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The Birthright Lottery

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Rethinking Citizenship through Alienage and Birthright Privilege: Bosniak and Shachar's Critiques of Liberal Citizenship*

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Abstract

The assumption that the boundaries of justice and democracy coincide with the territorial boundaries of states is subject to increasing normative critique. Linda Bosniak and Ayelet Shachar's recent books are part of this charge; their common starting point is the tension between a commitment to bounded citizenship that privileges citizens over noncitizens and the moral cosmopolitan claim that all human beings, regardless of their citizenship status, are entitled to equal concern and respect. Bosniak's focus is on the territorial interior and the difference that citizenship status does and doesn't make to the legal rights a territorially present person is entitled to. Shachar critiques birthright citizenship laws, which are a central mechanism by which global inequality is sustained. This review essay argues that while these authors identify important new challenges and offer innovative proposals, they only take us part of the way toward meeting the challenge of articulating citizenship's ethical significance and the relationship between our national and global obligations.

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The movement of persons, goods, pollution, diseases, and ideas across territorial boundaries has led some to talk of the loss of state sovereignty. Others point to the decoupling of citizenship status and individual rights and the move toward a personhood-based conception of rights as a sign of the decline of citizenship (Soysal 1994; Jacobson 1996). But infringements on state sovereignty are not new. The authority of modern states over their domestic institutions has never been absolute or undivided; it has always been compromised by contracts and conventions, as well as coercion by more powerful states (Krasner 1999: 24-40).

Whatever the actual degree of erosion of state sovereignty today, what is clear is that the normative significance of territorial boundaries and nation-state-centered theories of political membership are under increasing attack. Moral cosmopolitans lead the charge. Starting from the premise that all human beings are owed equal respect and are equally entitled to certain basic rights, they argue that the enormous privileges associated with membership in well-off political communities is normatively indefensible. Moral cosmopolitans differ on what they take to be the normative grounds of our global obligations, but they agree on the scope of those obligations: all human beings regardless of their citizenship status.

While many scholars of citizenship and immigration are sympathetic to moral cosmopolitan claims, they are also clear-eyed about the continuing social, political, and legal significance of membership in bounded political communities. Some are pragmatists who accept that the nation-state continues to be the best way to meet people's needs and aspirations; others agree but go further in believing that citizenship is an ethical relationship—that citizens of a bounded political community have special obligations or responsibilities to one another that they do not have to the rest of humanity. This belief needs to be defended, especially because membership in political communities is attached to enormous material advantages or disadvantages. Much scholarship on citizenship and immigration has tended to focus on the life inside nation-states: on racial and gender hierarchies that have relegated large groups of people to "second-class" citizenship, on immigration laws that have favored certain groups and excluded others on the basis of ascriptive characteristics, and on alienage laws that treat noncitizens much more harshly than citizens in certain respects and like citizens in other respects. Much of this literature has taken for granted the legitimacy of a state's right to control its borders without consideration of what, if anything, is owed to territorial outsiders.

If they are to meet the normative challenges raised by moral cosmopolitans, scholars of citizenship and immigration must take up at least two challenges. First, they must answer the question of citizenship's ethical significance: is citizenship a special ethical relationship that gives rise to special

responsibilities, and what are the grounds and content of those responsibilities? Second, they must look beyond citizenship's boundaries and directly connect discussions of the domestic law of citizenship and immigration to discussions of global distributive justice. The question of what, if anything, special we owe to our fellow citizens must be considered in connection with the question of what we owe to all human beings.

This essay considers two important books on citizenship and immigration with these challenges in mind: Linda Bosniak's *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2006) and Ayelet Shachar's *The Birthright Lottery: Citizenship and Global Inequality* (2009). The first two parts of the essay examine the central aims and arguments of each book. In the third and final part of the essay, I argue that while they provide important contributions to ongoing debates about citizenship, they only bring us part of the way toward meeting the challenges I have outlined.

Citizenship and Alienage

Linda Bosniak's *The Citizen and the Alien* begins by giving us a sense of the current landscape of scholarly debates about citizenship before turning to examine the legal significance of alienage. She identifies three main overlapping questions at the heart of debates about citizenship: what is citizenship (substance), where does it take place (location), and who is a citizen (scope)? To understand her important contributions to ongoing debates about citizenship, it is helpful to see which of these questions is her focus and how she views the relationship between them. On the question of the substance of citizenship, she identifies four understandings: citizenship as a legal status, entitlement to a set of rights, active political participation, and a common identity. Her analysis is primarily concerned with the first two understandings of the substance of citizenship—"status citizenship" and "rights citizenship." On the question of the location of citizenship, her focus is not so much on different social domains within a particular political community (the family, the market, civil society), but on whether citizenship is a national territorial project or a universal one. The question of location is connected to the question of scope: she notes that while theorists of citizenship define citizenship's scope in *universal* terms, citizenship is typically bounded by membership in a nation-state. Universality may govern inside the nation-state in the treatment of citizens and some resident aliens, but exclusivity governs at the border.

Combining these three questions of substance, location, and scope, Bosniak asks what difference "alienage," the lack of status citizenship, makes for the rights that immigrants present in the U.S. territory are entitled to. She observes that questions about citizenship's substance and citizenship's scope are not always

in alignment. Just as legal status citizens have been denied some of the rights of citizenship in virtue of ascriptive characteristics, such as race or gender, aliens who lack status citizenship have enjoyed some of the rights of citizenship, including due process rights in criminal proceedings, freedom of religion and association, and access to public education and some welfare benefits. In light of this, Bosniak suggests that it makes sense to speak of the citizenship of aliens or “alien citizenship,” if by citizenship we mean entitlement to a set of rights within a political community or “rights citizenship” (Bosniak 2006: 34-35, 81, 93-95). In some contexts, alienage matters very little for “rights citizenship”; in others, it matters a great deal.

Bosniak argues that American law’s deep ambivalence about alienage arises largely from two starkly different views about the relationship between two bodies of law: “immigration law and policy” that governs “the world of borders, sovereignty and national community membership” and “alienage law and policy” that governs “the world of social relationships among territorially present persons” (38). There are some who believe that these two bodies of law should be kept separate, others who advocate their convergence, and still others who fall somewhere in between. Bosniak’s central question is the *descriptive* question of how far the government’s immigration power has been permitted to extend into the national territory to determine what rights and benefits aliens are entitled to, although lurking in the background is the *normative* question of how far immigration law proper *should* be permitted to shape the rights of aliens.

The separation strategy is motivated by a desire to protect aliens whose lack of citizenship status makes them vulnerable to exploitation. To elaborate the strategy of separation, Bosniak draws on Michael Walzer’s *Spheres of Justice* in which he argues that different social goods should be distributed according to the distinct social meanings of those goods, and not according to a single principle of distribution (Walzer 1983: 8-9). For example, health care might be distributed according to need, elementary and secondary public education according to a principle of equality, public office according to merit, and commodities according to free exchange. Walzer’s theory of justice is a theory of “complex equality,” not simple equality: not only are there a plurality of distributive principles for different spheres, but dominance in one sphere should not be permitted to translate into dominance in another. As he puts it, “*No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x*” (Walzer 1983: 20). Examples of dominance or tyranny include using wealth to gain access to political power or using political power to secure lucrative employment for one’s children.

Walzer famously argued that *membership* in a political community should also be considered a social good—indeed “the primary good that we distribute to one another”—and like other social goods, it should be distributed according to a

community's shared understandings of that good (Walzer 1983: 31). But in accordance with his theory of complex equality, he emphasizes that the membership sphere should not be permitted to dominate the other spheres of justice. That is, the lack of citizenship status should not translate into advantages or deprivations in other spheres, such as health care, education, and work. While Walzer accepts the right of political communities to control "first admissions" (immigration), once persons are admitted to the national territory, "second admissions" (naturalization) into full membership "are subject only to certain constraints of time and qualification, never to the ultimate constraint of closure." In democratic societies, "political justice is a bar to permanent alienage... every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship" (Walzer 1983: 61, 62). Bosniak nicely sums up this separation approach as "*hard on the outside and soft on the inside*": while exclusionary at the community's borders, a "universalist ethic" of inclusion applies within the political community (99).

Integrating political and legal theory with U.S. Supreme Court jurisprudence, Bosniak demonstrates that the Walzerian separation approach is reflected in a line of important court cases. The 1886 case, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), was the first case to recognize a sphere of constitutional protection for aliens. Two Chinese noncitizens challenged a San Francisco ordinance, which, although neutral on its face, was intended to preclude Chinese laundry owners from doing business. The Court held that aliens could invoke the Equal Protection Clause in challenging race-based application of the law on the grounds that the Fourteenth Amendment's provisions are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."¹ This same principle was the basis of the 1982 case, *Plyler v. Doe*, 457 U.S. 202 (1982), which held that while undocumented aliens—in this case, children—are subject to the government's immigration power, the fact of being so does not define their entire relationship to the government. These cases are based on the idea that noncitizens inhabit, in Bosniak's words, "a sphere of territorial personhood that remains insulated from the action of membership principles" (55).

While this Walzerian separation approach sounds good in theory, Bosniak's analysis demonstrates how extremely difficult it is to pursue in practice. For every case embodying separation, we can find cases embodying the *convergence* of immigration law proper, which regulates borders and access to U.S. territory, and alienage law, which governs the rights of citizens and aliens in the U.S. territory. Bosniak discusses a range of cases in which the government's

¹ *Yick Wo v. Hopkins* at 1070. See also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), in which the Court held that "all persons within the territory of the United States" are entitled to the protections of the Fifth and Sixth Amendments.

exclusionary immigration policies have sometimes been restricted to the border and sometimes converged into the territorial interior to justify discrimination against aliens at the local, state, and national levels.

Consider access to public benefits. The 1971 case *Graham v. Richardson*, 403 U.S. 365 (1971), embodies the separation approach: the Court struck down two state laws that restricted welfare benefits to citizens and excluded noncitizens, emphasizing that the treatment of aliens had nothing to do with *immigration* proper. In contrast, another public benefits case five years later, *Mathews v. Diaz*, 426 U.S. 67 (1976), represents “the convergence paradigm in its purest form” (57). This case involved a federal Social Security Act provision that excluded aliens from Medicare coverage unless they had resided in this country as lawful permanent residents for at least five years. The Court found that the disparate treatment of citizens and aliens was neither “invidious” nor “wholly irrational.”² As Bosniak observes, because Congress is recognized as having the authority to establish the terms of aliens’ membership and because it was Congress that had enacted the Social Security statute, the Court argued that it was Congress’s prerogative to decide whether to include or exclude aliens in Medicare coverage (57-60). In addition, although *Graham* struck down alienage discrimination by state governments in the distribution of welfare benefits, the Court has upheld state-level discrimination against aliens when it comes to *political* rights. The Court has made clear that it would not compel states to permit aliens to vote or hold public office, and it has also upheld citizenship qualifications for jobs in the public sector, including police officers, probation officers, and public school teachers (61-62; see also Motomura 2006: 122).

In light of this state of affairs, what is to be done? Lawmakers could strive for the impossible and try to maintain separation of immigration law proper and the treatment of noncitizens. Part of why this is such a Sisyphean task is that immigration law proper has never solely been about the admission or rejection of foreigners who seek to enter; it has also always involved the deportation of those aliens present in the territory. “Pure” immigration law has always operated on the territorial “inside.” This is most clearly the case, as Bosniak observes, in the case of unauthorized aliens. On the one hand, the separation approach has been applied to uphold the rights of unauthorized aliens in *Wong Wing* and *Plyler*, as well as in cases upholding their rights to sue in tort and contract and to enjoy the protection of employment statutes. But on the other hand, even in *Plyler*, which opened up access to public education to undocumented children, the Court suggested that an *adult* alien’s immigration status is not irrelevant in determining what rights she may have inside the territory: the parents are persons “who elect to enter our territory by stealth and in violation of our law” and who “should be prepared to

² *Mathews v. Diaz* at 80, 83.

bear the consequences, including, but not limited, to deportation” (64-68).³ It is not only unauthorized aliens but also legal permanent residents who are subject to deportation. A legal permanent resident who has resided in the U.S. for decades can be deported for committing a variety of acts defined as violating federal or state criminal laws. This underscores that one major difference that citizenship/alienage status makes is the right to remain in the country.

In light of the impossibility of separation, lawmakers could embrace convergence in one of two directions: toward greater exclusion that permits the government’s immigration power to impose greater restrictions on aliens who are present within the territory (what we might call “nationalist convergence”—hard on the outside and hard on the inside), or toward greater inclusion that permits the generous treatment of territorially present aliens to extend to territorial outsiders who seek to enter the country (what we might call “universalist convergence”—soft on the inside and soft on the outside). The “nationalist convergence” approach would involve measures that expand the range of post-entry conduct that can lead to deportation or measures that reduce the rights of noncitizens, such as the right to sue, make contracts, and go to school. The “universalist convergence” approach would support policies that not only diminish the difference that alienage makes for territorially present noncitizens, such as noncitizen voting rights and a path to legalization for unauthorized migrants; it would also support a more open immigration policy.

My sense is that Bosniak is sympathetic to *both* the separation view (insulating the rights of aliens from the government’s immigration power) for its inclusionary approach toward aliens *and* the second of the two convergence approaches (an inclusive alienage policy leading to a more inclusive immigration policy) for extending the circle of obligation beyond a political community’s own territorial boundaries. She expresses support for a “personhood-based conception of rights,” which grounds the separation approach’s inclusion of noncitizens. As she puts it, granting “citizenship rights to status noncitizens... gives appropriate expression to the Constitution’s universalist commitments” (95). But it is not clear how far she thinks the universalist logic of the personhood-based conception of rights *should* extend, and related to this, whether she thinks the special rights and obligations associated with citizenship are ultimately normatively justifiable. While Bosniak’s book provides a rich descriptive and analytical account of the difference that alienage actually makes in terms of the rights and obligations one has access to, it left me wanting to hear more about Bosniak’s own *normative* views about the difference that alienage *should* make, as well as the normative bases of citizenship itself.

³ *Plyler v. Doe* at 220.

She does hint at her normative views, primarily through critique of existing views and approaches. Consider first the question of whether alienage *should* make a difference to the rights a person is entitled to. On the one hand, she notes that a “true and exacting regime of separate spheres” would require extending full citizenship status to any immigrant who sets foot in the country. A modified version would exempt short-term visitors and extend citizenship status to anyone who comes to work and settle. Even this modified version, she observes, “seems unlikely to be accepted as a practical matter” (129). So she turns to consider alternatives: first, “fast-track naturalization” that would minimize the period of time it takes for immigrants to become status citizens, or second, decoupling status citizenship and rights citizenship more completely than U.S. law has already done such that alienage becomes “inconsequential” (131). But here she worries that both alternatives would leave noncitizens vulnerable. First, those eligible for fast-track naturalization will be precluded from political participation and subject to removal from the country during the period of time they lack status citizenship, and there will be a great many noncitizens ineligible for fast-track naturalization, including undocumented immigrants and temporary workers. While such ineligibility would not be justifiable on a pure separation approach, does Bosniak herself view such ineligibility as justifiable? Would she part ways with the separationists on this matter? Or as a pure separationist would urge, does Bosniak support legalization for undocumented immigrants and if so, on what normative grounds? While fast-track naturalization is not fast enough for pure separationists, does she think a political community has the right to determine the conditions of naturalization and within what limits? For example, what does she think of policies that require more than a certain period of residency and also include knowledge of the country’s history, language competency, and perhaps other cultural criteria? Regarding the second alternative of “alien citizenship,” as Bosniak demonstrates in the central chapters of her book, the enjoyment of rights citizenship without status citizenship is only a “partial citizenship” (131). Bosniak concludes, “Assuming...that we are going to maintain a normative citizenship model of bounded solidarity in a world of cross-national population movements,” the category of alienage and the dilemmas it generates are “inevitable” (132). Throughout the book, Bosniak’s aim is more to diagnose and elaborate the dilemmas of citizenship and alienage rather than provide her own normative vision of citizenship, but hearing more about her own vision would have helped us to see which of the many responses she considers is more desirable than the others.

Consider next the question of the scope of the personhood-based conception of rights. Should it be bounded by territory such that only those persons *present in the territory* have access to citizenship rights, as the separation theorists urge? On the one hand, Bosniak is clear-eyed about the practical and

political limits of implementing a truly universal ethic of inclusion. She notes that “normative alienage theorists” do not usually question whether national communities are legitimately “hard on the outside”; for instance, very few are advocates of open borders, and those who do take the position are typically “dismissed as utopian eccentrics” (123, 205 n.5). Instead, she and others have focused their attention on the condition of territorially present aliens. Yet, on the other hand, she is critical of the fact that *both* the separation and convergence approaches tend to take for granted the legitimacy of bounded political communities and their authority to regulate admissions and membership (75, 123). As she points out, the separation approach’s call for the “universal” inclusion of “everyone” does not really include everyone since inclusion is meant to stop at the community’s borders (96). In the book’s concluding chapter, she questions the “normative nationalism” implicit in much theorizing about citizenship—the idea that citizens (or more expansively, all persons present in a state’s territory) have special responsibilities to one another that they do not have to the rest of humanity (134). She does not directly engage the normative grounds for defending “bounded solidarity,” and instead takes aim at the empirical premises that underlie normative accounts of bounded solidarity as “largely implausible” (125). The fact that she suggests only negative motivations for such solidarity—“hatred or xenophobia or hostility toward the other” or “selfishness, self-interestedness, or indifference”—implies a skepticism about the possibility of developing any compelling normative defenses of bounded political communities.

In light of these judgments, readers are left to conclude that Bosniak is, as a matter of principle, a moral cosmopolitan who thinks bounded solidarity cannot be normatively defended, but as a practical matter, does not see any real alternatives to bounded political communities to serve as the locus of citizenship and its many important protections and rights. So she, like the separation theorists, seems to have reconciled herself to splitting the difference—hard on the outside, soft on the inside—for the time being. Hers is a strategic acceptance of bounded solidarity.

Bosniak’s book points us to the other challenge I discussed at the outset, connecting theories of citizenship with theories of global ethics. A need for a global theory of justice and responsibility is made clear by Bosniak’s chapter on the transnationalization of domestic work. Bosniak raises the important question of whether women in wealthy countries achieve equal citizenship at the expense of people, usually women, from poor countries who care for their children and do other domestic work and who themselves lack citizenship status where they labor. Here she reiterates the important point made throughout her book that “status citizenship” and “rights citizenship” can be decoupled. In the context of domestic work, she points out that both groups of women experience a form of “noncitizenship.” American citizen women have “status citizenship,” but they do

not enjoy full “rights citizenship.” For example, citizen women are still not earning equal pay for equal work. Transnational domestic workers may enjoy certain aspects of “rights citizenship” even though they lack “status citizenship,” but as Bosniak emphasizes, they are more vulnerable than the women for whom they work precisely because of their lack of status citizenship and their structural location in racial and class hierarchies both within the U.S. and globally.

The transnationalization of domestic work is a growing area of concern in debates about citizenship and immigration, but the problems it raises are not really problems of *citizenship*. As Bosniak keenly observes in a recently published article on the same subject, “the citizenship that women in this society may seek by way of decent paid work is not dependent upon the expropriation of the *citizenship* of the immigrant domestic workers.” To be sure, “expropriation occurs—exploitation of labor and care in the context of a market exchange, one that often redounds to the greater benefit of the employer than the employee...[but] it is an exchange that is contingent upon international economic inequality and histories of gender and racial subordination as well as the operation of national immigration controls” (Bosniak 2009: 145). This suggests the limits of what the concept of citizenship can do for us. Whatever our desired conception of citizenship, so long as it is linked to membership in sub-global political communities, it cannot do the work of providing an account of what is owed to transnational domestic workers or other migrant workers. To understand and address problems arising out of the transnationalization of labor, we need a transnational or global framework for thinking about justice, responsibility, and democracy.

Birthright Privilege

While Bosniak’s *The Citizen and the Alien* examines the boundaries and limits of citizenship primarily from the perspective of territorially present noncitizens, Ayelet Shachar’s *The Birthright Lottery* focuses on citizens: how do people come to acquire citizenship in the first place? In particular, Shachar critically explores the basis of entitlement of those who are deemed to “naturally” belong through *birthright* citizenship laws in the broader context of global inequality. She emphasizes that the birthright rule does more than demarcate who is to be included in the political community; it also has serious distributive consequences: citizenship determines access to “certain resources, benefits, protections, decision-making processes, and opportunity-enhancing institutions,” and in this respect, is like other *property* regimes (Shachar 2009: 7). Indeed, the analogy between inherited property and birthright citizenship is a central theme of her book. In contrast to Bosniak’s primarily descriptive and interpretive analysis,

Shachar offers bold, innovative normative proposals for rethinking citizenship, which also opens the work up for deeper normative critique.

A basic premise of much scholarship in the ongoing debate about global inequality and global distributive norms is the moral arbitrariness of being born into well-off countries that enjoy an abundance of natural resources, well functioning institutions, and high GDP. As Charles Beitz put it thirty years ago, “The fact that someone happens to be located advantageously with respect to natural resources does not provide a reason why he or she should be entitled to exclude others from the benefits that might be derived from them” (Beitz 1979: 138). Advantageous location with respect to natural resources is an accident of birth. Joseph Carens has perhaps put it most baldly, going beyond a focus on natural resources: “Citizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances” (Carens 1987: 230). Members of well-off polities must answer what Samuel Scheffler has called the “distributive objection” made on behalf of those individuals outside the well-off polities: not only do members of well-off polities enjoy the rewards of group membership itself, but they also get the benefit of having stronger claims on each other’s services than non-members (Scheffler 2001: 57). Many scholars who have written about global inequality have argued for global redistribution as an obligation incurred through regular interaction and interdependence in a global *institutional* context. Toward this effort, they have sought to reexamine the basic operating assumptions of the global market, including “state sovereignty and resource ownership, fair competition and free trade, and *citizenship and legitimate entitlements*” (Tan 2004: 25, emphasis added). In light of this existing scholarship, Shachar’s statement that “the global-distributive dimension of birthright membership has largely escaped critical assessment” is not entirely true (9). What is true is that the existing literature on global justice has not directly challenged how citizenship and its material benefits are typically transmitted—through the mechanism of the birthright rule. Shachar’s contribution to the burgeoning normative literature on global inequality is a direct critique of the birthright citizenship rule itself.

Shachar develops her critique by analogizing citizenship to property. As she puts it, “once the analogy to inherited property is placed at center stage, it becomes far harder to justify the wealth-preserving aspect of citizenship that has long been cloaked under the cover of birthright’s ‘naturalness’” (22). There is no denying the material worth of membership in one of the world’s wealthy societies, in terms of health, educational attainment, life expectancy, and a whole host of freedoms and opportunities (Pogge 2002: 102-106; Tan 2004: 20-21). But what additional insight does the analogy between citizenship and property provide? Shachar argues that the analogy “helps reveal the pacifying role that legal norms and institutions play in legitimizing...transmission patterns” that

benefit those who inherit membership in well-off polities and also allows us to draw on innovative reform proposals from within property law for reforming citizenship law (23).

Shachar adopts a view of property as, following Jeremy Waldron, a “system of rules governing access to, and control over, scarce resources” (28). She favors a broad “trusteeship” conception of property as “a web of social and political relations” in which people depend on one another for their flourishing. Analogizing citizenship with this broad view of property, citizens are then understood as “co-owners or partners in a shared political community” who have a duty, as joint owners, to consult one another in determining how to generate and allocate revenue for necessary government functions and other decisions (30-33). She highlights two analogous functions of property and citizenship. First, like property law, citizenship law demarcates who is included and who is excluded (“gatekeeping function”) (33). Second, like property law, citizenship law also provides the basic enabling conditions for each member to fulfill her potential (“opportunity-enhancing function”). These conditions include not only the right not to be excluded but also a range of social and political benefits. Shachar’s central argument is that birthright citizenship is itself a valuable “property” understood in the broad sense, which generates for its “holders” access to certain common goods and benefits (37).

The argumentative strategy is to discredit birthright citizenship by analogizing it with the property inheritance regime of *fee tail* or entail. Dating back to medieval England, entail was a legal method of restricting future succession of property to the descendants of a designated person for the purpose of keeping landed estates in the hands of a small elite group. Shachar argues that while the hereditary transfer of property has been discredited in the realm of property, birthright principles are “by far the most important avenue” structuring the transmission of citizenship around the world. This is a “striking exception to the modern trend away from ascribed status” (38, 41-42).

In light of the moral arbitrariness of birthright citizenship and the inequalities it reproduces, what is to be done? Shachar first considers and rejects two “extreme” proposals, one for “world citizenship” and another for “resurrecting the borders” without any concern for global responsibilities (45-53). She identifies Thomas Pogge as a proponent of world citizenship or legal cosmopolitanism, but it is important to point out that Pogge himself suggests that *moral* cosmopolitanism may be consistent with the existence of separate political communities. He has expressed support for a “contextualist moral universalism” in which different moral principles might apply in different contexts. While moral universalism permits monistic universalist theories, like utilitarianism, Pogge also insists that it permits contextualist theories of the sort favored by David Miller in which different principles of justice apply at different times and in different places

(see Miller 2007). Pogge suggests that a “contextualist moral universalism” is consistent with certain distinct principles applying in delimited contexts, such as the nation-state, such that compatriots can take priority in certain respects. But this contextualism would have to be accompanied by meeting certain fundamental obligations to all human beings (Pogge 2002: 109-110, 98). It is difficult to find many scholarly advocates who actually embrace the two extreme proposals Shachar lays out. Most cosmopolitans are “moderate” cosmopolitans who heed Kant’s warnings about the despotism of a world state and recognize the necessity of multiple political communities for human freedom and meaningful democratic participation. It would have been helpful if Shachar had actually identified particular scholars or writers who advocate these positions and looked closely at their arguments. For instance, does the second policy of “resurrecting the borders” without any concern for global responsibilities find substantial support in public opinion of wealthy liberal democratic societies, or does support for tightened border control actually co-exist with some support for assistance to the world’s poor?

A third proposal that Shachar considers is an open borders immigration policy, which some egalitarian liberal theorists have advocated as a means toward remedying global inequality, along with foreign aid (see, e.g., Carens 1987). What is being redistributed in an open borders policy is not wealth and income but membership in a wealthy polity via migration. But, as Shachar argues, an open borders policy is an extremely limited means of remedying global inequalities since it can only assist a very limited group of people. Currently, only about three percent of the world’s population lives in a country other than the one in which they were born (132). In addition, those who migrate are typically not the world’s poorest but rather individuals with employment skills or family ties that provide them with more swift admission through existing immigration categories in wealthier states (84).

Instead of policies for abolishing, resurrecting, or opening borders, Shachar endorses a proposal that retains borders and “stable citizenship regimes” while also extending “the moral and legal boundaries of care and responsibility beyond those of established citizenship” to include the global poor (68). Toward this effort, Shachar defends what she calls the *birthright privilege levy*: a tax on those recipients of the automatic membership-entitlement transfer in the world’s wealthier countries (96). She draws on political and legal theories of property to support her case: inheritance conflicts with the egalitarian premise that people should start life with fairly equal chances, and from Bentham, Blackstone, Kant, and Mill to Rawls and Dworkin, we find support for imposing legal restrictions on the inheritance of fortunes (87-96). Extending this logic to the context of citizenship, she argues for imposing restrictions on the materially valuable inheritance of membership in one of the world’s wealthy countries.

Some concerns arise in the details and implementation of this innovative proposal. The first has to do with intra-country inequality. It is not entirely clear how to determine how much each individual born into a well-off polity must pay. On the one hand, in virtue of birth in one of the world's wealthy countries, "everyone within the well-off political community who enjoys its enabling functions" must pay the levy. On the other hand, Shachar emphasizes that birthright-citizenship heirs are entitled to keep enough of the inheritance necessary for a fair chance at a successful life and that the amount of the levy will be "subject to familiar need-based, gender-sensitive, minimal-income thresholds and related exemptions and deductions" (98-99). Shachar acknowledges the importance of being sensitive to "intranational distribution of opportunity," but in the absence of greater details, serious concerns remain about the potentially regressive nature of the birthright privilege levy. *Everyone* born in wealthy political communities must pay, but the citizens within one political community are born into very different socioeconomic circumstances. How much of a deduction would a child get if she were born into a family below the poverty line? Would she still have to pay the levy in the form of public service, an alternative method of payment that Shachar proposes? Will the public service only count as sufficient payment if it actually alleviates global poverty? Could the government of the well-off community extract greater payment from its wealthiest birthright-membership heirs to pay the levy for its poorest birthright-membership heirs? Is there a cap on how much a government could demand from the wealthiest birthright-membership heirs?

The birthright privilege levy need not be an all-or-nothing proposal. As Shachar suggests, it might be combined with a liberal immigration policy, which could reduce the amount a wealthy polity would owe in terms of the birthright privilege levy. She views her innovative proposal as part of a range of proposals for addressing global inequality, including Pogge's "global redistributive dividend" and Jagdish Baghwati's "brain-drain tax" (106). Against this backdrop, her criticism of foreign aid seems misplaced: she argues that they have had "a troubled history of being misapplied or not fully utilized to assist those in dire need" (100). But the birthright privilege levy, if implemented, could very well be vulnerable to the same criticism. How well or badly the receiving country utilizes the redistributed resources will depend in part on the quality of the institutions in that country, a challenge that any proposal of global redistribution will have to grapple with. Indeed, the birthright privilege levy is a type of foreign aid; the key difference is the *normative justification* for these forms of assistance. The payment of foreign aid by wealthy countries might be justified as a form of charity, not an obligation of justice, although some proponents of foreign aid may view the matter as one of obligation. One important difference between the birthright privilege levy and foreign aid, which Shachar highlights, is the

symbolic effect of the former: those born into wealthy polities are made to reflect on the “bounty of their inherited property and bear its accompanying moral responsibility toward those not so fortunate” (98-99).

A second question about the birthright privilege levy has to do with inter-country inequality: how much redistribution from richer to poorer countries would be enough? Shachar accepts rather than defends “modest” cosmopolitan principles of distributive justice, while also accepting that citizens have special responsibilities toward one another (197, n. 51). What are the content and grounds of these “modest” cosmopolitan principles? She argues for “providing real opportunity for everyone” in the world, which she acknowledges is an ambitious goal, but “the more immediate task is to eliminate absolute deprivation from the face of the earth” (105). This suggests a kind of global prioritarianism, which focuses on bringing the well-being of the world’s poorest individuals to some threshold level. Shachar leaves unclear whether she views the obligations of global justice to be satisfied when absolute deprivation is eliminated, or whether a more ambitious theory that strives for greater relative equality among human beings is required.⁴ Greater elaboration of the grounds of her cosmopolitan views would clarify how far the birthright privilege levy goes toward meeting the demands of global justice.

Another set of normative concerns has to do with the property-citizenship analogy. While the direct analogy between citizenship and property helps focus attention on the *material worth* of citizenship, I am not entirely convinced that we need the analogy to appreciate the enormous *distributive* consequences of membership in a well-off polity. More importantly, I worry that the property-citizenship analogy can lead in potentially exclusionary directions. For instance, if we are encouraged to view citizenship as a kind of property in which citizens are “co-owners” of the national territory (30), what is to stop us from making property arguments in favor of drastic immigration restrictions? One might defend a state’s unilateral right to control its borders not only by appeal to the idea of the sovereignty, but also by appeal to the idea of dominion and property ownership: not only do citizens belong to a political community but the community’s institutions and collective life belongs to them in virtue of the toil and sweat of their labor that has built up those institutions. Indeed, this reasoning is reflected in contemporary immigration discourse, and the property-sovereignty connection has a long history in Western political thought. It is reflected in the early American immigration cases, *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892) and *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893), in which the U.S. Supreme Court drew on natural law theorist Emer de Vattel to establish the plenary power

⁴ On the distinction between absolute and relative deprivation and an argument that liberalism should be concerned with absolute deprivation abroad and limit concern for relative deprivation within the boundaries of the nation-state, see Blake 2002.

doctrine. Vattel argued that the property of individual citizens is in the aggregate “the property of the nation.” The settlement of a nation establishes not only rights of property but also the right of sovereign command, which includes the right to exclude foreigners.⁵ To be fair, Shachar does not normatively affirm that citizenship should be conceived as property; she draws from property law to consider reforming citizenship law in inclusionary ways. Yet, rethinking citizenship by way of a citizenship-property analogy opens the door to exclusionary, as well as inclusionary, uses of the analogy.

In addition to the birthright privilege levy, the other major innovative proposal of Shachar’s book is the *jus nexi* principle of membership assignment, which is offered as a complete or partial substitute for the *jus soli* and *jus sanguinis* principles. On the *jus nexi* principle, membership is assigned on the basis of “the *social fact of membership*,” as opposed to the accident of birth. *Jus nexi* would lean toward excluding the “*nominal heir*: the child born abroad to parents who have long lost their ties with the country of birthright membership” and toward including the “*resident stakeholder*: the person who participates in the life of the polity but lacks citizenship due to the weight presently given to ascriptive factors in defining the demos” (165). Shachar’s proposal is part of a larger body of citizenship scholarship that argues for making citizenship depend on “functional and pragmatic rather than formal criteria” (169).

One immediate concern that arises is the relationship between her two proposals: the birthright privilege levy and the *jus nexi* principle. Does the latter obviate the need for the former? If a country embraces the *jus nexi* principle in place of *jus soli* and *jus sanguinis* and social connections are indeed just or legitimate grounds of membership, as Shachar suggests, then have we removed the grounds for the global redistributive tax Shachar defends in the first half of the book? Shachar suggests that even if well-off states were to adopt the *jus nexi* principle, redistribution from wealthier to poorer polities would still be required. Indeed, she says that long-term resident aliens who are on the path to citizenship in the world’s wealthier countries must also pay their share of the privilege levy (214, n. 108).

But this suggests that what is being taxed is not the *fact of birth* in a well-off country but the *fact of enjoyment* of all the benefits that come with membership in a well-off polity, regardless of how one came to acquire membership. The question of the acceptability of a state’s membership rule has to be separated from the normative grounds for global redistribution. We citizens of well-off polities might think *jus nexi* a more legitimate and inclusive membership

⁵ Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 2008), Book II, §81, 94; see also Book I, §203-210.

rule than *jus soli*, but this does not release us from obligations of global redistribution—which are grounded not on the fact that some of us were born or naturalized into well-off polities and others into poor polities, but on the grounds that we are connected through regular interactions in a global “basic structure” (Beitz 1979) or because we are implicated in global institutions that harm others (Pogge 2002) or because we are responsible for the structural injustice produced by political institutions that act in our name (Young 2004).

I want to turn to examine the normative concerns about democracy that motivate Shachar’s support of the *jus nexi* principle and consider whether her concerns are met by the principle. Her support for *jus nexi* is motivated by “democratic legitimacy concerns” raised by a mismatch between how *jus soli* and *jus sanguinis* define membership boundaries and what she understands to be required by principles of democratic legitimacy (165). As she puts it, the concern is that “the laws of the polity ought to serve and reflect the interests of all those who regularly reside within its territory and are subject to its authority,” a commitment which she endorses and believes is reflected in the *jus nexi* principle (135). Drawing on Robert Dahl and other democratic theorists, she argues that all those subject to the laws of the state should be included in the demos (137). Both the *jus soli* and *jus sanguinis* principles fail to meet this test of democratic legitimacy because both are overinclusive and underinclusive in the way they define the demos. On the one hand, the ascriptive membership rules include the following individuals who should ultimately be excluded: a child born to visitors or short-term visa holders who have no intention of establishing permanent residence in their child’s country of birth and a child born abroad to parents who have long lost their ties with their country of origin (116, 122). On the other hand, the ascriptive membership rules exclude individuals who should ultimately be included: minors who lawfully enter the country with their immigrant parents at a young age; foreign-born adoptees; newcomers who do not share the national identity, as in Central European countries and Germany prior to 2000, which attributed membership based exclusively on parentage entitlement; and unauthorized migrants who develop social ties over time in the countries where they live and work (117, 119, 121-22, 184-88). The *jus nexi* principle would correct these problems of overinclusion and underinclusion such that citizenship’s boundaries line up with the boundaries of democratic legitimacy.

An undefended premise in Shachar’s argument for the *jus nexi* principle is that the boundaries of the demos are properly defined by the boundaries of a state’s territory. But democratic theorists have challenged the tight linkage between territoriality and democracy, moving toward deterritorialized conceptions of democracy. On two leading principles of democratic legitimacy, any definition

of the demos based on nation-state membership will be underinclusive.⁶ Consider the *all affected interests principle*, which says that all those persons whose interests are affected by a state's laws and policies should have a say in its governance. As Robert Dahl put it in an early formulation of the idea, "The Principle of Affected Interests is very likely the best general principle of inclusion that you are likely to find"; it says that "everyone who is affected by the decisions of a government should have the right to participate in that government" (Dahl 1970: 64-65; see also Shapiro 1999: 37). Who should have a voice in collective decision-making is not based on citizenship status or even territorial presence but instead on who has interests affected. The principle has radical implications for the scope of democracy. The policies of any one state affect the interests of a great many people beyond the boundaries of citizenship and territory, including not only resident noncitizens and nonresident citizens but also *nonresident noncitizens*. Dahl himself was ambivalent in his support of this principle, but he is clear about its scope: not only *resident* noncitizens whose interests are affected by a democratic state ("foreign workers, other foreigners, even illegal aliens") but also *nonresident* noncitizens ("persons not living within the country or subject to its decisions") should have the right to participate. He points to the Vietnamese during the Vietnam War as an example of nonresident noncitizens entitled to representation in American foreign policymaking in virtue of affected interests (Dahl 1989: 292).

Another distinct and related principle of democratic legitimacy, the *coercion principle*, which Shachar seems to favor, also challenges the tight linkage between democracy and territoriality. This principle says that all those subject to state coercion should have a say in how the state's coercive power is exercised (Eisgruber 1997; Blake 2002; Benhabib 2004).⁷ As Shachar emphasizes, a great many people who reside within a state's territory but lack citizenship status ("resident stakeholders") are subject to state coercion and are therefore entitled to inclusion in the demos. Yet, not only resident stakeholders but also a great many people *outside the state's territory* are subject to the state's coercion. Using the U.S. as an example, this would include nonresident noncitizens who seek to immigrate to the U.S. (Abizadeh 2008); noncitizens residing in borderlands, such as Ciudad Juárez, Mexico (Spiro 2008: 101); and foreigners who are subject to U.S. foreign policy or military occupation (Dahl 1989: 292). In light of this, while it comes closer to meeting the demands of democratic legitimacy than *jus soli* and *jus sanguinis* membership rules, the *jus nexi* principle is still underinclusive. To resist this conclusion, Shachar needs to

⁶ I develop this argument in Song 2009.

⁷ Dahl (1989: 127) also defends the coercion principle: "Every adult subject to a government and its laws must be presumed to be qualified as, and has an unqualified right to be, a member of the demos."

say more about why democracy's boundaries ought to be limited to the territorial boundaries of nation-states.

Some final questions about the *jus nexi* principle. Shachar argues that on the *jus nexi* principle unauthorized migrants would be entitled to a path to legalization in virtue of the passage of time and development of social ties (184-88). Shachar finds support for this rationale in another doctrine from property law, the doctrine of "adverse possession," under which a trespasser may obtain full title to the property if the occupancy is peaceful, continuous, and visible (185). The logic of adverse possession applies to the citizenship context if the authorities turn a blind eye to the presence of unauthorized migrants who have settled in the state's territory. But in recent years in the U.S., the government has stepped up enforcement efforts, as exemplified in ICE workplace raids. The success of the adverse possession doctrine depends on government inaction, but if the government does act, what recourse would unauthorized migrants have? Should the development of social ties be decisive grounds for legalization and against deportation even in the face of government action, as opposed to inaction?

Lastly, one reason why one might favor *jus soli* or *jus sanguinis* to *jus nexi* is not so much for its administrative convenience, which Shachar rightly criticizes as a defensible basis for retaining existing membership rules, but for the potential abuses that might arise in implementing *jus nexi*. *Jus nexi* is based on "actual, real, and genuine connection" to the polity (183). How is genuine connection to be determined? Shachar suggests certain tests having to do with a person's actual behavior. For the expatriate who seeks to retain membership in the country of her birth, *jus nexi* would require that she establish residency, send remittances, maintain links through frequent travel, learn the language, or engage in intercultural and political exchange (173). For the resident stakeholder who seeks inclusion in the country to which she has migrated, *jus nexi* would require a certain "length of residence in the country, family ties, evidence of value and service to the community, employment history, and the extreme hardship that might be incurred" by her and her family if she were to be deported (177). As Shachar discusses, in the U.S., immigration judges already engage in consideration of such factors in removal proceedings. Section 240A of the Immigration and Nationality Act allows for persons subject to a formal removal order to apply for a waiver that would permit them to stay. But Shachar's *jus nexi* proposal is intended to make "genuine connections" the basis for the assignment of citizenship for *everyone* in a state's territory, not just those undergoing removal proceedings. Who is to determine whether "genuine connections" to the polity have been established? While social connections may be the normative grounds for assigning membership, for the 97 percent of the world's population who live out their lives in their country of birth, the fact of birth in the territory may end up serving as the proxy for assessing "genuine connection." In addition, when it

comes to children born to unauthorized migrants, the *jus soli* principle may be less invasive and more inclusionary in practice than the *jus nexi* principle, depending on what the tests for determining “genuine connection” are.

Throughout the book, Shachar emphasizes that she does not advocate the abolition of the good of membership, but rather seeks a balance between protecting the valuable aspects of membership and improving the well-being of those excluded from such benefits in virtue of where or to whom they were born (16, 23, 68, 71). Like Bosniak, Shachar assumes rather than defends the normative significance of citizenship. As I argued above, however, more explicit defense of citizenship is necessary not only to adequately address the powerful challenges raised by postnational and moral cosmopolitan theorists who doubt citizenship’s desirability, but also to consider whether and how special responsibilities based on citizenship can be reconciled with the responsibilities that all human beings have toward one another.

Defending Citizenship in the Context of Global Inequality

Citizenship, as Bosniak suggests, is understood in a variety of ways—as a formal legal status, entitlement to a set of rights, a shared identity, and active participation in shared political institutions (18-20). Underlying all of these understandings is the premise that citizenship is an ethical relationship that gives rise to special obligations or responsibilities. This premise requires defense, not least because, as Shachar emphasizes, citizenship in one of the world’s well-off polities is attached to enormous material advantages. In this final section, I want briefly to sketch some normative defenses of bounded solidarity and then elaborate the territorial outsider’s challenge that any account of bounded solidarity must meet.

One justificatory strategy focuses on the nature of the relationships we have (for example, to family and friends), which we take to ground special responsibilities or obligations. Each of us (hopefully) has enriching personal relationships with at least some family members and friends, and we take these relationships as giving rise to special responsibilities. We might contend that the relationship of citizenship is a relationship of this kind. This is the approach taken by theorists of nationalism, who stress the relationship of co-citizenship as based on affective ties and attachments based on a shared national culture (Walzer 1983; Miller 1995). The fact that citizens value their relationship toward one another serves as the ground of the special responsibilities they have toward one another.

A second justificatory strategy might focus on the distinctive circumstances within which citizens stand: they are subject to the authority of the state in virtue of fair play or hypothetical consent, and this subjection gives rise to special obligations toward the state and fellow citizens that don’t apply to

outsiders (Blake 2002). One might argue that aliens present in a state's territory are also subject to that state's authority and are thereby entitled to inclusion into full citizenship.

A third justification looks to the pursuit of social justice within a nation-state. As David Miller has stressed, the institutions of the welfare state serve as redistributive mechanisms that can offset the inequalities of life chances that a capitalist economy creates and raise the position of the worst-off members of society to a level where they are able to participate as equal citizens. While self-interest alone may motivate people to support social insurance schemes that protect them against unpredictable circumstances, solidarity—in particular civic solidarity fostered within bounded political communities—is said to be required to support redistribution from the rich to aid the poor, including housing subsidies, income supplements, and long-term unemployment benefits (Miller 2006: 328, 334). The basic idea is that people are more likely to support redistributive schemes when they trust one another, and they are more likely to trust one another when they regard others as like themselves in some meaningful sense. The implication is that such feelings of solidarity would be hard to achieve on a global scale.

A fourth argument in defense of bounded solidarity is its importance for democratic participation. If we view democratic activity as involving not just voting but also deliberation, then it is important for people to make an effort to listen to and understand one another. They must be willing to moderate their claims in the hope of finding common ground on which political decisions can be based. Such democratic activity cannot be realized by individuals solely pursuing their own interests; what is required is some concern for the common good. A sense of civic solidarity can help foster mutual sympathy and respect, which in turn support citizens' orientation toward the common good. Another important aspect of democracy is citizens' sense of effectiveness. As Robert Dahl argued, there is a tradeoff between the size of a democratic association and individuals' sense of effectiveness. A benefit of a larger association is that it can often cope with certain matters more effectively than a smaller association (think of global environmental or economic problems). But one cost of making the association larger is a decline in each individual's impact on collective decisions. The larger the association, the more that sheer numbers prevent everyone from participating equally in decisions. The smaller an association, the more fully it can adhere to the principle of political equality (Dahl 1970: 77, 121). On this argument, democratic participation requires bounded political communities (Dahl 1999; see also Benhabib 2004: 219).

This is a very quick gloss of some possible normative justifications for bounded solidarity, and much more could be said about each. If Bosniak were to accept any of these defenses, they could help justify the separationist's "hard on

the outside, soft on the inside” approach. If she finds none of them compelling, she would find herself in alliance with those who favor what I called “universalist convergence,” an approach that moral cosmopolitans would surely applaud. Shachar’s acceptance of bounded solidarity seems to stem from concerns about democracy and retaining the “enormous social advantages of having stable citizenship regimes” (68).

Whether they favor one of these strategies of argument for bounded solidarity or some other, they and others who wish to defend citizenship must answer what Scheffler calls the “distributive objection” lodged on behalf of those excluded from the world’s well-off polities: the special responsibilities based on citizenship are unfair when they work to the disadvantage of those who are already worse off. What is objectionable about the bounded solidarity that stems from political membership is less the fact that citizens (or more expansively, all territorially present persons) have “associative duties” or special responsibilities toward another; most of the world’s people are members of some state and therefore already have associative ties and duties of citizenship. Rather, what is objectionable is when those associative duties, in Scheffler’s words, “serve to reinforce inequalities in the distribution of resources of other kinds” – in particular, material inequalities as happens when the citizens of wealthier countries, like the U.S. and Canada, prioritize the interests of their fellow citizens over those outside their borders who are poorer. Scheffler suggests that the putative special responsibilities of citizenship “will remain open to challenge on distributive grounds unless those who are not members of the putatively duty-generating groups and relationships are given the opportunity to join and voluntarily decline to do so” (Scheffler 2003: 74-75). In other words, from a liberal perspective, only if there were open borders and everyone were given a chance to become a member of any country would the special responsibilities of citizenship be justifiable. The citizens of poor countries are unlikely to decline the opportunity to migrate to wealthier countries until there is a significant decrease in global economic inequality.

A policy of open borders is not the only way for defenders of bounded solidarity to meet the “distributive objection.” An alternative approach is to develop and implement global redistributive norms that address the material inequalities that attach to membership in political communities. This is the central challenge that Shachar’s book takes up, though without connecting it to an explicit defense of bounded solidarity. On this approach, if the citizens of well-off polities meet the obligations of global justice, then the distributive objection to citizenship’s special responsibilities would be met.

Whether it is possible to reconcile the special responsibilities of bounded solidarity with global distributive responsibilities will depend in part on how demanding each set of responsibilities are, and this is why it is crucial to address

these issues—justifying bounded solidarity and addressing global inequality—together.

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