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Boundaries and Birthright: Bosniak's and Shachar's Critiques of Liberal Citizenship*

Rainer Bauböck

Abstract

This review essay argues that citizenship in contemporary states exposed to migration should be understood and evaluated as membership in territorially bounded and intergenerational political communities that are no longer fully separate from each other. Linda Bosniak's book exposes the ways in which the hard territorial border has been increasingly folded into the inside of the American polity but does not take sufficiently into account the complementary extension of membership boundaries beyond territorial borders through transnational citizenship links. Ayelet Shachar's book is marked by a tension between a luck egalitarian critique of the privileges attached to birthright citizenship and a relational principle of *jus nexi* for determining claims to membership. I defend a principle of stakeholder citizenship that builds on the same intuition but includes a normative argument for birthright membership.

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Once upon a time, for example in 1949, when T. H. Marshall wrote his famous lecture on citizenship and social class (Marshall 1949/1965), citizenship was a progressive idea. It had, as Marshall explained, expanded from civil via political to social rights, and its circles of membership had simultaneously widened by drawing in propertyless classes, women and minor children, and religious, ethnic, and racial minorities. Much of the initial revival of citizenship discourses in the 1980s was still a continuation of this story with newly proclaimed rights for disabled persons, gays and lesbians, and migrants. Yet including this last category raised a problem that had been largely ignored before. Since World War Two immigrants had progressively gained civil and social citizenship rights, but increasing numbers did not have citizenship status in their countries of residence and their admission to these countries remained tightly controlled. Citizenship, as it now turned out, was both an instrument of inclusion and exclusion. It looked like a soft fruit with a hard shell. Yet, as Linda Bosniak points out, the inside and the outside cannot be so neatly distinguished. The legal status of the alien who remains excluded from two of the most important citizenship rights, the right to unconditional residence and return and the right to political representation, imports the hard boundary into the territory of the receiving society. Ayelet Shachar takes this critique one step further. The very achievements of citizenship hailed by progressive liberals look like morally arbitrary privileges that the citizenship boundary regime is designed to preserve for the fortunate citizens born into wealthy democracies.

These are powerful arguments and both authors support them with much evidence and sophisticated reasoning. My response will focus on what I find missing in Bosniak's lucid account of alienage in American jurisprudence and what I find unconvincing in Shachar's critique of birthright citizenship. While Bosniak stays too close to home in interpreting alien status exclusively within an American citizenship framework, Shachar moves too fast to the global level where there are no institutions that could allocate citizenship or redistribute its benefits. An alternative to both views would instead emphasize the transnationalization of citizenship through migration. I propose therefore that responses to the migration dilemmas and paradoxes of liberal citizenship, which remain largely implicit in Bosniak's book but are at the forefront of Shachar's, should focus on the multiplicity of migrants' ties to particular societies.

1. The Boundary between the Citizen and the Alien

Linda Bosniak wants to "deepen the conversation between inward-looking and boundary-conscious approaches to citizenship" (Bosniak 2006: 2). She engages with these two strands of citizenship discourse by confronting them with a detailed account of the legal status and rights of aliens in the U.S. What she finds is, first, that the boundary between alien and citizen is not only an external one

but runs through American society; second, that it has become blurred to such an extent that we can speak of the “citizenship of aliens”; but, third, that it has also retained or even regained some of its hard edges. She identifies two legal regimes, one of which governs admission to the territory and membership while the other governs the status of territorially present persons. Bosniak demonstrates how American jurisprudence has vacillated between a “separation model” that disconnects these two regimes by extending constitutional protections to legal and even to undocumented aliens, and a “convergence model” that treats the territorial presence of non-citizens as generally subjected to immigration control and puts their rights under the constant shadow of the government’s extensive deportation powers.

This is an original and interesting account of changing boundaries between the statuses of aliens and citizens. But it covers only one of three dynamic aspects of boundary regimes. These are *boundary crossing*, *boundary shifting* and *boundary blurring* (Bauböck 1998; Zolberg and Woon 1999; Hochschild and Mollenkopf 2009). Boundary crossing refers to individuals moving across a boundary and thus to its permeability, which does not affect its differentiating function. The territorial border distinguishes between residents and non-residents and immigration is the act of crossing this boundary. Even when borders between states are as open as they are today in Schengen Europe, the territorial jurisdictions of states remain clearly demarcated. The legal status of citizenship marks a second, non-territorial boundary between aliens and citizens, which can be crossed by naturalization or renunciation of citizenship. When analyzing “the difference that alienage makes” (Bosniak 2006: chap. 3), we must not only examine the rights that aliens and citizens enjoy as distinct categories of persons, but also the permeability of the boundary between these. These two questions cannot be dealt with separately, since naturalization entitlements are among the most important rights that resident aliens may enjoy or of which they may be deprived.

The second dynamic aspect of boundary regimes concerns shifting demarcations. Territorial borders shift through annexation or unification and through partition, separation or secession. The boundary between aliens and citizens shifts when whole categories of persons (rather than individuals) that had previously been registered as aliens are reclassified as citizens or the other way round. Citizenship boundaries have shifted on a grand scale in the disintegration of empires and multinational states, and most recently in the break-up of the Soviet Union, Yugoslavia and Czechoslovakia, whose successor states adopted different rules for determining who of their residents would become citizens at independence. Boundary shifts happen, however, also in reforms of birthright citizenship, such as the introduction of qualified *jus soli* in Germany in 2000 or the move away from American style unconditional *jus soli* in Ireland in 2004. No

individual boundary crossing was involved in these policy changes, but citizenship became either more inclusive or more exclusive for entire categories of persons as a result of these changes of rules.

Bosniak focuses on the third dynamic, boundary blurring, which concerns the pervasiveness and consistency of the demarcation itself, but this limits her account of alienage in important ways. Blurred political boundaries create ambiguous classifications and relations of individuals to jurisdictions. With very few exceptions, such as the current status of Kosovo, the system of sovereign states leaves hardly any scope for a blurring of territorial borders, i.e. for territories that are neither independent nor clearly part of one and only one independent state. The boundary between aliens and citizens, by contrast, has been extensively blurred and Bosniak's book provides an excellent account both of the scope of this phenomenon in American law and its reversibility when legislators or judges attempt to reassert the distinction in order to tighten up immigration control or to preserve the special privileges attached to citizenship status.

But what about the crossing and shifting boundaries of citizenship? It is understandable why boundary shifts do not play a major role in Bosniak's account. The American regime of territorial birthright has been remarkably stable since the major shift brought about by the 14th Amendment. Interestingly, in chapter four of her book, Shachar fills this gap with a broad discussion of the inclusive and exclusive features of birthright citizenship in the U.S. and discovers a minor extension in the 2000 Child Citizenship Act that attributes citizenship to certain foreign-born children adopted by American parents (Shachar 2009: 119). What both authors fail to note is that, as virtually all current states, the U.S. has a much broader regime of *jus sanguinis* that includes second generation children born abroad to U.S. citizen parents. There is thus something important missing in Bosniak's discussion of the what, where, and who questions about citizenship (Bosniak: chap. 2): the answer to "where?" and "who?" must include foreign territory and American citizens born there.

Even more significant for Bosniak's "who" question is the boundary crossing regime that regulates immigrants' access to American citizenship status. Apart from a footnote on p. 208, Bosniak does not address the U.S. rules for naturalization and how they have changed over time. Maybe she wants to stay away from a topic that has so strongly dominated the legal and political science literature on immigrant incorporation in the U.S. But she fails thereby also to engage with the traditional American view that the status of alienage is either merely temporary or self-chosen. From this perspective, American citizenship is sufficiently inclusive as long as naturalization is offered under fair conditions. For some academics and policy-makers extending too many rights to resident aliens is even positively harmful as it reduces incentives to naturalize and undermines

thereby the inclusive American traditions that promote the crossing but not the blurring of the citizenship boundary.

In the concluding chapter of her book, Bosniak gives these arguments short shrift. She acknowledges that “a requirement for fast-track naturalization would go some distance towards ameliorating the effects of internal border enforcement” but argues then that “a regulatory regime that permits denial of both access to political voice and security against banishment to large numbers of its residents, even temporarily, is problematic under ‘soft,’ liberal universalist principles” (130). I agree, but it does not follow that the permeability of the boundary between aliens and citizens should not be regarded as an integral aspect of every liberal citizenship regime. The relation between boundary blurring and crossing remains a crucial empirical as well as normative question. How are these two aspects connected in the American citizenship regime? And should an enhanced protection of resident aliens be seen as a substitute for their access to citizenship, as some postnationalist authors have suggested (Soysal 1994; Kostakopoulou 2003), or as a position from which they can choose to naturalize without being driven by purely instrumental motives (Bauböck 1994, chap. 4)? I guess that these questions are not a main concern for Bosniak because she is more concerned about transitions between migrants’ irregular and regular statuses and the inherent vulnerability even of permanent residents’ “alien citizenship.” Yet her portrait of the alien in American law remains incomplete by failing to consider the traditional image of the immigrant as the future citizen and the legal pathways that have supported or obstructed this other transition into the secure status of full membership.

There is a second important question that vanishes from view because of Bosniak’s exclusive focus on how alien status is shaped by American law. She fails to consider the other aspect of boundary blurring, which is generated by overlapping jurisdictional claims of immigrant receiving and sending countries. The most obvious manifestation of such blurring is multiple nationality, which Bosniak addresses only very briefly as a phenomenon discussed in the broader literature. This lacuna may be simply explained by the thematic scope of her present book. What I find really surprising, however, is that she does not discuss those multiple citizenship relations that determine the status of long-term resident aliens. Following a dominant tradition in American jurisprudence, Bosniak calls aliens “noncitizens.” Yet this is clearly wrong, since very few among them are stateless persons.¹ They are instead external citizens of their countries of origin and internal quasi-citizens in the American polity. Denizenship or alienage is a

¹ The Latvian government has introduced the term “noncitizens” in order to avoid labeling those ethnic Russians who have not obtained either Latvian or Russian nationality “stateless persons,” which they clearly ought to be called according to international legal conventions. In Estonia the same group is officially called “aliens.”

composite status and a bundle of rights produced jointly by several countries, a receiving state and many sending ones.

Since the 1990s, cultural anthropologists and sociologists have extensively studied the transnational ties that link migrants to their countries of origin (e.g. Basch et al. 1994; Guarnizo and Smith 1998; Vertovec 1998; Faist 2000), while legal scholars and political scientists have mostly focused on the incorporation of immigrants into the receiving society. It is time for each side to recognize the salience of the complementary perspective for interpreting the migrant condition. Transnationalism, properly understood, is about this multiplicity of ties that incorporate foreign nationals as well as expatriates into domestic citizenship regimes.

I can think of three explanations why Bosniak, as so many other American scholars, fails to integrate external citizenship into her analysis of alienage. The first one is a methodological and normative nationalism which regards nation, society and political community as coextensive and treats claims made on behalf of other nations as fundamentally different from those made by one's own. The closed society models of methodological nationalists explain why they never consider that immigrants are also emigrants, and the moral parochialism of normative nationalists explains why they might defend rights of Americans abroad to multiple citizenship and voting in American elections, but would dismiss equivalent claims of Mexican immigrants. I hasten to say that Linda Bosniak, as her texts on postnational and multiple citizenship demonstrate (Bosniak 2000; 2002) is beyond any doubt opposed to both versions of nationalism.

The second explanation is that she probably regards external citizenship rights as less salient for the legal position of aliens than those rights, duties and liabilities that are determined by American law. This is not an unreasonable view. Territorial sovereignty implies that states can subject the citizens of another state to most of their laws without even considering which legal rights and duties the same persons may have towards their country of nationality. But this is the legislators' perspective, which is no longer adequate once we consider the opportunities and constraints that legal regimes create from the migrants' point of view. Diplomatic protection by a country of origin may be of little relevance for their daily lives in a democratic society, although it does become pertinent when they have to face deportation or the harsh sanctions of the American criminal justice system. External political participation plays a more important role for some immigrant communities in the U.S. but has so far been severely constrained for the largest contingent, which comes from Mexico (Smith 2008). For aliens, the biggest "difference that external citizenship makes"—to paraphrase a chapter title in Bosniak's book—is the right to return. Losing this right is a major deterrent against naturalization in countries that require that applicants abandon a

previous citizenship. And, conversely, unconditional territorial admission in both a country of origin and of settlement is a major incentive for naturalization in countries that tolerate dual citizenship *de jure* or *de facto* (as the U.S. does). We simply cannot understand and assess the legal position of aliens who are of migrant origin without considering their legal opportunities and constraints to move back and forth across the border.

A third reason for neglecting external citizenship applies more to normative political theories than to the interpretation of existing legal norms. If citizenship is understood as a status of equal membership and rights within a political community, then it seems *prima facie* plausible that this basic norm of equality can only apply within a territorial jurisdiction but not across its borders. One could thus propose that alien residents who are subject to the laws in the same way as native citizen residents have a claim to enjoy the same protection and rights, whereas the status and rights of expatriates is incomparable with that of domestic citizens because they are subjects of another sovereign and cannot access from abroad a system of rights that is territorial in its most basic features. Yet this response begs the question why then all states recognize that emigrants can hold on to their citizenship of origin and even pass it on to a next generation. Political theorists who deal with norms that are already embedded in existing democratic institutions ought to acknowledge that a purely territorial conception of citizenship and political community is just wildly out of synch with the present world. And when thinking about the legitimate interests and corresponding rights of migrants we can find plenty of reasons that support the sticky quality of citizenship, which travels across international borders with its holders.

The upshot of these considerations is that for analyzing the boundary between alien and citizen we need a much broader framework that goes beyond the protections aliens enjoy and the disabilities imposed on them in their country of settlement. I call this a *constellation perspective* that takes into account how the independent citizenship regimes of sending and receiving countries interact in generating bundles of rights and transition rules between legal statuses that jointly determine migrants' position vis-à-vis sedentary citizens in both societies (Bauböck 2010). The core norm of equality among citizens becomes then necessarily complex in a way that is not captured by Michael Walzer's notion of separate spheres of equality, which serves as a major reference point for Bosniak's analysis. For Walzer, the distinct norms of equality that operate within different distributional spheres build on a foundation of equal membership in a single political community. With multiple memberships in separate political communities we get a second order complexity that still needs to be properly understood and theorized. Bosniak's book complicates the analysis of alienship within the American polity by highlighting the conflicting regimes that regulate

alien status and rights. But it fails to explore the additional complexity that aliens import as external citizens of their countries of origin.

2. Birthright Citizenship and Global Injustice

Shachar's book proposes a diagnosis and two remedies. The diagnosis is that birthright citizenship (BRC) preserves global injustice in the distribution of opportunities in a similar way that inheritance of private property preserves inequality of wealth across generations. The first remedy is a birthright privilege levy (BRPL) that would tax the inherited privileges of BRC in wealthy states and transfer these funds to poor countries; the second one is a *jus nexi* principle for (re)allocating membership titles that would require "a shift away from present ascriptive principles for birthright membership to a genuine-connection principle of citizenship acquisition" (Shachar 2009: 165). I have considerable doubts about the diagnosis and the first of these remedies. And while I strongly support a *jus nexi* principle I also have some questions about Shachar's interpretation.

The metaphor of the birthright lottery that serves as the title for Shachar's book has intuitive appeal. Certainly, nobody "deserves" to be born as the citizen of a wealthy and stable democracy rather than of a poor society ruled by an authoritarian government or ridden by a civil war. This intuition has been used by political philosophers for quite some time to argue for "fairly open borders" between the better off and the worst off countries (Carens 1987, 1992; Bader 1997, 2005). Shachar has reasonable doubts about the open border response to global injustice (Shachar 2009, chap. 2), which I broadly share (Bauböck 2009). So she proposes instead compensation payments for the BRC privilege. But before accepting this as a convincing reason for global redistribution we need to examine first whether the lottery metaphor and the property analogy stand up to critical scrutiny.

A lottery is a procedure that determines winners and losers who have ex-ante equal chances to end up in either category. Unless we believe in reincarnation, there is of course no lottery at birth in this sense. Before being conceived and born we simply do not exist. And being born to particular parents is not a matter of chance but is a constitutive fact that determines our biological as well as social identities.² That our parents are citizens of a particular country or reside in a particular territory at the time of our birth can be regarded as contingent circumstances and in this sense there is indeed nothing natural about being born with a specific citizenship. Yet the image of a lottery does not quite

² Shachar discusses and dismisses a narrow interpretation of birthright citizenship as reflecting family ties and social networks into which individuals are born (Shachar 2009: 152-159). I will instead defend below a broader justification derived from an intergenerational conception of political community.

capture the nature of these contingencies. I could not have been born in Paraguay as the son of parents with Senegalese citizenship because that person certainly would not have been me. Instead of ascribing citizenship based on the social facts of parentage and birthplace, an actual birthright lottery would randomly assign to new-born children any of the citizenships currently available. Such an allocation mechanism would satisfy the idea of global equality of opportunity combined with inequality of outcomes.

Of course, a metaphor must never be taken too literally. What this one suggests is that we all share the quality of being human that transcends our circumstances of birth and grounds universal moral rights and duties. This should be uncontroversial. Yet the lottery metaphor does some more work in Shachar's argument. First, it illustrates what philosophers have called a "luck egalitarian" approach to justice that seems at odds with the relational approach underlying Shachar's *jus nexi* principle (see Anderson 1999). Proposing that, ideally, all people should have the same probabilities to acquire at birth the citizenship of any particular state is contradictory with proposing that individuals should have access to the citizenship of those states to which they are most closely connected. Second, the metaphor appeals to an ideal of equality of opportunity that, in the view of many liberal philosophers, only applies within political communities whose members are subject to the same political authorities and share a common citizenship (Rawls 1999; Nagel 2005; Miller 2007). The proposal that all individuals ought to have equal opportunities in life independently of those circumstances that determine their citizenship at birth would be incoherent if shared citizenship were the precondition for applying an equal opportunity standard of social justice.

Asking Shachar to address these philosophical debates about global justice may be unfair. The discrepancy of opportunities in the present world is so huge that the distinction between global egalitarian standards and less demanding ones of mutual aid (Walzer 1983) or satisfaction of basic needs (Shue 1980; Miller 2007) does not make much difference in practical terms. The more important question is what specific role birthright citizenship might play in establishing duties to assist those living in circumstances that do not meet even the most minimal standards of decency.

In order to make her point fully convincing, Shachar should consider alternative arguments for such global duties and then show why birthright citizenship provides us with better reasons and connects to more effective remedies. Here is a short and incomplete list of reasons recently proposed in the global justice literature. The citizens of wealthy democracies have redistributive duties of global justice towards the citizens of poor countries because:

(1) the earth is originally a common property of all humankind. States that underuse their land and natural resources have duties to either admit immigrants from countries with fewer resources per head of population or to compensate them for exclusion (Blake and Risse 2006);

(2) in the present world all states participate in a global structure whose institutions work to preserve global inequalities of wealth and power. The citizens of wealthy democracy have a negative duty to refrain from supporting this structure and must therefore accept redistributive duties towards the globally worst off (Pogge 2002);

(3) all human beings have rights to satisfaction of their basic needs. The corresponding duties fall on particular states if these are either specifically responsible for worsening the situation in other countries, or if they are connected to them in such a way that they are best able to assist (Miller 2007).

These three arguments differ considerably with regard to the scope and measurement of duties of global justice that can be derived from them and the policy proposals that they imply. What they have in common is that none needs to be backed up by a strong cosmopolitan ideal of global equality of opportunities. Shachar may reject each of these alternatives for good reasons, but she would still have to show why deriving duties of global justice from the institution of birthright citizenship provides us with stronger reasons and better instruments than linking them to the institution of territorial state sovereignty, to the global institutions of an economic and political world system, or to the particular responsibilities that result from connections between states.

I would, for example, object to the argument from original ownership that it wrongly conceives of the unequal distribution of land and natural resources as the main cause of global injustice and suggests a highly implausible remedy. Contemporary migrants are no longer settlers in search of land, but seek to be admitted to the socially created economic opportunities and political protections that wealthy democracies offer to their citizens. So population density or the per capita value of natural resources, which is Blake's and Risse's indicator for redistributive duties, are really inadequate as yardsticks for measuring contemporary claims about social justice.

What would then be the advantages of focusing on birthright citizenship? While their preferred alternative may not be convincing, Blake and Risse have raised strong objections, which are also shared by Miller, against Carens' original version of the BRC argument. "While shared citizenship... has come about in a manner for which individuals deserve neither credit nor blame and is in that sense

morally *arbitrary*, this does not mean shared citizenship is morally *irrelevant*. A border does mark something of moral importance—an area of shared liability to a community” (Blake and Risse 2006: 16).

Shachar treats citizenship instead as a form of property and concludes that the benefits from citizenship ought to be redistributed in a similar way as those from inherited private property. She argues quite convincingly that the legal concept of property refers to relations between individuals in reference to resources and consists of variable bundles of rights, powers and liabilities that do not necessarily include excludability, alienability and transferability (27-33). The problem I see is less with the property analogy itself and more with Shachar’s ideas about what kind of good citizenship is and which of its benefits may give rise to claims of redistribution across borders. The focus of the redistributive argument is on the discrepancies of aggregate wealth between states. If we go back to the Marshallian typology, citizenship consists of civil, political and social rights. Among these, only the latter refer to redistributive claims inside a society.³ The institutions of civil and political citizenship provide persons who are subject to the same authority with very important benefits, such as freedom of thought, speech and association, access to independent courts and democratic representation in legislative bodies. How could these benefits be redistributed to the unfortunate subjects of authoritarian or politically unstable regimes? Shachar proposes a transfer scheme from rich to poor countries, but, since she considers the benefits of citizenship in liberal democracies as giving rise to redistributive claims, wouldn’t we have to envisage also a transfer of civil and political rights from democratic to authoritarian states? Do citizens of democratic states then have a duty to export democracy through promoting regime change elsewhere? I suppose Shachar will hesitate—for good reasons—to support such a radical expansion of justifications for humanitarian intervention. Within the logic of her approach, it would make more sense to calculate instead the benefits of democracy and the rule of law as part of the Birthright Privilege Levy. But if we adopt this latter strategy, how could we ensure that monetary transfers actually help to build civil and political citizenship elsewhere?

Finally, if we include the benefits of social citizenship in this balance, should welfare states then tax the recipients of public assistance and the beneficiaries of national health insurance or free public education in addition to taxing private wealth? Imagine a libertarian capitalist society that is wealthy in terms of its GDP because of natural resources, all of which are privately owned, or because low labor costs boost the competitiveness of its private companies in global markets. As a libertarian society, it would have only a minimal state that

³ Moreover, in the Marshallian framework even social citizenship does not entail a general redistribution of wealth, but a publicly guaranteed minimum of welfare that legitimizes unequal market outcomes and inequalities of social class.

does not provide its citizens with any form of social protection. Since opportunities and wealth are then only privately inherited without any state redistribution, the social and economic benefits of inherited birthright citizenship will be correspondingly minimal, and so would any tax revenue levied on these benefits. Compare this now with a comprehensive welfare state where birthright citizenship indeed provides everyone with a baseline of social equality, roughly equal opportunities and where collectively created wealth is used to raise the position of the worst off in this society. A levy that taxes birthright privileges attached to citizenship rather than privately inherited wealth would have to redistribute money from the welfare state towards the libertarian state. Shachar will object that in her scheme the wealthy libertarian state would still have to contribute to global redistribution if its per capita wealth exceeds that of most other states. But the point is that this privately accumulated wealth would not be causally related to birthright citizenship. It would indeed be an insult to poor citizens of such a state, who have to scrape by without any public support, to argue that they have a duty to assist other countries because they happen to be born in a state that has many rich citizens. Shachar introduces a number of caveats to meet this challenge. She specifies that “the birthright privilege liability should apply to everyone within the well-off political community who enjoys its enabling functions, subject to familiar needs-based, gender-sensitive, minimal income thresholds and related exemptions and deductions” (99). But this move cannot resolve the dilemma since it would still lead to much heavier taxation of socially egalitarian states where all citizens benefit strongly from their birthright privilege compared to socially inegalitarian ones where large populations would be exempted from the levy and where those who are not can object that their privileges are privately created or inherited and have nothing to do with their citizenship.

In contrast with libertarian minimal states and authoritarian maximal states, comprehensive citizenship in liberal democracies provides individuals with opportunities and protections that greatly improve their autonomy and welfare and reduce the extent of social inequality compared to other forms of political subjection. As a result, individuals in these societies will on average be better educated, have better health and more disposable income. Since economic productivity in such societies is a result of regulated market economies with private property, there will also be considerable accumulation of private wealth that is transferred across generations. In a strongly interdependent world economy, such private wealth cannot be seen as wholly generated by a domestic market economy. Global justice theories can thus argue, first, for duties to assist other societies in building institutions of democratic citizenship, or at least not to obstruct their building. And they can argue, second, that privately owned and inherited wealth should not only be redistributed within a political community but

also taxed for purposes of development aid to other societies. None of this amounts to an argument for taxing the privilege of birthright citizenship itself.

My point is therefore that Shachar confuses the privileges of citizenship with distributive outcomes.⁴ If citizenship means a status of equal membership in a democratic polity with a bundle of liberties, participation rights and claims to social protection, then these benefits may entail redistributive obligations of the state towards its citizens, but cannot themselves be redistributed across the borders of its jurisdiction. Liberal states should, however, tax distributive outcomes, i.e. wealth accumulated by individual citizens and corporations who have benefited from the protection of private property and economic transactions under the rule of law and from the infrastructure financed by public budgets. Such redistributive taxation could provide a revenue basis for transfers across borders in the name of global social justice. But this would be a levy on undeserved economic privileges rather than on the privilege of being a citizen of a liberal democracy.

3. Intergenerational Continuity

I have so far argued that the rights of democratic citizenship cannot be interpreted as undeserved privileges that give rise to redistributive obligations across political boundaries. But Shachar's argument focuses specifically on the determination of citizenship status through birthright, be this descent from citizen parents or birth in the territory. The second aspect of her critique of birthright citizenship is that it creates a morally problematic allocation of membership status. This critique is linked to her proposal for an alternative principle that she calls, quite appropriately, *jus nexi*, i.e. a principle that membership should trace previously established connections between an individual and a particular polity. Since I have endorsed the closely related idea of stakeholder citizenship (Bauböck 2007; Bauböck 2009), I need to explain how this latter principle might differ from Shachar's interpretation of *jus nexi*, and specifically why stakeholderhood would support acquisition of citizenship as a birthright. Philosophically, the difference between the two principles is that *jus nexi* refers to membership in societies governed by states,⁵ whereas a stakeholder principle conceives of citizens as individual stakeholders in the common good of a particular political community. The basic idea is that persons have a claim to citizenship in a particular polity, if their biographies link their individual autonomy and well-being to the collective self-government and flourishing of that polity.

⁴ Although Shachar acknowledges that "wealth-preserving is not the sole or even core function of birthright citizenship" (23), she brackets these other functions in order to highlight what she regards as the global distributive dimension of BRC.

⁵ For a similar view see Carens (1989).

In fleshing out the *jus nexi* principle, Shachar's critique of BRC becomes considerably less radical. It would have been more consistent for her to claim that citizenship should generally be acquired through long-term residence and lost through long-term absence, both of which would serve to establish whether there is a "genuine connection" between an individual and a polity. Instead, she proposes to retain birthright transmission, but to strengthen or weaken membership entitlements in subsequent generations depending on whether or not these generations are connected to the society through long-term residence. In practical terms this means *jus soli* for the children of first generation immigrants and an expiry of *jus sanguinis* transmission outside the territory after the second generation, a proposal which closely mirrors American citizenship law.

I agree with these policy recommendations, but they still presuppose a normative defense of birthright citizenship for the 97 per cent of the world population who reside in their country of birth as well as for children born abroad to emigrant parents. As a first line of defense, Shachar might argue that birth serves merely as a proxy and predictor for future connections. This may cover the majority for whom country of birth and residence coincide, but cannot explain why first generation emigrants, who have inherited their citizenship of origin at birth in that country, can retain it for life and even pass it on to their children. With increasing mobility across borders, place of birth becomes less good as a predictor for future societal connections. Adopting a *jus nexi* principle with long-term residence as the dominant criterion for genuine connection would justify to simply strike long-term emigrants from the citizenship registry. This was indeed common European state practice supported by the mercantilist views until the American and French Revolutions (Zolberg 2007: 36). The same principle would also support a conditional form of *jus soli* that requires either long-term residence of a parent at the time of birth or that applies *jus soli* only retroactively once the child has for some time resided in the country. Such residential conditionality exists today in fact in all those European countries that apply *jus soli* to children who also inherit another nationality *jure sanguinis*.

Finally, why should the acquisition of citizenship not be generally delayed also for the native origin population until several years after birth when it can be derived from residence-based *jus nexi* rather than from arbitrary circumstances of birth? The obvious answer seems to be that children have a right to citizenship from birth and native-born children of parents without a foreign nationality would grow up stateless unless they inherit a citizenship at birth.⁶ But would that really

⁶ The right of the child to a nationality is enshrined in several international conventions, i.e. in the International Covenant on Civil and Political Rights, Art. 24, the Convention on the Rights of the Child, Art. 7 and in several provisions of the 1961 Convention on the Reduction of Statelessness.

be a problem? The passive rights that minor children enjoy, which include rights to public education and protection against abuse of parental authority, do not depend on citizenship status and would be guaranteed for resident stateless children just as they are today for foreign national ones. If one adds protection against deportation for all native-born residents to these rights, why would formal statelessness for minor children make any difference as long as they are guaranteed access to full citizenship status and rights of active political participation around the age of majority?

Why then should liberal polities not do away with BRC altogether and replace it with a residence-based *jus nexi*? The answer must be that birthright citizenship has some value that is independent of its function as a proxy or predictor for residential connections. Shachar acknowledges that BRC “permits a degree of continuity that is important for political communities to fulfill their enabling provisions” (172), but she does not fully explore this idea, which could profoundly undermine her critique of the birthright lottery.

The need for intergenerational continuity that is fulfilled by birthright citizenship has been stated most famously by Edmund Burke, who saw the political community as a “great partnership not only between the living, but the living, the dead and those who are to be born” (Burke 1987: 118). This idea can be interpreted in two contrasting ways. For conservatives it implies primarily obligations of living generations towards ancestors to maintain their heritage, whereas for progressive movements of all kind it implies primarily duties towards future generations to maintain equal or better opportunities for them to shape their destiny. Birthright citizenship supports both past- and future-oriented visions of the continuity of the polity and enables thus internal contestation between them without contestation of the identity of the polity itself. One might also say that the conservative vision emphasizes the fact of human mortality, whereas the progressive one highlights the “fact of natality, through which the human world is constantly invaded by strangers, newcomers whose actions and reactions cannot be foreseen by those who are already there and are going to leave in a short while” (Arendt 1977: 61).

Arendt’s image of new-born generations as invading strangers strikes at the heart of the problem: What are the necessary preconditions for keeping self-governing polities open for political change across generations as well as for the other strangers who come from outside? The answer must include relative stability of territorial borders and intergenerational continuity through birthright citizenship. Territorial borders can become permeable for migration only if migrants are not perceived as invaders but as potential citizens who are invited, but not forced, to join the political community. For the same reason, openness towards future change is only possible if new generations are not perceived as invaders, but as citizens by birth. The value of birthright citizenship lies thus in

securing intergenerational continuity in the political community, which enables it to remain open towards both kinds of newcomers without seeing its capacity for self-government undermined. A stakeholder principle for the allocation of citizenship is for that reason fully compatible with birthright citizenship and not reducible to residence-based social ties. It refers instead to individuals as stakeholders in a self-governing political community, which must be imagined as an intergenerational community in order to be self-governing.

4. Conclusion

I am thus less skeptical than Bosniak about normative liberal responses to the boundary between aliens and citizens. Although all present liberal democracies clearly fail to meet these standards, a stakeholder conception of citizenship would transform resident aliens into quasi-citizens with a right to choose full citizenship status and it would at the same time recognize the multiplicity of citizenship ties that connect migrants to sending and receiving societies. And I am clearly less critical of citizenship transmission at birth than Shachar is.

There is, however, one further precondition for the stability of democratic communities of citizens that I have not yet considered. What if the current proportions between relatively sedentary and mobile populations were reversed? Imagine a hypermobile world society in which only three per cent reside permanently in their country of birth while 97 per cent are for most of their lives temporary residents in many different states. I am not sure that our present ideal of democracy could be sustained in such a world. I guess that territorial jurisdictions would remain but the democratic ideal of government of, for and by the people would—in the most optimistic scenario—be replaced by a minimal state providing some public infrastructure, services and security for a society of strangers. In a more pessimistic view, governments that are no longer accountable to citizens imagining themselves as members of an intergenerational community, will either become authoritarian or will lose their monopoly of violence to gangs that provide security for their members and identity groups that maintain intergenerational solidarity among theirs. Once territorial polities are no longer self-governing, their subjects will be driven towards alternative self-governing associations as substitutes for the lost benefits of citizenship. They will form non-territorial associations that provide health care or school education for their children, and they will invest their aspirations of self-government into ethnic and religious communities where they are respected as equal members. In a way, this would mean that civil society substitutes for political community, which may be an attractive idea for many libertarians.

And maybe this is not a utopia but an irresistible transformation, the birth-pangs of which we are already witnessing. In this case, we would have to rethink democratic citizenship much more radically than Bosniak, Shachar or I am

inclined to do. There is thus in the end a lot of common ground that I find in these two important books and on which I would like to stand as well. This is the assumption that we need to reform the boundaries between aliens and citizens and the intergenerational continuity created through birthright from the perspective of territorially bounded polities that incorporate migrants rather than from that of migrants taking over territorial polities. Instead of giving up on bounded political communities, we ought to imagine them as embedded in overlapping, nested and interdependent constellations. When working out what liberal principles require with regard to the allocation of membership status and rights in such constellations, we may still find that citizenship is a progressive idea.

References

- Anderson, Elizabeth. 1999. "What is the Point of Equality?" *Ethics* 109 (January): 287-337.
- Arendt, Hannah. 1977. *Between Past and Future*. New York: Penguin Books.
- Bader, Veit M. 1997. "Fairly Open Borders." In *Citizenship and Exclusion*, ed. V. M. Bader. London: Macmillan.
- . 2005. "The Ethics of Immigration." *Constellations* 12 (3): 331-61.
- Basch, Linda, Nina Glick Schiller, and Cristina Szanton Blanc. 1994. *Nations Unbound. Transnational Projects, Postcolonial Predicaments and Deterritorialized Nation-States*. Amsterdam: Gordon and Breach Publishers.
- Bauböck, Rainer. 1994. *Transnational Citizenship. Membership and Rights in International Migration*. Aldershot, UK: Edward Elgar.
- . 1998. "The Crossing and Blurring of Boundaries in International Migration. Challenges for Social and Political Theory." In *Blurred Boundaries. Migration, Ethnicity, Citizenship*, ed. R. Bauböck and J. Rundell. Aldershot: Ashgate, 17-52.
- . 2007. "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting." *Fordham Law Review* 75 (5): 2393-447.

- . 2009. "Global Justice, Freedom of Movement and Democratic Citizenship." *European Journal of Sociology/Archives européennes de sociologie* 50 (1): 1-31
- . 2010. "Studying Citizenship Constellations." *Journal of Ethnic and Migration Studies* 36 (5): 847-59.
- Blake, Michael, and Mathias Risse. 2006. "Is There a Human Right to Free Movement? Immigration and Original Ownership of the Earth." In *John F. Kennedy School of Government, Faculty Research Working Paper Series*. Cambridge, MA: Harvard University.
- Bosniak, Linda. 2000. "Citizenship Denationalized." *Indiana Journal of Global Legal Studies* 7: 447-509.
- . 2002. "Multiple Nationality and the Postnational Transformation of Citizenship." *Virginia Journal of International Law* 42 (4): 979-1004.
- . 2006. *The Citizen and The Alien: Dilemmas of Contemporary Membership*. Princeton: Princeton University Press.
- Burke, Edmund. 1987. "Reflections on the Revolution in France." In *Nonsense upon Stilts. Bentham, Burke and Marx on the Rights of Man*, ed. J. Waldron. London: Methuen.
- Carens, Joseph H. 1987. "Aliens and Citizens: The Case for Open Borders." *The Review of Politics* 49 (2): 251-73.
- . 1989. "Membership and Morality. Admission to Citizenship in Liberal Democratic States." In *Immigration and the Politics of Citizenship in Europe and North America*, ed. Rogers Brubaker. Lanham and London: University Press of America, 31-49.
- . 1992. "Migration and Morality. A Liberal Egalitarian Perspective." In *Free Movement. Ethical Issues in the Transnational Migration of People and of Money*, eds. B. Barry and R. Goodin. Pennsylvania: Pennsylvania State University Press, 25-47.
- Faist, Thomas 2000. *The Volume and Dynamics of International Migration and Transnational Social Spaces*. Oxford: Oxford University Press.

- Green, Nancy L., and François Weil. 2007. *Citizenship and Those Who Leave. The Politics of Emigration and Expatriation*. Urbana and Chicago: University of Illinois Press.
- Guarnizo, Luis, and Michael Peter Smith, eds. 1998. *Transnationalism from Below*. Piscataway, NJ: Transaction Publishers.
- Hochschild, Jennifer L., and John H. Mollenkopf. 2009. "Modeling Immigrant Political Incorporation." In *Transatlantic Perspectives on Immigrant Political Incorporation*, eds. J. Hochschild and J. Mollenkopf. Ithaca: Cornell University Press, 15-30.
- Kostakopoulou, Dora 2003. "Why Naturalisation?" *Perspectives on European Politics and Society* 4 (1): 85-115.
- Marshall, T.H. 1949/1965. "Citizenship and Social Class." In *Class, Citizenship, and Social Development. Essays by T.H. Marshall*, ed. T. H. Marshall. New York: Anchor Books.
- Miller, David. 2007. *National Responsibility and Global Justice*. Oxford: Oxford University Press.
- Nagel, Thomas. 2005. "The Problem of Global Justice." *Philosophy and Public Affairs* 33 (2): 113-47.
- Pogge, Thomas. 2002. *World Poverty and Human Rights*. London: Polity.
- Rawls, John. 1999. *The Law of Peoples*. Cambridge, MA: Harvard University Press.
- Shachar, Ayelet. 2009. *The Birthright Lottery. Citizenship and Global Inequality*. Cambridge, MA: Harvard University Press.
- Shue, Henry 1980. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Princeton, NJ: Princeton University Press.
- Smith, Robert C. 2008. "Contradictions of Diasporic Institutionalization in Mexican Politics: the 2006 Migrant Vote and Other Forms of Inclusion and Control." *Ethnic and Racial Studies* 31 (4): 708-41.

- Soysal, Yasemin. 1994. *Limits of Citizenship. Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press.
- Spiro, Peter. 2008. *Beyond Citizenship. American Identity after Globalization*. Oxford: Oxford University Press.
- Vertovec, Steve. 1998. "Conceiving and Researching Transnationalism." *Ethnic and Racial Studies* 22 (2): 447-62.
- Walzer, Michael. 1983. *Spheres of Justice. A Defense of Pluralism and Equality*. New York: Basic Books.
- Zolberg, Aristide, and Long Litt Woon. 1999. "Why Islam is like Spanish: Cultural Incorporation in Europe and the United States." *Politics & Society* 27 (1): 5-38.
- Zolberg, Aristide. 2007. "The Exit Revolution." In *Citizenship and Those Who Leave. The Politics of Emigration and Expatriation*, eds. N. L. Green and F. Weil. Urbana and Chicago: University of Illinois Press, 33-60.