

Contested Consent

by

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ABSTRACT

It is widely recognized that consent plays a central role in legitimating political authority in liberal democratic states via the contract tradition we associate with Hobbes, Locke, Rousseau, Hume and others. In this context, consent is understood as a means to secure popular sovereignty and an individual's duty to obey that sovereign authority. While there is broad recognition of the importance of consent, current interest in the concept is dwindling. The problem with consent has always been twofold: on the one hand, explicit consent is remarkably rare; on the other hand, the notion of tacit consent is so diffuse as to be deemed useless. As a result, most political theorists have moved away from consent. In this paper, I demonstrate that the use of explicit consent is on the rise in contemporary liberal democratic states and I juxtapose this rise against the democratic ideal from which it sprouted. In doing so, consent is no longer used to protect citizens from potential abuses of political authority; rather consent strengthens the hand of political authority by dividing the citizen body. In short, it would appear that consent in practice is almost the exact opposite of consent in theory.

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In 1898, R.W. Lee noted a political truism that stretched back to the time of Aristotle: society implies or requires consent (Lee, 1898: 8-9). Since that time, our need for consent has not dwindled and the concept continues to play a central role in the way we understand liberal democracy. Political theorists, political scientists and the public at large all recognize “the consent of the governed” to be a distinguishing feature of liberal democratic states.

Despite its common currency, political consent is not well understood. Over thirty years ago, Carole Pateman (1985: 81) noted that “there are surprisingly few thorough examinations of the meaning of ‘consent’, or the manner in which it is, or can be said to be, given, in the recent academic literature on the subject, and there are even fewer genuinely critical discussions.” Sadly, our willingness to examine the concept has not improved in the interim.

In this piece I wish to redirect our attention back to consent. I do this by showing how contemporary states are employing explicit consent with increased frequency (in the form of citizenship/loyalty oaths), but that consent’s impact on political authority is different than described in traditional consent theory. In contemporary liberal democratic regimes, consent is *not* used to protect citizens from potential abuses of political authority or to justify our obligation to this authority. Rather, consent is now used as a formal device to initiate or welcome new members to the community. Seen in this light, explicit consent strengthens the hand of political authority and divides the citizen body between those who have explicitly consented, and those who have not. It would appear that consent in practice is almost the exact opposite of consent in theory. To put it bluntly: contemporary consent provides a rope, with which new citizens can be subsequently hanged.

Consent in Theory

To understand the role that consent plays in the liberal order, this section provides a brief introduction. Traditionally, consent has been used to justify popular sovereignty in two (related) ways. First, consent provides a mechanism, used in social contract theory, by which the people (broadly conceived) can restrict or withdraw power from political authority that strays from its popular mandate. Second, individual consent implies individual obligation to that political authority. These two objectives are, in themselves, widely embraced. The problem of consent lies elsewhere, in its nature: both explicit (express) and implicit (tacit) forms of consent are deemed problematic.

Consent, as a political term, has a long and checkered past. In the medieval era, the notion of consent was tied to the authority of custom—individuals were not recognized as independent, deliberate, voluntarily actors—they merely did what was expected of them, as creatures of custom. Individual actions were seen to be propelled by custom, which represented the general will of the community. Although custom rested on natural law, it was not universal: it contained natural law, but varied along with local circumstance. Hence, political theorists of the time could “justify the supremacy of custom on the grounds that it was generally accepted and therefore expresses the permanent will of the community” (Plamenatz, 1977: 223). Before the 17th century, then, consent was understood in collective terms: it was operationalized as custom, which reflected the will of the community.

With the 17th century, the individual takes center stage. Many of the period’s political thinkers referenced consent (among them, Hobbes, Locke, Suarez, Grotius, Pufendorf...), but they now focused on the personal and deliberate nature of the individual act. The essence of consent in the modern vocabulary is that it signifies an act of choice (and obligation results from that choice). Consent provides individual *permission*: it means “I agree to this”. The

modern notion of popular sovereignty is rooted in the idea that the people (understood as deliberate, conscious, thoughtful individuals) agree to limit some of their inherent and individual freedoms in exchange for the benefits and security provided by the broader community.

To understand the nature of this individual consent (and its limitations), consider its best known example: John Locke's *Second Treatise*.¹ Locke's (1960 [1688]) work is often referred to as an example of social contract, even though Locke goes to great lengths to avoid the contract form. The problem with contracts is, of course, that they capture the negotiated outcome between two (presumably) equal partners. Locke wanted to avoid a situation where one signatory to the contract (political authority) could independently void the contract at the expense of the other signatory (the individual citizen). A contract form would not provide Locke the legal scope he sought: he aimed to employ individual consent as a means to legitimate and *restrict* sovereign power.

To do this, Locke relies on some fancy legal footwork: he introduced a two-stage arrangement, crowned by a trust (not a contract). While the first part of this arrangement, creating an Independent Society, resembles a contract, the mechanism Locke used to create legislative power was delivered by a device that was expressly *not* a contract. To create Civil Association (empowering the legislature to act on behalf of its subjects), Locke employed the terms of a trust, which allocates obligations and responsibilities in a disproportionate manner, between trustor, trustee and beneficiary.

A trust binds three parties: the trustor (who creates the trust); the trustee (who administers the trust) and the beneficiary (who receives the trust). In Locke's Civil Association, the legislature is the trustee—as such, it has only obligations, not rights; while the people are both trustor and beneficiary.² This is by design: as a contract implies reciprocal rights and duties between signatories, Locke chose to describe the relationship between people and their political authority in terms of a trust, in which the government is saddled with duties and obligations, while the people are empowered with rights.³

I have elaborated on Locke's argument in order to emphasize the role that consent plays in his larger scheme of things. Locke aimed to provide a new foundation for popular sovereignty—one that prioritized the interests of the people over that of their rulers.⁴ In the theory of divine rights, only the ruler has rights; in a theory of contract, both people and government have rights; but in Locke's conception of government as trust, only the people have rights. The legitimacy of this government, formed by trust, is sustained by the “consent” of the people, whether express or tacit (Locke, 1688: §119). This is Locke's central legacy to political

¹ For a broader overview of the role of consent in contract theory, see Gough (1963) and Barker (1948).

² This formulation raises the important question: wherein do the people's obligations lie? In a trust, the trustee and beneficiary have no obligations. To the extent that people are obliged to follow political authority, that obligation must be derived from the first contract-like arrangement (to create Independent Society), not with the trust (creating Civil Association). This is odd, in that it implies we are not obliged to follow new laws (created by the legislature), only the foundational laws. Subsequent thinkers have assumed that individual consent obliges citizens to obey. But reference to a trust (rather than a contract) seems to imply otherwise.

³ For elaboration, see Barker (1948: xxix-xxx).

⁴ It would be more accurate to say “important people”, as Locke was no democrat.

thought: the right of the people to withdraw political authority when it is abused. This is what we mean by popular sovereignty.

There is no disagreement over the importance of restraining political authority when it strays from the popular will. The problem lies in how we operationalize this restraint. For Locke, consent was strongest when made explicit: an individual's express (or explicit) consent makes him a "perfect member" of a society (Locke, 1688: §119):

Whereas he, that has once, by actual Agreement, and any express Declaration, given his Consent to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never again be in the liberty of the state of Nature; unless by any Calamity, the Government, he was under, comes to be dissolved (Locke, 1688: §121).

The problem, then as now, is that we seldom have an opportunity to grant this explicit consent (and voting does not count, cf Pateman, 1985). Most of us have never given explicit consent to our political authority; but find ourselves born into a system that was (perhaps) consented to by our forefathers. As Richard Flathman has noted, "One of the standard embarrassments of consent and contractarian theories of political obligation is that accepting them seems to lead to the conclusion that very few people have or have *ever* had political obligations" (Flathman, 1972: 209, emphasis in original).

As a result, our consent is said to be inferred, or tacit:

...what ought to be look'd upon as a tacit Consent, and how far it binds, i.e. how far any one shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expressions of it all (Locke, 1688: §119).

In short, most of the heavy lifting in liberal theory needs to be done by tacit consent, and this has proven to be problematic. On the surface, tacit consent looks like a panacea. Generally, the idea is that individuals living in a community consent to that community (tacitly) if they are not actively conspiring against it. By respecting (and thereby benefiting from) the laws of political authority, individuals are said to accept them tacitly. The problem with tacit consent is its ubiquitous nature—and this shortcoming can also be traced back to Locke:

Every Man, that hath any Possessions, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government (Locke, 1688: §119, emphasis in original).

As Hanna Pitkin (1965: 995) has pointed out, this formulation of tacit support is so vague as to make it "almost unrecognizable." It would mean, in effect, that one's attempt to satisfy basic and necessary human needs (e.g., buying food, traveling to work, etc.) in the world's most totalitarian state provides tacit support for that state.⁵

⁵ Plamenatz, on the other hand, doesn't seem to have a problem with this. "Whatever a man does which involves his taking advantage of the order maintained by government puts him under an obligation to obey it. The obligation is not, of course, unconditional, but it is not the less real for that. Every government, however bad,

Locke wants to argue that if a man has given only tacit consent to a government he is not obliged to remain under it if he does not like it, but “is at liberty to go and incorporate himself into any other commonwealth, or agree with others to begin a new one *in vacuis locis*” (Locke, 1688: §121). I have made a similar argument about the nature of emigration and political voice at the birth of the United States, when emigration from Europe was seen as an implicit withdrawal of support for Europe’s ancient regimes, and a signal of tacit support for American government (Moses, 2009). Of course, and as Gough notes, this may have been easier in 1688 than it is today, but (as Hume pointed out) even in Locke’s time such liberty must have been largely imaginary.

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages he acquires? We may as well assert that man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her (Hume, 1748).

Not only is tacit consent impractical, it is too vague to be useful. This is the brunt of Hume’s objection to social contract theory. Hume holds that:

we are bound to obey our sovereign, it is said, because we have given a tacit promise to that purpose. But why are we bound to observe our promise?...you find yourself embarrassed when it is asked, Why are we bound to keep our word?

Given this pickle, Hume argues that there are more direct means to justify political obligation (e.g. by way of interest or utility).⁶

Since Hume (at least!), critics have rejected consent theory for being, vague, unrealistic or empirically questionable. Explicit consent is remarkably rare: there are few known examples of societies in which citizens have (explicitly) consented to the political authority which governs them, and explicit consent is mostly limited to the naturalization oaths taken by new citizens when joining a new political community. In the absence of explicit consent, we are left to justify obligation and political authority with reference to tacit consent—but this is defined in a way that is so weak that it becomes useless. As Plamenatz (1977: 209) notes, “...if consent can be given in the ways described by Locke, any form of government has the consent of its subjects provided they obey it.”

maintains some kind of order, and everyone living under it benefits, in one way or another, from that order. Everybody is clearly obligated to obey the government in many things, even when he is rightly plotting to overthrow it by force” (Plamenatz, 1977: 228).

⁶ I cannot elaborate on this here but see Hume (1748). It is important to point out that Hume’s beef is with contract theory, not consent. Hume does not wish to deny the political rights and duties asserted by the contract theorists; he simply argues that a social contract is not needed to explain them. In rejecting contract theory, Hume does not reject consent: he recognizes that all government rests, in some sense, on the consent of the governed. This consent is not agreement or the granting of permission; it is acquiescence grounded in the knowledge that government is in the public interest (see Plamenatz, 1977: 302).

As a result of these difficulties, consent has lost some of its draw. The important concern with constraining political authority has been delegated to questions of institutional design (ala Montesquieu or the Federalists), while the notion of obligation is justified with reference to individual utility or interest (following e.g., Hume or Plamenatz). Some contemporary theorists, such as Simmons (1979), have concluded that obligations simply do not exist. Others, like Pateman (1985), hold that it is not obligation or consent per se but their specifically liberal formulation that is to blame” (Hirschman, 1989: 1228). Some, such as Plamentz (1968 and 1977), have argued that consent can be read into the act of voting, and much of contemporary liberal theory has followed their lead (mistakenly, I believe⁷).

In this section I have aimed to present both the promise of, and problems associated with, political consent. In the academic literature, as well as among the public at large, consent is embraced as a means for legitimating popular sovereignty. Even as we recognize its implausibility and rareness, consent remains a powerful rhetorical tool in the way we think about popular resistance to sovereign authority, and our obligations to that authority. The reason for this, I suspect, is that we assume consent plays a role in restraining sovereign authority when it goes astray.

Consent in Practice

Most of contemporary political theory has left the terrain of consent: it now grazes in other pastures. The last time there was a sustained flurry of work on the topic was in the 1960s.⁸ One exception is Schuck and Smith’s (1985) *Citizenship without Consent*, which received much attention at the 1996 US Republican Party convention.⁹ Schuck and Smith reflect on the same shortcomings of consent (as I did above), but use this critique to argue for an extension of explicit consent: native citizens should be able to “self-expatriate” at the age of majority, perhaps by way of “mail-in” consent forms.

Indeed, it is to the nexus of citizenship, consent, and migration that much of the contemporary academic focus has turned. Rather than looking inward—using citizenship to consider the nature of political authority (as was common in the social contract literature), contemporary work tends to look outward—considering how citizenship is used to distinguish us (citizens) from them (foreigners). Most of this newer literature examines various regimes for acquiring citizenship, but recent studies have also considered citizenship loss.¹⁰ My interest is in the

⁷ “Unlike promising, liberal democratic voting, for example, allows citizens to vote only at times, and on matters, chosen by others, and in voting, citizens choose representatives who will then determine the content of their political obligation” (Pateman, 1985: 83, but see also Greenawalt (1970: 344-5)). I would add that individual consent cannot be aggregated to form a majority consent (as votes can). Consent can be given and withdrawn, but once it is aggregated (with the consent of others), it gets lost in the mix. An individual consents to joining a community (or not), but we cannot consent to letting a majority decide over us. Doing so would undermine the very nature of consent. However, consent can be extended through deliberation, when it results in unanimity.

⁸ E.g. Jenkins (1970); Plamenatz (1968); Siegler (1968); Pitkin (1965 and 1966).

⁹ The reason why this argument took the Republican Party by storm may have something to do with how it was being used to exclude birthright citizenship to “aliens” born in the United States (but absent consent).

¹⁰ The first (and largest) wave of literature that addressed this issue focused on the influence of immigrants on the acquisition of nationality in Western Europe, and noted an increased liberalization and harmonization of nationality regimes (see, e.g., Bauböck et al., 2006a). This literature has documented the gradual erosion of many distinctions between citizens and non-citizens, especially in Europe—as non-citizens now enjoy many

expanding use of citizenship tests and naturalization oaths. While the US has long relied on a naturalization oath to welcome new citizens to its community, this practice is now emulated by a number of other liberal democracies. The resulting oaths, tests and pacts are the closest thing that we have to explicit consent for political authority (see, e.g., Orgad, 2017: 339-41).

I am not aware of any comprehensive lists of citizenship oaths/pacts (though a thoroughly unrepresentative sample can be found on Wikipedia¹¹). But I do know that states increasingly require prospective citizens to demonstrate language skills, country knowledge, value commitments, and general integration requirements.¹² The sundry reforms of European citizenship legislation have introduced a proliferation of “integration” requirements, which often include mandatory *loyalty oaths* (e.g. a commitment to support liberal principles while pledging to obey the country’s laws, legal principles, and moral values); *citizenship tests* (that include questions about events in history, political concepts, and social practices); or simple *integration contracts*.¹³

In short, there is an evident increase in the number of states employing policies that require new citizens to consent, explicitly, to membership in the community. In light of liberal consent theory, we might expect this to be a good thing. Here we see new citizens acknowledging political authority as legitimate and explicitly signaling their obligation to that authority.

But we have also seen a corresponding rise in the willingness of states to revoke/withdraw/nullify citizenship, for a variety of reasons (e.g. security or terrorist threats, skewed allegiances, double citizenship, etc.). Many of these factors are independent of consent (i.e., they apply to both naturalized and natural/born citizens). But one type of denaturalization can only apply to citizens that have given formal consent: loss of citizenship based on a fraudulent claim. In cases of fraud-based denaturalization, the state decides to revisit its earlier decision about citizenship, look for possible cases of fraud, and prosecute with the intent of revoking that person’s citizenship status. Obviously, naturalized (by birth) citizens, who have not given their explicit consent, cannot be charged with fraud. This is a point I will return to below.

As with the use of formal oaths/explicit consent, we do not have firm data on the number of states that practice fraud-based denaturalization.¹⁴ States are not inclined to collect such data

legal rights. See, e.g., Jacobson (1996: 8-11). A more recent, second, wave of research has drawn our attention to the backside of nationality legislation among developed states: the criteria for withdrawing or losing nationality status (for examples, see fn. 14 below).

¹¹ https://en.wikipedia.org/wiki/Oath_of_citizenship

¹²See Kraler (2006); Goodman (2010), and the 27 modes of citizenship acquisition (A01-A27) listed by the EUDO Citizenship Observatory (2018).

¹³ In France, for example, every new immigrant is required to sign the “Reception and Integration Contract” in order to receive a permanent residence permit, and “The Charter of Rights and Duties of a French Citizen” in order to gain full citizenship. See Orgad (2017: 340).

¹⁴ Even as fraud-based denaturalization is on the rise, there is remarkably little written on the subject. While there is a large literature that examines the changing criteria by which states grant citizenship to, or naturalize, foreigners (see, e.g., the work generated by the IMISCOE network, www.imiscoe.org; e.g. Bauböck, 2006a and 2006b); and a newer and smaller literature that examines the criteria by which states are willing to revoke citizenship status, usually in cases of perceived security threats or skewed allegiances (see, e.g., Waldrauch, 2006b; Aleinikoff, 1986; DeGroot and Vink, 2010; Gibney, 2013a and 2013b; Lenard 2018); nearly all of this

in a systematic manner, and a multinational database does not yet exist. Still, the anecdotal and journalistic evidence seems to suggest that these types of cases have increased significantly in recent years. In e-mail exchanges with colleagues working on de/naturalization issues in OECD countries, concern has been voiced that these cases are on the rise.¹⁵

To get an idea of how prevalent this activity is, we can use the International Migration, Integration and Social Cohesion (IMISCOE) group's typology of nationality loss to focus on the legal foundations that allow for denaturalization on the basis of fraud (L09).¹⁶ Of the 173 countries listed in their database, only 35 *do not* have a provision that allows for the country to retract citizenship on the basis of fraud. As shown in Figure 1, there is no clear political or geographic pattern to the countries that use fraud to nullify/revoke citizenship.

Figure 1 about here

Even among the 138 countries that allow fraud-based denaturalization, there is a great deal of variation in the extent to which the alleged fraud can be persecuted. Some states apply a statute of limitations, after which a citizen's credulity should not be tested (while other states do not set a deadline for inquiries); some states require formal legal review (while others allow the decision to be made by administrators); some states do not allow the persecution if it results in statelessness (while others do); etc.¹⁷ If we look at the 35 OECD countries listed in Table 1, we see the extent of this variation, and note that only five of these do not employ fraud-based denaturalization.¹⁸ From Figure 1 and Table 1, it is easy to see how extensive explicit consent has become.

Table 1 about here

In conclusion, when we turn from the theory of consent to the practice of consent, we see a very different pattern emerging: while our theoretical interest in the concept is declining, states seem to be relying more heavily on express consent when welcoming new members into the political community. This raises the following question: is this consent consistent with the liberal tradition described in the first section? In other words, do we see a strengthening of popular sovereignty and citizen power as a result of our increased reliance on explicit consent?

Consenting to Second-Class Citizenship

In contrast to most of the contemporary literature on citizenship, I am not particularly interested in how naturalization laws affect foreigners seeking entry. Rather, I wish to shift

work either ignores or sidesteps fraud-based decisions. In short, most analysts and policymakers assume that it is unproblematic to revoke/withdraw or nullify a citizenship decision based on fraudulent information.

¹⁵ For example, in Norway, the prime minister has commented on these events in a blog (Solberg, 2017), and noted that 135 people had lost their Norwegian citizenship since 2012 (but without clarifying the grounds for this loss), and that the Norwegian UDI was considering the recall of about 500 Norwegian citizenship cases in December of 2016 (again, without any further clarification).

¹⁶ This typology includes 14 types of loss, and a remainder (i.e. L01-L15). See Waldrauch (2006a: 115, table 2.2)

¹⁷ Both the Convention on the Reduction of Statelessness (art. 8(2)(b)) and the European Convention on Nationality (art. 7) allow such deprivation of citizenship even if it results in statelessness.

¹⁸ Chile, Iceland, Japan, Poland and Sweden.

our parallax to consider what a change in citizenship practices (here fraud-based citizenship loss) says about the nature of the relationship between citizens and their state. In particular, I want to suggest that the state's willingness to prosecute on charges of fraud creates a wedge that splits the citizen body into two separate groups, with corresponding rights and protections. In the one group we find those who have been granted (or inherited) their citizenship naturally, absent any explicit consent; in the other group are those who have undergone a formal and explicit naturalization process, which can be subsequently challenged.¹⁹ By creating this two-tiered citizenry, political authority is able to strengthen its relative position vis-à-vis the people (now divided and unequal). When seen in the light of liberal consent theory, described in the first section, this change in the balance of power should have dramatic consequences for the nature of popular sovereignty.

To illustrate the problem at hand, consider a real life example. On 22 April 2016, a Norwegian lost his citizenship.²⁰ In the process, Mahad Abib Mahamud (30) became stateless. The details of Mahamud's descent into *persona non grata* status are both unsettling and insightful: they provide motivation for looking closer at the complex nature of the relationship between citizens and state in the early 21st century.

Mahamud's story begins optimistically: he first arrived in Norway in August 2000 (as a fourteen year old!); he applied for asylum in 2001; and he secured Norwegian citizenship in February 2008. In his (initially) successful application, Mahamud claimed prior Somalian citizenship. Eight years later, his story turns tragic: the Norwegian immigration authorities accused him of lying about his prior nationality. Norwegian political authority believes that Mahamud was originally a Djiboutian, not a Somalian, national. On the grounds of this alleged fraud, and consistent with Norwegian citizenship law (§26), Mahamud lost his Norwegian citizenship.

The question of Mahamud's innocence or guilt will not be addressed here: it is not relevant for the argument that follows. What does matter is that Mahamud's tragedy is becoming more commonplace. What concerns me most is Mahamud's precipitous fall in legal status, and its requisite protections. One day, Mahamud is a Norwegian citizen, fully integrated into Norwegian life, with a well-paying job as a bioengineer at a hospital in Oslo. Mahamud lived in one of the richest, safest and happiest places on the face of the earth, with all the protections and benefits that entails. The next day, Mahamud found himself at the bottom of the barrel of rights, among the world's most vulnerable populations: he was stateless. To borrow from Hannah Arendt (1986 [1958]: 293-96), Mahamud found himself without a home, without government protection, and absent "a place in the world which makes [his] opinions significant and actions effective."

This case raises an important concern about the nature of *nationality* in contemporary democratic states. By nationality, I am using the term in the way that it is used in international law, to mean membership in a particular state (Norway) as opposed to some other state (Somalia or Djibouti). Most obviously, Norway's decision has left Mahamud stateless, which is not supposed to happen: everybody is entitled to a nationality (Universal Declaration of Human Rights, Art.15, §1).

¹⁹We might note conventional language usage in this regard: we are "granted" citizenship through birth, but we "acquire" citizenship through naturalization.

²⁰ This cameo of Mahamud's fate is gleamed from a number of Norwegian newspaper accounts. The best of these come from Åse Brandvold's reporting in *Klassekampen*.

What concerns me most, however, is what Mahamud's case says about the status of *democratic citizenship* in contemporary democratic states. By citizenship, I refer to the way that the term is used among political theorists, with reference to a two-dimensional relationship used to legitimate the democratic state: a) between the individual citizen and political authority (the state); and b) among individual citizens within that state. As we saw in the first section, the state's legitimate authority and our political obligation to it is often justified with reference to a social contract or trust, in which individuals relinquish some of their freedoms in exchange for protections offered by the state. Since Locke [1688], and as evidenced in most contemporary liberal democratic constitutions, we recognize that the legitimate use of sovereign power rests on three necessary components: i) the relative *equality* of the individuals who constitute the sovereign authority; ii) the *consent* (both tacit and explicit) of the individual citizens who make up that sovereign authority; and iii) the ability of those individuals to *withdraw* that consent, when the sovereign authority breaks its covenant.

Of course, as we saw in the first section, the notion of consent has been disputed since it was first introduced, on both historical and logical grounds. Perhaps the most common (and arguably the strongest) of these criticisms recognizes the relative scarcity of explicit consent, and the difficulty of establishing tacit consent. Absent an explicit consent to the obligations of citizenship, most contemporary citizens have simply inherited their (citizenship) rights and obligations. But in response to a rising immigrant challenge, many states have reintroduced systems of explicit consent, as described in the second section (above). Hence, we are now creating a framework for citizenship that relies more extensively (but not exclusively) on explicit consent.

Mahamud's personal tragedy reveals that there are two very different forms to contemporary citizenship (let's call them C_1 and C_2), and each form of citizenship is reached by means of a different path. C_1 citizenship is *inherited* as birthright (Shachar, 2009): it is largely determined by where, and to whom, one is born. Consequently, the obligations of citizenship are assumed on the basis of tacit consent. By contrast, C_2 citizenship is *acquired* via a naturalization process that increasingly relies upon explicit consent: new citizens promise their fidelity and allegiance to the state by means of an explicit oath of citizenship and inclusion. In contrast to C_1 citizenship, the process of applying for C_2 citizenship requires a formal application and review process. This process adds a narrow gate on the path to citizenship, through which a particular (smaller and originally foreign) group of citizens must pass. The gatekeeper here is the state (or political authority).

Worse, citizens in these countries are no longer equal. Most citizens of contemporary democratic states enjoy C_1 status, with its special privileges and exemptions. Consequently, C_1 citizenship is like owning a diamond: it lasts forever. C_2 citizenship, by contrast, is like renting a house. C_2 citizenship provides shelter, protection and comfort as long as the tenant stays on good terms with his/her landlord. Not only does the precarious nature of C_2 citizenship strengthen the hand of political authority vis-à-vis this category of citizen, but it divides the citizen body into groups (C_1 and C_2) with varying status and rights.

As C_1 citizens never need to provide explicit consent, their citizenship cannot be questioned or revoked. By contrast, Mahamud's tragedy teaches us that C_2 citizens must live in continual fear that their explicit consent may one day be revoked by the state. In that lesson lies the realization that citizenship is no longer a binary concept, marking a distinct boundary between insiders and outsiders (e.g., Bauböck, 2006c: 19): there are clearly important differences

separating C₁ and C₂ citizenship status. This unequal status has implications for the nature of the resulting obligations associated with each class of citizenship.

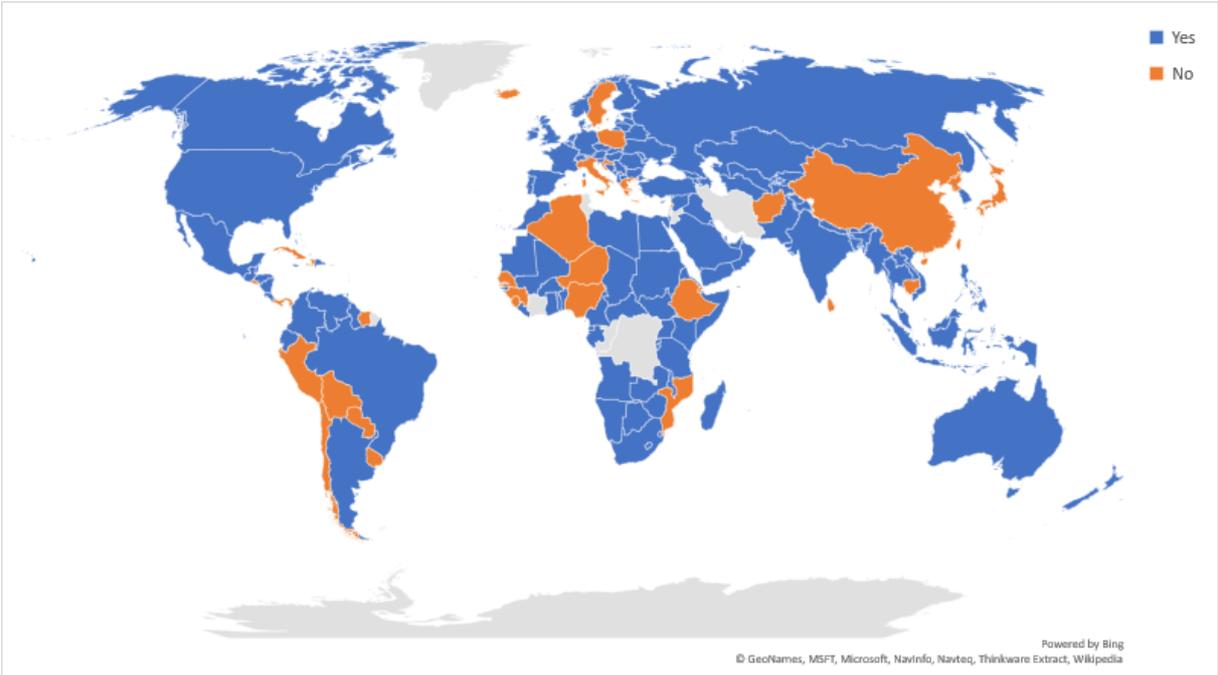
Mahamud's tragedy also teaches us that the contemporary state is much more powerful (*vis-à-vis* its citizenries) than is usually acknowledged by, or described in, liberal theory. Not only is the modern state able to divide its citizenry into two distinct tranches with varying rights (C₁ and C₂), and then play them off one another; but it has managed to skew the terms of the contract to its advantage: it is now the state, not the individual, who holds the power to sever the contract in light of a transgression. We have moved from a trust-based understanding of political authority—where political authority is saddled with obligations, while citizens (as beneficiaries) enjoy only rights, to a sort of renter's agreement—where political authority can cancel the contract at any time, and (C₂) citizens are left with little legal recourse.

Conclusion

In this paper I have shown how explicit consent is used by contemporary states and juxtaposed it against the democratic ideal from which modern consent sprouted. In particular, I have argued that the rise of fraud-based denaturalization reveals the changing nature of contemporary citizenship and its relationship to political authority. In this light, explicit consent is not used to protect citizens from potential abuses of political power by the authorities; rather explicit consent strengthens the hand of political authority as it is increasingly used to divide the citizen body into two unequal groups. In short, it would appear that consent in practice is almost the exact opposite of consent in theory.

As a result of this increased reliance on explicit consent, we find three important consequences related to questions of popular sovereignty. First, in contrast to liberal consent (and contract) theory, it is not the individual citizen that is able to limit the scope of political authority, but political authority that is able to limit the scope of individual (citizen) rights. This is not a contract, or even a reverse trust. Rather, C₂ citizenship resembles a rental agreement, where political authority plays the role of the landlord. Second, the increased use of explicit consent has divided the citizen body into two unequal groups. Older citizenship distinctions, between *jus soli* and *jus sanguinis*, are less relevant compared to the new cleavage that is separating those that enjoy enduring citizenship (C₁), and those who have expressly consented to that citizenship (C₂). Finally, the relative power of individual citizens, *vis-à-vis* political authority is undermined by this increased reliance on explicit consent. Not only is the power of political authority not diminished by these changes, but the use of express consent divides the citizen body into two, and severely limits the rights of one of the resulting citizen groups (C₂). As a result, political power seems to be strengthened, rather than constrained, by the extension of explicit consent.

Figure 1:
Countries with Laws that Allow for Fraud-Based Denaturalization



Source: GLOBALCIT (2017)

Table 1:
Extent of Fraud-Based Denaturalization among OECD Countries

<i>Country</i>	<i>Fraud clause</i>	<i>Even if results in stateless</i>	<i>Statute of limitation</i>	<i>Non-judicial process</i>	<i>Article in law</i>
Australia	Yes	Yes	No	No	AUS 34
Austria	Yes	Yes	No	Unclear	24 + GPAL
Belgium	Yes	Yes	5	No	23(1); 23(9); 23/1
Canada	Yes	Yes	No	Both	CAN 10
Chile	No	-	-	-	-
Czech Rep.	Yes	Yes	3	No	39
Denmark	Yes	Yes	No	No	8A
Estonia	Yes	Yes	No	Yes	28(1)(4)
Finland	Yes	Yes	5	No	33
France	Yes	No	1,2	Yes	27-2
Germany	Yes	Yes	5	No	35
Greece	Yes	Yes	No	Yes	GPAL
Hungary	Yes	Yes	10	No	9
Iceland	No	-	-	-	-
Ireland	Yes	Yes	No	Yes	19(1)(a)
Israel	Yes	No	No	Both	ISR 11(c)
Italy	Yes	Yes	No	No	GPAL
Japan	No	-	-	-	-
Lavtva	Yes	No	10	No	24(1)(1); 24(1)(3); 24(3); 24(4)
Luxemburg	Yes	No	No	No	15
Mexico	Yes	Yes	No	Yes	MEX 36, REG 41-42
Netherlands	Yes	Yes	12	Yes	14(1)
New Zealand	Yes	Yes		Yes	NEZ 17
Norway	Yes	Yes	No	Yes	NOR 26(2)
Poland	No	-	-	-	-
Portugal	Yes	Yes	20	No	16, 18, + art. 87-88 Civil Registry Code
S. Korea	Yes	-	No	-	ROK 21
Slovak Rep.	Yes	Yes	No	Unclear	8(b)(1)
Slovenia	Yes	Yes	No	No	1681)
Spain	Yes	Yes	15	Yes	25(2); 25(1)(a)
Sweden	No	-	-	-	-
Switzerland	Yes	Yes	8	Both	SWI 41
Turkey	Yes	Yes	No	Yes	TUR 31
UK	Yes	Yes	No	Yes	40(3)
US	Yes	Yes	No	No	INA 340(a)

Source: de Groot and Vink, 2014, Table 2b (pp.11-13); GLOBALCIT (2017) and author correspondences

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