

Undocumented Persons and the Liberal State*

By John SW Park

SOCIETIES, MULTIPLYING OR SPREADING RAPIDLY, SOON covered the entire surface of the earth; and it was no longer possible to find a single corner of the universe where one could free oneself from the yoke and withdraw one's head from the sword, often ill-guided, that every man saw perpetually hanging over his head. Civil rights having thus become the common rule of citizens, the law of nature no longer operated except between the various societies, where, under the name law of nations, it was tempered by some tacit conventions in order to make intercourse possible and to take the place of natural commiseration which, losing between one society and another nearly all the force it had between one man and another, no longer dwells in any but a few great cosmopolitan souls, who surmount the imaginary barriers that separate peoples and who, following the example of the sovereign Being who created them, include the whole human race in their benevolence.

Jean Jacques Rousseau

Discourse on the Origin and Foundations of Inequality Among Men

In the months leading up to the November elections of 1994, the issue of undocumented immigrants spread across the borders of California. The state's ballot

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included a controversial law that would deny public education and public health benefits to the estimated 1.6 million undocumented immigrants residing in the state. Under Proposition 187, all government agencies and officials would also be required to report to the state Attorney General and to the INS those "suspected of being present in the United States in violation of federal immigration laws." The INS would then deport those found to be illegally present.¹ Despite these harsh provisions, or perhaps because of them, an overwhelming majority of voters formally approved Proposition 187.

But the passage of that law did little to settle the controversy about undocumented immigrants, and about their proper "place" in American society. On the one hand, undocumented persons clearly arrive in this country

without any legal permission, and as such, they are law-breakers by definition. On the other hand, the plight of undocumented immigrants often deserves sympathy. Many citizens recognize that one need not “do” anything to be undocumented. In other respects, these immigrants look, speak, act, and work just like American citizens, and they usually come here simply to live a better life.

But their condition and presence raise some obvious, but neglected, problems for liberal theorists. In the first part of this paper, I outline more precisely why undocumented aliens pose such a problem for liberal political theory at all. In the second, I present and then critique a consensualist approach to solving the problem in liberal societies, an approach proposed by Peter Schuck and Rogers Smith in their book *Citizenship Without Consent*. In the third part, I offer and then critique yet another approach, this one suggested by several other theorists, including Yael Tamir. Finally, at the end of this essay, I explore whether liberals can legitimately defend nations against outsiders without compromising important liberal values. I myself do not provide a positive answer to that question in this essay, either from within liberal theory or otherwise; but certainly, in a world in which the distinction between “member” and “stranger” increasingly matters, this is no easy matter, and principled solutions are exceedingly difficult.

I. Undocumented Aliens and Liberal Theory

IN *A THEORY OF JUSTICE*, JOHN RAWLS TELLS US THAT THE well-ordered liberal society is one where all persons are equals, where everyone has the same rights as everyone else and the same opportunities to take advantage of those rights.² In such an ideal society, persons live by principles of equality which compensate for “contingencies that are arbitrary from a moral point of view,” such that no one, based on a “contingency,” is “worth” more than another; in a liberal society, persons are committed to “treat one another not as means only but as ends in themselves.”³ If economic or social inequalities are to exist at all among these equals, they must do so under a principle of justice where these inequalities are “attached to offices and positions open to all under conditions of fair equality of opportunity,” and structured in a way that they are “to the greatest advantage of the least advantaged.”⁴ For Rawls, the well-ordered society is not just one where persons are equals and have equal liberty; it is also a place where persons have profound commitments to principles that account for the least well-off among them.

The presence of 1.6 million undocumented persons threatens, and challenges, this liberal ideal in several ways. First, whether they *should* be treated as equals or not, undocumented aliens *are not* equal to legal residents and citizens in a number of fundamental areas. They are without certain basic rights, as the debate around Proposition 187 made clear. Because they are here illegally, revealing any presence is an occasion for detention or deportation. Thus, unlike legal residents, undocumented aliens are without a “right” to speak; in a matter that directly impacts their lives, “the more visible [they] became, the more difficult [it was] to beat Proposition 187.”⁵ Persons spoke for them, but no one claimed to be speaking as an undocumented person, and for obvious reasons. The specific provisions of the new rule also suggested that undocumented aliens had no right to privacy. By ordering all government units to report any information that could reveal illegal sta-

tus, regardless of whether such information pertained to immigration, Proposition 187 directly contradicted federal rules designed to protect privacy.⁶ But no one spoke as though undocumented aliens had a “right” to privacy, while many did warn of how the new rule could impact the privacy rights of *citizens*.⁷ Thus, even if the right to speak and the right to privacy are crucial to a set of liberties that all persons in a liberal society ought to share, not all persons in this liberal society share them.

Secondly, other provisions of Proposition 187 obviously suggest that undocumented aliens have no “rights” to public health or education. Prior to the new rule, undocumented persons were already ineligible for most forms of government assistance; nevertheless, the new rule further underscores the idea that undocumented persons have no claims to society’s help. Governor Pete Wilson, in speaking for Proposition 187, said, “Illegal aliens do need health care and education. But it is the government in Mexico, not in Washington or Sacramento, that should provide them.”⁸ And even when it had defended undocumented children against a Texas

law that would have deprived them of public education, the Supreme Court in *Plyler v. Doe* said that those children had an “interest” in education, but not a “right.”⁹ Indeed, most commentators consistently speak of

“Both opponents and proponents of 187 had worried whether officials could accurately discern legal resident from alien.”

undocumented persons as though they have no entitlement to society’s resources, even though they acknowledge that undocumented persons *are* in fact among the least well-off in American society.

Yet, that these immigrants are treated as such pariahs is problematic for at least two reasons. First, almost everyone can acknowledge that in many cases, undocumented persons are often not responsible for their illegal status. In particular, undocumented children who come to this country with their parents do not come willingly, but are nonetheless treated as wrongdoers. Justice Brennan had recognized this problem in *Plyler*, and he had struck down the Texas law in question partly on the grounds that “[it] imposes its discriminatory burden on a legal characteristic over which children can have little control.”¹⁰ Similarly, opponents of the proposed California law had said that “[it makes] kids victims because adults haven’t enforced existing laws.”¹¹

In addition, many citizens do notice that undocumented persons are like themselves in important ways. In the debate around 187, conservative columnists had characterized them as “hard-working, tax-paying, minimum-wage gardeners and nannies.”¹² Entrepreneurs in the multi-million dollar garment and agricultural industries had claimed that undocumented workers were an indispensable part of their labor force, and many had vowed to ignore 187 once it passed.¹³ In fact, throughout California’s history, undocumented workers have been a critical source of cheap labor; they have always had a presence here.¹⁴ And most undocumented

persons in California have settled in local communities where they share the same ethnic and cultural ties to the legal residents who are already there. Given this fact, both opponents and proponents of 187 had worried whether officials could accurately discern legal resident from alien.¹⁵ Overall, because of their contributions to society, their continued presence here, and their cultural similarities to legal residents, some had argued that the “illegal” status of undocumented persons should be treated as a morally arbitrary, and thus legally irrelevant, characteristic.¹⁶

II. The Consensualist Approach

Sovereignty and Consent

FEW LIBERALS, HOWEVER, ARGUE FOR ABANDONING THE idea of national boundaries, or with it, the distinction between citizen and stranger. Rather, in their book *Citizenship Without Consent*, Peter Schuck and Rogers Smith offer a “principled way” to protect the US boundaries, specifically against illegal immigrants. Unlike some, Schuck and Smith phrase the problem as a serious threat to the nation. They warn that “the existence of a large, discrete population that is present within the political community but is ineligible not only for membership but also for many lesser forms of political participation in social life cannot fail to provoke continuing political turbulence.”¹⁷ But while they argue that undocumented aliens are a threat, they acknowledge the morally arbitrary nature of the Constitution’s Birth-Right Citizenship Clause. Under the Fourteenth Amendment, “one’s political membership is entirely and irrevocably determined by some objective circumstance.” By being born within US jurisdiction, one automatically becomes a member. “Human preferences do not affect political membership; only the natural, immutable circumstances of one’s birth are considered relevant.” Against prevailing law, which does seem to discount persons’ own decisions, Schuck and Smith offer an “essentially consensual ideal of citizenship.”¹⁸

Schuck and Smith begin their argument with a detailed history of the Birth-Right Citizenship Clause. They tell us that prior to the Civil War, citizenship rules were understood to embody notions of consent, much as in English common law. Officials and citizens in the United States commonly believed that “to be born a citizen, one must belong to a class eligible for naturalization.”¹⁹ This formulation which consciously excluded Native Americans and blacks, illustrates the then-prevalent idea that white men would consent to accept only other white men as free and equal citizens. The “dependents” of white men, white women, could “partake of citizenship,” even though it was commonly understood that this would not mean full membership. Generally, though, white men agreed only to accept other white men as citizens. Here, by showing how a dominant class of members deliberately withheld membership from various other classes of persons, Schuck and Smith claim that the process of granting citizenship has always had within it important elements of political consent.

Furthermore, Schuck and Smith insist that after the Civil War, federal officials were more concerned with finding an expedient way of absorbing and protecting newly freed blacks than with delineating more carefully the vague principles that had once restricted membership to whites. Fully aware of the tension between state and federal powers, they settled on birth within national borders as the ground for

determining membership. This rule would effectively undermine the Southern states' claim that *state* citizenship should determine whether one was a US citizen, and thus it would quickly guarantee political membership to a new class of persons — freed black slaves — whose fate was dangerously uncertain within the Southern states. Still, Schuck and Smith say that “the debates... establish that the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship.” They argue that despite the language of the clause, the framers intended just the opposite:

The framers intended to limit the scope of birthright citizenship. The essential limiting principle was consensualist in nature. Citizenship, as qualified by this principle, was not satisfied by mere birth on the soil or by naked government power or legal jurisdiction over the individual. Citizenship required in addition the existence of conditions indicating mutual consent to political membership.²⁰

Since the framers intended to facilitate *only* the political integration of freed blacks, Shuck and Smith claim that the Citizenship Clause was never intended to favor “objective circumstances” above political consent. Under the Fourteenth Amendment, the nation-state consented to accept *one* class of persons as members; but the framers did not, according to Schuck and Smith, intend to accept just anyone born within the territory, notwithstanding the language of their own rule.

Schuck and Smith then argue that under this reading of American history, undocumented immigrants pose a problem because they enter without the explicit permission of the pre-existing political membership. The fact that they are here violates a right that the nation-state has always had. Schuck and Smith argue that by having a fairly coherent idea of just who can be a member by birth, and by enforcing a strict naturalization law, the nation has been committed to accepting outsiders in a very deliberate fashion.²¹ Undocumented immigrants, then, are “poorly situated, morally speaking, to contest that policy choice.”²² As a further step to reclaim notions of consent, Schuck and Smith advocate the outright repeal of the Birth-Right Citizenship Clause, expressly to deny formal membership to the *children* of undocumented aliens. They write that “if mutual consent is the irreducible condition of membership in the American polity, it is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens.... If society has refused to consent to the membership [of undocumented aliens], it can hardly be said to have consented to that of their children who happen to be born here while their parents are in clear violation of American law.”²³

Finally, to make rules of citizenship truly consensual, Schuck and Smith advocate a policy by which those born within US territory are not automatically granted membership. All persons born to legal residents would be “provisional” citizens, “in the sense that they would have the opportunity upon attaining majority to renounce the citizenship if they so desired.”²⁴ When they come of age, all prospective members would have to declare formally their intent to become a member. Citizenship would become an “option guaranteed to all children of an American parent, whether born in or out of the United States.” No one would be forced to join. Thus, Schuck and Smith suggest that by making the decision available, membership would have greater moral weight; the occasion would allow all prospective

members to express explicitly their loyalty and commitment, both of which are important to the survival of the liberal state.²⁵

Accidents of Birth

FOR SOME LIBERALS, THE APPROACH SUGGESTED BY SCHUCK and Smith looks very appealing. Particularly for those who “reject the notion that one can find oneself with special responsibilities without having done anything at all to incur them,” Schuck and Smith’s scheme is especially interesting.²⁶ Given some of the demands that liberal societies make on their members — including obedience to a particular system of law, or the possibility of being drafted for military service — many persons here might welcome the choice to be a “non-member.” Also, Schuck and Smith make an argument for excluding undocumented immigrants and their children that some liberals might find compelling. Indeed, if we think of our laws as originating from a government by consent among free and equal members, it does seem as though we are not bound to tolerate, nor to help, any person who enters in violation of our settled, known will.

But in spite of these strengths, the consensualist approach to citizenship has its flaws. First, the approach simply moves the source of moral arbitrariness associated with citizenship rules from one site to another. Instead of territory, Schuck and Smith link prospective membership with parentage. But to be born to one set of parents — who happen to be legal residents or citizens — rather than another would still seem morally arbitrary. For a child to be born of American parents would give that child, according to Schuck and Smith, a special choice later in life to become a citizen of American society. Another child born in Mexico, or in Korea, does not have that choice for reasons that Schuck and Smith do not establish. One can glean that this has something to do with American parentage, and thus, with pre-existing connections to the nation; however, it hardly seems fair to allow one child a choice and deny it to the other, particularly when neither “did” anything to be born to one set of parents rather than another. Though they acknowledge the moral arbitrariness of birthright citizenship, Schuck and Smith still tie political membership to accidents of birth.

Moreover, the consensualist approach says nothing about another type of objection to formal arrangements of national membership. Even though members in a self-contained, well-ordered society might truly agree to pledge allegiance to one another, those who are not parties to the agreement may still question their moral commitments. For instance, while the leaders of the United States express commitments to human rights and to global justice for all, they also exhibit a certain willingness to fence in the nation, to protect its borders from those who seek protection for reasons of human rights, or justice, or just a better way of life. When the United States “gives the interests of [its] associates priority of various kinds over the interests of other people,” those who are not associates, not citizens or legal residents, can legitimately wonder why the nation should act like such an exclusive club:

[This] distributive objection sees associative duties as providing additional advantages to people who have already benefited from participation in rewarding groups and relationships, and it views this as unjustifiable whenever the provision of these additional advantages works to the detriment of

people who are needier, whether they are needier because they are not themselves participants in rewarding groups and relationships or because they have significantly fewer resources of other kinds.²⁷

Certainly, many undocumented immigrants are as destitute or as desperate as the worst-off American citizen. For these immigrants, Schuck and Smith do not provide any account of why their interests should count so much less than the interests of members. Moreover, this arrangement seems more unjust *within* the liberal state in light of some of the contributions many “non-members” make to *this* society; it hardly seems fair to claim that all of them deserve expulsion, or exclusion, when what they really want is to share what all “members” have a right to share unproblematically.

Not surprisingly, perhaps in answer to these objections, and perhaps to make membership more consensual than Schuck and Smith have proposed, some theorists have suggested something close to a policy of open borders. For example, like Schuck and Smith, Bruce Ackerman expresses a similar commitment to notions of consent, although Ackerman certainly expands the range of possible participants. He argues that what is distinctive about liberal states is that within their borders, citizens are committed to a set of common values and beliefs and that they pledge to engage in a continuing dialogue based on those shared principles. Thus, “in an ideal theory, *all* people who fulfill the dialogic and behavioral conditions have an unconditional right to demand recognition as full citizens of a liberal state.” This scheme might not fully satisfy the distributive objection; non-liberals might still protest. But Ackerman’s theory does not rely at all on accidents of birth. Under this “super-consensualist” view, thousands of immigrants could make a moral claim to live within US borders, provided that they consent to a set of principles, and express allegiance to “the national project.”²⁸

And yet, many liberals, and many others who are not so liberal, might find this too objectionable, and their objections have more to do with protecting a national *culture*, rather than the nation per se.

III. The Cultural Approach

Liberalism and Culture

IN HER BOOK *LIBERAL NATIONALISM*, YAEL TAMIR WRITES that with respect to maintaining the integrity of nations, liberals have a “hidden agenda.” Tamir notes that while they do express universal commitments to the moral worth of all persons, liberals maintain that nation-states have the right to control admissions and to treat their members with “favoritism.” But instead of using universalist principles to reject the moral foundations of particularist, national obligations, Tamir endorses an approach that *justifies* nationalist obligations by conceptualizing the nation-state as a kind of community.

On her first point, though, liberal commitments to culture seem hardly “hidden.” For instance, Neil MacCormick and Joseph Raz offer two similar accounts that underscore the relationship of nation and culture. MacCormick argues that “nations are constituted by a form of popular consciousness, not by a mode of legal organization”:

A nation is constituted by a relatively large grouping of people who con-

ceive themselves to have a communal past, including shared sufferings and shared achievements, from which past is derived a common culture which represents a form of cultural continuity uniting past and present and capable of being projected into the future.²⁹

MacCormick further says that “exclusionary sentiments” — such as those against undocumented immigrants — are not necessarily evil because, in excluding outsiders, members are not so much denying moral equality as affirming the possibility for associates to have meaningful commitments to each other, which in turn makes *universal* commitments possible. “It is... those who have a decent and moderate love of their own family, country, colleagues, co-religionists or whatever who can alone recognize as equally legitimate the love others bear for their own.”³⁰

Moreover, acknowledging these particularist loyalties might be important for other liberal values. First, if liberals are committed to the full development of persons, perhaps they must give all persons a comprehensive framework in which to make meaningful choices. Thus, Joseph Raz writes that “[encompassing groups and nations] a culture which shapes to a large degree their tastes and opportunities, and which provides an anchor for their self-identification and the safety of effortless secure belonging.”³¹ Protecting a national culture can mean, then, protecting the grounds upon which persons become free and autonomous.

“Other liberals seem to agree that, without particularist commitments to help sort through ‘the abstract humanity,’ everyone threatens to be overwhelmed by a sea of duties.”

Yael Tamir echoes all of these claims.³² She writes that “the terms of membership set by the liberal state thus reinforce the view of the state as a distinct historical community rather than a voluntary association.”³³ In addition, she underscores the need for “communal membership,” so that members can see “fellow members as partners in a shared way of life, as cooperators they can rely on.” She suggests that the sense of belonging is indispensable for liberal society:

Having developed this attitude, they cannot but care for other members, wish them well, delight in their success, and share in their misfortune. These feelings provide individuals with a reason to attend first to the needs and interests of their fellows. If the moral force of such feelings is denied, ruling out any special attention to fellow members, the social structure might collapse and we shall be left with isolated individuals and an abstract humanity.³⁴

What Tamir fears might be a “total isolation and indifference among the various subgroups” that would compose a multi-fragmented nation, a place *without* a common culture.³⁵ Other liberals seem to agree that, conversely, without particularist

commitments to help sort through “the abstract humanity,” everyone threatens to be overwhelmed by a sea of duties.³⁶ Neither nations nor persons could function coherently.

For Tamir and other liberals, this last concern is directly related to another commitment important to liberalism. By granting priority to fellow countrymen, persons can begin to learn to care for, and to help, others in need without being overwhelmed. Tamir writes that “communal solidarity creates a feeling, or an illusion, of closeness and shared fate, which is a precondition of distributive justice.” Tamir suggests here that although the solidarity might be an “illusion,” liberals should recognize it: “The community-like nature of the nation-state is particularly well-suited, and *perhaps necessary*, to the notion of the liberal welfare state.”³⁷ In other words, without “feelings of solidarity and fraternity,” persons would be hard-pressed to find reasons for reaching out to anyone.³⁸

Thus, Tamir concludes that for both moral and for practical reasons, liberals are justified in making distinctions between member and stranger:

Assuming that individuals have a right to preserve the uniqueness of their communal life, it would make sense to place some restrictions on membership and claim that we, who already belong, should do the choosing “in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have.”³⁹

For Tamir, given their own values, liberals ought to be liberal nationalists.

Multiculturalism, Nationalism, and History

WHETHER TAMIR OR OTHER LIBERALS WOULD CONDONE the provisions of Proposition 187 and other anti-immigrant initiatives around the world, one can only guess. Although many liberals did openly oppose the measure, many did not. But whether they actually did or not, the idea of liberal nationalism does explain to a large degree the appeal of various arguments to curb immigration generally and undocumented immigration in particular. The experiences of the last election are again an example.

About three weeks before the November vote, thousands of people held a mass demonstration in Los Angeles to oppose Proposition 187. The display of red and green flags, the speeches delivered in Spanish, and the enormous size of the crowd made some feel that “American values are over-run by an uncontrolled influx of Third World citizens.”⁴⁰ “To proponents of 187... the march was an outrageous display of Mexican nationalism that bolsters the case for reducing immigration.” A co-author of the initiative said that “any time they’re flying Mexican flags, it helps us.”⁴¹ To many, the march indicated that for some persons here, political or patriotic allegiances lay elsewhere. Also, partly in response to the demonstration, proponents of 187 characterized undocumented immigrants as bearers of an outlaw culture, not just because they came illegally, but because “illegals do not work at all,” but “burglarize our homes, sell dope, and steal and chop automobiles or send them across the border to be used as Mexican officials’ personal cars.”⁴² Exaggerations aside, proponents of 187 suggested that if American “cultural” values included respect for law, for hard work, for honesty, for a commitment to this nation and its symbols, or simply for personal property, undocumented immigrants were truly

unworthy strangers. As formal members of the nation, proponents of 187 portrayed themselves as citizens of “a community struggling to preserve its distinctive character.”⁴³ Tamir’s theory explains much in this regard.

But it, too, has normative problems. First, the cultural approach is vulnerable to both voluntarist and distributive objections. Consensualists like Schuck and Smith might argue that although members of liberal communities might feel strong attachments to one another, largely on the grounds of a common political or social culture, no one performs a conscious act to accept political obligations. To this argument, “liberal nationalists” like Joseph Raz might propose a right of exit: “people may migrate to other environments, shed their culture, and acquire a new one.”⁴⁴ Raz does not suggest, however, where such persons could go. On the other hand, for those who want to migrate to *this* culture, away from their own, Raz suggests that the right to protect culture against outsiders should have considerable weight: “the interests of members of an encompassing group in the self-respect and prosperity of the group are among the most vital interests.”⁴⁵ Here, protecting culture could outweigh individual choice.

To other distributive objections, liberal nationalists seem more ambivalent, and more vulnerable.

That one is born into a fulfilling cultural group or nation serves as the grounds for a right to enjoy the benefits of that culture or nation. For those *not* born into such circumstances, the liberal nationalist has little to say. Tamir says that “the morality of community justifies favoritism,” and that

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“liberal nationalism... justifies support for the right of individuals to prosper within their own communities.”⁴⁶ Therefore, if “membership is a matter of belonging, not of achievement,” and if the members of the community do not wish to recognize certain outsiders as associates, then the strangers have no claim to partake of a culture that is not originally theirs, despite their desire to benefit from that association.⁴⁷ Again, to protect culture, a liberal nationalist can reject “people who are needier.”

But this position leads to another set of concerns, when thinking about how the theory of liberal nationalism might apply to the specific problem of undocumented immigration in California. First, this is because, as I noted earlier, most undocumented immigrants in this state usually settle in local communities where they are *not* a cultural minority and where they are often gladly accepted and recognized as members. Given how diverse California is, that is hardly surprising; given that California will soon no longer be predominantly Anglo, no one should expect that to change. If undocumented persons come into contact with citizens who are

not culturally similar to them, it is often because the citizens employ them as “minimum-wage gardeners and nannies.”⁴⁸ But for the most part, that 1.6 million undocumented persons can live in California — and largely remain undetected — speaks to the degree to which they are just like us.

In other aspects of “culture,” undocumented persons do not appear to act much more differently than legal residents and citizens: in reality, these persons *do* work (usually in undesirable, low-wage sectors of the economy), and they *do* obey

the law (with one exception). In fact, most commentators agree that the rates of employment, criminality, and reception of public assistance for undocumented aliens who settle here are *lower* than for the general population.⁴⁹ Although the extent to which they strain public services is debatable, many studies strongly suggest

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that they do not consume more in public services than they pay in taxes.⁵⁰ Thus, even if a liberal state needs communal ties to facilitate commitments to distributive justice, undocumented immigrants may not be the ones who unduly strain either the ties or the haphazard system of “re-distributive justice” that we have.

And if undocumented immigrants and others occasionally express pride in their cultural heritage, it is not clear why that should be such a problem for a society purportedly committed to multiculturalism. In a way, those who oppose the presence of undocumented immigrants seem as though they are not concerned with protecting “culture” per se, but with protecting — desperately — one particular culture, in a state that has many. This is clearly impermissible for a liberal nation committed to multiculturalism. Joseph Raz tells us:

Multiculturalism requires a political society to recognize the equal standing of all the stable and viable cultural communities existing in that society.... A political society, a state, consists — if it is multicultural — of diverse communities and belongs to none of them.⁵¹

But if *cultural* borders are the ones that should count, as Tamir and other liberal nationalists suggest, then perhaps most undocumented immigrants *should* be allowed to remain in the United States, and most of their friends back home should also come. To avoid this possibility, liberal nationalists might suggest that the dominant cultural group within a multicultural society has a right to control, through immigration restrictions, their very own hegemonic culture. Fortunately, such an option is not one that most theorists would be willing to accept. To be fair to Tamir, she does address the xenophobic and racist tendencies that some critics

might attach to her theory, and she disavows them.⁵² Still, whether liberal nationalists can adequately address the particular problem of “borders” in such multicultural societies remains questionable, especially in a place with a history of one cultural group dominating others.

Finally, one last concern that further complicates the cultural approach is history itself. In some parts of the world, culture and territory are somewhat synonymous: we think, for example, of Irish culture as rooted in the landscape and history of Ireland. In such places, one might say, perhaps in sympathy with the liberal nationalist, that the culture and people “belong” there. But in places like California, where culture and territory have not been fixed, things become more complicated. In reality, most of the state’s undocumented immigrants are Mexican nationals. About a century ago, though, California was indisputably Mexican territory, acquired through a war of conquest. Of course, prior to belonging to Mexico, California was Spanish, and prior to that, Native Americans lived here. In large part, the history of California has been “indelibly tainted with past unjust conquest, genocide, colonialism, and enslavement.”⁵³ Here, as in other parts of the world, it is difficult to fix which culture rightfully “belongs” to this territory, given its history. Moreover, it does seem morally arbitrary, and strange, to solve this problem by privileging the culture that happens to have conquered the territory most recently. Whatever the “solution” may be, the problem is certainly an important one for liberals, including liberal nationalists.⁵⁴ But while they acknowledge the problem, and its importance, they rarely seem to address it at the level of theory. Very few do.

In his bid for re-election, Governor Wilson ran television ads showing undocumented immigrants running frantically across the state’s border; and in these ads, the narrator described the influx of these immigrants as an “invasion.” To appreciate the irony here, one *does* need an historical context.

IV. Liberalism and Borders

“An Unruly Set of Values”

IN THE END, THE PROBLEM OF UNDOCUMENTED IMMIGRANTS remains a pressing and unsolved one for politicians, for citizens, for the “strangers” themselves, and for liberal theorists. For the last group, the problem is particularly odd. In spite of their general commitments to be sensitive to morally arbitrary characteristics, both consensualists and liberal nationalists rely heavily on arbitrary factors to limit an incredibly important part of modern life: political membership. To be born on a particular part of the Earth, to a fortunate set of parents, or to a specific culture “is no deed of him who is born.”⁵⁵ Yet, in one way or another, all these theorists make much of it.

Liberal commitments to autonomy, and to choice, are also implicated in this problem. As far as political membership is concerned, consensualists may not be consensual enough, while liberal nationalists don’t seem too preoccupied with consent at all. If someone wants to leave her native culture or nation to travel to another, both consensualists like Schuck and Smith and liberal nationalists like Raz and Tamir might leave her fate to the discretion of the nation-state to which she wishes to settle. She can choose another nation-state, but that nation-state need not choose her, even if she is, culturally and in other respects, similar to the people she wishes to join — or at least, similar to some of them. And neither consensual-

ists nor liberal nationalists seem to answer this variant of both voluntarist and distributive objections — “why can’t she choose to be a member?”

Finally, in a more fundamental way, the problem of citizenship is complicated here by the peculiar history and circumstances of California, and the nation, which further challenge liberal commitments to equality and fairness. As Schuck and Smith point out, full membership in America has been, for most of American history, the monopoly of one socio-cultural group: white men. They consented to accept each other as members, while excluding others. In California, we have a history of conquest, genocide, and colonialism culminating in the establishment of a dominant white culture that exists, despite the best efforts at exclusion and expulsion, in the presence of other cultures. Yet members of that dominant culture were not always “members” or “dominant.” Strange, then, that so many of them should now claim that these new “invaders” don’t belong, while never examining why they do. Liberal theorists like Schuck and Smith do not really acknowledge these particular problems of history; liberal nationalists like Tamir recognize these problems, but do not address them. These omissions are troubling, especially if liberal societies are committed to fairness between nation-states, as well as within each one. In the end, it may be true that “liberalism may not yet have found the most satisfactory way of accommodating an unruly set of values, none of which we are simply willing to abandon.”⁵⁶ Still, the degree to which some liberals take leave of their own values is surprising, especially at the border. φ

Endnotes

*The author would like to dedicate this article to his mother as well as to Edward Park, Reiko Furuta, and Gowan Lee.

¹ Secretary of the State of California, California Ballot Pamphlet (Sacramento, 1994), p. 92.

² See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 11-16, 60-64.

³ *Ibid.*, pp. 510-511, 179.

⁴ *Ibid.*, p. 83.

⁵ Patrick McDonnell and Robert Lopez, “Some See New Activism in Huge March,” *The Los Angeles Times* (18 Oct 1994), p. B1.

⁶ For example, the Family Educational Rights and Privacy Act denies federal funds to “any educational agency or institution” that permits the release of education records of students without parental consent. FERPA, §1232(g).

⁷ One voter cautioned that the rule would eventually lead to a situation where “everyone carries citizenship papers and anyone who can’t prove his or her citizen status is in jeopardy of being reported.” See Brad Hayward, “Foes Sharpen Strategies on Immigration Measure,” *The Sacramento Bee* (4 Sep 1994), A1. When the right to privacy was first proposed, it was a fundamental right thought to belong to all persons; see Samuel Warren and Louis Brandeis, “The Right to Privacy,” 4 *Harvard Law Review* 193 (1890), and Dean Prosser, “Privacy,” 48 *California Law Review* 383 (1960).

⁸ Julie Marquis, “Wilson Blames Ills on Illegal Immigrants,” *The Los Angeles Times* (17 Oct 1994), p. B1.

⁹ *Plyler v. Doe*, 457 US 202 (1982), 221. See also Marianne Constable, “Sovereignty and govern-

- mentality in modern American immigration law," *Law, Politics, and Society* 13 (1993), 249, p. 261. On whether education is or isn't a right for citizens, see *Brown v. Board of Education*, 347 US 483 (1954), and *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).
- ¹⁰ Plyler (ref. 9), 220.
- ¹¹ Susan Ferriss, "Immigrant Ballot Issue Imperils Kids," *The San Francisco Chronicle* (9 Oct 1994), p. C1.
- ¹² Ron Unz and Mark Fiore, "Scaling the Heights of Irrationality," *The Los Angeles Times* (3 Oct 1994), op-ed., p. B7.
- ¹³ See Susan Ferriss, "Prop. 187," *The San Francisco Chronicle* (30 Oct 1994), p. A1; J. Edward Taylor and Thomas Espenshade, "Seasonality and the Changing Role of Undocumented Immigrants in the California Farm Labor Market," in Francisco Rivera-Batiz, et al., eds., *US Immigration Policy Reform in the 1980s* (New York: Praeger, 1991); and Linda Bozniak, "Exclusion and Membership," *Wisconsin Law Review* 955 (1988).
- ¹⁴ See Taylor and Espenshade (ref. 13); Elizabeth Hull, *Without Justice For All* (Westport, CN, 1985); and Bozniak (ref. 13).
- ¹⁵ See Marquis (ref. 8), and John Mack, "Is Black-Latino Friction a Voting Booth Issue? No," *The Los Angeles Times* (24 Oct 1994), op-ed., p. B7.
- ¹⁶ See R. George Wright, "Federal Immigration Law and the Case for Open Entry," 27 *Loyola Los Angeles Law Review* 1265 (1994), and Plyler (ref. 9).
- ¹⁷ Peter Schuck and Rogers Smith, *Citizenship Without Consent* (New Haven: Yale University Press, 1985), p. 3.
- ¹⁸ *Ibid.*, p. 4.
- ¹⁹ *Ibid.*, chapter 2, p. 68.
- ²⁰ *Ibid.*, p. 96.
- ²¹ *Ibid.*, pp. 92-94.
- ²² *Ibid.*, p. 99.
- ²³ *Ibid.*, p. 94.
- ²⁴ *Ibid.*, p. 117-118.
- ²⁵ *Ibid.*, p. 139-140.
- ²⁶ See Samuel Scheffler, "The Sources of Special Responsibilities" (unpublished article).
- ²⁷ Samuel Scheffler, "Families, Nations, and Strangers," *The Lindley Lecture* (Lawrence, KS: University of Kansas Press, 1995), pp. 6, 11.
- ²⁸ Bruce Ackerman, *Social Justice in a Liberal State* (New Haven: Yale University Press, 1980), pp. 88-90.
- ²⁹ Neil MacCormick, "Nation and Nationalism," p. 249.
- ³⁰ *Ibid.*, p. 253.
- ³¹ Joseph Raz, "National Self-Determination," *Journal of Philosophy*, 87 (1990), p. 448.
- ³² See Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), pp. 100-101, 110.
- ³³ *Ibid.*, p. 124.
- ³⁴ *Ibid.*, pp. 115-116.
- ³⁵ *Ibid.*, p. 110.
- ³⁶ See, for instance, Henry Shue, "Mediating Duties," *Ethics*, 98 (1988), p. 695.
- ³⁷ Tamir (ref. 32), 121, my emphasis. See also MacCormick (ref. 29), 251, and David Miller, "The Ethical Significance of Nationality," *Ethics*, 98 (1988), p. 654, both of whom agree with Tamir that "imagined communities" are morally relevant, however "imagined" they may be.
- ³⁸ Tamir (ref. 32), p. 124.

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- ³⁹ Ibid., 127. She quotes Michael Walzer, *Spheres of Justice* (Oxford: Oxford University Press, 1983), p. 32.
- ⁴⁰ Alicia Doyle and Antonio Olivo, "Proposition 187's Impact on Race Relations," *The Los Angeles Times* (4 Nov 1994), p. B2.
- ⁴¹ Ibid., and also McDonnell and Lopez (ref. 5).
- ⁴² "A Panoply of Emotions Over Proposition 187," *The San Diego Union-Tribune* (22 Oct 1994), letters to the editor, p. 7.
- ⁴³ Tamir (ref. 32), p. 127.
- ⁴⁴ Raz (ref. 31), p. 444.
- ⁴⁵ Ibid., p. 461.
- ⁴⁶ Tamir (ref. 32), pp. 114, 162.
- ⁴⁷ Raz (ref. 31), p. 446.
- ⁴⁸ I should note here that both senate candidates and both candidates for governor in the November 1994 election had employed undocumented workers at some point.
- ⁴⁹ See Hull (ref. 14), and Bozniak (ref. 13).
- ⁵⁰ See Frank Bean et al., eds., *Undocumented Migration in the United States* (Santa Monica and Washington DC, 1990); Milton Morris and Albert Mayo, *Curbing Illegal Immigration* (Washington DC, 1982); Hull (ref. 14); and Bozniak (ref. 13).
- ⁵¹ Joseph Raz, "Multiculturalism," in *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), p. 159.
- ⁵² See Tamir (ref. 32), pp. 93, 94, 160, 162. Her arguments, however, do seem to be about how nationalism need not be racist or xenophobic, and how nationalism can be compatible with liberalism at its best. Also, while Raz says that numbers do matter sometimes, he suggests that mutual respect for cultures would make this option undesirable. See Raz (ref. 51), p. 159.
- ⁵³ The quote is from Thomas Pogge, "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, 23 (1994), p. 199. For a depressing history of California, one that chronicles the "conquest, genocide, colonialism, and enslavement" that did occur here, see Tomas Almaguer, *Racial Fault Lines* (1994).
- ⁵⁴ See Tamir (ref. 32), pp. 123-124, and Rawls, "The Law of Peoples," in Stephen Shute and Susan Hurley, eds., *On Human Rights* (New York: Basic Books, 1993).
- ⁵⁵ This phrase belongs to Kant, "Essay in Theory and Practice," in Carl Friedrich, ed., *The Philosophy of Kant* (New York: Modern Library, 1949), p. 418.
- ⁵⁶ See Samuel Scheffler, "Liberalism, Associative Duties, and the Boundaries of Responsibility" (unpublished article), p. 27.

asking for papers and arresting illegals. What do Liberals think Arizona should do? Just let them run free? Approximately 100,000 persons are in Arizona. The vast majority are gentle immigrants who have no problem touching directly to the KKKlan with a Tan MESSYcans brutal immigration enforcement? dhirender · 3 years ago. 0. 2. Liberal state presupposes the existence of many groups and organisations and the characteristic feature of a liberal state is they are engaged in cooperation and conflict among themselves. These groups are termed in various ways such as "power elite" "ruling elite" etc. There are also many interest groups. A liberal state is sometimes called a pluralist state because of the plurality of ideas and organisations. A competitive party system is a very important aspect of a liberal state. The persons in charge of the trust have no power to violate the rules. In the same way we can say that a liberal state is to some extent a trust which performs certain duties. The state cannot do anything beyond what it has been asked to do. Is There a Liberal Right to Secede From a Liberal State? Matthew J. Webb - 2006 - TRAMES 10 (4):371-386. From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups? Menachem Mautner - 2008 - Theoretical Inquiries in Law 9 (2):609-642. 5. Immigration, Race, and Liberal Nationalism. John Exdell - 2007 - Radical Philosophy Today 2007:95-110. Liberalism and Fear of Violence. Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler V. Doe. Maria Pabon Lopez - unknown. Liberal Individualism, Autonomy, and the Great Divide. M. Andrew Holowchak - 2006 - Philosophy in the Contemporary World 13 (1):20-27. Liberalism, State, and Community. Peter Simpson - 1994 - Critical Review 8 (2):159-173.