point to a significant 'tyrannical' effect of direct democracy, both at the 'agenda-setting' and 'decision-making' stages. The second section takes a normative turn and critically discusses the democratic legitimacy of a political franchise that excludes the very population that is most intimately and immediately coerced by electoral outcomes. It proposes a 'realist' reform of the referendum procedure based on the 'principle of empathy', the aim of which is to complement the norm of national self-determination underlying the national franchise in Switzerland as well as in most democracies with an objective examination of and due respect for the 'rights of others'.

Keywords: direct democracy, immigrants, Switzerland, referendum, voting rights, majority tyranny

Author's biographical note

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Hurl your calumnies boldly; something is sure to stick.

Francis Bacon, 1623

Introduction[1]

In the Swiss context of semi-direct democracy, citizens are frequently called to the polls to endorse or reject legislations or popular initiatives on migration-related issues. In recent years, the Swiss electorate seems to have favoured bills proposing to curtail down the rights of immigrants, successively rejecting the introduction of a *jus soli* provision in nationality law (2004), supporting the ban on the construction of minarets (2008) or jeopardising the free mobility of EU citizens (2014). Whilst the latest plebiscites give credence to the age-old argument that direct democracy encourages the 'tyranny of the majority' over a disfranchised minority, its long-term impact on migration-related outputs remains unclear. In fact, the latest referendum held in February 2017, which saw 60.4 percent of voters supporting a bill introducing a modest yet symbolically charged element of jus soli for third generation foreign residents in the nationality law, point in the opposite direction. By disavowing the radical right Swiss People Partly (SVP) that led the crusade against a liberalising legislation consensually passed in Parliament under the leadership of the Socialist party, the Swiss people conferred democratic legitimacy to the decision of widening the gate to full and equal membership in their political community to the grandchildren of immigrants.

Moving beyond anecdotal evidence, the paper pursues two objectives. First, it empirically investigates through a rational choice institutionalist lens whether the 43 referendums and popular initiatives on migration-related issues held in Switzerland between 1848 and 2017 have contributed to 'expand' or 'restrict' the rights of immigrants. Second, it discusses the normative legitimacy of electoral outcomes in a democratic

theory perspective and proposes a modest reform of the referendum procedure based on the 'principle of empathy' in order to reconcile the norm of self-determination underlying the federal franchise in Switzerland as well as in most democracies with due consideration for the 'rights of others'. To be sure, the question is by no means new: the 'tyrannical' potential of direct democratic rule has been on the mind of political philosophers and legislators alike at least since the Federalist Papers and was later more fully elaborated on by liberal theorists, chiefly Alexis de Tocqueville and John Stuart Mill. In recent years however, the issue has gained traction in the wake of declining party membership and rising populist fervour that have shaken to the core the very foundations of representative democracy in Europe and North America as laid out since 1945. While some have criticised the plebiscitarian turn as a 'disfigurement' of democracy (Urbinati 2014), others have welcome it as a healthy remedy to the technocratic and elite-driven politics that have alienated the people from the decision-making process as much as it has fed the recent populist backlash (Coussedière 2012). Whether lamented as a corruption of democratic ideals or praised as the *sine qua non* to their rejuvenation, most would agree that direct democracy shows no sign of falling out of fashion, and that further research is needed in order to understand its implications (Altman 2010). In regards to its empirical manifestations, a relatively large empirical scholarship has emerged, yielding contrasted results. In a seminal study, Barbara Gamble (1997) analysed 71 civil rights popular vote in the US and identified a compelling trend of a majority tyranny, in clear contradiction with Cronin who found that 'American voters have in most cases approved measures protecting or promoting minority rights, almost as often as institutions of representative government' (Cronin 1989: 78). In the Swiss context, which concentrates about half of the referendums worldwide, Frey and Gotte found that direct democracy was more likely to protect civil rights than undermine them (1998).

One important issue with existing literature has to do with the tendency of subsuming different 'minority' groups — be they territorial, racial, sexual, ethnic or religious — into a single analytical category, which goes far in explaining the absence of a clear answer to the overarching question. Where the line between majority and minority actually lies is a relational process that can only be examined contextually, and the same direct democratic instruments may expand the rights of certain minorities while undermining others, depending upon the institutional context and the question put on the ballot. As far as Switzerland is concerned, direct democratic institutions notoriously

played a key role in the successful political integration of territorialised linguistic and religious minorities into a single 'national' demos and the consolidation of power-sharing arrangements at the federal level, for it encouraged political elites to follow a strategy of 'cooperation' rather than 'confrontation' (Linder 1994, Papadopoulos 2001). The introduction of the *mandatory* referendum as early as 1848 was a historic necessity in the aftermath of the civil war. Besides boosting the democratic credentials of the nascent federation, the double majority rule – which requires the support of a 'democratic' majority of voters and a 'federal' majority of cantons – provided rural and predominantly Catholic cantons with a potent safeguard against the temptation of densely populated and large urban and Protestant ones to modify the constitution as they see fit (Kriesi and Trechsel 2008). As for the *optional* referendum, it was one of the main novelty of the 1874 overhaul of the constitution. It is widely credited for the successful incorporation of conservative Catholic elites in federal institutions: Initially kept at bay from central power, their primary concern at the time was to keep a strong grip over their own cantonal strongholds (Linder 1994). The new institutional context provided them with the opportunity to block several important legislations of a Federal Parliament until then dominated by the victors of the *Sonderbund* civil war: Radicals and Protestants (Glass 1977: 46). In turn, it encouraged Radicals to co-opt them into the decision-making process, a strategy that culminated in 1891, with the first election of a Catholic conservative to the Federal Council (Papadopoulos 2001: 37-9). Introduced in 1891 and modeled on similar instruments previously experimented in several German-speaking cantons, the *popular initiative* also played a more diffuse role of political integration, by creating a uniquely Swiss 'voting space' or demos transcending linguistic boundaries, as citizens speaking different languages are regularly invited to "consider and decide upon the *same* issues at the *same* time" (Lacey 2014: 73, emphasis in the original). The integrative potential of direct democracy is nowhere as evident as in the case of the 'Jurassian question', largely solved since a 26th canton was created in 1979 following a series of cascade referendums and popular initiatives allowing overlapping electorates to express their views at multiple levels, from the entire Swiss Confederation to the Canton of Bern, the Francophone districts within it and the municipalities located on either side of the border now separating the *Canton du Jura* from the *Jura bernois* (Buechi 2012).

Can a similar 'integrating' effect be observed in regards to immigrants, who unlike autochthonous minorities, are territorially dispersed and for the most part do not have the

right to vote? Or have direct democratic instruments impeded upon the extension of their rights? The overall question can be broken down into two empirical and one normative question, derived from existing institutionalist theory, chiefly veto players theory as exposed by George Tsebelis (2002, Hug and Tsebelis 2002), which posits that a) referendums add a popular veto to the decision-making process, thus increasing the likelihood of deadlock; b) conversely, popular initiatives have an 'innovating effect' by dispersing agenda setting and decision making powers from political elites to citizens; and c) referendum outcomes reflect the preferences of the median voter.

(Q1) Have optional and compulsory referendums had a 'veto' effect on the legislative making process? If so has it been more pronounced in regards to bills proposing to expand or to restrict the rights of immigrants?

(Q2) Have popular initiatives had an 'innovating' effect by dispersing agenda setting ('who asks the question' and 'who triggers the referendum') and decision making ('who ultimately decides') powers from Parliamentary elites to other groups in civil society? If so, has it primarily benefited pro or anti-immigrant groups?

George Tsebelis also shows that, under ideal conditions, the outcome of popular votes approximates the preferences of the 'median voter' — that does not coincide with those of a Parliament made of elected representatives. In Switzerland as in most democracies, however, the political franchise is reserved to Swiss citizens, therefore excluding non-citizen residents. This raises two interrelated questions, addressed at the end of the empirical analysis.

(Q3) Has the fact that the right to vote in national referendums is reserved to Swiss citizens impacted upon electoral outcomes? Does it undermine their democratic legitimacy, from a normative perspective?

The paper is divided into three parts. Following this introduction, Part 1 introduces the research design, dataset and aggregated results. Part 2 successively examines the impact of mandatory referendums, optional referendums, and popular initiatives addressing migration-related questions held at federal level between 1848 and 2017 in Switzerland, and highlights a significant 'restrictive' effect of direct democratic rule, both

at the agenda-setting and decision making stages. The final section takes a normative turn and discusses the findings in a democratic theory perspective. It argues that because federal voting rights are reserved to citizens and therefore exclude the very population that is most intimately affected and immediately coerced by electoral outcomes, direct democracy has given more weight to the preferences of natives over immigrants. In turn, this 'native bias' has contributed to perpetuate restrictive policies while damaging their democratic legitimacy. To conclude, the paper makes a modest and 'realist' proposal for mitigating the tyrannical tendencies of a franchise premised on the principle of a people's self-determination based on a complementary 'principle of empathy'. In practice, it recommends the introduction of a preliminary and compulsory 'impact assessment study' in the referendum procedure in order to raiser voters' awareness of the implications of their ballot on the 'rights of others'.

1. Research design and aggregated results

In Switzerland, the three main federal instruments of direct democracy are the mandatory referendum, which requires all constitutional amendments to be backed by popular plebiscite; the optional referendum, which is activated if at least 50,000 voters sign a petition opposing a bill within three months after its passage in the bicameral Parliament; and the popular initiative, which requires the collection of at least 100,000 signatures within a period of eighteen months to propose a constitutional amendment. Because they may alter the constitution, mandatory referendums and popular initiatives must be supported by a 'democratic' majority of voters and a 'federal' majority of cantons – the so-called double majority rule. By contrast, optional referendums are only required to meet a simple majority of voters to block the contested legislation.

According to rational choice theory, institutions ought to be understood as formal rules providing actors evolving in a given political field with incentives and constraints for action (Peters 2011). From this perspective, referendums and initiatives have distinct consequences on the broader legislative process. On the one hand, referendums – be they mandatory or optional – occur at the end of the parliamentary process, once the two chambers (the National Council and Council of States) have reached an agreement and issued a legislation. By adding a popular veto to the decision-making process, they may have a 'braking effect', the *vox populi* threatening to ruin an often long and tedious
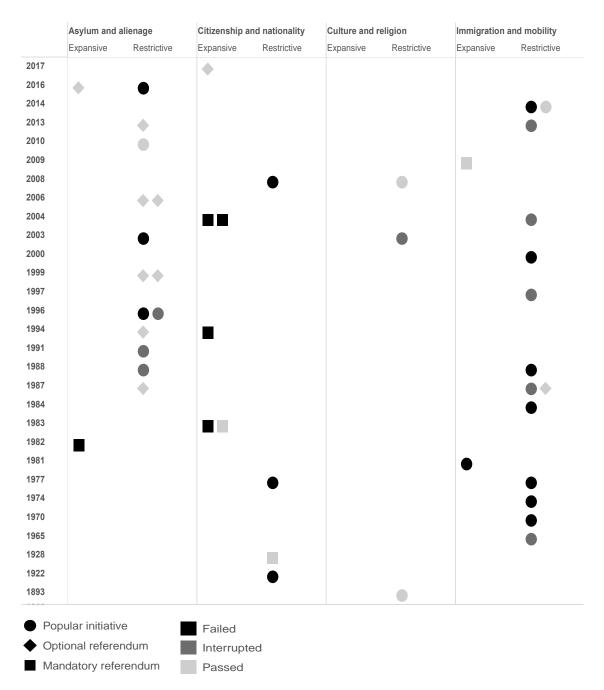
legislative process (Tsebelis 2002). Conversely, popular initiatives have an 'innovating effect' as they provide citizens with the possibility to bring to the fore issues that were sometimes deliberately left aside by the Federal council or Parliament (Linder 1994). As Papadopoulos put it, the former is meant to address 'sins of commission' and the latter, 'sins of omission' (Papadopoulos 2001).

Direct popular scrutiny also has more diffuse implications, of which I will only examine two: In regards to referendums, traditional elites have an incentive to turn groups with 'blackmail power' into 'coalition partners' by inviting them to join the negotiation table in order to mitigate the risk of seeing the bill challenged in the polls. Because the legislative process involves a broad range of stakeholders with heterogeneous preferences, legislative outputs generally do not significantly depart from the *status quo*. As for popular initiatives, they may have a so-called 'flywheel effect' on subsequent legislative proposals, even when they were rejected in the polls, especially when with a slim majority signaling a popular that falls short of the fifty percent threshold and yet cannot be ignored in subsequent legislations (Linder 2004). In other words, failed initiatives leave an imprint that does not disappear on voting day, but keep informing future decisions. Furthermore, in theory, facultative referendums and popular initiatives are not ideologically tainted, and may be initiated by political entrepreneurs and civil society groups that either seek to upgrade or downgrade the rights of immigrants. Hence, a pro-immigrant group may challenge a legislation already passed in Parliament and deemed too restrictive or calling for a popular initiative aiming at liberalising existing constitutional provisions. Conversely, political entrepreneurs who are hostile to immigrants may exploit the optional referendum avenue to block a liberal legislation, or gain control over the political agenda by triggering a popular initiative asking a question neglected by parliamentary elites.

In order to assess their impact on migration-related outputs, the analysis must thus include three variables: The type of plebiscite (mandatory referendum, optional referendum, popular initiative); its outcome (passed, rejected, failed) and orientation (expansive or restrictive). The empirical analysis is based on an original dataset that compiles all 43 plebiscites on migration related issues that took place at the federal level between 1848 to 2017, the list and details of which can be found on the website of the Federal Administration. Legislations were divided into three types (mandatory

referendum, optional referendum, popular initiative), four themes (immigration and mobility, citizenship and nationality, asylum and alienage, culture and religion) and three possible outcomes (rejected, accepted, interrupted – the latter referring to cases where the initiative or optional referendum was either withdrawn by its promoters, blocked by the Federal Council, or failed to collect enough signatures in due time). The dataset further distinguishes between a legislation's *orientation* (expansive or restrictive), reflecting whether it proposes to *upgrade* or *downgrade* the bundle of rights currently enjoyed by the targeted group, respectively. Because popular initiatives must by law focus on a single issue, they neatly fall into one or the other category. The same cannot be said of referendums, which deal with legislations that went through multiple stages of negotiations involving myriad stakeholders over extensive periods of time in a typical consensus democratic fashion, with some provisions expanding migrants' rights and others restricting them. I therefore coded them according to my own contextual interpretation of the direction of the reform, and subsequently checked whether this was consistent with political parties' voting instruction. For example, the Revision of the Federal Law on Foreigners, which was subjected to an optional referendum on 24 September 2006, significantly downgrades the rights of prospective immigrants by introducing yearly quotas on the entry of Third Country Nationals and shutting the door to low-skilled candidates. It also negatively affected the rights of non-citizen residents by making the acquisition of a permanent residence permit (the so-called 'C-permit'), no longer automatic after ten years of residence, but subjected to integration requirements. On the other hand, it marginally expanded the (internal) mobility rights of foreign workers, by waiving the obligation to obtain an authorisation in order to relocate from one canton to another. Ultimately, the spirit of the law tilted to the restrictive side, a view that is comforted by the fact that right wing parties – chiefly the radical right party SVP – instructed voters to back the reform, whereas the Socialist party as well as the Greens and other left-inclined civil society groups called for rejecting a bill they saw as 'inhumane', 'discriminatory' and 'arbitrary'. The legislation was thus coded as 'restrictive'. The overall results are summarised in figure 1.

Figure 1: Federal referendums and popular initiatives on migration-related issues in Switzerland (1848-2017)

	Asylum and alienage		Citizenship and nationality		Culture and religion		Immigration and mobility	
	Expansive	Restrictive	Expansive	Restrictive	Expansive	Restrictive	Expansive	Restrictive

Legend:
- ● Popular initiative
- ◆ Optional referendum
- ■ Mandatory referendum
- ■ Failed
- ■ Interrupted
- ■ Passed

Source: Author's own compilation based on information available on the website of the Swiss Federal administration. *In order to facilitate replicability, an interactive and coloured version of the dataset was made available online at* http://nccr-onthemove.ch/research/projects/dataset-on-migration-referendums-and-initiatives/ (Arrighi 2017).

2. Empirical analysis

This section successively examines the impact on policy outputs of mandatory and optional referendums and popular initiatives addressing migration-related questions held in at the federal level in Switzerland since the 1848 liberal constitution and 2017, through a rational choice institutionalist sense.

2.1. Mandatory referendums

From a game-theoretic perspective, referendums add a new collective veto player to the decision-making process. As such, they increase the likelihood of deadlock and favour policy stability over change (Tsebelis 2002). Looking at other policy areas in Switzerland, chiefly social policy, several authors have shown how referendums have long inhibited the development of a federal welfare state, as voters almost systematically refused further centralization of competencies and socialisation of private insurance schemes (Immergut 1992, Obinger 1998). On the other hand, the literature found that in a context of welfare retrenchment, the presence of multiple veto points could make the process of rolling back existing welfare policies more difficult (Leibfried et al. 2005). Can a similar 'popular veto' effect - be observed in the realm of immigration and immigrant policy? If so, has it weighted more heavily upon restrictive or expansive legislations previously passed in Parliament?

The data shows that throughout the entire period, only forty percent of mandatory referendums (four out of ten) found the support of a majority of cantons and voters. Besides, with the exception of the 1928 referendum on the 'Revision of Art. 44 of the Constitution (on Naturalisation)', which successfully repealed the right of cantons to introduce a qualified form a *jus soli*, all other nine constitutional amendments sought to expand immigrants' rights, mainly in the realm of citizenship acquisition. In 1983, a proposal to facilitate the naturalisation of foreigners born in Switzerland was rejected by a slim majority of voters. In 1994, a similar text found the support of 52.4 percent of voters and yet failed to meet the double majority rule, thirteen cantons and one half canton having voted against the bill. Again in 2004, two bills aiming at easing the conditions of naturalisation for second and third generation foreign youth were outvoted in the polls, with a wider margin than in earlier referendums (43 percent and five cantons and one half

canton, 48.4 percent and six cantons + one half canton, respectively). With sixty percent of expansive legislations rejected in the polls, the results highlight a significant 'popular veto effect' of mandatory referendums disproportionately leaning on liberal reforms.

2.2. Optional referendums

Optional referendums show a diametrically opposed picture: None of the nine bills subjected to a popular vote have been blocked, and the vast majority of them (seven out of eight) successfully constrained the rights of foreign residents (in 1987, 1994 and 2006) or of asylum seekers (in 1987, 1999, 2006, 2013). Unlike popular initiatives, that have been the preferred instrument of the right (see section 3.3. below), the left has privileged the optional referendum, although without succeeding in aborting a series of legislations deemed too restrictive. The only exception is the latest votation on the 'Introduction of a Facilitated Naturalisation Procedure for Third Generation Foreign Youth', held on 12 February 2017 and mentioned in the introduction, which saw the electorate endorsing a long-standing reform of the nationality law. However, the final legislation subjected to the *vox populi* was a considerably watered-down version of the early bill, pushed forward by Socialist National Councilor Ada Amara. Among other concessions made to the right, the initiator, moved by the fear of the popular Caudine Forks in the light of previous referendum results, renounced to push for an automatic *jus soli* provision, but opted instead for a far less ambitious facilitated procedure, including lower residence and cultural requirements, which already existed in no less than 16 out of 26 cantons. Hence, while not strictly speaking a failure, the threat of the referendum agitated by the SVP severely limited the liberal ambitions of the reform's promoters, which conceded to a far more modest legislation to which no more than an estimated 25,000 foreign youth are eligible (Wanner 2016).

To sum up our analysis thus far, optional referendums initiated by the left almost always failed to prevent restrictive legislations, whereas simultaneous efforts to steer the constitution along a more liberal route have been almost systematically arrested by the *vox populi*. In other words, optional referendums have not blocked restrictive bills, whereas mandatory referendums successfully vetoed expansive ones. Has this trend been counterbalanced by the 'innovating' effect of popular initiatives?

2.3. Popular Initiatives

Popular initiatives are said to shift agenda setting powers – who 'triggers the referendum' and 'who asks the question' – from the hands of political elites represented in Parliament to citizens (Tsebelis 2002). In regards to minority rights in Switzerland, it has provided radical groups with the opportunity to ask questions that traditional elites 'never ever dared to ask' since its inception in 1891. Indeed, the first federal initiative which took place one year later, in 1892, asked whether ritual slaughter, practiced at the time by a small and recently emancipated Jewish community, should be allowed without pre-stunning. Though framed through the lens of animal welfare, the initiative had strong anti-Semitic undertones, echoing the broader European context at the time. The Federal Council and all parties in Parliament unanimously recommended to reject a proposal they saw as an illegitimate infringement upon a religious right. It was nonetheless plebiscited by 60.1 percent of voters and thirteen cantons – among an electorate which, since 1874, no longer excluded (male) Jewish citizens (Studer et al. 2013).

In theory, popular initiatives are ideologically-blind, for they can be used and abused by organised actors across the political spectrum. In the realm of immigrant policy in Switzerland, however, extreme or radical right groups and sometimes even groupuscules – have been far more active and effective than their counterparts on the left at both 'asking questions' and 'triggering referendums'. In the post-war era, the politicisation of immigration in Switzerland kicked off as early as 1965 with the first infamous initiative 'Against Foreign Influence and the Overpopulation of Switzerland', a title which unambiguously conveys the aims of its promoters and set the tone of the debate for the decades to come (Ruedin and D'Amato 2015). Between 1965 and 2016, 25 initiatives on migration-related issues were launched, 24 of which proposed to (sometimes severely) curtail immigrants' rights. The tenacity of anti-immigrant groups appears particularly impressive in the light of their protracted failure – at least until recently – to gain support of a majority of voters. Out of sixteen restrictive proposals put forward by right-wing groups between 1965 and 2004, seven failed to collect enough signatures in due time while the remaining nine were outvoted, often by landslide margins. Their initiators have thus been largely immune from what some have called the 'boomerang effect' according to which a very low score does more harm than good to an initiative's promoter, as the people's lack of enthusiasm signals that the issue can be

durably taken out of the agenda. Instead, they seem to have fully endorsed the view that 'all publicity is good publicity', the priority being to keep the issue high on the agenda. It is only in the 2000s, when the SVP, which strategically started to occupy the anti-immigrant political space a decade earlier under the charismatic leadership of Christoph Blocher (Betz 2009), that restrictive initiatives started to make some progress and at times even gather a majority in the polls. Conversely, the period saw only one single referendum that was initiated by the left: In 1981, the popular initiative 'For a Renewed and Solidaristic Approach to Immigration' failed to mobilise and convince an electorate which without doubt started to experience a certain fatigue after five votes on similar issues over the previous decade.

The data shows that the recent and much publicised victories of the SVP – 'Against the Construction of Minarets' in 2008, 'For the Deportation of Foreign Criminals' in 2010, or 'Against Mass Immigration' in 2014 – actually came in the wake of a of a long series of humiliating defeats. But even though the direct legislative impact of popular initiatives has been negligible, their indirect and long term effects on subsequent policies should not be underestimated. First, anti-immigrant groups successfully used popular initiatives as a means to set the agenda and frame the issue in their own – and often unequivocally xenophobic – terms. Their domination over pro-immigrant groups in this regard is striking, although it may have been somewhat mitigated by the fact that (mainstream) media reports have been consistently more sympathetic to immigrants (Ruedin and D'Amato 2015: 148). Second, successive restrictive popular initiatives have had a so-called 'flywheel effect' (Linder 2004) on subsequent legislations by informing future debates and providing their initiators with the opportunity to join the negotiation table in the pre-parliamentary phase. The data provides anecdotal evidence of such a flywheel effect. For instance, the 2003 popular initiative 'Against Abuses in Asylum Law', launched by the SVP and proposing to severely restrict the rights of asylum seekers who allegedly exploited an over-generous policy framework was supported by fifteen cantons and yet was rejected by a paper-thin majority of voters (50.1 percent). Though unsuccessful, the initiative sent a strong signal to elected representatives, who could not ignore the fact that a large share of their constituency favoured a stricter policy framework. The preferences of the minority were subsequently translated into a bill approved by both chambers in 2005, which considerably tightened the asylum procedure and waived access to social aid for rejected applicants. The legislation was then

unsuccessfully challenged in a referendum initiated by the left, and eventually came into force in 2006.

To sum up, with one single exception, all twenty-five popular initiatives between 1965 and 2016 aimed to either curtail immigration of downgrade the rights of non-citizen residents. Despite a very low success rate (i.e. three out of twenty-five, that is twelve percent), they indirectly impacted upon the legislative process, by empowering anti-immigrant groups who gained control over the political agenda and by influencing subsequent reforms as the legislator sought to take into account the restrictive preferences of a sizeable minority of voters.

3. Normative implications

Existing scholarship has shown that referendum outcomes tend to approximate the preferences of the median voter in the population, which do not necessarily coincide with those of the median voter in a parliament made of elected representatives. The argument holds true both from a game theoretic (Tsebelis 2002, Hugs and Tsebelis 2002) and empirical perspective (Haider Markel et al. 2007, Bochsler and Hug 2015). In the Swiss case, our analysis has shown that the 'people' tended to veto expansive legislations that had been consensually crafted by parliamentary elites, endorse restrictive ones, and push on top of the agenda issues that had been neglected by them through frequent and predominantly anti-immigrant popular initiatives, thereby shedding light on the gap between representative and direct democracy.

If the theoretical proposition that a decision adopted through direct democratic means reflects the preferences of the median voter is correct, then a logical consequence is that the outcome essentially depends upon the scope of the franchise, that is the population who is eligible to vote, and the level of turnout, that is the proportion of the eligible population who actually casts a ballot. The former aspect determines *who has a voice*, while the latter asks *whose voice is louder*, for it is a long-established fact that the propensity to vote is unevenly distributed across society (Serdült 2014). Empirical studies disaggregating turnout figures by age, level of education, sex and other relevant variables reveal which groups in a specific electoral context tend to participate more than others and therefore see their preferences weigh relatively heavier in the democratic process.
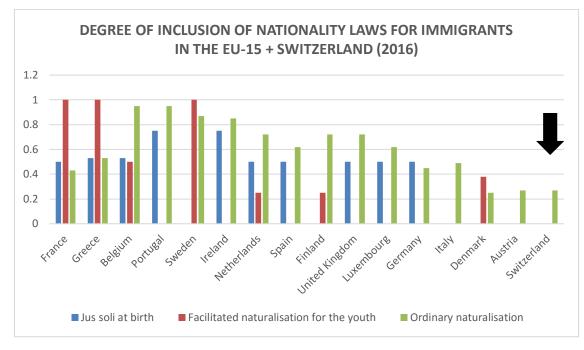
Now, the study of electoral behaviour in established democracies often starts from the (flawed) assumption of universal suffrage, according to which all resident adults have equal access to the franchise. While the 'expansion of the political rights of citizenship' (T.H. Marshall 1950) to traditionally disfranchised groups such as women, the working class or racial minorities has indeed become a near universal democratic norm in the course of the 20th century, protracted international migration have created new forms of 'discrepant electorates' (Caramani and Grotz 2015), pointing to a more or less significant mismatch between the demos and resident populations, which in turn has both empirical and normative implications (Arrighi and Bauböck 2017).

3.1. The 'native bias' of the political franchise

From an empirical perspective, the question is whether and how the scope of the franchise displaces the median voter and by extension affects electoral outcomes. In the Swiss case, the Constitution of 1848 granted the right to vote in federal elections to all male and Christian citizens of what were then twenty-five cantons, a comparatively broad franchise for European standards at the time. The religious qualification was waived in 1874 as part of a broader constitutional reform, which the suffrage to Jewish citizens, while the sex restriction was lifted as late as 1973, Switzerland being the last West European country to do so. Since the right to vote in federal elections was extended to citizens abroad in 1975, Swiss citizenship has become a *necessary* and *sufficient* condition to the franchise, and any further expansion of the demos requires the consent of a majority of those who are already included. In practice, eligible voters decide whether or not the rules of acquisition of citizenship should be relaxed, so that more or less immigrants can take part in subsequent electoral competitions. As our analysis clearly showed, however, Swiss voters have repeatedly favoured the *status quo*, thereby perpetuating exclusive citizenship policies, which in turn shrinks the pool of foreign residents who are eligible for naturalisation.

A concrete way to examine the discrepancy is to estimate and compare changes in the composition and size of the population who enjoys voting rights under several types of expansion of the demos as can be observed in other democracies. In practice, the demos can be expanded in two non-mutually exclusive ways: either by reforming electoral law to include all or selected categories of non-citizen residents, or by liberalising nationality

laws (Blatter et al 2017). The first scenario exists at local level in a growing number of Swiss cantons as well as in 12 EU Member States. Though much less frequently, a few countries also let foreigners participate in national referendums after a certain length of residence ranging from one year in New Zealand to five years in Chile or Ecuador and up to fifteen years in Uruguay. Another sub-set of countries reserve the right to vote in national elections to certain nationalities, either based on reciprocity, such as Portugal and Brazil, or on membership to an international organisation of states, such as Commonwealth citizens in the United Kingdom, Belize or Panama (Arrighi and Bauböck 2017). Under the second scenario, more foreigners would be eligible for a Swiss passport as a result of more inclusive nationality laws. For instance, Swiss citizenship could be automatically granted to all foreigners born in the country, either for second generation immigrants (the so-called unconditional jus soli, as it is practiced *inter alia* in virtually all North and Latin American countries) or for 3rd generation immigrants with at least one parent born in the country (the double jus soli, as it exists in France, Portugal or Spain). Figure 2 compares the degree of inclusion of the rules of acquisition of citizenship in Switzerland and the so-called EU fifteen states, as of 2016, based on the CITLAW indicators of the GLOBALCIT Observatory.[2] It captures legal provisions along three distinct modes of acquiring citizenship, namely: jus soli at birth (for 2nd and 3nd generation immigrants born in the country of foreign parents); facilitated naturalisation for the youth (for first generation immigrant youth based on number of years of residence or schooling prior to the age of majority); and ordinary naturalisation (for foreign residents based on residence, linguistic, civic, economic, and good character conditions). For each indicator, the absence of a provision or the most restrictive conditions result in an indicator score of 0, whereas unconditional entitlements or the most inclusive provisions get a score of 1.

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[2] THE CITLAW indicators of the GLOBALCIT Observatory (formerly EUDO CITIZENSHIP) measure the degree of inclusion of nationality laws in 42 European States between 2011 and 2016. For a comprehensive methodological overview of the indicators, see Jeffers et al. (2017) and the dedicated page on the GLOBALCIT website at http://ind.eudo-citizenship.eu/acit/topic/citlaw_2016 (last consulted on 10 October 2017).

Figure 2: Degree of inclusion of nationality laws for immigrants in the EU-15 + Switzerland (2016)

Source: CITLAW indicators, GLOBALCIT, 2016

The Confederation stands out for its remarkably restrictive legislation along all four modes of acquisition compared to its European neighbours, whose nationality laws are already far more exclusive than in the Americas.

Table 1 shows the number of additional voters and their share of the total electorate in response to four possible reforms of Swiss electoral or nationality laws, based on data provided by the Swiss Federal Statistical Office (OFS) for 2014. The figures only include individuals aged 18 or older and the proportions of additional voters are calculated as a ratio of the entire electorate, residing in Switzerland and abroad, in the 2015 federal elections. There are of course many other ways through which the demos could be made more inclusive, chiefly by relaxing the conditions of eligibility for ordinary naturalisation, which in Switzerland are among the most restrictive in Europe. However, how this would impact upon the demos is difficult to evaluate, for the policy environment is only one determinant of one's decision to naturalise and only a fraction of eligible foreigners would choose to take up citizenship (Vink et al. 2013). Such a scenario was therefore excluded from the probabilistic analysis.

Table 1: Projected changes in the electorate in response to four possible changes in electoral or nationality laws (estimates for 2014)

Modes of franchise expansion	Eligibility criteria	Absolute numbers (>18 years of age)	Percentage of the electorate (registered, as of 2015)
To selected categories of foreign residents	All foreigners after at least 10 years of residence	859,434	16,3%
	All holders of a permanent residence permit (C permit)	1,011,295	19,1%
	All EU citizens residing in Switzerland	1,110,746	21,0%
Through liberalising nationality laws	Automatic jus soli (first generation born in Switzerland)	1,511,430	28,6%

Source: Authors' own compilation of data provided by the *Office Statistique Fédéral* (OSF), 2014/15, with the benevolent assistance of Prof. Philippe Wanner from the University of Geneva.

Table 1 illustrates how a more expansive federal demos including at least a portion of the current non-Swiss long-term resident population bears the potential of tipping the electoral balance along a path that is more in tune with their collective interests, chiefly in tight electoral contests. The 2014 initiative 'Against Mass Immigration', supported by a paper-thin majority of 50.3 percent, provides one such example. So, does the 2004 referendum which saw 51.6 percent of the Swiss electorate rejecting the Parliament's decision to introduce an element of *jus soli* that would have opened an automatic path to citizenship to hundreds of thousands of residents born in Switzerland and yet unable to have a say in a referendum the outcome of which negatively impacted upon their legal status.

Of course, there is no certainty as to whether those newly enfranchised populations would vote differently from the *ex ante* electorate. For one thing, turnout among immigrants tends to be significantly lower than among the native population (Ruedin 2017). Notwithstanding a lower participation rate, there is some evidence that immigrants

in Switzerland tend to favour left-of-centre parties, who in turn treat them as a natural constituency (Strijbis 2014). Perhaps more importantly, an expansion of the demos could also have indirect implications on the broader political system, by providing political parties with incentives to compete for t*he vote of immigrants*, instead of the *anti-immigrant vote* (Koopmans et al 2012). Conversely, the current federal franchise narrowly defined through the cumulative impact of restrictive nationality and electoral laws, accentuates the discrepancy between resident and eligible populations resulting from large scale immigration. Electoral outcomes thus tend to over-represent the preferences of natives over immigrants, a 'native bias' that mechanically aggravates the restrictive effect of direct democracy on legislative outputs highlighted earlier. Beyond its empirical implications, the scope of the franchise also raises important normative issues, chiefly in regards to the democratic legitimacy of decisions that are taken without the participation of those who are most directly impacted by them, what Robert Dahl referred to as the 'problem of inclusion' in democratic theory (Dahl 1989: 119-31).

3.2. The 'principle of empathy'

Who should have the right to participation in the democratic making of laws? What normative principles can justify one's inclusion in or exclusion from the *demos*, that is the population who enjoys electoral rights? While these questions have been "long neglected by the great political philosophers who wrote about democracy" (Dahl 1989, 60–61), the past decade saw an outpouring of normative scholarship on what has been referred to as 'the problem of inclusion' (Dahl 1989), or the 'boundary problem in normative political theory' (Wheelan 1983). Unlike the enfranchisement of resident citizens irrespective of their sex, class, religion or ethnicity that has become a fundamental right tightly regulated in international law, whether and under what conditions *immigrants* ought to be included in the demos has remained a domestic matter largely left to self-determination (Garrone 2015). Moving away from the equation of the demos with the nation, most democratic theorists have defended one of three principles: The principles of All Subjected to Coercion (ASC), and All Affected Interests (AAI).

The ASC principle holds that all those who are subject to the coercive power of a political authority should have an equal say in how that power is exercised. It is premised

on the importance of individual autonomy and consent as the main sources of democratic legitimacy (Song 2012). Coercion constitutes a severe invasion of individual autonomy, which may only be justified if 'those subject to law as its addressees can at the same time understand themselves as authors of law' (Habermas, quoted in Lopez-Guerra 2005: 224). Since states exercise their sovereignty over clearly demarcated territorial jurisdictions, refusing political rights to long term resident aliens amounts to a form of citizens' tyranny and is therefore unacceptable (Walzer 1983). The AAI principles reaches a similar conclusion, though it is rooted in the idea that fair and equal representation of interests in collective decision making processes constitutes the cornerstone of democracy. Here the emphasis is placed on the instrumental value of political rights as an empowering device for otherwise neglected minorities. Such utilitarian conception of the demos was at least implicit in T.H. Marshall's historical account of the development of citizenship in England, which portrays the gradual extension of the franchise to the working class in the nineteenth century as a necessary precondition to the emergence of the social rights of citizenship in the 20th century. By analogy, we may expect the extension of the suffrage to immigrant minorities to play a similar transformative role, by turning passive targets of restrictive legislations into active citizens able to voice their support or opposition and therefore forcing political parties to take into account their preferences other than by mere altruism.

Ultimately, the AAI and ASC principles offer alternative normative routes to the same end: noncitizens have a strong claim to inclusion in the demos, the legitimacy of which increases together with the number of years spent in the country. In this perspective, one may infer that by excluding those whose interests are most intimately affected and most immediately coerced by the outcome, popular referendums and initiatives in Switzerland lack democratic legitimacy.

To be sure, basing the franchise on either one or the other principle does not come without problems, the most serious of which being the resulting instability of political boundaries (Bauböck 2015). Indeed, who is affected or coerced by a decision essentially depends on what the questions happens to be in the first place, which is itself determined by who has the power to set the agenda. In a challenging essay, Robert Gooding pushed the demonstration to its bitter - and unfeasible - end, by concluding that the process would amount to include 'anyone who might possibly be affected by any possible outcome of

any possibly question that might possibly appear on any possible ballot' (Goodin 2007: 55). More realistically, one may reasonably expect referendum and initiative processes to be informed by and sensitive to the possible ways in which the 'rights of others' may be impacted by the outcome, so as to make sure that the binary choice of those who are fortunate enough to have a say in the decision is made in full knowledge of the consequences. A 'realist' normative perspective allows us to abandon the quest of a democratically legitimate remedy in an ideal — and therefore unlikely — world, by focusing instead on identifying plausible conditions for desirable change, while remaining alive to real-world constraints (Sleat 2016). Reserving the franchise to adult citizens only may be incompatible with democratic principles. It nonetheless remains a near universal norm, at least in national elections, underpinned by the no-less hegemonic democratic principle that the 'people' constitutes the main source of democratic legitimacy. Henceforth, while falling short of a full realisation of the AAI or ASC ideals, a more modest yet 'realist' reform would consist in conditioning the conduct of a referendum to a preliminary evaluation of the likely effects on groups and individuals alike, thus strengthening the deliberative component of democratic decision-making and conceiving of democratic self-determination as what it actually is: A collective right that is not exercised in a desert occupied by a single homogenous group, but in a crowded world where individuals have multiple affiliations at the same time so that belonging to today's majority does not shield anyone from being part of tomorrow's minority. The proposal would consist in complementing the 'principle of self-determination' underlying the franchise with a complementary 'principle of empathy', defined in the Oxford Dictionary as the 'the ability to understand and share the feelings of another'. Though arguably alien to what is today the dominant conception of liberty, defined negatively as the unobstructed pursuit of individual self-interests, the concept of empathy was at least implicit among Enlightenment philosophers and legislators. Henceforth, the original definition of Liberty in the 1789 Declaration of the Right of Man, as the freedom to do everything which injures no one else' (Art. 4), acknowledges this limitation by bearing the question: *How does the fulfillment of one's right impacts upon others"*?

In practice, the 'principle of empathy' could take the form of a compulsory and preliminary 'impact assessment' study, embedded in the referendum procedure, the purpose of which is not acknowledge others' 'feelings', but to objectively evaluate the legislation's positive and negative externalities on their rights. A commission of

independent experts, appointed by Parliament, could be charged with the task of identifying the groups whose rights are potentially affected and potentially coerced in the event of a YES and NO vote, in accordance with the AAI and ASC principles sketched above. The report could be informed by interviews of representatives or a sample of members of the targeted group, conducted during parliamentary hearings. Besides the publication of the report, the projected consequences on the groups who will be affected and coerced by the outcome could then be summarised in the official brochure sent to all voters, so as to inform the public debate. While its impact on electoral outcomes may well be marginal, there remains the possibility that at least *some* voters may think twice before casting a ballot that hardly impacts upon their own lives and yet is likely to harm others'. The core of the argument is not 'output-focused', that is based on its likely consequences for electoral outcomes. Instead, it ought to be regarded as an 'input-centered' principle, that increases the democratic legitimacy of plebiscitarian forms of decision-making, that have gained popularity in recent years and show no sign of losing ground. More importantly, the 'empathy test' could be embedded in the validation procedure of all referendums, thus considerably broadening its scope beyond migration-related issues. Though I do not pretend to have an answer to this question, there remains the possibility that some Brexiters, once made fully aware of the implications of their ballot on the lives of EU citizen residents, British citizens residing in EU countries, and more broadly, their continental neighbours, whose interests may be directly affected by the outcome in a shaking European Union, may have chosen to take them into account when entering the polling booths…

4. Conclusion

In her seminal comparison of immigrant policy in France, Germany and the US, Virginie Guiraudon provided a potent institutionalist explanation as to why the rights of foreign residents have been gradually expanded. She found that rights were more likely to be granted when decisions were made 'behind closed doors', away from the public eye (1998). This is made impossible in a direct democratic context, where, by definition, citizens are closely involved in the decision making process, either from the agenda-setting and issue-framing stage – as in popular initiatives - , or at the end of the parliamentary stage, as in referendums.

Guiraudon's argument may explain at least part of the puzzle, chiefly why immigration has become politicised relatively earlier and has remained consistently more salient in Switzerland than in other European democracies (Ruedin and D'Amato 2015). However, inferring from it that direct democracy *necessarily* leads to the tyranny of a majority seizing the opportunity to unleash its vile passions and subjugate a disfranchised minority is both normatively dubious and empirically wrong: Normatively dubious because it tips *liberty* and *democracy* against each other in a zero-sum game, a dilemma that is proven wrong by the very existence of *liberal democracies*. Empirically wrong, as voters have sometimes challenged restrictive bills despite their success in Parliament and almost always rejected initiatives deemed too radical. Instead, the picture that emerges from our empirical analysis of popular votes on migration-related issues between 1848 and 2016 is more mixed. Three empirical conclusions can be drawn from it:

a) Mandatory referendums often blocked expansive legislations, whereas optional referendums largely failed to challenge restrictive bills.

b) Popular initiatives, though almost always failing in the polls, have shifted agenda setting powers from mainstream political elites to radical right and anti-immigrant groups, thus providing them with the opportunity to impose a negative frame on migration-related issues.

c) Because federal voting rights are reserved to citizens and therefore exclude the very population that is most intimately affected by electoral outcomes, the results have given more weight to the preferences of natives over immigrants, a 'native bias' which contributed to perpetuate restrictive policies.

Somewhat unusually in an empirical paper, the final section examined the results in the light of the burgeoning debate on 'the problem of inclusion' in normative political theory. More specifically, it criticized the national franchise which, in Switzerland as in most though not all liberal democracies, is premised on the principle of national self-determination. The nationalistic underpinning of universal suffrage is too often over-looked in the electoral behaviour literature as well as in most indices assessing the Quality of Democracy, despite the fact that an emerging consensus has emerged in democratic theory regarding the strong claim to inclusion of foreign residents in the political

franchise. Indeed, questioning the legitimacy of a franchise reserved to nationals, democratic theorists have defended that it should be consistent with either the principles of All Affected Interests or of All Subjected to Coercion. Yet, how the normative predicaments may be translated into concrete institutions circumventing the instability of political boundaries they entail is unclear. The paper made a 'realist' proposal in that direction, based on the so-called 'principle of empathy', the aim of which is to objectively examine and raise voters' awareness of the potential impact of a referendum on the 'rights of others' who may be coerced or affected by the outcome. However humble, the proposal could easily be implemented in the referendum validation procedures. Besides, its scope is not limited to migration-related issues but could instead be expanded to all referendums. As the foundations of representative democracy are inexorably been eroded by a seemingly unstoppable populist fervour, finding appropriate and concrete ways to limit the tyrannical potential of direct democratic rule on disfranchised and yet directly affected populations is an urgent task that should not be left to the *vox populi* alone.

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