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Ann E. Cudd
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Citizenship and Immigration - Borders, Migration and Political Membership in a Global Age

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Chapter 1
Introduction

Ann E. Cudd and Win-chiat Lee

Recent events in the world urgently impress upon us the need for discussion of the questions addressed in this volume. Even as we put together this volume, a number of humanitarian crises involving human migration across national boundaries were unfolding, stemming from war, economic devastations, gang violence, and violence in ethnic or religious conflicts.[1] Immediate actions and policies in response to these crises are called for, mostly in the form of providing opportunities for resettlement for those who are displaced, either permanently or temporarily, on the part of those nations who are in a position to help alleviate the dire conditions of these displaced people or "refugees," as they are often called.

Needless to say, these humanitarian crises immediately confront us with questions about our national and international moral responsibilities. Some of these questions are rather basic. Are we, i.e., those of us in affluent and politically stable countries, under the moral obligation to take in the displaced and provide them with the opportunities to lead reasonable lives? Or is this a matter of supererogatory charitable acts, which would not be wrong for us to decline to take on? Or are nations obligated solely because they are parties to the international conventions and treaties that require signatory states to provide aid to and accommodate refugees? If we are morally obligated to provide refuge to these migrants, what is the

[1] The New York Times reports, "The United Nations says that an estimated 20 million people around the world, half of them children, have fled their home countries because of conflict and persecution. The war in Syria is now the single largest source of new refugees, casting about 4.4 million Syrians out of their country since the conflict began nearly five years ago" (Sengupta 2016).

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extent of that obligation? How are these international obligations to be balanced against a nation's responsibilities towards its own citizens if resettling these refugees has impacts on the lives of its own citizens, economically and otherwise?

1.1 National Rights to Self-Determination

However, not all moral and policy questions concerning human migration across national boundaries arise with the same urgency or scale as the overwhelming humanitarian crises with which, unfortunately, we are made all too familiar lately. We are equally familiar in the United States, as well as a number of other, mainly European, countries, with the situation of immigration policy being a perennial political issue, especially during election times. Perhaps this is not unexpected. Immigration, both authorized and unauthorized, has been brewing as an issue in a number of countries, especially in the economically more developed parts of the world, such as North America and Western Europe, in part because of the ambivalence some of these countries have toward immigration.

It is, however, important to remind ourselves that human migration is by no means a recent or modern phenomenon. It is perhaps not an exaggeration to say that as long as there have been human beings, there have been migrating human beings. The movement and resettlement of human beings from one geographic location to another, in both small and large scale, take place for many different reasons and under a variety of circumstances, sometimes voluntarily and sometimes not so voluntarily. Whatever problems human migrations might have posed in the more distant past, in the modern era they pose a new and distinctive set of problems because of the political context under which they take place, namely, that of sovereign nation-states (often referred to as the Westphalian system) with their restrictive conceptions of membership in each of these nation-states. To be able to control its borders, i.e., to be able to determine whom to admit onto its territory and whom to allow to stay and on what terms, and to be able to determine whom to admit to membership, more specifically as citizens, are all part of what it is for a state to exercise its sovereign power. For this reason, we choose to address both questions concerning citizenship and those concerning immigration together. They are in many regards two sides of the same coin. In fact, in many countries, immigration is used to address the problem of a declining or negative population growth and produce future citizens. In order to address the normative questions concerning how a nation-state may exercise its control over immigration, we therefore need to address the normative questions concerning citizenship—what it involves and who may qualify for citizenship in a state.

Considering its claim to sovereignty and national self-determination, *de jure* open-border and "open-membership" would thus both seem to be antithetical to the idea of the modern state. Unauthorized immigration, especially if it is widespread and chaotic, poses problems for the modern state precisely because it threatens to open up, albeit *de facto*, the borders and potentially membership as well. Thus,

immigration control, criteria for citizenship, and state sovereignty (and national self-determination) are related to one another as parts of the same piece. As a result, the discussion of the extent to which a state may justifiably restrict immigration and membership is in many ways also a discussion of the extent to which a state may justifiably exercise sovereignty and self-determination.

The debates concerning a state's immigration and citizenship policies and their relation to its sovereignty and right to self-determination often center on the question of how much freedom the state has in determining these policies, i.e., whether the state may simply pick and choose any criteria whatever to determine whom to admit to its territory as residents or whom to admit as its citizens. The debate pits freedom of association against the imperative not to invidiously discriminate, among other moral issues. For example, may the state choose for immigration and citizenship only people of certain ethnic, national, religious, cultural or linguistic backgrounds?

It is important to realize that freedom of choice is very limited for both citizens and the immigrants. Citizens have limited ability to pick up and move just because they disagree with their nation's immigration policy, and migrants often feel forced to leave their state due to dire economic or violent circumstances. Immigration as a more systematic way to bring in new settlers for a nation is perhaps relatively modern. One might suppose that this creates a new kind of voluntarism for membership in a nation. People who are immigrants to a country, arguably, choose to do so and choose to become citizens of that country eventually when they are allowed to do so. But such choices are exercised only within a limited number of options and certainly not on their own terms. The vast majority do not become citizens of a country by choice. They become or qualify to be a citizen of a certain country as a result of facts about them that are beyond their control, facts such as the place of birth or the nationality of their parents.

Indeed, people do not have to move at all to acquire a new political identity or to have one imposed on them as the citizens of a different country. Political regimes change, and boundaries are redrawn as a result of conquests, annexations, colonization, independence, revolutions, secessions, and other kinds of political events. Without relocating a person can literally be the citizen of one country one day and the citizen of a different country the next day without having any say in the matter or at least without having any individual say in the matter (as, for example, in cases where the determination is the result of a popular referendum). The more coercive aspects of citizenship and immigration policy thus need justification.

It is important also to note that even the state may indeed have moral limitations on whom they may choose not to include as citizens. For example, it is plausible to argue that the state may not justifiably exclude someone born on its territory from citizenship. It is also plausible to argue that the state may not justifiably exclude a person who has resided on its territory for a long time from citizenship, even if that person's entry and stay on its territory is unauthorized.

1.2 Humanitarian Duties to Include

Immigration and citizenship, when addressed from the point of view of a sovereign state's right to self-determination, would appear to be a right of a state to be parochial, the right of a state to control its border and its membership in accordance with its interests and those of its citizens. The sovereign power of nation-states can therefore be generally described to involve *the right to exclude*, i.e., the right to exclude people from their territories and memberships. However, this way of looking at the issue is incomplete in that we are omitting a whole side of our moral duties, namely, our global responsibilities to humanity as a whole.

There is a different set of concerns that would pull our moral consideration of immigration issues in the opposite direction. Opposed to the right to exclude, we might want to take into account whether states have *the duty to include* and, if there is such a duty, whether the state's right to exclude should be tempered as a result. What may be the source of such a duty to include? We have suggested earlier some possible sources. Another possible source is cosmopolitanism, i.e., that the duty to include originates in the duties we have towards one another as fellow members of humanity. The cosmopolitan duties of nation-states towards noncitizens are really nothing other than the cosmopolitan duties we have towards one another as fellow human beings. Such duties may include many things. But for our purposes perhaps the most relevant considerations are humanitarianism and human rights. We typically associate a country's humanitarian and human rights responsibilities in relation to noncitizens as involving doing something across national boundaries, such as providing aids, military interventions, and sanctions against violations of human rights. But often a nation's duties of humanitarianism and human rights are to be performed at its doorsteps. For example, a nation, as we have discussed earlier, may have a duty to provide asylum and refuge to those who suffer and manage to escape from war, political persecution, economic devastations, social injustice, natural disasters, violence, and other problems in their homeland. The extent to which a nation owes such a duty is debatable, but such a duty would amount to demands for a nation to include certain people on its territory or even as its members.

If one believes, as declared in Article 15 of the Universal Declaration on Human Rights, that human beings have the right to a nationality, then a state's cosmopolitan duty to include may also involve a duty to provide a path to acquire citizenship in that state for those who become dispossessed and displaced and rendered "stateless" as a result of war, violence, and other human-made or natural disasters. Perhaps the duty can be discharged by ceding to the stateless a portion of territory that may be used by the migrants to create a state of their own. In either case, it seems that it is an international duty to discharge, a collective obligation of all decent nations, and therefore a burden to be shared among them.

As in all matters involving positive rights and positive duties, it is difficult to determine where a state's duty to provide asylum and refuge and to provide pathways to citizenship for the stateless begins and ends and when a state is expected to do too much and when it is not doing enough. Perhaps the best approach to

addressing this issue is to take the duty to involve some duty on the part of those states that are in a position to perform such a duty to coordinate among themselves. We certainly see the need for such coordination in the most recent humanitarian crisis involving refugees from Syria in order to bring about a fair and effective way of resettling them.

1.3 Organization and Content of This Volume

We hope to address some of these interrelated problems concerning citizenship and immigration in this volume. Accordingly we have divided this volume into five parts, each focusing on a different aspect of the larger overall question we address. The first two parts address issues concerning citizenship while the remaining three parts focus on issues concerning immigration.

1.3.1 What Is a Citizen?

Part I, "Conceptions of Citizenship," focuses on general questions concerning what constitutes citizenship. It begins with the chapter "National Citizenship and Civil Marriage: Ascriptive and Consensual Models" (Chap. 2), in which Emily R. Gill contrasts two models of citizenship, one based on the consent between the prospective members of a community and the community itself (the consensual model) and the other on certain characteristics of the individuals without requiring consent of the community (the ascriptive model). On the ascriptive model, individuals in a community, if they possess the right kinds of characteristics, such as birth or having developed certain social relations within the community, may make claims against the community for entitlement to citizenship in the community. While consent is generally regarded as more compatible with liberal democratic value, Gill argues that it in fact may facilitate exclusion from citizenship because consent is a two-way process and as a result a community may withhold citizenship by setting criteria that may not be reasonable. Ironically in contrast, precisely because recognizing certain properties of the individual, such as birth and social relations, as the basis for citizenship in a community deemphasizes the community's choice in the matter, it may facilitate inclusiveness.

Diversity in a community, therefore, in Gill's view, may require more of an ascriptive model than a consensual model of citizenship. Needless to say, whether an ascriptive model does enhance diversity in a community or not depends on what the relevant ascriptive properties are. Gill also draws an analogy between the citizenship issue and the issue concerning same-sex marriage. In her view, the consensual model also leaves too much control in the hands of the community to set criteria for who may be married with whom, as opposed to the ascriptive model which will give couples in a certain relation claims against the community to be married.

In the next chapter, "Citizens as Artifacts" (Chap. 3), Wade L. Robison argues that a citizen is an artifact *created* by government. In his view, citizenship, as a general concept, is rather empty of content. There is nothing in it that requires that birth within a country makes one a citizen of that country, for example. Therefore, no normative consequence is directly implied by the general concept of citizen. The more substantive content of citizenship is filled in when we have more specific *conceptions* of citizenship created by the law of a particular government to define who qualify as citizens and the legal relations involved in citizenship. Such specific conceptions of citizenship can vary greatly in terms of the number of rights and duties that go with it. It can vary from a very minimalist one that contains no rights at all or only one right, such as the right to live on the territory of the country in question, to a more robust one that contains a complex sets of rights and duties. For Robison, importantly, none of these political or legal conceptions of a citizen is a more natural manifestation of citizenship.

That is not to say that some artifacts are not better than others for a variety of reasons and especially in relation to the purpose for which they are created. Thus, it is not the case that we are without standards in assessing how a conception of citizen created in a particular political process fares. Since citizens are created for the purpose of government, Robison argues that the appropriate standards are the ones that are considered essential to having government. The legal relations created in citizenship should give rise to what Robison calls "political self-interests," the pursuit of which by one citizen will only enhance those of the others, as the purpose of government is to co-ordinate and provide mutual advantage and security of all. The exclusion of a large population residing within a nation's borders from citizenship (because they enter illegally, for example) poses significant problems for the body politic on this account.

In "Cosmopolitan Citizenship" (Chap. 4), Steven P. Lee argues that the eponymous concept of the title is not only a meaningful one, but that we should aspire to make all persons cosmopolitan citizens. Citizenship is often taken to be a purely legal category, and to imply an exclusionary community, such that it would not be possible to have an all inclusive, unbounded set of persons who could be classified as citizens. In opposition to Lee, David Miller argues that the preconditions of citizenship are such that transnational or global citizenship is impossible. To make conceptual room for the idea, Lee argues that there is a moral as well as a legal concept of citizenship.

The moral content of citizenship can take a liberal or a republican form. Miller embraces the republican description of citizenship, in which citizens are viewed as active participants in collective self-governance. Under the liberal description of citizenship, though, citizens are those who are treated as equals and guaranteed a set of rights, which may be specific to the community. Taking the liberal conception in its broadest sense implies all of humanity as equals and holders of human rights. Lee argues that to respect all persons as equally worthy of human rights requires a way to collectively protect those rights. Although this calls for a kind of world government, Lee explains that this need not imply an overriding world authority. Since persons are citizens of different kinds of communities, power can be verti-

cally dispersed, and the sovereignty of a world government of which all are cosmopolitan citizens would be vertically dispersed as well. Lee's argument paves the way for a concept of citizenship that transcends nationality.

The last two chapters in Part I take up the republican conception of citizenship according to the previous distinction. Our discussion of citizenship, however, takes a historical turn with Yi Deng's chapter, "The Expansion of Kant's Republicanism with Active Citizenship" (Chap. 5). The discussion centers on a debate between Immanuel Kant and Friedrich Schlegel concerning whether republicanism conceived by Kant as the division of the state into three branches of government, namely, the legislative, administrative, and juridical, is sufficient to prevent despotism and guarantee freedom, independence, and equality for its citizens. In Schlegel's view, the structure of government by itself may not bring about such desirable consequences for its citizens because of what he takes to be the "gulf" between the general will and the particular will—the latter defined as the particular interests of individuals or groups. Schlegel is in fact rather skeptical of the existence of the general will except in pure thought. In his view, all three branches of the government can be occupied by the same group with the same agenda dictated by their own interests. In such case, a republican government will still reflect the interests of a particular group and not the general will and thus subject citizens to domination and coercion.

Deng argues that this suggests that we need to go beyond Kant's emphasis on the structure of the state to reach the republican ideal. On the one hand, she suggests we seek the solution in Kant's idea of "active citizenship." On the other hand, while agreeing with Schlegel that pure general will exists only in pure thought, she rejects a stark distinction between the general will and the particular will so that an individual's will is clearly one or the other but not both. Our concern about the environment, in Deng's view, is both self-interested and public-minded, for example. By being active citizens, we interact with and influence one another in a process that makes the general will more salient.

Active citizenship is also what Joan McGregor has in mind in her proposal of food citizenship in the chapter "Public Interests and the Duty of Food Citizenship" (Chap. 6). The concerns for food safety, food security, sustainability, nutrition, and the quality of food, in McGregor's view, are at once public- and self-interested. She thinks that, like education, food choice should not be regarded as a private matter to be solely determined by us individually as *consumers* in the marketplace. In a democratic state, citizens should participate actively in the democratic process to exercise governance over food policies. This means that they should not only take the responsibility to understand how the food production and distribution system works and seek to control it through the political process but also change their own habits as consumers.

In forging the idea of food citizenship, McGregor invokes a conception of citizenship that is more robust than the legal conception. Citizens, under this conception, are politically engaged agents in a community, taking personal responsibility for how the community fares with regard to certain public good, which is food in this case.

1.3.2 Rights of Citizenship

Part II, "Citizenship and Equal Rights," addresses some of the benefits of citizenship in relation to the idea of equality as citizens. More specifically, equal protection of the law and the equal right to vote are discussed. In their chapter, "Equal Citizenship and Religious Liberty: An Irresolvable Tension?" (Chap. 7), Gordon A. Babst and John W. Compton address the issue of what equal citizenship means and the implications of that meaning for religious liberty. They argue that equality is compromised when too much deference is granted to religion, allowing claims of religious liberty to override claims to equal protection. This is particularly the case if the state does not pose any challenge to those claiming a religious exemption to discrimination law to show that their claims are sincere and based in their religious beliefs.

Babst and Compton consider the case of *Hobby Lobby*, in which private employers were held to have a right based in religious freedom to refuse to obey the federal mandate of the Affordable Care Act to require coverage of contraception. The objection to contraception turns on the belief, which is considered false by physicians, that some forms of contraception covered by the federal law are abortifacents. In this case the Supreme Court ruled for the plaintiffs and placed no requirements on them to show that their beliefs are justifiable or even religiously based. Babst and Compton argue that this could allow persons to falsely claim a religious objection in order to satisfy a non-religiously based desire, such as the desire to evade a tax or to arbitrarily discriminate. Despite the fact that the Supreme Court has earlier decided that religious freedom cannot be used to violate equal protection in the case of racial discrimination, the Hobby Lobby case clearly places religion above equal protection in the case of gender and sexual orientation discrimination.

In the chapter "Who Else Should Vote in Local Decision-Making? Enfranchising Part Time Residents and Non-Citizens" (Chap. 8), John G. Francis takes on an important issue for a democratic state, namely, the issue of voting rights. In some democratic countries such as the United States, citizenship is required to have the right to vote in political elections at all levels—from national to local elections. Residence in the country may also be a necessary condition for exercising voting rights in that country. In addition, one may only be allowed to establish residence in only *one* local jurisdiction for the purposes of participating in local elections. Francis argues that some of the changing features of our world, such as the increased mobility of people and the increased acceptance of dual nationality, should make us rethink some of these stringent ties between the ballot on the one hand and citizenship and residency on the other.

Francis's overall argument is that we should be more flexible and more expansive in granting franchise so that we can be more responsive to the interests that need to be represented at different levels of government. More specifically, Francis argues that citizenship should not be a requirement for voting in some local elections and people who have part-time residence in more than one local jurisdiction should not be restricted to vote in only one of them.

1.3.3 Moral Duties to Immigrants

Against the backdrop of citizenship, we move into a general discussion of how to think morally about the issue of immigration. Four general frameworks for such a discussion are presented in Part III, "Moral Frameworks for Immigration Issues." Larry Houlgate's contribution, "John Locke on Naturalization and Natural Law: Community and Property in the State of Nature" (Chap. 9), attempts to provide a Lockean argument for liberal immigration policies. While Locke himself seems to have only provided an argument in favor of the naturalization of immigrants on economic grounds, Houlgate argues that Locke's Second Law of Nature implies greater obligations to accept and then treat as equals those who seek to enter. The Second Law states, roughly, that when our own preservation is not at stake, we must seek to preserve "the rest of mankind" and not take away or impair the life, liberty, health, or goods of others. When persons enter our country seeking to escape from poverty, injustice, or persecution, Houlgate claims that the Second Law implies we must accept them and that we must care for them to some degree. If we impose harsh immigration laws on such persons or refuse to allow them to enter, then we violate the natural law and our obligations to preserve them. Houlgate concludes by imagining how best to provide for the preservation of persons fleeing inhumane conditions in their own countries. He argues that nations should agree to give up some sovereignty over immigration to an association of nations that would allow an international body to decide on each nation's obligations to share in the preservation of vulnerable persons.

In "Immigration, Citizenship, and the Clash between Partiality and Impartiality" (Chap. 10), Stephen Nathanson addresses the humanitarian crises facing the United States and Europe recently involving migration of people seeking refuge from war and violence in their homeland. He discusses our duties in relation to these migrants from the point of view of the cosmopolitanism/patriotism debate—a central debate in the discussion of global justice. The main issue is, in addressing the needs and the moral demands of these migrants, whether, as required in cosmopolitanism, we take account of the interests and needs of all human beings and treat them equally regardless of their citizenship and where they are from, or whether, as either allowed or required in patriotism, we give preference to the interests and needs of our fellow citizens. Where one stands on the cosmopolitanism/patriotism divide will have profound implications on the extent to which we are required to open our borders to migrants, especially to those who come upon our shores urgently seeking refuge from war, violence, famine, and other dire situations.

Nathanson seeks a balance between impartiality and partiality that is endorsed by an impartial point of view, namely, rule utilitarianism. In his view, there is nothing paradoxical about some degree of partiality in moral deliberation being justifiable from an impartial point of view. He argues that the correct moral approach is moderate patriotism, which takes our stronger duties to be the ones to our compatriots, but also recognizes some duties toward those who are not our compatriots. However, this general framework of our duties does not provide sufficient determi-

nate content to provide guidance for immigration policies and could yield a number of different results, some more demanding than others. Nathanson thinks it is also rule utilitarianism that can help us determine more specifically which type of moderate patriotism to adopt.

In his chapter, "Reconciling the Virtues of Humanity and Respect for the Rule of Law: Irregular Immigration from the Perspective of Humean Virtue Ethics" (Chap. 11), Kenneth Henley explores the question of what attitude should citizens take toward "irregular immigration," or persons who enter or stay without proper documentation? This is not a question about the ethics or legality of entering or staying in a country without documentation, nor about what immigration policies are legitimate. Rather, he is concerned about how citizens should regard those who are in the country illegally. Henley argues that this is best explored through virtue ethics.

Hume offers the distinction between natural and artificial virtues, which Henley believes to be important because it allows us to distinguish our attitudes toward breaking laws against murder or theft from those toward breaking traffic laws. While murder or theft violate the natural virtue of humanity, speeding violates a mere artificial virtue. Immigration laws, Henley argues, are like traffic laws in this respect. But on the other hand, we should be motivated to sympathize with the plight of the irregular immigrant, who may be fleeing injustice or poverty. Thus, the virtue of humanity should override and cause us to have a beneficent attitude toward the illegal immigrant and, for example, not turn in the neighbor or co-worker when we learn that they are in the country without proper legal documentation. The calculus of virtues is somewhat different for the official whose job it is to enforce or prosecute the law, however. Since they have promised to uphold the law, they are bound to do so.

In "Human Rights, Distributive Justice, and Immigration" (Chap. 12), Alistair M. Macleod seeks to set the debates over immigration policies on the proper moral ground. He argues that it is not a debate over existing law, since the laws that happen to exist are not necessarily justifiable. Nor is it the basic human rights of freedom of association, freedom of movement, or right of exit, which are the rights that are typically at issue in debates between liberal nationalists and cosmopolitans. These are seldom the rights in dispute in any given example of persons seeking to immigrate or to avoid deportation. Furthermore, they are not absolute rights, and so each case will require a balancing of considerations rather than simply invoking the rights as if that settles the issue. Rather, the human rights that are most likely to be at issue are other human rights, such as freedom of religion, or the right to be free of racial, ethnic, or gender discrimination. The relevant questions are whether their human rights have indeed been violated, whether it's *fundamental* human rights that have been violated, and whether these violations have been taking place on an ongoing basis. Answers to such questions are as likely to sway liberal nationalists as cosmopolitans to provide asylum.

1.3.4 Ethics of Exclusion

In Part IV, "Immigration and the Ethics of Exclusion," we address more specifically questions concerning how may a state exercise exclusion of certain people in its immigration policy and whether those who are excluded have the duty to comply with it. In the chapter "On Nonmembers' Duty to Obey Immigration Law: A Problem of Political Obligation" (Chap. 13), Win-chiat Lee takes to task the general assumption that for any given legitimate state, even people who are not its members have the duty to obey its immigration and border control laws. Without that assumption, one cannot say that unauthorized immigration to a state is wrong (albeit a wrong that can be outweighed by other considerations) simply because it is a violation of that state's law. What this assumption runs up against, according to Lee, is what is known as "the particularity requirement" for political obligations, including the duty to obey the law as law. Under "the particularity requirement," political obligations, such as the duty to obey the law, are special moral bonds that exist only among members of a state but do not exist between members and nonmembers. More important, membership in a state is constituted by the law of that state. If only members have the duty to obey a state's law, then it may be difficult to state the particularity requirement coherently.

To argue that even nonmembers have the duty to obey a state's immigration and border control laws, Lee suggests that we reject the particularity requirement and argue instead that the duty to obey a state's law is cosmopolitan in the sense that it is a duty people have regardless of nationality, i.e., regardless of whether they are members of that state or not, even if there are very few laws that apply to nonmembers besides immigration and border control law. Lee argues that we can ground this kind of cosmopolitan duty to obey the law on the natural duty of justice, which is universal in scope, as long as we can show that justice requires or at least allows for a state of affairs in which there are multiple states that are all reasonably or sufficiently just and include some people but exclude others as members.

In "'Where Are You *Really* From?' Ethnic and Linguistic Immigrant Selection Policies in Liberal States" (Chap. 14), Adam Hosein seeks to show that immigration policies that prefer immigrants to speak a particular language are illegitimate in liberal states. He begins with a discussion of Michael Walzer's analysis of racial preference policy in Australia. Walzer claims that these policies are unjustified because they claim too much of the world for whites, implying that if there were a little bit of Australia that practiced the white-only policy that would be acceptable. Hosein disagrees with this reasoning. Preferring an ethnic or racial group is not acceptable, Hosein argues, because such policies express disrespect for non-whites, suggesting that they are inferior to whites, and that is illiberal. He then goes on to argue that immigration policies that prefer an ethnic group are like those preferring a particular religion, but religious preference by states is well established as illegitimate in liberal states. Endorsing a particular religion in immigration expresses to those citizens who do not practice that religion that they are not full members of the community. Finally, Hosein argues that preferring immigrants who speak a particu-

lar language is also illegitimate because such preferences stem from similar ethnic preferences.

In "Restricting Immigration Fairly" (Chap. 15), Bruce Landesman addresses the question of whether it is consistent for a liberal state, with its central commitment to the values of equality and liberty, to restrict immigration. Or, is it the case that, as Joseph Carens has famously argued, these liberal commitments require open borders? Landesman's answer to this latter question is no. He argues that even though restrictions in immigration means being partial to one's own citizens and restricting the liberty of others, a liberal democratic state may justifiably restrict immigration in a way that is compatible with treating everyone as free and equal beings, but only if the restrictions are fair and reasonable. Landesman provides some considerations that he thinks are fair and reasonable grounds for restricting immigration.

The most fundamental consideration, in Landesman's view, has to do with the justification for the existence of states and their sovereignty. Border control and restrictions in immigration are presumably all part of a state's exercise of its sovereignty. It is in controlling whom to admit into and whom to exclude from its territory that a liberal democracy may perform a state's basic function of promoting the common good and the well-being of its citizens and maintain its integrity as a liberal democratic state. These are some of the considerations, when reasonable and properly balanced against other considerations such as humanitarian concerns, that may justify a liberal democratic state's being partial to the interests of its citizens and restricting the liberty of others.

1.3.5 Asylum Seekers and Refugees

There are two categories of migrants, namely, asylum seekers and refugees, to whom we may owe special consideration for immigration for humanitarian and human rights reasons. The final part of this volume, "Asylum and Refugee Policy," addresses some of the moral and policy issues involved in these two categories of immigration.

Ann E. Cudd's chapter, "Domestic Violence as Justification for Asylum" (Chap. 16), considers how domestic violence can be used by women as a justification for asylum. According to international law, a successful asylum claim must show that the applicant has a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion. There are two things that must be shown, then: that the applicant belongs to a particular social group and that the social group membership makes her fear of persecution well founded. For women attempting to escape domestic violence through asylum, they must show that women as a group or some definable subset of women are oppressed as women (or the subset of women) in a way that gives them a well founded fear of being subject to domestic violence.

Cudd's chapter examines three theories of domestic violence and argues that only one provides an account of it that would satisfy the requirements for asylum.

Namely, domestic violence must be seen as a form of oppression of women and not as merely a private crime by one individual against another nor as simply a form of family conflict. If it is a form of oppression of women, then being a woman in a society that does not effectively prevent or stop domestic violence meets the criterion of having a well founded fear of persecution on the basis of social group membership.

T. Nicolaus Tideman's chapter, "If We Were Just We Would Provide Refuge for All" (Chap. 17), argues for a liberal refugee policy but with a twist. He argues that we must share our natural resources with refugees. Because there is no unoccupied land for a refugee to escape to, and nearly all land that is now occupied has a history of dispossession or worse, no one can say that they deserve the natural land that they have. Furthermore, Tideman shows that even if a current occupant were able to show that she appropriated the land from a common stock of unoccupied land, say a deserted island, she would still be obligated to share that land with a newcomer who had nowhere else to go. Our rights to our land are not rights to the natural resource that underlies it—the unimproved natural land that once existed. So we owe any refugee, an uninvited guest with nowhere else to go, a portion of that unimproved land, or at least its equivalent value. The same thing can be said of other necessary natural resources, such as water. Tideman admits that we could discharge our obligation by providing a reservation and not allowing the refugee to become a citizen. But it is more likely to be economically efficient to invite the refugee into our borders to internalize the benefits of their labor and trade. The most important point, however, is that we have no right to exclude refugees without providing anything of value to them.

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Part I
Conceptions of Citizenship

Chapter 2
National Citizenship and Civil Marriage: Ascriptive and Consensual Models

Emily R. Gill

Abstract A contrast between the ascriptive and consensual models of citizenship allows for an interesting parallel between national citizenship and civil marriage as state institutions. First, ascriptive citizenship is based on birth or some immutable characteristic, while consensual citizenship is in varying degrees rooted in both the prospective member of the community and also the community itself. Second, although consensual citizenship is typically regarded as more compatible with liberal democratic values, I show that in marriage as in citizenship, the consensual model may facilitate exclusion as much as inclusion. Third, I examine the interface between the views of both enthusiasts and skeptics about same-sex marriage and relate these to conceptions of citizenship. Finally, because many still seek the formal statuses of national citizenship or civil marriage, greater attention to the ascriptive model will promote greater inclusiveness in a context of increasing diversity.

What is the meaning of citizenship in the liberal democratic polity? Michael Walzer suggests that "admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life" (Walzer 1983, 62, emphasis original). Admission and exclusion refer not simply to one's presence in the territorial jurisdiction of a sovereign state but also to one's participation in various elements of this common life. According to Yael Tamir, "A group is defined as a nation if it exhibits both a sufficient number of shared, objective characteristics—such as language, history, or territory—and a self-awareness of its distinctiveness." Objective similarities among members are by themselves insufficient. The drawing of boundaries "involves a conscious and deliberate effort to lessen the importance of objective differences within the group while reinforcing the group's uniqueness vis-à-vis outsiders"

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(Tamir 1993, 66; see 63–69). National self-determination entails the public expression of this collective identity, or "the right of individuals to a public sphere, thus implying that individuals are entitled to establish institutions and manage their common life in ways that reflect their communal values, traditions, and history—in short, their culture" (70; see also 42–48, 74). Individuals enjoy a type of self-fulfillment in interacting with others who are similar that they cannot experience alone. The members of such an expressive association, as we might term it, experience special and seemingly constitutive ties and obligations, a shared culture, and perhaps a collective destiny, and view each other as "partners in a shared way of life" (115; see also 63, 74, 83–86, 94, 96–102).

If the nation state is a type of expressive association, who participates in its common life? The growth of global ties blurs what formerly were clear divisions between insiders and outsiders. Citizenship is less essential than it was before as a source of rights and benefits. In the view of Peter Spiro, birthright citizenship has been grounded on the expectation that individuals will develop their affective ties and community attachments in the land of their birth. This expectation is belied today, however, both by increasing global mobility and also by the ability to maintain ties with communities outside of those in which one resides. Individuals living in border communities are often equally fluent in both cultures, although knowledge about American government, history, and culture is common worldwide. "Happenstance Americans," then, may include individuals born in the United States who experience few affective ties here, whereas this group does not include those who might have ties and knowledge of the culture but remain outside the circle of birthright citizenship. With the growing acceptance of multiple citizenships, Spiro observes a self-reinforcing departure from strong definitions of national community. "The larger the group of happenstance citizens, the less likely the status will be consequential, which renders existing citizens more accepting of expansive admission criteria and the addition of nominal members, which in turn entrenches the lack of consequence" (Spiro 2008, 31; see also 19–25). More simply, "*Once everyone is an American, no one is an American*…Once the difference disappears, the identity disappears with it" (52, emphasis original).

In this paper I contrast the ascriptive and consensual models of citizenship to draw parallels between national citizenship and civil marriage as state institutions. First, I shall discuss some contrasts between ascriptive citizenship, which is based on birth or some immutable characteristic, and consensual citizenship, which in varying degrees is rooted in the consent of both the prospective member of the community and also the community itself. Second, although consensual citizenship is typically regarded as more compatible with liberal democratic values, I shall show that in marriage as in citizenship, a consensual model may facilitate exclusion as much as inclusion. Third, I shall briefly examine the viewpoints of both enthusiasts and skeptics regarding same-sex marriage, discussing the interface between these views and conceptions of citizenship. Finally, I conclude that because many still seek the formal statuses of national citizenship or civil marriage, greater attention to the ascriptive model will promote greater inclusiveness in a context of increasing diversity.

2.1 Ascriptive and Consensual Citizenship

Ascriptive models of citizenship base status on who an individual is rather than on what an individual chooses. Birthright citizenship, or citizenship derived from *ius soli*, birth on American soil, or from *ius sanguinis*, birth to an American citizen, exemplify ascription. According to what Rogers Smith terms "inegalitarian ascriptive Americanist traditions,…'true' Americans are 'chosen' by God, history, or nature to possess superior moral and intellectual traits associated with their race, ethnicity, religion, gender, and sexual orientation." Because they emphasize involuntarily acquired or immutable traits as the basis for differentiation, ascriptivists often support exclusionary or hierarchical policies (Smith 1997, 508 n. 5). Smith contrasts ascriptive views with consensual ones such as that of John Locke, who rejected natural or birthright citizenship in favor of the membership acquired by choice that grounds social contract theory (78–80). Smith does not reject birthright citizenship, as infants born into a polity can neither choose nor be chosen. He merely wants to highlight the existence of two contrasting models.

Consent, however, is a two-way street. An individual may choose to take on a status such as national citizenship or civil marriage, but on the other side of the equation is the political entity that controls that status. Although he is inclusive in his own views, Smith argues that in theory, too much emphasis on ascriptive or de facto ties "represents an ascriptive infringement on the community's democratic authority to shape its own destiny" (Schuck and Smith 1985, 40). If individuals are collectively entitled to manage their common life in ways congruent with their shared values, they explain, control over membership is key to accomplishing this end. However, the consensual tradition may be interpreted in ways that are exclusive rather than inclusive. Robin Jacobson points out, for example, that immigration restrictionists have used consensual arguments to exclude Native Americans, Chinese, and more recently Mexicans from American citizenship. Correspondingly, an ascriptive standard such as that of birthright citizenship, "while based on an unchangeable characteristic, leads towards a more liberal and equitable citizenship policy" (Jacobson 2006, 645).

In the nineteenth century, for example, citizenship was denied to Chinese immigrants and potentially to their American-born children because of their racial and cultural differences, which "would prevent them from being able to give their loyalty and allegiance to America; the Chinese could not consent to American citizenship....America, therefore, did not consent to the inclusion of Chinese as citizens" (Jacobson 2006, 646; see also 650). The republican tradition's emphasis on a communal need for homogeneity plus the liberal tradition's foregrounding of consent added up to an exclusivist result. Although the basis for this exclusion was ascriptive, ascriptive characteristics were deployed as the tools of a consensually justified conclusion.

Jacobson observes that during the 1990s, immigration restrictionists used two different types of arguments, but both were grounded in consensual models of citizenship. In the mid-1990s, they foregrounded republican conceptions of collective

self-definition and self-rule. Proponents of reform advocated various laws and/or constitutional amendments stipulating that birthright citizenship be limited to the children of parents and/or mothers who were citizens or legal residents or were lawfully present under some other status. Although these limitations might seem objective, restrictionists consistently portrayed the problem immigrant as "a female, hyper-reproductive, dependent Mexican" (Jacobson 2006, 647), present without community consent and a burden on taxpayers, particularly on reproductive health services (648–649). In other words, if undocumented adults were present without the consent of the community, why should their undocumented offspring also be permitted to strain the nation's resources?

In the late 1990s, the focus shifted from a republican emphasis on community consent to a liberal emphasis on individual consent. The issue is less one of fairness to current citizens and legal residents, and more one of invasion by individuals who ostensibly want to join the polity but refuse to assimilate. The rollback of social service denials to the undocumented that characterized California's Proposition 187 in 1994 and the federal welfare reform act in 1996 reinforced this shift. Restrictionists continue to portray immigrants in racialized terms, but focus on the political power of opponents of reform that enabled this rollback as evidence of invasion. For them, loyalty means exclusive national allegiance. "Allegiance is about individual choice to join a community. Invasion…is understood as a result of permitting individuals to reside here who have not chosen to be American citizens, legally, culturally, or economically." Birthright citizenship gives unchosen citizenship to individuals. "Therefore a way to stop the invasion, according to restrictionists, is to promote a liberal notion of consensual citizenship, by providing citizenship on the basis of an individual choosing membership" (Jacobson 2006, 653; see 650–653). To restrictionists, maintaining Mexican culture by displaying Mexican flags at political and sporting events or by speaking Spanish betokens a failure of loyalty. Therefore, individuals may be present territorially and may even be citizens, but on this argument have not actually "chosen" membership.

Jacobson concludes that the mutually consensual model of citizenship we associate with liberalism is less liberal than it seems. That is, it is ostensibly grounded in choice, but behind the emphasis on choice lurk preconditions that must be fulfilled if either the community is to consent to the membership of aspiring individuals or if these individuals are deemed to be giving their own consent. Because the current interpretation of consent "is imbued with racial meaning," consent functions as an illiberal basis for citizenship. "The ascriptive nature of birthright citizenship may not follow in our liberal republican heritage…, but is crucial to our liberal future" (Jacobson 2006, 645). I now propose to examine how these models of ascriptive and consensual citizenship map onto attitudes towards the institution of civil marriage.

2.2 Marriage as an Instrument of Self-Definition and Self-Rule

Marriage is the most intimate of private commitments, yet it also possesses a public character. In its civil aspect marriage comprises both rights and obligations that span both the marriage itself and also its possible dissolution. Like citizenship, ideally marriage benefits both its participants and also society at large. Although it is rooted in consent, its public character means that one consents to a status, a model of marriage reinforced by laws that can both privilege and punish. As in the consensual model of citizenship, those seeking this status must give their consent. Additionally, the community must also consent, and it may attach conditions to its agreement. What many fail to recognize, however, is the extent to which local community recognition of existing personal bonds has historically been constitutive of marriage (Snyder 2006, 19).

This point is well demonstrated by Nancy Cott in her account of the gradual extension of governmental control over personal relationships in the early history of the United States. "The dispersed patterns of settlement and the insufficiency of officials who could solemnize vows meant that couples with community approval simply married themselves. Acceptance of this practice testified to the widespread belief that the parties' consent to marry each other, not the words said by a minister or magistrate, mattered most" (Cott 2000, 31; see also Snyder 2006, 17–19; Cherlin 2009, 45–46). Moreover, fruitful sexual relationships often preceded marriage; thus, "Pregnancy or childbirth was the signal for a couple to consider themselves married." A chaplain on a surveying expedition in 1728 on the North Carolina-Virginia border reportedly "was called on to marry no one while he was asked to christen more than a hundred children" (Cott 2000, 31; see also Snyder 2006, 17–19).

Although in time state legislatures regulated access to legal marriage, states' desire to promote monogamous relationships and the building of stable households led the courts to presume in doubtful cases that a couple was married, often on the basis of circumstantial evidence. Marriage was considered a common right. Otherwise the offspring of too many parents would be held illegitimate. Overall, Cott explains, "A couple's known consent to marry and general repute as married was sufficient, so long as there was 'public recognition' of the marriage—meaning acknowledgement by the informal public" (Cott 2000, 40; see also 30, 39), or "at least some publicity beyond the couple themselves" (1–2; see also 101). Although these intimate relationships were grounded in choice, in such circumstances the state was recognizing a *fait accompli*, an existing state of affairs. This recognition resembles the ascriptive model of citizenship, just as the conferral of national citizenship by birth recognizes existing facts. The government "consented" by recognizing such couples as married, but the initial consent was the couple's mutual commitment, putting them in the driver's seat. Therefore, the government was in effect consenting to an existing ascriptive status.

Simultaneously, however, the practice of recognizing informal relationships as marriages co-opted couples into acquiescing to a particular conception of

matrimonial relationships, or the sort of status relationship described above. "In accepting self-marriage, state authority did not retreat, but widened the ambit of its enforcement of marital duties. By crediting couples' private consent, the law drew them into a set of obligations set by state law" (Cott 2000, 40). Similarly, states developed divorce laws that allowed for the termination of marital relationships by means other than "self-divorce" or desertion. But by thus defining what constituted proper marital behavior, "the states in allowing divorce were perfecting the script for marriage, instructing spouses to enact the script more exactly (52; see also 48–49). Although personal choice is primary, it may be co-opted by the state either to regularize relationships or to prevent the recognition of some kinds of relationships as constituting marriage. To use Cott's terminology, some relationships may be excluded altogether from the "script" that is being perfected. Similarly, immigration restrictionists would prevent some types of births on American soil from conferring birthright citizenship, thereby excluding some individuals from the "script" that is being perfected as to the appropriate attributes of American citizenship.

Analogies between consent to the marriage contract that initiates family relationships and consent to the social contract that legitimates political authority are a standard feature of liberal theory. Once again, however, what one consents to is a status. Nonconforming groups can be made to conform, such as the Mormons in Utah, who abrogated polygamy in 1890 (Cott 2000, 120). Alternatively, just as Chinese immigrants were formerly excluded from citizenship, some groups might be excluded from marriage altogether, as illustrated by nineteenth-century anti-miscegenation laws as well as by today's laws and state constitutional amendments defining marriage as between one man and one woman. The terms of marriage were not to be left to individual discretion. Moreover, couples understood that they had to comply with state requirements if they wanted to marry and that they could not marry on their own terms—an understanding that elevated the status of legally defined marriage (101, 110). The implication was that "the institution of marriage had to be insulated or salvaged from misuse by irresponsible, unsuited, or defiant couples," which in turn "created an atmosphere of moral belligerence about Christian monogamous marriage as the national standard" (128; see also Metz 2010, 3–15).

The consensual standard for citizenship that has focused variously on both community consent and individual consent can be found in contemporary arguments of traditionalist opponents of marriage equality. As we have seen, the late-1990s emphasis on the individual consent of immigrants was not true recognition of individual consent. Rather, restrictionists argued that the national community should decide whether Mexicans were actually capable of giving their consent. Like the Chinese in the nineteenth century who were deemed too culturally different to assimilate, those who do not fit the standard definition of marriage cannot give true allegiance to this all-important social institution, and as a result, opponents argue, the government should not consent to their inclusion in it. For Maggie Gallagher, marriage communicates a shared ideal of exemplary relationship, but the institution is in crisis because we have forgotten "its great universal anthropological imperative: family making in a way that encourages ties between fathers, mothers, and

their [biological] children—and the successful reproduction of society" (Gallagher 2003, 19). For traditionalists, the defense of this imperative is—or should be—a shared communal value, and therefore it should be insulated from misuse.

Households headed by same-sex couples often include children from a prior marriage of one or both partners and/or unrelated children whom such couples have adopted. David Blankenhorn of the Institute for American values recognizes that although caring families may form through adoption, adoptive and stepfamilies all represent a failure or unhappy ending—through widowhood, divorce, remarriage, the mistreatment or abandonment of children—of traditional biological family formation and maintenance. Therefore, "adoption is ultimately a derivative and compensatory institution. It is not a stand-alone good, primarily because its existence depends upon prior human loss" (Blankenhorn 2007, 191; see 189–194). Some states have in the past tried to bar same-sex couples from fostering or adopting children; when these attempts have failed in the courts, they have tried barring unmarried couples altogether, also a failing strategy with the spread of marriage equality. The existence of children needing parents is a *fait accompli*, however, and allowing fostering or adoption by all qualified individuals is a response akin to the ascriptive model of citizenship. It is a rational response to existing facts. The overwhelming impact of same-sex marriage bans, notes legal scholar Evan Gerstmann, "is to prevent children *already being raised in same-sex households* from having the protection afforded by the benefits of marriage, a policy that has the irrational consequence of punishing children for the 'sins' of their parents" (Gerstmann 2008, 39, emphasis original).

Both the opposition to same-sex marriage and the valorization of the biological family demonstrate the weaknesses of the consensual model of citizenship as described by Jacobson. For traditionalists, attempts to alter the historical standard for marriage of one man and one woman represent an impingement upon, in Tamir's terms, our communal values, tradition, and history without the consent of the community. Moreover, although many same-sex couples desire to marry, these attempts represent an invasion by those who not only will not but in fact cannot succeed in assimilating to the institution of marriage as it has been understood. The "natural teleology of the body" (Whitehead 2012, 135–136) or lack of sexual complementarity prohibits it, whatever they might will. If sexual orientation and attraction are innate, traditionalists are focusing on an ascriptive and immutable trait as a basis for exclusion from a crucial civil institution. As put by Jyl Josephson, "This ascriptive status is not based on race or national origin, but on heterosexual identity and willingness to participate in and benefit from the state-sanctioned institution of marriage" (Josephson 2005, 272; see also 271). Although same-sex couples are often willing and eager to participate, their ascriptive status precludes their inclusion.

At first glance this statement may suggest that the ascriptive approach is at least as exclusivist as the consensual approach, if not more so. Traditionalists, however, are actually foregrounding the consensual model by using an ascriptive status as a basis for denying that consent. They are doing so, moreover, both on republican grounds of community self-definition and also on individualist grounds that some individuals are incapable of true consent even if they choose to give it. Put differently,

traditionalists use ascriptive status as an excuse, deciding somewhat arbitrarily who is and who is not capable of consent, and then use that conclusion as a basis for policing the borders of the institution of civil marriage just as immigration restrictionists have attempted to police the borders of the nation.

Respecting those who valorize the biological family, traditionalists who think that allowing same-sex couples to adopt might encourage the breakdown of biological families are in the same position as the state of Texas when it denied public funds for the education of undocumented schoolchildren. In 1982 in *Plyler v Doe*, the Supreme Court ruled that the Texas law violated the Fourteenth Amendment guarantee of the laws to which all persons within the territorial jurisdiction of the United States are entitled. "We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests" (*Plyler v. Doe*, 457 U.S. 202 [1982], at 221). Many undocumented children will remain here even if uneducated, some becoming legal residents or citizens, at worst adding to the burden of unemployment, welfare, and crime and at best suffering "a lifetime of hardship" for which they themselves are not accountable (223; see also 226, 230, 234, 239). The fact that these undocumented children are here is an unchosen status on their part, and for the state's purposes an ascriptive and immutable trait. The fact that educating undocumented children can be viewed as a compensatory policy, like Blankenhorn's view of adoption, as a result of a failure to exclude their undocumented parents from national territory, does not detract from the value of this education.

A final example of the weaknesses of the consensual model appears in the circumstances surrounding *Romer v. Evans* (517 U.S. 620 [1996]). Here the Supreme Court struck down a Colorado constitutional amendment, passed by referendum, that not only repealed ordinances adopted by three political subdivisions to prevent discrimination based on sexual orientation, but also barred any state or local entity from enacting similar protections in future. In his majority opinion, Justice Anthony Kennedy wrote that the rights withheld under the amendment "are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society" (631). Therefore, "a State cannot so deem a class of persons a stranger to its laws" (635).

For the purposes of this chapter it is Justice Antonin Scalia's dissent that is most relevant. Noting that the constitutions of five states, Congress, and the Supreme Court had previously singled out the sexual practices of polygamists by depriving them of the franchise, he argued that the state should not take sides in this culture war, in which "Amendment 2 is designed to prevent the piecemeal deterioration of the sexual morality of a majority of Coloradans....Striking it down is an act, not of judicial judgment, but of political will" (653). For Scalia, the issue in *Romer* was whether those with conventional views concerning sexual morality might use the power of the state to enforce those views. Here again the consensual model of citizenship is being advanced as an arbitrary justification for exclusion on the basis of an ascriptive and immutable trait, one that is considered a disqualification whether or not it *ought* to disqualify.

For example, according to Jonathan Chait, in 2009 the National Organization for Marriage was telling activists that if people ask who gets harmed if same-sex couples can marry, they should answer, "The people of this state who lose our right to define marriage as the union of husband and wife, that's who." In Chait's view, this assertion simply means that "expanding a right to a new group deprives the rest of us of our right to deny that right to others," thereby devaluing the right by making it less special (Chait 2009, 2). Concerning both Amendment 2 and traditional marriage, both sides of the consensual model of citizenship are in evidence. Traditionalists assert a right to police the borders, based on communal values and history, thereby refusing the community's consent to change, as in the republican justification for exclusion. Correspondingly, those who would invade these precincts are sufficiently different from those who have historically populated the institution of marriage that they cannot "consent," meaning they cannot assimilate in ways that evidence their loyalty to the institution. The individualist attempt to consent is overridden by the judgment that some are incapable of true consent.

2.3 Enthusiasts and Skeptics

The consensual model of citizenship analogizes to the traditional understanding of marriage. The state defines civil marriage with specific parameters that couples aspiring to the institution must fulfill if they are to be accepted as participants. Moreover, they are judged not only on the basis of formal criteria, but also as to whether their consent manifests true loyalty to the institution. On the other hand, as in Spiro's view of citizenship, marriage is less essential as a source of rights and benefits than it once was. Both single individuals and unmarried couples have many of the same rights as those who are married. As explained by Stephanie Coontz, "Marriage was once part of the credentialing process that people had to go through to gain adult responsibility and respectability....It was the gateway to adulthood and respectability and the best way for people to maximize their resources and pool labor. This is no longer the case" (Coontz 2005, 276; see 275–278; Cott 2000, 133, 178).

Just as the special status of one religion faded in many Western nations as a variety of religious institutions proliferated, Nancy Cott suggests that "by analogy one could argue that the particular model of marriage which was for so long the officially supported one has been disestablished," as "plural acceptable sexual behaviors and marriage types have bloomed." As in the early years of United State history, many are now willing to accept "marriage-like relationships *as* marriage" (Cott 2000, 212, emphasis original). Governments have in part colluded in this shift, because they have been able to enforce family support obligations outside of formal marriage relationships (213; see 212–215; Coontz 2005, 256–257; 278–280). Like a number of other countries, some states without marriage equality have provided various alternative arrangements, such as civil unions and domestic partnership, some of which are open to traditional couples, that are often accompanied by all the material

benefits that these states provide to married couples. Unmarried partners can also access benefits at many large corporations. In France an individual can enter a legal resource-pooling relationship by designating virtually any other person to receive material benefits and legal privileges. "Two sexual partners can take advantage of this arrangement. So can two sisters, two army buddies, or a celibate priest and his housekeeper" (Coontz 2005, 279). As with Spiro's view of citizenship, the status of civil marriage becomes less consequential as other forms of union proliferate.

Many marriage enthusiasts deplore this proliferation, not as exclusivists but because they want to include more couples within its potentially capacious embrace. Andrew Sullivan, for example, argues that the very absence of social incentives and guidelines with respect to same-sex relationships renders traditionalist opponents' expectations a self-fulfilling prophecy. To disapprove of same-sex intimacy because of the instability often thought to accompany these relationships is to ignore not only the non-monogamous behaviors of straight couples, but also the fact that these consequences may flow from the very disapproval that traditionalist opponents recommend (Sullivan 1996, 106–116). For him, marriage equality constitutes an endorsement not of same-sex relationships themselves, but rather the ideal of long-term commitment that marriage represents. Because marriage equality "would integrate a long-isolated group of people into the world of love and family, gay marriage would…help strengthen it, as the culture of marriage finally embraces all citizens" (Sullivan 2001, 7).

Along related lines, Jonathan Rauch suggests that the growing prevalence of domestic partnerships and civil unions, accompanied by various material benefits, competes with and devalues the institution of marriage as the unique option for committed couples, straight and gay. Writing in 2005 when marriage equality was rare, he warned that if marriage were undermined, "the culprit…is not the presence of same-sex couples; it is the absence of same-sex marriage" (Rauch 2005, 91; see 91–93). That is, the presence of stable same-sex couples who cannot marry advertises the irrelevance of the institution of marriage. Marriage, he argues, should not be regarded simply as a lifestyle choice. Rather, it should be expected of committed couples and should be privileged as "better than other ways of living…a general norm, rather than a personal taste" (81–82; see also 89). Where Sullivan argues that marriage strengthens same-sex relationships, Rauch suggests that marriage equality strengthens the institution of marriage itself. "Marriage is for everyone—no exclusions, no exceptions" (6; see also 42–43, 89, 94). Rauch argues that all couples should marry if they want the benefits of marriage, thereby reinforcing "marriage's status as the gold standard of committed relationships" (94).

On the other hand, for both marriage and citizenship, perhaps an institution with a well-defined status and specific parameters is now less important than what the status betokens. Joseph Carens, an advocate of open borders, argues that the same reasons that we accept birthright citizenship for those born in the United States also ground what he terms social membership for those who came to reside here at a young age—and also potentially all individuals who have developed social ties over a period of time. Birthright citizenship recognizes the ties that children will develop with their families, with other people, and with their community as a whole. It

"acknowledges the realities of the child's relationship to the community and the fundamental interest she has in maintaining that relationship," as well as the state's moral obligation to attend to these interests (Carens 2013, 25; see 21–26). Similarly, when adults come to a society, settle down, and put down roots over time, they develop moral claims to social membership that deepen over time. For him, citizenship in another nation, absence of good behavior (unless one has committed a crime serious enough to warrant deportation), lack of economic self-reliance, and tests of civic competence should not be bars to social membership (45–61). As Spiro notes, today individuals are increasingly knowledgeable about cultures other than their cultures of origin. Many immigrants know more about the country to which they are immigrating than native-born American citizens do. Carens's core insight "is that living within the territorial boundaries of a state makes one a member of society, that this social membership gives rise to moral claims in relation to the community, and that these claims deepen over time." In sum, "social membership matters morally" (158; see 158–169). More specifically, "What matters most morally…is not ancestry or birthplace or culture or identity or values or actions or even the choices that individuals and political communities make but simply the social membership that comes with residence over time" (160). Social membership is in fact "more fundamental than citizenship because it is actually the basis for the moral claims of citizens themselves to many legal rights....Social membership is [thus] normatively prior to citizenship" (160–161). In Spiro's terms, citizenship based on consent can be underinclusive of those with ascriptive ties to the community. Similarly, one could argue that committed couples possess social membership as couples in the community, and therefore have a moral claim to be treated as such whether or not they embrace the formal status of civil marriage.

If in Sullivan's terms, marriage enthusiasts want the culture of marriage finally to embrace all citizens, skeptics about marriage point out that it cannot do so. Because the terms of civil marriage are externally defined by the state rather than internally defined by its participants, greater inclusiveness without reforms simply means more couples are subject to an inherently restrictive institution, while other individuals and couples are excluded altogether. As we have seen in the case of France, individuals with no sexual connection can pool resources. Why do matters such as finances and health insurance need to be bundled into packages that accompany sexual relationships? (Jakobsen and Pellegrini 2004, 140–147; see also Lehr 1999, 33). As Nancy Polikoff suggests, "The most contested issue in contemporary family policy is whether married couple families should have 'special rights' not available to other family forms" (Polikoff 2008, 2). Although couples may want to choose marriage for its religious or cultural meaning to them, "they should never have to marry to reap specific and unique legal benefits" (3; see 3–10, 84; Metz 2010, 133–139, 151, 159).

Thus, both traditionalists and marriage equality advocates valorize marriage as a special legal status that is rightly accompanied by special rights and benefits. They only differ in regard to who should be admitted to this status. The law still privileges adults who marry over those who do not. Marriage equality advocates, then, are still traditionalists, but of a different sort. Their understanding of marriage is still "one

that ensconces a particular form of intimate relationship as the state-recognized norm" (Josephson 2005, 272; see also 274), but it is inclusive of same-sex couples as well as traditional couples. As put by Jaye Cee Whitehead, both the religious right and marriage equality advocates erroneously portray "marriage as a natural grouping rather than a historically constructed and state-consecrated classification that inherently privileges one form of intimacy and care structure above all others." Equality advocates "in effect fortify the boundary between normal (monogamous) and deviant (non-monogamous) sexualities." Both equality opponents and proponents "are responding to a larger call from the state to disguise its symbolic power as a prepolitical longing" (Whitehead 2012, 139; see also 106–108, 127–130, 142–145).

Discussion of reforms to address this asymmetry is beyond the scope of this paper. However, once again, with respect to both civil marriage and citizenship, perhaps formal status is less important than what that status betokens. In *Ambach v. Norwick* (441 U.S. 68 [1979]) the Supreme Court determined that a New York law forbidding teaching certification to resident aliens eligible for citizenship who have not at least "manifested an intention to apply for citizenship" was legitimate (70). Public schoolteachers, the Court declared, perform a function that goes to the heart of representative government. Through both teaching and example, "a teacher has the opportunity to influence the attitudes of students towards government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy" (79). Because teachers are obliged "to promote civic virtues and understanding in their classes," they unquestionably perform a governmental function (80). If, however, Spiro is correct that many noncitizens in the United States possess knowledge of the culture and strong ties here, it should not matter whether or not they possess the formal status of citizenship. For a variety of reasons, perhaps 40 % of individuals who are permanent residents of the United States do not apply for citizenship. Aside from the inability to vote in elections, one three-decade resident says, "I really have everything that I need. I am treated pretty much just like a citizen" (Semple 2013, A3). They are indeed social members, and this membership matters morally, as Carens asserts. Similarly, individuals or couples may meet the requirements for civil marriage, but their social membership, in Carens's terms, may to them be enough without the formal status.

2.4 Conclusion

For some, the benefits of both citizenship and marriage should be contingent on the consent not only of individuals aspiring to these statuses, but also on that of the political community in question. For others, benefits should be grounded on a moral claim deriving from facts about individuals' relationships with a society. Ascription "implies that people are *entitled* to citizenship in any state in which they have sufficiently powerful social ties" (Carens 1987, 426, emphasis original; see 423–235). The first view argues that it is the community's decision to bestow a status that

renders individuals members or participants. The second view suggests that de facto membership in the community through social ties is what eventually should earn individuals the de jure status of citizenship or the benefits typically associated with marriage if these are desired. Moral claims may be a matter of fact regardless of will. As Jacobson suggests, the liberal principle of consent, which is traditionally linked with choice and empowerment, can become a tool of exclusion, whereas ascription, or attention to established facts, may increase the possibility of inclusion.

Both citizenship and marriage might be defined as a status bestowed on those desirous and capable of taking on the responsibilities associated with full membership in a community. The self-marriage practices of our early history suggest an ascriptive interpretation of marriage. That is, committed couples whom the community recognized as such had already formed relationships that entitled them to be regarded as married. Their de facto ties earned them the right to the de jure status of marriage. As states widened the scope of their authority, however, marriage became a more exactly defined formal status. In this consensual model, marriage rested not only on the consent of the individual parties who were to be married but also on the civil consent of the state in whose eyes the couple wished to be seen as married. This development put governments in a stronger position to withhold consent to marriages of which they disapproved, as we have seen. As of this writing, however, the Supreme Court in *Obergefell v. Hodges* (576. U.S. ___) just struck down marriage equality bans in the states that still maintained them. It asserted that rather than disrespecting the institution of marriage, same-sex couples respect it so much that they want to participate in it also. The Court in effect decided that these couples might truly consent to this institution. It was their ascriptive status, however, their demonstrated attachments and social membership, in Carens's terms, that grounded the argument.

We do not need to adhere to a traditional view of either citizenship or marriage to acknowledge that these statuses still matter. The difference, rather, is in what should entitle individuals to acquire them. Although legal residency in a nation state or alternative institutions to marriage provide many of the benefits of formal citizenship or civil marriage, many nevertheless desire to make a public and formal statement recognizing their commitment to what *they* view as the gold standard for these relationships. Although Spiro concludes that "American citizenship no longer reflects or defines a distinctive identity" (Spiro 2008, 161), Rogers Smith argues that Spiro does not attend to the social or psychological aspects of citizenship or "how much people feel that their national citizenship is crucial to their identity" (Smith 2009, 930). Most people not only want community memberships that provide physical and economic security, but also "want to believe that those community memberships have ethical worth" (932). Although analogously to Spiro, some argue that similarly, civil marriage cannot carry the ethical worth afforded only by a community with shared worldviews (Metz 2010, 114–119), many still believe that it can. For those who wish to participate in the institutions of national citizenship and/or civil marriage, the consensual model can function to exclude, whereas the ascriptive model can be more inclusive.

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Chapter 3
Citizens as Artifacts

Wade L. Robison

Abstract A citizen is an artifact, a creature of a government, and no rights or any other legal or moral implications follow from the concept of a citizen itself. Only after the concept becomes a conception, after being given content through a government's law-making powers, do any implications flow from it. So no natural rights are attached to being a citizen.

A conception of citizenship consists of legal relations, none of which are required in order to be a citizen and none of which, it seems, imply any others. So it would be possible to be a citizen in name only, or to be a citizen with only a right to live in a country, or a citizen able to hold office but not to vote, and so on.

The government in question may be that of a state or anything down to a village, which may permit, for instance, only its citizens to use the village beach. In any event, decisions about the content of the concept of citizenship will be determined by a political process, no doubt messy and perhaps incoherent in its decisions. But there are relevant principles that ought to guide that process, and one of great importance is that our political interests be so arranged that the political self-interest of any one individual serves the political interests of all.

We will first look at the concept of a citizen, arguing that it is an artifact, not a natural kind, and drawing some of the implications of that claim. That concept is given content through a political process. In Sect. 3.2, we shall consider the nature of that content, turning in Sect. 3.3 to the question of what principles ought to guide the process and in Sect. 3.4 to a brief discussion of how those principles ought to affect our immigration policy.

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3.1 A Citizen Is an Artifact

Humans are a natural kind. A citizen is not. Citizens are no more natural kinds than property or contracts. They are conventional constructs. A man truly without a country is not a citizen without a country, but no citizen at all.[1]

One way of putting this is to say that the phrase "a citizen" is always incomplete. A citizen is always a citizen *of* something, and that "something" is always itself an artifact, a conventional creation—a city, a state, a country. Thus, when we say that "…babies are 'citizens of the world' when they're 6 months old—able to hear all the sounds of every language…", we speak metaphorically (Bock 2005). A baby could be a citizen of the world, but it would take more than birth or a linguistic capacity to make it so.

Even birth within a country does not make us a citizen of that or any other country unless the laws make it so. We can readily imagine a country where a person must either be a descendant of those who were citizens at some previous time or pass an examination for competence in the native language to become a citizen, and unless one has such ancestors or such competence and has passed the official examination, one would not be a citizen and so could not vote or hold office or do anything else citizens can do.[2] An infant born in such a country of parents who reside in the country but are not citizens and lack citizenship in any other country would not be a citizen and could not be a citizen until the conditions of citizenship were met. Indeed, such an infant would not be a citizen at all—unless some other government, for some reason, granted such an infant citizenship. Were such an infant not to gain competence in the native language or, gaining competence, were unable to pass the examination set for citizenship, he or she would not be a citizen of such a country. It might have some other status, accorded to it by the government, but would lack citizenship.

What could make us citizens from birth is a government bestowing citizenship upon us—because one or more of our parents are citizens, because the location of our birth matters, because our ancestors back so many generations were citizens, or because of some other characteristic. The laws can obviously vary from country to country, using different features to bestow or withhold citizenship, but whatever the features used, citizenship is bestowed by a government.

The government need not be that of a country. A village citizen may have the privilege of taking out books from the village library that those who are not citizens of the village do not have. Any government will do as far as citizenship is concerned. I am a citizen of the town of Ontario, in Wayne County, in the State of New York, and in the United States. The features I have as citizens of these various governments vary significantly, but it is possible, obviously, that an overarching

[1] Edward Everett Hale's man without a country was a citizen of the United States, an army officer sentenced to life at sea without any contact with or information about the United States.

[2] We need not have much of an imagination. See e.g. Samale (2014).

government in such a nested set might preclude any other government within its jurisdiction from granting citizenship.

A citizen is an artifact, and as with any artifact, its features are whatever humans decide.[3] It is a creature of government, and since the concept itself is empty, implying nothing about how it shall be filled out, what features it has will be result of human craft—human political craft, to be accurate, the craft perhaps least likely to produce an elegant, useful and coherent artifact.

That citizenship is an artifact has at least two implications of importance for assessing any claims about citizenship:

- No natural rights or duties or any other moral or legal relations spring from being a citizen. To repeat, the concept itself is empty of content.

The concept is filled, if filled at all, by a government. So it is possible for someone to be a citizen of a country and be the subject or object of no legal relations at all. It is possible, that is, for the concept to be empty of all content. Some government might make me an honorary citizen, giving me the title, but ensure that I have only the title and none of the legal obligations, rights, privileges or immunities we may naturally—that is, conventionally, from within some existing government—attach to someone's being a citizen.[4] A citizen in name only is a perfectly empty but perfectly possible concept.

So another implication is that

- The entry and exit conditions of citizenship, as well as the content of any particular conception, are all conventional, artifacts of a government.

It may help to think of this implication in terms like those Rawls uses for his original position.

Rawls has an entry condition into the original position. Only beings with a capacity for a sense of justice are entitled to entry. That happens to include sociopaths, Rawls thinks, because we are to presume that they have that capacity, however undeveloped it may be, but it excludes bonobos, chimpanzees, and other animals (Rawls 1971; Robison and Pritchard 1981). They are not entitled to entry and so are excluded from any benefit entry bestows. Since any theory of justice chosen from the original position only applies to those entitled to choose from the original position, animals are excluded from considerations of justice. We humans cannot treat them unjustly on Rawls's view. So his entry conditions have an ethical bite to them.

Just so, there will be entry conditions into the position of being a citizen, and they will have an ethical bite as well, providing some with whatever it is that the

[3] Like languages, a 'government' can be a natural social artifact, something that will naturally occur as a social structure, created and changed by individual decisions by its members. Such a natural occurring artifact would have members who could be rejected by other members and so cease to be citizens. I lay out this view in Robison (1994, Chap. 2).

[4] I use, for convenience sake, Hohfeld's fundamental legal relations (Hohfeld 1946). Any other understanding of legal relations would work as well for the purposes of this paper so long as they are, like Hohfeld's, independent of one another, a condition I think is readily satisfied.

government has decided citizens are to have and excluding those who are not citizens. None of us can walk into the public library in Hume, New York and check out books. We are not citizens of that village and so lack a feature village citizens have. The features a citizen of a government entity has will depend upon the laws of whatever entity has granted them citizenship, but the presumption is that because there is a difference in legal status between citizens and non-citizens, there will be a different set of legal relations attached to being a citizen that advantages—or perhaps disadvantages—a citizen within the purview of that government entity over a non-citizen.

Just as it seems obvious that the entry conditions for citizenship depend upon a government's decisions about which features are to count and which are not, so it is just as obvious that a government controls the exit conditions—at least at the level of a nation. I can move out of Hume, New York were I to live there and so change my citizenship in the village by myself, without the approval of the governing body of the village. But to renounce citizenship in a country would presumably not be so easy. Indeed, the laws in a country may preclude that possibility. In any event, conditions of all sorts may be attached—a "renunciation fee," perhaps, sufficiently high to cover administrative costs or to make up for the projected loss of tax revenue.[5]

3.2 A Citizen as a Set of Legal Relations

We may think of a citizen as having a set of legal relations. As a citizen of the United States and of the state of New York, I have a set of rights, privileges, powers, and immunities. I can make contracts that are legally enforceable, for instance. I can try to pass a test to drive a vehicle and am entitled to drive if I pass the test and meet all the other conditions for obtaining a license. I am obligated to serve on juries within the state of New York and on federal grand juries within my district.

A complete list would be very long, but, however long the list may be, it will be a contingent set of legal relations. Nothing about the concept of being a citizen implies anything about how to fill out its content to create a particular conception, and so we cannot find in the concept anything that tells us what must or must not be in any conception. Nothing about the concept of a citizen tells us, for instance, that we should treat similarly situated persons similarly. We ought to do that for the sake of justice, but appealing to justice is necessary because nothing in the concept of a citizen tells us we must treat similar individuals similarly. We will need to look elsewhere for what legal relations are to go into the concept of a citizen. The suggestion, however, is that not a single legal relation will be found essential. As I have already remarked, we can readily imagine being made a citizen of a country in name

[5] The United States just increased its fee from $450 to $2,350, a charge the State Department justifies because of the processing costs. See Documentation for Renunciation of Citizenship in Kennedy (2014).

only, carrying the title "citizen of X" without any specific legal relations granting or denying any rights, privileges, powers, or immunities.

Even if we were to find a legal relation essential for being a citizen, nothing else would follow from that. Not only is each relation contingent, but the relations between relations are contingent. A citizen may be entitled to vote without being entitled to hold office (e.g. voting for a Senator in the United States when below the age of 35) and may even be entitled to hold office without being entitled to vote. A citizen may be entitled to a trial by jury, but not entitled to sit on a jury. A citizen may be obligated to pay taxes, but not be entitled to vote for the official or officials who determine how that tax money is to be spent. The list can go on and on.

In short, a government may pick and choose among a wide variety of legal relations that a person may come to have in becoming a citizen, and there is nothing about the relations themselves that will ensure a coherent set. A citizen may not have the right to vote, or be permitted to drink, but may be obligated to serve in the armed forces, for example. Such combinations may not be logically incoherent, but do raise questions about the criteria used by a government to determine what legal relations are to enter the concept and what are not.

The various legal relations that make up any particular conception of a citizen will no doubt differ in weight, in their capacity to trump one another should they come into conflict, or in their value to individuals in, say, trying to fulfill their visions for their lives. In addition, the political process is likely to produce sets of relations so that, for instance, the parties to a contract are not only legally bound to fulfill the obligations they have undertaken in creating a contract, but are also empowered to go to court should some contractual obligation not be fulfilled or fulfilled properly. But, as has been suggested, that a government may tie together legal relations does not mean that it will, and nothing about the nature of a legal relation implies any other legal relation. It is perfectly possible to have a right to create a contract without a right to enforce it. We may think such a right to contract not very useful, "a right without a remedy" and, as Hume puts it, "a gross absurdity," but that is a separate issue and would require some reason to link the two.[6] It is also perfectly possible for a government not to stack legal relations in any way; then no one relation can trump any other.

We can best understand how citizenship being an artifact can have an ethical bite by returning to our "imaginary" country, examining the effects of its entry conditions into citizenship. If becoming a citizen requires competence in a language and passing a test to prove competence or having ancestors who were citizens prior to whatever time the government has set, then a person could be a resident of the country but be distinguished, for the worst, from those who are citizens. Such a person would not even be a second-class citizen, not being a citizen at all, and so certainly unable to take part in the political life of the country and thus unable to be a party to determining the laws under which they must live. The principle of no taxation

[6] Hume (2005). References are in the text using the book number followed by the part, section and paragraph and line numbers. So this quotation comes from 3.2.10.16.51-52.

without representation would certainly resonate there, among the residents who were not citizens. The ethical bite here is evident.

We can pursue another possibility about that imaginary country. We can suppose that those within that country who do not meet the conditions of citizenship are made citizens of the country that is home to their native tongue. Suppose the country were Latvia or Ukraine, for examples, where relatively large percentages of the population speak Russian as their native tongue. We might well find a leader of Russia saying that "millions of Russians and Russian-speaking citizens live and will continue to live in Ukraine [and other nations such as Latvia], and Russia will always defend their interests through political, diplomatic, and legal means" (Mankoff 2014). Indeed, that is just what Putin said to the Russian parliament in announcing Russia's annexation of Crimea. So we do not need much imagination to suppose that Russia could pass a law annexing, as it were, the Russian-speaking residents of such other countries as Latvia and Ukraine and making Russian citizens of infants born of such residents. They would become Russian citizens despite living in other countries, but, then, many citizens of many countries live abroad. So tying citizenship to residence within the country of citizenship is as contingent as any other feature of citizenship.[7]

Such a move on the part of Russia would shock the world order, of course, and no doubt breach international laws, but, in any event, such individuals would become full citizens of their "mother" country, and that would certainly change their status, both legally and morally—just as the residents of Crimea found their status changed, legally and morally, after annexation. Their status was changed legally because, Russia claimed, with boots on the ground, that Crimea was part of Russia and so, in that way, its residents became Russian citizens. They lost whatever legal relations they had as citizens of Ukraine and gained whatever legal relations Russian citizens have. Their status was changed morally because, among other things, they now have a prima facie moral obligation to uphold the Russian constitution rather than the constitution of Ukraine.

We have many an example of a nation expanding itself by annexing territory populated by its ethnic kin and of the terrible wars that followed—Nazi Germany, for instance, or Serbia before World War I. So what Russia did in Crimea was not anything new. What it might do regarding the Russian-speaking residents of Latvia would thus be fraught with risky implications—not just for the citizens of Latvia, obviously, but for all those nations tied by treaty to Latvia. It would also set a precedent for other nations with pockets of distinct ethnic populations living elsewhere.

[7] Citizens of a country who live abroad are obviously not strictly comparable to the supposed Russian-speaking citizens who would have been born abroad and bear no other relation to Russia than its native tongue, but the point is that however we parse out the idea, there is nothing conceptually impossible about Russia making such individuals in other countries Russian citizens

3.3 Which Legal Relations Are Determined by Principles

We would hope that a country would not make citizens of residents of other countries, but nothing about the concept of a citizen precludes that possibility. Only social, political, and economic pressures other countries may marshal can discourage such an act peacefully. In any event, governments will determine what legal relations residents will have as citizens, and those determinations will occur through the usual messy political process in democratic countries and presumably in totalitarian regimes by whatever those in power see as essential or helpful to continuance in power.

We might hope, yet again, that such determinations will be guided by normative principles of what a citizen ought to be, but however unlikely it is that governments will be guided by such principles on a regular basis, we can at least sketch out what those normative principles should be.

Among these will be principles of legislation, of what ought and ought not to be legislated by a government, some of the obvious principles articulating what is essential for individuals to live together (e.g. legislation criminalizing murder).[8] Some will capture the essence of what Lon Fuller (1969) has called the inner morality of the law. Included among those are such principles as that laws ought not to demand the impossible by, for instance, requiring that individuals not do what they already did before the enactment of the law (ex post facto laws) or by making it illegal to do what another law requires one to do.

A great deal of what it is to be a citizen will be completed by following such principles, but we can readily imagine a set of laws that left possible much we would find morally reprehensible. A government might prohibit one citizen murdering another, but limit citizenship to males or to a small number of males, thus permitting citizens to murder non-citizens as well as non-citizens to murder one another.

What is needed to preclude such possibilities is some overarching general principle that specifies the point of citizenship and articulates a normative end by which to weigh all legislation regarding citizenship. That principle could not draw any of its content from the concept of a citizen, but would specify a conception of a citizen grounded on, among other things, what is thought essential to having a government. There are no doubt a great many candidates, but one that seems most plausible is that the entry and exit conditions for citizenship and the legal relations that provide its content ought all be in what we may call the political self-interest and only those political interests that further the political interests of all.

We may think of a nation as a cooperative enterprise "for mutual advantage and security," (Hume 2005, 3.2.10.16.7-8) and the overarching general principle is that we so organize ourselves as to further the cooperation necessary to achieve our mutual advantages and security.

[8] See Feinberg (1964–1968); Bayles (1978); and Packer (1968, esp. 270ff).

When Hume is arguing against governments being formed through contract, as e.g. Locke would have it, he remarks, "Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other" (*Ibid.*, 3.2.2.10.7-9). The mutual end is assumed by the example: the men are trying to row to the same place. So they pull the oars of their boat in concert with one another to achieve their common end. They accommodate themselves to one another, without any promise or commitment other than that necessary to row together rather than against one another.

Life in a nation is obviously much more complicated, with individuals pursuing very different ends and interests and often pursuing them in competition with one another. But even competitive games like chess or baseball are played out within a background set of conditions that regulate the competition for what we may consider the mutual advantage and security of those playing. We can play chess with an assurance that we will not have wasted our time, win or lose. Those background conditions require that the competition and winning take a certain form. It is not possible to win in chess by killing our opponent.

Just so, what we should want in a government are background conditions that are to our mutual advantage and security—a constitution and a set of laws laying out, among other things, the legal relations that are to hold between those within a nation such that even political interests in conflict with one another work in concert for our mutual security and advantage.

A raft of examples come to mind where an individual's self-interest is at odds with the interests of others. The free-rider problem is an example, and if we embed the seeds of the free rider problem in the ways in which we grant or deny citizenship and specify its content, we will encourage a society in which individuals advantage themselves to the detriment of the interests of others—a situation more likely to lead to civil discord than a peaceable kingdom.

We need not go far to understand how a failure to consider the relationships between self-interest and the interests of others can introduce problems into a body politic. As Hume pointed out, Poland consisted of quasi-independent fiefdoms for many years, and for many years it failed to achieve the stability of a nation-state. The cause, Hume says, is that it was always in the self-interest of a prince of a fiefdom to ask whether or not to help other princes should they be invaded, for example. If a fiefdom in the east was invaded by Russia, the prince of a fiefdom in the west had to pause and consider whether helping would harm or benefit his own interests and those within his fiefdom. If he came to the help of the fiefdom under attack, he would guarantee that his interests would be harmed because he would be at war with the invader; if he did not come to help, the invader might stop in the eastern part of Poland. So over the centuries Poland was dismembered, again and again, because its political structure ensured that the interests of its princes were not aligned with each other or the interests of the country as a whole. Even if their interests were not at odds, they certainly did not mutually support one another (Hume 1987, 17).

What we should want is a situation in which the self-interest of one furthers the interests of all so that everyone can act in their own self-interest and, in so acting, not harm the interests of others, but encourage them. It is the structure of the state

and what conditions its citizenship that is the object of concern here, and what we want is a structure and conditions that ensure a coordination of what we may call collective political interests.

Hume thought the republic of Venice an example of such a structure. The welfare of each depended upon the welfare of all. That is why he thinks it flourished for so long and was so much more stable than Poland. In Venice, "no nobleman has any authority which he receives not from the whole" so they "possess their power in common." The noblemen will thus aim to promote "the interests of the whole body" out of an interest in maintaining their own power (*Ibid.*).

Hume's vision is an ideal, and structuring a political system and providing conditions of citizenship to ensure or at least encourage a coordination of interests may be daunting. But some judgments are easy.

Consider that the Supreme Court has held that

> Police officers and other law enforcement personnel who commit perjury have absolute immunity and cannot be sued for money, even when it results in the imprisonment of an innocent person. A prosecutor who commits misconduct,…also has absolute immunity to civil suits (Chemerinsky 2014).

Whether the perjury results in someone innocent going to prison or not, providing such legal immunity for a citizen who is a police officer does not align the officer's interests with those of other citizens. We all have an interest in fair trials and in those in authority telling the truth—if only because we may find ourselves wrongly charged or stuck in a traffic jam trying to get out of New Jersey. But the Supreme Court has ruled that the very citizens charged with ensuring compliance with the law are immune from any suit even if, having taken an oath in a court of law to tell the truth, they lie. The Court has given them a license to lie.

Officially sanctioned perjury is at odds with the Humean ideal that the citizens of a government have their interests so aligned that the welfare of each furthers the welfare of all. This example concerns the content of, as it were, a Humean conception of citizenship, and, unfortunately, it is only one of many that could be cited.

Because of a 2011 Supreme Court decision, "the officer who shot Michael Brown can be held liable only if every reasonable officer would have known that the shooting constituted the use of excessive force and was not self-defense" (*Ibid.*). Conditioning legal liability on such considerations will in practice mean that no officer will be found legally liable—if only because the circumstances will never be clear enough to preclude reasonable doubt.

We have here another example of how the interests of those charged with enforcing the law are in tension, if not at odds, with the interests of citizens. Hume's vision has political and moral bite, that is, and not only regarding what legal relations ought to enter into being a citizen.

The Humean ideal also ought to give us pause over entry conditions into citizenship. To the extent that some residents of a country are differentiated from other residents by not being given citizenship or, if given citizenship, given fewer significant legal relations, we create instability in the body politic. We ensure that the interests of some are not aligned with the interests of others and so ensure that the

self-interests of those denied citizenship may well stymy the collective interests of citizens or, perhaps too obviously, vice versa. So a country that excludes a third of its population from being citizens, especially when they have been there long enough to have a number of generations excluded, is unstable, a state open to the discord and strife that comes from greatly misaligned interests among its population.

What we should want is a policy on citizenship so all have an interest in furthering the interests of all. We are not concerned here with all the interests of all citizens, but only those that further the collective interests of all. Andrew Sabl puts it well:

> It is common to assume that political order rests, or must rest, on a normative consensus, given that our political, social, and economic interests would normally put us at odds. What I shall call Hume's "liberalism of enlargement" suggests that the opposite is the case. Moral factions divide the members or potential members of polities; political interests, suitably defined and creatively accommodated, unite them. Conventions of authority need not rest on moral agreement. In fact, their great attraction is that they can arise in the absence of such agreement and persist, to the benefit of peace and good government, even as the social and moral foundations of society shift radically (Sabl 2012, 1).

If political interests are aligned so that all have a political interest in furthering the political interests of all, a government is well positioned to resolve whatever other conflicts of interest arise.

This is what is now called the coordination problem, and, to put the point being made in the language of that problem, we should want to coordinate the content of citizenship and its entry and exit conditions, and that means ensuring that the political interests of the residents of a country are so aligned as to further the political interests of all. We have coordination "whenever it is rational for *all* agents involved to prefer joint to independent decision-making."[9]

Which side of the road we are to drive on is such a coordination problem. Having all drivers decide for themselves will create chaos, making movement altogether impossible or risky at best. We want the drivers, like the rowers, to drive in concert. In such a situation, each driver's "welfare is affected by others' decisions, giving each an incentive to coordinate his or her decisions with the rest,"[10] and, obviously, "independent decision-making…involve[s] risks of disagreeable outcomes for everyone involved."[11]

The connections with Venice and Poland ought to be obvious. Although the welfare of both Polish and Venetian princes was affected by the decisions of other princes of those states and independent decision-making had disagreeable outcomes in both cases, only in Venice were matters arranged so that rational action by princes furthered the political interests of all.

We need only look to our dysfunctional Congress to understand the political bite Hume's ideal has. However matters are to be rearranged to ensure that elected

[9] Sabl (2012, 24) quoted from Goodin (1976, 27).

[10] *Ibid*., also quoted from Goodin.

[11] *Ibid*. See also Schelling (1980).

officials further the political interests of all as they further their own political interests, any rearrangement would cut deeply into the current political system.

3.4 Immigration Reform

There are obvious limitations to realizing the Humean ideal. Indeed, it may be practically impossible. We cannot start from scratch, creating a new world ex nihilo. We would have to get from where we are to where we ought to be, and that would mean using the existing Constitutional framework, with the existing political forces in place, to change fundamentals of the system for ends that some will find politically unacceptable. In any event, if coordination is successful only if "it is rational for *all* agents involved to prefer joint to independent decision-making," we make success impossible since we will always have someone whose self-interest makes it rational to free ride on the system created by the coordination of others. That claim needs further justification, obviously, but even if the ideal can never be fully realized, we can understand why we should strive to realize as much of it as we can.

We ought to do that for practical reasons: if we ensure that those within the system have a stake in the cooperative enterprise we call a nation, we remove strains within the political system that might otherwise sunder it apart. We need only consider the fear of southerners before the Civil War that their slaves might rise up in revolt. The slaves had little stake and certainly no political stake in the existing political system, and so it would always be in their political interest to change that system. The possibility created by their having no political stake put the system at risk as well as those profiting from the system. In many ways, a country that precludes a large number of its residents is similar to our political system, at least in the South, before the Civil War. It was a system in tension, always open to being ripped apart by those without a political stake making claim to a political stake. The Revolution in Haiti was an object lesson to southerners and is still an object lesson for us.

So we have practical reasons for striving to realize the Humean ideal. We also have moral reasons. We need only think, "Ah, a second-class citizen," to realize how much depends upon being a citizen, both politically and morally. It is no small moral matter to be barred from taking part in the political system within which one lives. We all deserve respect, and in a constitutional democracy, political respect comes from equal treatment under the law.

We need not go into detail here about how illegal immigrants within our country are treated—or fear being treated. We have enough of a sense of that just by hearing about Senator Leahy of Vermont being stopped by a Border Patrol agent while driving in Vermont. "When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, 'That's all the authority I need'" (Miller 2013). It is unclear why the agent stopped the Senator, but Senator Leahy's response was more civil. He introduced a bill to prevent such incidents (Carle 2013), but the response of an ordinary citizen would require more. If a Senator can be stopped, 125

miles from the border, we are all at risk of being stopped and of having to prove what most of us are ill-prepared to prove on the spot—that we are citizens. Just imagine that you are one of over 11 million illegal immigrants and the treatment you can expect if stopped by the agent who stopped Senator Leahy.

The Humean ideal tells us that for both moral and practical reasons we ought to ensure that those who are resident within our country are accorded respect, both legally and morally. How we are to do that is another question, the answer to which, I would argue, must presuppose that we are not going to deport over 11 million residents, that we will not encourage further illegal migration, that we ought to strive for a political system without the tensions that face Latvia.

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Chapter 4
Cosmopolitan Citizenship

Steven P. Lee

I am a citizen of the world.

(Diogenes)

A citizen is by definition a citizen among citizens of a country among countries.

(Hannah Arendt 1968, 81)

Abstract This essay joins a debate over the notion of cosmopolitan citizenship, specifically, whether the notion makes sense. Many argue that citizenship makes sense only in the context of an institutional arrangement under which it could be granted. In the absence of such an arrangement at the global level, or even its future likelihood, cosmopolitan citizenship makes no sense. I argue, in contrast, that the concept of citizenship, like that of person, applies independently of any institutional arrangement under which it could be recognized. We are all cosmopolitan citizens, and we are under an obligation to create the institutional arrangements under which this could be recognized.

The phrase "cosmopolitan citizenship" seems oxymoronic. Citizenship is a legal status and there is no organization with legal authority to grant global citizenship. There is no world state, nor is there likely to be one as far as we can see into the future. Organizations with the legal authority to grant citizenship are sovereign states. Only in the context of such an authority is it meaningful to claim that someone is a citizen or to ask whether someone without citizenship should have that status. Echoing Arendt, Kwame Appiah notes that cosmopolitan citizenship "is a metaphor, of course, because citizens share a state and there is no world state" (Appiah 2007, 2375). The question of citizenship can, for example, be meaningfully raised regarding the status of illegal immigrants. There are an estimated 11 million illegal immigrants now resident in the U.S. Because the U.S. is a sovereign state, it makes sense to ask whether these individuals should have citizenship. It seems not to make sense, however, to ask whether anyone could be or should be a cosmopolitan citizen.

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Consider the relation between the current national debate over U.S. immigration policy and the nineteenth century debate over the abolition of chattel slavery. In 1863 millions of individuals in the U.S. were enslaved, treated legally as property, and so denied the status of legal personhood. This lack of legal personhood was affirmed by the Supreme Court in the Dred Scot case. It is morally clear, if anything is, that the slaves should have been recognized as legal persons, because they were already *persons in a moral sense*, despite their de facto legal status. Their legal status should have been altered to reflect their moral status.[1] Maybe the idea of citizenship works the same way.

But the debate over U.S. immigration policy seems different than the abolitionist debate, for it appears that the *moral category* is primary in the abolitionist debate while the *legal category* is primary in the citizenship debate. It seems that the moral question whether someone should be considered a citizen can arise only because there is available the legal category of citizenship. In contrast, in the abolitionist debate, it seems that an individual's status as a person raises by itself the question whether he or she should receive legal recognition as a person (and be freed of the legal category of slavehood). If there is not at the time a legal category of personhood, then it should be created; faced with the lack of an appropriate legal structure, one may have a Kantian type obligation to seek to bring about such a structure. Moreover, given the independent and prior status of personhood, it seems more accurate to say that the law should *recognize*, not *grant*, an individual's status as a person. The status is not a gift, but what is due, what *should* be acknowledged. It is an implication of an individual's moral status. In the case of citizenship, however, it seems more natural to say that the status should be granted rather than recognized.

Despite these appearances, I will argue that the claim of cosmopolitan citizenship is more than metaphorical. I will argue: (1) that it is meaningful to ask whether someone is a cosmopolitan citizen; (2) that we all are in fact cosmopolitan citizens in a moral sense; (3) that we should work to strengthen the institutional conditions for a legal recognition of our cosmopolitan citizenship. My argument is based, in part, on reflections on the moral content of the notion of citizenship. "Citizenship has an ethical dimension…because there are standards built into the concept," notes Richard Dagger (2002, 149). Moreover, the ethical factors in the concept of citizenship loosen the tight connection between the application of the concept and the availability of the legal status. Due to the richness of the moral concept of personhood, we take that concept as being prior to (and in its absence, justification for the creation of) the corresponding legal category. I will argue that citizenship has a similarly rich moral content, such as to make it independent of the corresponding legal status, and that, as a result, we are all cosmopolitan citizens in a moral sense, a moral status that should receive legal recognition but which stands on its own even in the absence of such recognition. I maintain that if we have a proper understanding of the moral dimensions of the concept of citizenship, it follows that we are all cos-

[1] As some have noted, it is more accurate to refer to those held in bondage not as "slaves" but as "enslaved persons."

mopolitan citizens in the way that we are all persons, not necessarily legally but morally.

There are moral considerations that support our claim to cosmopolitan citizenship even in the absence of institutional arrangements (such as a world government) that could recognize us as cosmopolitan citizens in a legal sense. It is the moral status that makes the case for the legal status and the moral status can be asserted in the absence of the legal status. To see the relevance of the moral richness of the notion of citizenship, compare being a citizen with being a licensed driver. Both represent an available legal status, but the latter is morally trivial compared with the former. It is the moral richness of the idea of citizenship in contrast with the relative triviality of that of licensed driver that suggests that it is meaningful to ask whether we are cosmopolitan citizens, while it is meaningless to ask, in the absence of the relevant global authority, whether we are "cosmopolitan" drivers. To be a driver is to be licensed under legal authority, but there is more to being a citizen than being legally recognized as such. The availability of the legal category is not a necessary condition for the attribution of the moral status.

4.1 The Case Against Cosmopolitan Citizenship

Before considering the moral content of the idea of citizenship, I will review one of the arguments that has been made against the coherence of the idea of cosmopolitan citizenship. David Miller (1999) argues that once we understand what citizenship is, we recognize that there are preconditions for its possibility that are not and cannot be available at the global level. The idea of cosmopolitan citizenship is, as a result, incoherent. Note that this position is stronger than the position that cosmopolitan citizenship is possible, simply not actual in the absence of the relevant global authority. Miller begins: "If we are going to talk about the boundaries of citizenship, we first need to get clear what citizenship means." Once we do this, we will understand that "those who aspire to create transnational or global forms of citizenship have failed to understand the conditions under which genuine citizenship is possible" (Miller 1999, 60, 61).

Miller recognizes that citizenship, like many concepts in political theory, is contested. He adopts a concept of citizenship that he claims is generally endorsed, even by advocates of cosmopolitan citizenship. Those who theorize about citizenship draw a contrast between republican and liberal conceptions of citizenship.[2] The republican conception, which Miller endorses, places "more weight on the idea of the active citizen who takes part along with others in shaping the future direction of his or her society through political debate" (*Ibid.*, 61–62). On a republican conception, to be a citizen is to be politically active in one's community in pursuit the common good, and to have the civic and political virtues necessary for such activity. Miller argues that this presupposes a bounded community as the site of citizenship.

[2] This is small "r" republican, having little to do with the views of the Republican Party in the U.S.

A bounded community, he believes, is necessary for such virtues to be developed and practiced. The globe is unbounded. The idea of cosmopolitan citizenship lacks the precondition of boundedness necessary for citizenship, and so is incoherent.

4.2 The Moral Content of Citizenship

To see how an advocate of cosmopolitan citizenship could respond to Miller's argument, we need to consider more fully the moral content of the idea of citizenship. Taking into account a broad range of discussions of citizenship, its moral content seems to be captured in three main sets of features. (a) Citizens are individuals who are equal in the sense that they share with all fellow citizens a basic set of rights, the corresponding duties of which belong both to their government and to themselves as individuals; some of these rights may be special to that community. (b) Citizens are normally politically active in their community, engaging in political debate with their fellow citizens, helping thereby to shape the direction of their community and to make it self-determining; in all of this, their focus is the common good of the community. (c) With equal membership in their community, citizens have available the psychologically important benefits of feelings of belonging and a sense of identity, and flowing from this a sense of solidarity with their fellow citizens.

The idea of set (a) is that citizenship involves a guarantee of a substantial and equal set of rights for all citizens. This aspect of citizenship was set out by T.H. Marshall (1992) in his 1950 essay, "Citizenship and Social Class." His idea is that all individuals in a political community should be integrated into that community, that is, be recognized as citizens by being guaranteed a basic set of equal rights. Marshall includes three sorts of rights necessary for such integration—civil, political, and social.

> The civil element is composed of the rights necessary for individual freedom…By the political element I mean the right to participate in the exercise of political power…By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being… (Marshall 1992, 8).

Civil rights include free speech and right to property, political rights include the right to vote, and social rights include basic welfare provisions. The point is to insure equality and inclusion, so that no one is a "second-class citizen."

These rights correspond to duties that all citizens have toward each other, either directly through their own actions, or indirectly through the actions of their government. Citizens share with fellow citizens relationships of mutuality, reciprocity, and fairness; they respect each other's rights and recognize the corresponding duties, in both their political relations and their relations in civil society. This feature is connected with Rawls's idea of a sense of justice as one of the key elements of a moral personality: people are generally willing to act justly toward others, to respect their rights, when that behavior is reciprocated. The rights in question include both nega-

tive rights, rights against interference, such as civil rights, and positive rights, such as social rights requiring that citizens take certain actions in support of the needs of fellow citizens. Jones's healthcare, which she is unable to provide for herself, may be provided for her by the government through the taxes on her fellow citizens. Michael Ignatieff notes: "Taxation [for the provision of social rights] was thus explicitly conceived as the instrument for building civic solidarity among strangers" (Ignatieff 1995, 67).

In his emphasis on social rights, Marshall follows the logic of left-liberalism, which requires efforts by the state to ameliorate the economic and social inequalities resulting from the unregulated operations of the market. Marshall sees state intervention to ameliorate such inequalities as part of citizenship. He would agree that there is only the "empty formality of citizenship in an unequal market society" (*Ibid.*, 65). According to Marshall, "basic equality can[not] be created and preserved without invading the freedom of the competitive market" (Marshall 1992, 7). Citizenship guarantees not only freedom *from* interference, as represented by the civil rights, but also freedom *to* participate in the culture and politics of the society, as underwritten by political and social rights. This generates the familiar conflict characteristic of liberalism between social rights and the civil rights guaranteeing market freedoms. In Marshall's view, those who do not see the rights guaranteed in citizenship as including social rights do not have an adequate appreciation of citizenship. In addition, at least implicit in Marshall is the idea that the amelioration of market-induced inequality is necessary to avoid the threat to equal political rights posed by the plutocratic domination of democracy to which severe economic inequality can lead (Walzer 1995, 165).

The idea of social rights has, of course, been under serious challenge in the past few decades from libertarians and others who do not see the amelioration of unequal market outcomes as a necessary feature of citizenship.[3] But with the idea of social rights included, the notion of citizenship based on features in (a) is already a very rich one.

Set (b) regards vigorous political activity as a necessary condition for citizenship. According to (b), citizens are not only possessors of rights, but also active participants in the self-government and self-determination of their community. They are primarily political actors, co-legislators, engaging with fellow citizens in debate and legislation. They are participatory democrats. This is Miller's view: citizenship as political agency. Moreover, citizens are public spirited in their political activity, and that activity is guided by the common good, not their own perceived self-interest or group interest. As required for this sort of political activity, citizens possess a variety of civic virtues, which motivate their activity and their focus on the common good.

Both (a) and (b) require that citizens be politically active, but the level and nature of the activity is different. Under (b), citizens see themselves primarily as political actors in pursuit of the common good and as having the corresponding duties. In contrast, under (a), members of a democracy may limit their political activity and

[3] For a discussion of this, see Ignatieff (1995, 65ff).

they need not see themselves primarily as political agents pursuing the common good. They are often encouraged, even expected, to vote in terms of their individual or class interests, instead of the common good, An individual is *free*, according to (b), primarily because he or she is participating in a common effort of collective self-determination. In contrast, individual freedom under (a) is largely the freedom to participate in non-political activities, activities in civil society. Political activity is seen in (a) as largely of instrumental value, while in (b) it has inherent value; it is where our human freedom lies. Defenders of (b), such as Miller, are said to have a *thick* conception of citizenship, while those who reject (b) in favor of (a) have a *thin* conception, too thin according to defenders of (b) (Kymlicka and Norman 1994, 353).

Set (c) represents the benefits, often psychological, following on the status of citizenship. Citizenship provides a sense of identity, of belonging to the group. Kymlicka and Norman note: "Citizenship is not just a certain status, defined by a set of rights and responsibilities. It is also an identity, an expression of one's membership in a political community" (*Ibid.*, 369). Having feelings of identity is important for human beings as social creatures, so that the opportunity for such feelings that citizenship provides is itself of moral value. Crucial to this opportunity is the sort of equality characteristic of both (a) and (b). An individual cannot easily identify with a group in which he or she is a "second-class citizen."

Closely connected to feelings of identity are feelings of solidarity with the community of one's citizenship. This is how citizenship plays an integrative role in the community. This was a major concern of Marshall's, who thought that the promotion of social rights insures that members of the working classes would feel a part of the community. Along with solidarity comes allegiance. Citizens feel loyalty to their community; they are faithful to it. In enacting this feature, children in the United States everyday pledge their allegiance. These feelings are often mediated through symbols, as children pledge allegiance to the flag. Importantly, all of these feelings facilitate the achievement of the other two features. For example, individuals are more inclined to respect the rights of other members of their community and to give some attention to the common good, if they identify with their community and feel solidarity with it and allegiance to it.

It is important to note, however, that the universality of citizenship as understood in terms of (a) and (b) usually goes along with exclusivity. The inclusiveness of citizenship within a state's borders goes along the exclusion of those outside. The universality of citizenship is a circumscribed or bounded universality.

Various theorists claim different groups of these features to be the morally relevant characteristics of citizenship, the moral content of the notion of citizenship. But my question is which of these features are necessary to the idea of citizenship, for on the answer to this largely depends whether cosmopolitan citizenship is a coherent notion. Answering this question means adjudicating the debate between liberal and republican notions of citizenship. In the literature on citizenship theory, as noted earlier, there are mainly two different ideas of citizenship. "The first describes citizenship as an office, a responsibility, a burden proudly assumed; the second describes citizenship as a status, an entitlement, a right or set of rights pas-

sively enjoyed" (Walzer 1989, 216). The first is the republican conception and the second is the liberal conception. Set (a) represents the liberal notion of citizenship. The republican notion, the one defended by Miller, includes, in addition to (a), set (b). Is (b) part of the moral content of the idea of citizenship, and, if so, in what way? It is (b) that Miller appeals to in arguing that citizenship is necessarily bounded.

The case for cosmopolitan citizenship depends, in part, on how we adjudicate this debate between a liberal and a republican notion of citizenship.

4.3 Citizenship: Liberal or Republican?

One argument against the liberal conception is that citizenship involves activity and that the liberal notion of citizenship is passive, requiring nothing from citizens, no positive activity (Bosniak 2000, 469). Republicans contrast their own "citizenship-as-activity" notion with the liberal "citizenship-as-status" notion (Kymlicka and Norman 1994, 354). But, as I mentioned earlier, the liberal endorsement of (a) shows this to be an exaggeration, if not mistaken. Because the rights under (a) include positive rights, citizenship requires the activity involved in the fulfillment of the duties that positive rights entail. The question is not activity versus passivity, but instead the degree and the nature of the activity, republicans requiring more.

Republicans conceive of the activity of citizenship as being more extensively political, and political in a different way. For liberals much of the activity of citizens takes place in civil society, in involvements with family, religion, and the marketplace. Citizen activity will sometimes be political, but it need not be. Moreover, liberal political activity may be based on self-interest rather than the common good. Liberal citizenship involves political activity undertaken not necessarily for its own sake, but instrumentally, for the sake of maintaining a community that insures the rights referred to in (a), a community that leaves people free to engage in pursuits in civil society. In contrast, republicans tend to see political activity as of intrinsic value. For liberals, the common good becomes, at best, the result of a *modus vivendi*, not the result of activity of civil virtue. As it is sometimes put, democracy for liberals serves primarily a protective function, whereas for republicans it is a matter of self-fulfillment and free action. Republicans are more focused on the *forum* as a vehicle for promoting the common good, while liberals focus more on the *market* (and other areas of civil society).[4]

But is the citizen focus on intense political activity advocated by the republicans anything like current social reality? The answer clearly is no. Walzer notes the obvious, that "the number of citizens actually involved in political organizations, actually holding political office, is fairly small, and the willingness of ordinary men and women to devote time and energy to politics is fairly minimal" (Walzer 1989, 218). Ignatieff notes that "many people in modern society…conceive of participation in

[4] The distinction between forum and market is discussed, for example, in Nauta (1992, 29).

the elective process as a vestigial duty [which] really has nothing to do with them, and as long as they are left alone, they are happy to leave politics to others" (Ignatieff 1995, 62). Thus the republican view, for which citizenship necessarily involves a strong political component, seems utopian. It is nowhere, at least nowhere at the national level, which is taken as the paradigm locus of citizenship.[5] Moreover, it may be not just a matter of how people in fact act, but how it is advisable for them to act. Referring to "the continuous, intense, morally uplifting interactions that the [republican] ideal presumes," Richard Flathman suggests that attempting "to achieve and sustain such interactions at the level of political society [is] distracting and destabilizing" (Flathman 1995, 105–106).

Nor perhaps have even republicans seen state citizenship as possible. The face-to-face, New England style town hall interaction that seems to be part of the republican conception of politics is simply impossible in a state of several tens of millions or more. "A prudent republic will also be a small one," notes Richard Dagger. "That at least has been the conclusion—or presumption—of many republicans throughout the centuries" (Dagger 2002, 148). The republican ideal has been connected with groups much smaller than modern states, for example with Rome or with the Greek city-states. Even Miller gives some credence to the argument "that genuine citizenship is anyway not feasible in states of that size [the size of nation-states], but belongs rather within city-states on the scale of ancient Athens or Renaissance Florence" (Miller 1999, 60).

But there is a *reductio* argument here: a conception of citizenship that cannot apply to the modern state seems to be a non-starter. The conclusion seems to be in favor of a liberal conception rather than a republican conception.[6] If it is not necessary that citizenship exhibit features of set (b), then the objections of the sort Miller raises to cosmopolitan citizenship seem not to hold.

4.4 Citizenship: Actual and Aspirational

But it seems an overreach to claim that republicanism contributes nothing to our idea of citizenship. The sorts of political activity and civic virtues endorsed by republicans are certainly of value and praiseworthy in regard to a person's role as citizen. These notions seem to play some role in our idea of citizenship, even if their presence is not a necessary condition.[7] We can get an idea of what that role is if we

[5] In contrast, note that Miller and others charge that the notion of cosmopolitan citizenship is utopian.

[6] Another argument against including features in (b) is that they can conflict with features in (a), for example, if virtuous activity is legally mandated. See Kymlicka and Norman (1994, 368–369).

[7] By saying that the aspirational elements are not necessary, I mean that they do not have to be realized or actualized in order for the term "citizen" to apply. In contrast, the non-aspirational elements, such as most of the elements in (a), are necessary in the sense that "citizen" cannot apply unless they are present in fact.

consider the distinction between a citizen and a good citizen. If citizenship were limited to (a), it would be more difficult "to distinguish 'good' citizens from 'bad', or 'true' citizens from those who are citizens 'in name only'" (Dagger 2002, 149). But the good/bad citizen distinction is different from citizen/noncitizen distinction. Kymlicka and Norman note that "we should expect a theory of the good citizen to be relatively independent of the legal question of what it is to be a citizen" (Kymlicka and Norman 1994, 353). We are inclined to say that a good citizen is one who displays the civic virtues emphasized by republicans. So far, this supports the conclusion of the previous section that only the features of (a) capture the necessary conditions for citizenship. We could say that features of (b) represent the *aspirational* characteristics of citizenship, what is to be encouraged in a citizen, but not something that is necessary for the idea to apply.[8] Richard Dagger notes: "The republican standards embedded in the ethical dimension of citizenship thus provide an ideal of what a citizen should be" (Dagger 2002, 150). What a citizen should be, but not necessarily what a citizen is.

Consider our idea of a spouse. There are certain necessary conditions that a person must satisfy to be a spouse, but there are, on top of that, conditions that distinguish a good spouse from a bad spouse. A good spouse is faithful, considerate, supportive, et cetera, but one does not fail to be a spouse simply because he or she lacks these qualities. Consider the concept of a person. Being autonomous is not necessary to being a person, in the sense that many persons exercise little of the autonomy that is potential to them. But persons should be autonomous, they should make their own choices, assume responsibility for their own lives, et cetera. A good person is autonomous, but a non-autonomous person is still a person.

But the aspirational characteristics of citizenship include not only the elements of set (b), but also some elements of set (a). This is especially true of social rights. For decades, the U.S. has been moving away from a full guarantee of social rights, making the guarantee of such rights for its citizens aspirational. For the same reason, this may also be true of political rights. As mentioned earlier, market induced economic inequality can lead to political inequality, to a diminution of democracy through the effect of money on the political system.

The aspirational elements, however, may play a different sort of role in our understanding of citizenship. It may be that many of the citizens of a democratic state (though not all) must exhibit some of the aspirational elements, if the democracy is to survive. A democratic state may, for example, need citizens with some of the civic virtues to function effectively, even to survive. Speaking of the republican virtues, Kymlicka and Norman note: "Without citizens who possess these qualities, democracies become difficult to govern, even unstable" (Kymlicka and Norman 1994, 353). Citizens must, they suggest, participate politically to promote the public good and restrain their own economic demands to that same end.[9] In regard to social

[8] Aspirational elements are in a sense necessary, that is, necessary as aspirational, but they are not necessary as actual or realized, as are some elements of (a).

[9] For example, one question is whether the common good can be achieved through institutional checks and balances, the balancing of parochial interests, or a kind of *modus vivendi*, or whether

rights, there is speculation in the U.S. that the lack of social rights represented by growing economic inequality could lead to serious social instability. But even if the some aspirational elements are required (among some portion of the populace) for the stability or survival of a state, this is a form of necessity quite different from the conceptual necessity involved in the presence of some of the elements of (a). Instead it is like the "empirical" necessity involved in H.L.A. Hart's minimum content theory of natural law: it is "necessary" for the law of a state that it prohibit the free exercise of violence, for otherwise the state would not long exist (Hart 1961, Chap. 9).

4.5 Can Citizenship Be Cosmopolitan?

If the republican elements of citizenship are not necessary, but merely aspirational, this may open some theoretical space for cosmopolitan citizenship, since the main arguments against this idea lie in its inability to embody the republican elements. But the argument for the coherence of the idea of cosmopolitan citizenship requires some additional arguments. (1) For citizenship to be cosmopolitan, it must not be part of the concept of citizenship that it be exclusionary. Citizenship as it is now legally recognized is exclusionary, distinguishing outsiders from insiders. Because cosmopolitan citizenship would not be exclusionary in this way, does this show that it cannot be a form of citizenship? (2) Because the republican (and some liberal) elements are aspirational, it must be possible to show how these elements could be embodied under a concept of cosmopolitan citizenship. (3) It is part of the concept of citizenship that it calls for efforts to achieve its institutional embodiment, so it must be shown that there is a feasible institutional embodiment of cosmopolitan citizenship, not actual but at least possible.

(1) As we have seen, Miller makes his case against cosmopolitan citizenship, in part, by arguing that citizenship, as republican, is necessarily bounded. For there to be citizens, there must be noncitizens. The bounds of citizenship are drawn within the human community. But this argument is greatly weakened once the republican elements of citizenship are understood to be aspirational rather than necessary. There is a related argument, however, that appeals to compatriotism or preferentialism toward one's fellow citizens as a necessary feature of citizenship. On this argument, the rights granted through citizenship include special rights, rights not applying to outsiders. (The duties corresponding to these special rights are associative duties.) It seems that without outsiders, a purported global citizen, qua global citizen, could have no special rights or associative duties, so could not in fact be a citizen.

There clearly are special rights and associative duties within groups below the level of the state. For example, parents have associative duties toward their children, and the children have corresponding special rights against their parents, even though

individual self-sacrifice is also required. See Kymlicka and Norman (1994).

these rights and duties do not apply outside that family. This shows that a person's having special rights as a member of a group does not preclude that person's being a citizen of a larger group, such as the state.[10] Hence, the members of a state having special rights does not preclude their being citizens of a larger group, such as humanity (Pogge 2002, 90). More generally, it is not clear why all forms of citizenship must involve special rights simply because state citizenship involves such rights. The characteristic of having special rights may simply be an accidental feature of citizenship as it applies to states, not an inherent feature that must apply in all cases of citizenship.

In one respect, the matter of special rights provides the basis for a positive argument for cosmopolitan citizenship. For it reveals, as one might put it, a contradiction at the heart of the idea of state citizenship, a contradiction that is removed only by a recognition that cosmopolitan citizenship is citizenship in its clearest sense. Linda Bosniak notes that citizenship is understood both to "stand for the inclusion and recognition of 'everyone'" as well as "to entail a necessary degree of exclusivity and boundedness." How can it stand for both, she asks: "is there not a contradiction here?" (Bosniak 2007, 2450–2451). The inherent logic of citizenship, so to speak, pushes against its exclusivity to greater forms of universality. Only in cosmopolitan citizenship would universality triumph over exclusivity. This is also seen in the earlier argument that set (a) is more central to citizenship than the aspirational elements of set (b). It is (a) that pushes toward greater universality, while (b) pushes toward exclusivity. As Andrew Linklater notes, cosmopolitan citizenship challenges "a deep moral contradiction at the heart of the modern state" and brings to our attention "the unfinished moral business of the sovereign state" (Linklater 1998, 24). This unfinished business is the universal recognition of individual human rights.

(2) The aspirational elements in citizenship remain important in their capacity as aspirational, which poses the challenge of how such elements could be realized at the global level. If there were no avenue for their realization, this would count against the coherence of the idea of cosmopolitan citizenship. What mechanisms are there for cosmopolitan citizens to engage in the political activities and exercise the civic virtues to which citizens should aspire? In fact, this is not a difficult question to answer because the civic virtues required at the state level are becoming more and more like those required at the global level. Social and ethnic diversity, characteristic of the globe, is a growing feature of the politics of states. When diversity characterizes a political community, a key civic virtue is the capacity to facilitate pubic dialog in an effort to explore what commonalities exist and how the community should govern itself given the differences that remain, to search, in Rawls's terminology, for overlapping consensus.

One such civic virtue in political discussions is the use of public reason, that is, an appeal to reasons for policies that do not presuppose the truth of sectarian doctrines of any of the diverse groups within the society. Following work of Jürgen

[10] It may even be that associative duties in families may be more stringent than those of the state, as in one interpretation of *Antigone*, though this is not necessary to this argument.

Habermas,[11] Andrew Linklater develops the idea that something like this can be the basis for political activity in a global context. He speaks of "the dialogic conception of world citizenship" instantiated in "a universal communication community" (Linklater 1998, 27, 30). The idea is that global interchange among all individuals, made all the more possible by new communications technologies, is a form of political activity, an exercise of civic virtue, replicating what exists at the state level as diverse sub-state communities seek to work out a means of common governance.[12] Global interaction is not simply through the market. The kind of interaction sketched by Linklater shows the development of a global forum, exhibiting an essential aspirational element of citizenship at the global level. While it may be unrealistic that global governance could come to be based to any significant extent on such interactions, it is not unrealistic to think that they could make some contribution to such governance.

(3) Set (a), which is a necessary part of a concept of citizenship, requires that there be a universal set of rights applying equally to everyone in the social group. On this basis, cosmopolitan citizenship seems to be a coherent idea, given that there is a universal set of rights applying equally to all human beings. The other main part of concept, set (b), can be merely aspirational.[13] But an additional element of the concept of citizenship is that it should call forth efforts at its institutional embodiment, when this is lacking. If such an embodiment does not already exist, the application of the concept requires that it should be pursued, which requires that it is possible to pursue it. So, the lack of such a feasible path to such embodiment would undermine the coherence of the concept. An obvious response to the claim that this is lacking under cosmopolitan citizenship is that it could be embodied under a world government. But a world government is at most a bare possibility, hardly feasible. Not only is it difficult to imagine its coming about, whether by agreement or conquest, but it is difficult to imagine its being sufficiently stable to maintain itself over time. Though this is another matter, it is also difficult to imagine its being morally justified, given the repression it would likely require.

But there is an alternative form of institutional embodiment for cosmopolitan citizenship. Consider that citizenship can be multiple. There is a recognized duality in legal citizenship, as, for example, a person may be a legal citizen of both the U.S. and Canada (Schuck 2002, 138). This is, one might say, a *horizontal dispersal* of citizenship. But there is also a *vertical dispersal* of legal citizenship, as I am a citizen of the United States as well as a citizen of (the great state of) New York. These legal realities seem consistent with the concept of citizenship; the idea of a set of universal rights to be realized equally among a group of people does not imply that citizenship must be singular. The idea that there are multiple *sites of sovereignty* is discussed by a number of authors. Kwame Appiah notes: "Decomposing sovereignty, allowing ultimate authority to lie in many places, has been one of the great

[11] For example, Habermas (1992).

[12] On a development of this idea, see Waldron (2000).

[13] As we have seen, unless feature (b) were aspirational, the idea of national citizenship would likely be incoherent.

discoveries of modern times" (Appiah 2007, 2388). He refers to this idea as "sphere sovereignty." Thomas Pogge adds the idea that the multiple sites of sovereignty can be understood as a form of vertical dispersal, noting that "government authority—or sovereignty—[should] be widely dispersed in the vertical dimension" (Pogge 1992, 58). This idea is closely connected with that of *subsidiarity*, which refers to the practice of lodging governmental authority at the level where it can be most efficiently exercised.

The dispersal of sovereignty implies the dispersal of citizenship. Pogge observes that "persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant…" (*Ibid.*). With multiple sites of sovereignty, Linklater notes, "[c]itizens would…be able to exercise their political rights and express their different political loyalties within diverse public spheres" (Linklater 1998, 32–33). This vision of the vertical dispersal of citizenship over multiple sites of sovereignty is a model, which, already beginning to be realized, can serve as an institutional embodiment of cosmopolitan citizenship. One could be a citizen of the highest level of political authority, a global authority, which would be, among many governing sites, the one that concerned itself with achieving the universal recognition of human rights, as well as with policies governing those areas, such as environmental policy, where coordination must be global. This is indeed a form of world government, but it is constitutionally limited by the vertical dispersal of sovereignty. It does not raise the sorts of concerns as have been raised by the idea of a world government with overwhelming, Leviathan-like authority and power.

4.6 We Are All Cosmopolitan Citizens

I set out to argue that (1) it is meaningful to ask whether someone is a cosmopolitan citizen, (2) we all are in fact cosmopolitan citizens in a moral sense, and (3) we should work to strengthen the institutional conditions for a legal recognition of our cosmopolitan citizenship. Most of my effort so far has been seeking to show that (1). Now I want to try to show that (2) would entail (3). The argument for (2) is based on the moral richness of the concept of citizenship, which makes it like the concept of personhood. Personhood is prior to its legal recognition and a justification for the creation, if necessary, of such a legal status. So, I claim, is citizenship. This is due to the connection between the two concepts.

In virtue of the characteristics we have as human beings, we are persons in a moral sense, whatever the law allows. The moral richness and importance of personhood implies that it should be protected in the strongest way, which is legally. Citizenship simply is the legal protection of personhood, whether this protection is actual, through state citizenship, or merely a moral demand, as in the case of cosmopolitan citizenship. The basic set of human rights, the elements of set (a), that represent the legal protections of these characteristics should be recognized universally because they are universal. Cosmopolitan citizenship is the true universal rec-

ognition of these rights. As a person is a person whether legally recognized, a person is a cosmopolitan citizen though there is currently no legal status that could constitute the recognition of this. This connection between personhood and citizenship is presented in the opening sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The logic of the amendment is that because an individual is a person, he or she is a citizen. Of course, the amendment speaks of persons in the United States because it is a U.S. legal provision, but the moral logic it represents applies to all persons because the rights that guarantee the protection of personhood are universal. In this sense, we are all cosmopolitan citizens.

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Chapter 5
The Expansion of Kant's Republicanism with Active Citizenship

Yi Deng

Abstract Regarding domestic justice, Kant establishes republicanism as the requirement of governments. Defined as the division of legislative, administrative, and juridical branches, Kant's republicanism aims to guarantee citizens' independence, freedom, and equality and prevent despotism. Friedrich Schlegel criticizes Kant's view by arguing that the mere legal division of the three powers is not sufficient to guarantee citizens' independence, freedom, and equality or prevent despotism, and therefore he challenges Kant's republicanism as an appropriate means for preventing injustice. Schlegel's criticism, in my view, rightly points out the gap between the legal division of the three branches and ideal republicanism. To respond to Schlegel's doubts, I present two arguments that elaborate on Kant's republicanism, which could include active citizenship in addition to the legal division of the three branches. The first one argues that Kant's republicanism, as merely the legal division of the three branches, would bring internal contradiction to the conception of republicanism. The second positively argues that the gap between the legal division of the three branches and ideal republicanism does not originate from the "gulf" between a particular will and the general will as described by Schlegel but from the vague overlap between a particular will and the general will. This argument also calls for the expansion of Kant's republicanism with active citizenship.

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5.1 Introduction[1]

In *Toward Perpetual Peace*,[2] Kant outlines conditions for international relations and the relations among peoples to achieve the moral ideal of *perpetual peace*. As a condition of securing internal peace for each state (the first definitive article), Kant's republicanism is defined as the division of the legislative, administrative, and juridical branches, with the aim of guaranteeing citizens' independence, freedom, and equality and preventing despotism. Although (direct) democracy is classified by Kant as one form of sovereignty (*forma imperii*),[3] he links democracy with despotism. "*Democracy*…is necessarily a *despotism* because it establishes an executive power in which all decide for and, if need be, against one (who thus does not agree), so that all, who are nevertheless not all, decide; and this is a contradiction of the general will with itself and with freedom" (PP 8: 352). Without constitutional separation, direct democracy can possibly generate the tyranny of the majority (Rosen 1993, 34), which violates the demand of the general will as justification for public authority and rightful coercion. In a manner reminiscent of Rousseau, Kant highlights the notion of general will as opposed to a particular will, which is usually viewed as the will of an individual to pursue personal interests. "General will" as "the general united will of the People" here is, in a sense, a "united will of all, insofar as each decides the same for all and all for each" (MM 6: 313–314). It is not the actual united will of all nor the will of majority, but "an Idea of reason" (as Hans Reiss notes in his introduction, Kant 1991, 28). It is the grounding of the *original contract*, constitution, and laws, while "no particular will can be legislative for a commonwealth" (TP 8: 295).

In the *Essay on the Concept of Republicanism occasioned by the Kantian tract "Perpetual Peace"* (*Versuch über den Begriff des Republikanismus*, 1796), Friedrich Schlegel (1772–1829) defends democracy against Kant's criticism (Schlegel, 93–112).[4] Schlegel mainly argues that, "*republicanism* is *therefore necessarily*

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[2] Quotations from Kant are cited from Royal Prussian (later German)Academy of Sciences (ed) (1900-) *Kants Gesammelte Schriften*, Berlin: Georg Reimer, later Walter de Gruyter & Co. by volume and page number. The translation of *Toward Perpetual Peace* (hereafter PP) is from *Practical Philosophy* (1996a, 311–352); *The Metaphysics of Morals* (hereafter MM) is also from *Practical Philosophy* (1996b, 353–604); *On the Common Saying: That may be correct in theory, but it is of no use in practice* (hereafter TP) is from *Practical Philosophy* (1996c, 273–310).

[3] The form of *sovereignty* (*forma imperii*), which relates to the number of ruling powers, includes *autocracy*, *aristocracy*, and *democracy* (PP 8:352).

[4] Friedrich Schlegel's 1796 essay *Versuch über den Begriff des Republikanismus* has been translated by Frederick Beiser as "Essay on the Concept of Republicanism occasioned by the Kantian tract 'Perpetual Peace'" in *The Early Political Writings of the German Romantics* (1996, 93–112). References here are to Frederick Beiser's translation.

democratic; and the unproven paradox (p.101)[5] that democracy is necessarily despotic cannot be correct" (Schlegel, 102). Schlegel's defense of democracy focuses on the question of whether "*political domination and dependence*," explained as coercion (Kleingeld 2011), is conceptually necessary to the notion of an ideal "republican constitution." "Not *every* state (p.102)[6] contains the relation of a superior to an inferior, but only that which is empirically limited by such factual data" (Schlegel, 97). Since we can conceive a state without coercion in which people act with "the general will," coercion does not necessarily constitute the pure concept of republicanism, which cannot be defined by empirical conditions.

The dispute between Kant's representative republicanism and Schlegel's direct democracy has produced important contributions to the history of modern political thought, but it has also shaped key characteristics of modern politics. Henceforth, these constituents, necessitating the pure concept of republicanism, are worthy of our attention. I argue that the constitutional republic or the structure of government alone does not ensure the ideal republicanism on the basis of the general will. A response to Schlegel's criticism is a new Kantian republicanism, which requires non-structural components, such as active citizenship, in addition to the legal division of the three branches. By rejecting Schlegel's "gulf" model, I further demonstrate that such a hybrid republicanism is originated from the "vague overlap" between a particular will and the general will, which calls for interpersonal influences in forming a sense of unity. My expansion of Kant's republicanism with active citizenship, by addressing the role of informal interpersonal influences in shaping the general will, aims to respond to the challenge of whether it is possible to reconcile the ideal republicanism with the limits of liberal traditions.

5.2 The Civil Constitution in Every State Shall Be Republican

In the first definitive article of *Toward Perpetual Peace*, Kant sets up republicanism as the required form of government, which relates to "the *way* a people is *governed* by its head of state" (PP 8: 352). Different from the form of *sovereignty* (*forma imperii*), the form of government (*forma regiminis*), is divided by Kant into two groups: *republican* and *despotic*. Republican governments separate the executive power from the legislative power, while despotic governments, including

[5] Here are Beiser's explanations of those quotations within Schlegel's texts in *The Early Political Writings of the German Romantics*. "Schlegel cites the first edition of Kant's work *Zum ewigen Frieden. Ein philosophischer Entwurf* (Königsberg: Friedrich Nicolovius, 1795). His reference to this virtually inaccessible edition have been replaced by references to the more accessible Reiss edition (*PW*). Schlegel's citations of Kant's text frequently depart from the exact wording of the original. In these cases I have translated Schlegel's exact words, not the original text. In citing Reiss's edition, then, I am referring to the passages that correspond to Schlegel's citations, not reproducing Reiss's translation" (1996, 95).

[6] See fn. 5's explanation.

democratic and aristocratic governments, involve "the high-handed management of the state by laws the regent has himself given" (PP 8: 352). Kant believes that a republican government can best fulfill his requirements for ideal states.

In *The Metaphysics of Morals*, Kant explicitly advocates for the separation of the legislative, executive, and juridical powers in a state. "Every state contains three *authorities* within it, that is, the general united will consists of three persons (*trias politica*): the *sovereign authority* (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of judge (*potestas legislatoria*, *rectoria et iudiciaria*)" (MM 6: 313).

One way to justify the necessity of building a republican government is to look at the three defects in the state of nature regarding the concept of a right, as suggested by Arthur Ripstein (2004, 2009). Without public authority, a right cannot be acquired, enforced, or determined in the state of nature. Correspondingly, the legislative, executive, and juridical branches of government are formed to separately solve these defects. Not only is it conceptually compatible with the concept of right, but the republican government, like a triangle, has a stable structure to prevent despotism.

Take property rights, for example. Following Ripstein's understanding of the structure of property rights as a "mine or yours" acquisition of an object entails normative coercion upon others. My acquisition of land excludes others' usage of my property. However, in the state of nature, such an acquisition comes from my "unilateral choice"; therefore, it is arbitrary. As a free person, no one should be restricted from possessing or controlling an object due to another individual's arbitrary purpose. Otherwise, the former's subordination to the latter's arbitrary choice is justified. However, such acquisition of a right from a "unilateral choice," which entails an individual's arbitrary subordination to another, contradicts the necessary components of the concept of right, such as individuals' freedom, equality, and independence. Therefore, acquisition of a right requires that public authorities, say, rules or laws, reflect the general will. "*Appropriation* (*appropriatio*), as the act of a general will (in idea) giving an external law through which everyone is bound to agree with my choice" (MM 6: 259). Correspondingly, the legislative branch in a republican government authorizes an individual's private possession of certain objects from the considerations of all; therefore, it is an "omnilateral authorization." This authority of the legislative branch is why Kant claims that the legislative authority should reflect "the general united will of the people."[7] Similarly, without public authority, there is no assurance that one would secure one's entitlement if he or she acted on his or her obligations to, say, not touch or use others' objects, since others might fail to comply with their obligations entailed by acquired rights. Accordingly, acquired rights are arbitrarily enforced by force in the state of nature,

[7] Arthur Ripstein reconstructs three arguments from Kant's political writings to explain defects of the state of nature: the assurance argument, the unilateral choice argument, and the determinacy arguments. Ripstein argues "the three arguments generate three independent but coordinate branches of government." See, Ripstein (2009, 173).

and such private enforcement of rights sometimes subordinates an individual to another's will. Thus, to secure rights, a public executive authority established in a civil society is necessary in that it offers individuals the needed assurance to comply with their obligations. As to the indeterminate applications of rights in the state of nature, the juridical branch of a republican government is designed to resolve disputes in particular cases over specific applications of laws on behalf of everyone.

Kant describes the relationships among the three authorities by stating that they "coordinate with one another (*potestates coordinatae*)," and they are "*subordinate* (*subordinatae*) to one another" (MM 6: 316). Without the help of others, each authority cannot fully complete its distinct role of promoting the general will. However, because they complement each other, no branch has higher authority over the others; each authority has its own principle and irreplaceable dignities.[8] For example, the legislative branch does not have the authority to execute punishments or rewards. Kant uses analogies to illustrate republicanism's separation of the three authorities. In one analogy, he considers the three branches as three moral persons in office: a legislator, a supreme ruler, and a judge. They help each other deal with certain cases without comprising their own dignity. If the same moral person is allowed to occupy the same two positions, the whole system runs the risk of reflecting merely the private will of certain groups.[9] In contrast, a republican government, as the union of political autonomous individuals, is able to reflect the general will of the people by separating these three authorities.[10]

[8] Thomas Pogge states that the legislative branch has ultimate authority over other branches, because the legislative authority "decides how to institute executive and judicial agencies" (2009, 197). This interpretation describes Kant's separation of governmental powers as "an extra-legal demand on the sovereign that it should confine itself to general legislation while delegating administrative and judicial decisions about particular cases to executive and judicial officers and agencies" (*Ibid.).*

[9] In a second analogy, Kant parallels the separation of governmental powers with the structure of a syllogism. "These [branches] are like the three propositions in a practical syllogism: the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law, that is, the principle of subsumption under the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand" (MM 6: 313). Under this analogy, the major premise is the legislative branch making the law. The minor premise is the executive executing the law. The conclusion is a judicial verdict on a particular case in accordance with law. Similar to the first analogy, if there is no separation of three branches, a juridical verdict has a risk of being arbitrary.

[10] A despotic government is the type where the ruler or its executive power does not subordinate to juridical or legislative authorities. "Democracy" is criticized by Kant as despotic, because the people occupy the position of both executive and judicial powers at the same time.

5.3 Friedrich Schlegel's Criticism of Kant's Republicanism

In the *Essay on the Concept of Republicanism occasioned by the Kantian tract "Perpetual Peace,"* Friedrich Schlegel claims that Kant's republican government runs the risk of being despotic (Schlegel, 93–112). Schlegel affirms that the pure concept of republicanism is derived from the general will, and despotism is established from the particular will with egoistic interests. "All political culture has its beginning in a special end, in force (cf. the splendid discussion p.117)[11] and in a private will—in short, in despotism—so that every *provisional government must be despotic*" (*Ibid*., 101). Under such a distinction, Schlegel argues that Kant's republican government, which includes coercion and representatives, is conceptually despotic, because the need to have representatives and a legal division of the three powers in Kant's republican government depends on the empirical assertion that some individuals act on their particular will over the general will.

Schlegel further claims that the mere legal separation of three powers does not even empirically prevent the satisfaction of particular groups' own preferences and interests. "The legislator, executive, and judge are indeed completely distinct *political* persons (p.101); but it is physically possible that one *physical* person could unite these distinct political persons" (*Ibid*., 98). Schlegel's point is that the separation of political positions does not exclude a situation in which one interest group occupies main positions among the legislative, executive, and juridical powers. The government under that situation only reflects the particular will of a powerful interest group rather than the general will.

Schlegel's criticism of Kant's republican government is based on an assumption that there is "an infinite gulf" between a particular will and the general will. "The absolute general (and therefore absolute enduring) will does not occur in the realm of experience and exists only in the world of pure thought" (*Ibid*., 101). To further illustrate "the gulf," Schlegel describes several types of freedom: "the *minimum of civil freedom*," "the *medium of civil freedom*," and "the (unattainable) *maximum of civil freedom*" (*Ibid*., 95–98). Kant's legal *equality* is categorized as the *minimum of civil freedom. The medium of civil freedom* is "the right to obey no external laws other than those which the (represented) majority of the nation has really willed and the (supposed) universality of the nation could will" (*Ibid*., 95–97). Defined as "the right to obey no external laws except those to which the individual could have given his consent" (*Ibid*., 96–97), Kant's civil freedom is *the maximum of civil freedom*, as the necessary condition for a state to guarantee equal rights and duties for all citizens. Schlegel describes Kant's conception of freedom as "an ideal," since it presupposes individuals' adequate incentives for taking the general will as their particular will. However, in an empirical world, not all citizens have such incentives; thus Schlegel believes that Kant's concept of freedom is unattainable. Correspondingly, Schlegel argues that democracy is needed as "an approximation" and "the surrogate" to the pure concept of republicanism (*Ibid*., 104).

[11] See fn. 5's explanation.

5.4 Responses to Schlegel's Criticism

I think Schlegel rightly points out the gap between the legal division of the three branches and the ideal republicanism, and a Kantian way to respond to Schlegel's doubts is to extend Kant's republicanism to include active citizenship in addition to the legal division of three branches. I agree, firstly, that considering Kant's republicanism merely as the legal division of the three branches would bring internal contradiction to the concept of republicanism. Nevertheless, the gap between the legal division of the three branches and the ideal republicanism, I argue, does not originate from the "gulf" between a particular will and the general will described by Schlegel but from the vague overlap between a particular will and the general will, which also calls for the expansion of Kant's republicanism with non-structural components, such as active citizenship.

Schlegel's concerns about the possibility of Kant's republicanism being despotic and the gap between republicanism being limited to the legal division of powers and the ideal republicanism are not empty claims. The legitimacy of a republican government presupposes our obligation to exit the state of nature and establish a state. The creation of a republican government is justified because it is a means to realize the general will and resolve those problems in the state of nature, such as the problems of assurance and indeterminacy. However, if the formation of the three branches is a republican government's ultimate goal, such a concept of republicanism runs the risk of being internally contradictory. Such republicanism creates a dilemma for itself: on the one hand, it is possible for it to become despotic; on the other hand, through laws, it places coercion upon every individual within the state. It leaves the question of why a free person should accept coercion from despotic laws unanswered. Here, I do not want to criticize the legal construct of the three branches, since a tripartite model is a better structure to approach the above goals than one without the division of branches. The point is rather that merely emphasizing a legal structure's restrictions on individuals ignores the assumption that people's will in choosing a state justifies the state's obligation to pass laws on behalf of the whole. Thus, the internal contradiction of republicanism limited as the separation of three branches urges us to look for a version of Kantian republicanism that demonstrates its respect for omnilateral authority in establishing rights.

5.5 The Expansion of Kant's Republicanism with Active Citizenship

The internal dilemma of republicanism limited as the separation of the three branches calls for the expansion of Kantian republicanism. In the construction of an expanded conception of republicanism, the relationship between a particular will and the general will deserves underlining. Schlegel indicates that the gap between the legal division of the three branches and ideal republicanism lies in the "gulf"

between a particular will and the general will. One way to understand such a gulf is to describe a particular will and the general will as opposites of each other. Under the gulf model, an individual's action is motivated by either a particular will or the general will but not both. Kant's republicanism seems to assume that individuals act on their particular wills; as a result, people have an obligation to exit the state of nature and create a public authority, which restricts individuals' interference upon others' rights through laws.

In opposition to the "gulf" model, I want to suggest and demonstrate a vague overlap between a particular will and the general will. By "vague overlap," I mean that there are no sharp cut-off boundaries between a particular will and the general will and that this is manifested in the corresponding mental state of a reflective agent as his or her reluctance to make either "polar verdict" about his or her motivation in some cases. The reason we, as agents, cannot know the precise verdict of having either a particular will or the general will behind some of our actions is neither because of our "ignorance" of sharp boundaries nor because of the unavoidable inability for us to achieve determinacy of our wills.[12] Furthermore, the source of such a quandary mental state is not language either, but, rather, the *mixture* of the general will and a particular will that drives most people's actions in most situations. For example, the mixture of the general will of "having a sustainable community food system" and a particular will of "worrying about pesticide poisoning" might be what drives me to support farmers' markets. Then, it cannot be said with certainty what the precise percentages of a particular will and the general are due to their mixture. What we can say is the likely reason, which is the overlapping motivation behind an action. Like a cloud with dense and thin spots, a particular will is dominant in some moments, and the general will is more noticeable in other moments. The determinant or recessive status of the general will or a particular will is subject to interpersonal influence, and therefore merely asserting legal coercion as the force that restricts individuals' behaviors ignores the role of interpersonal influence in shaping the sense of unity.

In response to the above overlapping model, I suggest expanding Kant's republicanism with his notion of active citizenship. In the *Metaphysics of Morals*, Kant describes the transformation from passive to active citizens. I argue that such citizenship is driven beyond external incentives from the laws by dispositional shifts, which might reflect a constant process in which the general will becomes more salient for individuals through interpersonal interaction, as I suggested. Kant describes "independence, equality and freedom" as three features of active citizens,[13]

[12] Crispin Wright has written a series of articles on the philosophical problems of vagueness. Although his main focus is not on political theory, his psychological solution to the problem, and objections to supervaluationism, vagueness as rebus, and Epistemicism, could shed light on our discussion of the "vague overlap" between the general will and a particular will. See: Wright (2001); Wright (2003).

[13] Kant also presents a slightly different version of citizenship in part 2 of *Theory and Practice*. In this chapter, I only investigate *The Metaphysics of Morals* version of citizenship in sections 43–49 of the "Doctrine of Right."

who are "fit to vote" (MM 6:314). None of the three features is a natural qualification for being an active citizen, since everyone is able to make a transformation from passive to active regardless of his/her economic background, social status, and gender.[14] "Anyone can work his way up from this passive condition to the active one" (MM 6: 315). A citizen's freedom is "the attribute of obeying no other law than that to which he has given his consent" (MM 6: 314). This means that I am free because I am a "good"[15] legislator who participates in lawmaking. Such an account of active citizenship establishes certain requirements for the internal incentives, since merely external incentives from the laws cannot drive me to participate in the legislative progress.[16]

I also suggest that "being fit to vote" presupposes active citizens' moral incentive of contributing to the community, whose domain is larger than the one of a personal purpose. Since we are not isolated creatures, there are certain connections among us, which make us a whole. However, any individual in a community is not the master of another individual; thus, nobody can take his/her own personal purposes as the laws determining other individuals. To make the mutual interaction possible, individuals should recognize the idea of a community, which is a whole of those parts. As a part that constitutes the whole, I must recognize my contribution to the whole. In a civil society, we all equally receive the protection of the laws, which reflect the unity of a community; therefore, we, as members of the community, must contribute to lawmaking with consideration for the community and not merely one's own personal purpose. With the above inner recognition, active citizens perceive themselves no longer as passive followers but as "legislators" of the community. This is why Kant claims that the source of laws is "the united will of people."

[14] Kant notoriously provides several examples about active and passive citizens. For example, children, domestic servants, the woodcutter, the Indian blacksmith, and women are passive citizens, while civil servants and school teachers are active citizens. We have to recognize Kant's social and economic limitations of being in eighteenth century Prussia. Jacob Weinrib presents a charitable interpretation of Kant's mature account of citizenship, which does not "exclude women or any other class of persons (with the exception of children, who are excluded on the basis of their dependency)" (Weinrib 2008, 14).

[15] A "good" legislator is one who satisfies the three features of active citizens. Together with the requirement of "equality," every citizen should recognize the equal role of being state legislators between him-/herself and others. "Equality" as legal equality also implies that all citizens are equally constrained by the same legal authority without exception. In addition, every independent citizen should form the consent to legal authorities in terms of his/her own reason rather than others' coercion, brainwashing, or deception.

[16] Ronald Beiner adopts terms "high-liberal" and "low-liberal" interpretations of citizenship to explain Kant's conception of citizenship and suggests Kant's citizenship is the one between "high-liberal" and "low-liberal" views. According to the "low-liberal" view, "politics is conceived as an instrumentality for securing a system of laws that allow each of us to get on with our individual purposes without unnecessary interference by the state, and citizenship is simply the title assumed by all those who participate in this arrangement." Ripstein's account of freedom is close to the "low-liberal" view. However, Kant's account of active citizenship in MM, at least to a certain degree, challenges such a "low-liberal" account. See: Beiner (2011, 209–210).

For Kant, however, the "legislative" function of active citizenship goes beyond formal political participation in institutional republican political arrangements such as voting. In addition to recognizing the power of internal incentives, the Kantian transformation from passive to active citizens could affirm the role of non-institutional interpersonal influences of active citizenship in forming the general will. Each individual's behavior at a specific moment, like a miniature magnet pointing in random directions, features arbitrariness. However, similar to the phenomena of atoms together creating small groups, each of which points in the same direction, individuals in close distance to one another strongly influence each other and might share a certain pattern in their behavior. As for the importance of interpersonal influences in approaching the general will of a group, a family as a small-scale group provides a simple example to illustrate such influences. The influences among family members range from diet choices, life principles, and even political ideas, which all gradually shape a sense of unity within a family. The interpersonal interaction over time increases the sense of unity among family members, which corresponds to the general will of the family. It is true that each member's recognition and promotion of such a general will does not guarantee the continuation of the family. However, a member's indifference to the family will necessarily drive the family to collapse in the long run, since other members will be correspondingly affected to different degrees. Comparatively, legal restrictions and protections of family relationships alone are not the key forces that sustain the family. The change of laws influences but does not determine those family relationships. If it is true that an individual's motivation for behavior is largely the vague overlapping between the general will and a particular will, then at least in family relationships, an individual's recognition or participation in the general will in this very small group is strongly influenced by other members' attitudes and behaviors.

Although a state as a large-scale group presents far more complicated interpersonal as well as institutional relationships than those within a family, nobody can deny that individuals influence each other proportionally to how active they are as citizens within a state. For example, for many of environmentalists, their behavior is not driven by legal punishment or rewards but by perceptional shifts through the interactions of everyday life. For them, their commitment to promoting sustainability on the Earth, through spreading the overlapping parts with their personal flourishing, has been gradually internalized as their personal commitment to justice. This conjecture could be confirmed by the considerable amount of campaigning by environmentalists against existing laws. Given environmental degradation, there is an urgent need for active citizens who choose the general will of "having a sustainable earth" as their particular wills and who voluntarily use recyclable bags, classify garbage, or advocate for a green earth. Thus, the condition of becoming more active citizen(s) must be supplemented to Kant's republicanism to approach the general will and prevent despotism. Under such a condition, we ought to become more active citizens and bring about such interpersonal influences to prevent despotism.

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Chapter 6
Public Interests and the Duty of Food Citizenship

Joan McGregor

> *There is, then, a politics of food that, like any politics, involves our freedom. We still (sometimes) remember that we cannot be free if our minds and voices are controlled by someone else. But we have neglected to understand that we cannot be free if our food and its sources are controlled by someone else. The condition of the passive consumer of food is not a democratic condition. One reason to eat responsibly is to live free.*
>
> (Wendell Berry 1990)

Abstract The food system impacts many issues of public interests and hence requires that we participate in the governance of it; not only should we act responsibly for our own food purchases, but for the system that produces, manufactures, transports, and disposes of food. This means that society needs to stop treating food choices as merely private ones and not open to democratic governance. We need to stop acting as passive consumers assuming that the system puts out safe, culturally appropriate, and quality products with proper protections for actors in the system and the environment. Instead, we should take responsibility to understand and control the food system through the democratic process and our consumer habits to ensure that the food system is just, supports environmental integrity, is humane to animals, and provides nutritious and delicious food for society.

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Our current food system, that is, the entire system of how and what we eat, how it is produced, consumed, and disposed of is the cause of a multitude of social, political, and environmental problems. First, the food system is causing serious environmental damage including global climate change since a quarter of all carbon produced is associated with the food system. Second, the food system has generated catastrophic health outcomes with 68 % of the population overweight (CDC report 2012) largely due to consuming too much food that is devoid of nutritional value—resulting in skyrocketing rates of diabetes, heart disease, and other deadly diseases. Third, there are tremendous inequalities in the food system resulting in "food deserts" (areas where there are no commercial outlets for produce and other healthy foods) and "food swamps" (areas where there is an overabundance of fast food outlets), mostly in low-income neighborhoods or rural areas. Additionally, there are inequalities in the treatment of food workers, from farm to slaughterhouse laborers—many of whom are "immigrant labor" without the (paltry) farm labor protections of citizens. On the other hand, food undoubtedly plays a critical role in human functioning and flourishing. Food cultures are constitutive of any culture; the values, rituals, and norms around food are essential to cultural identity. Consequently, food not only sustains human lives but also provides critical meaning for peoples' lives in a society.

Food choices in our society are conceived as private decisions by rational free actors and thereby not subject to the public deliberative processes of citizens in the political sphere. The food system, unlike, for example, the educational system, has not been conceived of as a system of public governance where self-determination of communities is necessary. Why is there this difference between education, for instance, and food? The agricultural system and, generally, the food system have changed dramatically in the last half of the twentieth century. Modern agri-business has nationalized and even globalized its scope. Those businesses have successfully avoided being objects of democratic deliberation, regulations, control, and transparency about their processes and products by framing food choices as mere consumer choices in the private domain and not ones with political and public welfare dimensions. This framing of food has shielded agri-business and the food system from the appropriate level of public scrutiny and denies peoples' right to have a voice in the values of the food system. This framework belies the nature of food systems as one where communities have a stake in processes and products, and it belies the fact that the food system within which consumers act has particular background conditions produced by the society (whether explicitly or implicitly). The model of rational free actors making voluntary, private food decisions that are not affected by political decisions, regulatory policies, market manipulation, and other market forces is seriously distorted. For example, the assumption of the rationality and voluntariness of individuals' decisions in the food arena is questionable since there are so many factors that militate against that assumption, for example, the lack of transparency of the food system, including the opacity of government subsidies for unhealthy foods and regulations protecting the food industry's interests, often against consumer interests. In this paper, I argue that the food system requires that we engage as *citizens*, not only acting responsibly for our own food purchases, but for the system that produces,

manufactures, transports, distributes, and disposes of food. This means that the system needs to cede control of the food system to democratic governance, that we should have "food sovereignty," the right of citizens to participate in determining what food is produced and how it is produced, distributed, consumed, and disposed of.[1] We should not be passive consumers, we should not assume that the system puts out safe and quality products with proper protections for consumers and other actors in the system, but rather, we should actively take responsibility to understand and ensure that the food system is just, supports environmental integrity and avoids cruelty, and provides nutritious and delicious food for society and our community.

6.1 What Are Citizens?

What is meant by "food citizen"? A citizen is "a member of a political community who enjoys the rights and assumes the duties of membership" (Leydet 2014). 'Citizenship' is typically used to refer to national citizenship. Citizenship of a nation, such as Mexico, the United States, or Canada, is geographically determined—everyone born within the U.S. border is a citizen of the United States. Geography, however, doesn't always define citizenship—not all nation states define citizenship by geography, and people can be citizens of states where they don't physically reside or aren't born. Many tribal nations in the United States define citizenship based on a blood quantum; for example, the Navajo Nation requires one-fourth Diné blood to be a citizen. Legal citizenship is a legal status "defined by civil, political, and social rights" (*Ibid.*). The protections of the U.S. Constitution are for U.S. citizens and are not necessarily extended to foreign nationals as was seen with the aftermath of 9/11 and the Patriot Act. Being a legal citizen doesn't entail that the citizen is a maker of the laws, although the assumption in liberal democracies is that all citizens have the right to vote (notice that women were citizens but didn't have that right until the 19th Amendment of the U.S. Constitution) and be part of the political process. Citizens are bound by a common set of laws.

With citizenship comes certain benefits or rights *and* responsibilities. A citizen of the U.S. has the right to vote and the protection of the Bill of Rights and has the responsibility to serve in the military if drafted or serve on a jury when called. The government has many responsibilities vis-à-vis its own citizens: to protect its citizens from external enemies and from internal assaults, to ensure a fair and robust economy, and to ensure the welfare of its members in the form of standards for welfare, air, and water quality, for example. States also have the responsibility to protect the human rights of their citizens. A second dimension of citizenship refers

[1] "Food sovereignty" is a term coined by an international peasant-farmer movement called La Via Campesina which is focused on local control, sustainability, self-determination of culturally appropriate healthy foods. The organization grew up in reaction to the control of the food system by multinational corporations and trade arrangements facilitated by the WTO. I am appropriating that term and arguing that all citizens, whether in the developed or developing world, should have agency and control over their food system.

specifically to agents as politically engaged actors in the community, speaking to their responsibilities to the community and the state. This political dimension was the most important one for republican theorists, like Aristotle and Rousseau, and is most critical for being a good food citizen. Citizens are actively engaged in the interests of the community, working on the public good.

A third dimension of citizenship is that of identity; political communities provide their members with a source of identity. People identify with the shared values and history of the state where they are citizens. This is a psychological dimension, describing how people feel about themselves and their source of belonging to a group or community—citizenship provides people with a sense of self-identity. These identities can be sources of responsibilities to the community to which one belongs. Often people are moved to military service, for example, because of their identification with their country—they are moved to protect its values.

Historical accounts of citizenship postulated a sharp line between the public and private spheres. The public sphere is the domain of citizens where equality and justice reign, where there is deliberation and decision-making and the civic virtues of toleration and respect for others are valued (Okin 1998). By contrast, in the private domain, the domain of family life and domesticity, there were not the assumptions of equality or justice—women's liberty was permissibly curtailed, and there was no expectation of justice in family relationships. Women were relegated to the private domain and to subjugation by men. Beyond just exposing how this framework worked for men's advantage and against women, Susan Okin (1998) argues that this view failed to recognize that laws and policies of a state dictate the personal circumstances, the possible choices, of women (and men). Denying women access to education or the ability to own property prevented them from being able to be active political citizens or full agents in the economy. Treating reproduction, pregnancy, and child care as a "personal choice," for example, rather than an essential function of members of the community, means that individuals are left to their own devices when pregnant or requiring child care, thereby placing obstacles to their full participation in the polity. Those policies (or lack thereof), and viewing many "women's" issues as merely personal problems, structure women's liberty, opportunity, and agency in society. These policy decisions further structure the personal lives of women.

The boundaries between the public and the private domains are constructed by society, not fixed by nature, and should be critically evaluated and exposed when perpetuating hierarchical structures and shielding important issues from public deliberation. Society determines what issues are part of the private domain, what a matter of private choice is, and what is in the public domain and part of public values. It also determines what issues and choices are part of the public's interest and thereby the domain of citizens. These boundaries, as we see from the example of childcare where it was designated in the private domain, have a profound effect on the structure of people's lives and systems in society.[2] Think about when education

[2] Notice that abortion is not thought in the U.S. to be a private matter but one for public deliberation and control, whereas child bearing and childcare are private matters and ones which don't receive public consideration and support.

was constructed as in the private sphere, not open to public debate, standards, and regulations. When educating children was a private matter, most women and the poor weren't educated, leaving them with unequal abilities and opportunities. Ultimately it affected the nature and character of our democracy.

Food related activities such as food purchasing, preparation, and consumption—"food work"—are associated with women in the home and treated as lesser, uncompensated domestic activity. They are treated as private activities and choices, part of the family, and, therefore, not appropriate for political engagement or deliberation. Food has been thought to be part of the private domain, regulated by free market principles presumably dominated by the free choices of individual agents. Conceptualizing food choices as merely the private choices of individuals and not part of the public deliberative body puts the food system out of the scope of the responsibilities of citizenship and the government. Another way of justifying the "hands off" approach is the argument that the state is being paternalistic when attempting to regulate people's food choices. Recall the fight over the attempted regulation of soda size in New York City or Michelle Obama's push for healthy school lunches. Requiring transparency, safety, quality, and just treatment in the food system is not illegitimate paternalism by the state; rather, it grants the citizenry the ability to decide the character of the food system and giving people the tools to make informed decisions.

Citizens act in the public domain on matters of public interest. The political dimension of citizenship assumes that members are acting on something besides or in addition to their own private self-interests. In those relationships one has responsibilities to others in the community—there are common values and common interests. Uses of the term 'citizen' that highlight those common values and interests, but where citizenship is not associated with explicit political communities, are "ecological citizenship" or "global citizenship." In those instances, 'citizenship' is used to highlight our responsibilities to the common interest of ecological integrity or global justice. In these metaphorical senses of the term citizenship, the responsibilities associated with citizenship are not legally defined (nor are the criteria for membership) but are determined by a shared understanding of what are the appropriate responsibilities of various actors to ensure the goals of the community. Aldo Leopold famously said, "A land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and *citizen* of it…it implies respect for his fellow-members, and also respect for the community as such" (Leopold 1949, 204, my italics). Leopold is arguing that humans as citizens of the land-community have certain responsibilities to the land and the humans we share it with. Land-community members are in a common venture, an interdependent relationship that requires the members to sometimes act in ways that support the common good of the community. Citizenship in this sense takes seriously the responsibilities of members, which include duties to be informed and to participate and engage in certain actions based on values of the public interest.

When acting as citizens in this sense, Mark Sagoff argued in *The Economy of the Earth*, we act based on "public interests" as opposed to when we act as consumers, then we act on "private interests" (Sagoff 2007, 29, 38). Sagoff used this distinction

to argue that the current analysis for environmental decision-making erroneously assumes that we could capture what people's environmental values are by considering their market-based consumer preferences, what they are "willing to pay" by looking at consumer choices. He argued that consumer preferences and the related cost-benefit analysis are not the correct ways to understand environmental values for protection of wildlife and wild places, concern about population, and climate change. Consumer preference-satisfaction does not truly reveal people's valuing of the environment since people value the environment on the basis of aesthetic, spiritual, cultural, moral, and political values, and not values that can necessarily be assimilated to economic preferences. Aesthetic, spiritual, cultural, moral, and political values are often part of the political debate about the public interests; these debates focus on "what is good for the community," including future generations. They require moral or political justification for their public support. Consumer preferences aren't like that. If I prefer the red dress and am willing to pay x for it, there is no public justification required for it—it just is a brute fact of the matter (this is too simplistic since preferences can be shaped by other kinds of values, such as moral values). That's what I prefer, and since it is a private matter I am not compelled to explain my wants to the larger community. The other feature of this distinction is that consumer preferences and citizen values are incommensurable; in other words, they can't be compared with one another. Consumer preferences can be compared with one another— it is possible to ask whether you would be willing to trade one thing for another—but spiritual or aesthetic values can't be compared with consumer ones. They aren't even on the same scale as consumer preferences. If asked how much you would need to be compensated for the extinction of polar bears, you might understandably respond that there isn't a price that could be paid for their extinction. For the environmentalist, there isn't a monetary value that could be put on those creatures any more than there could be a price for art lovers on the destruction of the Sistine Chapel, for example. This is not to say that we don't have to deliberate about how to make trade-offs between these values, economic development and environmental degradation; even human lives are sometimes weighed against economic value (we trade-off how many lives we can save by building safer guardrails on the freeways versus the cost of building them), but that is not to say that all values are reducible to economic values.

The distinction between consumer preferences and citizen values, the difference between private and public domains and interests, will help us understand the current situation with the food system and the rights and responsibilities of food citizenship. The contemporary food system in the United States, the food industry and the government, treats food like a commodity, fungible, in the private domain where the goal of actors in the market is just to get the most quantity at the cheapest price. What is valued is economic efficiency only. There are many problems with this model. One problem noted by Marion Nestle (2002) is that though the rhetoric about food is that it is a matter of informed personal choice, there are so many factors at play that militate against that construction. She states:

> We may believe that we make informed decisions about food choice, but we cannot do so if we are oblivious of the ways food companies influence our choices. Most of us, if we choose to do so, can recognize how food companies spend money on advertising, but it is far more difficult to know about the industry's behind-the-scenes efforts in Congress, federal agencies, courts, universities, and professional organizations to make diets seem a matter of personal choice rather than of deliberate manipulation. The emphasis on individual choice serves the interests of the food industry for one critical reason: if diet is a matter of individual free will, then the only appropriate remedy for poor diets is education, and nutritionists should be off teaching people to take personal responsibility for their own diet and health—not how to institute societal changes that might make it easier for everyone to do so (Nestle 2002, 360).

Characterizing food choices as private and informed ones that we are personally responsible for is problematic for many reasons including, as Nestle argues, the levels of manipulation in our food system. That characterization is also flawed because it erroneously assumes that our food choices are based solely on consumer values of getting the most for the lowest price. What the system has neglected to recognize is that individuals do have consumer preferences about food, but they also value food for many other reasons, including aesthetic, nutritional, environmental, cultural, spiritual, and consequently, not merely economic ones. There are important public values as well at stake in the structure and workings of the food system. We can't address the public values and expose the problems that are created in the food system by the government structure, laws, and regulations (or lack thereof) if the system is framed as located in the private domain.

6.2 Why Food Choices?

Why single out food for special moral attention, as part of the virtues of citizenship, rather than constructing them merely as private consumer choices? "Food citizenship" has been defined "as the practice of engaging in food-related behaviors that support, rather than threaten, the development of a democratic, socially and economically just, and environmentally sustainable food system" (Wilkins 2005). The notion of food citizenships entails that there are particular citizen responsibilities for the food system and rights correlated with the duties of the state (whether federal, state, or local). This means that food choices should not be treated as merely private ones. That treatment excludes them from critical analysis from the moral or political point of view. This is misguided since there are many public interests at stake. First, there are serious environmental impacts resulting from the industrialization of food production. These include the loss of biodiversity, depletion of topsoil, increased CO_2 levels in the atmosphere from production and transportation, and pollution of waterways. Environmental problems such as climate change will further transform where and what we can produce, and in some cases, populations will have to flee their agricultural lands entirely due to flooding and other results of climate change. The transportation of food across vast distances and borders raises questions about the environmental impact of that transportation, the security of

national food sources, and whether such practices contribute to or detract from more equitable and sustainable national economies. Citizens need to be concerned about these impacts on environmental integrity, for the current community and future ones. Many of these practices are incentivized by government policies, or at least aren't regulated by the government.

From the perspective of human health, the contemporary food system has led to an "obesity epidemic" in developed nations, particularly among the poor and minority populations. Many of these people are undernourished since the foods they eat have little or no nutritional value. This epidemic is created by government policies and the modern food industry, for example, by subsidizing corn and soy and making products like high corn fructose and hydrogenated oils plentiful and cheap. Soaring rates of cancer, heart disease, and other lifestyle diseases are also products of our current food practices. The major killers in the world are not infectious diseases; rather, they are heart disease, cancers, lung disease, and diabetes. These diseases killed more than 36 million people in 2008 according a report by the World Health Organization. Industrial bioengineered plants and animals, and animals raised in concentrated feeding operations, have produced more food, but at a high cost to human health, animal welfare, and the welfare of the planet. At the same time, malnourishment and starvation remain rampant in less developed nations where wholesale loss of cultural food practices have occurred due to increases in agricultural trade and resulting crop choices.

Whether animals should be part of our diet has gained attention first with the exposure of the horrors of factory farming and now with the exposure of the negative impact of meat production on the environment. Peter Singer raised the issues of the plight of farm animals in his classic *Animal Liberation* from 1975. Since then, the suffering endemic to the system of animal food production has been difficult to ignore. Whether animals have rights, as some philosophers have argued, or are part of the moral community due to their ability to suffer, or (even more modestly) since we have a duty to avoid unnecessary cruelty or suffering to animals, the contemporary production of meat is morally problematic and needs the attention of citizens to ensure a humane food system. Alas, meat producers have aggressively tried to hide information about the processes with legislation such as "ag-gag" rules (New York Times Editorial Board 2015).

And lastly, although not least in contributing to the moral and political complexity of food, are the social justice issues presented by the food system. Food is an important lens through which to view global poverty and sustainable development. The United Nations Declaration on Human Rights recognizes a right to food. The global market in food raises serious ethical questions since, for instance, people are growing food for export but are food insecure themselves (including many of the farm laborers in this country). The UN reported that even though in 2009 there were record amounts of food produced, the number of hungry people went up. Internationally, 870 million people are food insecure, including, ironically, in this country where we exports tons of food. "Hunger, in most cases, is caused by lack of *money* rather than a shortage of food production" (What causes hunger? 2015, my italics). But the problems of food justice are not only international, but are also

specific to our own nation and communities. Modern agriculture has increased production, the Green Revolution was supposed to end hunger, but "food deserts" make it difficult to access nutritious food in some American cities and rural areas, and malnutrition and hunger are ubiquitous in America. These paradoxes in our global food system raise political issues of food security on a national and community level, which underscores the difficulty of the challenges confronting us. As climate changes occur, new types of injustices emerge; developed nations dump their wastes of overconsumption into the common atmosphere, where the vulnerable in developed nations and certain regions of United States will be most disadvantaged. In many cases, climate change will exacerbate the food crisis situation of those peoples and in regions like the southwest U.S. where it will be hotter and dryer. Other questions of social justice have to do with the conditions of farm laborers. Under the Fair Labor Standards Act, farm workers are sometimes exempt from minimum wage, overtime, and child labor laws. Workers within the food system, often women or racial minorities, receive abusive treatment in the current system (Khokha 2013). Constructing the food system as private and not part of the deliberative public domain has left its workers without basic protections and treatment equal to workers in other domains. Guest worker programs have increased farmers' access to farm labor but have not alleviated and perhaps have aggravated the historic problem of depressed wages and itinerancy among farm workers. Farm workers are unnecessarily exposed to pesticides and other dangers in a system pursuing cheap food where workers have little say in the conditions under which they work.

Because of the profound public interests and implications of the modern food system on our health, the health of our community, the land's health, the welfare of workers' within the system, the global implications, and our government's complicity in the structure, there are many good reasons for pushing the governance of the food system into the public domain of citizenship and out of the private sphere. What exactly would we be required to do as food citizens? Advocates of food citizenship often argue that our responsibilities of good citizenship can be satisfied by purchasing *local food*.

6.3 Do We, as Good Food Citizens, Have a Responsibility to Purchase Locally Produced Foods?

Popular food writer Michael Pollan argues for the virtue of purchasing local: it is generally fresher, leaves a lighter environmental footprint, and is an act of conservation (Pollan 2006). Gary Nabhan, often called the pioneer of the local food movement, argues in *Coming Home to Eat: The Pleasures and Politics of Local Foods* that our global eating habits are destroying the environment (Nabhan 2001). Other writers such as Anna Lappe in *Diet for a Hot Planet* (2010) argue for purchasing local as a way to mitigate climate change. The idea of investigating where our food comes from, and in particular how far it travels to get to our plate, has gained

tremendous traction in the last few years. A researcher in Iowa in 2005 found that the milk, sugar, and strawberries that go into strawberry yogurt collectively travelled 2211 miles (3558 km) to the processing plant. Environmental groups such as Natural Resources Defense Council claim:

> How your food is grown, stored, transported, processed and cooked can all influence how it impacts climate change and the environment…The results of our analysis show that—all else being equal—locally grown foods are a better choice (Natural Resources Defense Council 2015).

The local-food movement has grown up, and the concept of "food miles," meaning the distance food travels from farm to plate, has come into its own. The United Kingdom's Tesco, their largest supermarket chain, instituted carbon labelling on all its products (Carbon Trust 2015). This and other policies have been supported by environmental groups who encourage local food sourcing as the moral choice for the planet.

Before granting a wholehearted endorsement for local food to solve our environmental crisis and make us good food citizens, we must acknowledge that what 'local' means has itself been a source of controversy. Gary Nabhan (2001) in northern Arizona settled on a radius of 250 miles. By contrast, Alisa Smith and J.B. MacKinnon, authors of *The 100-Mile Diet*, settled on the boundary of 100 miles for their diet, which they recounted in their book (Smith and MacKinnon 2007). The term "locavore" was coined by Sage Van Wing from Marin County, California, where there is an agricultural abundance thereby making the 100 mile diet an easy one to accomplish. Rich Pergo from the Leopold Institute conducted a survey of consumers throughout the United States and found that two-thirds considered "local food" to mean food grown within 100 miles. Yet, sometimes 'local' gets associated with a state or province identification. In Arizona the produce is often marketed "Arizona Grown," the implication being that it is local even though for many people in the state produce grown in Mexico would be more "local" than other parts of the state—less than 100 miles. Some countries market their own food as "local" and encourage a kind of nationalism or patriotism about purchasing those foods, supporting their farms, and resisting the globalization of food—the converse is xenophobia about purchasing the foods of *others*. Some have asked if the zeal for local food is a kind of "culinary racism."

6.4 Why Is Local Thought to Be Morally Better?

Looking at Pollan's arguments, his first claim is that local food is fresher and more nutritious. Peter Singer responds to this argument advocating local foods by saying "fresher and tastes better" aren't ethical reasons for purchases (Singer and Mason 2007, 140). Singer's glib response isn't entirely accurate, since purchasing food that tastes better and is more nutritious (Singer wasn't addressing the nutritious element) for you and your family are moral considerations, on the assumption that morality

requires you to consider your family's and your own welfare. Also, purchases of local food support the market for local producers thereby making them more accessible for others in your community. As citizens we ought to support a system that makes healthy and better tasting food more accessible to the community.

Local food is thought to be the most ecologically sustainable based on the concept of "lower food miles." Focusing on Rich Pirog's study of produce in Iowa, for instance, the average produce in the U.S. travels 1500 miles to the store versus the 47 of local produce (Pirog et al. 2001). That difference does seem to imply that buying local would make a big difference in one's carbon footprint. Nevertheless, the caveat that Pirog introduces to this simplistic analysis is that it is not only important to consider the food miles, but also what form of transport is used. Shipped foods and train-transported foods are significantly more efficient than trucked foods. For instance, trains are 10 times more efficient than trucks. Rice grown and shipped from Asia may have less environmental impact than rice grown and trucked in the United States. Food miles just focus on transportation cost and neglect the other environmental impacts of growing food in particular regions and the packaging of food. Hothouse grown tomatoes in northern climates may be local, but the amount of energy consumed to grow them in a hothouse, cancels out any saving in transportation. Regions like Florida with lots of sunshine and water are better choices for tomato production from the perspective of greenhouse gases. In the Southwest we have an agricultural industry that has grown up on borrowed water resources and overusing ground water. So even though the food is locally produced some of that produce is rapidly depleting our water supplies, and water in the Southwest involves a tremendous amount of energy since it needs to be pumped (Debuis 2011). As global climate change occurs or technologies advance (for example, greenhouses might efficiently be heated with renewable energy), what can be grown environmentally efficiently will change as well. The calculations for environment impact of particular food products in particular regions will change over time. Nevertheless, the shorthand of "food miles" doesn't capture the entire environmental impact of any food, and hence doesn't provide a useful shortcut for the most sustainable food choice.[3]

In considering the environmental effect of food choices and the industries that the government subsidizes, certain foods, in particular meat and dairy products, create significantly greater amounts greenhouse emissions than other food products. Raising animals for food requires producing food in the form of grains and corn and feeding it to the animals. It requires as much as ten times the number of calories from grain to produce the same calories in meat (Bittman 2008). From the perspective of greenhouse gases, that is not efficient production of food. All the carbon costs of the grain production and transportation including the fertilizers and pesticides are included in the meat and dairy emissions. Additionally, animals like cows and sheep emit gases, methane and nitrous oxide, which are 23, in the case of methane, and 296, in the case of nitrous oxide, times more destructive than carbon dioxide

[3] See Weber and Matthews' (2008) analysis, which determined that the transportation, the final delivery of food, only represented 4 % of the total greenhouse gases for food. They found that 83 % of the emissions for agricultural products occur before the food leaves the farm.

(Responding to climate change 2015). Overall, whether local or not, there are heavy environmental costs from industrial animal production. Other environmental impacts include problems of disposal of the wastes produced by concentrated animal feeding operations (or CAFOs), often called "manure lagoons." A study of the United Kingdom's food system showed that meat and dairy amounted to half of all the emissions in the U.K. food supply. The researcher concluded that "probably the single most helpful behavioral shift one can make" to reduce the greenhouse gases from food products is "eating fewer meat and dairy products and consuming more plant foods in their place" (Garnett 2008). This conclusion has been taken up with the "Meatless Mondays" movement, which tries to get people not to consume meat one day a week based on the health and environmental benefits (Meatless Monday 2015).

Food miles are not the only way in which local food is thought to be more environmentally sustainable. Local food proponents are also advocates of eating seasonally. Bringing food halfway around the world so that consumers can continue to eat grapes in the winter is not generally a very greenhouse gas efficient approach to eating. Eating seasonally from your local area has benefits. Eating locally, however, wouldn't be feasible everywhere given particular environments, Alaska, for example. Nevertheless, the prescription of eating local doesn't have to be understood as absolute—"never eat anything that isn't locally produced" —but rather, other things being equal, purchase food that is produced locally. Another part of the "eat locally" movement is to eat less processed foods. Processed foods almost always use more energy in producing and packaging them; even just the transport costs of moving the ingredients to the point of production adds an additional level to the transportation costs. Furthermore, processed foods tend to have more packaging, which has environmental costs (producing the packaging), and the packaging usually ends up in landfills, which itself is an environmental problem.

Finally, local food advocates argue for organically produced foods. Organic food is the largest growth area in the food business; in 2011 the organic industry was worth 31.5 billion dollars (Smith 2012). Organically produced food does not use synthetically produced fertilizers and pesticides and does not use growth hormones and antibiotics. Creating synthetic fertilizers and pesticides produces greenhouse gases and applying them on the crops results in nitrous oxide. Additionally, the fertilizers pollute waterways and kill wild fish and other marine wildlife and bees; they contribute to soil erosion, which in turn creates carbon dioxide, further exacerbating the climate problems. Generally, organically produced foods have a significantly better effect on the environment even when produced at a large scale. A widely cited study in 2012 by Stanford University researchers argued that organically grown foods aren't more nutritious than nonorganic food. However, it did show that organic foods lead to fewer toxins in the body (Smith-Spangler et al. 2012). A more recent British study in 2014 concludes that organic foods are better since they have more antioxidants and less pesticide residues (Barański et al. 2014). Since the impact on the ecological environment is substantially better than nonorganically produced foods, and since they don't expose farm laborers to pesticides that are hazardous to their health, there are good moral reasons for choosing organically produced foods.

It is important to mention, something that Pollan is conspicuously silent about, that buying local and even organic doesn't guarantee fair treatment of farmworkers who helped bring the local and/or organic food to market. In one instance of farm worker exploitation in the United States, Eric Holt-Gimenez, in "The Coalition of Immokalee Workers: Fighting Modern Day Slavery in the Industrial Food System," exposed slave like conditions for farm workers in Florida. Living in Florida and purchasing these tomatoes would be purchasing locally, but, in so doing, would be supporting conditions of abuse and exploitation. There are not guarantees that local, even small-scale farmers are not engaged in unfair labor practices. Unfortunately, there are structural problems in determining whether farm workers in the United States are treated fairly. In the 1930s, the National Labor Relations Act (guaranteeing the right to form unions) and the Fair Labor Standards Act didn't include farm workers in their provisions. Consequently, in the U.S., farm workers are not automatically subject to the same protection as other workers, including minimum wage and OSHA protections. This is an issue that engaged food citizenship should address to ensure justice for the workers in the food system.

The final argument Pollan presents for local food is that it is "an act of conservation—of the land, of agriculture and of the local economy, all of which are threatened by the globalization of food. Anyone who prizes agricultural landscapes, and worries about sprawl destroying them, should buy local whenever possible…. Otherwise the landscape will revert to second-growth forest or housing developments" (Pollan 2006). In Europe they have a saying, "Eat your view," which has gained momentum in this country including in 2008 with the White House's garden. Buying local will preserve agricultural landscapes. But the types of landscapes Pollan and others have in mind are the smaller agricultural operations, the Arcadian model, practicing land stewardship that will conserve the environment and the local economy, and not large-scale industrial agribusinesses. The large-scale industrial agribusiness grew up after the Second World War partly as an outcome of government programs that incentivize these operations. Small farms have difficulty competing with the large-scale agribusiness and the consolidation of the food business, which have driven down the wholesale costs. Government programs have encouraged large-scale agribusiness and have consequently hastened the decline of the small-scale farming. Citizen engagement in the political process to force political changes can refocus our food system by supporting the values of health, the environment, aesthetics, culture, and justice and not merely costs.

Conservation of land is not merely wilderness preservation as has been the focus of many major environmental groups in the latter half of the twentieth century. Aldo Leopold was well aware of the virtues of conservation of farmland and wrote extensively about farmers as conservationists. His famous commentary on our current relationship with the land was: "We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect" (Leopold 1949, 203–204). Just supporting local is not sufficient; more has to be said about the types of practices the farms and farmers are engaged in and the government's role in supporting or hindering particular types of food systems.

Finally there are economic, social, and political benefits to local communities from supporting local farmers, small family operations with roots in a community, and not multinational agribusinesses. Purchasing from those producers conserves local economies making those economies and communities sustainable. Purchasing local foods strengthens the local economy by keeping the money spent within the local economy. If farmers can bring their products more directly to community consumers, without intermediaries, they will reap more of the profits, and hence make the practice of farming economically viable. This is a compelling argument for the entire community since the tax base of a community is what provides the services that contribute to the welfare of the residents of community, sustaining those communities—schools, libraries, parks, police and fire protection. The mantra "buy local" has led to the revitalization of farmers markets and community supported agriculture (CSA) where people commit to purchase produce and meat directly from a particular farmer each week. Farmers markets have contributed to the revitalization of neighbourhoods and foster a "sense of community" in many cities and towns. Communities can't survive, and certainly can't thrive, without reciprocal relationships among the members, including a sense of identification and solidarity with the group. The globalization of food production and manufacture risks essential relationships needed to keep alive these bonds of solidary of particular communities. Buying local can hence strengthen the economy and bonds of a community, which is arguably part of the responsibility of good citizenship.

Peter Singer objects that "keep your dollars circulating in your own community" is not an ethical principle and embodies a kind of "community selfishness" (Singer 2007, 141). We do, however, as *citizens* have special responsibilities to our communities, to promote the welfare of the citizens as well as our own. It is not selfish to pay more attention to the character of the educational system in one's community as opposed to the educational system of other countries or even states. One important way of promoting the economic livelihood of one's own community is purchasing from the producers in the community. In discussing the changes in pig farming from the smaller family operations to the industrial operations, Kendall M. Thu and E. Paul Durrenberger point out that it meant that "ownership becomes separated from the community so that profits are externally defined and assigned with a purely economic denominator while local benefits and costs that include quality of life, the environment, and human values such as mutual trust and sharing, are largely ignored" (Thu and Durrenberger 1998, 2). Further, ensuring that the products you purchase are ones that preserve ecological integrity and encourage healthy citizens is significant to promoting the welfare of your society.

Pragmatically, it makes sense to restrict moral responsibilities with regard to the food system primarily to one's community since one is in a better position to know the pressing needs and concerns and share basic values with those in one's community. Indeed there are dangers of paternalism and cultural hegemony when individuals try to "help" communities to which they don't belong. Citizen virtues are responsibilities to one's community to look out for the community's interests. Purchasing local food supports the economic vitality of one's community, helps conserve agricultural landscapes, and encourages trust in food by cultivating relationships with the farmers

and other known actors in the food system, and if the purchases are from farmers who are good stewards of the land, it will support the ecological integrity of the land. This will encourage the cultural sustainability of communities. So while the contribution to ecological sustainability is mixed for purchasing local foods, sometimes buying local and organic (although organic is better whether local or not) is better for the environment, and sometimes it is not, there are other important reasons for food citizens to give preference to purchasing local foods.

6.5 Beyond Food Purchases—What Food Citizenship Demands?

Beyond purchasing local foods that promote public values, food citizenship demands a kind of engagement and agency in the political processes about the food system—learning the issues, informing others, demanding accountability from elected officials, and generally participating as a citizen in the process of working for a sustainable, healthy, and just food system. Demanding the government live up to its food duties to its citizens means at minimum demanding that the state ensures that all its citizens have the UN Declaration of Human Rights recognized right to food. A plausible construction of the right to food means that nations are required to have policies that make it possible for individuals to either produce or have access to healthy food at reasonable prices. When nations sell off farmland to foreign investors, for example, in countries such as Mozambique, Mali, and the Philippines, pushing local farmers off the land, they cut "access to food, livelihoods are shattered and communities are uprooted" (Kugelman 2013); their policies violate the human rights of their citizens.

Many government policies arguably violate the right to food. For example, in the U.S. there are regulations that make it difficult for small family farmers to stay in business since the government heavily subsidizes large commodity farmers but not the smaller farmers. Government policies that encourage the market to be flooded with cheap processed engineered "foods," based on the heavily subsidized crops of corn and soy—corn syrup and hydrogenated oils—are not supporting citizens' rights to access to healthy foods or the right of farmers to produce food. Other rules such as zoning regulations that make it difficult for urban dwellers to grow food in urban areas discourage self-sufficiency and the production of healthy foods.

Citizen sovereignty over the food system to protect the public interests and not private corporate interests would ensure that the products that come to market are safe and meet nutritional baselines. Furthermore, the marketing of food products should not involve manipulative techniques and manufactured desires or deception, particularly to children, that encourage people to eat foods that are detrimental to their health. Data is now coming out that agribusiness has manufactured and manipulated many "food products" to make them "addictive."[4] Just as was done with the

[4] See, for example, Moss (2013), which discusses the food industry's use of scientists to develop food that is "irresistible" with the combination of, for example, certain amounts of salt and fat.

tobacco industry, the government should provide oversight to products with little to no nutritional value and that may be hazardous to people's health. At minimum, over issues where the citizens are sovereign, there is the presumption that the government will disclose information. In the case of the food system, there should be full disclosure of what goes into food and of the processes of production, transposition, and waste. The public cannot deliberate about issues of public concerns without full information.

6.6 Summary

If the government has a duty to empower its citizens to control the system to ensure that the food system is safe, healthy, just, environmentally sustainable, and culturally appropriate, then our current government has failed its responsibilities. Framing food choices as private ones being made by rational free actors in a free market belies the facts of this of the current food system, where if consumers are not literally coerced into poor food choices they are certainly heavily manipulated into them. Undisturbed by government oversight or regulation, the food industry has spent years and billions of dollars engineering their products with salt, sugar, and fat to make them "irresistible" to consumers, much like the tobacco industry did with cigarettes in earlier decades. Now the food industry spends billions aggressively marketing their products to consumers, particularly children. Lack of information about our food choices and transparency in the system is a big problem for us acting as consumers and acting as citizens. For example, big agribusiness has worked against transparency by supporting laws that shield the public from knowledge about food production practices such as concentrated animal feeding operations (CAFOs) and aggressively financing campaigns against labelling products. Labelling food products has only come in its limited form with significant fights from the industry.

Beyond particular outcomes, governments need to facilitate "food sovereignty" or self-control and self-determination of communities, the right of communities "to healthy and culturally appropriate food produced through sound and sustainable methods, and *their right to define their own food and agricultural systems.*"[5] This is the right to agency, participation, and control of the food system, which is essential for sovereignty, not to particular outcomes. Food citizenship is the vehicle to exercise food sovereignty. As citizens we need to wrestle control of our food system from private corporate interests, government agencies need to support the public's interests, and we need to start conceptualizing the issues of the food system as public ones requiring public deliberation and public values. Acknowledging the importance of food in individuals' lives and the well-functioning of society and the environment, the shape of the food system should be part of public debate. Consequently, these aren't merely private choices with no impact on public values, but rather they have profound public interests at heart and should be addressed by

[5] Definition from La Via Campesinaat the World Food Summit 1996 in Rome.

citizens. Citizens need to be informed and engaged in political activism about the process of food production, distribution, consumption, and disposal. Food policies and regulations are issues that citizens require political candidates to debate and citizens should have oversight on the ultimate implication of regulations over the food system. Issues pertaining to education, for example, are not conceived as private ones, ones that are left solely to free market principles. The reason for that is that we recognize that there is more at stake to education than private consumer preferences; even if the education is not for our own children, we recognize the public interests in an educated populace. Citizens have an interest in education and have the power to deliberate about its policies and practices. The food system should likewise be conceived as an institution with widespread public interest.

Governments need to be transparent in policies and practices, require citizen input and oversight of those policies and practices, foster regulations that facilitate regional control and small-scale operators, and generally conceive of their mission as ensuring food sovereignty through food citizenship. Beyond engagement in the political process through the design and implementation of regulations and practices for the food system, I argued that buying local food is an important aspect of food citizenship. Through purchasing local foods, one can be supporting and sending a "moral message" about the importance of the economic, social, and environmental sustainability of one's community. The caveat is that the purchased foods must be from local producers who are good stewards of the land and engage in just labor practices and the humane treatment of animals.

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Part II
Citizenship and Equal Rights

Chapter 7
Equal Citizenship and Religious Liberty: An Irresolvable Tension?

Gordon A. Babst and John W. Compton

Abstract In this paper our focus is not on discrimination against religion, but *for* it. We are concerned that U.S. citizens who are religious believers receive degrees of latitude and deference in the law relative to non-religious believers that privilege religion in general in American society to the detriment of the equal citizenship and standing of other citizens. In many cases, the citizens most impacted by religious deference are precisely those who have been identified in law and policy partly through the lens of majority religious belief, as not deserving of equal consideration. This ought not be an effect of constitutionally securing religious freedom. We distinguish religion-based deference in law and policy with respect to race and sexual orientation to illustrate the conundrums we find, conundrums that are highlighted in the Supreme Court's recent *Hobby Lobby* decision.

7.1 Introduction

A key tenet of the liberal conception of citizenship holds that all members of the polity are "entitled to be treated by the organized society as…respected, responsible, and participating member[s]." No person, that is, should be regarded as "a member of an inferior or dependent caste or as a nonparticipant" (Karst 1989, 3).[1] The basic principle of equal citizenship is so widely accepted as to border on the banal, though certainly controversies remain over what it entails. A second

[1] Also see Shklar (1991, 17). As Shklar puts the point, "To be less than a full citizen" is to "suffer derogation and the loss of respectable standing."

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important feature of citizenship, at least in the American context, is the First Amendment right to freely exercise one's religion; together with the no establishment clause, the free exercise clause protects citizens who are religious believers from intrusions by the state.

In this chapter, we ask whether the traditional deference accorded religion in matters of law and public policy does not violate the principle of equal citizenship by creating one class of citizens subject to the religious beliefs of another, even to the extent of legally condoning discriminatory practices in the face of democratically sanctioned anti-discrimination protections. In addition, we suggest that lack of clarity over what constitutes a religion and the disinclination to probe into the sincerity of the religious beliefs proffered to legitimate differential treatment work to the added benefit of American citizens who happen to be religious believers, and now also to the "closely held" for profit companies they own, owing to the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*[2] Although protecting religious free exercise is certainly an important goal of a just society, the accommodation of religion becomes problematic when (1) significant burdens are thereby shifted to other citizens, and (2) religious objections are *presumed* to be valid and deserving of accommodation, without regard to their sincerity or to how the public might judge them when juxtaposed to neutral and generally applicable laws that promote non-discrimination.

7.2 Potential Harms of Religious Accommodation: Burden Shifting and Arbitrary Authority

The much publicized *Hobby Lobby* litigation began when the Green family, owners of a craft store chain with more than 600 stores and 15,000 employees, raised religious objections to a provision in the Affordable Care Act (ACA) which requires large employers to offer employee health plans that cover various forms of contraception, including some that the Green family regards as abortifacients – that is, as preventing the implantation of a fertilized egg.[3] In particular, the Greens argued that

[2] 573 U.S. _____ (2014). The reader may be familiar with the nationwide Hobby Lobby chain of arts and crafts stores owned by the Green Family, or with Hobby Lobby's annual Fourth of July flag-draped one-page advertisement of patriotic, religion-themed quotations in the country's major newspapers entitled "In God We Trust," which solicits the reader to call "Need Him Ministry" and to download a free Bible "for your phone" at www.mardel.com/bible. See the *Orange County Register* July 4, 2014, p. 13 of the News section. The reader may also have heard of the 440,000 square foot "Museum of the Bible (its working name)" the Greens are building near the National Mall at an estimated cost of between $270 and $440 million, "to house the best of their 45,000-piece collection of biblical artifacts." See Van Biema (2014, 33, 31).

[3] Hobby Lobby asserted that its objection to four of the ACA-mandated contraceptive options was because they worked as abortifacients by preventing implantation of a fertilized egg, though the Institute of Medicine, whose list of medically beneficial contraceptives is reflected in the ACA, disagrees that they are properly termed abortifacients. While this dispute is interesting, the crux of

both the First Amendment and a 1993 statute known as the Religious Freedom Restoration Act (RFRA) entitled them to an exemption from the so-called contraception mandate – unless, that is, the Obama Administration could demonstrate that the mandate advanced a "compelling state interest" and that alternative, less burdensome ways of advancing this interest were unavailable. In the end, a bare majority of the justices concluded that less coercive means – including direct provision by the state – were indeed available, and that Hobby Lobby and other "closely held" corporations whose owners object to the use of contraception on religious grounds should be granted an exemption from the mandate.[4]

At first glance, the Court's treatment of the contraception mandate may appear consistent with the liberal ideal of equal citizenship. Most liberal theorists would agree that we should, whenever possible, avoid forcing citizens to choose between religious obligations and the commands of the state. A citizen who is regularly confronted with this choice, the argument goes, is less than a full citizen, having to tolerate compromised freedom of religious expression.[5] Justice Alito invoked this principle when he declared, in his majority opinion, that applying the contraception mandate to Hobby Lobby would amount to a form of "discriminat[ion]…against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs." Or as Justice Kennedy put the point in a concurring opinion, an accommodation was necessary to permit religious believers to participate fully in "the political, civic, and economic life of our larger community."[6] Both opinions expressed the same basic sentiment – namely, that the state should not deny religious believers access to state-provided benefits, such as the use of the corporate form, that help to ensure full membership in the life of the community.

A moment's reflection, however, reveals that there are both practical and principled limits to the state's obligation to accommodate citizens and corporations who

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it for our purposes is to note that the principal objection to abortion, at least among religious believers who categorically object to it, is grounded in their religious understandings, which have become an entrenched part of the legal, political, and popular landscape such that to assert a connection between any practice and abortion is to curry deference to religious belief, so that *of course* it is understandable that the practice is found objectionable without further argument.

[4] "The Greens are the only shareholders in the $3 billion, 626-store Hobby Lobby arts-and-crafts empire" and were "invited by the Becket Fund for Religious Liberty…to challenge the Affordable Care Act on the grounds that it infringed in their religious beliefs." The lawsuit was "a huge departure for the low-key Green clan, which had finally grown too big to avoid public conflict between its deeply conservative faith and a government whose actions it found increasingly unbiblical" (Van Biema 2014, 28).

[5] Numerous authors identify, contest, or otherwise discuss the demands of liberalism on religious believers. To mention only a couple of those able commentators whose views lean toward the more expansive accommodation of religious belief: Galston (2005), Gamwell (2002). Those whose views are more critical of the role of religious belief in the public square, or for whom restricting the expression of religious belief in law and policy is part of the sort of mutual accommodations that can rightfully be demanded of citizens, include Eisgruber and Sager (2007), Hamilton (2005), and Leiter (2013).

[6] 573 U.S. _____ (2014).

raise religious objections to generally applicable laws. As the U.S. Supreme Court has pointed out on more than one occasion, an absolute conception of religious freedom – one that affords religious believers complete immunity from laws to which they object – would court anarchy, rendering every believer "a law unto himself."[7] Taken to the extreme, such a conception would prevent the state from restraining citizens who, purporting to act on the basis of religious belief, violate the most basic rights of their neighbors.[8] One need not invoke the unlikely case of human sacrifice – a favorite trope of the nineteenth-century Supreme Court – to see the basic point: An overly expansive conception of religious liberty necessarily sacrifices the liberty and autonomy of one group of citizens to another, and then for justificatory reasons that carry little to no weight for non-believers. As Marci Hamilton puts the point, "[L]egislators need to be reminded that they are not in their positions of power to roll over for religious organizations that demand rights to do whatever their beliefs dictate. It is never enough for representatives to assert that they are furthering religious liberty. They must also always ask whether the conduct in question comports with the public good, and that means that they must examine with some care how the conduct impacts others" (Hamilton 2005, 77).

Curiously, however, this rather obvious implication of religious accommodation – the thin edge of the wedge of discrimination *for* religion affecting other citizens' liberties – received scant mention in the opinion of the *Hobby Lobby* majority. During oral arguments, in fact, Justice Anthony Kennedy appeared puzzled by the Obama Administration's argument that providing female employees with access to contraception via employer-sponsored health plans amounted to a "compelling state interest." Noting that the Administration had already exempted houses of worship and religious nonprofit organizations from the mandate, Kennedy concluded: "It must have been because the health care coverage was not that important."[9] And indeed, one can detect in the larger public debate over the contraception mandate a troubling indifference to the wellbeing of citizens who are negatively impacted when self-proclaimed religious entities, including corporations, are exempted from neutral and generally applicable laws.[10] During the drafting stage of the ACA, it was

[7] Reynolds v. United States, 98 U.S. 145 (1878); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[8] Both Galston (2005) and Gamwell (2002) would have difficulties addressing the issue of how to protect a citizen's rights when the moral foundations for their exercise are regarded as dubious by the majority – religious or other – in a given community. Galston's communitarian leanings incline him to selectively prioritize religious authority over political authority, while Gamwell is committed to the proposition that democracy must ultimately serve a divine purpose. Both positions invite speculation as to government's obligation to serve religion.

[9] Transcript of Oral Argument at 71, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. _____ (2014).

[10] As we see it, at issue in *Burwell* was not the degree of importance of contraceptives to persons who need them, mainly women and often for medical reasons, but the basis for the deference offered to explicitly faith-based objections to this provision of the ACA, and whether the contraceptive mandate could nonetheless be offered in some other way using the least restrictive means so as not to burden those with religious objections to it. The fact that the government presently has other proven means at its disposal to provide access to FDA-approved contraceptives cost-free to women who need them does not subdue our concerns, however, because the trigger for alternative

widely *assumed* that houses of worship would receive an automatic exemption from the contraception coverage requirement; and indeed they did. Religiously affiliated nonprofit entities – such as Catholic universities and hospitals – were originally covered by the mandate, but the Obama Administration, in response to intense opposition from Catholic leaders and conservative evangelicals, opted for the accommodation that prompted Justice Kennedy's remark, quoted above. Under the new policy, colleges, hospitals, and other religious nonprofits would be permitted to "self-certify" that they oppose coverage for contraceptive services, in which case the insurer or some third party would have to step in and directly provide them. Many religious opponents of the contraception mandate remained unsatisfied by the scope of this accommodation, however. Asking a religious group to complete and submit a one-page form to its insurer certifying its opposition to the mandate, they argue, will set in motion a process whereby contraception will indeed be provided to employees who request it, thus making the religious employer complicit in the sins of his employees. In a brief decision handed down a few days after *Hobby Lobby*, a majority of the Court granted Wheaton College, an evangelical institution, a temporary exemption from the self-certification requirement – a move many have interpreted as signaling the Court's receptiveness to this line of argument.[11] One can only speculate as to whether or when the requirement to have the insurance provider indicate an alternative provision of contraceptive services will itself be viewed as an objectionable infringement of religious liberty.

The important point to note here is what might be labeled the *presumption of deference* – that is, the assumption that religious objections to the contraception mandate are both sincere and worthy of accommodation. From the perspective of equal citizenship, the problem with the presumption of deference is that it tends to erase the rights of third parties from the equation, thereby facilitating their subordination to the rights of self-proclaimed believers. Note that most of the classic examples of religious accommodations – e.g., permitting orthodox Jewish service members to wear yarmulkes, exempting Amish children from compulsory schooling laws, exempting ministerial staffing decisions from antidiscrimination laws – are relatively uncontroversial precisely because they do not impose significant burdens on third parties.[12] Religious accommodation becomes more difficult to

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means of provision is that which we dispute – religion. One might also follow Justice Ginsburg, who authored a scathing dissent in *Burwell*, in noting that any alternative provision is not really cost-free; or one might re-frame the entire issue as motivated by economic concerns – on Hobby Lobby's part, to avoid the estimated $475 million penalty had it decided not to offer contraception and not to pursue the case in court.

[11] Wheaton College v. Burwell, 573 U.S. ___ (2014).

[12] To be sure, a Rastafarian soldier may object that such policy exemptions prioritize "religious" forms of belief over equally sincere, but secular, forms of moral conviction. This is an important point, but it leads to a much broader debate about whether religious accommodation is ever morally required within the liberal framework – a debate that we lack the space to take up in this paper. For present purposes, the important point is that, although the yarmulke accommodation grants one class of citizens a privilege not granted to others, it does not grant the Jewish soldier authority over his fellow service members, or suggest that the U.S. military operates with a religious vision.

justify as the burdens shifted to third parties become more significant. For example, few would claim that religious citizens who object to engaging in combat on Saturdays (or Sundays) should be permitted to enlist in the military. And even if we are prepared to exempt a Southern Baptist congregation from antidiscrimination laws so that it may honor the denomination's belief that women should not serve in positions of leadership, we are not likely to endorse a Southern Baptist's right to demand a change of personnel upon discovering that the commercial airline flight he is about to board is to be piloted by a woman. In this last case, our imaginary Southern Baptist would be right to point out that citizens who cannot travel freely for fear of violating God's commands will be unable to participate fully in the "the political, civic, and economic life or our larger community." But the example demonstrates that there is a point at which the liberal theorist must say, in effect: So what? Under no circumstances, that is, can the liberal conception of citizenship authorize the believer to *commandeer* third parties – the pilot, the airline, fellow passengers – in the service of his or her own religious convictions. While the immediate response to this contrived example is likely to be skepticism at the religious weight of the matter (here, women pilots), such skepticism rarely enters into play in actual court cases where a claim of violation of religious belief is being advanced.

The Green family will of course object that the case of the contraception mandate differs in one important respect from the case of the traveling Baptist. The objection would run something like this: "We are not attempting to commandeer our fellow citizens. Rather, it is the government that is attempting to commandeer *us*. Stated differently, we are unlike the traveling Baptists in that we are simply asking to be left alone. Although we believe that some forms of contraception are tantamount to murder, we fully recognize the right of our fellow citizens, including our employees, to disagree with this conviction. All we ask is that the state not make us the agents of evil by forcing us to finance practices we regard as sinful."

This is a fair point, but only if one ignores the authority relation at the heart of the *Hobby Lobby* litigation – that is, the relationship between employer and employee. To be sure, during the late nineteenth and early twentieth centuries, American courts were often sympathetic to claims that minimum wage laws and other workplace regulations deprived employers of liberty and property without due process (though claims of corporate religious liberty were unheard of in this period). But for the better part of a century now, the United States, like most Western democracies, has subjected large employers to numerous forms of oversight – from antidiscrimination laws, to workplace safety regulations, to unemployment insurance programs – on the grounds that workers who are deprived of an equal opportunity to earn or who are forced to labor under unusually dangerous conditions cannot be full participants in the life of the community.[13] There is, of course, considerable room for debate about the *extent* of the economic burdens that may be justifiably imposed on employers in the name of protecting the dignity and independence of workers. But until quite recently – and with the sole exception, mentioned above, of

[13] See, e.g., Shklar (1991), Chap. 2.

"ministerial" employment decisions – the Supreme Court was of the view that the economic "rules of the game" must be applied to all employers on equal terms.

As the Court explained in the early 1980s, in a case involving an Amish employer who objected to the payment of Social Security taxes, religious liberty must give way to the law of workplace relations whenever "followers of a particular sect enter into commercial activity as a matter of choice." Any other course of action, the Court declared, would have the effect of "impos[ing] the employer's religious faith on the employees."[14] The *Hobby Lobby* majority relegated the Social Security decision to a footnote, which in turn dismissed the earlier decision as irrelevant, on the grounds that it predated the enactment of the RFRA (the law invoked by the Greens in their suit against the Obama administration). But, viewed from the perspective of liberal theory, it seems clear that the intuition at the heart of the earlier decision was correct: so long as employers stand in a position of authority vis-à-vis their employees, one cannot prioritize free exercise claims above the law of the workplace without simultaneously demeaning the social standing of workers.[15]

The most basic problem with the presumption of deference, then, is that it violates the principle of equal citizenship that lies at the heart of the liberal constitutional project. There is, however, a second problem that is arguably more troubling than the first: the authority exercised by religious believers over their fellow citizens is often *arbitrary* in nature. The arbitrary nature of religious authority stems from three distinct but related features of the presumption of deference, as it is currently practiced in the United States.

First, so long as judges and lawmakers in religious exemption cases treat religious belief as a "black box" – that is, so long as they refuse to inquire into the sincerity or centrality of the religious tenet in question – there is nothing to prevent religious individuals or corporations from altering their beliefs (or inventing new ones) as a way of camouflaging purely secular interests (e.g., desire for higher profits or less regulation). This means that even if an employee is informed of – and agrees to be bound by – her employer's religious beliefs at the time of hiring, there can be no guarantee that the employer will not invent new "beliefs" in response to changes in the political or regulatory environment or convert to another religion with different views that may be deemed impactful on the workplace.[16]

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[14] U.S. v. Lee, 455 U.S. 252 (1982), 261.

[15] It should be noted that in the U.S. laws governing the workplace have long contained exceptions for small businesses. Even the ACA employer mandate applies only to businesses with at least 50 employees. For reasons of space, we cannot take up the philosophical basis of such exemptions here, except to note that they appear to reflect the commonsense idea that larger business enterprises wield greater influence over the lives of citizens, and may therefore be justifiably subjected to a greater degree state oversight.

[16] The potential problems arising from arbitrary and shifting "beliefs" has led noted law Professor Brian Leiter to ask whether there may be "special reasons *not* to tolerate religion?" (Leiter 2013, 59, emphasis original). Although the Obama administration did not question the sincerity of the Green family's religious objections to the contraception mandate, some critics have seen the family's investments in companies that manufacture contraceptives as evidence that the ACA litigation

Second, so long as judges and lawmakers refuse to examine the empirical validity of purported infringements of religious liberty, it will be impossible for employees to anticipate the real-world effects of their employers' beliefs – even when those beliefs are well known and sincerely held. The Green family, for example, is religiously opposed to forms of contraception that it regards as abortifacients – that is, as preventing the implantation of a fertilized egg. But most of the forms of contraception the Green family labels "abortifacients" are not regarded as such by the medical community.[17] Moreover, as new forms of contraception are invented, there is no way of predicting with any degree of certainty how the Green family will categorize them, since their beliefs about the physiological effects of particular drugs are not subject to empirical verification; as Justice Alito declared in his opinion for the *Hobby Lobby* majority, "it is not for us to say that their religious beliefs are mistaken or insubstantial."[18] Viewed from one angle, the Court's reluctance to engage in detailed scientific and theological speculations concerning the workings of various modes of contraception is certainly understandable. Judges may lack the requisite expertise for such inquiries, and we should in any case be wary of authorizing courts to issue definitive interpretations of religious doctrine. But here again, the important point to note is that the end result of the presumption of deference is to subject the employee to a form of authority that is essentially *arbitrary*. We might add that the employee may not be up to the task of evaluating her employers' beliefs, or if in real need of a job not in a position to determine whether the anti-discrimination laws she relies on for protection will operate in any given workplace, owing to the religious beliefs of its owner. This burdens the prospective employee, who may erroneously believe that certain forms of workplace discrimination, including discrimination in benefits, are not contingent upon her employer's religious outlook.

Finally, there remains the thorny problem of defining "religion."[19] In the American context, it is generally accepted that the First Amendment and the RFRA do not protect all ethical convictions, but only those that derive from or function similarly to religion. American judges, however, have been understandably reluctant to put forward a clear definition of "religion." In the 1960s, Justice Potter Stewart was widely ridiculed for his definition of pornography: "I know it when I see it."[20] Legal commentators were understandably bothered by Stewart's approach, which suggested that the boundary between permitted and proscribed forms of speech was essentially arbitrary, a matter of sociological, not legal apperception – or at least that the justices need not articulate clear standards when deciding such

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may have been motivated by political or economic, rather than purely religious, considerations. See Long (2014).

[17] See fn. 3, above.

[18] 573 U.S. _____ (2014).

[19] See, e.g., Freeman (1983, 1557–1559). In this seminal article, Freeman argues that "there is no single feature or set of features that constitute the essence of religion" and urges us to be sensitive to the problems of vagueness and vacuity with respect to religious concepts.

[20] Justice Potter Stewart coined the phrase "I know it when I see it" in the obscenity case *Jacobellis v. Ohio* 378 U.S. 184 (1964).

cases. But the same can be said for the courts' treatment of religion. The reluctance to define the term, coupled with the refusal to inquire into the sincerity and centrality of particular beliefs, means that the courts' judgments about which citizens are eligible to exercise arbitrary authority in the name of religion are themselves imbued with a sense of arbitrariness.

In the next section, we point out that Americans have at times refused to accommodate the free exercise claims of religious employers, and for the reasons discussed above. More specifically, we note that religious employers who have claimed a religion-based right to engage in racial discrimination have met with little success. And indeed, in cases involving race discrimination, both judges and average citizens seem to understand intuitively that carving religious exemptions from generally applicable laws has the effect of subordinating one group of citizens to another. This observation, of course, begs the question: Why are Americans willing to endorse this type of subordination in cases involving gender and sexual orientation, but not in cases involving race?

7.3 The "Shadow Establishment" and the Analogy to Racial Discrimination

In his opinion for the *Hobby Lobby* majority, Justice Alito pointedly rejected the dissenters' claim that a ruling in favor of the Green family would have the effect of exempting religious employers – or those who claim to be religious – from laws prohibiting racial discrimination in the workplace. The "critical goal" of "providing an equal opportunity to participate in the workforce without regard to race" was sufficiently "compelling," Alito wrote, as to outweigh almost any conceivable religious objection. That antidiscrimination measures impose significant burdens on religious employers was no doubt true; but it was also irrelevant, since the laws in question were "precisely tailored" to achieve a "compelling" government interest.

Alito's comments are reflective of a broader societal norm. In the case of discrimination based on race, it is generally *assumed* that religion and the religious understandings of believers can secure no accommodation, and citizens who may feel that they should be able to discriminate in employment due to their sincerely held religious convictions are not accorded priority over their fellow citizens who feel that not even religious belief can trump the law when it comes to discrimination based in race. Hence, various anti-discrimination laws have been enacted and found constitutional – laws that, over time, have affected the demeanor of American society such that one may say that certain forms of discrimination are currently regarded as categorically wrong, and this is properly reflected in the law. For these forms of discrimination, *no valid justification is deemed legally permissible or even thought to exist*. Hence, should a shopkeeper claim a religious right to refuse service (or employment) to African-Americans for reason of their race, the case would get nowhere, despite the First Amendment's guarantee of freedom of religious

expression.[21] And it would be unexpected, to say the least, for lawmakers even to attempt to craft an anti-discrimination statute so as to permit religious believers to discriminate on the basis of race.

Strangely, however, the norm that workers should be judged solely by the quality of their work seems to carry less force when the discrimination in question is based on gender, and less still when it is based on sexual orientation. Justice Alito's opinion, for all its careful attention to race, was curiously silent on the question of whether believers may claim a constitutional or statutory right to discriminate on the basis of gender or sexual orientation. And because the goal of preventing these forms of discrimination is, under current constitutional doctrine, viewed as less "compelling" than the goal of preventing racial discrimination, many commentators have speculated that the justices will ultimately endorse the right of religious employers to discriminate in favor of male and heterosexual citizens (Russell 2014). Similarly, where federal laws barring discrimination on the basis of race enjoy widespread support among lawmakers of both parties, the Employment Non-Discrimination Act (ENDA), which would bar discrimination in hiring and employment on the basis of sexual orientation, has languished in Congress since it was first sponsored as the Equality Act of 1974, about 40 years ago.[22] To be sure, some states have extended workplace antidiscrimination statutes to cover sexual orientation. But even here, it is common for these laws, *but not other* significant workplace anti-discrimination laws, to include a provision exempting certain religiously affiliated establishments and enterprises. Indeed, ENDA itself contains such provisions so as to make this first sexual orientation anti-discrimination law at the federal level palatable to Congress and the electorate, a provision that exceeds Title VII protections of religious institutions (i.e., these are extended to non-religious organizations) and also exceeds what is offered non-religious institutions with respect to race and gender (i.e., religious reasons do count for sexual orientation, but not for race and gender).[23]

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[21] See, for example, the Supreme Court's 1983 decision upholding the denial of tax-exempt status to a private religious university that prohibited interracial dating among its students. Bob Jones University v. United States (1983), 461 U.S. 574 (1983).

[22] The Equality Act of 1974 sought to ban discrimination against unmarried persons and also women alongside gay and lesbian individuals in employment, housing, and public accommodations. It would stretch credulity, however, to suppose that the Act failed to get out of committee owing to the presence of these other groups. Since 1974 the Act has been revised and re-introduced many times with its focus narrowed to sexual orientation, which has not managed to win it majority support in any session of Congress so far. To date, only President Obama's recently signed executive orders have extended federal benefits for gay couples, though while providing exemptions for religious nonprofit groups (Lederman 2014), or prohibited employment discrimination on the basis of sexual orientation nationwide in the federal government and also in organizations that the federal government has contracts with, but without such exemptions (Bendery 2014; Lee and Meckler 2014; Pickler 2014). The latter Executive Order "affects 24,000 companies employing roughly 28 million workers, or about one-fifth of the nation's workforce" (Bendery 2014).

[23] We should note here that these sorts of exemptions are very different from the Title VII exemption which "gives religious organizations, and only religious organizations, complete freedom to discriminate on the basis of religion, whether they do so from good motives or ill" (Eisgruber and

Thus, in the case of American citizens who happen to be gay or lesbian, or otherwise in a sexual minority, it is still deemed acceptable and also legal to discriminate against these citizens in non-religious enterprises – their "being gay is still a firing offense" (Pickler 2014).[24] Here, it is not sufficiently considered outrageous for an ordinary commercial employer to offer a religiously grounded argument as to why, say, a gay person is ineligible for promotion, or may be terminated. Indeed, in those jurisdictions that have extended protection in the workplace to cover sexual orientation, *this is precisely the rationale someone would reach for in order to justify discrimination against a member of a sexual minority*. All of which begs the question: Why is the presumption *against* religiously sanctioned race discrimination in the workplace not extended to discrimination based upon sexual orientation? Indeed, why is it that in matters touching upon sex and gender the presumption is *reversed*, with religious belief generally trumping the rights of citizens who happen to be gay, lesbian or female?[25]

We can begin by dismissing a seemingly plausible, but ultimately unsatisfactory, response. It will not do to say that matters of gender and sexuality are somehow more central to the life of religious communities than are matters of race (with the implication that the former type of antidiscrimination measures are more burdensome of religious practice than the latter). This has not been the case historically, as anyone familiar with the history of Southern American Protestantism will know. In the antebellum period, white Southern theologians developed elaborate Biblical defenses of slavery, which were endorsed by all of the major (white) Southern denominations (Noll 2006; Stout 2006). And Biblical defenses of segregation – purged of their former association with slavery – played a significant role in the campaign of "massive resistance" that greeted the *Brown v. Board of Education* decision and subsequent federal civil rights legislation.

Federal civil rights laws, in short, were imposed on reluctant Southern whites with little or no regard for religious belief, even in cases where racist beliefs were assumed to be both sincere and central to the religious self-understandings of particular churches. In the well-known case of *Bob Jones University v. U.S.* (1983), mentioned earlier, the Supreme Court upheld the IRS's decision to deny tax-exempt

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Sager 2007, 251). Religious organizations have exclusive permission to discriminate on the basis of religion because "[i]t makes perfectly good sense for the Catholic church to insist that its priests be Catholic, but there is no comparable reason for, say, McDonalds to scrutinize the religious beliefs of its short-order cooks" (*Ibid*., 249). If viewed through the standard lens of Title VII exemptions, an Evangelical church, but not a chain of arts and crafts stores, may engage in workplace discrimination *for* religion and against non-Evangelicals, albeit then only with respect to church affairs.

[24] Twenty-one states have statutes against workplace discrimination based in sexual orientation, 18 of which also protect against gender identity discrimination to protect transgendered people, among others.

[25] Corbin (2012, 962) notes that "[c]ourts have held that antidiscrimination laws trump religious views" as part of her argument that neutral laws of general applicability, such as the Americans with Disabilities Act, do not violate the Free Exercise Clause and are not to be blithely dismissed as happened in the *Hosanna-Tabor* case, where a suspect ministerial exception was found controlling.

status to an evangelical college that barred interracial dating on its campus. The key point of contrast with cases involving sexual orientation and gender is the Court's virtual indifference to the extent of the burden imposed on Bob Jones University by the IRS's ruling. In the words of Chief Justice Burger, who authored the majority opinion, the government's "fundamental, overriding interest in eradicating racial discrimination in education…substantially outweighs *whatever burden* denial of tax benefits places on [the University's] exercise of their religious beliefs." "The interests asserted" by the university, Burger concluded, simply "[could] not be accommodated" without sacrificing the government's "compelling interest" in promoting the equal standing of its citizens.[26] We would argue that surely American citizens who happen to be in a sexual minority are also equal citizens, or at least ought to be regarded as such in the law.

We suspect that there is neither principled reason nor philosophical justification for the differential treatment accorded race and sexual orientation. That is to say, it almost certainly does *not* result from any sort of objective balancing of the harms occasioned by different forms of discrimination, on the one hand, and those resulting from restrictions on religious exercise, on the other. Rather, where court decisions and popular judgments may sometimes *appear* to be based this type of judgment, it is far more likely that they are in fact based on little more than deeply rooted societal prejudices – prejudices whose roots can be traced, in most cases, to majority religious sentiment. What is really doing the analytical "work" – if one can call it that – in the cases involving sex and gender is the fact that traditional, religiously-derived sexual mores are thoroughly ensconced in our purportedly liberal constitutional framework, and reflected in the value judgments of justices and lawmakers – a phenomenon one of us labeled the *shadow establishment*.[27] The harm is the same as in race: to draw a line through the American citizenry, which cannot be redeemed by treating equally whatever groups of U.S. citizens the line divides because of the unavoidable imputation of inferiority that must be ascribed to the one side with respect to the other, marking the one group in the law and so justifying its distinctive, worse treatment in the "political, civic, and economic life of our larger community," to recall Justice Kennedy's words in the *Hobby Lobby* decision.

The end result of this differential treatment is that one group of American citizens – religious believers – stands in a different relation to law-and policy-making and to laws of general applicability than does another group of American citizens, even as all citizens, individually, are formally equal in their standing. This citizenship differential manifests itself not just with respect to arguably hot-button issues such as contraception, but also with respect to far more mundane issues, closer to home, such as holding down a job and being treated fairly by one's employer. Shklar reminds us that "citizenship is not a notion that can be discussed intelligibly in a static and empty social space" and that "[m]odern citizenship is not confined to political activities and concerns." In modern society, it is often "in the marketplace, in production and commerce, in the world of work in all its forms, and in voluntary

[26] 461 U.S. 574 at 604.

[27] See Babst (2002).

associations that the…citizen finds his social place, his standing, the approbation of his fellows, and possibly some of his self-respect" (Shklar (1991, 9, 63). We follow Shklar's lead in noting the public aspects of many of these everyday features of contemporary life, features that are subject to legal definition in the light of our core political values and ideals, including equal citizenship.

7.4 Conclusion

The worst of all worlds will obtain if the reasoning of the *Hobby Lobby* majority is extended to cover the modern workplace so that Americans who happen to be gay or lesbian, or otherwise in a sexual minority, may lose their ability to earn an income or advance in their career based on merit, should their employer deploy religiously-grounded arguments against them to justify treating them differently – by which we mean, of course, worse. Simply put, it ought not be an effect of religious freedom that those citizens whose religious beliefs incline them toward an unfavorable view of one or another group of their fellow American citizens are entitled to perpetuate social hierarchies and forms of discrimination that the broader community has condemned as unlawful.

We would argue that if there is a way out of the quagmire we find, it is to hold it for wrong to discriminate *simpliciter* and, starting from this baseline position, assess the quality of the reasons proffered for any deviations, de-privileging religious belief as in any way deserving of special deference when the state is presented with claims of discrimination against any of its citizens outside of religious institutions, properly understood (e.g., an Evangelical church, not a chain of arts and crafts stores). To ask whether it is legitimately within the power of the State to esteem religion above any other sort of deeply and sincerely held ethical conviction, and also to interrogate the quality of the reasons offered to rebut that baseline position in any particular case, we believe, would go a long way towards realizing the discrimination-free society reflected in the principle of equal citizenship to which many Americans would aspire. When we see religion-based race discrimination, and so too religion-based discrimination against American citizens who happen to be gay or lesbian or otherwise in a sexual minority, as just that, discrimination, then we will ascertain the proper scope of due deference.

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Chapter 8
Who Else Should Vote in Local Decision-Making? Enfranchising Part Time Residents and Non-citizens

John G. Francis

Abstract This paper argues for an expansion of the suffrage in American local governmental elections significantly beyond what is currently permitted in most local elections in the United States. Two recommendations are proposed: (1) Allowing non-citizen residents to vote in local governmental jurisdictions. (2) Allowing individuals who demonstrably live in two local areal jurisdictions to claim dual residency with local voting rights in both districts. The paper defends these two recommendations by calling attention to the global change in our understanding of citizenship and residency and the implications of these changes to the exercise of the franchise. These changes include the rise of dual citizenship. Citizenship in one state is no longer preclusive of citizenship in another state. A second change is the importance assigned to a single declared and recognized residency within many countries including the United States. A third change is the shifting understanding of the relationship between citizenship and residency and the implications for how we should think about voting rights at home and abroad.

8.1 Introduction

This paper argues for an expansion of the suffrage in American local governmental elections significantly beyond what is currently permitted in most local elections in the United States. If adopted, the two recommendations for widening the opportunities for electoral participation discussed below would in some local governmental

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jurisdictions increase the number of qualified voters significantly. In some places, the increase may be larger than the adult population currently eligible to vote. The recommendations are as follows:

1. Allowing non-citizen residents to vote in local governmental jurisdictions.
2. Allowing individuals who demonstrably live in two local areal jurisdictions to claim dual residency with local voting rights in both districts.

The paper defends these recommendations by examining changing expectations in our understanding for citizenship and residency and their implications for electoral regimes. A major change in our understanding of citizenship as explored in this paper is the rise of dual citizenship. Citizenship is no longer widely understood as a singular exclusive relationship to one state at a time. A second major factor is the importance of a single declared and recognized residency within a number of countries, notably the United States. A third important factor is the changing relationship between citizenship and residency and the implications for how we should think about voting rights at home and abroad.

This paper will first discuss, in Sect. 8.2.1, selected questions in the relationship between voting and representation. Next, Sect. 8.2.2 will survey changing expectations for citizenship. Sections 8.3 and 8.4 review the constraining role of singular residency. Finally, Sect. 8.5 will present proposals for selected expansion of access to the franchise.

8.2 Citizenship, Residency, and Expectations for Voting

Across the globe today, many people can vote in two sovereign countries by partially residing in each (Faist and Gerdes 2008). In addition, a number of countries permit dual voters to reside in one country but hold voting rights in another country as well. In contrast, people holding citizenship within one country are confined to vote in one jurisdiction alone within that country—that is, the jurisdiction that has accorded them residential status. This paper argues that the narrow focus on claiming a single residency raises problems about the reality of American mobility and meaning of preclusive residency rules. At the same time, it ignores the implications of citizenship across national borders that raise appealing opportunities to address electoral participation across internal borders.

Voting matters in the United States as it does in other established democracies. Electoral outcomes are determinative of political leadership and are influential on public policy making. An obvious measure of the importance of the franchise is the long and often-contentious history of extending the suffrage to denied populations. Inclusion was not a descriptor of nineteenth century electorates on both sides of the Atlantic. The British Reform Act of 1832 that set the course for future expansions of the suffrage only increased the electorate from about 9 % to 18 % of the male population (British Library 2015). The majority of people were not allowed to vote until the twentieth century. A decision to exclude was justified on the various

grounds of unsuitability for civic participation that are discussed below. The importance of elections has meant recurring political contestation over two related yet distinct questions: ballot access and the expectations for representation.

8.2.1 Ballot Access

The range of groups denied the suffrage historically varied by the country in question. Many countries shared a similar commitment to massive exclusion of people who did not meet a property qualification, an identified educational standard, the proper sex, or some other qualification. In the United States there were steady demands for inclusion and for equal treatment for groups such as American Indians who were here before the formation of the union and African-Americans who were present at the creation and partially counted for representation but were not allowed to vote. The extension of the franchise to women was an affirmation of a majoritarian principle, since for the first time a majority of the defined adult population could now vote. In addition to African-Americans, people of Asian descent and Mexican descent frequently were excluded from exercising the franchise. Both federal and state interventions were required to enable people of color to vote (Keyssar 2009). Various groups of people with disabilities were excluded from the franchise either by law or by practical barriers to access; some of these barriers persist. And the denial of voting rights to convicted felons remains a source of ongoing controversy.

In contrast to the experience of most people of color with long histories of living in the United States or of immigrants arriving from non-European countries, immigrants from various parts of Europe were recruited to vote, often immediately upon their arrival. Over the course of the nineteenth and twentieth century, such immigrant groups were sometimes recruited by political parties to vote without necessarily holding citizenship; in fact, they were promised citizenship if they voted for the party that recruited them into the voting booth. Moreover, immigrants themselves often sought out the vote as recognition of acceptance into American society (Hayduk 2006).

The debate over access to the suffrage has long been framed as fulfilling the promise of equality associated with American citizenship. Over the course of the eighteenth, nineteenth, and twentieth centuries, the claim was gradually accepted that to be an adult citizen (albeit not imprisoned or with intellectual disabilities or mental illness) was to be allowed to vote. The debate over representation in the United States has been a debate over inclusion—whether to extend the suffrage to more and more of the population living in the United States. Over time the relationship was established between access to the voting booth and possessing American citizenship (Raskin 1993). Equality came to be understood as one person, one vote. It became a defining measure of the drive to achieve democratic representation in American politics from the post-Civil War constitutional amendments, through the Civil Rights movement of the 1960s, the Voting Rights Act, the Help America Vote

Act, and of course the present day controversies over voter I.D. laws and laws denying the franchise to individuals convicted of crimes (Wang 2012).

The doctrine of one person, one vote was accepted in emerging European democracies as well. But another important theme in European debates over electoral reform has concerned institutional rules for representation. European debate over how the institutional rules that govern electoral systems shape the representation of small parties in parliament and permit shared exercise of power became a more explicit concern in many European states than in the United States. In Europe there has been far more serious discussion and for far longer than in the United States over whether or not their particular state should adopt proportional representation and, if so, what sort of proportional representational system should be adopted in order to improve the chances of minority parties gaining parliamentary representation (Leemann 2014). Would, for example the adoption of a proportional representation system promote the risk of too many small parties having representation in the legislature, as a consequence making it difficult to form an effective government?

In the United States, electoral reform debates are not held on the merits of proportional representation versus the efficiency of a winner take all system in political representation. The absence of any sort of national debate over other ways to explore representation for a complex and diverse society has meant that the debate has concentrated on the inclusion of minority electoral participation as in the Voting Rights Act. This highly focused understanding of representation has a good deal of merit, of course, in a country where electoral exclusion of much of the population was the reality for much of its history. But it should not be understood as the only value that should guide access to the franchise.

The debate over expanding access to the ballot box has been framed as the acceptance of the commitment to equal treatment judged to be integral to American citizenship. Equality of access to voting has relied on a narrowly conceived understanding of political equality as core to what is meant by American citizenship. Largely not addressed is representation for a fluid population made up of citizens who are partial residents of more than one community and non-citizens who are either part time residents or full time residents and in both cases are without institutional recourse to capture the attention of local policy makers—policy makers who play an ongoing role in shaping the course of their daily lives. This paper seeks, in part, to argue that our understanding of citizenship is changing both domestically and multi-nationally, and we should take the lesson of this changing understanding of citizenship to offer a model to reconsider who should be able to vote locally. But first a brief discussion is needed about citizenship and voting expectations.

8.2.2 Citizenship and Voting Expectations

This section draws attention to the changing expectations that long standing debates over citizenship have had for voting in democracies: that is, who should be allowed to vote and which justifications are persuasive in widening or restricting electoral participation.

Citizenship and voting are interconnected in the U.S. today. As discussed in the last section, this comes as no surprise, but it is important to recognize that at various times the two have not been connected at all or have been connected in institutionally unconventional ways. In some time periods and in some areas within the United States, as well as of course in many other nations, the possession of citizenship and the permission to vote are entirely independent of one another. In other cases the grant of access to the ballot box may precede the award of citizenship.

Traditionally, residency is regarded as a necessary condition for a new arrival to a nation to obtain citizenship. But it is not at all uncommon for people who have never lived in a certain country and are unlikely to ever do so to have voting rights and/or citizenship in that country. In addition, in the nineteenth and early twentieth century, citizenship was often not an explicit requirement for the act of voting. The United States experienced successive waves of immigrants, and party competition for these new voters was intense. Such competition may have contributed to recruiting local residents to vote regardless of how they had arrived. By the early decades of the twentieth century, however, citizenship had become a necessary condition for voting in American elections. A further great change in our understanding of citizenship is that we no longer see holding citizenship as exclusively confined to one nation only, for many people possess citizenship in more than one country.

Three contributions of the debates over expectations for citizenship that have largely shaped the debates over how we think about fairness in voting are discussed below: egalitarianism, human rights protection in the exercise of the suffrage, and the responsibilities of citizenship.

A lasting expectation for citizenship that arose from the late eighteenth century revolutions on both sides of the Atlantic is that citizenship is the formal recognition that all citizens are to be treated equally regardless of their social and/or economic position in their society (Heater 1999). Citizens, regardless of their respective social and economic condition, enjoy equal access to participation in state institutions. The Rights of Man adopted during the course of the French Revolution stressed that equality in political participation was open to all citizens. “Each citizen has an equal right to participate in the formation of the law and in the selection of his mandatories or his agents” (Hunt 1996).

The application of this egalitarian understanding of citizenship in making sure each voter is the equal of every other voter was achieved in large part with the abolition of qualifications based on property, prior condition of servitude, or gender and by lowering the voting age. In the United States, as in a number of other federal systems, the egalitarian principle was not applied to the upper house where states were given equal representation despite variations in state populations. The

egalitarian principle for the lower house, the House of Representatives, is apparent in the commitment to legislative reapportionment in the attempt to distribute the registered population equally among the set of legislative districts. It should be pointed out that in federal systems, particularly the American federal system with elected upper houses where state boundaries enjoy constitutional protection, the egalitarian principle in representation is not met, given that shifting populations do not result in the adjustment of state boundaries. This constitutional understanding of two forms of representation—one based on population, the House, and the other, the Senate, designed to represent the states—does suggest an openness to different expressions of egalitarian representation. The question that these federal arrangements call to our attention is part of a larger discussion about institutional arrangements: that is, not only to make sure that everyone gets to vote but also to assess the effectiveness of that vote for all the people who live in our nation. What should be explicitly explored is how we distribute public policy and regulatory decision-making particularly at local levels and the seeming institutional disinterest in adjusting access to the franchise. One important element in this exploration is the significance of the franchise for the many people whose lives cross domestic borders and for the many others who are recognized as residents but are denied electoral access to the local elected officials who shape their lives on a local daily basis.

The understanding of equality as inclusion, as will be argued later, often generates confusion for voters who move. This very act of movement seems to challenge the prevailing understanding of electoral equality of one person, one vote, given the importance assigned to residency as a necessary condition for voter registration. The question of how best to represent people who move is often obscured by the preoccupying commitment to identifying a single residency for the enrolled voter.

The second and related expectation of our understanding of voting that is closely associated with citizenship draws from the contribution of classical liberalism that defined the limits to state power and the corresponding importance of defining and protecting individual rights afforded the citizenry. The burden is on the state to guarantee access for citizens seeking office, electoral participation, and other related rights that make the act of voting meaningful. The protection of citizens' right to vote, to gather information, and to express views all are part of a bundle of rights that are conventionally understood as critical to electoral participation. This approach to citizenship concentrates on political rights and not social rights as a foundation for voting. Over time the expectation in the United States is that citizens determine the extent to which they should prepare themselves to vote, but it is the obligation of the state to protect the citizenry in the exercise of their franchise.

The third strand in the understanding of citizenship focuses on the relationship between citizenship and civic obligation. Voting is one of a set of responsibilities that make up civic engagement. The engaged citizen is critical to the political and social wellbeing of the republic; if citizens exercise their respective responsibilities in a thoughtful, informed, and sustained way, then the quality of democracy is substantively improved. The state is expected to facilitate the exercise of the citizens' responsibilities, but the exercise of responsibility rests with the citizenry. Jason Brennan has argued that a citizen who does not prepare for voting through gathering

information and thoughtful discussion has not done her or his duty, and therefore should not cast a ballot (Brennan 2011). The emphasis on citizen responsibility places the burden on the citizen not the state and brings back the problematic assumption accepted by political leaders during the pre-egalitarian era that only those people who were qualified by their background and social position were the people who should vote.

These contrasting expectations are often deployed in debates on the relationship between citizenship and voting rights found in the citizenship/electoral regimes discussed below. The understanding is that once people have citizenship they have the state's commitment to protect equal access to the voting booth albeit with qualifying rules. But as observed earlier this understanding of equality is a narrow one and certainly does not mean, for example, equal limits in the amount of money that each citizen can donate, let alone any thought of taking into account the many people with only modest resources who may not be able to give very much to a campaign. In contrast, the tradition of citizenship as virtue shifts a significant measure of responsibility from the state to its citizens. Later in the discussion of residency, we will see how and why residency and registration remain contested as to whether residency should constrain access to the voting booth.

In contemporary discussions of citizenship much is made of the expectation that people should vote. Campaigns to encourage voting are undertaken in various parts of the country. A number of such campaigns do work, and turnout does increase for a limited time.

Preparing for the act of voting in the U.S. is assumed to flow from the information acquired from the extended political campaigns. A working assumption is that the educational system has instructed citizens as to how American political institutions work. Individuals who acquire citizenship at a later age also are expected to learn about American institutions. Residents seeking naturalization are required to pass a modest test administered by the Federal Immigration and Naturalization Service for prospective citizens. A person seeking to become a citizen must correctly answer six questions on this test.

There is little prospect that American election officials would opt to increase the number of thoughtful voters at the expense of increasing turnout regardless of the quality of the voter produced. The bare commitment to inclusion is the prevailing norm. The equality principle with its emphasis on inclusion and increased turnout is the prevailing commitment, and adoption of an objective such as voter preparation that might depress turnout levels would be seen as an unacceptable trade off. The concern is enduring that the imposition of tests of citizenship knowledge and the workings of American democracy should not be deployed to keep people from voting and should be kept to a minimum for naturalized citizens. This concern rests on the history of past efforts, notably in the South during the Jim Crow era, to restrict black voting through a range of devices such as passing a required civics test. In short, anything that smacks of state assisted voter preparation that may suppress turnout is viewed skeptically.

8.3 Residency

Residency is a necessary condition for American voter registration (NASS 2008). The centrality of the identification of a single residential address in order to be registered to vote and the implications for political representation for people who move, and particularly people who move back and forth, is a comparatively unexamined topic, however. Reliance on residency matters as an anchor both to insure one person one vote and perhaps as an affirmation of a spatial model of representation. Locating a citizen within geographically defined space is consistent with the importance we assign to where you live as some measure of political representation. Discussed below is a twist on the residency requirement such that, in a number of American states, when a citizen lives abroad, the residency of her or his parents may serve as the residency of the overseas voter.

Voter registration is still difficult for people without easy access to official documents that establish an address, however. This seems even more difficult for Americans when they move and seek to register in a new location. A declaration of residency may be confirmed in some American states by a range of items to verify a residential address, including a driver's license, a utilities bill, a state I.D. card, a passport, or a pay stub. But even with that caveat of the difficulty in verifying a home address or securing a driver's license for residential registration, we can only infer why the local residential connection matters.

States may require that a person who has moved to the state from another state live at a new address for up to 30 days before allowing them to vote. The majority of states require over 20 days. In contrast, other states allow for 1-day registration in order to vote.

It should be pointed out that residency rules governing services other than voting vary within states depending on what requirements the state has established for services it supplies. U.S. states demand much more in the way of evidence and time spent in the state in determining if an out of state student is eligible for in state tuition and even more detail to establish that a deceased former resident actually left the state for an established residence in another state so that his or her estate is no longer subject to the former state's inheritance taxes.

The Brennan Center has argued that the state variations in required proof needed to register to vote and the identification to actually vote stifle electoral participation. The Center has argued for the adoption of a new electronic registration system that would make registration portable and thus in their judgment would maintain similar levels of electoral participation for movers as is found among more stationary residents (Perez 2009).

8.4 Crossing National Borders and the Vote: The Interplay of Citizenship, Residency, and Representation

Whether a person gets to vote in an election in which he or she was not allowed to vote in the past depends on a number of different factors. It usually involves some combination of citizenship and residency or only one or none of the above. The politics that has driven who is to be given citizenship has often been separated from the politics that has driven the expansion or contraction of who is allowed to vote. There are many examples across the globe in which citizenship and residency function differently with respect to access to the franchise. To give one example, in the United Kingdom during the time of Britain's empire, to move to Britain was a means to vote if one were so inclined. It is still possible to do so today for some groups. Today there are larger numbers of citizens from Commonwealth countries who have neither British citizenship nor E.U. citizenship but are allowed to vote in British General Elections than there were in the past (Electoral Commission 2014). The contrast with the practices in U.S. domestic elections as described above should be apparent. There is, however, an intriguing example even for the U.S. Many immigrants to the U.S. are allowed to become American citizens without surrendering citizenship in their country, thus enabling U.S. citizens to vote in more than one country even though they reside in the U.S.[1]

In other states such as Italy and France, another approach has been adopted to apply to voting beyond the nation's borders. France gives seats by global region in the national legislature for French citizens living abroad. Italy has the same provisions for seats in the Italian Parliament (Roman 2014). The Italian overseas electorate includes descendants of the Italian emigrant diaspora.

Yet another way of extending the electorate to people living in other lands is to grant citizenship to people living in nearby lands who share a common language and/or a shared ethnicity. Hungary is one of several countries that have extended the offer of citizenship and voting rights to people who are regarded as kin but live in other nearby countries. Thus, these non-residential Hungarians may vote in the elections of two different countries (Thorpe 2013).

Over 122 nation states allow for dual citizenship, a number vastly increased from three decades ago. There are also some nations that do not necessarily allow for dual citizenship for some categories of people but do allow for dual voters. There are a number of ways in which the interplay of residency and citizenship across national boundaries generates opportunities for voting in more than one national state.

The acceptance of dual citizenship is now widespread around the planet. Many people holding dual citizenship may be permitted to participate in similar elections but in different sovereign nations. A study of 144 sovereign states found 115 of these states give the vote to their respective citizens who are permanent residents of other countries. It is true that 13 of the states granting the vote to citizens living elsewhere require the non-residential elector to return "home" to vote, but the rest

[1] Estimates range from 500,000 to 5.7 million U.S. dual citizens (Renshon 2009).

do not. Moreover, 12 of these states give the non-resident citizens seats in their respective national legislatures (Collyer and Vathi 2007).

There are several types of such arrangements. In one type, individuals who have emigrated from a sovereign state are allowed to retain citizenship of their land of origin even after they have acquired citizenship from their new homeland. Holding citizenship in two sovereign states may also enable them to have voting rights in both states. In a second arrangement, some states such as Italy and France may not only allow dual citizens living elsewhere to have voting rights but also provide representation in their respective national legislatures. Third, some countries, notably Italy, allow the descendants of emigrants voting rights even if they have never lived in that homeland or possessed citizenship in it. Fourth, a state may award citizenship and voting rights to individuals in another state on the grounds that the individuals in question have linguistic or ethnic ties to the state extending citizenship—possibly including people who have neither lived in the state making the offer nor had an ancestor(s) who lived in the state. A fifth model is extending citizenship and voting rights in other states to people by treaty. Such voting rights may not be grounded in emigration, descent, or a shared cultural background. Such is the case with the European Union that grants European citizenship to citizens holding national citizenships in the respective member states (The European Commission 2014).

The point of this enumeration is to emphasize two observations. The first is to draw attention to the willingness of policy makers to grant voting rights independently of citizenship. The second is the rise of dual citizenship that has resulted in a set of people having voting rights in more than one country. Both of these observations, this paper suggests, should enable us to consider the value of multiple voting rights for a mobile population within a country.

There are, however, useful illustrations of the point that residency does not always matter in voting in U.S. elections. The obvious illustration is serving with the armed forces abroad. But there is another illustration of being allowed to vote in U.S. elections without physically residing in the States. Today there are 31 American states where persons may claim to be resident of the district where their family once lived but they themselves do not reside and indeed have never resided (Federal Assistance Voting Program 2014).

In short, given the innovations found in voting, citizenship, and residency that link Americans to electoral participation while living in other countries, or that empower non-residents to vote in other nations, we should be open to exploring new ways to strengthen electoral inclusion within our own national borders.

The next section discusses the two recommendations presented at the outset. Crucial in this discussion is that if citizenship should matter in being allowed to vote it should matter more in federal and national elections, but the argument why citizenship matters seems much less persuasive at the local level. Stanley Renshon has argued that awarding voting to non-citizens could engender sharp disagreement within the nation and takes away an important and distinguishing component of what it is to be citizen (Renshon 2009). In reply, it is hard to continue to maintain

that in an age of mobility we should not partially address the question of inventing new institutional ways of building inclusion (Portes et al. 2008; Chung 1996).

8.5 Recommendations

This section defends the two recommendations presented at the outset:

1. Allowing non-citizen residents to vote in local governmental jurisdictions.
2. Allowing individuals who demonstrably live in two local areal jurisdictions to claim dual residency with local voting rights in both districts.

Joseph Carens in a discussion of what we owe immigrants argues that the longer someone lives in a place (their new country) the more they should have some say in the decisions that affect them (Carens 2010). Nearly 70 years ago, V.O. Key observed that no one pays attention to people if they do not have the vote (Key 1949). Both of these observations seem particularly applicable at the local governmental level where decisions are made that do not shape the nation's future but certainly can shape the course of daily life for the people who reside in local governmental districts. The making of local public policy has implications for resource distribution for other residents, both citizens and non-citizens alike. Yet the lack of local franchising in the U.S. seems particularly striking in contrast to the ease of voting in selected other counties with less of an apparent stake in what is taking place. It seems reasonable to argue that partial residents, at least those residents who regularly divide their time between two locations for a range of reasons, should be thought about in the same way as people who only reside in one place. Perhaps some of the same reasons that apply to voting for people who only reside in one place should also be seen to support part-year residents' ability to vote in both places of partial residence.

Why does the franchise matter? It may be the case from the perspective of some voters that they are not sure that their vote matters in electoral contests particularly if they are voters registered to vote in a safe district. But people who are not allowed to vote know that they are excluded from participation in the democratic institution formally designed to give people a voice in the selection of policy makers and the policies that will be adopted.

There are a number of reasons to extend the franchise to residential non-citizens in local elections. They are: first, the opportunity to vote is a recognition that their presence is politically included in the community in which they live and contribute. Second, office holders, as Carens suggests, are far more likely to pay attention to voters than to people denied the franchise. There is reason to believe that candidates for office are never entirely sure who will show up to vote in an upcoming election. Nor do they know for sure the size and membership of the coalition that will support or oppose them in that election. This sense of uncertainty seems to be reinforced by the American plurality electoral system that is occasionally sensitive to great changes arising from relatively small shifts in votes.

Over the past two and half centuries, established democracies have extended the franchise to people without money, to people of color, to women, and to younger people. This paper's contribution to the enlargement of the electorate is to give the vote to resident non-citizens in local elections. Given the fluidity that has come to characterize citizenship and its implications for voting, described earlier, it is a fair question to ask as to why the argument in favor of voting in local elections for non-citizens should not be extended also to voting at the state and federal level—that is, why shouldn't non-citizens be accorded the voting rights available to nearly all citizens?

The argument for initiating voting rights in local elections but not regional or national elections relies on three considerations. First is the value of the example found in a number of other nations around the globe allowing non-citizens to vote in local elections (Earnest 2006). The European Union extends limited voting rights to residents of member states who hold European citizenship but not the citizenship of the country where they are residing. Second, even though the acquisition or loss of citizenship in many sovereign states increasingly reflects changing domestic and international political conditions, nonetheless citizenship remains linked to the national level and as a consequence to national political institutions in a way that local government is not. Finally, there is a pragmatic argument for laying the foundation for local residents who are not citizens to vote locally, initiating a debate over the value of extending the franchise to regional and ultimately national elections.

The argument for granting electoral rights to non-citizens in local governments is related to the argument for granting rights for recurrent residents who divide their time annually between two local governmental districts. The arguments are related in supporting a claim for electoral participation in a jurisdiction that shapes the course of a person's daily existence on a sustained or recurring basis.

Movement remains over the course of a lifetime an important characteristic of many Americans' lives. About 12 million Americans fell into this category of part-year residents in 2014, up slightly from 2 years before. The Census Bureau (2013) estimates that there are about three million second homes in the United States. There also are some three million farm and migrant workers. Some 4.8 million Americans cross state lines in complete moves, half of the number from the 1990s. The majority of movers stay within their respective counties. It should also be observed that one quarter of Americans work in one county but live in another county (Frey 2006). In addition, there are over 30 million non-citizens living in the United States, of whom 19 million are legally recognized residents.[2] The other estimated 12 million lack such recognition.

[2] The Department of Homeland Security (DHS) provides the most current statistics on the number of immigrants living in the United States. According to the DHS, as of January 1, 2008, the number of non-citizens equaled approximately 31.3 million (19.7 million legal residents and approximately 11.6 million unauthorized immigrants). Most legal permanent residents are eligible for naturalization after a minimum of 5 years of residence or 3 years if they are married to a U.S. citizen. Immigrants who are allowed to live in the United States but are not given permanent residence include individuals authorized to work or temporary visitors. All people working in the United States, regardless of immigration status, are obligated to pay taxes.

Groups of second homeowners in the United States have from time to time sought a second vote particularly in local elections where the individuals elected have planning and budgetary authority for the district in which their respective homes are located. Some local governments in a number of states have allowed limited second voting by second homeowners (NCSL 2008). In 2002, the United States Court of Appeals for the 2nd Circuit upheld the principle of the single residency rule in voting. It should be pointed out that this challenge to the single residency rule was not simply a matter of interest to the economically privileged; the Farmworker Legal Services of New York filed an amicus brief on behalf of Wit and his goal to be allowed to vote both in Manhattan and in East Hampton (Wit v. Berman 2003).

Courts in the state of New York have since clarified their understanding of voter registration rules and, as of 2007, New Yorkers may choose whether to register to vote at their primary residence or their second home if, of course, the second home is located in New York (Wilkie v. Board of Elections 2008). In a spring 2015 decision, the New York appellate court confirmed that voters with two homes in New York State who regularly divide their time between these two residences may choose the residential area in which to cast their vote, even if they appear to be motivated by a single issue in making the choice they do (Matter of Maas v. Gaebel 2015).

To be sure, a concern is that this may give second homeowners a certain electoral strategic value to their votes. Is even that strategic advantage a good idea given that second homeowners may be judged as better off property owners? Critics question whether the practice appears to be a return to voting discrimination based on property qualifications that challenge one person, one vote (Merrill 2011).

If we conceive of partial residency as embracing both the second homeowner, the migrant laborer, and other diverse groups of semi-residents, however, the debate over granting local voting rights in more than one constituency may provide access to representation for migrant workers as well as second home owners and, of course, retired people moving between the north and the south seasonally. The argument is that if for various reasons a person divides his or her time between two distinct areas where decision are made that shape their lives then extending suffrage to them in helping to select the local governments that play a substantive role in their lives is a commitment to inclusion—a value that is consistent with the steady expansion of voting rights over the course of the past two centuries and that recognizes that those who are sojourners are particularly aware of the importance of local governmental administration in shaping their daily lives.

8.6 Conclusion

The goal of these two recommendations is consistent with our past commitment to enlarge the proportion of the resident or partially resident population who can participate in decision-making. It is a proposal to expand the franchise once again. Past

expansions of the franchise for blacks and for women were controversial. The arguments for continued exclusion of non-citizens at the national level do not lack foundation. But nothing of that scale is contemplated in these recommendations. Both address two aspects of movement for people who have recognized contributions to our society and may strengthen our understanding of representation in a society that both celebrates spatial representation and movement at the same time. Perhaps these proposals suggest an agenda for reflecting on what other resources should be shared for people who are committed to living in two places or people who are non-citizens, but this argument is beyond the scope of the present paper.

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Part III
Moral Frameworks for Immigration Issues

Chapter 9
John Locke on Naturalization and Natural Law: Community and Property in the State of Nature

Laurence D. Houlgate

Abstract In an unpublished paper of 1693 John Locke weighed in on a long debate in the English Parliament by declaring that there should be a "general naturalization" of all immigrants currently residing in England. His argument for this controversial policy was entirely economic and based on promoting England's interest in achieving greater wealth. He wrote nothing about the interests of the immigrants (most of whom were escaping religious persecution) nor did he appeal to the moral and political theory he had so strongly proposed in *Second Treatise of Government*, published only a few years earlier in 1690. In this paper I look closely at the concepts of community and law in the state of nature and conclude that if Locke had employed the fundamental principles developed in *Second Treatise* he would have endorsed a humanitarian policy focused on the plight of refugees. The application of these principles has important consequences for contemporary debates in the United States and in other wealthy countries about the extent of the obligation to provide relief to foreigners escaping religious persecution, war, enslavement, hunger, and natural disaster.

9.1 Locke's Argument for a General Naturalization[1]

In 1693 John Locke wrote a short essay opposing the popular position that naturalization would have a detrimental effect on England's population and economy (Locke 1997).[2] Although the essay was never published, it has been suggested that Locke was responding to the contemporary political debate about the several

[1] I would like to thank Patrick Lin, Robert Van Wyck, and all members of the American Section, International Association of Legal and Social Philosophy who gave helpful comments during discussion of an earlier version of this paper at the section's bi-annual conference at Chapman University, October 9–11, 2014.

[2] Locke uses the word "naturalization" to mean the legal act or process by which a non-citizen in a country may acquire citizenship or nationality in that country. An "immigrant" is someone who has

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naturalization bills that were introduced in Parliament in the late seventeenth century (Resnick 1987). The bills and the debates were prompted by the large wave of French Huguenots arriving in England in order to escape religious persecution. Locke's argument for "a general naturalization" of not only Huguenots but anyone applying for citizenship was a simple appeal to the best interests of England.

> Naturalization is that safest & easiest way of increasing your people which all wise governments have encouraged. 1. People are the strength of any country or government, this is too visible to need proof. 2. Tis the number of people that make the riches of any country.... The riches of the world do not lie as formerly in having large tracts of land, which supplied abundantly the native conveniences of eating and drinking… but in trade (Locke 1997).

And to the familiar objection that those who are naturalized will "eat the bread out of our own people's mouths," Locke humorously replies

> …when they are once naturalized, how can it be said that they eat the bread out of our own people's mouths? …when they are then in interest as much our own people as any. The only odds is their language which will be cured too in their children & they be as perfect Englishmen as those that have been here since William the Conqueror's days & came over with him. For tis hardly to be doubted but that most of even our Ancestors were Foreigners (Locke 1997).

The debate about whether to naturalize an existing immigrant population should be painfully familiar to contemporary readers. There are currently 11.7 million undocumented immigrants in the United States (Pew 2014). This has given rise not only to a national debate about whether an immigration overhaul should include a pathway to legal status or citizenship, but also to frustration about the inability of the U.S. Congress to agree on some kind of compromise plan that would satisfy a majority of its members. Many have been influenced by scholars who are opposed on grounds quite similar to those given by members of the English Parliament who voted against naturalizing Huguenot immigrants (Rector 2013). Others who want to create a pathway to citizenship responded on grounds remarkably similar to those given by Locke: there are enormous benefits to be gained through an expansion of commercial society by enlarging the labor pool (Bier 2013). Here are Locke's comforting words: "You may therefore safely open your doors, and a freedom to them to settle here being secure of this advantage that you have the profit of all their labor, for by that they pay for what they eat and spend of yours" (Locke 1997).

Resnick (1987) quotes brief passages from Locke's essay to suggest that the connection Locke makes between population and riches is founded in his labor theory of value previously developed in *Second Treatise of Government*. Since "labor makes the far greatest part of the value of things we enjoy in this world," writes Locke, then "this shows how much numbers of men are to be preferred to largeness

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entered a country or region to which one is not native and who may or may not be naturalized. Locke uses the word "foreigner" to refer to an unnaturalized or "undocumented" immigrant.

of dominions" (Locke 1997). The more labor, the more value, and, consequently, the more wealth for England.

My main concern in this paper is not to discuss the labor theory of value and its connection to Locke's plea for a general naturalization.[3] I am more interested in what Locke *does not* say about the conditions under which a political society should open its borders to new members. For what he does not say is not only relevant to contemporary debates about immigration, but was also relevant to the debates during Locke's time. For example, Locke does not tell us whether there is ever an *obligation* of an independent political society to open its borders to people escaping such life-threatening conditions as war, famine, religious persecution, or genocide. By "opening borders," I mean allowing people to seek asylum, refuge, to immigrate and even to become naturalized citizens. The more specific question is: "Does a politically independent state ever have an obligation to accept new members?" If the answer to this question is positive, we need to ask a second question: "Under what conditions does this obligation arise?"

In order to answer these questions for Locke I will use his famous method of "understanding political power right" in order to see whether a general naturalization law might be among the group of positive laws that can be "derived from its original" – *the law of nature* (Locke 1980, Sect. 6). Natural law theorists believe there is a strong connection between positive law and morality, at least in the sense that positive law ought to enforce the obligations of the law of nature. But what is this natural law, and how would it apply to positive laws regulating immigration and naturalization? Locke writes about the existence of a pre-political "natural community" governed by the law of nature. What does he mean, and what are the markers by which we can identify the members of this community? Are there any conditions under which people in the state of nature can justifiably be excluded from the natural community? Professor Resnick opened the door to these questions when he discussed the relevance of Locke's remarks about labor and value to his proposal for a general naturalization. I now want to walk through this door and see what other features of Locke's state of nature might be used to answer these questions.

9.2 The State of Nature

In *Second Treatise of Government* John Locke defines the terms "state of nature" and "civil society" as specifying two different types of social relationship. Two or more persons are in a *civil society* relationship when they "are united into one body, and have a common established law and judicature to appeal to, with authority to

[3] Although it is not a main concern, in Sect. 9.7 of this paper I argue that the strict limits Locke places on the amount and kind of property one can justifiably appropriate in the state of nature has implications for the moral and legal obligations that both individuals and nation states have to others who are in need of land for their survival.

decide controversies between them, and punish offenders." They are in a *state of nature* relationship when there is "no such appeal, I mean on earth…. each being, where there is no other, judge for himself, and executioner" (*Ibid*., Sect. 87). In an earlier section of *Second Treatise*, Locke poses the rhetorical question "When are, or ever were there any men in such a state of nature?" to which he immediately answers "all princes and rulers of independent governments all through the world, are in a state of nature" (*Ibid*., Sect. 14). By definition, an independent government is one that is neither "united" nor "subordinate" to any other government, and in the event of a dispute with other governments there is no common authority to which they can appeal. Locke also reminds the reader that being in a state of nature relationship does not preclude princes and rulers of different countries having private agreements with each other. Such promises and bargains do not put them out of the state of nature. This could only happen by "agreeing together mutually to enter into one community, and make one body politic" (*Ibid*., Sect. 14).

And so it is with independent individuals in the state of nature. They can make private bargains with each other without committing themselves to the public contract that creates civil society. Private promises and bargains "are binding to them, though they are perfectly in a state of nature, in reference to one another; for truth and keeping of faith belongs to men as men, and not as members of society" (*Ibid*.). These individuals are *free* in the sense that they can do whatever they want "without asking leave, or depending upon the will of any other man." But they are not free to violate "the bonds of the law of nature," which obligates them "not to harm another in his life, health, liberty, or possessions" (*Ibid*., Sect. 6). They are also *equal* in the sense that none of them is subordinate or subject to any others who are capable of understanding the law of nature.[4]

We can infer from this that free individuals in the state of nature are free to associate with any consenting person. The word "consenting" is important. Someone who is forced or coerced to join with others is not a consenting member. We can imagine, then, two consenting persons associating with one another for a specific purpose, for example, to trade apples for acorns, or to hold evening philosophical discussions about Locke's *Second Treatise*. Suppose that a third person wants to join the discussion group but is rejected because he has not yet read the book. They reject his application for membership and say they have the right to do so by quoting this passage from Locke: "This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature" (*Ibid*., Sect. 95).[5] The rejected applicant's freedom has not been injured by those who refuse to admit him to the discussion group because he is still free to form his own group.

[4] Locke does not regard young children, "lunatics and ideots" and "madmen" as either free or equal because they lack the mental capacity needed to understand the laws of nature (Sect. 60).

[5] I am assuming that this quote applies not only to those who create a civil society but also to those who create any type of association, private or public.

9.3 Natural Communities

I shall refer to the example of the study group imagined above as a "voluntary" combining of individuals for a specific purpose. In the state of nature there would certainly also be non-voluntary groups – for example, tribes, clans, neighbors, hamlets, villages, friendship groups, and extended families. Locke is aware of this. In several passages of *Second Treatise* he discusses the *family* obligations and rights of parents and children. "All parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten…" (*Ibid*., Sect. 56). These obligations do not arise by virtue of a contract or agreement between parent and child. Locke also points out that adult children have an obligation to care for their elderly parents. The law of nature "has laid on [adult children] a perpetual obligation of honoring their parents…and engages [them] in all actions of defense, relief, assistance and comfort of those, by whose means [they] entered into being, and has been made capable of any enjoyments of life; from this obligation no state, no freedom can absolve children" (*Ibid*., Sect. 66). This obligation extends to other family members. For example, I have an obligation to help my disabled sister in a time of need simply because she is my sister.[6]

Thus, the law of nature imposes not only *universal* obligations *not to harm all others* in their life, liberty, health and possessions, but also *special* obligations *to care for and help* other members of one's family in specific circumstances of need. It is important to see that the duty of care that family members have towards each other is *specific* and *partial*. The duty applies only to those persons in one's family. I have a duty to care for my disabled sister, but no duty to care for the disabled sister of a stranger.

Having acknowledged the existence of a set of duties in the state of nature that are specific to a sub-group of persons therein, we immediately notice the existence of many other such groups, for example, clans, tribes, hamlets, villages, neighborhoods. Each of these groups generates specific and partial duties of care that are not the result of private agreements or contracts between their members. These duties are separate and distinct from the universal duty proclaimed in the first mention of the Law of Nature: the obligation not to harm others in their life, liberty, health or possessions (*Ibid*., Sect. 6).

I will call such groups *natural communities*, meaning by this that they are not created by a contract between its members, and the obligations and rights that they acknowledge and act on did not come about because of any agreements they have made with one another. Consider John Ladd's example of a person's relationship with neighbors in a village. "This may involve many different activities and concerns, ranging, for example, from helping them to put out a fire to lending eggs or a ladder, or to help to take care of a sick child." Being in a village (or in a family, a

[6] There is no bright line telling us what family members fall within the group of those to whom we have special obligations. The obligation to give help and support to my sister is clear, but I do not seem to have the same obligation to my third cousins (most of whom I have never met).

clan, and a tribe) allows us to say, for instance: "You are in our community, therefore you should do X," … or "You belong to us, therefore, we must care for you, or *mutatis mutandis*, you must care for us" (Ladd, 1998a, 15).

Despite obvious differences of culture and context, there is a moral standard that all specific natural communities have in common. Ladd refers to it as an *ethics of giving and receiving*.

> Simply being in the same community with another person *eo ipso* establishes a basis for the giving and receiving of goods and services, of care and nourishment, and of comfort and understanding. …Being in a community generates special mutual responsibilities and entitlements of co-members concerning giving and receiving, responsibilities and entitlements that would otherwise not exist were the individuals in question not co-members in a community. Barring specific culturally prescribed conventions about giving and receiving, it is the general responsibility of members of a community to care for others in the community who are in need, and those in the community who are in need are entitled to such care from their co-members (*Ibid*., 163).

9.4 The Problem of Multiple Natural Communities

When Locke uses the words "community of nature" (*Ibid*., Sect. 6) and "natural community" (*Ibid*., Sect. 128) he is naming the *entire* group of persons who inhabit the state of nature. He means that these persons are God's property, having "like faculties," being "free," "equal" and subject to the law of nature (*Ibid*., Sects. 4–6). But having described one sub-group in the state of nature that has additional specific and partial obligations (the family), and thereby opening the door to the inclusion of many other similar groups, Locke has a problem. The problem is best described by reminding ourselves of his objective. He wants to give a plausible account of the role of the natural community in providing, through a social contract, the moral foundation of political society. That moral foundation is the *Law of Nature*. Locke informs us that this law can be discovered by the use of *reason*, which "teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions" (*Ibid*., Sect. 6). But if the analysis in the preceding section is correct, there is another set of rules, also discoverable by the use of reason, which imposes on members of families, tribes, villages, and other small communities, specific and partial obligations that go well beyond the universal obligations of the law of nature. The question is: Can Locke make consistent (a) the special and partial ethics of giving and receiving that he so carefully describes in his account of the natural duties of parents and children in *Second Treatise* with (b) the universal and impartial ethics of the Law of Nature? If he cannot accomplish this task, then how can he guarantee that the general community will choose (b) instead of (a) when creating the laws of an ideal political society?

There are obvious problems with choosing (a) as the only standard of positive law. The most serious problem is that the moral requirements binding members of specific communities are contextual. "[T]hey are not only situation specific within the community context, but they are also relative as between cultures" (Ladd 1998b,

167). Think of the cultural variations about clan membership, some depending on blood-lines and others on residence within a specific territory. It would be arbitrary to decide on one variation to the exclusion of others in constructing public policy, although there is evidence that some independent states have historically done this to maintain ethnic or religious identity. Second, the duties that most philosophers tell us are "imperfect," "optional," or "acts of pure benevolence" in the general community of the state of nature are *mandatory* in the context of specific natural communities. The usual interpretation of the Law of Nature tells us not to take or destroy the lives of others unless this is necessary to defend one's own life, but it does not tell us to rescue or protect those who are in danger of losing their life. If I give food to a malnourished child, this is an act of charity, or benevolence, and I should be praised for my benevolent concern. But by virtue of being a member of a specific natural community, such acts, grounded in communal relationships, are not optional, and praise is not due. "For not to help a fellow community member in need is wrong and contemptible" (*Ibid*., 164).

9.5 A Solution: Locke's Second Law of Nature

The solution to the problem of consistency is to be found in a second statement (or version) of the Law of Nature in which Locke includes an *obligation* "to preserve the rest of mankind." He writes that not only do we have natural duties not to "destroy one another," and to preserve our own life, but:

> …by the like reason, when his own preservation comes not in competition, ought he, as much as he can, *to preserve the rest of mankind*, and may not, unless it be to do justice on an offender, take away or impair the life, or *what tends to the preservation of the life, the liberty, health, limb or goods of another* (Locke 1980, Sect. 6).[7]

I shall refer to this as the *Second Law of Nature* (the First Law being the negative duty not to harm others), because it strongly suggests that we must do what we can to help and support ("preserve") all others, not just those in our specific communities, when they are in danger of losing their life, their liberty, their health or property. Locke appears to endorse this interpretation in a later paragraph in which he contrasts the state of nature with the state of war. He writes that the former is "a state of peace, good will, *mutual assistance and preservation*" (*Ibid*., Sect. 19, my emphasis).[8] In this brief passage Locke uses words suggesting the existence of positive ethical relationships of care and attention to the needs of others within the *general* natural community. There is no suggestion that these relationships are tied to membership in *specific* communities (clans, tribes, villages). The peace they enjoy, the good will they have, and the mutual assistance they give to one another is

[7] This quotation is edited with my emphasis on the concluding words "*what tends… another*."

[8] Locke is here attempting to distance himself from Thomas Hobbes (1651, Part I, Chap. 13) who had earlier proclaimed that the state of nature *is* a state of war.

spread throughout the natural community, thereby making it remarkably like the kind of relationship he earlier described as existing between family members.

The Second Law of Nature would be rejected by Locke scholars who insist that members of the general community in the state of nature have only negative obligations to refrain from doing harm to one another but no positive obligations of care. And yet there is ample early warning from Locke about the existence of positive obligations when he gives a strong endorsement (in Sect. 5) of his predecessor Richard Hooker's claim that the *equality* of men by nature is "the foundation of that obligation to mutual love amongst men" (Hooker 1993). Hooker's argument is this: if we see each other as equals, then we ought to give each other as much love and affection as we give to ourselves. To attend only to the preservation of my own life while refusing to attend to the preservation of the lives of others is not to treat others as my equals. If you and I are equals, then I cannot regard myself as deserving of more love and affection (or help and support) than is deserved by you.[9] These words in the early part of *Second Treatise* bring the obligations of natural law much closer to the obligation of giving and receiving that constitutes the ethics of all specific natural communities. "Giving help and support" is certainly implied by the Second Law of Nature's call to preserve not only yourself but "the rest of mankind."

9.6 Implications for Immigration Policy of Independent States

What does this tell us about the obligations of "princes and rulers" of independent nations whose relationship with each other Locke uses as proof that not only are there presently people in a state of nature relationship, but "it is plain the world never was, nor ever will be, without numbers of men in that state"? (Locke 1980, Sect. 14). If independent nations are in a state of nature relationship with each other, then how should those who possess "federative power" (*Ibid.*, Sect. 145)[10] in a nation be instructed to behave toward other nations and persons "without [outside] the commonwealth"?

First, the large group of rulers of independent states on earth does not constitute a *community* in the same sense of this word I have used to describe those groups constituting *specific* communities (tribes, clans, villages, families). I realize that it is common and even fashionable to refer to the 193 countries in the United Nations as a "community of nations," but the U.N. is an *association*, not a community

[9] Compare The Golden Rule (also known as the rule of reciprocity) as it is found in most of the world's religions: "One should treat others as one would like others to treat oneself."

[10] Locke uses this phrase to refer to the "power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the common wealth" (*Ibid.*, Sect. 146). He also calls it a "natural" power "because it is that which answers to the power every man naturally had before he entered into society."

(Tonnies 1963).[11] Associations are created by fiat through mutual agreements, contracts and treaties. They have goals and purposes.[12] Natural communities do not have purposes and they are not created by fiat. Communities, like traditions, are "natural," in the sense that they "arise," "grow," and even at times "disappear" and "die," but they certainly are not created.[13]

Second, in calling a group of nations a community we would imply a long history of each member nation giving help and support to others in times of crisis and (especially) a long history of refraining from committing acts of war to settle disputes. There is no such history. The Universal Declaration of Human Rights has as one of its goals to "*develop* friendly relations among nations" strongly suggesting that we still lack one of the key ingredients (friendly relations) necessary to the existence of a community (United Nations 1948).

Third, although the concept of a specific community cannot be applied to the group of independent governments in the state of nature, the ethical standard contained in the concept can be held as an *ideal* that the group of nation states might strive to attain. This seems to be the spirit of the words in the U.N. declaration of purpose. However, given the constant drum beat of war, terrorism, genocide, and the tepid response of many countries to natural and man-made disaster one wonders whether the ideal of a "family" or "community" of nations will ever be attained even to a minimal degree, perhaps never reaching even the low standard of a dysfunctional family.

Fourth, if the concept of specific community cannot be applied to the relationship between independent states, Locke's Second Law of Nature can certainly apply to the task of morally judging each of them individually. An ideal sets a standard with various levels of attainment, but a mandatory law sets a rule which either is or is not violated. The Second Law of Nature is a mandatory law. Its proper use is to morally judge the behavior of each individual state when it exercises its federative power. Hence, one would use the Second Law not only to evaluate policies on immigration and naturalization but any kind of behavior affecting other independent states that would fall under the general obligation "to preserve the rest of mankind." This is a heavy burden, and it falls on all nations having the ability to respond. The suffering experienced by mankind takes many forms. If an independent state suffers from a devastating earthquake or tsunami or is unable to prevent a tyrant from the genocide of a religious minority, then it is the moral duty of other nations to come to its aid.

[11] Originally published in 1897 under the title *Gemeinschaft und Gesellschaft*. See also the commentary by John Ladd (1998b, 158–162).

[12] The U.N. declaration of purpose is "to maintain international peace and security, develop friendly relations among nations and promote social progress, better living standards and human rights."

[13] "An intentional community, on this analysis, would therefore be a contradiction in terms" (Ladd 1998b, 167).

9.7 Implications of Locke's Restrictions on Private Ownership

Finally, the rule of the Second Law of Nature could be used by natural law proponents to defend dramatic changes in immigration and naturalization policy that arguably would go far beyond giving foreign aid. In order to see this, let us consider the limits that Locke puts on the justifiable use of private property in the state of nature. The important exception is that one cannot enclose land one does not use.[14] Countries like the U.S., Canada, and Australia each have vast amounts of unused land within their borders, much of it seized from native peoples. This land belongs not to these countries, but first to the native people, and if they choose not to use it, then to all mankind in common. If "foreigners" (to use Locke's word) are threatened by famine, civil war, or any of the man-made or natural disasters to which we are all susceptible, then not only can they *not* be excluded from crossing our borders, but these countries and all other countries under like circumstance must allow them in. They must feed, shelter and clothe them, and allow them to occupy any unimproved land, if this is what they wish.[15]

Another exception, implied by Locke's "non-spoilage" exception to the labor argument, is that one cannot enclose land in a way that causes harm to others.[16] Suppose that through our labor we take land that completely encircles the land of others who have also achieved ownership of their land through labor. We build a high wall or "separation barrier" on our land that effectively prevents anyone (without aerial or underground means of transportation) from leaving the land we have thereby enclosed. If those who are enclosed by the wall want to leave their enclosed land they cannot do this without permission. The initial harm is to their liberty, and Locke would consider this kind of harm a clear violation of the First Law of Nature. The secondary harms they might suffer depends on their need to travel through our land for medical, health, or economic purposes.[17] If the harm to

[14] I am aware of the vagueness of the words "use" and "improve." A country might show it is "using" its empty spaces by preserving endangered species, protecting important watershed areas, or for the aesthetic enjoyment of the population.

[15] This implies that they are not *required* to take the land or be confined to it. As legal immigrants or naturalized citizens they would be allowed to move to any part of the country and compete with others for jobs. If they do not want the common land that is offered to them because (for example) it is not fertile, then they are free to purchase any private land that is more suitable to their purpose.

[16] You cannot appropriate any land *you do not use*. Suppose a civil society is just an aggregation of large land holdings, much of it unimproved. Using Locke's "non-use" exception, all the unused land within the territory of that society must be returned to the commons. It can no longer be anyone's private property nor can the society legitimately use its executive power to prevent others (including "foreigners") from entering the commons in order to improve and so appropriate to themselves what they find therein.

[17] I suspect that some readers will see an analogy to the separation wall built by Israel along the West Bank, separating Israel from Palestinian populations. However, at this writing the Israeli separation wall is about 62 % complete, and little progress has been made on it in the last few

our enclosed neighbors is perceived by them as force or the threat of force, then this puts us in a state of war. Locke reserves some of his harshest language for actions that take away the freedom that belongs to all persons in the state of nature, and he extends this to a condemnation of those who are now in a state of civil society. He writes that, in the state of nature,

> he that would *take away the freedom* that belongs to any one in that state, must necessarily be supposed to have a design to take away everything else, that *freedom* being the foundation of all the rest; as he that, in the state of society, would take away the freedom belonging to those of that society or common-wealth, must be supposed to design to take away from them everything else, and so be looked on as *in a state of war* (Locke 1980, Sect. 17).

The general point implied by these examples is that "harm to the freedom of others" sets the limit of both the *amount* and *kind* of appropriation of land that one can justifiably enclose and prevent others from using. Any appropriation of territory that exceeds one or both of these limits is unjustifiable, and any land so appropriated must be returned to the commons.

9.8 Objections and Replies

There are three important objections to my claim that Locke would supplement his "best economic interest of England" naturalization policy with a humanitarian provision for increased naturalization if he used principles developed in *Second Treatise of Government* pertaining to both restrictions on private property and the demands of the Second Law of Nature.

The first objection is that because Locke does not tolerate any form of welfare, he would not recommend naturalization for immigrants because they would inevitably be on the dole as soon as they are naturalized. Although there is a passage in the unpublished manuscript cited earlier that appears to support this objection, Locke never makes this prediction about all immigrants. Locke distinguishes between those immigrants who are poor because "they have nothing to maintain them but their hands and who live by their labor" and those who are poor because they "are able to work and do not." And of the latter group he writes "if there be any such poor amongst us already who are able to work and do not, 'tis a shame to the government and a fault in our constitution and ought to be remedied, for whilst that is permitted we must ruin, whether we have many or few people" (Locke 1997, 326).

Notice that Locke is not saying that *all* immigrants will apply for and receive welfare. His target is the able-bodied immigrant. They should be treated the same as any able-bodied citizen who refuses to live by his or her labor. If money is given to those who are able to earn sufficient amounts to support themselves and their families by their labor, then this is not charity. It is a gift and Locke correctly observes

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years. Second, the Israelis call the barrier the "Wall of Security," implying (perhaps) that the right of self-protection trumps the right of freedom of movement.

that it would be "a shame to the government" to give gifts of money to those who do not need it. But he never writes that it would also be a shame for the government to give the relevant kinds of help to those who are unable to preserve their own "life, liberty, health, limb or goods." This help may take many forms including naturalization of undocumented immigrants, as well as giving refuge to those immigrants who are facing death, loss of liberty, serious injury, or loss of the basic means of physical survival in the lands from which they wish to escape.

A second objection is that most of today's immigrants are not looking for land to farm but for employment opportunities. Therefore, it is pointless to give them land from the commons that they would neither want (for example, it is not suitable for agriculture) nor know how to develop and improve. Instead, the way we help poor immigrants today is primarily through jobs.[18] However, this objection does not dispute the Lockean argument that unused land must revert to the commons and be made available to all (citizens and non-citizens) who would want to improve it, even if it the unused land is difficult or impossible to improve. Moreover, Locke anticipates the objection that immigrants are looking for jobs, not land, because this objection was also made in the 1690s debate by those who opposed the naturalization of the Huguenot immigrants. Their fear was that the newly naturalized Huguenots would take away jobs of native Englishmen. Locke's reply was

> They work cheaper or better. For nobody will leave his neighbor to use a foreigner but for one of those reasons and can that be counted an inconvenience which will bring down the unreasonable rates of your own people or force them to work better? Want of people raises their price and makes them both dear and careless (Locke 1997, 326).

In other words, competition for jobs is a benefit for all, not something to be feared. Will the jobs taken by the newly naturalized persons harm those citizens who are least well off by bringing their wages down even lower than they already were? Or will they take jobs that no one else wants? These are empirical questions that only can be answered by further observation.

Finally, it might be objected that the injunction of the Second Law of Nature is unenforceable, and thus it is an empty obligation. Of course unenforceability is a possible outcome, not of the lack of the ability to enforce compliance but of a lack of enforcement *authority*. Recall that Locke contends that there is a state of nature relationship between sovereign states. There is no common authority to which all nations can appeal in case of a dispute over a perceived violation of the laws of nature. But this does not relieve miscreant nations of the *moral* obligation to give aid to others. It only means either they will not be punished, they will give in to the threat of punishment, or they will resist.

[18] I owe this objection to Robert Van Wyck.

9.9 World Government and Humanitarian Immigration Law

The reply to the unenforceability objection does take us to what I believe would be John Locke's solution to the problem of immigration and naturalization *if* he were to impose the dictates of the principles for which he so strongly advocates in *Second Treatise*. The solution would go far beyond a simple appeal to wealthy nations to make greater efforts to help less fortunate nations and necessitous individuals through more generous aid packages and immigration policies for those escaping war, threats of death, serious injury, enslavement, natural disasters, and other deprivations. Appeals to the conscience of wealthy nations are often as futile as attempts to enforce such appeals without recourse to an enforcement mechanism.

Following his own logic regarding the necessity of *individuals* in the state of nature to voluntarily put themselves "out of this estate" and subject themselves to "the bonds of civil society," so must *sovereign nations* agree with other nations to join and unite into an association of nations with "a power to act as one body," each nation putting itself under an obligation, to all other nations "to submit to the determination of the majority, and to be concluded by it." In so doing, they would give up at least that *portion* of their sovereignty that would help them to secure a "comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it" (Locke 1980, Sect. 97). This portion would include each member nation giving up its sovereignty over immigration. If this hypothetical association of member nations is guided by Locke's laws of nature when creating the positive laws that govern immigration and naturalization, then not only will they have a common judge to which they can appeal to settle disputes (an international or world court), but they will create and enforce laws requiring each member nation to do what it can to "preserve the rest of mankind." My argument is that this would include the enactment of immigration and naturalization laws containing humanitarian rules aimed at the relief of human suffering.[19]

I realize that this proposal, like most proposals for world government, is a fantasy, but similar recommendations have been made in the past. For example, the *World Federalist Movement-Institute for Global Policy*, begun in 1947, was founded on the idea that all people have the fundamental right to self-government.[20] WFM-IGP proposes that "some policy matters, depending on their scope, should fall under the authority of local governments whereas others fall under the jurisdiction of national governments or international institutions" (World Federalist Movement-Institute for Global Policy 2015). My argument in this paper is that John

[19] This would not necessarily be an open borders policy in which all who want to immigrate to a participating state are free to do so. Immigration could also be means-tested, that is, applicants must prove that they do not have the means to protect themselves against constant threats to their life, health, and liberty.

[20] WFM-IGP is a nonprofit, nonpartisan organization "committed to the realization of global peace and justice through the development of democratic institutions and the application of international law."

Locke, true to his own moral principles, would endorse these recommendations and advocate for placing immigration policy under the jurisdiction of international institutions, subject to international law.

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Chapter 10
Immigration, Citizenship, and the Clash Between Partiality and Impartiality

Stephen Nathanson

Abstract Do aspiring immigrants have a right to enter a new country? Do countries have a moral duty to allow people seeking refuge to enter? Or do countries have a moral right to deny entry?

In this paper, I link these questions to the broader clash between a partialist morality that stresses duties to particular people and an impartialist morality that requires equal treatment of all people. According to strongly partialist views, governments and citizens have duties only to their own country and its citizens and thus no duty to admit aspiring immigrants. According to strongly impartialist views, morality requires impartial concern for all people and thus a duty to admit aspiring immigrants. I focus on the problem of partialism vs. impartialism because solving it is necessary (though perhaps not sufficient) for determining what are the rights of aspiring immigrants and what are the rights and duties of countries that aspiring immigrants seek to enter.

One possible solution is provided by "moderate patriotism," a view that is meant to reconcile partiality and impartiality. According to moderate patriotism, countries have greater duties to their own citizens but also have some duties to non-citizens. Because moderate patriotism can take different forms, it provides multiple answers to questions about immigration. To settle on one answer requires determining which form of moderate patriotism is correct. I describe a few types of moderate patriotism and use a rule utilitarian strategy to determine which type provides the best answers to questions about immigration rights and duties.

In 2014, the number of people who were forcibly displaced from their homes reached almost 60 million. According to a UNHCR report, these included 19.5 million *refugees* who fled from their own to another country, 38.2 million *displaced persons* who fled their homes but remained within their country, and 1.8 million *asylum-seekers* in other countries. Half of these people were from Syria, Afghanistan, and Somalia. The countries that took in the most refugees are Turkey, Pakistan,

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Lebanon, Iran, Ethiopia, and Jordan. Turkey took in the most, 1.59 million people, while Jordan, which took in the least of these six nations, allowed in the substantial number of 654,100 refugees (UNHCR 2014).

Another group of fleeing persons got considerable attention in the United States in the summer of 2014 when a large increase occurred in the number of unaccompanied children crossing the border from Mexico and Central America into the United States. Seeking to block their entry, U.S. officials apprehended 21,403 children, almost double the number from the prior year (Center for Immigration Studies 2014).

While some people in the U.S. favored assisting these children, most wanted them sent back as quickly as possible. When Massachusetts Governor Deval Patrick proposed temporary shelter for some children, his proposal met strong resistance and was dropped. A national poll at the time showed similar hostility to allowing the children to remain in the U.S. after a legal hearing. While 39 % supported allowing the children to stay, 43 % said the children should be deported (Ramos 2014).

While Syrians fleeing from civil war are generally referred to as refugees by people in the U.S., those who fled to the U.S. from Central America without authorization are called "illegal aliens," a label that stresses their legal status while down-playing the severe economic hardships that they suffer and their risks of being kidnapped, forced into the drug trade, or killed. One reason for this inhospitable response is that the U.S., while allowing entry to many aspiring immigrants, also has a large number who enter and stay illegally. In 2012, of the 2.7 million immigrants who left El Salvador, Guatemala, and Honduras and both entered and remained in the U.S., 60 % are estimated to be residing illegally. This population has generated a considerable level of hostility in the U.S. (Center for Immigration Studies 2014).

10.1 Clashing Views on Moral Duties to Citizens and Immigrants

These varying responses to refugees reveal a clash between two sets of views and attitudes. According to one view, people who flee their native land have a right to protection from severe harm simply because they are human beings. The fact that they are not citizens is irrelevant. According to a second view, while citizens of a country have a right to protection by their own government, non-citizens have no such right, and governments have no duty to allow aspiring immigrants to enter.

This second view appears to divide people into two classes, citizens who are insiders and immigrants who are outsiders. While this dichotomy may serve some purposes, it omits differences within each group. The differences within the two groups are as follows:

Insiders include: (i) citizens by birth; (ii) immigrants who become "naturalized" citizens; and (iii) immigrants who become legal residents but do not become citizens.

Outsiders include: (i) "undocumented immigrants" who enter and reside in a country illegally and thus have no legal right to enter or reside there; (ii) aspiring immigrants who are outside of a country but hope to gain legal entry and to become resident aliens or citizens.

It is generally believed that people who aspire to immigrate have no right either to enter or reside in a country without permission of the government. According to this standard view, it is entirely up to governments to determine whether "outsiders" may enter and how long they may stay. States are defined in part by their authority to determine who may cross their border and, among those who gain entry, which may only remain temporarily (for pleasure, work, or study, for example) and who may remain permanently as resident aliens or potential citizens.

While this view of governments' authority is certainly plausible if we are thinking of legal rights, it is unclear whether it is correct regarding moral rights. According to a global, humanitarian view, people in desperate situations have a moral right to cross borders and establish residence in countries other than their own, and states have a moral duty to take them in even though they are not citizens. In spite of the moral appeal of this view, it seems to be generally believed that while countries may allow people entry if they wish, doing so would be an altruistic act but is not morally obligatory.

The opposing view can take different forms. One supports a duty to allow entry to people in dire circumstances. The other, more radical view is that all borders should be open to all people. This latter view seems to amount to the idea that there should be no borders. Most people would think this is absurd.[1] In spite of this, cosmopolitan thinkers have succeeded in casting doubt on the standard view that states have a right to full control over the distribution of residence rights within their borders.[2]

I do not think that we can solve problems about immigration unless we can resolve the basic moral clash between partiality and impartiality. Which is correct: the partialist, "citizens only" view that governments have moral duties only to their own citizens or the opposing impartialist view that because all people have equal moral value, governments have duties to all people, whether they are citizens or not?[3]

There are other reasons for focusing on the tension between partiality and impartiality. Not only is it at the heart of questions about immigration rights and duties, but in addition, it underlies many other controversial issues. Debates about global poverty, for example, arise from tensions between (a) the partialist view that affluent people and countries have a right to use their legally owned resources for their own benefit and (b) the impartialist view that affluent people and countries have a moral

[1] The belief in open borders may seem absurd but is nonetheless hard to resist if one accepts a principle of liberal equality. On this point, see Will Kymlicka (2001) in David Miller and Sohail Hashmi (2001). For a defense of open borders and the moral right to enter, see Joseph Carens (1987).

[2] Among the influential advocates of cosmopolitan views are Peter Singer, Martha Nussbaum, Charles Beitz, and Thomas Pogge. For an overview of cosmopolitanism, see Pauline Kleingeld and Eric Brown, "Cosmopolitanism" (2013).

[3] Nathanson (2011) contains an overview of the partiality vs. impartiality debate.

duty to assist impoverished people who lack adequate food, clean water, and other basic resources. This issue was put on the philosophical map by Peter Singer's powerful, classic essay "Famine, Affluence, and Morality." In arguing for duties of assistance, he challenged the moral partiality that is central to common sense morality and defended the radical impartialist view that the well-being of distant strangers is as morally important as the well-being of the near and dear people to whom we are partial (Singer 1972).[4]

Similar questions regarding partiality vs. impartiality arise in other areas.

- The ethics of war: May countries at war be strictly partialist and use whatever tactics they believe are needed to achieve victory? Or are there impartialist duties (such as the principle of non-combatant immunity) that constrain the ways in which warfare may be carried out?
- Ethics and the economy: Is it morally permissible to promote the economic interests of one's own country without considering the impact on people in other countries? Was President George Herbert Bush justified when he spoke at the 1992 Rio Conference on the global environment and told delegates that "the American way of life is not negotiable"?
- Climate and future generations: When we evaluate responses to climate change, should we weigh only the interests of people now alive? Or do we have duties to later generations who will inhabit the earth when we are gone? Should we be temporal partialists or temporal impartialists?[5]

In order to decide what is right or wrong in these cases, we must decide whether we should be partialists who are particularly responsive to people with whom we have special ties or impartialists who try to treat all people equally. If we could resolve this problem, we would be in a better position to determine what duties we have both to aspiring immigrants and to our fellow-citizens.[6]

10.2 Patriotism vs. Globalism

Table 10.1 displays and contrasts two starkly different views about whether there are moral duties to assist people who seek to immigrate to a new country.

Patriots (as described) see no reason why their own country has any moral duty to allow non-citizens to cross its borders and receive its benefits. They understand patriotism as exclusive concern for one's own country and its citizens. Given this

[4] Singer (2002) extends and applies his view to various global issues.

[5] Tim Mulgan (2011) raises issues about the environment and future generations in a clever, indirect way. For a discussion of this book, see Nathanson (2012b).

[6] For an excellent discussion that explicitly links partiality issues to problems regarding immigrants and refugees, see Veit Bader (2005). For an overview of issues regarding partiality, see Nathanson (2012a). For a discussion of partiality with special attention to the ethics of war, see Nathanson (2009).

Table 10.1 Patriotism/nationalism vs. global universalism

Features	Patriotism/nationalism	Global universalism
Concern	Exclusive concern for one's own country and its citizens	Equal concern for all people
Goals	Unconstrained promotion of the national good	Promotion of the good of all people, not countries
Rights	Only citizens have rights to protection and benefits	All people have rights to protection and benefits
Duties	States have moral duties only to their own citizens	States have moral duties to all people

narrow partiality, patriots would not allow aspiring immigrants to enter their country unless this would benefit their own country. If there is no benefit to their own country, they will not favor permitting foreigners to enter.

The opposite view, global universalism, rejects the narrow, partialist focus of patriotism. As impartialists, they see no justification for special concern about people who happen to be citizens of one's own country. Global universalists support universal duties that require countries to protect the rights of all people, whether they are citizens or not. Thus, people who seek to migrate into another country have a moral right of entry, especially if they are threatened or endangered in their home country.

10.3 Beyond Either/Or

If these positions are our only options, it is hard to see how any progress in resolving this issue is possible. The two sides are so diametrically opposed that no compromise or shared resolution looks possible. Moreover, if these are our only options, things are even worse because neither of them is particularly plausible or attractive. The patriotic view implausibly rejects any concern at all for human beings who are non-citizens while the globalist view implausibly rejects the legitimacy of any special concerns or duties toward one's own country and its inhabitants. Indeed it rejects all types of special concerns or duties, not just those connected to patriotism.

Fortunately, these extreme views are not the only options. In particular, there are middle positions that allow both special concern for one's own country and some level of concern for people of other countries. In past works, I have defended a version of this middle position called "moderate patriotism." Its key feature is that it combines a high degree of partiality toward one's own country with some degree of impartial concern for all people.[7] Table 10.2 displays the features of moderate patriotism and the ways in which it differs from the extreme versions of both

[7] My first defense of moderate patriotism is Nathanson (1989). It was most fully defended in Nathanson (1993) and further developed in subsequent works that are listed in the reference section of this paper.

Table 10.2 Moderate patriotism: Combining partiality and impartiality

Features	Extreme patriotism/ nationalism	Moderate patriotism	Extreme global universalism
Concerns	Exclusive concern for one's own country and its citizens	Greater concern for one's own country + some lesser concern for others	Equal concern for all people
Goals	Unconstrained promotion of the national good	Morally constrained pursuit of national good	Promotion of the good of all people, not countries
Rights	Only citizens have rights to protection/benefits	Recognition of some rights of non-compatriots	All people have equal rights to protection and benefits
Duties	States have moral duties only to their members	Recognition of some duties to non-compatriots	States have moral duties to all people

patriotism and universalism discussed earlier. I now label those views "extreme patriotism" and "extreme global universalism."

Unlike Table 10.1, which describes two extreme, totally opposed views, Table 10.2 shows that the types of features possessed by these view can differ in degree. This makes it possible to reject an "all or nothing" conception of patriotism without rejecting patriotism. The extreme patriotism displayed in Table 10.1 is not the only kind of patriotism.

Moderate patriots reject the "exclusive concern" embraced by extreme patriotism. Instead, they affirm both a special, greater concern for their own country with some degree of concern for people in other countries. While they have an especially strong desire to promote their own country's well-being, they are not indifferent to the well-being of people in other countries. Similarly, while they agree that their own country has stronger duties to its own citizens than to outsiders, they nonetheless recognize that non-citizens have some genuine, even if less extensive, rights. These might include rights to enter other countries or to receive forms of humanitarian assistance in their home countries. Unlike both extreme patriotism and extreme global universalism, moderate patriotism allows for this balance of partialist and impartialist attitudes.

To see how this works in practice, consider the balance of partiality and impartiality involved in the "rules of war." Both international law and just war theory recognize the partialist right of countries to use military force to protect their basic interests. This partialist right, however, is constrained by impartialist concerns. One constraint specifies that countries may use warfare only to protect themselves from aggression. They may not engage in war simply to seek benefits (such as natural resources). A second constraint involves ways of fighting. While countries may use a wide range of tactics in war, some tactics are forbidden. Among these are direct attacks against civilians, the use of certain types of banned weapons, and attacks whose destructive results are not proportional to the military value achieved. Overall, then, the laws of war permit partialist actions while also imposing impar-

tialist constraints on how and why countries engage in warfare. This is the same pattern found in moderate patriotism.

10.4 Is Moderate Patriotism Genuine Patriotism?

In spite of its appealing features, moderate patriotism has been the target of strong criticisms. One of its most prominent critics is Alistair MacIntyre. In "Is Patriotism a Virtue?" MacIntyre correctly describes moderate patriotism as an attempt to find a middle path that avoids both extreme forms of partiality and impartiality. Defenders of moderate patriotism, he writes, see it as a "perfectly proper devotion to one's own nation which must never be allowed to violate the constraints set by the impersonal moral standpoint" (MacIntyre 1984, 6).[8]

MacIntyre rejects this approach, claiming that moderate patriotism is not genuine patriotism. "Patriotism thus limited," he writes, "appears to be emasculated." Its lack of force is evident when countries are threatened. In such times, the patriotic component of moderate patriotism comes "into serious conflict with the standpoint of a genuinely impersonal morality…." When this occurs, moderate patriots must choose between genuine, partialist patriotism and impartial, universalist morality. If they side with impartial morality, they cease to be patriots. If they side with (what MacIntyre sees as) genuine patriotism, they show that moderate patriotism does not actually guide actions but instead is nothing more than "a set of slogans that are practically empty" (*Ibid.*).

The upshot of MacIntyre's argument is that there is no genuine middle ground between partialist, extreme patriotism and impartialist globalism.

10.5 Multiple Partialities in Conflict

There are many problems with MacIntyre's either/or approach to these issues.[9] I will focus on one, namely, his failure to see that in real life, individuals and groups have many objects of partialist concern and that these multiple partialities may sometimes conflict with one another. When conflicts arise, partialities that trump in some contexts may be over-ridden in others.

Table 10.3 identifies a small set of partialities and is meant to serve as a reminder that virtually everyone has multiple objects of partiality and loyalty. Even strongly patriotic people tend not to care exclusively about their country. They also care about themselves, their families, their friends, and other groups they belong to. Our common understanding of patriotism does not rule out these multiple targets

[8] Reprinted in Primoratz (2002).

[9] For criticisms of MacIntyre, see Nathanson (1989) and (1993, Chaps. 5 and 7).

Table 10.3 Varieties of partiality and impartiality

Egoism	Near-and-dear-ism	Racism and/or religionism	Patriotism/nationalism	Global humanism
Partiality to self	Partiality to loved ones, family, and friends	Partiality toward race, religion, membership and/or emotional ties	Partiality toward one's state, fellow citizens, or national group	Impartial concern for all people

of partiality. It recognizes that patriotic people can also be parents, friends, or co-religionists.

When there are tensions between the demands of patriotism and the demands of self-interest or parenting, we have to decide which type of partiality takes priority. If we are lucky, we will not face these hard choices, but if we face a clash between our patriotic commitment to our country and our commitment to our family and settle it by giving priority to our family, that need not show that we are not patriots. It simply shows that in some situations, priority to family will trump patriotism. In other situations, patriotism may take precedence. In most situations, however, people can feel committed to both parenting and patriotism. The fact that genuine commitments may sometimes be over-ridden shows that MacIntyre is wrong when he claims that if a person's stated commitment to patriotism can be over-ridden, that shows that his or her patriotism is nothing more than "a set of slogans that are practically empty."

The only people who never face partiality clashes are extremists and fanatics. Extreme egoists, for example, face no such conflicts because they care only about themselves. Likewise, extreme "familyists" care only about their family and have no concern for other individuals or groups, including their country. Similarly, extreme patriots have no concern for anything but their country.

Most people have multiple partialities that sometimes compete with one another. When they do, they have to decide which takes precedence in the specific case. Contrary to MacIntyre, the patriot who sometimes puts family first need not be either a fake or an "emasculated" patriot.

What this shows is that moderate patriotism can be genuinely patriotic even if it accepts some impartial concern for people in other countries. Because they recognize the moral importance of all people, moderate patriots can acknowledge that outsiders too have rights and interests that may give rise to duties to assist people who are not citizens of our country.

10.6 Moderate Patriotism and Global Universalism

Just as we can distinguish between extreme and moderate types of patriotism, we can do the same with global universalism. The resulting options are shown in Table 10.4.

Table 10.4 Four forms of partiality/impartiality

	Extreme patriotism	Moderate patriotism	Moderate globalism	Extreme globalism
Types of concern	Exclusive concern for one's own country and its people	Higher priority for one's own country; genuine but lesser concern for others	Equal concern for all people but recognition of legitimate partiality for one's own country and its citizens	Equal concern for all people and hostility to any type of partiality toward one's own nation and its citizens
Goals and constraints	No moral constraints on the pursuit of national goals	Morally constrained pursuit of national goals	Morally constrained pursuit of globalist goals	No moral constraints on the pursuit of globalist goals

In the same way that moderate patriotism incorporates some impartialist values, moderate globalism can grant the legitimacy of some features of patriotism. Globalism can recognize that patriotism can have genuine value in some societies, bringing people together in ways that encourage cooperation and sacrifice for the common good. As a result, differences between moderate patriotism and moderate globalism will be matters of degree. While Table 10.4 shows two versions of each, other possible versions of moderate patriotism and moderate globalism would reflect greater closeness or distance between them. There might even be a point at which moderate patriotism and moderate globalism converge.[10]

10.7 A Challenge to Moderate Patriots

Suppose that we accept the moderate patriotism view that while we have stronger duties to our country and its citizens than to other people, we nonetheless have some moral duties to outsiders in other countries. Will this help us to decide what these moral duties are? Does it say whether we have a duty to allow all illegal and aspiring immigrants to reside in our country? Does it tell us how to differentiate cases where we have such duties from ones in which we don't?

It is a serious defect of moderate patriotism that while it tells us that we have some duties to people in other countries, it does not tell us what those duties are. But if it cannot tell us how morality requires us to act, then moderate patriotism would be open to MacIntyre's charge that it is an "empty slogan."

Samuel Scheffler raises this problem in discussing tensions between globalist impartiality and special, partialist duties. Although Scheffler's focus is on moderate globalism rather than moderate patriotism, the issues he raises apply to both. Scheffler agrees that there is no contradiction in combining impartial concern for all

[10] For discussion of both tensions and overlaps between these views, see Nathanson (2007).

Table 10.5 Minimal vs. strong moderate patriotism

Types of duties	Minimal moderate patriotism	Strong moderate patriotism
Scope of duties to outsiders: positive and negative	Negative duties only:	Positive and negative duties:
	Accepts negative duties to avoid harming outsiders;	Accepts both negative duties to avoid harming outsiders and positive duties to assist them
	Rejects positive duties to assist them	
Degrees of acceptable sacrifice	Minimal sacrifice:	Significant sacrifice:
	Accepts duties only if they require little or no sacrifice by one's country or its citizens	Accepts duties even if they require serious sacrifice by one's country or its citizens

people with partiality to one's own country. But, he says, "despite the ways in which the two values are compatible, we should not expect that principles capable of accommodating them both will be easy to identify." Nor will it be easy to "to develop institutions, policies, and habits of conduct" that will support these principles in practice (Scheffler 2002, 124).[11]

Scheffler rightly sees that defenders of an ethic of moderate patriotism or moderate globalism must develop these views more fully if they are to provide people with ideas that are action-guiding and practically meaningful.

In order to meet this challenge, the moderate patriot defender must articulate different versions of moderate patriotism and evaluate them to see which most effectively resolves the clash between partiality and impartiality.

I will begin by distinguishing two possible types of moderate patriotism and two features that give rise to them. These are displayed in Table 10.5. Although its depiction of types of moderate patriotism is rather crude, it provides a start to clarifying the types of choices that face anyone who wants to develop an acceptable, action-guiding, moderate patriotic ethic.

Table 10.5 describes and contrasts two forms of moderate patriotism by focusing on two dimensions of moral demandingness. The first dimension involves the scope of duties to outsiders. It uses the familiar distinction between negative duties (that forbid directly harming others) and positive duties (that require benefiting others) to indicate greater or lesser scope.

A minimal version of moderate patriotism accepts negative duties toward outsiders but rejects positive duties. As a result, although *minimal moderate patriotism* recognizes that it would be wrong to inflict harm on outsiders, it does not recognize a positive duty to assist people who seek refuge, even if not assisting them will result in their suffering serious harm.

Opposed to this is *strong moderate patriotism*, which recognizes both positive and negative duties toward outsiders. According to this view, we have both a negative duty not to harm others and a positive duty to help them if they are in dire need.

[11] While I cite only one essay, Scheffler's whole book deals with partiality vs. impartiality problems with great care and insight.

If denying entry to people seeking refuge is likely to result in death or serious harm, we have a duty to protect them from these harms.

While these forms of moderate patriotism both recognize some duties toward outsiders, they nonetheless differ significantly in their degree of demandingness.

The second dimension of demandingness displayed on Table 10.5 concerns the amount of sacrifice that a moderate patriotic ethic requires people to accept. Minimal moderate patriotism recognizes only those duties that require little or no sacrifice while strong moderate patriotism includes compliance with duties even if this will result in a high level of sacrifice by a country or its citizens.

Moderate patriots, whether they accept only negative duties or both positive and negative duties, can disagree about acceptable levels of sacrifice. Minimal moderate patriots who accept negative duties to outsiders may disagree about whether they have duties to act when doing so would require serious sacrifices for their own country or its citizens. Similarly, strong moderate patriots who recognize positive duties of assistance to outsiders may disagree about whether their positive duties to outsiders include actions that require serious sacrifices by their own country. While some people might accept a duty to allow refugees to enter their country even if this required high costs and serious sacrifices, others would reject any duties that required more than low costs or minimal sacrifices.

The problem of sacrifice and demandingness arises not only with positive duties but with negative duties as well. For example, in wartime, the negative duty not to kill enemy civilians intentionally might result in greater casualties among one's own soldiers and civilians or a smaller chance of victory. Some moderate patriots would reject any such costly duties while others would uphold them even when compliance comes at a high price.

If moderate patriotism is to make a contribution to moral deliberation, its supporters need to recognize its different forms and determine which is best. That will provide a clearer account of the degree of partiality and impartiality that moderate patriots should accept.

10.8 Finding the Right Balance Between Partiality and Impartiality

One strategy for determining the limits of patriotic partiality is to start by asking why patriotism is justified at all. If we know what reasons justify patriotic partiality, we might then understand how much partiality is justified and when partiality ceases to be legitimate.

I assume that justifying views about the claims of partiality and impartiality requires evaluating them from an impartialist perspective. This may sound like a question-begging method, but as Brad Hooker has shown, partiality and impartiality play different roles. They can play a role in justifying moral rules, and they can play a role in providing the content of a moral rule. For example, using an impartialist method of reasoning can lead to justifying partialist moral rules that allow special

duties to some people. In doing this, the impartialist justification method would, for example, reject an impartialist rule that forbids parents to give special attention to their own children. The upshot is that an impartialist method of reasoning does not automatically favor moral rules that require impartial treatment (Hooker 2000, 23–29).

While there are several types of impartialist methods of justification, I will use a rule utilitarian perspective. The rule utilitarian method for justifying moral rules combines three basic ideas:

(a) an impartial commitment to giving equal weight to the interests of all people in the process of determining the content of moral rules,
(b) a consequentialist goal of achieving the greatest overall good for people, and
(c) a normative claim that right actions are those that conform to moral rules whose acceptance into a moral code would maximize overall well-being.

As I have noted, while rule utilitarianism uses an impartialist form of reasoning, it can be used to justify partialist moral rules. It does this when the acceptance of partialist rules promotes greater well-being than the acceptance of rules that require impartiality and forbid partiality. Rule utilitarianism supports, for example, moral rules that allow partiality to friends and family because it is reasonable to believe that prohibiting partiality in these cases would deprive people of important, life-enhancing benefits that friendships and family relations give rise to.

In some cases, partiality can be justified by using the idea of a division of labor. Consider the partiality of parents toward their children. Although rule utilitarianism accepts the view that all children are equally valuable, it justifies the partiality of parents toward their own children because of the good effects of dividing the task of raising children. Instead of every parent having duties to care equally for all children, better results are produced when particular parents are designated to care for specific children. This is beneficial because children need a high level of personal attention from specific adults in order to develop physically, emotionally, and cognitively. Moreover, since children differ from one another, their caretakers must know them well in order to give them the special treatment they need. Parental partiality is justified because it distributes care more effectively than an impartial system that requires parents to distribute care impartially to their own and other children.

Similar "division of labor" arguments can justify other partialist rules and practices. Students learn more when teachers have special duties to educate the particular students in their own classes rather than having a general duty to educate all students. Similarly, public officials have a duty of partialist concern to people in their own jurisdiction rather than caring equally for all. The result of this permissible partiality is that each city, for example, is more likely to have officials who know more and care more about their own city while other people who know and care more about other cities can strive to benefit them.

Robert Goodin applies the division of labor model to patriotic duties (Goodin 1988). These duties are justified, he says, not because one's own "countrymen" are more valuable or important than other people but rather because global goals can

best be achieved by dividing the task. As the slogan "think globally, act locally" suggests, people with global goals can often be most effective if they focus on local aspects of general problems. Because they generally know more about their local environment, they can be more effective locally than in foreign societies. Patriotic partiality is justified when it supports a division of labor system that provides the most effective means of achieving the impartialist goal of promoting overall human well-being.

10.9 The Limits of Partiality

While rule utilitarianism can be used to justify partiality, its method also provides grounds for determining both the scope and the limits of morally permissible partiality. Rule utilitarians, for example, will support a moral rule that forbids parents to advance their own children's interests by directly harming other people's children. They might also support a moral rule that requires financially well-off parents—whose children's needs are fully met—to contribute resources for other children who lack important goods. Why is this? Because when one's own children are already well off, additional resources could do much more good for other children who are in need. More generally, rule utilitarians might support a positive duty for well off people to provide assistance to strangers when their own needs and interests are already met and when there are effective ways to channel surplus resources to benefit strangers in dire need.

The same point seems to follow about national partiality vs. global, impartial concerns. While moderate patriotism allows countries to promote their own well-being, they may not be indifferent to people in other countries. As I noted earlier, extreme patriotism is excluded because it is exclusively concerned about a particular country and accepts no constraints on how it acts toward others. It rejects both negative and positive duties to outsiders.

Recall that patriotism and national partiality are justified by the idea that a division of labor will achieve overall well-being. That goal will not be achieved by unconstrained pursuit of the national interest or exclusive concern for a country's own citizens. Nor will it be achieved by a morality that frees countries from any moral duties whenever compliance with them results in costs to the country's well-being. As with personal morality, the morality of nations sometimes requires that sacrifices be made, but it also recognizes that there are limits on the extent of sacrifice. When the limits of sacrifice are reached, the duties cease to be required.[12]

[12] For a probing discussion of borders, national sovereignty, and a defense of strong duties to people in other countries, see Kymlicka (2001). For applications of a rule utilitarian method to issues in the ethics of war, see Nathanson (2010) and (2012a). For an overview of both act and rule utilitarianism, see Nathanson (2014).

10.10 A Moral of the Story

My main point in this paper is that answering moral questions about refugees, immigrants, and citizenship requires a better understanding of how to resolve the tensions between partiality and impartiality. I have argued that the moderate patriotic perspective provides this understanding and can help us avoid what seems like an either/or choice between the total partiality of extreme patriotism and the total impartiality of extreme global universalism.

Although moderate patriotism is a step in the right direction, it tells us only that countries and their citizens have some degree of duty to assist non-citizens, but it does not tell us how strong a duty we have. To make it more informative, I have introduced a distinction between strongly and weakly moderated forms of moderate patriotism. Strongly moderated versions recognize duties that are both positive and negative and that retain moral force even when acting on them requires sacrifices. Weakly moderated versions are less demanding because they recognize only negative duties and duties that require little to no sacrifice.

In order to evaluate these types of moderate patriotism, I have suggested that a rule utilitarian method can be helpful in determining which has the better view about duties to immigrants. My conclusion is that the rule utilitarian method suggests that countries with the ability to assist aspiring immigrants in dire circumstances have positive duties of assistance that are morally binding even when they require more than minimal sacrifice. The extent of acceptable sacrifice remains a difficult matter and may vary among different countries that face different challenges of their own. Decisions about what policies and actions they should adopt cannot be made without considering their impact on both the potential recipients of assistance and the countries providing assistance.

While migration may not be the only effective response to some disasters, it may be the best response in many cases. While immigration can often benefit both immigrants and their host countries, we know that problems may arise in countries that consider or accept taking in large numbers of immigrants. The most serious costs may be social and political rather than financial. In many European countries, the presence of large numbers of immigrants and the prospect of many more has generated considerable hostility among the citizen population. This is true as well in the United States, where millions of people reside in the country but lack legal authorization. These attitudes can generate conflict within a receiving country and can increase support for bigoted, nationalist and racist political groups. While bigotry and prejudice against immigrants should not dictate public policies, widespread opposition to aiding immigrants can lead to unrest and even violence. For these reasons, citizen opposition to allowing the entry of immigrants in need cannot be ignored by government officials and in some cases may generate costs that exceed the level of sacrifice that assisting countries are required to accept.

A philosophical analysis of these issues is unlikely to make an immediate difference to disagreement about these issues, but it is not irrelevant. Clarifying patriotic ideals may help people to understand that while patriotism encourages special concern for one's own country, it need not require or encourage indifference to outsiders.

Anti-immigrant attitudes may also be altered by recalling past denials of assistance that now are now seen as moral failures. Many people now deplore the actions of the United States and Britain in sending boatloads of Jewish refugees back to Nazi Germany. With this in mind, they may not want to support policies that will later be seen as repeated versions of moral failures.

In addition to keeping these past failures in mind, it is equally important to acknowledge the governments and people that have made serious sacrifices in responding humanely to refugees. The governments and people of Turkey, Jordan, and Iraq have accepted large numbers of refugees from the Syrian civil war. If their efforts were more publicized and praised, it might alter our ideas about what can reasonably be expected of people when they are faced by non-citizens in need of refuge. If some countries and their people have the ability to provide refuge or other assistance to people in dire need, we cannot write off these actions as being inconsistent with human nature. If some human beings have managed to respond humanely to strangers in need, then others may also have the capacity to do so.

Nonetheless, there are real burdens attached to acceptance of large numbers of immigrants, and various stresses are being felt in Turkey and in European countries, which have policies of accommodation but are struggling with increased numbers of immigrants (Kirişci 2013). At the same time, attempted migrations by desperate people continue to increase in Europe. As of July 2015, the number of people seeking refuge in Europe has increased by 149 % since 2014, with over 60,000 entering into Greece and into Italy (Peter 2015). As of November 2015, the number of people seeking refuge in Europe has climbed even higher. Germany has taken the lead in admitting migrants while others have been resistant, and anti-immigrant political parties have gained strength in a number of countries. As both the need for help and the burdens of providing assistance for so many people have greatly increased, the challenges to responding humanely have become more and more difficult.

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Chapter 11
Reconciling the Virtues of Humanity and Respect for the Rule of Law: Irregular Immigration from the Perspective of Humean Virtue Ethics

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Abstract Using a virtue ethics framework derived from David Hume, I focus on the perspective of a citizen or legal resident of a state receiving irregular (undocumented, "illegal") immigrants, rather than focusing on questions concerning the rights of immigrants or what justice requires of states. What view should a virtuous citizen take of the many issues concerning irregular immigration into her country? This question involves both the virtues of the citizen or legal resident herself and her view of the virtues and vices of the immigrants. I argue that there are tensions within such a virtues approach, that understanding these tensions allows us to grasp the contrasting attitudes concerning immigration, and that on balance a virtuous person will respond to the plight of irregular migrants with sympathetic concern tempered by recognition of the need for order. I conclude with a plea for another Humean virtue, moderation.

11.1 Introduction

The many debates concerning irregular (undocumented or "illegal") immigration tend to focus on questions of what justice requires of states, what rights states have to regulate immigration, and the rights of immigrants themselves. While these questions are certainly important and unavoidable, changing focus may provide a different theoretical perspective. I focus here on the perspective of a citizen or legal resident of the potentially receiving state who seeks to be as good a person as she can be. In old-fashioned (and current academic philosophers') language she seeks to be *virtuous*. I am not claiming that a justice/rights approach and a virtues approach are at a fundamental level incompatible. As Onora O'Neill (1996) has argued, an ethics of obligation and rights may be compatible with an ethics of character and

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virtue, and these approaches may even be complementary. I see the initial varying focuses of these two approaches as significantly emphasizing or hiding important insights.

What view should a virtuous citizen take of the many issues concerning irregular immigration into her country? This question involves both the virtues of the citizen or legal resident herself and her view of the virtues and vices of the immigrants. I argue that there are tensions within such a virtues approach, that understanding these tensions allows us to grasp the contrasting attitudes concerning immigration, and that on balance a virtuous person will respond to the plight of irregular migrants with sympathetic concern tempered by recognition of the need for order.

The focus on rights and justice is perhaps best evinced in the work of Joseph Carens (2013). His approach is to argue for immigrant rights from the presuppositions of democratic principles (Carens 2013, 12; 306–309). In the first chapters of *The Ethics of Immigration*, Carens assumes for the sake of argument that states have a prima facie right to control immigration and argues that even so, potential immigrants have a right to entry on certain grounds (most notably as refugees or asylum seekers, using an expanded conception of these categories) and that even irregular (undocumented, illegal) immigrants, without any claim of asylum, come to have moral and legal rights over time through social membership (*Ibid.*, 158–169). Carens clarifies social membership: "Most people do develop deep and rich networks of relationships in the place where they live, and this normal pattern of human life is what makes sense of the idea of social membership. Nevertheless, in the end, simply living in a state over time is sufficient to make one a member of society and to ground claims to legal rights and ultimately to citizenship" *(Ibid.*, 168). He claims that there is a "moral logic" *(Ibid.*, 152, 184) that requires extensive recognition of immigrant rights, given the underlying basis of the rights of citizens. That basis, he argues, is also social membership. Carens then argues that, contrary to the previous assumption, there is no general right of states to control entry (though special cases such as people endangering security can be denied entry).

In contrast, a virtues approach does not seek to uncover a moral logic to justify immigrant rights. The focus is rather on the moral sentiments and attitudes of citizens and legal residents as they reflect upon immigrants in their varying circumstances. The basic framework for the virtues approach I use derives from David Hume, though my view is not in detail or in the final application to irregular immigration ascribable to Hume. The crucial Humean distinction relevant to immigration is that between natural virtues and artificial virtues (Hume 1978, 474–475). The natural social virtues (for instance, humanity and benevolence, generosity, kindness, gratitude) are based on sentiments found in human nature (*Ibid.*, 478) existing without need of inculcation through socialization or education, though these may refine and modify the sentiments. The natural virtues relevant to how we should view immigrants are humanity or benevolence, generosity, and kindness toward children. These virtues undergird a virtuous person's seeking to help irregular immigrants and ease their difficulties. And when reflecting about the character of the irregular immigrants themselves, their motivation of care and concern for their families, where present, will count as virtuous. For Hume, prudence and industry

are self-regarding natural virtues, so the motivation of seeking a better life even for oneself evinces virtue. The artificiality of the artificial virtues consists in their resulting from human artifice or contrivance. The artificial virtues (for instance, honesty concerning property, promise-keeping, allegiance to lawful authority) are based on conventions which develop gradually in society, need inculcation through education (*Ibid.*, 533–534), and have detailed content that varies from place to place and time to time, even though at a very general level these conventions are common to human societies, and so in that sense may be called "natural" *(Ibid.*, 484; 489–492). The virtuous citizen will have an attachment to lawfulness, and so feel some degree of disapprobation of illegal actions. As the virtuous citizen reflects about irregular immigrants, she may consider them to some degree lacking in the virtue of respect for law, because they entered her state (or overstayed their visas), and remain, without legal permission. The more finely detailed the conventions underlying the artificial virtues, the less intense will be the disapprobation of those who violate the rules. In contrast, disapprobation of the absence of the natural virtues has no such tendency to diminish, for there are no rules at issue that vary in detail. I will return to this distinction in application to immigration later.

It is often easier to recognize viciousness than virtue. In early July of 2014 a large screaming crowd in Murrieta, California blocked buses transferring immigrant detainees, most of them young children, from the Texas border to a Border Patrol station in Murrieta (Hansen and Boster 2014). In Oracle, Arizona protestors gathered on July 15, 2014 expecting the arrival of buses of migrant children to be sheltered locally. State Representative Adam Kwasman, who was seeking the Republican nomination for Congress in his district, tweeted: "Bus coming in. This is not compassion. This is the abrogation of the rule of law." Later Kwasman told a reporter, "I was able to actually see some of the children on the buses, and the fear on their faces. This is not compassion" (Stewart 2014). The children on the bus turned out to be YMCA campers. A vicious lack of humanity is evinced in these incidents. Protesting current immigration policies can be done in many places, for instance in public spaces near federal buildings, without trying to block children from shelter and needed services, and without frightening the children. These incidents also evince disrespect for the rule of law and a failure of allegiance to lawful authority as the legal requirements are implemented regarding placing children at first in temporary facilities and then with sponsors as they await immigration hearings. Again, protesting these policies need not involve directly interfering with those providing the children care.

11.2 The Virtue of Humanity or General Benevolence

The word "humanity" may be used in ethics either within a theory of rights and duties or within virtue ethics. For instance, Chandran Kukathas (2014, 380) uses the phrase "principle of humanity" as the second reason for open immigration (the "principle of freedom" is the first). But he seems not to be working within a virtues

account; rather, his principle of humanity seems to be the action-guiding principle imposing a duty to help other human beings in need.

In Hume, humanity is a quality of mind (a virtue) that responds with compassion through sympathy ("empathy" in current terminology) to the suffering (or happiness) of others—it is "general benevolence" (Hume 1978, 478 and 1998, 93–95). It is based on sentiments natural to us as human beings. The virtue of humanity in Hume's *Enquiry Concerning the Principles of Morals* seems to encompass pity and compassion, as these sentiments or passions are explained in the *Treatise* (Hume 1978, 368–371). The underlying feeling is pity or compassion, and the virtue of humanity is the durable character trait that these sentiments inform. Hume (1998, 76) writes, "Whatever conduct gains my approbation, by touching my humanity, procures also the applause of all mankind, by affecting the same principle in them…."

The role of compassionate sympathy in tension with moral or legal rules is explored with great subtlety by Jonathan Bennett (1974), using Mark Twain's *The Adventures of Huckleberry Finn*. In Twain's novel Huck Finn is torn between his rigid rule moral beliefs, learned from a slave-owning society, and his sympathy for his friend, the escaping slave Jim. Huck sincerely believes that slaves are property, as indeed they are in slave states before the American Civil War. In the end, Huck goes against his conscience (which informs him that he is participating in robbing Jim's rightful owner, Miss Watson) and, to protect his friend from being captured, lies to the fugitive slave hunters. I interpret this as Huck acting out of the virtue of humanity, in Hume's sense. Huck, however, believes that he is acting in a completely immoral way, for he does not have a reflective view of morality that allows for either modifying moral beliefs (for instance, rejecting the very idea that one human being can rightfully own another) or recognizing the complexity created by the opposition between humanity and respect for law. Of course, irregular immigrants are not slaves legally (though some are indeed illegally treated as slaves, especially as prostitutes "owned" by traffickers), but there is a comparable tension between humanity toward irregular immigrants and respecting the law that imposes a lesser legal status upon them than that held by citizens and legal residents. In *Illegal migrations and the Huckleberry Finn problem* John Park (2013) probes the partial similarity between the status of slave and the status of undocumented or irregular immigrant. Park raises the Huckleberry Finn Problem: if you knew that someone was here in the United States illegally, would you inform the authorities? I believe that many, perhaps most, would not. And being friends, good neighbors, or agreeable co-workers would make it unthinkable. Most of us would have no qualms, however, about informing the police about someone whose illegal conduct was murder, armed robbery, or rape.

As illustrated by Huck Finn's feelings of compassion and humanity for Jim, we tend to respond more intensely to the troubles of those nearer to us in some way, and even plain spatial propinquity affects our responses. However, as Annette Baier (1995, 2006) has pointed out, we can extend such humane responses outward, and that is what morality requires. A virtuous person will respond to most irregular immigrants with humanity, though not to those who come to do violence or harm.

And Carens's argument that over time social membership creates rights can be recast in virtue terms: over time irregular immigrants living peacefully in society call forth a greater response of humanity simply because they are our neighbors. The need, identified by Baier, to expand the natural virtue of humanity outward toward distant strangers diminishes as the distance disappears, not merely physically but also in terms of human relationships. In addition, the longer the irregular immigrants have participated in society, the more harmful uprooting them would be for everyone affected. The prospect of such harm will lead a citizen who has the natural virtue of humanity to feel disapprobation of the uprooting. Especially would a virtuous person respond with benevolence and humanity to the prospect of uprooting those who came as children (accompanied or not) once they are adults and fully a part of society.

11.3 The Virtue of Allegiance and Respect for the Rule of Law

Opposition to irregular immigration and to regularizing the status of long-time residents who arrived or stayed without legal authorization seems in part to derive from condemnation of irregular immigrants as lawbreakers. They are seen as vicious, showing no respect for the laws of the nation they entered or remained in illegally. But this "illegality" is easily misunderstood.

Joseph Carens points out that immigration matters as such (absent serious offenses or re-entry after deportation) are not treated as crimes, but rather as matters for administrative action. Criminal procedures are not used for irregular migrants (unless a crime is involved), and so they do not have the full range of protections and rights accorded both citizens and non-citizens in criminal cases (Carens 2013, 131–132). In addition to these points, I consider it very significant that immigration judges are not a part of the judicial branch, as they would need to be if immigration violations as such were crimes or even misdemeanors, but rather are within the executive branch in the Department of Justice. On the idea that amnesty rewards lawbreakers, Carens writes: "It is true that the rules governing immigration are laws but so are the rules governing automobile traffic. We don't describe drivers who exceed the speed limit as illegal drivers or criminals…. We all recognize that laws vary enormously in the harms they seek to prevent and the order they seek to maintain" *(Ibid.*, 155).

In an account with deep Humean roots, Shaun Nichols (2004, 6–7; 186–187) distinguishes between conventional norms (in the sense that applies to, e.g., rules of etiquette, or rules based on authority, such as keeping the Sabbath) and moral rules. (Unlike Nichols, Hume uses the term "convention" to designate the way norms arise through coordination of human behavior over time.) Moral rules, such as norms against harm, have a basis in sentiment and are authority-independent. Nichols recounts empirical evidence supporting a Humean ethical theory and the centrality

of sentiments for morality (*Ibid*., 29). I see Nichols's distinction between conventional norms and moral norms as mirroring Hume's distinction between natural virtues such as humanity, with an immediate basis in sentiment, and artificial virtues such as allegiance and respect for law. Unlike Nichols, Hume uses the word "morality" to encompass both and claims that the rules of property ("justice" in Hume's terminology) and lawfulness do come to be seen as moral requirements, and thus have an indirect basis in sentiment. However, as I have argued (Henley 2011), Hume emphasizes the highly contingent and varying nature of the rules required by the artificial virtues. Even though having some structure of justice and allegiance is necessary to support public and private utility (mutual advantage), and some norms promote utility better than others, much of the detailed content of the norms will be like taboos. Such taboos will seem more like what Nichols calls "conventional norms," in contrast to moral norms. Our disapprobation of violations of such detailed conventional norms, so distant in their connection to human well-being, will be weak if we consider matters carefully. As Carens urges, we should not treat mere immigration without legal permission as comparable to crimes such as armed robbery or rape. I urge that the connection between irregular immigration and harm to human interests is so distant that we should consider the relevant norms as like taboos. Armed robbery and rape directly harm those attacked, triggering strong sentiments quite apart from positive law, while irregular immigration is a (minimal) danger only to maintaining the authority of the legal system. Even traffic laws, which decrease the incidence of injury and property damage, have a more direct connection to human interests than laws against irregular immigration.

The virtuous citizen viewing irregular immigration will, however, not entirely reject the need for lawful, orderly procedures both regarding entry and regularizing the status of long-time residents who entered without authorization. Border security is needed to prevent entry of those intending violence or harm and to prevent chaos.

11.4 Reconciling Humanity and Respect for the Rule of Law

Carens (2013, 265–267) discusses Hume's point in "Of the Original Contract" that we are born into on-going multi-generational societies. Unlike butterflies and silkworms, we do not arrive and depart the world all at once as single generations (Hume 1987, 476–477). Carens uses this point to argue against David Miller's view that inequalities among nations may in principle be morally justified by collective self-determination, for differing choices regarding such matters as the use of resources can impact the prosperity of various nations (Miller 2007, 68–75). Miller thus seeks to block the claim that in all circumstances justice requires some degree of openness to immigration to remedy the inequalities of prosperity among nations. But, as Carens indicates, only the choices of a founding generation could justly be imputed to those who made them. Subsequent generations will be affected through no fault of their own.

A Humean virtues view will certainly agree with Carens's rejoinder to Miller, for the voluntarist, consent-based picture of political and social life is rejected on any Humean account. Even on David Gauthier's (1979, 11–16) interpretation of Hume as a hypothetical contractarian, both explicit and tacit consent of current citizens are rejected as a basis for the political community, for actual human societies span many generations, and individuals are born into already existing structures of conventions. The impact of the point that we are not butterflies goes further on a virtues account than on Carens's view. Since in our actual world it seems unlikely that immigrants are themselves responsible for the dire poverty, violence, or oppression they are fleeing, a virtuous person will not adjust her sentiments to harden her response to their suffering, discounting the suffering as the immigrants' own fault.

A virtuous citizen or legal resident will respond humanely to the suffering of those fleeing violence, oppression, or dire poverty. Even if irregular immigration to some degree evinces a lack of respect for law, an excuse of duress or necessity mitigates any condemnation of the character of the irregular immigrants.

The virtuous citizen or legal resident will also have the virtue of gratitude for not needing to resort to the often dangerous course of action that irregular immigrants have been forced into by circumstances they usually have no responsibility for. Most citizens have been born into citizenship. Just as the irregular immigrants are not to be blamed for their native country's problems, so most citizens cannot claim any merit for their good fortune. Like being born a slave or born free in a slave-owning society, being born in a dysfunctional or impoverished nation, or born in a prosperous rule-of-law nation, is a matter of luck, not merit. Reflecting upon this should encourage us to respond with humanity to the plight of irregular immigrants.

From a Humean perspective my view may seem mistaken at first. The artificial virtues of allegiance (and respect for the rule of law as a main component) and honesty concerning property ("justice" in Hume's terminology) are inflexible and rigid. The natural virtues of humanity and benevolence are variable, both in intensity and in terms of beneficiaries. This is usually taken to mean that a virtuous person will never violate the requirements of legality and honesty. When there is conflict between rigid artificial virtues and flexible natural virtues, the flexible must give way to the inflexible—or so it might seem.

I do not believe that this inflexibility-triumphant interpretation of Hume is the only one that is faithful to his thought. As Pall Ardal (1966, 188–189) argued, there are occasions upon which we approve of violating inflexible rules because of humanity and benevolence (or even prudence). Jennifer Welchman (2008), using the Robin Hood folk narrative, provides an insightful account of the conflict between benevolence and conformity to the rigid rules of justice (in Hume's sense of complying with property rules). I think we can simply say, along with Ardal, that the benevolent person who violates or ignores a technical requirement of respect for law is virtuous in respect to humanity or benevolence, but cannot be said to evince justice (in Hume's sense) or respect for law. Hume was not wedded to the classical idea of the unity of the virtues.

It is also possible, from what is still in the spirit of Hume, to distinguish among various perspectives connected to roles. Officials within the legal system have a strict obligation to follow the law, and so the virtue of respect for the rule of law must for a virtuous official be sovereign. An ordinary citizen or legal resident is in a different position. She is not charged with enforcing law, and so the sovereign virtue for her need not be respect for law in every matter. She is free to distinguish between technical infringements like irregular immigration and serious wrongs like armed robbery. Her humanity and benevolence may outweigh her sense that irregular immigrants technically evince the vice of failure to respect the rule of law, and so she may find them not very vicious.

Officials are also citizens and human beings. If they are virtuous citizens it might be argued that they too, like the virtuous citizen who is not an official, should view irregular immigrants as merely technically failing to respect the rule of law, and respond even within their official role with humanity and benevolence. After all, officials do respond differently to minor matters such as speeding and serious matters such as armed robbery, and this is not only consistent with their official role but even required by it. Comparable calibrations are required by officials in responding to irregular immigrants. But these calibrations are not the result of the virtue of humanity, for they simply conform to gradations in the relevant laws themselves. It is a different matter to go beyond the legally articulated differences between minor infractions and major infractions, and respond with humanity and benevolence. Citizens in their private capacity are free to act out of their virtuous humanity regarding irregular immigrants. Consider the Huckleberry Finn Problem discussed above. Ordinary citizens are under no legal obligation to inform on irregular immigrants. (There are separate legal issues regarding employing irregular immigrants. But even then, actually informing on their status is not legally required, only not knowingly faking records or failing to comply with regulations concerning employer tax and contribution requirements.) However, there are limits to an official's scope to act upon her humanity. These limits vary from one official role to another. For instance, law enforcement officers tasked with patrolling the border are free to feel compassion and to treat irregular immigrants with kindness, but they are not free, morally or legally, to allow an irregular immigrant to continue the journey. Having undertaken the official role, the officer has a special duty of fidelity to law. From a Humean perspective, this is not the bare duty of respect for law (which all citizens and residents have), for the official has an additional duty of promise-keeping that bolsters the moral claims of allegiance. Once a deportation case comes before an immigration judge, she is not morally or legally free knowingly to decide the case contrary to law, even if her humanity pulls her to do so.

On the other hand, in a legal system that recognizes prosecutorial discretion, as in the United States, if allowed by executive policy, there is no legal or moral barrier to a prosecutor's acting upon her humanity, choosing not to seek deportation of those whose only unlawful conduct is irregular immigration (and perhaps such minor infractions as traffic offenses). In the United States, Federal prosecutors operate within policies that come from higher officials in the executive branch, and ultimately from the President. The President is limited by his Constitutional

authority, and the virtue of humanity cannot have free reign as he carries out his duties. In August of 2015, a U.S. District Judge halted by injunction the implementation of President Barack Obama's executive action to defer deportation for approximately 5 million irregular immigrants (Hennessy-Fiske 2015). The programs in question, Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans, include more than deferral of deportation, providing work permits and access to various resources. It is possible that the deferral of deportation will eventually be vindicated, even if the other provisions are ruled invalid. The case was in appeal in the U.S. Court of Appeals for the 5th Circuit, which denied the Administration's motion to stay the preliminary injunction pending appeal (State of Texas, et al v. USA, et al. 2015). The U. S. Supreme Court has granted the petition to review the case, and the decision is expected by June of 2016. It is not clear whether President Obama has exceeded his authority, which includes setting policy concerning prosecutorial discretion. However, it is clearly admirable from a Humean perspective that the virtue of humanity be given as much scope as possible within the confines of the legal requirements of official duty.

11.5 Conclusion: The Virtue of Moderation

My account of reconciling the virtue of humanity and the virtue of respect for the rule of law includes controversial features such as the distinction between officials of the legal system and citizens without official role, allowing exceptions to the preeminence of the inflexible artificial virtue of respect for law motivated by the natural virtue of humanity, and emphasizing that many details of artificial virtues, including respect for the rule of law, are highly contingent and taboo-like. Even a Humean virtue theorist might reasonably reject any or all of these features of my reconciling account. And not everyone is a Humean virtue theorist. Recognizing such reasonable disagreements, I yet claim that these Humean distinctions between artificial and natural virtues, and specifically between respect for the rule of law and humanity, serve an important purpose in the often heated debates about irregular immigration. We need to recognize that those who seek to regularize the status of irregular immigrants (in one way or another) and those who reject such changes are both fueled by a sense of themselves as virtuous citizens. The proponents of regularization give the virtue of humanity reign, while the opponents give reign to respect for the rule of law. Both should embrace the virtue of moderation, listed as a social virtue along with humanity and benevolence by Hume (1998, 78). Hume argued for moderation throughout his political writings, combating the factional politics of both Tories and Whigs. We should share Hume's skepticism regarding a politics of principle that claims a final and complete hold upon truth. As Stuart Warner and Donald Livingston (1994, xvi) explain, Hume argues "…that even well-formed principles—especially political principles—are problematic in their application to the realm of things human. Hume's appeal … may be seen as sounding a note of moderation—and, indeed, moderation finds a close friend in Hume…."

Moderation concerning the topic of irregular immigration requires that the opposing political factions explicitly recognize the conflict between the opposing virtues of humanity and respect for law, and grant their opponents' good faith, unless in particular cases there are solid grounds for doubting that good faith exists.

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Chapter 12
Human Rights, Distributive Justice, and Immigration

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Abstract Two assumptions set the stage for the argument. First, it's only sometimes that immigration policy debates invoke human rights (or justice) considerations. Second, it is largely irrelevant to the moral defensibility of immigration policies, both (a) whether they are legally or constitutionally permissible or whether they conform to international law, and (b) whether they are adopted by a legitimate state exercising its right to political self-determination. The paper makes three claims. (1) Immigration policies can't be shown to be morally defensible by appeal to such putative human rights as the right to freedom of association and freedom of movement or the right to leave one's country on a permanent basis unless the limited scope of these rights is given proper recognition. (2) In any case these rights (even when they are appropriately formulated as "limited scope" rights) are not the human rights that are most likely to be particularly relevant to the moral defensibility of immigration policies. Rather, the rights most frequently invoked are the rights—civil, political, economic, social, or cultural—that are typically violated by oppressive or exploitative regimes in the countries most would-be immigrants want to leave. (3) There is less reason than sometimes supposed to expect "cosmopolitan" theorists to be more committed than "liberal nationalists" to the liberalization of immigration policy.

Immigration policies can be (and indeed often enough are) defended without appeal to rights or to considerations of justice. For example, a highly selective immigration policy – one that grants permanent entry only to would-be immigrants with skills that are in short supply in the receiving country – may be justified on "national

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economic interest" grounds. Since pursuit of this goal is generally assumed not to be in need of any justification, no question so much as arises about whether there's a *right* to adopt immigration policies that serve the national economic interest. Indeed, this sort of right (on any interpretation of its status and rationale) plays no significant role in the defense typically offered for adoption of this line on immigration issues. It isn't because the state takes itself to have such a right that it supposes its immigration policy to be defensible. Rather, the defensibility of the policy is normally thought to be bound up with the empirical evidence that can be marshaled to show both that the economy urgently needs skilled workers of some special sort and that workers with the required skills are (and will continue to be) in short supply within the domestic labor market.

However, it's not unusual—certainly in philosophical treatments of the normative underpinnings of a country's immigration policies—for rights-invoking arguments to be cited, and such arguments can be cited both in support of liberalization of immigration policies and in support of policies that restrict or limit immigration (perhaps even drastically). For example, more liberal immigration policies can be defended (e.g., by libertarians, among others) on the footing that would-be immigrants have a right to freedom of movement, a right that doesn't stop at a country's borders, and this general position may be bolstered by appeal to the right individuals have, under human rights law, to leave their own country – a right that would be meaningless unless it went hand-in-hand with a right to be admitted to at least some other country (even if not to the country of choice). However, rights can also be invoked in defense of more restrictive immigration policies. It can be (and has been) argued that a legitimate state has the right to give content to its immigration policies in any way it pleases, because it has a right to political self-determination that incorporates the right to freedom of association and because the right to freedom of association must be understood to be a right to decide whether or not to enter into any particular associative arrangement. On the strength of this argument, a legitimate state is held to have complete discretion to adopt immigration policies that exclude some or all would-be immigrants as well as to determine the terms on which those who are admitted are to be granted entry.

12.1 Immigration Policy and Rights-Invoking Arguments

How are these rights-invoking arguments to be understood, and do they contribute to the justification of the immigration policies they are designed to support?

A preliminary point that has to be noted is that if what's at issue is the *moral* defensibility of immigration policies, the rights have to be taken to be (putative) *moral* rights. The fact that a country's immigration policies have been adopted in ways that conform to its system of law is consequently relevant only to the answering of a very different question—viz. the question whether the policies are *legally* defensible. While it is generally (even if not quite universally) recognized that the gap between moral and legal justification in such contexts can't be closed by mak-

ing moral defensibility a necessary condition of the very existence of a system of law, it is sometimes supposed that the gap can at least be narrowed, in countries that have a constitution, if the constitution serves as a criterion of the acceptability of all the parts of the legal system. Alternatively, it might be surmised that the gap can perhaps be narrowed in jurisdictions that require domestic legislation to be in accord with the norms of international law, in particular the norms embedded in human rights law. But these are mistaken conjectures. In all these cases, a distinction still needs to be drawn between what is legally required or permitted and what morality requires or permits. The provisions of a country's constitution and the requirements of international law are no less in need of moral scrutiny than the rules and procedures that give content and structure to a domestic legal system.

Does it help to render a country's immigration policies immune to further moral scrutiny if, in addition to satisfying legal and constitutional requirements and in addition to complying with international law, the policies have been adopted by a *legitimate* state when a state's "legitimacy" is held to be contingent on its satisfaction of a demanding moral criterion—a criterion that is met (say) only by states that have a track record of respect for human rights, both the human rights of their own citizens and the human rights of outsiders? Does the fact that an immigration policy has been adopted by a legitimate state (on some such ambitious account of the criterion of state legitimacy) render it superfluous to raise questions about the moral acceptability of the policy? The answer must still be "No," because the question whether an immigration policy is morally defensible can't be settled by simply appealing to the fact that it has been adopted by a country with an excellent human rights record. A legitimate state, in exercising the prerogatives of sovereignty, may be secure in its enjoyment of the right to political self-determination without the laws it enacts or the policies it adopts being immune to further moral scrutiny. Indeed, it's normal practice in societies with impressive democratic institutions for vigorous society-wide debate to take place about the moral justifiability of the policies and laws the state has either proposed or defended.[1]

But what if—recognizing that what is crucial to the moral evaluation of a country's immigration policies is neither (a) the consonance of these policies with its own legal and constitutional arrangements or with the requirements of international law nor (b) the fact that they have been adopted by the country in exercise of its (let

[1] In her book on "territorial rights," Margaret Moore (2015) notes that in "both international relations and political science more generally, and most normative analysis by political philosophers," it is commonly assumed that "it is inherent in state sovereignty that it involves political authority over a territory" (*Ibid*., 3). But while the view that "state sovereignty necessarily involves control over territory" is indeed the "dominant view," it's a view she rejects, principally because once the (three) territorial rights associated with "control over territory" – viz. "rights of jurisdiction" (over a territory), "rights to control (territorial) borders," and "rights to control resources" (within a territory) – are distinguished (or unbundled), "it is not at all clear that the argument for one dimension of territorial right will also apply" to the other dimensions (*Ibid*., 4). For a nuanced discussion of "rights to control (territorial) borders" – where these include the right to "control the flow of people" across borders – see the chapter on "Territorial Rights and Rights to Control Borders and Immigration" (*Ibid*., 188–218).

it be supposed undoubted) right to political self-determination—these policies are defended by appeal to the putative moral rights of individuals? Can we bypass questions about the moral credentials of an immigration policy if its supporters defend it by representing it as consonant with such individual moral rights as the right to emigrate, the right to freedom of movement, and the right to freedom of association? The answer must still be "No," because, even if these rights are represented as *moral* rights—indeed as putative human rights, rights ascribable to all human beings—the question whether they have the content they are said to have and whether they can be justified still has to be faced.

12.2 Immigration Policy and the Right to Freedom of Association

Take the right to freedom of association. Even if we grant that, suitably interpreted, it is a right all human beings have, questions arise inevitably about its content and scope and also about its rationale. Is there, for example, a human right to freedom of association *as such*, or is it a right ascribable to all human beings only when certain conditions are fulfilled? The scope of the right might, e.g., be restricted to ensure that the associations individuals have a right to form or join are unobjectionable associations (even if only in a fairly undemanding sense of "unobjectionable"). It would be odd, for example, if the content of the right were thought to be the same whether the association in question existed to serve some plainly anti-social end or whether its purposes were at least consistent with protection of the vital interests of the members of society. Could there be, e.g., a human right to join a racist organization like the Ku Klux Klan or a criminal gang committed to the peddling of life-threatening drugs?

But the existence of morally obnoxious associations, it might be thought, needn't force any retreat from the view that the right to freedom of association gives all individuals a right to enter into the associative arrangements of their choice, without the imposition, antecedently, of restrictions on the range of options among which they can choose. All that need be noted (it might be said) is that the right to freedom of association is merely a *defeasible* or *presumptive* (or "prima facie," or "other things being equal") right. When, in particular cases, an individual seeks to exercise the right by joining or by forming a morally objectionable association, the right to freedom of association can be *overridden*: exercise of the right can be blocked, in light of special circumstances. The "problem" seemingly posed by the existence of morally objectionable associations can thus be handled without any delimitation of the scope of the right to freedom of association. There's no need to deny the existence of the right in situations in which the associative decisions individuals choose to make clearly violate important moral principles. All that need be acknowledged is that the right to freedom of association is a defeasible or presumptive (and thus an overrideable) right.

Against this view, however, it can be argued that one of the ways in which the status of rights—including such rights as the right to freedom of association—can be subtly misrepresented is by inadequate attention to the distinction between "unlimited scope" and "limited scope" rights. Neglect of this distinction encourages premature appeal to the familiar fact that rights can be overridden, certainly in contexts in which they happen to come into conflict with one another, but arguably also in contexts in which they conflict with (moral) considerations that are not themselves right-related. Thus, it may be thought that it's defensible to regard such rights as the right to freedom of expression or the right to freedom of association as rights of unlimited scope provided they are simultaneously acknowledged to be *defeasible* rights. That is, it may be thought to be innocuous (on this account of the defeasibility of moral considerations) for a right to be regarded as a right of unlimited scope because its defeasibility provides a ready basis for curtailment of the right in all those contexts in which there is a powerful moral objection to its exercise. In such contexts (it might be held) it need only be acknowledged that the right must be *overridden*. The purveyor of hateful (and potentially highly injurious) oral or written messages might thus be said to *have* a general right (that is, a right of unlimited scope) to freedom of expression, even though, given the particular circumstances, there may be a conclusive moral objection to exercise of the right. Again, individuals bent on joining or forming morally objectionable associations might still be said to *have* a general (but defeasible) right to make the associative decisions of their choice, even though any attempt on their part to exercise this right by making morally objectionable associative arrangements will be blocked because the right will be overridden by the more stringent rights they will be violating.

This approach to the interpretation of the defeasibility of general moral considerations is frequently adopted in many other contexts. Consider, for example, the status of the principle that promises ought to be kept. One familiar prop for the view that the principle should be read as calling for promises *as such* to be kept—that is, for all promises, regardless of their content, to be the source of a moral obligation to do what has been promised—is the claim that the principle is *defeasible*, and that consequently allowance can be made for the possibility that there may be no "all things considered" or "other things being equal" obligation to keep the promise in situations of certain sorts—for example, when the promise itself is immoral, or when keeping it would have very undesirable consequences, or when there's a conflict between the obligation to keep the promise and some other important moral requirement like telling the truth, and so on. The same approach to the defeasibility of moral considerations is sometimes adopted to avoid otherwise plausible counterexamples to expansive interpretations of the doctrine of consent. It is generally recognized that consent must be both "voluntary" and "informed" if it's to carry significant moral weight, but resistance to the addition of a third general condition—one that requires the moral permissibility of what is consented to—is sometimes supported by pointing to the defeasibility of consent-related moral considerations.

However, in all these (and other relevantly similar) cases, serious attention needs to be given to the possibility that the *scope* of important moral considerations—

right-related, promise-generated, consent-based, etc.—may have to be delimited in some way *before* appeal can appropriately be made to the defeasibility of these considerations. For example, there may be even a defeasible right to freedom of expression or to freedom of association *only when* the scope of the right has been significantly delimited by denying in advance that the right has any application in situations in which recognition of the right would routinely generate grave injustices. Thus there may be *no* right to freedom of expression in contexts in which the free expression of some view serves no other purpose than to do irreparable damage to someone's professional reputation—perhaps through the promulgation of blatant lies about her professional record. Again, there may be *no* right to freedom of association in contexts in which the sole purpose of an associative arrangement—a conspiracy, for example—is to bring about the death of the members of some hated or despised religious or ethnic minority. In cases of both these sorts, what should *not* be said is that, while perpetrators of these gross injustices did indeed have a defeasible (or "other things being equal") right to give expression to their views regardless of their content or consequences or to associate with freely selected others in pursuit of any goal of their choosing, there was an overriding reason to prevent them from exercising their right. And in the case of promise-based and consent-related principles, the truth may be that it's a mistake to suppose that the making of a promise (any promise whatsoever, no matter what its content or its consequences happen to be) or the giving of consent (regardless of what is being consented to) can be absolutely *all* it takes for there to be a moral obligation (even a *defeasible* or *overrideable* obligation) to keep a promise or to stand by what has been consented to.

When Christopher Wellman claims that the right to freedom of association that he takes to be part and parcel of a legitimate state's right to "political self-determination" gives virtually unlimited discretion to such a state to determine the content of its immigration policies, his argument presupposes an indefensibly broad ("unlimited scope") understanding of the right, an understanding he takes to be protected by recognition of its defeasibility (Wellman and Cole 2011).

Now there are a number of possible objections to Wellman's line of argument—to the claim, for example, that a right to freedom of association is an integral part of the right a "legitimate" state has to "political self-determination," or to the claim that if the *state* should adopt an immigration policy that excludes some or all would-be immigrants, it can be presumed to be adopting a policy that merely expresses the right *individual citizens* of the state have to exercise *their* right to freedom of association. Here, I want to draw attention to a different problem—viz. that if there is no such right as the right to freedom of association when it is viewed as establishing the presumptive permissibility of *any* associative arrangement the right-holder might decide to become a party to (if, that is, there is no such thing as a *defeasible* right to determine the content and structure of associative arrangements *in any way whatsoever*), then there can be no such *general* right to freedom of association as Wellman ascribes to "legitimate" states. And this means that the right to freedom of association can't be invoked to *settle* questions about the moral acceptability of a legitimate state's immigration policies, whether these are designed to exclude some or all would-be immigrants or to determine the terms on which to grant them entry.

An immigration policy that excludes some or all would-be immigrants (or that sets the terms on which they are to be granted admission) might, of course, be defensible on freedom of association grounds once a suitably qualified articulation of the right to freedom of association had been effected. But for that to be a possibility there would have to be scrutiny of the reasons for the granting or the denial of the right to enter. A ban on immigration, for example, might be defensible if a country's economy is too fragile to accommodate immigrants, or if it already suffers from excessive population density, but not if the ban simply reflects racial animosities. There can be no such blanket endorsement of the immigration policies of "legitimate" states as Wellman seems to think can be supported by appeal to the right to freedom of association. If the right to freedom of association is to be invoked in (partial) defense of a country's immigration policies, the right cannot be regarded as a free-standing or self-vindicating right, one that has normative force independently of the moral considerations that serve to provide its justification and in the light of which its boundaries have to be determined.

12.3 Immigration Policy: The Right to Freedom of Movement and the Right of Exit

Much the same criticism can be directed at arguments for immigration policies that purport to hinge on recognition of such human rights as the right to freedom of movement and the right to leave one's own country on a permanent basis. In both cases—and for reasons that run parallel to those reviewed in connection with the right to freedom of association—there can be no *general presumption* in favor of these rights. While drug traffickers, plying their trade both internationally and within particular countries, find such "freedom of movement" as they enjoy in practice to be crucial to the success of their criminal activities, it would obviously be a mistake to suppose that, as human beings, they have a (moral) right to (this sort of) freedom of movement and to think that there's consequently at least a prima facie objection to attempts to curtail their freedom. Again, when efforts are made by legal authorities (including the police) to prevent a known murderer from leaving a country in order to move to a jurisdiction in which criminal charges can't be pursued, it would be absurd to suppose that while, like any other human being, he has a right to leave his own country on a permanent basis, it is only *on balance that* the authorities are justified in breaching the right, because in these circumstances his right of exit is overridden by the right of citizens to live in a country in which serious criminal offenses (like murder) cannot be committed with impunity.

Like the right to freedom of association, the right to freedom of movement and the right to leave one's country on a permanent basis can only be defensibly invoked when it is understood that both are *qualified* rights, rights that exist only when due regard is had for the many considerations that restrict their scope. For example, the right to freedom of movement, even within a country, can justifiably be restricted to

limit the freedom of individuals who haven't obtained the relevant sort of consent to enter the houses or to cross the lands that are owned (let it be supposed, defensibly) by other individuals. And while the right to leave one's country permanently (the right of "exit," as it is sometimes called) has obvious force when the right-holder is subject to unrelenting racial or religious persecution or to political repression, it cannot be invoked by individuals seeking to escape prosecution for heinous crimes, and it can at least be challenged when it is claimed by locally educated professionals who would like to pursue more lucrative careers in other countries without incurring any obligations to the country they are leaving for its investment in their education.

If such putative human rights as the right to freedom of movement or the right to leave one's own country permanently for another are to be invoked in (no doubt partial) settlement of debates about immigration policy, it's not only the case that the appeal must be to significantly qualified versions of these rights (versions that make it clear that they cannot be regarded as general rights with unlimited scope), but the appeal cannot hope to be persuasive unless the rationale for these more restrictive versions is borne in mind.

12.4 Immigration Policy and Other Human Rights

Of course in these respects, the rights to freedom of association and freedom of movement and the right of exit are not unique among putative human rights. On the contrary, whenever putative human rights are cited in debates about the law or about the shape of institutional arrangements or about the contours of public policy, the rights in question cannot defensibly be regarded as "freestanding" or self-vindicating moral norms. They always stand in need of moral justification, if only because unavoidable disputes about their interpretation, scope, and weight can only be resolved by exploration of the more fundamental (moral) considerations in which they are grounded. Even rights as seemingly "basic" as the right to freedom of expression and the right not to be tortured can't defensibly be viewed as self-vindicating rights and thus as standing in no need of (further) justification. Thus, while the right to freedom of expression may be uncontroversial when it is invoked in many ordinary contexts and for many familiar purposes, recognition of the boundaries within which this is so is bound to generate curiosity about the rationale for these boundaries, a rationale that will also help to explain the uncontentious cases that fall securely within these boundaries. As for the right not to be tortured, inescapable debates about what counts as "torture" are intimately bound up with competing accounts of the rationale for the extreme gravity of violations of the right.

But if human rights are to be invoked in debates about the merits of immigration policies, it shouldn't be assumed that the relevant rights are (let alone must needs be) such rights as the right to freedom of association, the right to freedom of movement, and the right of "exit."

For example, when questions are under discussion about the admission of refugees to a country on a permanent basis—that is, when questions have to be faced by that country about what its immigration posture ought to be in face of the needs of would-be immigrants who represent themselves (or are represented) as refugees—human rights considerations are indeed often highly relevant. There are questions about the human rights of the putative "refugees" that have allegedly been violated: it may be asked whether their human rights have indeed been violated, whether it's *fundamental* human rights that have been violated and whether these violations have been taking place on an ongoing basis. Thus, the relevant evidence may be that their lives are being threatened (whether by civil war or by a repressive state, for example), or that they are being deprived in systematic ways of the right to freedom of religion, or they may be victims of racial, or ethnic, or gender discrimination, and so on. What's at least unlikely[2] is that they will be deemed to qualify as refugees merely because such rights as the rights to freedom of association or freedom of movement are imperfectly respected. And as for the right of "exit," it too is unlikely to be a factor in their quest for immigrant status if only because it's overwhelmingly probable that as putative refugees they have already left their homeland (often, indeed, because they have been driven out or forced to leave); it's unlikely that the country they are fleeing is actively disputing their right to leave. And when it comes to the questions that potential "receiving" countries have to resolve in deciding whether or not to grant immigrant status to applicants for admission who are refugees, freedom of association and freedom of movement issues are unlikely to be central to the immigration policies they adopt. Insofar as the shape of these policies is in part dictated by human rights considerations, the focus is likely to be on such things as whether their country has a strong obligation to admit refugees on a permanent basis because of the gravity of the human rights violations they have suffered, and also whether granting them immigrant status is consistent with both (a) ensuring that they can be incorporated into the general population in ways that protect their human rights in adequate ways and (b) protecting on a continuing basis the human rights of current residents.

Of course not all immigration policy disagreements have to do with the granting of immigrant status to refugees. Often, governments adopt highly selective immigration strategies in order to deal with domestic labor market problems—either problems created by the unwillingness of residents to take on arduous labor-intensive jobs in the agricultural sector or by the unavailability (or under-supply) of the highly skilled specialists needed to fill important positions in the upper reaches of the economy. Human rights considerations sometimes surface in these debates both because the immigration policies in question allegedly increase domestic unemployment at both ends of the economic spectrum, thereby threatening to undermine right to work guarantees, and because of "brain-drain" concerns if immigrants with special skills are being encouraged to leave behind comparatively poor countries that can ill afford to lose skilled personnel who have been educated at considerable public expense. It's noteworthy, however, that in these contexts the

[2] Not impossible, of course; just unlikely.

human rights to which appeal may be made are *principally* rights to participation on an equitable basis in the fruits of economic prosperity (in the case of receiving countries) or rights to fair conditions of economic development (in the case of "donor" countries with underdeveloped economies). A *crucial* role is unlikely to be played by such rights as the right to freedom of association or the right to freedom of movement, even if these are to be regarded (when suitably qualified) as human rights. As for the right of "exit," it *is* at stake in some of these debates, but despite the international recognition it is often accorded, attention is seldom given to the qualifications that attach to it if it is to be endorsed as a human right.

12.5 Immigration Policy and Debates About the Scope of Principles of Distributive Justice

In addition to their relevance to debates about the role immigration policies can play in helping to reduce the worldwide refugee problem and to the limited contribution they can make to the assessment of selective immigration policies dictated by labor market requirements, human rights considerations are often taken to be critical to ongoing debates about the scope of principles of distributive justice between liberal nationalists and cosmopolitans. An interesting feature of these debates is that while liberal nationalists are critical of cosmopolitan claims about the global reach of principles of distributive justice, they often concede that all human beings have rights-related (and thus also justice-based) claims to the satisfaction of their most basic needs. This concession can be expressed in various ways. For example, it may take the form of appeal to a version of human rights minimalism for which all human beings only have a right to international guarantees that their lives will not fall below the level needed either for subsistence or for the satisfaction of claims to the most basic conditions of a decent life. Alternatively, if the concession is built into a doctrine of distributive justice, it may take the form of the view that, insofar as considerations of distributive justice have an application beyond domestic boundaries, they impose duties to contribute to the relief of economic deprivation only in its more extreme forms.

I can't here consider whether minimalist interpretations of human rights doctrine or of the trans-national obligations generated by principles of distributive justice are defensible or whether the adoption of anti-minimalist approaches would suffice to close the gap between liberal nationalism and cosmopolitanism. I want in closing to suggest, however, that the scope for principled disagreement about immigration policy between liberal nationalists and cosmopolitans may be more limited than is sometimes assumed. Moreover, this suggestion is not indebted in any significant degree to the ongoing disagreements there are between minimalists and anti-minimalists, whether about the doctrine of human rights or about principles of distributive justice.

The reason is that, even when it is a matter of agreement, in given historical circumstances, that the human rights of individuals in some country have been violated (or are being violated) in serious ways—or when (to put the point in terms of principles of distributive justice rather than in terms of the doctrine of human rights) certain individuals in a given country have been treated (or are being treated) in grossly unjust ways—making it possible for the victimized individuals to escape these rights-violations (or these injustices) by enabling them to move to a country with a significantly better record of respect for rights and justice is only one of a number of different responses to their plight that might be defended on human rights or distributive justice grounds. For example, where the government of a country can be identified as the perpetrator of these rights-violations or injustices, members of the international community may sometimes have the option of choosing between a broad range of "interventionist" measures—from military invasion (at one end of the spectrum), through imposition of increasingly severe economic and diplomatic sanctions, to enabling individuals and groups and organizations to provide support (moral, religious, financial, etc.) to indigenous resistance movements that may have the potential to moderate the policies of the government or even to overthrow it. Again, if the rights-violations and injustices are traceable to remediable features of a state's economic institutions, then the international community may have the power to undermine the ability of the state's ruling elites to exploit impoverished citizens. One prominent example—explored in the recent literature about the "natural resources curse" in developing countries run by unscrupulous dictators—might be to change the rules of international law that govern contractual arrangements between resource-rich but otherwise poor countries and foreign governments and corporations for legal access to, and exploitation of, the state's natural resources. Again, where the rights-violations and injustices are generated by features of the rules the international community has devised to regulate international trade, the appropriate response might be to effect a radical overhaul in these rules in order to minimize their adverse economic impact on the struggle of developing countries to lift their members out of the poverty in which they are often trapped.

Despite their many obvious and dramatic differences, these (and other similar) alternatives to the granting of immigrant status to (at least some of) those whose human rights have been violated or who have been the victims of serious injustices have something important in common, in that they attempt to deal with many of the sources of the demand for the liberalization of immigration policies in ways that, if successful, would enable those who might otherwise have a strong desire (or an urgent need) to leave their own country in search of another to stay put, and to stay put on terms that are responsive to their most basic concerns. Moreover, besides providing alternatives to moving to a new country, strategies of these kinds enjoy two additional advantages. They would not only eliminate the many upheavals that are a notorious feature of emigration to a new country but also cater at the same time to the preference many potential emigrants still harbor for remaining in their own country if only the conditions of their lives can be improved.

The fact that granting immigrant status to would be immigrants is only one option among others for dealing with the human rights and justice concerns that

often fuel the demand for an alternative to continuing to live in one's own country doesn't of course eliminate the need for judicious liberalization of immigration policies to meet these concerns. After all, many of the possible alternatives, despite their potential attractiveness, will prove to be impracticable—simply unavailable within the timeframe that matters to would-be migrants. Nevertheless, cosmopolitan theorists and liberal nationalists have much the same stake in the potential availability of these alternatives. Both must be sensitive—and for largely similar reasons—to the importance of determining whether or not they are viable alternatives to the liberalization of immigration policy, especially in light of the fact that the disruptions involved in the move to a new country provide an understandable disincentive to the quest for immigrant status. There is consequently at least some reason to think that cosmopolitan theorists are perhaps no more likely to be committed in any systematic way to the liberalization of immigration policy than liberal nationalists.

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Part IV
Immigration and the Ethics of Exclusion

Chapter 13
On Nonmembers' Duty to Obey Immigration Law: A Problem of Political Obligation

Win-chiat Lee

Abstract Do people who are not members of a certain country have the duty to obey that country's immigration law as law? The answer is no if we take seriously John Simmons' particularity requirement, under which only members of a state have the general duty to obey its law. I argue in this chapter that the particularity requirement for political obligation should be rejected for a number of reasons. While this opens up the possibility of nonmembers having the duty to obey the law of the countries of which they are not members, it also means that an account of the duty to obey the law will have to account for such duty on the part of both members and nonmembers, and the exclusion by membership will have to be justified to those who are excluded as members. I suggest that the natural duty of justice will do the job. The implication of this natural duty account of political obligations for exclusion by membership and immigration law is explored.

13.1 Introduction

Do the immigration and border control laws of a country apply to people who are not its members?[1] Presumably they do at least in one sense. In fact, one could say that the principal purpose of a country's immigration and border control laws is to regulate the admission and entry of nonmembers in particular into its territory. If

[1] Although the distinction between members and nonmembers is essential to any discussion about political obligations, it is not always clear who should and who should not be counted as members of a given state. Are citizens of a state the only ones who should count as members of that state? What do we do with categories such as "nationals" and "subjects," for example, especially in the case of a state that does not use the category of 'citizens"? Should "resident aliens," especially those who have lived in a country legally for a long time without becoming its citizens, count as members of that country for the purposes of political obligations? Should "expats" who live permanently in another country without giving up the citizenship of the original country where they come from still count as members of the latter?

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such laws did not apply to people who are not members of that country, then they could be said to have failed. So legally speaking, we can say these laws are intended to impose certain obligations on the part of nonmembers. But does this amount to a genuine obligation or duty on the part of the nonmembers to obey these laws *as laws*?

In some people's view, nonmembers of a country clearly have a duty to obey its immigration and border control laws. When people who are not members of a certain country enter that country without proper authorization as prescribed by its law, we say they have broken the law in doing so. For some, this description is not merely a value-neutral factual claim, but rather a judgmental one to the effect that such nonmembers have done something wrong. Some might think such wrong is not inexcusable in all cases and can be outweighed by considerations such as the violators' circumstances in their home countries. Nevertheless, according to this view, even when the wrongness is outweighed, the violation of a country's immigration and border control laws by anyone, including a nonmember, is still wrong by itself.

Is it wrong for nonmembers to violate a country's immigration and border control laws? More specifically, do people have a duty to obey the immigration and border control laws of a country of which they are not members *just because* they are the law of that country? This is the question I would like to address in this paper.

13.2 Political Obligation and the Particularity Requirement

In the way I have just phrased it, the question seems to be one about political obligation, i.e., the general duty to obey the law. There may be all kinds of other reasons, moral and otherwise, for doing some of the specific things required by law. The law prohibits murder, for example. But we have independent moral reasons for not committing murder in any case regardless of whether it is prohibited by law. However, if the fact that murder is prohibited by law gives us additional, independent and separate reason for not doing it, then that reason is the result of political obligation, i.e., the general duty to obey the law.

There may be things required by the law that we either do not have other independent moral reasons to do or have independent moral reasons not to do. If we do not owe the state in question the general duty to obey its law, then there is probably nothing wrong with not doing those specific things that its law requires. Of course, we may still have prudential reason for doing those things if the law is enforced and the chance of getting caught for not doing it is not negligible.

In using the term "nonmembers" instead of "aliens" in this paper, I also hope to avoid using a term which, in its current American usage, might have too specific a meaning as a legal term referring to a classification of people in U.S. law, especially immigration law. However, because of this, the term "aliens" actually makes one of the points in this paper, namely, that the distinction between members and nonmembers is itself a matter of the law.

We can certainly ask whether people who are not members of a particular state have moral reasons to comply with its immigration and border control laws that are independent of the fact that it is the law of that state. I suppose the answer will seem to vary greatly from case to case and much would depend on the circumstances. It will be, to a large extent, similar to the answer to the question whether it is wrong for a person to cut across a lawn where there is a rule that prohibits doing so, but which carries no authority over that person. As I said, it depends. A separate question, i.e., the main one I would like to address in this paper, however, is this: do people who are not members of a particular state have the duty to obey its immigration and border control laws and refrain from entering its territory without proper authorization just because they are the law? And *that* is a question about political obligation.

This question is interesting and puzzling in particular because of what John Simmons calls "the particularity requirement" of political obligations—a feature about political obligations which he appeals to consistently in his work on the subject.[2] It is perhaps not an overstatement to say that it is now the reigning philosophical orthodoxy that the particularity requirement has to be met by any plausible account of political obligations. To put Simmons's point very simply, as a political obligation, the duty to obey the law is a particular kind of moral bond that exists only among fellow members of a state. Fellow members of a state owe it to one another or to the state to obey its law but not to other people or other states to obey their law. The particularized moral bonds among fellow members of a state are what a theory of political obligation has to account for. The kind of moral bond that constitutes political obligations is thus akin to associative obligations that exist among only people who have certain special relations to one another—people who are friends, family, or comrades with one another, for example. Simmons denies (correctly, in my view) that political obligations are associative obligations.[3] But if they are not associative obligations, what kind of particularized moral bonds can they be?

It is safe to assume that the relevant *particular* moral bonds, whatever they are, if they exist, do not exist between a foreign national and the state of which she is not a member precisely because she is not a member. It follows that she does not have a standing political obligation to obey the law of the country of which she is not a member, including its immigration and border control laws.[4]

One can certainly take a skeptical view regarding political obligations in general, a view known as philosophical anarchism. On this view, no one has the duty to obey

[2] The particularity requirement is introduced and discussed by Simmons (1979) in his classic work on the subject of political obligations, *Moral Principles and Political Obligations*. See esp. p. 29–38.

[3] See the chapter Associative Political Obligations in Simmons (2001, 65–92).

[4] There is perhaps no clearer and more revelatory statement of the problem posed by the particularity requirement we are considering than this passage from Simmons (2007, 19): "The moral duty to obey the law should be understood to be a duty to specifically obey *our own* laws in our own societies, thus tying this duty to the idea of allegiance and to the exclusive relationship of citizenship." (Emphasis Simmons's.)

the law including the law of the state of which she is a member; the political authority exercised by any state simply does not command obedience from anyone. Thus, on this view, political membership simply does not matter to one's moral duties at all. Philosophical anarchism does have an answer to the question we pose for this paper. The answer is no, but only because no one has a standing duty to obey any law as law. On this view, no state's claim to control the admission of people into its territory and, indeed, no state's claim to control certain territory deserve any respect by themselves; everyone, members and nonmembers alike, would have to find other moral reasons, if there are any, for respecting such claims.

One might think that philosophical anarchism cuts too deep for the question we pose for this paper. The puzzling aspect of the problem of illegal immigration is that a state's immigration and border control laws are meant to be applied also to the rest of humanity who are not members of that state and who seem to have no duty to obey them because they are not members. The problem as we have framed it for this paper takes as its point of departure that there are political obligations. It is just that if such obligations, as Simmons claims, are particularized only to a state's members, then they do not extend far enough to cover nonmembers' duty to obey the laws in question. What worries us is the claim about the particularity of the duty to obey the law and what we should be considering is whether that claim should be rejected.

But we need not dodge the big question concerning philosophical anarchism here by claiming that it is beyond the scope of the present paper. It is not. Simmons provides some of the strongest and best-known arguments for philosophical anarchism. His case for skepticism about political obligation, however, is negative and, to a large extent, based on the same assumption that we are considering rejecting here, namely, the particularity requirement. After Simmons frames the particularity requirement for political obligations, then he proceeds to show that none of the candidate theories for political obligations, theories such as the ones based on consent, gratitude, the duty to be fair or the duty to be just, succeeds because they all fail to meet the particularity requirement. They either under-include (by showing that only a subset of a state's members have the duty to obey its law) or over-include (by showing that not only members of a state have the duty to obey its law).[5] Thus to reopen the case for political obligations including the duty to obey the law might involve rejecting the particularity requirement also.

I believe that immigration and border control laws are particularly interesting for the purposes of taking the particularity requirement to task because these are laws that a state routinely applies to both members and nonmembers alike. If we adhere to the particularity requirement, however, then the duty to obey such laws would have to be given a different account in the case of a nonmember than in the case of a member. In fact, we might not be able to account for the duty to obey a state's immigration and border control laws on the part of nonmembers at all even if we

[5] I am using "over-include" and "under-include" here in a sense different from the sense in which Simmons uses these terms in, for example, Simmons (2007, 19). For Simmons, "over-inclusive" accounts of political obligations are accounts that imply political obligations on the part of those who are identified as *members* of a state but do not owe such obligations to that state.

have an account of members' political obligation to obey its law. It is as if the legitimacy of the political authority of a legitimate state would extend only so far to its internal relation to its members but not externally to everyone else. On the other hand, if the long arm of a legitimate state's law reaches beyond its membership and obligates those who are not its members to obey, if nothing else, its immigration and border control laws, then surely we will need to over-include and thus reject the particularity requirement.

13.3 Membership and the Particularity Requirement

We have been dealing with the problem of having to accept the implication that someone who is not a member of a certain state will have no duty to obey that state's immigration and border control laws *as law* if we adhere to the particularity requirement. The problem with the particularity requirement, however, goes much deeper than this. More fundamentally, if the particularity requirement is correct, it is questionable that a nonmember of a state even need to respect the state's distinction between members and nonmembers and her own status as a nonmember by that state's law and act in accordance with that state's law required of nonmembers.

This is because membership in a state is a *legal* status in relation to that state and is therefore a matter of its law. The state defines who its members (citizens, nationals, subjects etc.) are as a matter of its law. When this is taken into account, it would not be difficult to see that the particularity requirement is problematic and cannot be stated without some kind of circularity. It also shows why political obligation is so hard to account for with this requirement. The particularity requirement as applied to the duty to obey the law amounts to the claim that all and only members of a state have the duty to obey its law as law. This is what a theory of political obligation has to account for, according to Simmons. However, if all and only members of a state have the duty to obey its law and a state's membership is a matter of its law, then it follows all and only those identified by the state's membership law to be members have the duty to obey its law, including its membership law. This is the circularity I allege.

Strictly speaking, one does not *obey* membership law and thus the allegation of circularity in the particularity requirement needs more careful formulation.[6] As I said, membership is a status; one either *is* or *is not* a member of a state. Membership law at the most basic level merely confers status. Insofar as conferring status is all that membership law does and that by itself does not require that we *do* or *don't do* certain things, perhaps it does not make sense to claim that a person has the duty to obey or comply with a state's membership law. Obeying or complying with a state's membership law at this level may simply amount to taking a certain attitude towards the legal status of membership, namely, taking such status seriously and letting it figure in one's practical deliberation. Letting one's legal status of membership figure

[6] I am indebted to Ralph Kennedy for raising this set of questions.

in one's practical deliberation, however, is not an idle matter either. It also amounts to obeying the law in the ordinary sense because membership law does not merely confer status. A set of rights and liabilities are also conferred or denied to someone, and a host of actions also are or are not required of someone by law as the result of the status (citizen or alien, for example) that is conferred to her.

With this complex sense of obeying membership law in mind, interestingly, one can observe that on the flip side, for nonmembers, the claim that membership in a state is a matter of its law, when coupled with the particularity requirement, yields some rather paradoxical results. For example, with the particularity requirement, those who are classified as nonmembers by a state's law have no duty to obey that state's law including its membership law. So those classified by the law to be nonmembers are under no obligation to take seriously that classification and therefore need not think of themselves as under any obligation to obey that state's law including its membership law.

The circularity in the duty to obey the law under the particularity requirement might not be "vicious" enough to require us to dismiss the duty as logically incoherent. But it does reveal a troubling aspect of political obligations under the particularity requirement, which makes political obligations very difficult to justify or account for. Under the particularity requirement, the state exercises its political authority in making the law determining who its members are, thus also determining who has the duty to obey its law including the law concerning who its members are. It is as if the state, in exercising its political authority, could simply choose to obligate someone to obey its law by choosing that person to be its member by law. It would not be hard to see how no genuine obligation could arise out of this process or how any moral principle can account for it. It would also not be hard to see how the proposed particular moral bonds, such as consent, gratitude, fairness etc. would all fail to account for political obligations. Such moral bonds might not exist among exactly the same people whom the state may simply declare to be members by law and thereby obligate them to obey its law.

Simmons is aware of this problem concerning the particularity requirement. He has identified a problem he calls "the boundary problem" in a recent article (Simmons 2013). In my view, the underlying problem in the boundary problem is the one I have just mentioned and thus concerns borders less directly and less fundamentally than it does membership. In Simmons' view, accounts of political obligation focus on the structural and not the historical aspect of a political entity. For example, theories of democratic authority focus on how the exercise of political authority by democratic institutions is legitimate and how citizens under democratic institutions are obligated to obey the outcomes of their democratic decision-making procedures. Even if all this is correct to a large extent, according to Simmons, it does not show that *all* members of a democratic state (or whatever other forms of state that are legitimate) have the duty to obey it. What we need to take into account is also *how* these members become members of the state. This is what Simmons means by the historical aspect of political obligations. For example, if the boundary of a state is drawn by a wrongful act of annexation or conquest and the state acquires new territory as a result, it does not follow that the people who live on that territory

and who are now considered members of that state owe political obligation to that state even if that state is the right kind of political institution (e.g., a democratic state) that legitimizes it structurally speaking. Simmons invites us to imagine that if the U.S. were to move its southern borders further south by several miles to include part of Mexico by annexation, the formerly Mexican citizens who would now be U.S. citizens would not thereby be obligated to obey the U.S. government and its law (Simmons 2013, 340–342). This is the case, in Simmons' view, even if no questions are raised about the legitimacy of the U.S. political institutions structurally speaking.

Unfortunately, Simmons does not seem to draw from this argument the conclusion that I think he should, namely, that the particularity requirement should be rejected for the reason that not all those who are considered to be its members by a state owe it political obligation and have the duty to obey its law. Perhaps the conclusion Simmons wants to draw is that the boundary problem poses difficult, if not insurmountable problems for identifying the proper membership of a state for the purposes of satisfying the particularity requirement for political obligations. In my view, Simmons' boundary problem is good reason to reject the particularity requirement and seek an account of political obligation that might not show that *all* and only members of a state have the duty to obey its law.

13.4 Exclusion in Membership

Furthermore, in his argument Simmons focuses primarily on the case of the state's *inclusion* of some people as members, which it cannot justify. However, it is important to note that membership in a state is not just a matter of inclusion; in defining membership, by the same token, the state *excludes* as well. A state, just as it may unjustly or wrongfully include some people as its members, may also unjustly or wrongfully exclude others as members or as possible members.

We are well aware of many historical and contemporary examples of people who reside within a state's territory on a more or less permanent basis who are prevented from being full-blown members (citizens) of that state because of discrimination on grounds of gender, race, ethnicity, or national origins or for other reasons such as slavery. Some are excluded from membership less directly as a result of discrimination or exclusion in immigration laws (such as the Chinese Exclusion Act in the U.S. in the nineteenth century) or asylum policies. Furthermore, in drawing national boundaries, just as some people could be unjustly included, as in Simmons' examples, others might be unjustly excluded as well. In fact, given the way the way national boundaries are drawn, one can say that if a group is wrongfully included as members of a state as a result of land grab, they may be wrongfully excluded as members of the other state from which the land is grabbed. Case in point: Russia's recent annexation of Crimea. If we suppose that the annexation is wrongful, then, as a result, not only are some Crimeans wrongfully included as members of the Russian state but, by the same token, the same people are wrongfully excluded as members

of the Ukrainian state also. The point is that just as those who are unjustly included by a state as members, arguably, may not have to accept the normative consequences of membership, those who are unjustly or wrongfully excluded by a state as members, arguably, may not have to accept the normative consequences of non-membership either.

The problem of political obligation has typically been conceived as a problem of how to justify the exercise of political authority by the state to those who are included as its members, as if they are the only ones who have to face the consequence of the exercise of political authority of that state. This way of thinking seems to be what underlies Simmons' particularity requirement for political obligations. But when a state exercises its political authority to constitute itself as a state and includes some and excludes others as members, those who are excluded are not simply being left entirely in the same situation as they were before. The fact they are excluded from the membership of a state supposedly has normative consequences that they cannot simply ignore. At least that seems to be what is at issue. There are things that nonmembers supposedly have to do or may no longer do, and there are places they supposedly may no longer be or go, at least not without proper authorization, as a result of being nonmembers. If we are to take these normative consequences for nonmembers seriously, it would seem to be just as important that the exercise of political authority by a state be justified to those it does not include as members as well.

13.5 Natural Duty of Justice and Political Obligations

If we take seriously the duty on the part of nonmembers of a state to obey that state's membership and immigration and border control laws, then we will have to abandon the particularity requirement for political obligations. In fact, the requirement, conversely, should be that an adequate account of the duty to obey a state's law must show that such duty is not particularized but cosmopolitan in the sense that it is a duty that one has regardless of one's own nationality or membership in a state.

Some philosophers have suggested that the duty to obey the law should and can be given a natural duty account. Most prominent among these accounts is the one put forward by Jeremy Waldron (1993) based on the natural duty of justice. Natural duty accounts of political obligations have to struggle against the particularity requirement for an obvious reason. The natural duties we owe to one another are typically universal in scope in the sense that they are owed by all human beings to one another. It may not be easy to find a principled way to contain them so that they apply to only members of the same state. If a particular natural duty translates into something more specific I have to do for some specific person or persons due to circumstances, it does not imply that I do not owe the natural duty in question to everyone else also. For example, my natural duty of Good Samaritanism might mean that I owe it specifically to this particular person now to throw my lifesaver to her because she is drowning within the reach of my lifesaver. But it does not mean

I do not also owe everyone else such a duty which might require me to do a similar or a different thing to another person under a different set of circumstances even though it is also true that given where I live and where and how I spend my time, there are only a limited number of people who might come within the range of possible situations in which my duty of Good Samaritanism would amount to actions on my part for them. If my arguments here are correct, then there should not be a debate about whether the appeal to the natural duty of justice in Waldron's account fails to meet the particularity requirement because it clearly does. Rather, its failure to do so should be touted as a virtue in support of the account instead.

An argument specifically for the duty to obey the law based on the natural duty of justice would go like this.[7] There are two parts to this argument. The first part is relatively familiar. It would show that our natural duty of justice *requires* us to enter into a state with one another not only because the state of nature is nasty and inconvenient, but also because it is unjust. In the state of nature, conflicts cannot be properly adjudicated and rights cannot be secured. What is needed is the existence of a state that exercises political authority that set down clear and definite enforceable norms, i.e., laws, to secure these rights.[8] This is the part of the argument that shows that having a state is superior to having no state insofar as justice is concerned.

A second part of the argument is less familiar to us but just as essential to the overall argument. This part of the argument would show that as the solution to the problem of injustice in having no state, justice does not require *one* state, namely, the world state, but instead requires or at least allows *multiple* relatively local territorial states that claim some people and exclude others as members. This part of the argument could take the form of a comparison between that state of affairs, i.e., the one in which there are multiple territorial states, and the state of affairs in which there is only one state (the world state) that shows the former to be superior or at least not inferior insofar as meeting the demands of justice is concerned. In short, we will have to show that whatever multiple states can do for justice by being the political authority regionally, the world state cannot do better by being the sole political authority globally, at least not without involving greater risks for injustice.[9]

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[7] Here I am following Waldron (1993), but not entirely. One should note that some of Waldron's arguments in that article that are relevant here originate in Immanuel Kant especially his view in Immanuel Kant (1965).

[8] These are what Kant believes to be some of the problems in the state of nature that call for the existence of the state. For a detailed discussion of this part of Kant's view, see Arthur Ripstein (2009, Chap. 6).

[9] Kant famously argues against the world-state in "Perpetual Peace: A Philosophical Sketch." See Kant (1983, 124–125). Many recent writers on global justice, such as John Rawls and Charles Beitz, agree that the world-state is a bad idea. However, it is not clear to what extent Kant's very brief argument against the world-state is based on considerations of justice. Louis-Philippe Hodgson (2012) argues that Kant in fact should require bringing about the world-state based on the same kind of justice considerations that require bringing about states to begin with. If the world-state is preferable to having multiple states insofar as justice is concerned, then exclusion by membership in order to forge a smaller-scale state would no longer be justifiable in the kind of argument I am sketching, except perhaps as a necessary step towards a world-state.

I am clearly only sketching out what is needed for this argument based on the duty of justice so that I can get to the main point for this paper. The significance of the second part of the argument for the overall argument, however, cannot be underestimated.[10] Without it, I cannot demonstrate that justice either requires or can be satisfied in a state of affairs in which there are members/nonmembers distinctions to be respected. If justice either requires or at least allows for multiple territorial states that claim some of us but not others as members, then our duty of justice will amount to a duty to support that state of affairs as a whole. That means that we have the duty not only to obey the law of the state that claims us as members but also the duty to obey the law of the states that do not claim us as members. Of course, the latter may involve no more than respecting their members/nonmembers distinction and their immigration and border control laws in most cases and most of the time. In this way we have an account of the duty to obey a country's immigration law *as law* on the part of those who are not its members that is part of the same overall account for the members' duty to obey its law.

Our duty of justice requires us to respect the fact that we are excluded from some states as members and to respect their national boundaries and obey their immigration and border control laws if pursuing justice in these smaller segments of humanity in geographically circumscribed units is what is required (or at least allowed) by justice. Reciprocally, those who are excluded from our states as members have the same duties towards us. Although justice may require or allows for multiple states, it may not require more specifically how the world is to be divided into these states. Thus national boundaries may be drawn and the membership of states may be constituted in ways that are arbitrary or historically contingent. Although justice does not dictate any particular way of drawing national boundaries or constituting membership, arguably it need not prohibit the use of ethnic, cultural, or linguistic criteria by some states if legitimate goods can be achieved in states that use these criteria. On the other hand, even if a certain degree of arbitrariness is allowed from the point of view of justice in the division of the world into states, it does not imply certain *means* of acquiring territories and populations by a state, such as conquests and annexations by force, are not considered wrong.

It is, however, essential to this account of the duty to obey the law of a state by both members and nonmembers that the states involved are all reasonably (or sufficiently) just.[11] If we take the case of two adjoining countries A and B, for example, and assume that they are both reasonably just, or better yet, *equally* reasonably just, then it would not seem to matter how the boundary between the two states is drawn and as a result who is included and who is excluded from each of the two states as members, at least from the standpoint of justice alone. However the boundary is drawn, people in these two states would fulfill their natural duty of justice to one another by obeying the law of their own state, whichever one it turns out to be, and

[10] I am indebted to Ann Cudd for stressing the importance of this part of the argument.

[11] I am leaving it vague here what counts as reasonably just because I do not have an account of it. But clearly, not every state can be taken to be pursuing justice on the whole even when doing so is intended by those exercising political power within that state.

by respecting their exclusion from the other state as members and complying with the legal consequences of that.

However, things would be drastically different if the two countries involved were not both reasonably just. If both were not reasonably just and the prospect of their becoming so is not good, then it would seem that all bets are off. Members of A would have no duty of justice to accept the exclusion from B as members and respect or comply with its membership, immigration, and border control laws because B is not pursuing justice at a relatively small and more local scale (in fact, not at any scale) as required (or allowed) by justice. The same goes for members of B with respect to their exclusion from A. Perhaps this is not a particularly interesting result because in this case, none of the people in A and B have the duty to obey the law of their own states either, according to the natural duty of justice account.

The more interesting and complicated case would be the one in which one of the two states is reasonably just and the other is not. Suppose A is reasonably just and B is not. In such case, how the boundary between A and B is drawn would seem to make a big difference on who would be subject to a just state and who would be subject to an unjust one. More importantly, the exclusion of members of B from membership in A can no longer be justified on the grounds of the natural duty of justice. State A could argue that its exclusion of those who are now members of B from its membership is justified on the grounds that it is required (or allowed) to pursue justice at a relatively small and local scale. But arguably it has failed its natural duty of justice in relation to members of B insofar as A's own pursuit of justice at the relatively small and local scale has left members of B out in the cold without access to just institutions, assuming that these members of B have no other access to just institutions. Under these circumstances, State A may be under an obligation to devise their membership criteria and immigration policies to admit as many members of B to its own membership without compromising its ability to sustain its just institutions and its pursuit of justice. Without such more open and liberal membership and immigration policies embodied in A's membership and immigration laws, members of B may be under no duty to obey these laws.

The upshot of these arguments should be clear even though they are sketchy and oversimplified by narrowing things down to a two-state case.[12] In the less-than-ideal real world completely carved up by states, many of which are far from being reasonably just or even seriously attempting to pursue justice, if not downright unjust, exclusion by membership and immigration and border control laws exercised by states may be quite difficult to justify to those who are excluded and are not themselves already members of just states. Correspondingly, those who are excluded by another state because of one law or another and are not themselves already members of just states should feel little obligation to comply with it as law.

[12] One question I have not addressed in this paper is whether the kind of justice involved in this question involves social and economic justice as well. If it does, I suppose it would make it even harder for states to justify their exclusion of nonmembers.

13.6 Conclusion

States are neither social clubs nor analogous to them. If they were, perhaps one could argue that like social clubs, they would be governed by the principle of freedom of association.[13] On this approach, a state, as a free association of individuals, would be justified to choose to exclude anyone from its membership and dictate the terms for anyone to "join the club."

If states were free, voluntary associations of individuals, then some kind of consent or contract theory of the state would have to work. The difficulties of this kind of theory are well-known and would have to be overcome in order to treat states as free associations of individuals. Using this approach, however, at the very least, relatively cost- and obstacle-free exit from membership, arguably including internal opting-out, i.e., secessions even on an individual scale, would have to be allowed.

Regardless, the main question for this paper is what kind of obligations these clubs/states as free, voluntary associations of individuals may impose on nonmembers and what kind of obligations nonmembers owe to these clubs/states apart from what they already owe to their members as individuals. The answer is very little, if any. Consider the following example of a social club. The club admits as members only people of a certain regional identity or cultural heritage, say, people of Scandinavian descent. The club also has a rule that allows for socializing among members but prohibits socializing between nonmembers and members without authorization from the club. I, not being of Scandinavian descent, cannot be a member of the club. Should I feel obligated not to socialize with a club member without prior authorization by the club as a result of the club rule? The answer is no. Insofar as freedom of association is concerned, *I* should feel free to socialize with anyone who wants to socialize with me, with or without the club rule. If anyone should feel obligated to follow that club rule, it would be the members of that all-Scandinavian club. If it is wrong for anyone to violate that club rule, it would be, again, the members of that club. They are the ones who voluntarily join the club and, directly and indirectly, have consented to that rule.[14] As for me, being a nonmember, I don't think the club can really prohibit me from doing anything, including things that involve its members, other than what I already have moral reasons not to do. In fact, I am not even sure I should take all that seriously my status as a nonmember of the club.

If a state may impose the membership distinction on people in general and impose laws such as immigration and border control laws on members and nonmembers alike and as a result, nonmembers, thus classified, owe the state the duty

[13] For arguments concerning immigration based on the principle of freedom of association, see Christopher Heath Wellman (2008).

[14] The upshot is that if I socialize with my friend, Sven, who is a member of the club, without prior approval by the club, then at best Sven is doing something wrong and not me. Similarly, on this free association approach, it may be wrong for an employer who is a member of the state to hire an unauthorized immigrant for work if the law prohibits that. But it would not be wrong for the unauthorized immigrant to take the job. Nor should she feel obligated not to take it.

to obey these laws, then the state has to be justified on grounds other than the free association of individuals. My proposal in this paper is to take seriously the natural duty of justice as providing that justification. But, as I have also argued, in a world with many states that are far from reasonably just and far from serious attempts in pursuing justice, such an account would also pose severe limits on how far exclusions imposed by a state's membership or immigration and border control law may be exercised and obligate those who are thus excluded.[15]

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[15] Earlier versions of this paper were discussed at the 2014 AMINTAPHIL Conference in Orange, CA and the Philosophy Department Faculty Workshop at Wake Forest University. I am grateful to the participants on both occasions for their contributions.

Chapter 14
"Where Are You *Really* From?" Ethnic and Linguistic Immigrant Selection Policies in Liberal States

Adam Hosein

Abstract In this paper, I discuss some of the criteria that liberal states have used to choose between potential immigrants. While overtly racist policies have been widely condemned and abolished, many states have still in the recent past selected immigrants based on their ethnicity and/or language competency. I argue that even apparently more benign examples of ethnic and linguistic selection are unacceptable because they tend to express a morally problematic message that members of certain ethnic groups within the territory—the people who are *really* from there—occupy a privileged position within the political community. And this means, I argue, that they unjustly exclude members of other ethnic groups. Finally, I address some special features of linguistic selection that are sometimes thought to make it justifiable, including the *de facto* inevitability of promoting some languages more than others, the fact that languages can be learned voluntarily, and the fragility of minority languages in territories where there is another language that is more universally known.

14.1 Introduction

Suppose that states are not required to have open-borders: they may put *some* limits on who enters and exists. And suppose, further, that while the state is sometimes required to grant people within their territory citizenship (as with long-term residents) there are other cases (as with recent arrivals) where this is discretionary. How should states decide which people to allow in and which to allow to naturalize? In this paper I'm going to discuss, in particular, *ethnic* selection policies, which sort people based on their origin. I'll provide some explanations for clear cases of unacceptable ethnic selection policies, but I also argue that problems with these policies carry over to other forms of selection which are not on their face ethnic per se, but

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instead "cultural" or linguistic, such as language based selection in Quebec. Even these policies, I'll argue, often require a problematic distinction between those who merely live in, or came of age in, a territory, and those who are *really* from there. The central moral concern here, I claim, is with the *expressive* dimension of such policies.

14.2 Racial Selection

The clearest cases of unacceptable selection policies are those based on racial preferences. Historically examples include the Reed Johnson Act in the United States and the White Australia policy, both during the early twentieth century.[1] Both were aimed at keeping out non-Caucasian immigrants, who were deemed less fit for citizenship.

What was wrong with these policies? Michael Walzer suggests that the White Australia policy can be rejected on the grounds that the white Australians occupied only a small portion of a "vast territory" (Walzer 1983, 47). By excluding non-whites they were using much more than their fair share of the world's resources. Given that there were many poor Southeast Asians who would have liked to use some of the resources of Australia, Walzer suggests, it was unjustifiable to exclude all of them.

Walzer's account implies, as he says, that if white Australians had been willing to cede large parts of their land to others and exercise jurisdiction over a smaller territory, then it would have been permissible for them to maintain a homogenous society: "White Australia could survive only as Little Australia." This suggestion is troubling. Many of us would still find the White Australia policies unjust even if they were implemented by Little Australia. We would be equally troubled by a White Ireland policy, even though Ireland is a fraction of the size of Australia.

Walzer's approach also cannot explain why the abandonment of the Reed-Johnson Act is viewed as a moment of moral progress. When the policy was finally changed, in the 1960s, it did not involve an expansion in the overall number of immigrants admitted to the U.S. In fact, immigration from Central and South America was now capped for the first time, as it still is today, seriously limiting the number of immigrants from those areas. So, it can't be that the U.S. had to abandon ethnic selection in order to fill up its territory more. There was something wrong in itself, it seems, about using those criteria for selection. Walzer may well be right that Australia ought to have been admitting more immigrants, but this sort of consideration doesn't seem to be central to the explanation of why racial selection is problematic.

Another potential explanation focuses on the fact that these selection schemes were justified by now disproven racial theories and thus lacked any rationale. David Miller, for instance, writes that race and sex may not be used as criteria in selecting

[1] See Ngai (2004) for a more extensive discussion.

migrants because they "do not connect to anything of real significance to the society they want to join" (Miller 2003, 204). States cannot rely on such a flimsy explanation for excluding someone, he suggests, given the important interest she has in being able to gain entry.

It is true that White Australia and the Reed Johnson Act were premised on ideas of racial superiority that reflect clearly refuted biological theories. So one problem with these selection schemes is that they were unmotivated given their flawed racial basis. Certainly any attack on these schemes should point out that one of the central rationales offered for them rested on a mistake, and this removes one major source of support for the schemes.

But simply attacking this rationale is not sufficient to explain why we so firmly reject those schemes. The mere fact that a policy is *irrational*, or unmotivated, is not sufficient to make it *unjust*. For instance, suppose that in the U.S. labor market there is a large need for more doctors but very little need for engineers. Yet the United States allows many more foreign engineers to become new permanent residents than foreign doctors (because, let's suppose, U.S. doctors are better politically organized than engineers, and so they put more pressure on Congress to support immigration policies which will keep their wages high). This policy would be irrational because there is no reason to skew green card distribution towards the engineers. But it doesn't seem to *wrong* an applicant. Racial selection seems not merely imprudent but also unjust.

What is it that is so objectionable about racially motivated policies then, aside from the fact that they rest on false views? One familiar idea is that these policies *express* something objectionable about members of the dispreferred races. What is it that these policies express? Plausibly they express a message of inferiority. Carens' discussion suggests this when he says that they convey "stigma" (Carens 2013, Chap. 3). They convey that the state considers the members of one race not worthy of mixing with those of its own (racially defined) nation. For instance, White Australia plausibly expressed the message that Asians were too debased to be worthy of mixing with Australians. Similarly, U.S. policies expressed that Southeastern Europeans and (even more so) non-whites were degraded races, unfit for mixing with Northern Europeans. Thus, race selection was not simply ill-motivated. It was *unjust* because it expressed a demeaning message towards the dispreferred races.[2]

14.3 Ethnicity and *Aussiedlung*

We've seen why the race based ethnic selection policies of the past had to be rejected. I'd like to now consider "positive" ethnic policies in more recent European history. Policies of this kind have proven more resilient in liberal democracies due to their very different structure, though they are now constrained by EU Law. I would like to consider whether they can be distinguished from the older policies. As

[2] For further discussion of how and when racial distinctions demean, see Hellman (2008).

case studies, I'll consider German return policies and then Spanish preferences for Hispanics.[3]

(West) Germany's *Aussiedlung* ("resettlement") policy was instituted well after, following World War II, earlier discriminatory policies had become discredited, though it too has been phased out since the 1990s. The policy allowed people considered ethnically German but living outside of the territory, especially in Eastern Europe or the Soviet Union, the opportunity to "return" to the home country, even if their German origins were remote. Definitions of Germanness varied over time but largely required an immigrant simply to show that they had some German ancestry and a willingness to identify as German. Those who could do so were given entry to Germany, accompanied by an easy naturalization process.

Did this policy face the same difficulties as the earlier racial schemes? Unlike the earlier racial policies, the German scheme does not seem to have largely relied on eugenic ideas, fears about miscegenation, and so on; and so, more generally, it was not based on the claim that there is a natural hierarchy of races. This means that it could not be undermined simply by providing scientific evidence that there is no such hierarchy (or no such races at all). And furthermore, it did not on its face express that non-German people are in general inferior. To say that ethnic Germans deserve to return to their homeland is not itself to imply that non-Germans are genetically substandard, just perhaps that their own homeland may be elsewhere.

All the same, the scheme was problematic and is now widely condemned. To see the problem, notice that there are some messages which we can express without violating people's rights simply as persons but which may not be expressed by a government to its own subjects. We owe it to other people, simply as persons, not to demean them. But there are certain messages which a government may not communicate to its own citizens even if they would be acceptable were they communicated between private individuals. These messages help to illustrate the special expressive wrongs that states can inflict on their own citizens. Religious expression provides a good example. It is clearly permissible for one person to try to convince another of their religious (or anti-religious) viewpoint. Surely I do no wrong to someone by, say, giving her a pamphlet suggesting that she convert to Islam or accept atheism. But it would clearly be wrong for the government to distribute such leaflets. Doing so would violate widely accepted liberal democratic principles of nonestablishment.

Why? What is so worrisome about the government expressing a religious message which private people are free to express? In a democracy, citizens and long-term residents are supposed to be equal members of the political community. It is impermissible to treat one of them as an inferior member by, for instance, denying her a right to hold office that is granted to other citizens. This demand for equal treatment partly requires equality of certain opportunities, including running for office, but it also plausibly includes an expressive dimension. The state must not convey the message that some citizens are lesser members of the political community than others, or outsiders entirely. Religious endorsements, as Justice O'Connor

[3] I largely borrow from Joppke (2005)'s account for the facts.

pointed out, do just that: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community" (Lynch v. Donnelly 1984). When the government endorses a religion, as in the pamphlet example, it expresses the message that the political community as a whole is committed to a particular religious view. This implies that those who do not accept that message are not really members of the community. I'll call messages of this kind an "exclusionary message:" a message which communicates that someone is a lesser member of the political community even though she is entitled to be treated as an equal member.[4]

How exactly do we know that a policy expresses a message of endorsement and, ultimately, exclusion? Borrowing from Joshua Cohen, I suggest that what we need to look at is what the most plausible *rationale* for a particular policy is, in light of both its content and the broader context of its adoption, including the legislative history of the policy, the local culture, and so on.

I cannot defend this approach fully here, but I would like to explain some initial advantages of it. There are clearly ways for the government to support the display of religious symbols without thereby committing itself to any particular religious view. For instance, a government-funded museum might display medieval paintings of the crucifixion.[5] Cohen's proposal gives an intuitive explanation for the difference between this and, say, putting a large cross in front of a courthouse. In the former case, the most plausible reason to hang the painting is just to allow the public to enjoy its artistic excellence and so on, whereas in the latter case the most plausible rationale is to actually advance Christianity. Only in the latter case, where a religious purpose can reasonably be attributed to the political community, can it be said that the community is really committing itself to a particular religious viewpoint and thus endorsing it. And only with that endorsement do we see an exclusionary message.

Germany's return policy expressed an exclusionary message.[6] What is the most plausible rationale for it, taking into account the full context? It was initially claimed at the time that those policies could be defended on purely humanitarian grounds; this ground would not create an exclusionary message. There were two obvious related objections to justifying the policy on this basis, however. Firstly, it cannot explain why ethnic Germans who were under threat of oppression were being given preference over non-German refugees, who did not have access to such an easy immigration and naturalization process. Secondly, it cannot explain why the criterion for admission was just being German and did not include some attempt to screen applicants for whether they were really at risk of oppression. The only available explanation for this is to say that giving special preference to Germans was

[4] I borrow the term from Cohen (2011).

[5] See Eisgruber and Sager (2007).

[6] Blake (2005) briefly suggests that ethnic selection can "degrade" members of the existing population, though he doesn't distinguish what I have called "demeaning" and "exclusionary" messages. Carens (2013, Chap. 3).

appropriate because they had a right to "return" that others did not. As members of the German nation they were entitled to return to their ancestral homeland.

This justification clearly associated the Germany political community with a special commitment to the interests of a particular ethnic group and as such it implied that other residents of Germany were less fully members of the political community. Most obviously, German return policies expressed to the large community of people of Turkish origin that they were tolerated within the territory but still considered of secondary importance in the mission of the German state. As I have argued above, this kind of political exclusion is incompatible with liberal democratic principles and thus unjust.

In sum, Germany's return policy seems less problematic than earlier racial exclusion policies. However, it still created the problem of an exclusionary message towards existing residents who were not ethnically German and was thus unjust.

14.4 'Cultural' Selection, the *Comunidad Hispanica*, and the *Révolution Tranquille*

The German policies just discussed involved a definition of Germanness tied almost entirely to plain descent, and this is generally taken to be clearly unacceptable. By contrast, it is often said that merely "cultural" selection schemes are acceptable since they rely on criteria that can be voluntarily acquired.

I will argue that at least some prominent selection schemes that seem to be (at least facially) cultural cannot be defended in this way. I'll explain the details of some example schemes, present my central objection to them, and then evaluate some familiar defenses along with some other responses to my argument.

First, Spain through much of the post-War period adopted immigration and naturalization policies that privileged people from "Hispanic" countries, such as Mexico, Chile, Colombia, and so on. The underlying justification for the policies was that people from those countries were entitled to special concern in light of their "historical-cultural ties" to Spain. The definition of "Hispanic" varied substantially over time: During the Francoist period, Catholicism, race, traditionalist values, and so on were emphasized, but later regimes, which will be my main concern here, focused on ideas about shared language and (less religious, less traditional) culture.[7]

These ideas found their main expression in naturalization law, especially dual-nationality regimes. Against the background of otherwise tight restrictions on dual-nationality, these regimes allowed members of Hispanic countries to naturalize in Spain without giving up their original nationality and offered similar privileges for Spanish citizens settling in Hispanic America. In immigration law, Hispanic

[7] I ignore some significant complexities here: the role of language, for instance, is not entirely clear since Portugal, along with other Lusophone countries, such as Brazil, was often considered Hispanic.

migrants again received some special privileges, especially in the assignment of work permits.

Do these laws fare any better than Germany's? On the face of it, there is more to be said for the Spanish procedures. Setting aside the issue of protecting vulnerable Germans, the rationale for the Spanish laws seems stronger. The connection between Spain and someone who likely genuinely participates in Hispanic language and culture seems significantly stronger than the connection between Germany and someone who merely has a distant German ancestor. Recognizing the attachments of Hispanics living in other countries seems like a more legitimate purpose.

All the same, the Spanish laws we have been considering seem to have not only promoted Hispanic language culture but also expressed the claim that the Spanish state is associated with a particular ethnic group. Their most plausible rationale was the view that Hispanics were of special interest to the Spanish government. To take that view is to imply that Hispanics have an elevated status in the eyes of the government and a superior political status. And saying this, in turn, wronged those non-Hispanic subjects who were entitled to treatment as political equals. In Spain, the most obviously maligned were settled Moroccans, along with other North Africans. Thus, although it was superficially more attractive than the German approach, Spanish Hispanic preference schemes were also problematic because of their exclusionary message.

The other example I want to discuss is Quebec. Although part of federal Canada, Quebec maintains a degree of autonomous control over immigration to the province. This allows it, in particular, to maintain some additional preference for immigrants who speak French. Across Canada generally, immigrants are admitted based on a points system which allocates points based on skills, family connections, ability to speak French and/or English, and so on.[8] In Quebec, the weights are adjusted so that speaking French is significantly more advantageous than speaking English. These laws came into effect following the *Révolution tranquille* and associated attempts to promote the use of French in Quebec. Is Quebec's linguistic selection problematic? In particular, does it, like the German and Spanish policies discussed, express that members of a particular ethnic group, in this case indigenous Francophones, are insiders?

There is a familiar way of thinking about Quebec, and cultural/linguistic nationalism generally, according to which we can easily separate Quebec from states that pursue clearly problematic ethnic goals. In a well-known passage, Kymlicka argues explicitly that language/culture focused policies like Quebec's can be distinguished from German ethnic immigration policies in the following way. German policies were based, he says, on a conception of the nation "defined in terms of blood… Membership in the German nation is determined by descent, not culture…. Such descent-based approaches to national membership have obvious racist overtones, and are manifestly unjust" (Kymlicka 1995, 23). By contrast, places like Quebec have an acceptable liberal approach to membership because "membership is open in

[8] Aren't the non-cultural criteria, such as an immigrant's skill base, also subject to expressive concerns? I consider this question below, in Sect. 14.5.

principle to anyone, regardless of race or color, who is willing to learn the language and history of the society and participate in its social and political institutions." Following Kymlicka, someone might say that Quebec's law does not express an unacceptable exclusionary message because learning French is a voluntary action, and so anyone who wants to be a full member of the political community can simply learn French.

Kymlicka is right that since Quebec's policies select only based on language skills, not descent, they express a more welcoming attitude to anyone who would like to integrate into and consider themselves a member of the Francophone community. However, I don't think this is sufficient to dispel any worries about exclusion. Firstly, it seems clear that many Quebecers support the survival of French not because they just, say, enjoy the sound of it, but because French is the language of their forbearers. They are concerned, as Charles Taylor puts it, with "remaining true to the culture of [their] ancestors" (Taylor 1994, 58). So even if everyone willing to speak French is fully welcomed, it seems that the most plausible justification for the policy, in context, is the goal of maintaining a connection between the territory and a particular ethnic group. As such, the policy seems to imply a special connection between the political community and that ethnic group: while others may reside in Quebec, those are the people that *really* from there. Now, French is spoken by people from a wide range of ethnic backgrounds, including, for example, Haitians, and North Africans. And this may seem to weaken this first objection. But the question remains of why exactly Francophone Quebeckers are ultimately concerned with promoting French. And to the extent their concern derives mainly not from just association with this global community of French speakers but—as Taylor's remarks suggest—more specifically to pass on something inherited from their own white forbearers this first concern still goes through.

Secondly, even if the promotion of French can be separated out from ethnic goals it may still be impermissible for the state to express an association with the French language and associated identity. The law may still express an exclusionary message towards those who would prefer not to identify with the language or with any associated cultural traditions. To be clear, the concern is not that immigrants are forced to identify with a language simply because they have to speak it sometimes: that claim seems implausibly strong. Rather, the objection is that members of a political community can object when that political community becomes allied with an identity that they do not accept.

Thirdly, the mere fact that an identity can be voluntarily acquired is not sufficient to make it acceptable to condition full political membership on adopting that identity. Some religious identities can be voluntarily acquired but we still think it would be wrong for the state to associate itself with any particular religion. Similarly, there are many linguistic goals the state surely cannot pursue even though languages can be voluntarily acquired. For instance, we don't think it would be acceptable for the U.S. federal government to attempt to prohibit Spanish on street signs on the grounds that English is the indigenous language of the U.S., and many U.S. speakers of English are upset about having to live in areas, say Miami, where Spanish is relatively common.

Thus, I don't think Quebec's selection policies can be as easily distinguished as some philosophers would suggest. But of course there are many objections to my argument that need to be faced, especially to my analogy between cultural selection and religious establishment. I'll now try to address some of them.

14.5 Objections and Reply

A first objection relies on Kymlicka's well-known point that all states necessarily promote some language or culture more than others. It is possible, he claims, to avoid religious establishment, but all states necessary promote, and thus "establish," a culture. Mostly obviously, he suggests, states have to use a language to conduct official business, and they thereby lend support to that language over others: "The state can (and should) replace religious oaths in court with secular oaths, but it cannot replace the use of English in courts with no language" (Kymlicka 1995, 111). Kymlicka's point suggests that if my analogy between promoting a language or culture is correct then basically all states are automatically seriously unjust.

The trouble with this objection is that it elides the distinction between the effects of a policy and its rationale. It is true that states generally use a particular language (or at any rate a limited number of languages) to conduct their official business and as such advance that language and the interest of those who identify with it. For instance, in the United States presidential debates are conducted in English. Moreover, these countries typically also use language for selection in immigration and naturalization. But, as Weinstock (2003) also suggests, what matters for our purposes is whether it is possible to adopt a language policy that can be defended on grounds other than the sheer desire to advance that language or any associated identity.

Is this possible? There is of course one obvious reason for using a language other than simply promoting its use: languages are mediums of communication, and one can use them purely in order to convey information. And there is also a fairly straightforward justification for language-based selection that has no broader cultural basis, namely favoring immigrants who will be able to integrate relatively easily into the economic and political life of the country. But where a state uses a particular language for official purposes and gives weight to knowledge of that language in immigrant selection in a country primarily populated by users of that language, the suspicion may reasonably remain that its use by the state is also backed by reasons related to cultural identities. What determines whether that suspicion is reasonable is the surrounding context. Some steps the state can take to make clear a purely communicative rationale include declining to adopt any officially designated language,[9] providing official communications in a variety of languages where fea-

[9] In the U.S., for instance, there is no official federal language, although there is variation at the level of the states: English is the official language of Alabama, while Texas constitutionally mandates that all service be available in both English and Spanish.

sible, allowing extensive freedom to use whichever language in private and public settings, and generally making clear a willingness to revise official language use in light of changes in what would be most useful in communicating to the public.

Can Quebec and similar states also distance themselves from problematic justifications for their selection policies? This is unlikely. Given the surrounding political discourse, which emphasizes the importance of maintaining a distinctive Francophone culture, and the kind of policies needed to support that goal—such as heavily restricting which languages can be used for official business—it will be clear that more than communication and economic/political integration is at stake.

These points also help to show how other aspects of the "points system" are not subject to the kind of concerns I have raised in this paper. Take, for instance, the allocation of points based on an immigrant's possession of skills that are scarce in the domestic labor market. This policy has a clear rationale of enhancing overall productivity that can be justified to people with widely differing views and identities, since such productivity is worthwhile from all of these perspectives. Unlike, say, a policy that privileged more skilled workers based on their inherently greater worth as potential citizens, this policy does not imply any hierarchy among citizens.[10]

According to a second objection, the analogy I have drawn between religious endorsement and official endorsement of a culture or language is mistaken because the two play very different roles in people's lives. Any policy is backed by various reasons, and some people will disagree with those reasons. If the view of endorsement that I have relied on is to be at all plausible, sheer disagreement of this kind cannot be enough to express an exclusionary message, otherwise pretty much all polices would be exclusionary. As Cohen (2011) and others emphasize, there must be something special about religion that makes relying on religious reasons special. Cohen's suggestions, which overlap with those of others, are that religions convictions, along with some non-theistic matters of conscience, are special because they "provide a comprehensive and fundamental guide to conduct" (*Ibid*., 267): they bear on all aspects of life and provide the most basic considerations that adherents are supposed to rely on in their deliberation. These criteria provide plenty of scope for distinguishing linguistic identities from religious affiliations. So it might be said that linguistic goals do not exclude in the way that religious goals do.

I think we should treat Cohen's criteria as providing *sufficient* conditions for the rationale behind a policy to raise concerns about exclusion. There are also, I'll argue, other sufficient conditions. It is certainly possible for someone to speak a language and for that fact to play no role in their basic self-conception and be entirely unconnected to their main values. But in the places that we are concerned with, where linguistic protection has become a central political concern, language plays a very different role. In these places, individuals are expected to take a stand on the importance of certain languages and, in doing so, to associate themselves

[10] Compare also, for instance, the United States' history of excluding people with various mental illnesses, a policy that does seem to imply that mentally ill people in general are not fit for citizenship.

with much broader cultural and ethnic traditions. In those contexts, to associate with a particular language is to take on an identity that would substantially shape one's life, albeit in a somewhat different way than would a religion. Thus, for the state to endorse a particular linguistic tradition is to suggest that full membership in the political community is conditioned on accepting one of these very thick identities. This creates exclusion because there are members of the polity who reasonably wish not to identify in this way.

This problem creates something of a dilemma for those who wish to shore up support for protecting a particular language. On the one hand, they need to create enough support among existing speakers to convince them to accept sacrifices and mobilize politically on behalf of the language. And to do that they will often need to suggest that it is more than *just* a language: that it is associated with an entire way of the life, an inheritance from their forefathers, and so on. But the "thicker" this linguistic identity becomes—the broader the set of values and traditions that become connected with it in the social consciousness of their society—the stronger the case that other members of the society can reasonably wish not to adopt that identity and not to have their political status conditioned on accepting it.

A third objection relies on the idea of reciprocity.[11] Suppose that I am a member of the indigenous population and that my language is threatened by the influence of a settled immigrant community. I can say to members of that community, according to this objection, "Look, if I were to immigrate to your country, then you could reasonably demand that I accept the dominance of your language because that is your homeland. So, it's fair for you to accept the dominance of my language here in my homeland."

This objection seems to presuppose precisely what I am disputing. It says that the mere fact that one group is indigenous and another group "ethnic" reasonably gives the former a political status in the territory that the latter lacks. That's why, supposedly, it would be *reasonable* for you to say to me in *your* country "Our language must take preeminence here, no matter how many of you come." I have denied that the state can associate itself with one group over another just because it is indigenous. Turks in Germany, for instance, we've seen, must be given equal political status despite their (relatively) recent arrival. So it is impermissible to deny them equal membership just as it would be impermissible to deny equal treatment to members of a settled German community in Turkey.

A third objection says that I have ignored another crucial difference between language, on the one hand, and religion and culture generally, on the other. Languages, according to this objection, are uniquely fragile and vulnerable to extinction in light of immigration in a way that religion and culture are not. In particular it is often said, following Van Parijs' findings, that languages are subject to potentially rapid erosion through "maximin" dynamics (Van Parijs 2011, Chap. 5.4). Suppose that a group of people who speak various languages, with varying degrees of ability, start a conversation. According to the theory, the language they select to converse in will be the one that is best known by the member of the group

[11] See, for instance, van Parijs (2011, Chap. 5.6).

who knows it the least. Here is a simple, and pertinent, illustration. Suppose that a group is made up of people who all speak English reasonably well and French fluently. They will converse, of course, in French. If, however, a newcomer joins the conversation who speaks good English, but almost no French, the conversation will now be conducted in English: the members of the original group speak English better than he speaks French. Similarly, if immigrant groups in Quebec learn English better than French, and members of the Francophone population mostly come to speak good English, then English may quickly start being used generally.

This difference between threats to religions/culture and threats to language seems to me one of degree and not of kind. If immigrants settle in a country and practice their religion there this can make it more expensive to practice a religion that has stronger historical roots in the territory and may well ultimately lead to the death of the religion in the territory. Yet this clearly would not justify establishing the "local" religion. The maximin dynamics in linguistic behavior just mean that a language can, in some cases, be eroded more quickly.

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Chapter 15
Restricting Immigration Fairly

Bruce Landesman

Abstract Commitment to the liberal democratic ideals of equality and liberty suggests that all should be allowed to live where they choose and that controlled and restricted borders are therefore unjustified. I argue, however, that nation-states can have reasons for restricting immigration that are both justifiable and compatible with treating people as free and equal beings. Liberal commitments do not require open borders. Not all immigration restrictions, however, pass the test of conforming to the demands of equality and liberty. Immigration may be restricted but only if restricted fairly.

In an early paper, Joseph Carens (1987) argued against immigration restrictions and in favor of open borders. His claims rested on "the basic supposition that we should treat all human beings, not just members of our own society, as free and equal moral persons" (*Ibid*., 256). He used this to argue against the conventional view that "the power to admit or exclude aliens is inherent in sovereignty and essential for any political community" (*Ibid*., 251). His arguments are compelling, and his paper does what good philosophy does: it makes us reconsider conventional ideas we tend to take for granted. This paper is my current reaction.

I examine the question of borders as it affects affluent liberal democracies in the world as it is today. I take for granted, as Carens does, the moral equality of persons and the fundamental right to freedom. I will show, however, that the commitment to equality and freedom does not entail open borders, and that border restrictions are compatible with respecting the equality and liberty of outsiders. I therefore end up supporting a version of the conventional view. I argue that border restrictions and controls are part of sovereignty and that sovereignty is justified in the world we live in. I also argue, however, that the commitment to equality and liberty of all persons means that immigration restrictions and exclusions are justified *only* when

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they are for morally sound reasons compatible with the equality of all persons. Immigration, I conclude, may be restricted, but there are considerations of justice that constrain those restrictions.[1] Immigration must be restricted fairly.

15.1 Borders and the Nation-State

It is helpful to begin by considering the different ways that states manage borders with respect to people wishing to enter a country and make it their permanent home, that is, people who want to immigrate. I suggest four rough possibilities for managing borders for the purpose of immigration.[2]

Completely Open Borders Anyone may enter a nation in order to live there without having to go through any administrative processes. Examples of this are free entry from state to state in the United States, from province to province in Canada, and travel among Schengen states in EU countries.

Lightly Controlled Borders Anyone may enter to immigrate, but such entry requires the possession of appropriate documents and inspection of them at the border. These borders are open, but there are administrative and bureaucratic procedures that must be followed. One needs to procure and show an appropriate document, such as a passport, before entry. It is similar to voting in the United States: any citizen over 21 may vote, but she must first be registered.

Controlled Borders More typical is immigration based on various selection criteria such as skills, job prospects, family connections, country of origin, quotas, etc. There may also be lengthy waiting periods before applications for entry are processed and final decisions made. Borders can therefore be quite open to immigration or heavily restricted depending on the nature of the criteria and the relevant administrative processes.

Completely Closed Borders No one is allowed to immigrate. North Korea is often given as an example.

Which of these is appropriate for an affluent liberal democracy? The world that we live in is divided into nation-states. I assume that nation-states are justified entities.[3]

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[1] In his recent book, *The Ethics of Immigration*, Carens (2013) develops and complicates his ideas and ends up with more qualified conclusions about open borders in a world like the one we live in now.

[2] I am not discussing tourists and other visitors here. Even countries with severely controlled borders may have very light restrictions for visitors.

[3] The division of the world into separate nation-states is one way of organizing the world. This division came into being at a certain historical moment and may pass out of being at another. There may be better ways to structure the globe. For the purpose of this paper I assume the nation-state is currently justified. My interest is solely in the question of what immigration restrictions, if any, are justified, given the nation-state system, and why.

It seems clear that they have a function. They are to provide for the common good, the general well being, of their members.[4] A nation has what Robert Goodin calls an "assigned responsibility…for protecting and promoting the interests of those who are its citizens" (Goodin 1988, 644). National governments enact, or should enact, laws and policies intended to further the interests of their citizens. That is their function.[5]

How open or restricted borders should be is certainly a question for discussion as a matter of law and public policy within a nation-state. Liberal democratic countries will have reason to refuse immigration to people with serious criminal records who constitute potential harm to their citizens. They may exclude those likely to spread very serious diseases.[6] They also have reason to exclude those who threaten national security—spies, saboteurs, and terrorists. Immigration, further, can have an economic impact—negative when immigrants threaten jobs or threaten to overload welfare provisions, positive when they bring needed skills. Since it is the obligation of a liberal democratic government to promote a successful national economy, criteria for immigration based on economic harms and benefits are certainly fit subjects for discussion and action. In addition, a liberal democratic nation is based on a set of values and procedures—liberal values and democratic procedures, values such as equality, liberty, democracy, tolerance, the rule of law, non-discrimination, etc.[7] A liberal democracy cannot survive and be stable as a liberal democracy unless these values are generally accepted in the population. Some immigrants come from countries or cultures hostile to liberal values. They typically come to embrace liberal values, but this is not inevitable. At the very least, it should be a matter for discussion whether the immigration of those hostile to liberal values will threaten the stability of liberal society.

In sum, liberal nation-states have reasons to consider immigration restrictions on the basis of preventing crime and epidemics, promoting security, ensuring economic well being, and maintaining stability.

15.2 Nation-States and States

One rejoinder to this view rests on free movement over internal borders *within* liberal nation-states. Many countries are divided into regions each of which has their own government. The United States is a clear example. It has 50 states, each of which has a government responsible for many functions. Those 'sub-states' and their governments might have the *same* sorts of reasons as nation-states for wanting

[4] This is a moral claim, a claim about what nations are *supposed* to do. Many do not.

[5] Having this function does not rule out concern for outsiders or obligations to them. The scope of such obligations is discussed below.

[6] These will also be reasons for restricting visitors.

[7] These values are to be distinguished from more 'cultural' or 'communal' values, such as those reflected in a widely held religion. I discuss this below, Sect. 15.4.

to restrict immigration. They, too, would want to keep out criminals and saboteurs, prevent epidemics, protect their local economy, etc. Nevertheless borders between states are completely open for people to move from one to another. Why should sub-state borders be open to immigration and not nation-state borders? Why aren't the reasons for controlling nation-state borders also reasons for controlling sub-state borders, as well?[8]

One possible argument for this is that internal borders function mainly as administrative devices for dividing up responsibilities for nation-state functions. Some responsibilities go to the national or federal government; others go to regional governments. Division into sub-states is simply a practical device for promoting efficient government, leaving certain decisions up to localities where they can be better made in response to local conditions. Sub-state borders have only pragmatic significance; they do not have the significance that nation-state borders do.

This answer may work for some countries, but it does not easily fit the constitutional structure of the United States. Historically the states preceded the federal government. The U.S. Constitution leaves certain rights and powers to the states. The states are not merely administrative sub-divisions. It is certainly true that there is free migration between states in the U.S. and a state that tried to impose border restrictions on U.S. citizens would act illegally.[9] But that's because such restrictions are seen as inappropriate among regions within the country. This then brings us back to the question: why are internal restrictions inappropriate?

One might try out that idea that people have a special identity with their nation-state. Questions about identity raise complex and difficult questions. It is reasonable to think that a nation-state will be successful only if its citizens feel a sense of identity with it. But that identity need not be based on religion, ethnicity, or personal similarity among its citizens. Identity does not require homogeneity and is compatible with a great deal of diversity. Keeping this in mind, let's admit that people in liberal societies identify with the nation-state. This will not, however, show that the nation-state is special, as opposed to its sub-states. People also identify with their region, their state, city or town. They may also identify with other nations, regions, and cities, etc. A mere appeal to identity with the nation-state will be both too narrow and too broad to show that identity with the nation-state makes the nation-state different from its sub-divisions.

We seem to be left simply with the idea that free movement within states is the norm. We live under a nation-state system in which it is simply taken for granted that there should be free movement within the nation-state and controls between nation-states. That's the way the system works. These are norms built deeply into the Westphalian nation-state system as understood in the current century.[10]

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[8] Carens (1987, 258) raises this issue.

[9] See Shapiro v. Thompson 1969.

[10] These norms also include the freedom to leave one's country and emigrate to another nation-state.

We cannot, however, take this mundane fact as decisive. We have to ask if going along with the expectations built into the nation-state system are acceptable. The central question, raised by Carens, is whether excluding people from immigration fails to treat them as equals and/or violates their right to liberty. If it does, exclusion from immigration cannot be justified by liberal values; it is unjust. I therefore now turn to this issue.

15.3 Interpreting Equality and Liberty

The major liberal arguments for open borders appeal to two universal values. One is the moral equality of all human beings. The other is the right to liberty. With respect to equality, restricted borders in the current world give some people access to much better lives than others. Citizenship and the border restrictions that go with it, Carens has argued, are "the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances" (Carens 1987, 252).[11] It provides some with wealth and opportunity denied others solely on the basis of birth location. This, it is held, does not treat all as equals. As for liberty, let's understand it as the right to make fundamental decisions about one's own life. The freedom to live where one chooses is taken to be part of this right. That right is especially important for allowing people to pursue opportunities for improving their lives. Closed borders violate that right.

Is it true, then, that border restrictions and prohibitions are incompatible with respecting the equality and liberty of all persons? There is no quick answer. To begin to have an answer, we need to look more deeply into the concepts of equality and liberty. The implications of these values for specific political questions cannot simply be read off from their meaning but require interpretation. I turn now to the question of what equality and liberty imply for immigration.

15.3.1 Equality

I turn first to the idea of equality. The root idea can be put in different ways. I am inclined to formulate it as the view that all persons are equal in their intrinsic worth or value. Others may speak of treating all persons as equals. Another idea is that all persons are owed equal concern and respect. Thomas Hobbes put it nicely as a law of nature:

> If nature therefore have made men equal, that equality ought to be acknowledged…And therefore for the ninth law of nature, I put this, *that every man acknowledge other for his equal by nature* (Hobbes 1994, Chap. XV, 97).

I call the idea of the equal intrinsic value of all persons *basic equality*.

[11] See also Carens (2013, 226, 289).

The idea of basic equality must be interpreted in order to answer questions about what the idea implies for particular goods. Treating people as equals and respecting their equality often requires making them equal in some respect. Thus if there are any fundamental human rights, such as the right to liberty, it seems clear that all should have that right and should have it equally. Another example is equality before the law. Basic equality grounds the idea that the laws of a state should treat everyone in the state the same with respect to particular provisions; they should not be applied differently on the basis of wealth, gender, race, etc. On the other hand, equality is not always required. Giving unequal grades to students whose work differs in quality does not violate basic equality and does not show disrespect for those with lower grades. Nor does giving a job to the person most qualified for it show disrespect for the equality of others. Very difficult questions arise with regard to the distribution of income and wealth and much can be said about when this should be equal (e.g. equal pay for equal work) and when inequality is justified (perhaps when inequality benefits everyone.[12])

With regard to immigration, the most important issue with regard to the application and interpretation of equality is the partiality that nation-states show to their own citizens. Such partiality lies behind closing or restricting borders, since it means giving or protecting advantages for some and refusing them to others. Is refusing permission to immigrate into rich liberal democracies failing to respect the equality of others? Peter Singer put this issue of partiality on center stage with his famous essay, "Famine, Affluence and Morality" (Singer 1972). In that early essay, he totally rejected the idea that we may be partial to particular people with whom we have developed special relationships. Surely Singer was mistaken about this. We develop special moral ties to family members, friends, and colleagues that justify us in giving greater attention to their interests than to others. Providing good things to my child rather than to an unknown child is certainly justified and does not mean rejecting the equal value of the other child. Partiality is compatible with equal respect.

Partiality, however, has its limits. Providing my child with luxuries instead of helping starving strangers can be wrong. A judge acts wrongly if she favors someone in a legal proceeding because he is a friend or belongs to the same political party. A politician is corrupt when he steers contracts to friends and family members. In general, anyone playing a public role acts wrongly by showing partiality to friends and family. In sum, partiality is often justified but sometimes conflicts with considerations of justice and equality.

What, then, about partiality to fellow citizens? Do citizens of liberal democracies have morally sound reasons for preferring the interests of fellow citizens to those of non-citizens?

[12] This is the well-known theory proposed by John Rawls (1971, 13–14).

I have said that we can often justifiably show preference to the interests of family members and friends. I think we can also be justified in favoring the members of associations we belong to from which we get benefits and to which we have special obligations. I have in mind, in the first instance, such things as clubs, teams, and business and academic enterprises. I take it for granted that showing such preferences often does not violate the equal worth of others. Again, however, it must be mentioned that this partiality is not unrestrained. A judge, for example, must not favor his golfing colleague in legal proceedings. Partiality, then, is often justified, but difficult questions occur about when it becomes unjustified. Lines need to be drawn.

Is the nation-state the sort of association with respect to which partiality towards fellow members can be justified? I'm not sure there is a decisive answer to this question. People can be skeptical, pointing out that our relationship to most other members of the state is not a personal one. The nation-state is in fact an association of strangers, most of whom are no more important to me as persons than citizens of foreign states. The most important particular obligations in one's own life are to close friends and associates with whom we share a great deal.

I nevertheless think it clear that a well-organized nation-state is a kind of community, a community in which each member depends on the rest for the satisfaction of his or her needs and interests. We depend on our fellow citizens not to harm us as we go about our daily lives, to show the basic restraint captured by the idea of law-abidingness. We depend on their paying their taxes to fund the infrastructure needed to enable us to lead decent lives (an infrastructure which includes oversight of the economic market which, left alone, causes havoc). In short, a well functioning nation-state is a community in which the well being of each depends on the efforts of others. It is what Rawls calls a scheme of social cooperation in which benefits are produced for its members through burdens they bear (Rawls 1971, 15). This relation produces obligations of reciprocity among members of society. We may not know many fellow citizens or depend upon them for many things, but our good nevertheless depends on their restraint and positive actions just as if they lived next door. About a nation, we can say: "We are all in this together."

I conclude that a nation does not fail to treat others as equals when it restricts immigration for good reasons, the sorts of reasons I mentioned earlier. However, just as partiality to friends and family has limits, so does partiality to fellow citizens. Since all are equals, the reasons for restricting immigration have to be appropriate ones if they are to show respect for the equality of foreigners. To deny entry into a successful nation to people wishing to seek a better life requires justification. Arguments that the nation should not allow entry on the ground that the number of immigrants is too high to be supported by the economy, that they will take away jobs, that they will overload welfare systems can, in the right context, be valid. They can also be rationalizations that are not grounded in the facts but are expressions of xenophobia, bias, and hate. Respecting the equality of all is compatible with immigration restrictions but only when they are based on reasonable grounds.

15.3.2 Liberty

Liberty, too, is taken to be a universal right, including the right to live where one chooses. The right to live where one chooses is part of the liberty to make fundamental decisions about one's own life and to pursue one's best opportunities for a good life. Those liberties might be best exercised by immigration into a new country. Thus to be prevented from immigrating appears to violate one's right to live where one chooses, to make basic decisions about one's life, and to pursue one's best opportunities.[13]

I think the most important thing to say about liberty is that it is a right that needs to be '*shaped*'; with respect to a particular liberty, its scope and limits must be determined. With respect to freedom of movement, liberty is not the right to go just anywhere. There are places restricted to owners, members, associates, etc. There are places restricted by time of day rules (parks, beaches, museums, etc.). A right to liberty is shaped in terms of a variety of considerations relating to context and consequences. It is a platitude that freedom of speech does not include shouting fire in a crowded theater, false advertising, libel, and many other things that are literally speech.

The shaping of a right like the right to liberty is a complex matter, both of morality and law. A liberty is significant because of the importance of its exercise both to individuals retaining the liberty and to others who benefit from its exercise—free speech, for example, is as important to the hearer as the speaker. One of the benefits of free speech in a democracy is discussion of matters requiring political decision. A liberty should be as wide as possible, securing for all the benefits that liberty is supposed to bring. Restrictions based on context and consequences should be as minimal as possible. For any particular liberty, the question of its extent and scope will be complex, with obvious instances of actions to be included and excluded from it, with many difficult cases in the middle.[14]

The liberty to immigrate into a country as the reflection of the liberty to live where one chooses, make fundamental decisions about one's life, and seek one's best opportunities, is also a liberty that needs to be shaped. One can't live just anywhere; other people's homes and public parks, for example, are off limits. Thus the right to live where one chooses cannot be taken literally and, like other liberties,

[13] I am taking it for granted that the basic right to liberty is a claim right, a right that entails correlative obligations on the part of others. So if I have a right to live where I choose, others have an obligation not to interfere with my doing. The basic right to liberty is not a 'mere liberty', that is a right to do something which others may legitimately try to prevent one from doing. A basketball player has a right to shoot the ball, but his opponents have no obligation to let him do so. Shooting the ball in the course of play is a mere liberty while a right to take a foul shot the referee has awarded is a claim right.

[14] In his classic work, *On Liberty*, John Stuart Mill (1978) struggles with these issues in the second half of Chap. IV and in Chap. V.

requires shaping with regard to its scope and limits. The same is true for the freedom to locate to the place with the best opportunities. I may think that I will have the greatest opportunities only if I attend a particular university, but I am justifiably out of luck if I haven't got good enough grades for admission. I may sincerely think my life will go well only if I can live on the Upper East Side in Manhattan in New York City. But I am out of luck if I cannot afford the rent. Of course lack of means (in this case, rent) sometimes raises issues of justice; both liberty and opportunity demand that certain barriers be removed. But that does not mean being able to afford anything and everything one might want.

The freedom to move to another country also needs to be shaped. I have argued that sovereign states are justified in our current world and that they have the important function of protecting and promoting the common good of their citizens. As such they have a legitimate interest in restricting the freedom of non-citizens for the kinds of reasons I have mentioned above: preventing crime and epidemics, promoting security, ensuring economic well being, and maintaining stability. Thus, as in the case of equality, reasonable and appropriate restrictions on immigration are compatible with respect for basic rights of liberty.

A very large issue about allowing immigration has to do with the numbers of people wanting to immigrate into affluent countries. In this regard, let's consider 'humanitarian immigration', the entry of those who want to immigrate to escape situations of violence or extreme poverty that they cannot avoid in their own country. Affluent countries should help. Their obligation to help stems from taking seriously the liberal commitment to the equality of all persons, which extends the scope of moral concern beyond that of their own citizens. They can fulfill their obligations in this matter either by helping people in foreign countries overcome their problems at home or allow them to immigrate. The first is generally preferable, but the second must also play a role. But what if more wish to come than the economy can bear? One does not fail to respect people's freedom when one does not allow them to attend an event when there is no space left. Concert halls, theaters, sporting arenas fill up. Those who come late can legitimately be denied entry and are not disrespected as a result. Immigration restrictions seem to make the most sense when more immigration is *too much* immigration. People will argue about when "too much" has been reached, but a sovereign state has the right to make these sorts of decisions.

It is possible, however, that the fear of over-immigration may not be grounded in facts and be nothing but a smoke-screen for xenophobia and paranoia. As in the case of equality, restrictions on the right to immigrate will respect people's basic right to liberty only if they are appropriate, reasonable and just. In sum, while affluent countries may be partial to their own citizens, they still have obligations and responsibilities to people worldwide. These responsibilities are based on equality and justice.

15.4 Immigration and Stability

I have spoken of stability as one of the grounds for restricting immigration. I have in mind something very specific here and I wish to make it clear. Michael Walzer (1983, Chap. 2, 31–41) argues that it is reasonable to see a state as a 'membership' community. It is somewhat like a club that has wide discretion to determine who its members shall be. Walzer, I think, would allow reasons for immigration restrictions that go well beyond the ones I have repeatedly mentioned. He writes,

> [the] distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people…seem to believe, then closure must be permitted somewhere. At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants (*Ibid*., 39).

The suggestion is that immigration restrictions are justified to protect the distinctive culture and character of a given society.

This is not what I mean by "stability." My concern is with a liberal society and with those values, and only those values, that enable it to be a liberal society. Those values include equality, freedom, democracy, the rule of law, tolerance, and the separation of church and state. Walzer's net seems wider than this; it appears to include distinctive features of the culture that go beyond these norms. Since a liberal society needs to be open to cultural change, Walzer's idea of 'protecting its distinctive character' goes well beyond liberal ideas. Nevertheless it can protect itself and its basic norms. A liberal state has the right to defend itself as a liberal state. This is not because any state can defend itself as the sort of state it is—that's not so. It's because the norms of the liberal state just mentioned are worthy of respect and a liberal society is a good society. Immigration restrictions to protect the widespread allegiance to those norms are justified.

The question of stability arises when many immigrants come from countries which do not respect liberal values and have been socialized in ways that fail to express tolerance, respect for liberty, etc. In many liberal nations, citizens are concerned about damage done to liberal norms and stability by such immigration. I do not know to what extent this is a genuine problem. Most immigrants or their children adapt to the new basic norms of the liberal countries they enter. Complaints of damage done to liberal norms by alien outsiders with alien values are often another example of the expression of narrowness, xenophobia, bias, and hate. Such complaints can also be produced by the failure of society to be welcoming to its new members, causing resentment that issues in crime and violence. Nevertheless, a society does change as a result of changes from the character and values of newcomers, often for the good but potentially for the bad. A liberal state does no wrong to take this issue seriously and discuss it in the public arena. It should be able to take action to curb immigration when there is good reason to think immigration raises threats to the sort of normative stability liberal society depends on.

15.5 Immigration in the Ideal and Real World

Suppose we had an ideal world in which all nation-states are relatively affluent liberal democracies. In such a case there could be little objection to completely open borders, to making movement between nations similar to movement between states as in the United States. Immigration in those conditions is very unlikely to pose any of the issues that make immigration controls and restrictions justifiable. This is so for the simple reason that few people will want to move to new countries and as a result, those who do want to immigrate will pose few problems.[15] Open borders are suitable for an ideal world.

What about the world as it exists today? I have argued that certain types of border controls and restrictions are justified and compatible with respect for the equality and freedom of all persons. I have also argued, however, that some restrictions fail to show such respect and are unjustified.

I suspect that affluent nations in today's world can permit immigration to more people than they now do and can do a much better job helping to ameliorate the conditions of deprivation and violence that motivate people to immigrate. The commitment to the universal values of equality and liberty should be taken seriously. While that commitment is compatible with some partiality towards the citizens of one's own nation, the rights and needs of others do not disappear from moral concern and moral obligation. Even when immigration restrictions are justified, aid to other nations to ameliorate conditions of deprivation is called for by considerations of justice.

Both immigration and general aid to foreign nations are currently encompassed in a politics of fantasy, bigotry, ethnocentrism, and chauvinism. Affluent countries can afford to be more humane than they have been with respect to both immigration and aid.

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[15] I am inclined to think that Carens (2013) ends up defending completely open borders only in such an ideal world. But I have not tried to argue for this here.

Part V
Asylum and Refugee Policy

Chapter 16
Domestic Violence as Justification for Asylum

Ann E. Cudd

Abstract The basic requirement for achieving asylum in the U.S. is to prove a well-founded fear of persecution based on social group membership. In the past two decades women have attempted to claim asylum as victims of domestic violence. This chapter examines three theories of domestic violence: the family conflict theory, the crime theory, and the oppression theory. I argue that only the oppression theory can justify asylum. I then respond to objections that this theory allows too many claims of asylum.

16.1 Introduction

The Geneva Convention in 1951 established the basic requirements for asylum. An asylum seeker must prove that she has a well-founded fear of persecution based on 'race, religion, nationality, membership of a particular social group or political opinion'. Persecution is generally understood to involve severe and pervasive violence and threat thereof. In order to qualify for asylum in the U.S., this basic requirement has come to be understood as requiring the asylum seeker to show that there is a causal "nexus" between membership in the social group justifying asylum and the fear of persecution. That is, they must show that they are targeted for persecution because of this social group membership. For women who have been victims of gender-based violence, it has long been difficult for them to win asylum based on their gender group. After all, it is hard to show that all or most women are persecuted at all, much less because they are women. Even narrowing down to women of a particular society seems to be overly inclusive. Furthermore, the Geneva Convention was not originally formulated to cover the kinds of violence women face because they are women. Domestic violence is one major kind of violence against women, a kind of pervasive violence that women have begun in the past two decades to try to escape by appeal for asylum. In the U.S., however, this claim has never been accepted until now.

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In a major breakthrough for women escaping violence, on August 26, 2014, the U.S. Department of Justice Board of Immigration Appeals decided that "depending on the facts and evidence in an individual case, 'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal" (Bureau of Immigration Appeals 2014). The case at issue was a Guatemalan woman (and her minor children) who had applied for asylum claiming that she was the victim of domestic violence in her home country. Her initial application was denied, and she appealed. The appeal decision represents the first time that domestic violence has been upheld as a potential justification for a claim to asylum in the U.S. However, she must still establish before an Immigration Judge that "the Guatemalan Government was unwilling or unable to control the 'private actor'," i.e. her husband.

Domestic violence raises several interesting philosophical and legal issues for asylum and immigration law. Does domestic violence satisfy the requirements of asylum law? If so, then what specific features must a case of domestic violence display in order to justify an asylum claim? How ought we understand domestic violence: as a crime, an interpersonal pathology, or a force of oppression?

The study of domestic violence has been approached in two broadly different ways. One approach is to conceptualize domestic violence as essentially a form of violent behavior of individuals in intimate relationships. There are two versions of this approach: one is to see domestic violence as a public crime that demands prosecution (Zorza 1994; Roberts and Kurst-Swanger 2002; Brooks 2012) – an approach I shall call the crime theory, and the other is to see it as an interpersonal, private conflict within intimate relationships – an approach I shall call the family conflict theory (Langley et al. 1997; Mills 1999, 2003). The other approach understands domestic violence as a socially constructed force of oppression of women. This approach has been taken by the feminist literature (Rhode 1989), which targets domestic violence as one of the major obstacles to women's full freedom and equality with men. I shall call this the oppression theory of domestic violence. As an extension of this approach, in recent years the term "violence against women" has brought together several phenomena under one term, including wife battering, describing them as a type of human rights violation (Violence Against Women Act 1994; Dempsey 2009).[1]

The three theories of domestic violence differ on the nature and extent of the problem, whether domestic violence is a gendered phenomenon, and if it is, whether men are more violent than women. The oppression theory understands oppression itself as a social, structural problem to be addressed in addition to the individual, psychological pathologies and crimes. The crime theory understands the problem as criminal violence that is typically male-on-female, but not necessarily so, and not necessarily connected to other social issues. The family conflict theory holds that

[1] The leading human rights organization of the world, the United Nations, as well as such human rights oriented NGOs as Amnesty International, Human Rights Watch, and Medicins Sans Frontieres address violence against women as among their top concerns.

intimate partner violence is a primarily individual, psychological problem within relationships and families, that women and men are equally violent, and that the problem needs to be solved through individual, or couple-centered, clinical therapies. Although each theory claims some evidence, I shall argue that only one explanatory theory, the oppression theory, can be used to justify domestic violence as a cause for asylum. Indeed, this is the theory being relied upon in the case described above. What implications does this theory have for others seeking asylum? The successful use of the oppression theory of domestic violence raises questions about what other cases of intimate partner violence would also justify asylum and about what other cases of oppression would justify asylum.

16.2 The Inadequacy of the Family Conflict Theory

The family conflict theory of intimate partner violence takes violence to be an individual or family pathology, essentially unaffected by social and legal structures. This theory is inadequate as a theory of domestic violence. If it were true, it would mean that domestic violence is not a structural, social, or political problem, and it would provide a reason for denying all asylum claims based on domestic violence. Linda Mills is the foremost proponent of the family conflict theory. Mills' argument rests on a causal analysis of intimate partner violence that locates the causes in individual, psychological problems rooted in childhood experience of violence. On her theory, the only causal relevance of gender to the problem is to the way in which violence is expressed. State intervention in intimate partner violence is useless because it fails to address the intimate interactions between partners and thus leaves them both as violent as before the intervention. Worse, such intervention tends to treat men as perpetrators and women as victims, which exacerbates the violence of women by robbing them of autonomy, and of men by blaming them for their violence when it was actually a defensive reaction to emotional abuse. Interventions should instead aim at getting both parties to recognize and confront their violent tendencies and to learn to control and avoid triggers for their outbursts. Victims of family conflict do not need asylum; they need couples therapy.

This theory would not justify asylum for any particular case that is explained in this way because there is no social group that could reasonably be said to cause the violence. Furthermore, such private violence cannot be said to be any kind of persecution that the State is somehow involved with. If this is the best explanation of women's experience of domestic violence, then it undermines any claim to asylum via domestic violence. Therefore, it is imperative to show first that the family conflict theory is not the best explanation of (at least most cases of) domestic violence.

The key claim in Mills' work that must be addressed if domestic violence is to justify asylum is that intimate partner abuse is not systematically, asymmetrically gender-based. Her claim is that gender is not causally relevant to intimate partner violence. Being a man or a woman does not create either a greater or lesser

probability of being the perpetrator or victim of domestic violence. Specifically, Mills attempts to show that women are as aggressive as men, where aggression is defined to include psychological and emotional cruelty as well as physical violence. By framing violence in terms of "aggression" rather than "assault," she points out, some surveys report more women than men as engaging in violence.[2] She claims that aggression is the real problem, rather than violence, and that men and women display aggression differently. She writes: "gender can, at times, determine the forms that aggression takes. Some researchers found that traditional gender roles influence how girls and eventually women express their anger and aggression. Passive aggression or "indirect" methods are common expressions of female anger" (Mills 2003, 71). She describes how girls gossip and backbite to express their anger and then points to the link between psychological aggression by women and physical abuse by men against women. Thus, according to Mills, women are just as aggressive and abusive as men, on the whole.

Mills argues that we should view emotional and physical abuse equally as forms of intimate partner abuse, and that we should focus on this combined phenomenon rather than domestic violence as either the crime theory or the oppression theory have come to conceptualize it, that is, as a gendered type of violence primarily against women by men. One reason for taking emotional abuse to be a type of violence is that "some women experience emotional abuse as much more significant than physical forms of violence" (*Ibid*., 74). Another reason is that if women's emotional abuse of men provokes men's violent responses, then we can reduce physical violence against women by reducing emotional abuse of men by women.

Even if we grant that emotional abuse is as harmful or violent as physical abuse, a significant problem with seeing women's emotional abuse of men as a type of domestic violence to be corrected is that what counts as "emotional abuse" is affected by social constructions of gender. A man might see a woman's demand to be treated equally as contesting his masculine privilege. A man may find it emotionally abusive to have his masculinity put in question, which may be done simply by questioning his dominance in any way, given that masculinity is equated with dominance in patriarchal culture. The fact that men's masculinity is so important to them is in large part because of the dominance it conveys for them. Yet it cannot be counted as abusive to object to, complain about, or even display anger over an injustice. Women should not be labeled abusive simply for contesting their subordinate status; they have every right to do so.

Mills claims that even if we separate emotional abuse from physical violence, women are as physically violent as men are in intimate partnerships. The most important evidence for this claim that Mills cites are studies of the 1975 and 1985 National Family Violence Surveys (NFVS).[3] However, critics point out that this survey measures acts of violence in isolation from the circumstances under which

[2] This is true of only one data set that she cites, however, and it should be noted that the data concerned only 21-year olds in New Zealand.

[3] The surveys referred to in this chapter are U.S. based surveys, and some are obviously now quite dated. I discuss them here because Mills depends on them for her theory of domestic violence.

the acts were committed. The surveys ignore who initiates the violence, the relative size and strength of the persons involved, and the nature of the participants' relationship (Dobash et al. 1992; Saunders 1986). Many violent acts by women are performed in self-defense against physically violent acts, but this fact would not be recorded by the survey's methodology. Yet, if we are trying to see whether gender is causally relevant to domestic violence, then we need to assess this question. Second, the NFVS does not differentiate between half-hearted or mild attempts to admonish or protest with say a slap on the wrist, and serious applications of physical force to subdue the other. When injuries are taken into account, again the violence against women by men is much more significant and severe.[4]

Crime victimization surveys uniformly report much more violence by men against women than by women against men (Dobash et al. 1992; Bachman and Taylor 1994). In trying to assess the reasons for the stark difference between the Family Violence Survey and the National Crime Victimization Survey, Ronet Bachman points to the fact that the former asks questions in the context of family conflict while the latter concerns the commission of crimes. The Crime Victimization Survey methodology asks about the same set of behaviors that the Family Violence Survey classifies as crimes (i.e., all of the violent conflict tactics included in the NFVS), and it asks subjects to report them whether or not they believe them to be crimes, but the context of the Crime Victimization Survey would likely lead persons to screen out those behaviors that were very mild, half-hearted, or in jest.

In 1995–1996 the National Violence Against Women Survey was conducted by the National Institute of Justice and the Center for Disease Control and Prevention. It found that nearly 25 % of surveyed women and 7.6 % of surveyed men said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their lifetime; 1.5 % of surveyed women and 0.9 % of surveyed men said they were raped and/or physically assaulted by a partner in the previous 12 months. Further, it concluded that 503,485 women and 185,496 men are stalked by an intimate partner annually in the United States (Tjaden and Thoennes 2000, iii). The authors of the study conclude that women are far more vulnerable to domestic violence, stalking, and the chronic injuries that result from this violence.

Mills is not warranted with her first claim that women are as violent as men are in intimate partner conflicts. Given women's subordinate position in society, what counts as emotional abuse will be biased against women, who may legitimately complain about their unjust treatment, and for whom there is less tolerance for complaint. Women clearly suffer more harm from the domestic violence they face. Not only is the evidence weak for the claim that women and men are equally violent in intimate partnerships, but also, as Dobash et al., point out: "The alleged similarity of women and men in their use of violence in intimate relationships stands in marked contrast to men's virtual monopoly on the use of violence in other social contexts, and we challenge the proponents of the sexual symmetry thesis to develop coherent theoretical models that would account for a sexual monomorphism of violence in one social context and not in others" (Dobash et al. 1992, 72). Since men vastly

[4] See Dobash et al. (1992, 75) for a summary of the evidence and list of citations.

outnumber women as perpetrators of other violent crimes, it is reasonable to require the burden of theory and proof to be on those who argue that in domestic contexts women are equally as violent as men.

I have argued that Mills' analyses of the studies of domestic violence do not provide sound empirical evidence for her basic claim that women and men are equally violent. Mills' work focuses on domestic violence in the U.S., and she may have a different perspective on domestic violence in other contexts. It might be objected that this theory is not relevant, therefore, to the arguments about justifying asylum for women in other countries. But her work could be seen as justifying a traditional view about domestic violence, which is that it is a personal issue, not a public crime or a systematic, gender-based harm. Furthermore, it could be seen as creating a distinction between U.S. women and "other" women.[5] By showing that her theory does not fit even the U.S. data, I believe that we can show both that her personal conflict theory does not explain male on female intimate partner violence, and U.S. women also suffer from gender-based systematic violence, a point that I will return to in the conclusion.

16.3 The Crime Theory of Domestic Violence as Incomplete

The crime theory takes domestic violence to be a form of criminal assault that occurs in intimate relationships. Crime theorists generally acknowledge the gender asymmetry of such violence, but the theory is aimed at finding the best way to reduce violence and crime through the criminal justice system. Thus the focus is not on gender but on unjustified violence. This theory is also inadequate as a justification of asylum because it does not provide a causal account to explain why being a woman brings about the harms of domestic violence. Furthermore, and related to that point, the crime theory does not explain why being a victim of crimes is a type of persecution.

Thom Brooks (2012, 190) defines domestic abuse (a term that encompasses domestic violence) as "repeated violence of a relational nature," where the relationship between the abuser and the victim is such that they hold special duties of care and concern. Thus domestic abuse is "a set of violent acts perpetrated against victims to whom we owe special duties" (Brooks 2012, 191). On this definition, either women or men who are victims of violence perpetrated by their loved ones are domestic abuse victims. He recognizes that the women are overwhelmingly the victims of domestic abuse, and that his theory is nonetheless gender neutral. His view is that what is important in analyzing domestic abuse is to see the severity of the crime due to its "relational" nature, which raises special duties. Thus domestic abuse is worse than ordinary battery because while both violate general duties not

[5] This kind of distinction would play into stereotypes that may harm women from other countries in other immigration contexts. See Sinha (2001).

to batter others, domestic abuse also violates the special duties of care and concern that arise in intimate relations.

Brooks' theory of domestic violence does not support an appeal for asylum. Because it treats single cases of abuse as causally unrelated to others, it cannot recognize the systematic, structural causes of domestic violence. It does not describe domestic violence as a group-based type of violence. And therefore there can be no claim that there is some systematic persecution based on the group membership. Thus, it cannot support a woman's claim that she has a well-founded fear of persecution because she has been the victim of domestic violence. Instead it would describe her as a victim of a particularly intimate (and therefore heinous) crime. But just being a victim of a heinous crime does not qualify one for asylum.

While Brooks' analysis helps us to understand better some moral features of domestic violence, it is not explanatorily adequate. Brooks focuses on the gravity of the crime of domestic abuse: it is graver than most other crimes because it is repeated violence and it involves these violations of special duties *(Ibid*., 194). But it cannot explain why women are more likely to be victims than men. What this analysis misses is that domestic abuse against women violates women's rights to equal dignity and respect *as women*, and disables them in many of the same ways that other forms of oppression of women and minorities are disabling. For example, it makes them more vulnerable to low wages, domestic servitude, and other forms of exploitation. Since these are not forms of oppression that men face as men, when they are victims of repeated violence by an intimate they do not face these multiple, interlocking forms of harm. Although men in different groups face other forms of oppression, domestic abuse is not a systematic part of these other oppressions. Men just are not systematically dominated as a gender through domestic abuse in the way that women are.

16.4 Defending the Oppression Theory of Domestic Violence

On my theory of oppression, social groups are constructed by the systematic social constraints they face that either privilege or disadvantage them as a group vis-à-vis other groups (Cudd 2006). Oppressed groups are those that face direct and indirect material and psychological forces of oppression, including violence, economic deprivation and discrimination, and cognitive and affective external and internal forces. Oppression is a network of interlocking forces that creates inequalities among social groups and harms individuals within them. Women, as a group, are oppressed by the many types of gender-specific violence they face, as well as by economic segregation, discrimination, sexual harassment, and psychological forces that stereotype, traumatize, and humiliate them. Because they are interlocking forces, the effects of one force make individuals more vulnerable to another, and the harms are exacerbated and multiplied. So, for example, because women are segregated into lower paid occupations and part time work, they have less bargaining power in domestic negotiations with men over who will do the domestic unpaid

Table 16.1 All violent crimes: victim related to perpetrator, incidents per 1000 persons age 12 and over

	1993–1994	1997–1998	2001–2002	2004–2005	2009–2010
Female	16.1	13.2	7.5	5.8	5.9
Male	3.0	1.9	1.1	1.7	1.1

Statistics from the National Crime Victimization Study (Catalano 2012) (The report warns against comparing statistics for 2006 with other years due to changes in methodology)

labor, how family income will be distributed, and whose human capital is to receive a greater investment. These facts make women more vulnerable to domestic violence, and more likely not to leave if they are subjected to violence, and more likely to return even if they leave. Since women are more likely to be domestic laborers, they prepare for and prepare their daughters for unpaid childcare work, including their ability and desire to attach emotionally to children, which makes it even more likely that they will be vulnerable to poor bargaining outcomes in domestic situations. By the same token, men will be less likely to prepare emotionally for domestic work and more likely to build human capital necessary for public life (Okin 1989).

Although women still face many disadvantages vis-à-vis men, things have assuredly gotten better for women as a group in the U.S. in the past 40 years since the first domestic violence shelters opened here. One indication of this is the narrowing gender wage gap. In 1970 the median annual earnings ratio for full time working women was 59.4:100 compared to full time working men, whereas that ratio in 2011 was up to 77:100 (Hegewisch and Edwards 2012). Another indication of the improved position of women is simply the fact that domestic violence is now treated more like other forms of violence, in that it is treated as a public crime, regardless of the fact that it takes place in the domestic sphere. Since the oppression of women has in these and many other measureable ways decreased over time, the oppression theory of domestic violence predicts that victimization rates should have decreased over that time, as well. This seems to be born out in the National Crime Victimization Survey statistics, as Table 16.1 illustrates.

In addition to being a set of interlocking forces, oppression is also intersectional, which means that individual members of oppressed social groups will be members of different social groups, and privileged or disadvantaged by these other group memberships. Black men and women are disadvantaged in multiple ways, including being vulnerable to economic forces including segregation and discrimination. The interaction of race and gender, as domestic violence statistics show, make Black women somewhat more vulnerable to victimization by their partners, although this effect may be largely screened off by the causal factor of unemployment. That is, unemployment is known to increase rates of domestic violence, and it may be that higher rates of unemployment among Blacks accounts for the higher rates of domestic violence, rather than race itself. Interestingly, the rate of intimate partner violence of Hispanic women has fallen more over the past 20 years than that experienced by white or Black women, so much so that Hispanic women in 2010 experience the

least such violence of any race in the U.S., at 4.1 per 1000 women (Catalano 2012). At the same time, the wage gap between Hispanic men and women has dropped from 8.7 to 6.1 % (infoplease 2013). This reinforces the empirical case for the oppression theory of domestic violence.

My theory of oppression locates many of the antecedent causal factors of domestic violence in women's oppression, the oppression of racial minorities and other stigmatized groups, and the many forces that constitute them. That is, it claims that oppression of women and racial and other oppressions cause domestic violence, so that absent the other oppressive forces, domestic violence against women would decrease or even be eliminated. It offers a systematic explanation of domestic violence, and it offers an explanation consistent with the claim of persecution. On this theory, a victim of domestic violence has a prima facie case to claim that there is a systematic failure to prevent oppression of women in her society. Being a member of the group women is on this theory causally related to being a victim of domestic violence. Thus, the oppression theory of domestic violence supports a claim to asylum.

16.5 Objections to Domestic Violence as Justification for Asylum

The main objection to domestic violence as a justification for asylum is from the perspective of immigration control, namely, that it seems that it may open the floodgates of asylum claims. There are a few ways that this objection could be put. One way is to argue that if domestic violence is a justification, then male victims of intimate partner violence or victims of same sex intimate partner violence might also be eligible for asylum. The oppression theory of domestic violence does not support most of these cases, however. The domestic violence that it can explain—typically that faced by women under patriarchy—is caused by oppression. If a person or group is not subject to oppression, or if the oppressive forces they face cannot be causally connected to the violence they face, then the oppression theory does not explain their victimization. And if the oppression theory cannot explain it, then it cannot provide support for asylum on that ground. Of course, same sex couples are oppressed in many, perhaps all, societies, but not in a way that forces the victim to remain with the abuser. If anything there is too much pressure for same sex couples not to be together. Thus, it is hard to see how domestic violence could be a legitimate asylum claim for a same sex victim.

A second way that the domestic violence justification of asylum seems to open the floodgates is that it recognizes oppression as a cause of systematic, group-based persecution, and thus suggests that any case of oppression justifies asylum. Insofar as oppression explains how harms that individuals suffer are sometimes best explained as group-based, systematic harms, a claim of oppression meets the group membership and causal nexus elements of an asylum claim. But what would still be

at issue is whether the harm rises to the level of persecution in severity. Although many harms of oppression are severe and pervasive and clearly justify asylum, many other harms of oppression are micro-inequities, and as such constitute only micro-harms, not full blown persecution. Sometimes they amount to the proverbial "ton of feathers," and when that happens, consistency would seem to justify asylum. I am willing to bite that bullet and argue that such cases might justify asylum.

The lesson of these floodgate-opening objections is that we need to distinguish among different causes of domestic violence and between the levels of severity of the oppression that support different cases of oppression. There are cases of intimate partner violence that cannot be explained by oppression. There are, quite uncontroversially, cases of oppressive harm that do not involve domestic violence yet still amount to persecution based on group membership. There may also be cases of domestic violence that are not severe or pervasive enough such that, even though they are caused by oppression of women, they do not rise to the level of persecution. Such cases might be ones which do not involve severe physical violence or where she could relocate away from her abuser without reasonable fear of reprisal.

Michelle Madden Dempsey (2009) provides a helpful conceptual model for examining the concept of domestic violence and distinguishing among cases. She describes three separable aspects found in theories of domestic violence: domesticity, violence,[6] and patriarchy. She then draws a Venn diagram of three intersecting circles representing each aspect and draws a circle in the center to divide the intersecting areas into two sets: those within are morally unjustifiable forms and those outside are justifiable. Accordingly, there are 13 possible conceptual spaces in which to understand violence, domesticity, and patriarchy and their intersections. In the center of the model is the paradigm of what I am calling the oppression theory of domestic violence, which concerns violent actions, occurring in "domestic" spaces (or intimate relationships) that perpetuate patriarchy. This conceptual understanding makes domestic violence fall necessarily within the circle of non-morally justified actions. The model ingeniously reveals the conceptual understanding of competing concepts of domestic violence (as well as other forms of justified and unjustified violence, patriarchal violence, patriarchal domesticity, etc.). Only those theories that explain domestic violence as unjustified, patriarchal violence would provide the group membership and causal nexus requirements for an asylum claim.

Dempsey also distinguishes two forms of domestic violence, "strong" and "weak" domestic violence, based on a similar distinction drawn by Michael Johnson between (1) patriarchal terrorism and (2) situational couple violence. The former is overwhelmingly committed by men against women, is motivated by a desire to exercise male power and privilege, and tends to escalate over time. The latter is committed by men and women equally, is motivated simply by the desire to get one's own way in a conflict, and tends to de-escalate over time. The oppression theory explains only strong domestic violence.

[6] By violence she means physical force, which can be justified or unjustified.

Dempsey devises her account of strong and weak domestic violence primarily for answering questions prosecutors have about domestic violence. For them it is crucially important to determine whether the case they have before them is one of strong or weak domestic violence, since the former must be treated as a public crime, including overriding the wishes of victims to drop prosecutions. With weak domestic violence, where there really are two sides to the conflict and violence is likely to deescalate over time, it is legitimate to pursue extra-legal, couple specific therapeutic means to resolve the violence. The strong/weak distinction is also helpful for the question of what cases of domestic violence should qualify for asylum. Those connected causally with oppression of women are cases of strong domestic violence. These are cases where a woman victim is less powerful and gets no aid from the mostly male legal power structure, or where the mostly male dominated social institutions prescribe wifely obedience and submission. Such cases qualify for asylum. Weak domestic violence cases include cases of male victims, same sex partners, or women who would receive strong social and legal support to leave and have little reason to fear reprisal. These cases would not qualify for asylum.

16.6 Conclusion

I have argued that the oppression theory of domestic violence can justify asylum on the grounds that domestic violence is causally connected to forces of the oppression of women. By contrast, individualist theories, such as the family conflict theory and the crime theory, do not support the claim of asylum on grounds of domestic violence. These theories are inadequate, however, on empirical and theoretical grounds. They are not able to answer the question of why there is an asymmetry by gender in the direction of violence (i.e., more man on woman violence than woman on man violence). They do not link domestic violence with oppression, and so not only do they miss the connections with gender oppression but with other forms of oppression as well. While the crime theory does not reject oppression as a background causal force, neither does it appeal to oppression to explain domestic violence.

Not every situation of domestic partner abuse rises to the level of domestic violence that can be explained by the oppression theory and that qualifies the victim for asylum. To qualify, the abuse must be part of the causal nexus of oppression, and it must be severe and pervasive, so that there is no escape for the victim. Thus, the objection that the oppression theory qualifies too many cases for asylum can be answered.

Oppression, on my view, is fundamental to justifying asylum claims, but the oppression must result in severe and pervasive harm to constitute persecution. When oppression is severe and pervasive, such as in the case of domestic violence in the August 2014 Bureau of Immigration Appeals decision referenced at the beginning of this essay, the requirements of persecution were met because the appellant was repeatedly severely beaten by her husband and could not, despite many attempts, escape or get the assistance of police. Wives in her culture, as in many patriarchal

cultures, are not granted the right to bodily integrity against their husbands. The State is implicated in this because it did not protect her from this severe and pervasive harm. The oppression theory of domestic violence thus also points out the State's obligation to reduce domestic violence by reducing women's oppression.

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Chapter 17
If We Were Just We Would Provide Refuge for All

T. Nicolaus Tideman

Abstract The mutual respect that people owe one another requires that we ensure that when we appropriate valuable natural opportunities (land, fresh water, minerals, etc.), we leave as much per capita for everyone else as we take for ourselves. This implies that those of us who have access to natural opportunities from which others are excluded (e.g., land in countries with guarded borders) have an obligation to share with those who have been excluded. Thus we owe refuge to economic as well as political refugees. We do not owe them citizenship, but if we accord them the refuge that they can justly claim, we are likely to find in most cases that we might as well grant them citizenship.

17.1 Introduction

Do not be distracted by the question of what is politically possible. Focus on what is just. On what basis, if any, can we say to those seeking refuge, "No, we will give you no refuge. Go away"? I argue that there is no just basis for the denial of refuge, that we owe refuge to all who seek it, whether their reasons are political or economic. To those who are horrified by this prospect, I grant a small concession: Those seeking refuge have a claim in justice to a *place of refuge*, but not to citizenship. Citizenship we may justly grant at our discretion, though if we are compassionate we will grant it liberally, and a liberal citizenship policy may be efficient as well.

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17.2 The Meaning of Justice

Since I argue in terms of justice, the meaning of which is not agreed, I must specify what I mean by justice. Conceptions of justice generally entail some form of equality. My left-libertarian conception of justice specifies that the ways in which we are equal is that we all have rights to ourselves and we all have equal rights to the valuable things that no one made—land, minerals, fresh water, fish from the ocean, etc. Because these equal rights are held by all generations, they do not entail right of ownership into the indefinite future, but rather equal annual shares (in terms of market value). Those who use more than their shares owe compensation to those who receive less than their shares.

The idea that people have equal rights to natural opportunities has a number of far-reaching implications. One of them is that we owe refuge to all who seek it.

17.3 The Fundamental Right of Refuge

What I mean by a refugee is a person who has left his native nation without an invitation to immigrate to any other nation. What I mean by refuge is access to enough land, water, and other resources to survive. In a just world of mutual respect we would grant refuge to all who sought it, because, I contend, there is no just basis for an unequal division of land and other valuable resources provided by nature.

There are potential objections to this contention. First, there is Locke's (1689) argument. Locke's argument begins with the proposition that people can justly claim the items from nature to which they add value "at least when there is enough and as good left in common for others" (*Ibid*., Sect. 27), that is, when such things are not scarce, so that no one is disadvantaged by their appropriation. He elaborates on this point in Sects. 28–31. I do not take issue with this proposition.

The argument in Sects. 32–35 leads up to the claim in Sect. 36 that, for all practical purposes, there is enough unclaimed land in America that no one can reasonably complain about the privatization of land. Whatever the merit of this argument in Locke's time, there is no unclaimed land of any value in America today, so the argument cannot be used to justify the denial of refuge today.

But Locke has a further argument. The argument that Locke uses to justify appropriations from nature when things are scarce appears in Sect. 38:

> but yet it was commonly without any fixed property in the ground they made use of, till they incorporated, settled themselves together, and built cities; and then, by consent, they came in time, to set out the bounds of their distinct territories, and agree on limits between them and their neighbours; and by laws within themselves, settled the properties of those of the same society.

In other words, Locke is saying, it is consent that justifies the division of natural opportunities when those opportunities are scarce. Essentially the same argument can be found in Pufendorf (1934 [1672], Book IV, Chap. 4, Sect. 4). Since Locke was

repeating an argument of Pufendorf, and Pufendorf was widely respected, Locke may have felt that he was not obliged to buttress the argument.

The argument has difficulties. Note that it entails the empirical claim that divisions of land are settled by consent. There may be times and places where this is true, but it happens more often that allocations of land are determined by force. Furthermore, if consent is the justification, then every generation must consent. Locke does not claim, as indeed he could not reasonably do, that every generation consents to the division of land and other natural opportunities. Finally, it would not be reasonable to seek to obtain the consent of every living person to a division of natural opportunities. Some other justification, such as leaving as much for others as one takes for oneself, must be found. Locke does not offer an adequate justification for an unequal distribution of access to natural opportunities.

A second objection to an equal division of natural opportunities comes from the argument that justice requires not an equal division of natural opportunities but rather an unequal division, with inequalities in shares of natural opportunities offsetting inequalities in genetic endowments. Bruce Ackerman (1980, Chap. 4), for example, makes this argument. I agree that people need insurance for needs that they and their families cannot meet; I do not agree that justice assigns an obligation to meet this need to all citizens. Children have many physical needs—particularly food, clothing, shelter, education, and insurance against inability to care for themselves. They also have emotional needs. We traditionally assign to parents the responsibility to provide food, clothing, and shelter, along with the responsibility to provide for the emotional needs of children, and we assign to government the responsibility to provide primary and secondary education. Parents and government share the obligation to assume the cost of special care when children lack the ability to provide for themselves. This division of responsibilities is not ordained by justice. It is an accident of history and politics, shaped as well by a shared understanding of what decency requires. It would be a contorted concept of justice that prescribed precisely this division of responsibility. A coherent concept of justice results if, instead of trying to devise a system that will allow justice to specify precisely how much compensation a person deserves for each possible disadvantage of birth, one says that the allocation of responsibility for providing what children require, including compensation for disadvantages of birth, is a matter to be determined not by justice but rather by the sense of decency in a society. Then one can say that in justice people are equals, with equal claims on the valuable things that no one made. Furthermore, even if one accepts the argument that those with physical disadvantages should receive greater shares of natural opportunities, that does not imply that refugees should receive none. As Ackerman (1980, 88–96) acknowledges, the claims of refugees to shares of natural opportunities are not reduced because they are refugees.

A third possible objection to dividing natural opportunities equally with refugees is that our response to refugees is not a matter of justice but rather of compassion. I certainly agree that compassion is important in our response to refugees. But that does not negate the role of justice. Justice sets a lower bound on our responses. If

we are tempted to ignore refugees, justice reminds us that we need to share natural opportunities equally with refugees. We can always do more.

17.4 Injustice in the Origins of Claims to Land

We have a tradition with respect to the allocation of land and other natural opportunities that is fundamentally unjust. Our practice with respect to claims to land has traditionally been to intersperse stretches of time when the status quo is respected with times of might-makes-right. This is the practice under which humans evolved. It can still be seen in the behavior of other animals and in our history. Americans acquired America by fighting the English, Mexicans, and Indians for it, and before the Europeans arrived the Indians fought each other for it. William the Conqueror grabbed England by defeating Harold II, and before that the Angles and Saxons invaded and displaced Celts who were there earlier, and who undoubtedly displaced earlier peoples. Relationships among languages point to a dispersal of people speaking a proto-Indo-European language, beginning in the third millennium B.C. (Beckwith 2009, 30). The geographic distribution of those languages suggests that the dispersal of Indo-Europeans was an invasion of Europe and India that displaced all previous inhabitants of Europe other than the Basques, the Georgians, and the peoples of the far north, and pushed the Dravidian population of India south. In India today, the landowners are predominantly members of the military caste, the descendants of those invaders. In England today, great landholdings are in the hands of the descendants of those to whom William the Conqueror granted titles. And so on around the world.

In a just world, the allocation of things would not be determined by force, but rather by principles of justice. In terms of justice, the mutual respect that we humans owe to one another entails that when we appropriate valuable things that are provided by nature, we have an obligation to leave as much for every other person as we appropriate for ourselves.

It is possible to find arguments against our equal rights and in favor of title by conquest. Frank Knight (1924, 591–592), a prominent economist from the University of Chicago, wrote:

> [I]n real life, the original "appropriation" of such opportunities by private owners involves investment in exploration, in detailed investigation and appraisal by trial and error of the findings, in development work of many kinds necessary to secure and market a product—besides the cost of buying off or killing or driving off previous claimants. Under competitive conditions, again, investment in such activities of "appropriation" would not yield a greater return than investment in any other field.

In other words, Knight is saying, killing people and grabbing their land is a competitive activity that should be expected to yield, on average, only "ordinary" returns to the resources employed in killing people and driving them from their land. It should not be expected to yield returns higher than any other activity. Knight says this as if the merely competitive return to land grabbing means that we have no

legitimate complaint against the land grabbers. This is nonsense. Killing people and driving them off of the land they have been occupying is wrong because people should not be treated that way whether the returns are merely ordinary or greater than ordinary. Even if it is true that returns to land-grabbing are merely ordinary, there is inefficiency as well as injustice when the killing and driving off are considered from a perspective that includes both the killers and those who are killed or driven off.

Knight is correct that the development of land generally requires a variety of "invisible improvements" in the form of such things as research, exploration costs, clearing, drainage, and stone removal. It is efficient and sensible to provide for a normal return to these activities. In other words, what should be divided equally is the value that land would have if it had not been improved. A person who has more than his share of this "unimproved value" owes something to those who have less than their shares. Because what is owed does not depend on how the land is used, requiring such a payment does not impede the incentive to use land productively. The efficiency of such taxes on land is a point on which virtually all economists since Adam Smith have agreed (Tideman 1994). Equal appropriation of the component of value provided by nature is consistent with rewarding investment in all activities that add value to land and make it more productive.

It might seem that our unequal distribution of natural opportunities can be justified by the fact that it was all decided so long ago. But the fact that many land grabs are ancient does not make them immune to criticism, because our history of land grabs means that there is no place to which we can direct those who have no land today, to get a share of land.

Do we really owe anything to those who have no land? Most of us never grabbed any land by force. If we own land, we bought it with our legitimate incomes. Nevertheless, if our land titles are traced back, they generally originate in governmental actions that deliberately ignored the use of force against those who occupied land before those who received from governments the land titles to which current titles can be traced back (Chandler 1945). Even if the land we bought cannot be traced back to forcible dispossession, the idea that we could ignore the claims of those who currently have no land would entail making the assumption that whoever got there first can respectably appropriate as much as he wishes, without regard to those who will come later. This idea should be rejected. A person who appropriates land in circumstances where land is not scarce should be understood to have a reasonable claim to as much as he chooses to appropriate for only as long as land remains not scarce.

17.5 The Just Allocation of Natural Opportunities

Imagine shipwreck survivors, cast up on a desert island. There are four of them, and the island is a circle, a mile across. Exploring the island, one of them finds a trickle of water on the side of a hill. He rearranges some rocks to get better access to the

water. It turns out to be the only source of fresh water on the island. Does the discoverer own it? He not only discovered the water but improved the site as well. If he owns it, he has life-and-death power over the other survivors.

The discoverer does not own the water, because the economic value of the discovery and improvement are trivial compared to the contribution of nature. If he hadn't discovered the water, someone else almost certainly would have. Furthermore, societies cannot reward every valuable act with income that matches the value of the act. Our heroes are people who do things for which we do not think we can adequately compensate. Sometimes a person needs to be content with thanks for being a hero.

Six months after their arrival, the survivors emerge one morning from the thatched huts that they have learned to construct to see a lifeboat arriving with a dozen survivors of another shipwreck. What happens now? In a world of might-makes-right, the newcomers will probably kill or enslave those who arrived earlier, because their greater number gives them the advantage in a fight. In a world of ownership by first possession, those who arrived later will become the tenants of those who arrived earlier, and the earlier arrivers can stop working and live on their incomes as landlords. However, that will only be stable against some form of revolt if those who arrived later come with firm attachments to the idea of ownership by first possession. Would you blame the later arrivers if they were to say, "Why should you be regarded as the owners of the entire island just because you got here six months earlier than the rest of us? The person who discovered the water source was not regarded as the owner of the water. We will compensate you for any improvements you made that we take over, but we have as much right to the island as you do." When land becomes scarce, our obligation of mutual respect for one another requires that we share the resources that no one made.

If the land or other resources that no one made have been improved, then justice is satisfied if what is shared is the value that land and other natural opportunities would have if they had not been improved. The required calculation does not involve an explicit valuation of improvements. Rather, the calculation is based on an estimate of the value of land and other resources in an unimproved state, and the implied value of the improvements is defined as the difference between the current total value of the property and the value of the land or other resources in an unimproved state.

17.6 Dealing with Refugees

Back to the refugees at our own borders, pressing to be admitted. We have land; they have none. Justice requires that we accord them equal shares of natural opportunities. We do not owe them health care, education, or other public services. We have organized ourselves into nations where every parcel of land is already allocated, and none is freely available to refugees knocking at our borders. What should we do?

If the world were globally just, the obligation to provide for economic as well as political refugees would be recognized as a global obligation. Respectable nations would share the obligation to provide for all refugees. As it happens, the respectable nations of the world have come to recognize a mutual obligation to provide for political refugees, those who have a well-founded fear of persecution in the nations from which they come, but not an obligation to provide for economic refugees (UN High Commissioner for Refugees 1978). The recognition of the respectability of the claims of political refugees was advanced by the 1939 voyage of the steamship *St. Louis*, memorialized in the book and movie, *Voyage of the Damned*. Nearly 1000 Jewish refugees from Germany on the *St. Louis* were denied entry to Cuba, where they had planned to go, because their visas were not valid. They were then denied entry to the U.S. and Canada and had to return to Europe, where the ship's captain arranged for them to be parceled out among the U.K., France, Belgium, and the Netherlands. It is likely that about one-fourth of these refugees later died as a result of the German occupation of France, Belgium, and the Netherlands in World War II (Miller and Ogilvie 2006). The thought of a shipload of people being told, "No, you can't come in; you need to go back to where a murderous government wants to kill you," was instrumental in the formation of the United Nations Convention and Protocol Relating to the Status of Refugees (UN High Commissioner for Refugees 1978), under which persecuted persons have recognized claims of asylum if they reach the territory of nations that accept the convention. However, the need to reach the territory of a nation to make one's case under the UN Convention has led to the anomalous situation where the U.S. tries to prevent Cuban refugees at sea from reaching the U.S. where they would have rights to have their cases adjudicated (Morley 2007).

Our compassion for those facing governments that seek to murder or torture them has led us to codify rights for them. If you meet the criteria, you get asylum. If you do not meet the criteria, the code gives you nothing.

In a just world, all refugees would be seen to be able to make claims for refuge not on the basis of mistreatment, but simply on the basis that they had no land. In July 1995 the volcano on the Caribbean Island of Montserrat exploded, destroying the island's capital city and forcing two-thirds of the residents of the island to flee. Because of past colonial connections, the British government permitted any residents of Montserrat who wished to settle in Britain to do so (BBC 2005). But it could have been worse. There could have been an island nation that was completely destroyed by a volcano, with no close tie to another nation, leaving all of its citizens with nowhere to live. Could all the nations of the world say, "No, we don't want you. You can all drown in the ocean for all we care"? What if rising sea levels cause inhabited islands to go under water? What if drought makes it impossible for land in some places to continue to sustain life? Suppose that a refugee from such an event were to say to us, "You have land. I have none. The land in its natural state is not the product of human effort. Your title to the land you have almost certainly originated in a dispossession, and in the unlikely event that it originated in a true first possession, that is not a sufficient basis for excluding a person who has none."

Perhaps we would be compassionate and invite them to start on the path to becoming our fellow citizens. But if compassion were to fail, justice should remind us that if we do not want to welcome them to citizenship, we at least owe them shares of land—perhaps a reservation in a rural corner of Kansas, for example.

Today's economic refugees, even though their circumstances are not so desperate, should receive the same treatment as hypothetical refugees from a nation whose land has become uninhabitable. They are not certain to die without refuge, though some of them will. They generally have some economic opportunities, though they do not have equal shares of the opportunities provided by nature. If we were just, we would acknowledge our obligation to share the natural opportunities to which we have access equally with those who are deprived but not on the brink of death, just as we are willing to share with those who will die if we do not.

Bruce Ackerman (1980, 93–95) offers a different analysis. While accepting the general principle of equal rights to natural opportunities, he considers the possibility of a somewhat liberal society that is far from perfect, whose leaders allege that if any additional refugees are admitted "our existing institutions will be unable to function in anything but an explicitly authoritarian manner" (Ackerman 1980, 94). This circumstance, Ackerman says, justifies the exclusion of refugees who would otherwise have valid claims for admission.

Ackerman's reasoning is coherent, but it applies only to a society whose leaders recognize the inability of their society to achieve all dimensions of justice. The reasoning does not demonstrate the possibility of a just society that excludes refugees. Except in an "overloaded lifeboat" situation where it is not possible for all to survive, a just society would grant refuge to all refugees.

Another objection that can be raised to Ackerman's analysis is that it does not distinguish between granting refuge and granting citizenship, and the two are different. A citizen is trusted to obey laws, participates in elections, and is eligible for systematic assistance. It is not unjust to restrict citizenship to those whom the current citizens (1) trust to fulfill the obligations of citizenship, and (2) have enough compassion for to be willing to include them in programs of systematic assistance. Refugees do not have rights to such trust and concern. The obligation to share natural opportunities equally with refugees is satisfied by offering them accommodation in adequate refugee camps, without citizenship, with their movements limited to the refugee camps. They are not entitled to the benefits of citizenship.

To adequately fulfill the requirements of justice, the refugee camps would need to have a combination of natural opportunities and supplemental cash with a per capita value equal to the value of natural opportunities per capita in the society offering the refuge. "Natural opportunities" include the pre-development value of land, the contribution of nature to the value of mineral resources, the market value of water withdrawn from rivers, the value of wild fish and other wild creatures taken from nature, the value of exclusive access to the frequency spectrum, and the global cost of emitting greenhouse gases. One published estimate of the global value of natural opportunities is $500 per person per year (Mazor 2009, 492). I suspect that the number for the United States is higher, perhaps on the order of $3000 per person

per year. It would be valuable to have more systematic inquiry into the magnitude of this number.

The refugee camps would also need to be allowed to make their own rules and to trade as they chose with persons in other nations. In other words, they would need to be allowed to become nearly equivalent to sovereign nations, somewhat like Indian reservations.

Where would the land for refugee camps come from? In the U.S., perhaps it would come from disused military bases, perhaps from large farms. Most counties in the U.S. have been losing population for many decades. There is no overall shortage of land in the nation. If we were prepared to do it, there would be no significant practical difficulty in offering refuge without citizenship to millions of refugees, implementing a principle of equal sharing of natural opportunities with all who lacked adequate access to natural opportunities in the places from which they came.

A practice of providing refuge to all who asked for it would have several important consequences, in addition to providing for the refugees. First, it would put the nations that adopted the practice in a position to make a morally coherent argument to other nations that they should join in the practice of providing for refugees. The argument for providing refuge for all refugees applies to any nation with any resource value provided by nature, and it applies with greater force to nations with more resource value per capita. Nations that accepted the obligation to provide for economic as well as political refugees could be expected to enter into agreements to share the obligation equitably, as now occurs to some extent with political refugees. If several countries work together to provide refuge, each refugee has a respectable claim on refuge somewhere, but not in the place of his choice, so it would not be unjust to assign refugees to places of refuge that were convenient for those providing refuge.

Second, the practice could be expected to lead to a greater willingness to offer citizenship to refugees. Even though refugees are not entitled to citizenship, nations might find it attractive to offer citizenship to refugees. If a nation recognized its obligation to provide refuge with a value corresponding to equal sharing of the value of natural opportunities, then that nation might reasonably conclude that it was less costly to grant citizenship, or at least non-resident alien status, than an adequately funded place of refuge. The value of opportunities for economic interconnectedness generally makes it much more valuable to be part of a national economy than to be part of the economy of a refugee camp. Therefore refugees could be expected to find a place in a refugee camp less attractive than citizenship that was combined with cash benefits that were smaller than the cost of a place in a refugee camp. This would make refuge outside of refugee camps better for both the refugees and the nations providing refuge.

Nations often are concerned about the possibility that increasing the number of workers in the economy will lower wages, and indeed it is reasonable to expect this to happen. But this is not sufficient reason to separate refugees into refugee camps. Permitting trade (in this case, in human effort) always makes a greater total production possible. If the consequences of free trade for the incomes of vulnerable groups

are unacceptable, then the efficient way to deal with this is through subsidies for wages, like the U.S. Earned Income Credit, not by restricting trade.

The third consequence of providing for economic as well as political refugees is that there will be an improved framework for pressing nations that generate refugees to do more to avoid generating them. While some persons become refugees through no fault of the countries in which they live, as in the case of Montserrat discussed earlier, there are many other cases where people become economic refugees because of the inequality and/or inefficiency of the economic institutions of the nations from which they come. If we were doing everything that we could reasonably do to assist economic refugees, we would be in a better position to press the nations that generate economic refugees to adopt economic reforms that would reduce the numbers of economic refugees.

The fourth consequence of acknowledging an obligation to assist economic refugees is that it would be easier to gain support for an institution of global sharing of natural opportunities. If we were to acknowledge that once people show up on our borders, we have an obligation to share with them the natural opportunities to which we have access, we might as well spare them the trouble of showing up. Our obligation to share with those who show up on our borders arises from an obligation of mutual respect for all humanity. If we can recognize the obligation to share with those who come as refugees, we should be able to recognize the obligation to share the value of natural opportunities on a global basis.

One could object, in line with the argument made by Hirschman (1970), that a generally acknowledged right of refuge would lower the threshold of discomfort that would induce people to emigrate, which would reduce the effort that went into seeking to improve political and economic circumstances in countries with problems. This is a logically coherent argument, but it is morally unsatisfying. We should not be saying to people, "This is a right that everyone should have, but we will withhold it from you because you have been chosen to suffer so that you will be induced to work for better opportunities for everyone." It is a fine thing when someone takes up such a challenge, but the concept of human rights does not admit such exceptions.

17.7 Conclusion

The refugees who are certain to die if we do not help them, the political refugees and those that can be imagined from disasters that destroyed whole countries, are the ones that make it clear to us that we who have privileged access to natural opportunities have obligations to share with others. But refugees come in a continuum of need, and there is no proper place to cut off our care. In justice, we would do more than provide refuge for all. We would share the value of natural opportunities even with those who are not refugees.

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