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The Ethics of Movement
and Membership

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Sarah Fine and Lea Ypi

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For Doli Ypi, Lani Ypi, Doreen Samuels, and Elaine Charlton
With Love

Contents

List of Contributors

1. The Ethics of Movement and Membership: An Introduction
Sarah Fine and Lea Ypi

Part I. Entry and Exit

2. Is There a Human Right to Immigrate?
David Miller
3. Immigration as a Human Right
Kieran Oberman
4. Is There an Unqualified Right to Leave?
Anna Stilz
5. Freedom of Movement and the Rights to Enter and Exit
Christopher Heath Wellman

Part II. Migration, Equality, and Justice

6. The Special-Obligations Challenge to More Open Borders
Arash Abizadeh
7. Immigration and Discrimination
Sarah Fine
8. Taking Workers as a Class: The Moral Dilemmas
of Guestworker Programs
Lea Ypi
9. Selecting By Merit: The Brave New World of Stratified Mobility
Ayelet Shachar

Part III. Migration and Membership

10. In Defense of Birthright Citizenship <i>Joseph H. Carens</i>	205
11. The Significance of Territorial Presence and the Rights of Immigrants <i>Sarah Song</i>	225
12. Are Refugees Special? <i>Chandran Kukathas</i>	249
13. <i>In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees</i> <i>David Owen</i>	269
<i>Index</i>	291

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11

The Significance of Territorial Presence and the Rights of Immigrants

Sarah Song

Contemporary philosophical debates about immigration have focused on two sets of questions. The first has to do with the control of state borders and the movement of people across them. Do states have the right to control their own borders? What, if any, limits are there on this right? Some theorists defend this right by appeal to the importance of preserving distinctive cultures or the idea of freedom of association.¹ Others have pursued the question of what the content of a liberal democratic state's immigration policy should look like: who should get in and why.² In this chapter, I leave aside these important questions about the grounds of the state's right to control immigration and how this right ought to be exercised in order to focus on a second set of normative questions about immigration: how a liberal democratic state should treat noncitizens who are already inside its borders.

These two sets of questions are, of course, related. If one thinks that the state has the right to control its own borders, one may also think that the state has the right to treat territorial insiders in any way it wishes. In states that aspire to liberal democratic principles, however, citizens must balance a political community's right to self-determination against a commitment to treating all persons in the territory as equals. One way of articulating the moral constraints on a liberal democratic state's right to self-determination is in terms of the value of equality. One might emphasize the moral equality of all human

¹ See, respectively, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) and Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008), 109–41.

² Joseph Carens, "Who Should Get In? The Ethics of Immigration Admissions," *Ethics & International Affairs* 17:1 (2003), 95–110.

beings to argue for basic human rights, regardless of the territorial location of individuals.³ But others might maintain that the premise of moral equality is consistent with the view that physical presence in a state's territory should make a difference to the rights one is entitled to. This chapter explores this normative position by considering what equality requires in the treatment of noncitizens who are present in the territory of liberal democratic states. A full treatment of this topic would require showing how the demands of equality should be weighed against the state's right to self-determination, including the right to control immigration. My more modest aim is to offer pro tanto reasons for extending rights to territorially present noncitizens in a way that is consistent with treating them as equals.

This normative inquiry is important because liberal democratic states are already engaged in the practice of extending a range of rights to noncitizens in virtue of their territorial presence, but without deeper consideration of why territorial presence matters. For example, in the U.S., noncitizens are entitled to many of the same rights as citizens, including the protection of antidiscrimination law, due process rights in criminal proceedings, and access to public education and some welfare benefits. In the 1886 case, *Yick Wo v. Hopkins*, the U.S. Supreme Court first acknowledged that basic rights should be extended to all persons within the territory, regardless of their citizenship status: "[Fundamental rights] are not confined to the protection of citizens . . . These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."⁴ That territorial presence was significant was asserted again in the 1982 case, *Plyler v. Doe*, which struck down a Texas statute barring the children of unauthorized migrants from attending public schools. The Court held that equal protection of the laws "extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a state's territory."⁵ These legal claims to personhood are not appeals to personhood *simpliciter*—that all persons *qua* persons are entitled to equal concern and respect—but what Linda Bosniak has called claims of

³ Joseph Carens' "Aliens and Citizens: The Case for Open Borders," *Review of Politics* 49:2 (1987), 251–73, reflects such a view. Yasemin Soysal's *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994) and David Jacobson's *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore, MD: Johns Hopkins University Press, 1996) offer a political sociological analysis of the way states have turned in incremental fashion to international human rights law (such as the UN human rights instruments and the European Convention on Human Rights) as a basis for extending rights to migrants; one might build on their analyses to argue, from the premise of moral equality, that this is what states ought to be doing.

⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). A decade later, in *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court ruled that noncitizen criminal defendants, like citizen defendants, are entitled to the protection of the Fifth and Sixth Amendments.

⁵ *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

"territorial personhood"—that all *persons within the territorial jurisdiction* are entitled to some of the same protections and benefits that citizens enjoy.⁶

This chapter examines three different accounts of the normative significance of territorial presence, based on the principles of (1) affiliation, (2) fair play, and (3) coercion.⁷ Each of these principles offers a way of delimiting the scope of the duties that human beings have to each other. My focus is on whether these principles can account for the special obligations that territorial insiders of a state have to one another. The claim that territorial insiders have special responsibilities toward one another rests on the following premises: (1) that there are certain kinds of relationships that ground special responsibilities, and (2) that territorial insiders share the kind of relationship that grounds special responsibilities. I assume the first premise and look to different accounts of the second premise. What kind of relationship do territorial insiders have to one another, and what sorts of rights and responsibilities does the relationship generate?

My chapter proceeds as follows. First, I analyze the three principles—affiliation, fair play, and coercion—to see how well they account for special rights and obligations of territorial insiders. While each account suffers weaknesses, I argue that the three principles, taken together, do ground a case for the special rights and obligations of different groups of territorial insiders. I then turn to consider the question of what equality requires when it comes to the treatment of territorially present noncitizens: does equality require uniform treatment, or is differential treatment permissible? I conclude by exploring the implications of my analysis for the content of the special rights and responsibilities of different groups of territorial insiders.

11.1 Affiliation

We might view territorial presence as generating special rights and responsibilities in virtue of certain kinds of *affiliations* that inhabitants of a territory share with one another. Legal scholar Hiroshi Motomura has described "immigration as affiliation" as "the view that the treatment of lawful immigrants and other noncitizens should depend on the ties that they have formed in this country."⁸ The affiliation principle is also at the heart of Joseph Carens'

⁶ Linda Bosniak, *The Citizen and the Alien* (Princeton, NJ: Princeton University Press, 2006), p. 55.

⁷ This chapter is inspired by Linda Bosniak's "Being Here: Ethical Territoriality and the Rights of Immigrants," *Theoretical Inquiries in Law* 8:2 (2007), 389–410, which examines the principles of affiliation, anti-caste, and "mutuality of obligation" (or the coercion principle). I explore the affiliation and coercion principles in greater depth and consider an additional account based on fair play.

⁸ Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford: Oxford University Press, 2006), p. 11.

argument for amnesty for unauthorized migrants: “there is something deeply wrong in forcing people to leave a place where they have lived for a long time. Most people form their deepest human connections where they live—it becomes home.” Webs of social connection or de facto social membership (as opposed to official legal membership) is taken to ground a case for the right to reside permanently in a state’s territory. As Carens puts it, “People who live and work and raise their families in a society become members, whatever their legal status. That is why we find it hard to expel them when they are discovered.”⁹

Affiliations were a central rationale for the legalization programs enacted by the U.S. Congress and signed into law by President Reagan in 1986, which extended a path to citizenship to 2.9 million unauthorized migrants.¹⁰ The importance of affiliations is also reflected in U.S. immigration law in the context of deportation proceedings. Consider noncitizens admitted to the U.S. as lawful permanent residents (LPRs). LPRs who commit certain crimes are subject to deportation, but if they have lived in the U.S. as LPRs for at least five years, have seven years of continuous residence, and no commission of an aggravated felony, they may appeal to an immigration judge to cancel the deportation order.¹¹ The underlying rationale seems to be that the longer noncitizens are here, the deeper their affiliations, and the stronger their claim to remain. Some appeal to human rights, but most rely on familial and social ties to citizens of the host society.

What kind of affiliations should count? One answer is provided by theorists of nationalism, who emphasize the importance of ties to the nation. On David Miller’s prominent theory of nationality, nations are defined as communities bound together by “natural sentiments.”¹² In characterizing what is distinctive about national identity, Miller says it “requires that the people who share it should have something in common, a set of characteristics that in the past was often referred to as a ‘national character,’ but which I prefer to describe as a common public culture.”¹³ You and I share a national culture, even if we never meet, if each of us has a personal history involving the national culture, has been initiated into its traditions, and identifies with the nation. Miller emphasizes the openness of his account to immigrants: “immigration need not pose problems, provided only that the immigrants come to share a

⁹ Joseph Carens, *Immigrants and the Right to Stay* (Cambridge, MA: MIT Press, 2010), pp. 12, 18–19.

¹⁰ Immigrant Reform and Control Act of 1986, Public Law 99–603 (Act of November 6, 1986).
¹¹ Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (hereafter IIRIRA), P.L. 104–208 § 240A(a), 8 U.S.C. 1229b(a) (2006).

¹² David Miller, *On Nationality* (Oxford: Oxford University Press, 1995), p. 58, n.11.

¹³ Miller, *On Nationality*, p. 25.

common national identity, to which they may contribute their own distinctive ingredients.”¹⁴

For the sake of argument, let’s grant that national affiliations have ethical significance, that they are a valid source of rights and obligations. We nonetheless run into some difficulties. First, the boundaries of national affiliations don’t map neatly onto territorial boundaries. Not even all citizens of a state speak the national language, and many residents, including many citizens, may lack a sense of belonging together or a strong degree of identification with the national culture. On a strict interpretation of the nationality principle, such disengagement with the national culture would undermine the “disengaged” noncitizens’ access to citizenship, or in the case of “disengaged” birthright citizens, jeopardize the citizenship status they already possess. Proponents of the nationality principle might say this is as it should be. My point here is that national affiliations are an imperfect proxy for territorial presence.

Second, it seems morally perverse to require affiliation with the dominant national culture as a condition of equal treatment. Consider Chinese migrants in late-nineteenth-century America. On the nationalist view, the greater the immigrant’s identification and interaction with the dominant society, the greater his claim to rights. But what if racial prejudice and inequality are barriers to integrating into the national culture as they have been in the U.S. and elsewhere? In order to claim rights, Chinese and other non-white migrants would have had to identify and affiliate with the white majority who sought to exclude them.¹⁵

In response, one might argue that what triggers equal concern is not affiliation with members of the dominant group but with any *local* group in the host society. Affiliations with family, friends, neighbors, and co-workers in the host society are sufficient to trigger equal concern. These local affiliations are what Carens seems to have in mind in making his case for amnesty. In practice, local, not national, affiliations are the kinds of ties that U.S. immigration law has tended to prioritize. For example, in considering appeals to deportation orders, much greater weight is given to family ties than national ties. Whether the noncitizen being deported is able to speak the language of the country to which they will go sometimes comes up, but it is a relatively minor factor. More weight is given to whether deportation would result in “extreme hardship” to their spouses, parents, or children who would be left behind.¹⁶

¹⁴ Miller, *On Nationality*, p. 26.

¹⁵ On racial discrimination in the history of immigration policy, see Sarah Fine’s chapter in this volume.

¹⁶ See, e.g., *Cruz Rendon v. Holder*, 604 F.3d 1104 (9th Cir. 2009) (minor child’s specialized medical and educational needs offered as grounds for cancelling the deportation order).

The local affiliations view, however, is not free of problems either. First, it seems too weak to generate equal concern. Consider a migrant in the UK who develops friends in the UK while also maintaining ties of family and friendship with people from his home country. Why does the fact that he interacts with a group of people in the UK entitle him to equal concern from the British government if he also has affiliations of a similar kind outside the territory? In response, the local affiliations view needs to explain the nature, density, and depth of affiliations that should trigger equal concern. A proponent of the local affiliations view would have to argue something like the following: when a person's *primary* affiliations are in the host country, he is entitled to equal concern. For example, one might argue that noncitizens whose most intimate affiliates—partners, children, and other family members or close friends—are in the host state have a *prima facie* claim to remain in the territory.

A second problem with the local affiliations view is that ties to family, friends, and neighbors is an imperfect proxy for territorial presence, especially for the most recently arrived migrants. Carens is probably right that most people form their “deepest human connections” where they live.¹⁷ Yet, there is some irony in grounding a case for the rights of immigrants on affiliations since the disjuncture between country of residence and the location of one's familial and other affiliations is greatest in the case of migrants, including temporary workers who leave loved ones behind in order to work and send money back home. Many immigrants will develop social ties in the host country, but most will not do this right away. Using time as a proxy for affiliation, Carens suggests that one or two years is not enough to develop substantial affiliations and fifteen to twenty years are “much more than enough.” He settles upon “five years of settled residence without any criminal convictions” as sufficient “to establish anyone as a responsible member of society.”¹⁸ But before a noncitizen establishes local affiliations, on what grounds could she claim rights? Consider the case of a first-time visitor to the U.S. who has no affiliations to any residents of the host country. Under current law, such a visitor would still enjoy legal protections against unreasonable search and seizure from the moment she sets foot in the territory. Noncitizens who have just entered the territory are treated, for many legal purposes, the same as those who have lived there for years.¹⁹ The affiliations view cannot account for the rights and responsibilities of short-term and temporary visitors.

¹⁷ Carens, *Immigrants and the Right to Stay*, p. 12.

¹⁸ Carens, *Immigrants and the Right to Stay*, pp. 20–1.

¹⁹ Kal Raustiala argues that the logic underlying this practice is “simply spatial” (“The Geography of Justice,” *Fordham Law Review* 73 (2005), 2501–60). This chapter explores the normativity of spatiality with the aim of showing that the rationales for distributing rights and responsibilities based on territorial presence is not “simply spatial.”

This limitation is not a reason for rejecting the affiliation principle as an account of the significance of territorial presence. While it may not apply to the most recently arrived, it does capture the situation of many migrants. The affiliation principle is scalar, not binary. It admits of degrees. The deeper one's affiliation to the country, the greater one's entitlement to rights. This view of affiliations as a matter of degree is reflected in the U.S. Supreme Court decision, *Mathews v. Diaz*, which upheld a Social Security Act provision that excluded noncitizens from Medicare unless they had resided in the country for at least five years:

The decision to share [the social] bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence . . . it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence.²⁰

The Court affirmed the view it had articulated earlier that the noncitizen has an “ascending scale of rights as he increases his identity with our society.”²¹ The affiliations view does account for some rights and responsibilities of noncitizens, typically those of longer-term residents, but it does not provide the whole story about the rights and responsibilities of territorial insiders.

11.2 Fair Play

A second way of accounting for the special rights and responsibilities of territorially present persons is the principle of “fair play” or reciprocity. On this principle, all those who participate in a scheme of social cooperation are entitled to the benefits and must bear the burdens of that scheme. Arguments about fair play presuppose a view of the state as a mutually beneficial system of social cooperation. As Rawls puts it, the basic idea is, “We are not to gain from the cooperative labors of others without doing our fair share.”²² Indeed, the modern state is the most consequential social scheme we know. Without the institutions of the modern state to make, enforce, and interpret the laws, each of us would be left to our own devices to ensure our own security and survival.

The principle of fair play has typically been invoked in debates about political obligation to answer the question of why individuals should obey

²⁰ *Mathews v. Diaz*, 426 U.S. 67, 80, 82–3 (1976).

²¹ *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

²² John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, [1971] 2005), pp. 4, 112. See also Rawls' “Legal Obligation and the Principle of Fair Play” in S. Hook (ed.), *Law and Philosophy: A Symposium* (New York: New York University Press, 1964), pp. 3–18.

the law. Here I consider the reverse—to justify obligations that the state has to individuals, or in the case of democratic states, to justify obligations that citizens have to one another as well as to noncitizens in their midst. If we think of a democratic state as the representation of the collective will or interests of the citizens who make up the state, the question then is: what obligations do democratic citizens have to newcomers who are participants in the scheme of social cooperation that is the state?

To answer, we need to consider what relationship must hold between an individual and a cooperative scheme for her to be said to be a *participant* in some significant sense. Someone who accepts benefits from the social scheme unintentionally or without knowing the moral consequences of doing so is not a participant. One might think that to be a participant in a social scheme one must have expressly or tacitly *consented* to participate. Before getting to the question of whether one can participate in a scheme without consenting to it, let me briefly say something about the problems with the consent principle for grounding the special rights and responsibilities of territorial insiders.

Consider first those inhabitants who are already citizens. As many critics of the consent principle have argued, the vast majority of citizens have never consented to citizenship. In defending a consent-based theory of citizenship, Peter Schuck and Rogers Smith seek to make consent to citizenship a real possibility by offering children born to citizens and long-term lawful resident noncitizens the opportunity to renounce citizenship when they reach the age of majority.²³ But even if a state agency were to notify birthright citizens of the opportunity to self-expatriate at age eighteen or thereabouts, the enormous costs and challenges of exiting a political community make it implausible to regard failure to self-expatriate as a sign of consent.

As for noncitizens in a state's territory, only lawful permanent residents (LPRs) can live up to the liberal ideal of consent. They enact consent in a way that native-born citizens never do. The "good, consenting immigrant," in Bonnie Honig's words, "reperform[s] the official social contract by naturalizing to citizenship."²⁴ In contrast, the unauthorized migrant is the "bad immigrant" whose territorial presence has not been consented to and therefore is deemed not only unworthy of membership but also ineligible for many of the rights accorded to LPRs.

²³ Peter Schuck and Rogers M. Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (New Haven, CT: Yale University Press, 1985). Schuck and Smith's claim is not that the native-born children of unauthorized migrants should be denied citizenship but that birthright citizenship (*ius soli*) is not constitutionally required and therefore open to democratic contestation.

²⁴ Bonnie Honig, *Democracy and the Foreigner* (Princeton, NJ: Princeton University Press, 2001), p. 92.

While the consent principle can ground the rights and obligations of naturalized citizens, it cannot account for all those birthright citizens who have never consented to citizenship. In light of this, we need to ask whether one can be a participant in a social scheme without giving her consent to it. In discussing the fair play principle, Rawls suggests that political obligation depends on "our having accepted and our intention to continue accepting the benefits of a just scheme of cooperation."²⁵ A. John Simmons distinguishes between *accepting benefits* from and *giving consent* to a social scheme. He uses the example of Jones, who opposes the neighborhood plan to dig a well for clean water. After the well is dug, however, he sneaks to the well every night and takes some water home. While Jones has accepted benefits from the well, he has not consented to it. Yet he still has an obligation to do his part within the cooperative scheme in virtue of having accepted benefits.

Unlike the consent principle, the fair play principle does not insist on a consensual or deliberate undertaking. Anticipating the objection that Jones' sneaking out at night and taking water from the well might be taken as a sign of consent, Simmons revises the example to have Smith going to the well in broad daylight and shouting, "Don't think this means I'm coming into your stupid scheme! I'll never consent to share the burdens of this enterprise!"²⁶ On this scenario, Jones has obligations to contribute not in virtue of having consented but in virtue of having accepted benefits from the scheme.

But how many citizens of a state have accepted the public goods provided by the state? I think we can plausibly say that using public roads is a way of willingly accepting public goods. I follow George Klosko in thinking that recipients of public goods have obligations of fair play if the goods supplied are: "(i) worth the recipients' effort in providing them; (ii) indispensable for satisfactory lives; and (iii) have benefits and burdens that are fairly distributed."²⁷ The state provides indispensable benefits, including protections to our physical security through national defense, maintenance of law and order, public health measures, and provisions for satisfying our basic bodily needs. My obligation to the state does not stem from my giving consent, but from the fact that I accepted and benefitted from these goods.

²⁵ Rawls, "Legal Obligation and the Duty of Fair Play," p. 10. Rawls himself rejects the idea that actual consent is necessary for us to be bound to uphold and comply with a scheme of social cooperation.

²⁶ A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), p. 127.

²⁷ George Klosko, *Political Obligations* (Oxford: Oxford University Press, 2005), p. 6. As Jon Quong pointed out to me, it is possible that the indispensability criterion may not be necessary to generate obligations of fair play. We may have obligations of fair play even in cases where I accept benefits that are not indispensable for my well-being. If accepting any goods produced by a scheme of social cooperation generates obligations of fair play, accepting goods that are indispensable for my well-being presents an easier case.

Not only citizens but *all residents* in a state's territory participate in the cooperative scheme of the state to varying degrees. The contributions of noncitizens can take a variety of forms. Noncitizens contribute through their labor and paying taxes. Many noncitizens, especially unauthorized migrants and temporary workers, do exhausting, grueling work that most citizens do not want to do at the wages currently on offer. This includes work in meatpacking companies and industrial farms, cleaning homes and offices, and domestic care work. Some noncitizens contribute through military service.²⁸ The vast majority of noncitizens also contribute by simply complying with the law. All of these contributions help sustain state institutions and the public goods they provide. On the fair play principle, it is in virtue of such contributions that noncitizens are entitled to the benefits provided by the state.

Turning to consider the scope of the fair play principle, we encounter difficulties. One might object that the fair play principle is not easily contained within the territorial boundaries of states. This is a point made in debates about global justice by critics of attempts to restrict the fair play principle within the boundaries of one state.²⁹ In response, it is important, first, to acknowledge the undeniable fact of global interdependence and cooperation, which is reflected in the great and increasing volume of global communications, trade, investment, and the movement of capital and labor across borders. The international economic and political relationships that states participate in suggest a global scheme of social cooperation.³⁰ But, second, even if we accept that there is a global scheme of social cooperation, cooperation within a state's territorial boundaries is distinctive and grounds distinctive claims and responsibilities. It is not simply that the social cooperation inside a state impacts us more profoundly and pervasively; sometimes it doesn't. Rather, the state is indispensable in securing the just background conditions that make fair transactions and agreements between individuals and groups possible in the first place.³¹ A just state makes possible much more

²⁸ About 65,000 foreign-born persons serve in the U.S. military, representing about 5 percent of all active-duty personnel; one-third of the foreign-born serving in the military are not U.S. citizens. See Jeanne Batalova, "Immigrants in the U.S. Armed Forces," Migration Policy Institute (May 2008), <<http://www.migrationpolicy.org/article/immigrants-us-armed-forces/>>, accessed August 6, 2015.

²⁹ See Arash Abizadeh, "Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice," *Philosophy and Public Affairs* 35:4 (2007), 318–58.

³⁰ Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), pp. 143–54; Joshua Cohen and Charles Sabel, "Extra Rempublicam Nulla Justitia?," *Philosophy and Public Affairs* 34:2 (2006), 147–75.

³¹ John Rawls, *Justice as Fairness* (Cambridge, MA: Harvard University Press, 2001), pp. 52–4; see also John Rawls, *Political Liberalism* (New York: Columbia University Press, [1993] 2005), pp. 265–9. See also Andrea Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy and Public Affairs* 35:1 (2007), 3–39, who develops a similar argument in terms of reciprocity.

than fair economic exchange; it provides the conditions necessary for individual autonomy through ensuring equal basic liberties, as well as equal opportunities and some minimum of income and wealth. Given the necessity of participation in a state for individual autonomy, each of us has, as Rawls puts it, a "natural duty of justice" to "comply with and to do our share in just institutions when they exist and apply to us."³² By contributing toward the maintenance of the state in whose territory we reside, each of us is entitled to the public goods provided by that state.

What do these considerations about fair play suggest for the rights and responsibilities of noncitizens in a state's territory? Like the affiliation principle, it admits of degrees. One might take a proportional view that says the benefits one can claim should be proportional to the contributions one has made, with the proviso that anyone who contributes through simple compliance with the law is entitled to some minimum of rights and protections. On such a view, all territorial insiders who support and comply with the state have a prima facie case to some minimal share of the benefits of the cooperative scheme, for example, protection of physical security and the provision of basic goods. A more extensive set of public goods should go to those who have contributed more over a greater period of time.

The fair play principle is already reflected in law. Take, for example, the U.S. Supreme Court case, *Graham v. Richardson*. Under challenge were Arizona and Pennsylvania laws that conditioned the receipt of public assistance on being a U.S. citizen or having resided in the U.S. for at least fifteen years. Both states justified their restrictions on the basis of a "special public interest" in favoring their citizens over noncitizens in the distribution of scarce resources. The Court acknowledged that states have "a valid interest in preserving the fiscal integrity of its programs," but argued that a concern for fiscal integrity did not justify the use of "invidious distinctions":

Aliens like citizens pay taxes and may be called into the armed forces . . . [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state . . . There can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the States.³³

Similarly, in a case striking down a New York requirement that state employees had to be citizens, the Court stated, "A resident alien may reside lawfully in New York for a long period of time. He must pay taxes. And he is subject to service in this country's Armed Forces."³⁴ The logic of fair play underlies these

³² Rawls, *A Theory of Justice*, p. 334.

³³ *Graham v. Richardson*, 403 U.S. 365, 374–6 (1970).

³⁴ *Sugarman v. Dougall*, 413 U.S. 634, 645, 646 (1973).

cases. Although the courts have focused on lawful long-term residents, the fair play principle ought to be seen as extending to *all noncitizens*, including unauthorized migrants and some temporary workers, who in virtue of their contributions have a prima facie claim to civil rights and basic public goods.³⁵

It is worth elaborating briefly on the importance of *work* as a form of contribution, which is particularly strong in the American political tradition. The connection stems in part from the history of exclusion of African Americans from the right to work and earn. As Judith Shklar observed, "The issue is not labor as such, but earning and the independence it confers. The slave is degraded not because he has to work—everyone should do that—but because he is kept rather than remunerated."³⁶ She points to the example of Frederick Douglass, who upon receiving his first paying job after escaping slavery, remarked:

I was now my own master—a tremendous fact . . . The thought, "I can work! I can work for a living; I am not afraid of work; I have no Master Hugh to rob me of my earnings"—placed me in a state of independence . . . All that any man has a right to expect, ask, give or receive in this world, is *fair play*.³⁷

Perhaps because the fair play rationale in American political discourse has been so focused on paid work outside the home, it raises some worrying implications. One is that the kinds of work that get counted as a "contribution" will be defined narrowly with exclusionary implications for many groups of territorially present persons, including children who don't work, noncitizen elderly adults who don't work, and economically unremunerated workers.³⁸ I think this objection can be answered by insisting on a broad definition of what counts as a "contribution" to the scheme of social cooperation: not only paid work in the labor market but also unpaid domestic labor and public service in local neighborhoods and communities. As Andrea Sangiovanni has suggested, the kinds of "contribution" that give rise to obligations of fair play (what he calls reciprocity) ought to be defined expansively to include contributions "paid in the coin of compliance, trust, resources, and participation."³⁹

³⁵ Because unauthorized migrants have violated immigration laws, one would have to address countervailing reasons articulated by those who argue for imposing additional requirements for undocumented immigrants who wish to remain, such as paying a fine.

³⁶ Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991), p. 94.

³⁷ Frederick Douglass, *The Life and Writings of Frederick Douglass*, ed. Philip S. Foner, vol. 4 (International Publishers, 1955), pp. 271–2.

³⁸ On this point see the discussion of reciprocity in Arash Abizadeh's contribution to this volume.

³⁹ Sangiovanni, "Global Justice, Reciprocity, and the State," pp. 20–1.

11.3 Coercion

A third way of accounting for the normative significance of territorial presence is in terms of autonomy and coercion. The basic idea is that because state coercion infringes on people's autonomy, all those subject to state coercion are entitled to some form of justification. Personal autonomy involves, in Joseph Raz's words, a vision of persons as "part creators of their own moral world" who "have a commitment to projects, relationships, and causes which affect the kind of life that is for them worth living."⁴⁰ Because coercion always invades personal autonomy, coercion must either be stopped or justified to those who are coerced. The most obvious form of state coercion is the imposition of criminal penalties: incarceration removes "almost all autonomous pursuits" from the prisoner.⁴¹ As Michael Blake has argued, while coercion is most starkly present in criminal law, it abounds in private law as well. In the law of contracts, property, and torts, adjudication of disputes will involve a transfer of legal rights from the loser of the legal dispute to the winner, and the civil judgment is backed by coercive measures.⁴²

What sort of justification is owed to those subject to state coercion? Some interpret the coercion principle as requiring a hypothetical justification: we ask not what is actually consented to here and now, but what would be consented to, *ex ante*, under some appropriate method of modeling rational consent. What matters is the justness of the institutions and laws through which political power is exercised. For example, in Blake's view, the justification of ongoing state coercion must take the form of state concern with the *relative* material deprivation of all those coerced. In contrast, on the democratic interpretation of the coercion principle, what is owed to those subject to state coercion is actual opportunities to participate in the political processes that decide how state power is exercised.⁴³ The democratic strategy of justification links personal autonomy with public autonomy: coercive infringements on personal autonomy are justified only insofar as those subject to coercion have the opportunity to govern those infringements.

As with the affiliation and fair play principles, one problem with trying to account for the normative significance of territorial presence through the coercion principle is that the scope of state coercion does not line up neatly with the boundaries of citizenship or territory. Blake restricts the scope of his arguments to *citizens*, assuming for his purposes that "the set of people bound

⁴⁰ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 154.

⁴¹ Raz, *The Morality of Freedom*, p. 419.

⁴² Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs* 30:3 (2001), 257–96 at pp. 276–7.

⁴³ Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36:1 (2008), 37–65.

under the territorial reach of a state's laws and the set of that state's citizens are equivalent."⁴⁴ Yet, there are many people "bound under the territorial reach of a state's laws" who are not citizens. All *persons* in the territory—from tourists and temporary workers to unauthorized migrants and legal permanent residents—are subject to the criminal and civil law of the state where they find themselves. Because these noncitizens are subject to a state's legal system, they too are owed some form of justification. Arash Abizadeh has argued that the coercion principle pushes not only beyond the boundaries of *citizenship* but also beyond *territorial* boundaries. A great many foreigners beyond the territorial boundaries of a powerful state are subject to its coercion, with radically inclusionary implications: justification is owed not only to territorial inhabitants but to all foreigners subject to a state's immigration and economic policies.⁴⁵

I think the radically inclusionary implications of the coercion principle can be resisted. First, while state coercion has a profound impact on the life chances of people outside the state's territory, we should not let these instances of extraterritorial coercion blind us to the fact that those *inside* the territory of the state are subject to profound and pervasive coercion in a way that most territorial outsiders are not. There is an important *dis-analogy* between nonresident noncitizens, on the one hand, and inhabitants of the territory, on the other: the foreigner at the border is subject only to the immigration power of the state she wishes to enter, but she is not subject to the entire legal system. The coercion principle is scalar. Different degrees and forms of coercion require different justifications. Every dimension of a territorial insider's life choices is structured by the policies of the state in which she resides; the same cannot be said of territorial outsiders who are members of other states and are therefore subject to the legal system of their home states.⁴⁶ Second, consent makes a difference here. While the vast majority of citizens simply find themselves, by the accident of birth, inside the territory of a particular state, many noncitizens have entered a host state voluntarily and have their home states to return to. Different migrants have different opportunities for exit and return, but where there is a viable exit option, the force of the coercion principle is considerably weakened as a basis for extending full and equal rights of citizenship.

⁴⁴ Blake, "Distributive Justice," p. 266, n.8.

⁴⁵ Abizadeh, "Democratic Theory and Border Coercion."

⁴⁶ I do not mean to suggest that territorial outsiders should have no voice whatsoever in the making of policies to which they are subject; they might be granted some voice. For example, Mexicans subject to U.S. economic and immigration policy would not have equal voting rights in U.S. elections, but they could reasonably demand a voice through their political representatives speaking to representatives of the U.S. government through transnational deliberative bodies.

A related concern is whether the coercion principle can distinguish among different groups of territorial insiders, including tourists, temporary workers, and long-term resident noncitizens. All seem equally liable to the criminal and civil laws of the state in which they find themselves. On the democratic interpretation of the coercion principle, all these individuals should be entitled to an equal voice in the making of the laws to which they are subject. However, coercion, like affiliation and fair play, is not an all-or-nothing affair. It admits of degrees, even inside the territorial boundaries of a state. Consider tourists or foreign students visiting the U.S. That they are subject to the host state's coercive power during their stay is undeniable. This is why they are entitled to certain basic rights and protections from the moment they set foot in the territory. But there are important differences between short-term visitors and longer-term residents. The former are in the country for a short period of time; their aspirations and life projects are bound up with their lives and networks back in their home countries. While these short-term visitors are subject to the laws of the host state during their stay, the degree of control that the host state exerts over their lives is far less than the degree of control that the host state exerts on long-term residents. To see why, we must recognize that the way in which territorial presence matters will depend in part on the person's own goals and life plans. The state has more power over the life of someone who pursues her life plan centrally inside the territory of the state than someone who is primarily engaged in short-term projects. This explains why we treat tourists and foreign students differently from long-term residents. In many cases, temporary workers are more like other short-term visitors in that they are in the country for a short period of time and their own aspirations are to return home. The longer foreign workers live and work in the host state and the more their own life plans become pervasively subject to the host state, the stronger their claim to remain becomes.

11.4 Implications for the Rights of Immigrants

Rather than defending one principle over another, my central contention is that the three principles considered above—affiliation, fair play, and coercion—work together to ground a case for the special rights and obligations of territorial insiders. The affiliation principle is perhaps the most imperfect proxy for territorial presence, especially in the case of newcomers to a state's territory. As one's affiliations with members of the host society expand and deepen, so does the extent of rights and obligations. Similarly, the fair play principle extends a greater set of rights and obligations based on the nature and extent of the contribution. The coercion principle accounts for why

newcomers present in the territory are entitled to certain rights and responsibilities from the moment they set foot in the territory.

If one accepts these principles as grounds for the special rights and responsibilities of territorial insiders, the question then is: what is the content of the special rights and responsibilities of territorial insiders? Before taking up this question, we first need to consider whether all territorial insiders ought to be treated identically or whether differential treatment is permissible for different groups of territorial insiders.

11.4.1 *Equality: uniform or differential treatment?*

There is a strong presumption in contemporary liberal theory in favor of treating most, if not all, territorial insiders in exactly the same way. Call this the *uniform treatment* view. Michael Walzer implies such a view when he writes: "Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does." Walzer was writing with temporary workers in mind, arguing that they "must be set on the road to citizenship." Admission into the territory must eventually come with full inclusion as equal members, which is "subject only to certain constraints of time and qualification."⁴⁷ Why?

Walzer provides two reasons. The first is shared subjection to state authority. We may think of temporary workers as guests, but they ought to be regarded as "subjects" just as citizens are. Subjection to state coercion triggers the demand for justification, which may be met through the provision of certain rights and protections. But as we saw, what is owed to those subject to state coercion is subject to debate: not necessarily full membership but a set of basic rights. Second, Walzer seeks to avoid the creation of a permanent, vulnerable caste of foreigners. This concern stems from the two historical cases that inform Walzer's theory of membership: the *metics* of ancient Greece and "guest workers" in Germany. Migrants typically perform difficult, dangerous work that is socially necessary, but they are regarded as strangers with little to no civil, social, and political rights. Because their presence in the territory is tied to employment, they live under the constant threat of deportation and their marginal economic and political position renders them vulnerable to exploitation. Reflecting on these cases, it is no surprise that Walzer concludes that temporary workers "must be set on the road to citizenship."⁴⁸

These are serious concerns, but I think there is an alternative to the either/or choice implied by Walzer's uniform treatment approach: either inclusion of

⁴⁷ Walzer, *Spheres of Justice*, pp. 60–1.

⁴⁸ Walzer, *Spheres of Justice*, pp. 57, 59, 60.

guest workers as full members or acceptance of their situation as a vulnerable caste with few rights. Before elaborating an alternative proposal, let's consider the limits of the uniform treatment view.

First, Walzer's theory presupposes only one type of migration across borders—permanent resettlement—but not all movement fits this model. Some intend to migrate only temporarily, and some who intend to remain permanently do not wish to become citizens.⁴⁹ If we take seriously the agency of immigrants—the "aspirations and projects of the migrants themselves"—we see that many migrant workers do not wish to settle in the host country.⁵⁰ Temporary workers' goal of returning home is reflected in their higher rate of savings and remittances, and their willingness to accept lower-paying jobs in contrast to permanent residents.⁵¹ If temporary workers wish to work for a time and eventually return to their home states, a group-differentiated approach that accords certain rights—but not the same rights as citizens or long-term residents—may be consistent with treating them as equals.

Second, there is the practical consideration that if the uniform treatment approach were to be implemented as a matter of policy, host societies would drastically reduce or eliminate temporary worker programs. Many egalitarians may rejoice at this, but temporary worker programs are one way of addressing global inequality. To be sure, such programs are limited tools of global redistribution because it is typically not the worst off members of a society who tend to migrate and because there are more direct means of redistributing wealth and income across countries. Yet, temporary worker programs do serve as one vehicle of global redistribution through remittances. According to the World Bank, \$111 billion was remitted worldwide in 2001. About 65 percent went to developing countries, with half going to countries considered to be "lower-middle income countries." Remittances constituted over 10 percent of GDP for countries such as El Salvador, Nicaragua, Eritrea, Jamaica, and Jordan.⁵²

Third, the uniform treatment view is at odds with the long-standing practice of group-differentiated rights, not only with regard to the treatment of temporary versus long-term migrants but also through policies such as pregnancy leave for women, language rights for linguistic minorities, and limited

⁴⁹ See Douglass S. Massey et al., *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell Sage, 2002).

⁵⁰ Valeria Ottonelli and Tiziana Torresi, "Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma," *The Journal of Political Philosophy* 20:2 (2012), 202–24 at 208.

⁵¹ Oded Galor and Oded Stark, "Migrants' Savings, the Probability of Return Migration and Migrants' Performance," *International Economic Review* 31 (1990), 463–7; Massey et al., *Beyond Smoke and Mirrors*.

⁵² Kevin O'Neil, "Remittances from the United States in Context," Migration Policy Institute (June 2003), <<http://www.migrationpolicy.org/article/remittances-united-states-context>>, accessed August 6, 2015.

self-government rights for indigenous groups, all of which have been defended on grounds of egalitarian justice.⁵³ We need to inquire into the purpose and justification of particular cases of group-differentiated policies to see whether they are consistent with egalitarian justice. A uniform treatment approach is too sweeping in its blanket opposition to differential treatment.

Rather than viewing rights as an all-or-nothing bundle attached to citizenship status, as reflected in the uniform treatment view, we ought to consider an approach that *disaggregates* certain rights from the formal status of citizenship and extends them to noncitizens in virtue of their territorial presence.⁵⁴ There are at least two advantages to a disaggregation approach. First, it leaves open the possibility that certain practices of group-differentiated rights and responsibilities are justifiable. Second, permitting differential treatment of different groups of territorial insiders is more likely to address Walzer's concern about the domination of vulnerable groups, including temporary workers and unauthorized migrants. On the uniform treatment view, unauthorized migrants must either remain in the shadows or be granted recognition as full members. A disaggregation approach could offer a middle position that extends a range of rights to them, not in virtue of membership but in virtue of territorial presence.

11.4.2 Which rights for which territorial insiders?

If one adopts a strategy of disaggregation, the question then is: which rights for which territorial insiders? In closing, I provide a brief proposal to illustrate one form the disaggregation approach might take. There are at least three categories of resident noncitizens that ought to be distinguished: sojourners, residents, and members. Table 11.1 below indicates which of the three principles discussed above offers normative support for each category and provides examples of different rights claims associated with each. No doubt, some will disagree with the particular content I suggest and favor alternative content,

⁵³ See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (Cambridge: Cambridge University Press, 2007).

⁵⁴ A number of scholars have provided historical, sociological, and legal analyses of the phenomenon of the disaggregation of rights from citizenship status as civil, social, and political rights are increasingly predicated on residency. In addition to Jacobson's *Rights across Borders*, Soysal's *Limits of Citizenship*, and Bosniak's *The Citizen and the Alien* cited above, see also Seyla Benhabib's *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) and Saskia Sassen's *Territory, Authority, Rights* (Princeton, NJ: Princeton University Press, 2008). These arguments are situated within broader arguments about the decline of nation-state sovereignty, especially in the European context. My argument is intended to offer normative grounds for domestic legal regimes to extend rights to noncitizens and does not depend on international human rights law as the sole or primary basis of the move toward disaggregation.

Table 11.1. An example of a scheme of differentiated rights

	(i) Sojourners	(ii) Residents	(iii) Members
Who	tourists, visiting students, temporary workers	long-term resident noncitizens	citizens (native-born and naturalized)
Rights	civil rights & liberties basic public goods (access to public roads, emergency healthcare)	civil rights & liberties extended public goods (non-emergency healthcare, welfare benefits, basic education) right to remain in the territory political rights (right to vote, freedom to contribute to political campaigns)	civil rights & liberties (freedom of religion, speech, & assembly; equal protection of the laws; due process rights in criminal proceedings; protection of property law and contract law) extended public goods right to remain in the territory political rights right to run for & hold political office
Normative Grounds	coercion	coercion, affiliation, fair play	coercion, affiliation, fair play

but my hope is that they will nonetheless see the appeal of the disaggregation approach.⁵⁵

(I) CLAIMS OF SOJOURNERS

Sojourners include temporary workers, tourists, visiting students, and other temporary migrants who enter a state's territory after agreeing to a short-term stay. Sojourners ought to be entitled to civil rights and liberties and basic public goods. In practice, the U.S. and Western European countries already extend civil rights and basic public goods to noncitizens. In the European context, the extension of these rights is predicated on international human rights instruments, as well as the European Convention on Human Rights.⁵⁶ My point is that the coercion principle offers distinctive grounds for extending rights to sojourners.

Sojourners may seek to adjust their status from sojourner to resident on grounds of affiliation or fair play, but as I suggested above, whether such

⁵⁵ Ryan Pevnick has also defended a disaggregation approach in a different context (as part of a critique of the social trust argument for a state's right to exclude foreigners); he distinguishes only between claims of residence and of membership, and assigns extended public goods and political rights and duties to members only. See Ryan Pevnick, "Social Trust and the Ethics of Immigration Policy," *Journal of Political Philosophy* 17:2 (2009): 146–67. A more complete analysis than I can provide here would discuss not only the particular rights but also the obligations of different groups of territorial insiders.

⁵⁶ See Jacobson, *Rights across Borders*; Soysal, *Limits of Citizenship*.

adjustment is ultimately granted will depend on how these pro tanto reasons are weighed against the state's right to self-determination, a part of the analysis that I have not been able to provide here.⁵⁷ On the democratic interpretation of the coercion principle of the kind defended by Abizadeh, sojourners would have a *prima facie* case for equal rights of political participation. In my view, the constitutive and instrumental conditions of democracy, including considerations about political equality and solidarity, weigh against enfranchising sojourners.⁵⁸

(II) CLAIMS OF RESIDENTS

Like sojourners, long-term residents are entitled to civil liberties and basic public goods. In contrast to sojourners, they are entitled to a more extensive set of rights, including the right to remain permanently in the territory, extended public goods, and rights of political participation. The affiliation and fair play principles provide pro tanto reasons for extending such rights to long-term residents, including unauthorized migrants. These principles would apply to someone who has resided, worked, and/or formed affiliations in the host country for a significant period of time, as opposed to someone who has just arrived in the territory. As in the case of sojourners, a full consideration of the rights of unauthorized migrants needs to address how their pro tanto claims based on affiliation, fair play, and coercion should be weighed against the state's right to self-determination.

On the democratic interpretation of the coercion principle, noncitizen residents would be entitled to equal rights of political participation. The concerns about knowledge, solidarity, and stability that apply to sojourners are less of a concern in the case of long-term residents. On the fair play principle, contributions to the scheme of social cooperation through working and paying taxes ground a pro tanto case for social and economic rights.

My proposal for the claims of residents diverges significantly from current law in the U.S. For example, only citizens have the right to reside permanently in the territory, which, among other things, means freedom from deportation. Federal laws prohibit noncitizens from receiving public assistance and from working in particular jobs.⁵⁹ When it comes to political rights, only citizens

⁵⁷ For discussion of the modern state's right to self-determination, including the right to control immigration, see my "Why Does the State Have the Right to Control Immigration," *NOMOS: Migration, Immigration, and Emigration* (forthcoming).

⁵⁸ Sarah Song, "The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State," *International Theory* 4:1 (2012), 39–68.

⁵⁹ For limits on lawful permanent residents' access to public assistance, see 8 U.S.C. 1611–13, 1621–2, 1631–2 (2006), and for restrictions on employment opportunities for lawful permanent residents, see *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). One notable exception is the California legislature's passage of AB 1024, which Governor Brown signed into law in October 2013 and which authorizes the California Supreme Court to admit to the practice of law an applicant who

have the right to vote in most local and all state and federal elections.⁶⁰ In contrast, the disaggregation of citizenship status and political rights is more widespread in Europe. The 1993 Maastricht Treaty granted the right to vote to any citizen of the fifteen signatory states of the EU who resides in another EU state. Since 1993, Ireland, the Netherlands, and all the Scandinavian countries have introduced universal local franchise for all residents, independent of their nationality. New Zealand has the most inclusive policy of all countries: local and national voting rights after one year of legal residence.⁶¹

(III) CLAIMS OF CITIZENS

Under the disaggregation approach, many of the civil, social, and political rights which have traditionally been tied to political membership would be unbundled from citizenship status and extended in virtue of residency. Rights of political participation or access to welfare benefits would no longer be restricted to citizens as is the current practice. One right that ought to be reserved for citizens is the right to run for and hold public office. This claim requires more defense than I can provide here, but a key premise is that effective political leadership requires not only certain expertise but also a deeper level of commitment to the political community. A noncitizen resident's decision to become a citizen might be taken as a proxy, however imperfect, of the extent of her loyalty to the political community.

One important objection to my proposal for disaggregating rights from citizenship status is that it would diminish the worth of citizenship, what Peter Schuck has called the "devaluation of citizenship."⁶² U.S. Senator Diane Feinstein echoed similar concerns when she expressed opposition to noncitizen voting rights in local school board elections in San Francisco, a measure that lost by a slim margin: "Allowing noncitizens to vote . . . clearly dilutes the promise of citizenship."⁶³ In response, it is important to acknowledge that the disaggregation approach would diminish the material worth of citizenship, but citizenship would retain symbolic importance: the shared pride and collective sentiment associated with the common history and common experiences of the political community. That it is symbolic does not mean it is insignificant. For noncitizens, the decision to become a citizen would signal a desire to belong to the political community. This would shift the

fulfilled all the requirements for admission to practice law but is not lawfully present in the U.S. (see <http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1024>).

⁶⁰ See Alexander Keyssar, *The Right to Vote* (New York: Basic Books, 2000).

⁶¹ Rainer Bauböck, "Expansive Citizenship—Voting beyond Territory and Membership," *PS: Political Science and Politics* 38:4 (2005), 683–7.

⁶² See, e.g., Peter H. Schuck, "The Devaluation of Citizenship" in *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (Boulder, CO: Westview Press, 1998), pp. 163–75.

⁶³ Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* (New York: Routledge, 2006), p. 126.

motivational basis for noncitizens' decisions to become citizens: one would join not for the sake of the benefits attached to the status of citizenship but out of affective attachment and identification with the political community.

11.5 Conclusion

This chapter considered the question of whether and why territorial presence makes a normative difference. Taken together, the three principles examined above—affiliation, fair play, and coercion—account for the special rights and obligations of different groups of territorial insiders. Turning to the question of the particular content of the special rights and obligations, I defended an approach that *disaggregates* rights and obligations from citizenship status. As I have tried to show, liberal democratic states owe a range of rights and protections to noncitizens inside their territorial boundaries in virtue of coercion, affiliation, and fair play, and such a system of disaggregated rights is consistent with equality.⁶⁴

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⁶⁴ For comments and discussion, I am grateful to the editors of this volume, as well as Seyla Benhabib, Linda Bosniak, Corey Brettschneider, Stephen Galoob, Bryan Garsten, Matthew Lister, Karuna Mantena, Hamsa Murthy, Paulina Ochoa Espejo, Jon Quong, Daniel Viehoff, Leti Volpp, and participants at the 2011 Law and Society Association meeting, the 2011 Princeton Program in Ethics and Public Affairs Seminar, and the 2012 Yale Political Theory Workshop.

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12

Are Refugees Special?

Chandran Kukathas

The stranger has no friend, unless it be a stranger¹

12.1 Prologue: The Morality of Hospitality

His vessel crushed by Poseidon's storm after leaving Kalypso's island, Odysseus finds himself washed up on the shores of Phaiakia and, eventually, the guest of the hospitable King, Alkinoos, to whom he tells the long story of the journey that led him from Troy to Ogygia. After reaching, and quickly leaving, the land of the lotus-eaters, Odysseus relates, he and his crew came to the "country of the lawless outrageous Cyclopes." Of the inhabitants he had this to say:

These people have no institutions, no meetings for counsels;
rather they make their habitations in caverns hollowed
among the peaks of the high mountains, and each one is the law
for his own wives and children, and cares nothing about the others.²

Yet when he found himself trapped in the cave of Polyphemus, he had no choice but to address his suspicious host, who demanded to know what these strangers were after, "recklessly roving as pirates do," and wondered if they too proposed to "venture their lives as they wander, bringing evil to alien people?"³ Odysseus at once tried to reassure the son of Poseidon that he and

¹ Sa'di, *The Gulistan or Flower Garden, of Shaikh Sa'di of Shiraz*, translated by James Ross (London: J.M. Richardson, 1823 [1258]), p. 297.

² Homer, *The Odyssey of Homer*, translated and with an introduction by Richmond Lattimore (New York: Harper Collins, 1991), Book IX, verses 113–15: p. 140.

³ Homer, *The Odyssey of Homer*, Book IX, 254–5: pp. 143–4.