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## Varieties of Citizenship

### Cover Page Footnote

Professor of Law, Rutgers Law School. This is a slightly edited version of the remarks I delivered at the New Dimensions of Citizenship Symposium at Fordham Law School. Many thanks to Jennifer Gordon and Sheila Foster for organizing a stimulating symposium, and to the editors of the Fordham Law Review for helpful assistance in preparing the remarks for publication.

## VARIETIES OF CITIZENSHIP

*Linda Bosniak\**

During this Symposium, we will use the concept of citizenship to talk about all kinds of things: about the enjoyment of rights of various kinds, about political and civic engagements, about experiences of collective identity and solidarity, and about the possession of formal national membership status or nationality. As you can see, “citizenship” is a term that does a lot of work—perhaps too much work. However, as requested by the organizers, I am going to address myself to the last understanding of citizenship I have mentioned: citizenship in the formal national status sense. I will do that by talking about a class of people who *lack* that status by legal definition—the class the law calls aliens. Understanding the condition of aliens is obviously important for practical reasons, given that, in this country and all over the world, increasing numbers of people find themselves living outside of their countries of nationality without citizenship status, often to their disadvantage. But attention to alienage is also theoretically important because it is a category in which different understandings of citizenship converge in challenging ways. Alienage is “about” citizenship as nationality, but it is also just as much “about” citizenship in its other registers.

Consequently, I will consider the relationship among the various understandings of citizenship as they converge in the alienage setting. Very briefly, I will argue that alienage is a site where citizenship’s contrasting normative impulses—universalist and exclusionary—meet and compete in ways which citizenship theory as a whole needs to attend to.

My comments are mainly conceptual, but they are motivated by two convictions: first, that mainstream citizenship theory (including constitutional theory) is often too internally focused and needs to pay more attention to national borders; and second, that the operation of borders implicates some of the deepest questions of equal and democratic citizenship that we face today.

To set the stage, I want to say a word about citizenship’s analytical orientation. Citizenship is an idea—or an optic—that looks both inward and outward. On the one hand, we use the term to talk about social and political

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relationships existing among people already assumed to be national community members, at least nominally. When we talk about struggles for “social citizenship,” the commitment to achieving “equal citizenship,” or the demands of “democratic citizenship,” we are usually talking about the nature and quality of relations among those understood to be part of some pre-constituted national society. (That is not to say we cannot talk about citizenship *across* borders—I think we can—but the idea of transnational citizenship remains marginal<sup>1</sup> and my current focus is on mainstream legal and political theory.)

Yet although citizenship is often inward-looking, it also sometimes faces outward as well. After all, we also use the term “citizenship” to talk about borders—the borders that divide this membership community from the world beyond. This is the citizenship of passports and nationality; it is the citizenship which designates some people as national members and others as national outsiders and limits the entry of those outsiders into the national territory.

The fact of citizenship’s dual analytical orientation can often be confusing because it is not always clear which sort of “citizenship” is at stake in any given conversation. For instance, when you hear someone talking about “citizenship rights,” it is not always apparent what the term’s reference is. Are these the rights that we understand individuals in liberal democratic societies to be entitled to—the rights that are denied to those we call “second-class citizens,” or are they the rights that a person possesses by virtue of holding the legal status of citizenship—the rights denied to aliens? Sometimes these are the same thing, but not always. Think of *Plyler v. Doe*. The educational right at issue was surely a right of “social citizenship,” yet, of course, the specific beneficiaries involved were status noncitizens—undocumented noncitizens, for that matter.<sup>2</sup>

But beyond this analytical confusion, citizenship’s dual orientation also presents us with certain challenges at the level of normative theory. Implicit in any discussion of citizenship is the question, “Who?” Who exactly is entitled to claim citizenship? Who are citizenship’s rightful subjects? When we ask these questions, it turns out that the inward-looking understandings of citizenship and the border-focused understandings tend to provide very different answers.

In its inward-looking mode, citizenship is usually understood to stand for the inclusion and recognition of “everyone.” This is what the political theorist Iris Marion Young called the “ideal of universal citizenship.”<sup>3</sup> It is, notoriously, a failed or unachieved universality in many ways. But universalism in the form of liberal-egalitarianism—in the form of an

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1. See generally Linda Bosniak, *Citizenship Denationalized*, 7 Ind. J. Global Leg. Stud. 447 (2000).

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

3. Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 Ethics 250 (1989).

inclusionary, anti-caste ethic—is assumed to be the relevant normative benchmark.

In contrast, citizenship in its border-conscious sense is usually understood to entail a necessary degree of exclusivity and boundedness. Citizenship of a nation presumes the existence of national outsiders; and, as an institution, citizenship works to keep many people out. In this context, exclusion is not apologized for; it is citizenship's normative core.

Now, if I were to ask you how it can be that citizenship stands for both universalism and boundedness simultaneously—is there not a contradiction here?—you might well respond that there is no paradox at all. It is simply a matter of distinct jurisdictions. Citizenship stands for inclusion of persons inside the community and exclusion of strangers at the community's edges. These contrasting normative orientations apply in different spheres and are perfectly complementary.

This conception of citizenship as jurisdictionally divided, as hard-on-the-outside and soft-on-the-inside, is widespread and makes a certain intuitive sense.<sup>4</sup> Yet, it is problematic for at least two reasons. For one thing (and I can only gesture at this now), it raises crucial questions about the legitimacy of citizenship's hard outer shell. From a liberal egalitarian perspective, why should we accept national exclusion at all?

Moreover, even if we concede the legitimacy of borders, there is another problem with the account: Its empirical premises about jurisdictional separation are untenable. The fact is that citizenship's exclusionary commitments are not always confined to the community's territorial edges; rather, citizenship's "border" operates on the territorial inside as well. Indeed, it is the internalized border that defines aliens *as* aliens, that imposes conditions on their presence, and that claims the authority to detain and deport them in various circumstances. It is also the internalized border that is invoked to justify discriminatory and marginalizing treatment of noncitizens, or aliens, in a variety of contexts. So the border is not just "out there"; it is in here as well.

On the other hand, it is important to understand that aliens are not *wholly* defined by this internalized border. They are also sometimes treated as subjects of the universalist commitments that animate citizenship in its inward-looking mode. In this country and elsewhere, a great many important rights—constitutional rights, but also common law rights and statutory rights—are extended not merely to status citizens but to all territorially present persons, including aliens. That is true whether they are here legally or not. For this reason, the apparently self-evident notion that "citizenship is for citizens" is not always true: Noncitizens are also the subjects of citizenship in some respects.

What I want to emphasize, therefore, is that alienage is a site where citizenship's contrasting normative projects intersect—it is a space of

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4. For extensive discussion of this conception of citizenship, see Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2006).

jurisdictional overlap (or concurrent jurisdiction, if you will). And in this space, these normative projects endlessly compete for primacy. As it turns out, the border very often prevails, because it has de facto trumping power: The possibility of deportation keeps many noncitizens, especially the undocumented, from enforcing the rights that they are formally guaranteed. Additionally, the border is often accorded a kind of institutionalized trumping power through the so-called plenary power doctrine in immigration law, pursuant to which the government's border control authority takes precedence over the rights of individuals. Still, the scope and impact of the border are not absolute: They remain constrained, to some degree, by operation of equality norms associated with citizenship in its universalist mode.

Understanding this interplay helps us to understand the push and pull of some of our current debates over the status of immigrants, from drivers' licenses to disaster relief to local police enforcement of immigration law. These debates are invariably structured by disagreements over the legitimate scope of the national border as a regulatory domain. At stake is the question of how far into the lives of aliens the border can, and should extend. Advocates for immigrants strive to *insulate* noncitizens from the action of the border in the name of equality and community—to build firewalls against the internal operation of the border through noncooperation policies, non-reporting policies and similar efforts. Meanwhile, anti-immigrant activists do everything they can to tear that insulation away and give the border full reign.<sup>5</sup>

I began this essay by saying that paying attention to alienage is theoretically important for citizenship scholarship as a whole. It is important analytically for some of the reasons I have described, but it is also important for normative reasons—and I will conclude with a word on that. The status of aliens is, I believe, inherently challenging for citizenship theory. It is challenging because, on the one hand, the kind of marginalization experienced by aliens often appears unjust from within an equal citizenship framework. But it can also sometimes appear necessary, since (the argument goes) without the operation of national boundaries, there could be no functioning political community within which universal citizenship can be pursued. On this view, we can certainly work to make citizenship status easier to obtain, and we can make sure noncitizens receive important basic protections to the extent they remain noncitizens, but at the end of the day, not everyone who sets foot in the country is going to be granted immediate and automatic citizenship, and so the exclusions inherent in alienage are, to some extent, inescapable.

I recognize the force of this argument—but I do not think that can be the end of the conversation. We know that historically, the ideal of universal

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5. See Linda Bosniak, *Confidentiality Policies, Reporting Requirements, and Enforcement Mandates: Contending Approaches to Unauthorized Immigration*, in *Debating Immigration* (Carol Swain ed., forthcoming 2007).

citizenship has served as a powerful resource for emancipatory struggles by various outsider groups. The ideas of equal citizenship and democratic citizenship have been invoked to support breaking down social barriers—barriers whose dismantling originally seemed unthinkable. Today, the question we are faced with is how far this universalizing dynamic can extend. Can it extend, in particular, to the national border itself?

The conventional answer is that the border lies beyond citizenship's universalist range; the border *frames* the map but can not itself be on it. I am attracted to a different reading, one that views national borders as in need of dismantling like other boundaries that were once viewed as inevitable. On this alternative reading, we would deploy citizenship against itself; we would challenge national restrictions on movement and membership by invoking universal conceptions of citizenship against exclusionary understandings. I know this will sound utopian to many ears, but citizenship has always had a fundamentally aspirational quality. In fact, it is precisely this quality which, I believe, has made the concept so deeply compelling to so many—activists and scholars alike.

*Notes & Observations*