EARNED CITIZENSHIP:

PROPERTY LESSONS FOR IMMIGRATION REFORM

AYELET SHACHAR*

** Forthcoming in 22 Yale Journal of Law & the Humanities _ (2010). Please do not cite or circulate without the author's explicit permission.*

Acknowledgments: The first draft of this Essay was written during my appointment as Jeremiah Smith Jr. Visiting Professor of Law, Harvard Law School. I would like to thank Yochai Benkler, Joseph Singer, Martha Minow, Jana Singer, Laura Kessler, Mark Graber, Michael Van Alstine, Gerald Neuman, Peter Schuck, Hiroshi Motomura, Deborah Hellman, Cristina Rodriguez, Lisa Austin, Barbara Fried, Rogers Smith, and especially Ran Hirschl for insightful comments and conversations. This paper also benefited from suggestions by workshop participants at Berkeley's Boalt Hall and Center for the Study of Law & Society; University of Maryland Faculty Workshop; and Stanford Law School.

* ©2010 Ayelet Shachar; Professor of Law, Political Science & Global Affairs; holder of the Canada Research Chair in Citizenship and Multiculturalism, University of Toronto. Comments are welcome: ayelet.shachar@utoronto.ca.

EARNED CITIZENSHIP:

PROPERTY LESSONS FOR IMMIGRATION REFORM

I. INTRODUCTION

At the heart of contemporary immigration debates lies a fundamental tension between the competing visions of "a nation of laws" and that of "a nation of immigrants." This is particularly evident in the American context.[1] The *nation-of-laws* camp maintains that people who have breached the country's immigration law by entering without permission (or overstaying their initial visa) cannot overcome this "original sin," even if they have lived on its territory peacefully and productively for decades thereafter. [2] The *nation-of-immigrants* milieu counters by reminding us that immigration is a vital component of the national self-definition of immigrant-receiving societies such as the United States, Canada, Australia and New Zealand—the "flesh of our flesh," as noted historian Bernard Weisberger once put it.[3]

For illustrative purposes, this article will focus on the United States, which annually accepts the largest intake of immigrants in the

---

[1] The literature on America as a "nation of immigrants" is too vast to cite. Notable contributions include John F. Kennedy's posthumously published NATION OF IMMIGRANTS (1964); ALEJANDRO PORTES AND RUBEN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT (3rd ed., 2006); ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY AND THE FASHIONING OF AMERICA (2006); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP (1998); OSCAR HANDLIN, THE UPROOTED: THE EPIC STORY OF THE GREAT MIGRATIONS THAT MADE THE AMERICAN PEOPLE (1st ed., 1951) (opening with the following statement: "Once I thought to write a history of the immigrants in America. Then I discovered that immigrants *were* America.") Historically, the nation of laws argument gained prominence in the late 19th century, culminating in influence in the 1920s, which saw a basic shift in the nation's immigration policy with the enactment of restrictive federal immigration laws and the assignment of quotas based on national origin (these were only removed in 1965). For an overview of these legislative changes, *see generally* EDWARD HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION LAW, 1798-1965 (1981); LAURENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3rd ed., 2005).

[2] The ideal of "a government of laws, not of men" is as old as the American republic itself. In fact, it predates it, appearing in the Massachusetts Constitution of 1780, Article XXX: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legal and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may a government of laws and not of men." This phrase is credited to John Adams who published articles referring to it in 1774 in the Boston *Gazette* under the pseudonym "Novanglus" and then of course had a hand in drafting the Massachusetts Constitution in 1779. *See* JOHN ADAMS, *NOVANGLUS* PAPERS, NO. 7 IN THE WORKS OF JOHN ADAMS 106, 230 (Vol. 4, Charles Francis Adams, ed., 1851).

[3] *See* Bernard A. Weisberger, *A Nation of Immigrants*, 45 AM. HERITAGE (Feb./March 1994)

world.[4] No less significant, the United States is currently in the midst of an acrimonious debate over immigration reform. Canada, too, might see similar debates erupt in the future given the rise of temporary workers' admissions that have skyrocketed in recent years.[5] If some of these temporary entrants remain beyond the terms of their initial visa, Canada might witness the establishment of a population that settles in the country for years yet remains prohibited from the protection of citizenship, for the regulations that govern the initial admission are specifically designed to bar the option of ascendance to citizenship and the fundamental protections (such as those against deportation) that come with it.

In terms of policy framing, the nation-of-immigrants position challenges the nation-of-laws perspective that certain entrants to a country should not be set on the road to citizenship. In today's immigration battles in the United States, it also focuses on finding a path to regularize the status of long-term resident noncitizens, an especially significant project given the estimated ten to twelve million undocumented migrants already in the country.[6] Many of those in the United States without status have U.S.-born citizen children who possess a legal right to remain in the country.[7] This makes the prospect of tearing up families and deporting them *en masse* as bleak as it is impractical.[8] Senator Charles Schumer, Chairman of the Judiciary Subcommittee on Immigration, made this point succinctly: although "people are strongly against illegal immigration, they are also just as strongly against turning their country into a 'roundup

[4] Canada, Australia and New Zealand have higher per-capita rates but lower absolute admission numbers. Today's foreign-born population in the United States accounts for approximately 12.9 percent of the population, 18.9 percent in Canada, 20.3 percent in Australia, and in 19.5 percent in New Zealand.

[5] In 2008, for example, Canada admitted almost 200,000 temporary foreign workers – the highest number recorded in recent years. See Citizenship and Immigration Canada, *News Release: Canada Welcomes a Record High Number of Newcomers in 2008* (Ottawa, Feb. 20, 2009).

[6] I use the terms "undocumented," "unauthorized" and "irregular" migrants interchangeably throughout this essay to refer to the situation of persons who either entered in breach of immigration laws or overstayed their initial visas.

[7] *See* Jeffery S. Passel and Paul Taylor, *Unauthorized Immigrants and their U.S.-Born Children* (Pew Hispanic Center, Aug. 11, 2010); *Latino Children: A Majority are U.S. Born Offspring of Immigrants* (Pew Hispanic Center, May 28, 2009). Nearly 1 in 10 American families are of mixed immigration status: at least one parent is a non-citizen, and one child a citizen. An estimated four million US citizen children have at least one parent who is an undocumented immigrant.

[8] *See* Mary Lyndon Shanley, *Enable Citizen Children to Keep Their Families Together*, BOSTON REV. (May/June 2009) (arguing in favour of allowing children citizens to be raised by their immigrant parents rather than live in a household in which the threat of deportation is ever-present).

republic.'"[9] While both sides generally agree on the latter, the main bone of contention between them is the terms of response to the former.

The nation-of-laws stance on this matter is firm and relies on an intuitive appeal: if unlawful admission (or unauthorized overstay) is wrong, then "why should people who violated the law be given an opportunity 'of converting to legal status and earning a path to citizenship'"?[10] Other proponents of this approach go further, arguing that such legalization or "[a]mnesty undermines the rule of law. In the first encounter these people had with our country, they broke our law."[11] Although bearing moral force, this position's Achilles heel is its reluctance to see anything *beyond* the first encounter. It also displays a want of viable alternatives, assuming (as I think we should) that a "roundup republic" option is both unrealistic and undesirable. Under the incumbent situation, "[migrant] workers who seek only to earn a living end up in the shadows of American life—fearful, often abused and exploited. When they are victimized by crime, they are afraid to call the police, or seek recourse in the legal system." Many, including government officials, have declared this situation "wrong" and "not the American way."[12]

The nation-of-immigrants perspective has a ready-made and potent response to these types of observations. According to its proponents, if America is to remain an open and welcoming nation, it must create a path for undocumented migrants to emerge from the shadows and gain legal status as part of a comprehensive—and humane—immigration reform project. This position is supported by a wide range of civil society, immigrant, labor, and interfaith organizations. Alas, an emphasis on compassion and human decency is unlikely to convince the hard line restrictionists that make up a section of the nation-of-laws bloc. They view any such concession as rewarding lawbreakers with "the most coveted asset on the planet—permanent residence in the United States."[13] Thus we are back to square one in this ideological standoff. The nation-of-laws and nation-of-immigrants positions appear irreconcilable, a dangerous prospect

---

[9] *See* Senator Charles Schumer, Chairman of the Senate Subcommittee on Immigration, Refugees, and Border Security, Remarks for 6th Annual Immigration Law and Policy Conference, Migration Policy Institute (Washington D.C., June 24, 2009).

[10] *See* FAIR's Response to Sen. Charles Schumer's Seven Point Plan for so-called "Comprehensive Immigration Reform" (June 25, 2009).

[11] Mark Krikorian, *Amnesty Again: This Country Should Have Learned—Apparently, It Has Not*, NATIONAL REVIEW (Jan. 26, 2004).

[12] *See e.g. Fact Sheet: Fair and Secure Immigration Reform* (White House, Jan. 7, 2004), stating that "[i]llegal immigration … creates an underclass of workers, afraid and vulnerable to exploitation. … Workers risk their lives in dangerous and illegal border crossing and are consigned to live their lives in the shadows."

[13] Krikorian, *Amnesty Again*, *supra* note _.

given the momentous social and political ramifications implicated in this tremendously high-stakes debate.

This essay proposes a way out of this stalemate, setting out a new theoretical framework that emphasizes the importance of *rootedness* as a basis for legal title. For those barred from legal membership under traditional principles of citizenship acquisition, the rootedness framework offers a path for earned citizenship arising from the existence of already established, real, and genuine ties toward the political community. The idea of emphasizing actual, continuous, and peaceful presence on a territory as the basis for legal title is here drawn from property theory and doctrine.[14] Despite the centrality of rootedness in these core legal arenas, this concept has not gained similar traction in present debates over immigration. This is an oversight that this essay seeks to address.

The idea of taking root as a basis for earning entitlement has been familiar to the common-law tradition for centuries. It was brilliantly captured in Oliver Wendell Holmes' resounding words: "a thing which you have enjoyed and used as your own for a long time, whether property or opinion, takes root in your being . . ., however you came by it."[15] Placing rootedness at center stage also fits with the growing recognition in law (from modern contract to property theory, family law to private international law) that changes in relationships and expectations over time often can necessitate shifts in legal status. It further offers a concrete legal method to fulfill the ideal of inclusive participation in a democratic society.[16] The emphasis on rootedness possesses yet another significant advantage: it holds the key to overcoming the nation-of laws *vs*. nation-of-immigrants standoff that has repeatedly frustrated attempts at comprehensive immigration reform.

Counter-intuitively, I argue that the way out of the immigration stalemate is to turn the restrictionists' argument on its head, demonstrating that not only as a nation of immigrants but also as a nation of laws, there is an obligation to provide a venue for regularizing the status of those who have already become part of the country's economic and societal fabric by virtue of establishing real and effective links to the community. The rootedness approach developed here has the benefit of relying not just on considerations of goodwill or human compassion, as most arguments in favour of legalization do. Instead, it adds a thus-far missing analytical link that

---

[14] *See infra* text accompanying notes _ -_.

[15] *See* THE ESSENTIAL HOLMES: SELECTION FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES 176 (Richard A. Posner, ed., 1992).

[16] *See infra* text accompanying notes _ -_.

reveals an existing legal basis for defending a regulated path to earned citizenship.

If we can demonstrate that even in the realm of *private* property—the ultimate Blackstonian bastion of "sole and despotic dominion"[17]—individuals who initially resided on a property without permission can later gain legitimate title to it under specified legal conditions, then a similar logic can apply with at least equal force when the title at issue is a government-issued new property-like good: namely, access to the *public* entitlement of political membership, or a state-dispensed good, rather than a privately held chattel.[18] This permits us to see earned citizenship in a fresh light: not as a handout or act of charity, but as a legal title that arises from the existence of already-established, real, and genuine ties to the political community.

The emphasis on rootedness animates a new legal principle, *jus nexi*, which I defend here as an auxiliary path for inclusion in the polity that could operate alongside the established principles of citizenship acquisition: by birth on the territory (*jus soli*, encoded in the 14th Amendment of the U.S. Constitution and the territorial birthright provision of Canada's *Citizenship Act*)[19] or birth to a citizen parent (*jus sanguinis*, established by statutory provisions for membership by lineage).[20] The *jus nexi* principle offers a remedy to some of the most glaring inequalities of the current situation in which those who are ineligible for a nation's citizenship according to traditional principles—despite sharing in its society and economy—remain shut outside the recognized circle of political members and denied the basic security and opportunity that is associated with full, legal membership.

The urgency of reform is undisputed. Almost everyone agrees that the current immigration system in the United States is "broken." To this we must add the realization that in a world of increased cross-border mobility, the traditional territorial (*jus soli*) and parental (*jus sanguinis*) principles for allotting membership no longer serve as sufficiently refined predictors for determining who shall actually reside in "this or that country."[21] This leads to significant problems of

---

[17] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Vol. 2, 1979) [1766].

[18] *See* J. W. Harris, *Private and Non-Private Property: What is the Difference*? 111 L. Q. 421 (1995).

[19] *Citizenship Act*, R.S.C. 1985, c. C-29, s. 3(a) [Canada].

[20] The statutory scheme governing the transfer of citizenship by parentage still bears residual traces of gender inequality: it distinguishes between men and women in the transmission of citizenship out of wedlock for a child born outside the United States. *See Miller v. Albright*, 523 U.S. 420 (1998); *Nguyen v. INS*, 533 U.S. 52 (2001). For commentary, *see* Rogers M. Smith, *Gender at the Margins of Contemporary Constitutional Citizenship*, *available at*

[21] *See* SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 141 (2004).

over- and under-inclusion.[22] My focus here is on the latter dimension, arguing that instead of merely focusing on the legalese of a person's immigration status, there must be a point in time in which the nexuses between right and duty, actual participation and membership status, social connectedness and political voice gain weight and sway. This approach enables the development of a legal framework that accounts for actual, on-the-ground (or "functional") ties that give rise to the *jus nexi* citizenship principle. I call this new principle *jus nexi*, because, like *jus soli* and *jus sanguinis*, it conveys the core meaning of the method through which political membership is conveyed: by connection, rootedness, or linkage.

The shift to *jus nexi* easily gains traction from the nation-of-immigrants position's familiar ideal of offering a fresh start to newcomers. The innovation of the rootedness argument lies, however, in its simultaneous reliance on a quintessential nation-of-laws rationale: the idea that we must have a rational and defensible legal system that determines who is (or ought to be) defined as a right-holder in the first place, and under what conditions. This is what distinguishes right from might, the rule of law from anarchy or tyranny. Without the provision of title and protection by law, as Immanuel Kant famously observed, we are doomed to a life of lawlessness where no one's freedom and liberty is ever secure.[23] The nation-of-laws argument can thus be "recovered" from the stronghold of its current restrictionist and doctrinaire vein. It is here that the conceptual borrowing from contemporary theory and jurisprudence in property proves most helpful. It permits developing an equitable or remedial basis for gaining political membership for those who cannot benefit from the existing citizenship and immigration principles and remain barred from naturalization under current law.[24] The *jus nexi* principle offers an improvement to the present setup: it accounts for the significance of an immigrant's actual community membership and the social fact of her attachment to the nation, rather than simply relying on the initial moment of entry that fails to account for subsequent immersion and changed expectations over time. This shift in perspective also allows for the highlighting of notions of

---

[22] I have addressed these over- and under-inclusion concerns in detail in *Children of A Lesser State: Sustaining Global Inequality through Citizenship Laws*, in NOMOS: CHILD, FAMILY, AND THE STATE 345-397 (Stephen Macedo and Iris Marion Young eds., 2003); AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 111-133 (Harvard University Press, 2009).

[23] *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (trans. and ed., Mary Gregor, 1998) (invoking Kant here is restricted to the connection between the rule of law and property, rather than endorsing his particular vision of property rights).

[24] *See United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898) (pronouncing that there are "two sources of citizenship, and only two: birth and naturalization.")

interdependence, acquiescence and reliance, as well as the importance of state action or omission in giving rise to a legal obligation.

As I detail in the following pages, the rootedness framework corresponds with the emergent emphasis on progressive or trusteeship notions of property, requiring that we "look to the underlying human values that property serves and the social relationships it shapes and reflects."[25] It permits a revival of earlier scholarly attempts to cross-fertilize notions of sovereignty with those of property, although my analysis reverses the arrows: I use concepts found in property and related private law fields to both inform and foster a discussion about the possibilities for *public* law reform of citizenship and immigration policy.[26] Deploying the influential terminology coined by Charles Reich almost half a century ago in his landmark article *The New Property*,[27] this essay demonstrates that citizenship itself has become a special kind of "new property" that guarantees security and opportunity to those fortunate enough to hold it. I also build upon my previous writings on the enduring worth of political membership in today's world, which highlights the global distributive implications of treating citizenship as a special kind of inherited entitlement.[28] Here I turn my gaze to the domestic arena, arguing that this framework of using analogous insights drawn from property theory yields unexpected insights for our thinking about membership in this context as well and provides the framework for exploring some creative solutions.

---

[25] *See* Gregory S. Alexander et. al. *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, §1 (2008-2009) [hereinafter Alexander, *Statement*]. *See also* Kristen A. Carpenter et. al. *In Defense of Property*, 118 YALE L.J. 1022 (2009) (defending a stewardship model of property).

[26] In the early twentieth century, the critical attempt was to impose notions of public law and accountability on private actors; a classic contribution in this vein is Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927). Today, we find a rich discussion that aims to bring considerations of public good and human flourishing to the analysis of private property relations. *See e.g.,* Alexander, *Statement.* Recent years have also witnessed attempts to explain the sovereign prerogative of regulating borders as grounded in property theory. *See e.g.,* KURT BURCH, PROPERTY AND THE MAKING OF THE INTERNATIONAL SYSTEM (1998); Anna Stilz, *Why Do States Have Territorial Rights?* 1 INT'L THEORY 185 (2009) (distinguishing between Lockean and Kantian accounts).

[27] *See* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). I should note that whereas Reich urged a reinterpretation of the due process clause, my aim is more modest: I propose an additional (remedial) venue for citizenship acquisition, which fully accepts and endorses the standard interpretation of the citizenship clause of the 14th Amendment as bestowing membership to *any* child born on the territory – with the narrow exception of those born to foreign diplomats. *See e.g.,* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996). As I explain below, the dilemmas affecting undocumented students arise in part from the fact that they cannot benefit from the citizenship clause because they were brought into the country *after* birth.

[28] *See e.g.,* Ayelet Shachar and Ran Hirschl, *Citizenship as Inherited Property*, 35 Pol. THEORY 253 (2007); SHACHAR, BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY, *Id*.

While the argument I develop bears immediate policy implications for contemporary debates in the United States, the analysis is intentionally cast in broader terms. It draws upon a set of illustrative comparative and international examples, as well as engaging with core insights from private law and contemporary democratic theory. This inquisitive method permits us to shed fresh light on some of the oldest and most fraught moral and legal dilemmas facing any immigrant-receiving nation: defining who belongs, or ought to belong, within the circle of full membership, and according to what criteria.[29] My discussion proceeds in two major steps. Part II develops the principle of *jus nexi* and its core implications by drawing upon the rich body of property jurisprudence and contemporary democratic theory, as well as reinvigorated definitions of membership in the local and international arenas. Part III portrays the human face of the present dilemma of immigration reform. It explores the case of young people without status (the "1.5" generation) who were brought into the country by their parents or guardians in breach of American immigration law, the situation of those who overstayed the terms of their initial admission visa and, finally, the most testing situation of all: those who entered without permission but who have resided in the country for decades. It then turns to application and institutional design, devising concrete legal responses to some of the most contested policy arenas in today's charged nation-of-laws *vs.* nation-of-immigrants debate.

II: *JUS NEXI*: ROOTEDNESS AS A BASIS FOR MEMBERSHIP

It is against this background that this essay recommends an important reform of current immigration law, encouraging a shift towards a *jus nexi*, or rootedness, principle of membership

[29] I make this observation as a factual and empirical statement, based on the operation of membership rules enforced by nation states in the real world around us. The conventional position is that each state has the authority to define and police its territorial borders and membership boundaries. For those who argue in favour of a normative global-cosmopolitan alternative, however, any legal regime that defines membership as bounded (i.e., encompassing less than the whole world population) is perceived as falling short of the ideal. There is a vast body of political and philosophical writings on these topics. Some of the most influential accounts in this vein include: MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-63 (1983), Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HAST. CON. L.Q. 915 (1994); PHILLIP COLE, PHILOSOPHIES OF EXCLUSION: LIBERAL THEORY AND IMMIGRATION (2000); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006); CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW (2008); PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008); BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS, *Id*.

acquisition.[30] Instead of making citizenship turn solely on the initial, almost frozen-in-time moment of entry, some proximity or nexus must be made between full membership status in the polity and an actual share in its rights and obligations. This requires us to look to the actual conduct of the person, taking into account not only the circumstances of his or her admission into the country but also the establishment of genuine ties and actual "stakeholding" in the political community.

Placing rootedness at center stage counters the absolutist stance that asks us to refer back to the initial act of unauthorized entry or visa overstay. The *jus nexi* call for exploring the actual, or functional, conduct of individual immigrants over time is consistent with the shift away from purely formalist conceptions of title that are familiar to us from other legal fields, from contracts to property to family law, where social-relational interpretations may grant protection to parties in non-traditional contexts.[31] In the same vein, equitable doctrines such as laches, constructive trusts, statute of limitations waivers, and estoppels—to name but a few examples—permit "making good" the imperfection or otherwise incomplete form of title acquisition. The kernel of these approaches is that rights may flow from the way a relationship functions rather than remain forever confined by its legal form.[32] The proposed *jus nexi* principle follows in this tradition and crafts a viable response to today's immigration stalemate. The defense of this route for regularization takes its practical cues, mostly by way of analogy, from the quintessential private law examples of earned title and equitable estoppels in the semi-sacred context of property. If there is a route to overcome the lack of papers in *that* context, surely there is a way to do so where the entitlement at issue is citizenship, a new property-like legal status that is dispensed and regulated by the government and is not "pre-owned" by any particular individual.

---

[30] This section draws upon SHACHAR, BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY, *Id*., at 27-33.

[31] In the family law context, *see e.g.,* Martha Minow & Mary Lyndon Shanley, *Revisioning the Family: Relational Rights and Responsibilities*, in RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 84-108 (Mary Lyndon Shanley & Uma Narayan eds., 1997) (proposing the grounding of family policy and law in a nexus of relational rights and responsibilities, as opposed to contractual and communitarian conceptions of the family. *See also* Jennifer Nedelsky, *Citizenship and Relational Feminism*, in CANADIAN POLITICAL PHILOSOPHY 131-146 (Ronald Beiner & Wayne Norman eds., 2001).

[32] *See e.g.* Jenni Millbank, *The Role of 'Functional Family' in Same-Sex Family Recognition Trend*s, 20 CHILD & FAM L. Q. 1, 1 (2008) (highlighting the prevalence of legal recognition offered to non-traditional family structures through the adoption of a functional family model in the United States, Canada, Australia and Britain).

A. Citizenship as New Property

Property is always subject to legal and philosophical contestation. As William Blackstone observed more than two hundred years ago, "[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property."[33] Invoking a conceptual analogy to social-relational property regimes therefore requires vigilance and clarification of the intended use of these charged concepts. As every law student surely knows, property is notorious for escaping any simple or one-dimensional definition. It is commonly recognized that "although property has to do with tangible and certain intangible 'things' property is not the thing itself."[34] Rather, it is a human-made and multi-faceted institution that creates and maintains certain *relations* among individuals in reference to things.[35] These relations have a special validity in law; a property owner has rights that are valid against the world (rights *in rem*). These are distinguished from rights *in personam*, which are only valid against a specific set of individuals, such as those with whom one has contracted. The *in rem* quality provides strong protection to entitlements that are defined as "property."

The protection of entitlement, in turn, relies upon collective recognition and enforcement. The collective dimension is important: property rights gain meaning only when they are connected to a system of law and governance that can enforce them.[36] As such, "property must be seen as a web of state-enforced relations of entitlement and duty between persons, some assumed voluntarily and some not."[37] Given its currency in the contemporary moral and legal landscape, the specific content and protection given to a property entitlement are subject to contestation. Property relations are thus never immune to reconstructive inquiry whether in law or in

---

[33] BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note __, at 2.

[34] JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL FRAMEWORK 1 (1998).

[35] For a classic exposition of this legal realist insight, *see* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). A detailed analysis of the legal-realist account of property is offered by JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

[36] *See*, *e.g.*, Crawford B. Macpherson, *The Meaning of Property*, *in* PROPERTY, MAINSTREAM AND CRITICAL POSITIONS 1 (Crawford B. Macpherson ed., 1978).

[37] *See* Thomas C. Gray, *The Disintegration of Property*, *in* PROPERTY 69, 79 (J. Roland Pennock & John W. Chapman eds., 1980). *See also* DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990). In theory, other levels of governance (those "above" or "below" the state level) can also fulfill this enforcement function. Furthermore, property scholars have traced how people concoct various common property regimes, even without a formal regulatory system. *See*, *e.g.*, Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEG. STU. 453 (2002).

philosophy. Following Wesley Hohfeld's seminal work, property relations are understood to establish a range of enforceable claims that are often described as a "bundle of rights."[38] Some of the most notable sticks in the bundle include the rights to use, to transfer, to delimit access, and so on.[39] As Guido Calabresi and Douglas Melamed observe in their classic *View from the Cathedral*, each society or legal system must define who has an enforceable claim in a given entitlement and must further determine which protections, opportunities, and decision-making processes become available to the title-holder. [40]

Modern theories of property apply to concrete and tangible objects (my car, your house) but increasingly also refer to a host of more abstract entitlements (shares in a company, intellectual property in the form of patents and copyrights, professional licenses, genetic information, even folklore practices). Changes in human relations and social values constantly modify our understanding of what counts as protected property.[41] Important questions of allocation come up when we begin to categorize certain relationships as legal property: *who* owns what, and on *what* basis? Ownership and possession of property affects people's livelihoods, opportunities, and freedoms.[42] Conflicting interests concerning access, use, and control of goods are therefore likely to arise, particularly with respect to items that are scarce relative to the number of claimants or demands that human desires place upon them.[43] Jeremy Waldron usefully formulates property relations as

---

[38] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). For a more elaborate exploration of what is included in the "bundle," *see* A. M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE, A COLLABORATIVE WORK 107 (Anthony Gordon Guest ed., 1961).

[39] For a concise discussion on the form and substance of property, *see* Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517 (2003). For a comprehensive analysis, *see* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

[40] Calabresi and Melamed distinguish between property, liability and inalienability rules as offering different degrees of alienability and transfer of such entitlements. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[41] *See e.g.*, Kristen A. Carpenter, Sonia Katyal & Angela Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009); Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007).

[42] On property's connection to freedom of autonomy, *see* the classic elaborations by Kant and Hegel; for contemporary accounts, *see* Reich, *The New Property*, *supra* note __; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Jeremy Waldron, *Property, Justification, and Need*, 6 CAN. J.L. & JURISPRUDENCE 185 (1993); Antoni Domenech & Daniel Raventos, *Property and Republican Freedom: An Institutional Approach to Basic Income*, 2(2) BASIC INCOME STUDIES (2007); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2003).

[43] *See* Jeremy Waldron, *Property Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 3, 5 (Dennis Patterson ed., 1996).

offering a "system of rules governing access to and control of [scarce] resources."[44]

When applying these understandings to citizenship, perhaps the most obvious parallel is that immigration laws create precisely such a system of rules governing access to, and control over, scarce resources—in this case, membership rights (and their accompanying benefits). This gate-keeping function of citizenship is well-recognized in the literature on political membership: "Every modern state formally defines its citizenry, publicly identifying a set of persons as its members and residually designating all others as non-citizens. . . . Every state attaches certain rights and obligations to the status of citizenship."[45] Even in today's world of increased economic globalization, determining who shall be granted full membership in the polity still remains an important prerogative of the state. Gate-keeping is, however, never absolute or unrestrained, whether in citizenship or in property doctrine.[46] When we explore the realm of citizenship, we soon recognize that what each citizen holds is not a private entitlement to a tangible thing, but a *relationship* to other members and to a particular (usually national) government that creates enforceable rights and duties.

From the perspective of each member of the polity, re-conceptualizing his or her entitlement to citizenship as a special kind of property fits well within the definition of *new property*. This influential phrase was coined by Charles Reich, referring to public law entitlements as serving the traditional private law purposes of ensuring a baseline of security and dignity to citizens under market-based economies.[47] Unlike traditional forms of wealth, which were held as private property, valuables associated with the public title of citizenship derive specifically from holding a legal *status* that is dispensed by the state alone. Such entitlement to the status of membership in turn bestows a host of privileges and protections (as well as certain civic obligations) upon its beholders.

---

[44] Waldron, *What is Private Property? supra* note __, at 318.

[45] *See* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 21 (W. Rogers Brubaker, ed., 1989).

[46] It can be restrained by other liberties and compelling state interest. There are also internal limits to property rights. *See* Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 735 (2008-2009) [hereinafter Alexander, *The Social-Obligation Norm in American Property Law*]. *See also* SHACHAR, BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY, *Id*., at 33-35 (discussing gate-keeping in citizenship).

[47] *See* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964) (referring to governmental largesse, such as welfare entitlements, jobs, and subsidies as new property. Reich also used the example of occupational licenses as a form of new property, which creates enhanced earning potential for its holder).

Although the value of citizenship is communally generated, the entitlement conferred upon each member is individually held.[48] This intricate combination of individual and collective aspects makes citizenship a particularly complex type of new property-like entitlement with "priceless benefits," as the U.S. Supreme Court memorably declared, adding that "it would be difficult to exaggerate its value and importance."[49] In this legal structure, the state operates as generator and trustee of membership titles, with the critical enabling implications on the life opportunities of its individual members that these titles confer.[50] When citizenship is conceived in this way, the distinction between a narrow (or "rivalrous") notion of property and a broader one that emphasizes social relations and stewardship becomes highly relevant.[51]

B. Rivalrous and Social-Relational Conceptions of Property

The rivalrous conception of property has become synonymous in the law and economics literature with the values of tradability and alienability, otherwise identified with "sole and despotic" ownership.[52] According to this notion of property, each owner has near-absolute dominion over his or her assets and is free to dispose of these as he or she sees fits.[53] This vision of property rests on a particular conception of social life, according to which all inter-personal interactions are characterized as "trades," and thus everything may in principle be

---

[48] I thank Barbara Fried for this formulation.

[49] *See Schneiderman v. United States*, 320 U.S. 118 (1943).

[50] On the distinction between "private" and "common" property regimes (the latter is often referred to by different names, with somewhat different interpretations, such as "group," "collective," "communal," "mixed property," or "limited-access"), *see e.g.* DANIEL W. BROMLEY, ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY (1991); S.V. Ciriacy-Wantrop & Richard C. Bishop, '*Common Property' as a Concept in Natural Resources Policy*, 15 NAT. RESOURCES J. 713 (1975); J. W. Harris, *Private and Non-Private Property: What Is the Difference?*, 111 L.Q. 421 (1995); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999).

[51] The distinction between the narrow and broad conceptions draws upon C. B. Macpherson's extensive writings on property, in particular, his essay on "Human Rights as Property Rights" [24 DISSENT 72 (1977)]. The analysis is also influenced by the magisterial works of authors such as Gregory Alexander [COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997)] and Joseph Singer [*Paradoxes of Property*, *supra* note __].

[52] BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note __, at 2. For a familiar exposition of the narrow view, *see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007). For a sharp critique of this "commodified" understanding of property, *see* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

[53] *See* BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note __.

subject to market transaction.[54] This in turn relies on what has been termed a possessive individualism worldview, whereby social atomism and unrestricted commodification rule, and where self-interest is the core motivation for human action.[55]

In contrast, there is a competing and older vision of property that is regaining renewed attention, which I wish to bring to the fore in the context of citizenship, labelling it the broad (or "social relational") conception. Here, property is seen as part of a web of social and political relations, wherein people depend upon others "not only to thrive but even just to survive."[56] This view dates back to Aristotle and treats property not as an end in itself but as a means toward advancing human flourishing and building relations of trust.[57] As a collectively generated good that creates a complex set of entitlements and obligations among various social actors, citizenship offers a textbook example of re-emerging interpretations of property as constituting a web of relations that are imbued with obligations towards promoting the public good rather than merely satisfying individual preferences and entrenching existing power relations.[58] This broader perspective permits us to see citizenship regimes not only as generating intricate rules that define the allocation of membership, but also as bearing considerable effects on the distribution of voice and opportunity among those residing on the same territory who nevertheless do not share equal access to the government-distributed status of membership. These inequalities are particularly disturbing given that access to the said social good is determined almost exclusively by circumstances beyond our control: where and to whom we are born, or under what circumstances our parents crossed the border many years

---

[54] For a critical assessment of this vision of social life, *see* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

[55] The term "possessive individualism" was coined by Macpherson in THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962). The same behavior is often described by modern neoclassic economists (as well as law-and-economics scholars) as a vehicle for preference satisfaction, based on the assumption that there exists a "human propensity to be a self-interested, rational utility maximizer." *See* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 29 (1990).

[56] *See* Alexander, COMMODITY AND PROPRIETY, *supra* note __, at 2.

[57] *See* Alexander, *The Social-Obligation Norm in American Property Law*, *supra* note _; Dagan, *Exclusion and Inclusion in Property*, *supra* note _.

[58] For a concise overview, *see* Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001); Singer, ENTITLEMENT, *supra* note __. This emphasis on 'property as relations' is also consistent with various strands of feminist theory, which frequently foregrounds relationships and relatedness. For an illuminating discussion, *see* DONNA DICKENSON, PROPERTY IN THE BODY: FEMINIST PERSPECTIVES (2007). For the development of the concept of stewardship in relation to indigenous cultural property, *see* Carpenter, Katyal & Riley, IN DEFENSE OF PROPERTY, *supra* note __.

ago. To acknowledge property (and citizenship) as a human construct that is not impervious to change is to open up the existing system of distribution to critical assessment and innovation.

The answer to today's immigration problems lies not in "de-valuing" citizenship nor watering down its content nor declaring its imminent "death" or "withering away," as some have suggested.[59] Instead, what is required, and urgently so, is a diversification of the methods of membership title allocation—specifically, the adoption of a framework for inclusion that reflects a social relational conception of citizenship and thus complements the traditional *jus soli* and *jus sanguinis* mechanisms for defining the legal boundaries of membership. That foundation is defined here by rootedness, or the *jus nexi* principle of membership assignment.

C. Rootedness Defended

The *jus nexi* principle is informed by progressive reconceptions of property and related fields of law, spanning from contracts to family law to conflict of laws.[60] These influential accounts have rejected the traditional emphasis on static, blanket formalism, highlighting instead the value of an *actual, real, everyday and meaningful web of relations of human interaction*.[61] Instead of focusing on the legalese (of contract, marriage, and so on), this type of analysis looks to acts and conduct in light of the circumstances in which parties operate, in order to determine whether or not an implicit promise, property transfer, or permanent relationship has been established by deed.[62] This approach is widely employed in a host of contemporary legal arenas. Consider, for example, the status given to non-marital cohabitation relationships.

---

[59] PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008); Peter J. Spiro, *Whither Citizenship?* 24 FOCUS L. STUD. 1 (2009); Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMM. L.J. 1 (1989) (against devaluing); DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996) (arguing that postnationalism is breaking the bond between individual and state).

[60] *See*, *e.g.,* Jeffrey L. Blackman, *State Succession and Statelessness: The Emerging Right to an Effective Nationality under International Law*, 19 MICH. J. INT'L L. 1141 (1998) and text accompanying notes *infra* _-_.

[61] For an illuminating discussion, *see generally* Stephen R. Munzer, *Property as Social Relations*, *supra* note __; Alexander *The Social-Obligation Norm in American Property Law*, *supra* note _.

[62] See, e.g., Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 89 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001); Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL L.J. (2002); Stephen R. Munzer, *Property as Social Relations*, *supra* note __.

Instead of applying a formalist legal interpretation under which such relationships were categorically *un*recognized and *un*protected, today many jurisdictions treat them as generating a range of actual rights and obligations between partners as well as towards third parties, even without the couple entering into a formal agreement or undertaking registration. On this reading, factors such as the pooling of resources or the sharing of a household for an extended period of time become evidence of the seriousness of the relationship and, in turn, its legal validity. Another example is found in determinations concerning the best interests of the child for custody or visitation purposes, which today are governed by factual, attentive, case-by-case decision-making, rather than a reliance on fixed and gendered presumptions (as was the case in the past). The growing use of the constructive trust to achieve equitable distribution of shared property among partners based on imputed duties of good faith and fair dealing in the absence of a formal agreement offers yet another illustration of this larger trend.[63] Consider also the relevance of one's place of abode for determining tax liability for foreign residents, or in defining eligibility for local voting rights, admission to public schools, access to municipal services, and so on.

There is also a surprisingly rich body of comparative and international jurisprudence that provides support to the idea of reinvigorating definitions of membership by adopting a social-relational, genuine-connection criterion for defining citizenship. Consider the influential landmark 1955 *Nottebohm* decision of the International Court of Justice in which the ICJ held that citizenship is not "merely an empty title;" citizenship must reflect instead "a legal bond having as its basis the social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the [s]tate conferring [citizenship] than with any other [s]tate."[64]

---

[63] *See* Laura Weinrib, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.-C.L. L. REV. 207 (2002). For married couples, equitable division of property has become the norm that is applied even in states that have only presumptions of equal division of property or have failed to adopt the equality standard. *See* Carolyn J. Franz & Hanoch Dagan, *Properties of Marriage*, COLUM. L. REV. 75, 101-102 (2004). The American Law Institute (ALI) Principles of Family Dissolution Law has recommended the extension of rules of property division to domestic partners as well. *See* ALI PRINCIPLES, § 4.03, at 650. I thank Jana Singer and Laura Kessler for guiding me through the maze of these recommended rules.

[64] *See* Nottebohm (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 23 (April 6) [hereinafter *Nottebohm*].

In this particular case, the ICJ had to determine whether a citizen of Germany who had resided in Guatemala for most of his adult life, before acquiring a Liechtensteinian passport in an expedited fashion, was entitled to enjoy protection by one of these countries (Liechtenstein) against another (Guatemala). This was not an easy case. It required the international court to "pierce the veil" of membership title in the search for that something else that makes citizenship effective at the international law level vis-à-vis another polity. To address this challenge, the ICJ crystallized the principle of *real and effective citizenship*: namely, instead of just looking at the formal status of membership, the court explored and then gave preference to the actual connection "which accorded with the facts." In the *Nottebohm* case, the real and effective ties pointed to Germany (and possibly the place of fixed abode, namely Guatemala), but certainly not to Liechtenstein, in which Nottebohm had a tenuous connection at best. The more general lesson to be drawn from *Nottebohm* is that instead of relying on mere formal status of affiliation to determine citizenship, one must examine the social fact of attachment, the genuine connection of the person to the polity, as a valid and relevant basis for membership allocation. Similar developments are occurring on the ground at the local and municipal levels. Major European cities (Amsterdam is a key example) grant local franchise to non-citizens who reside in the metropolis for at least five years, asserting—based on factors such as employment, residence, and social attachment—their genuine connection to the local community. Those benefiting from these provisions are then entitled to have their interests and voices represented in citywide elections and to form political parties.[65]

The ICJ articulates several different factors that need to be taken into consideration in identifying whether a "real and effective link" has been established between an individual and a nation, granting that the

[65] In the United States, non-citizens are already voting in several local elections, for instance, in certain communities in Maryland. In Chicago, non-citizen can vote in school board elections. Other metropolitan areas, including New York City, have considered the adoption of non-citizen voting rights as well. These current practices revive a forgotten tradition in American history, which permitted non-citizens to vote in various local, state, and federal levels. *See generally* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (2006) (recounting this fascinating history). In Canada there is an ongoing campaign to extend the right to vote in municipal elections to non-citizens in Toronto, as well as in Vancouver. In Europe, all EU citizens have a treaty right to vote and run for office in municipal elections (according to local guidelines) irrespective of nationality. Many European countries have further extended a similar right to vote to non-citizens outside the EU. *See* DAVID C. EARNEST, OLD NATIONS, NEW VOTERS: NATIONALISM, TRANSNATIONALISM, AND DEMOCRACY IN THE ERA OF GLOBAL MIGRATION (2008) (analyzing why democracies give non-citizens the right to vote and offering empirical evidence from twenty-five countries).

importance (or weight) of these factors might vary from one case to the next. This list of factors, which is illustrative rather than conclusive, includes: "the habitual residence of the individual concerned but also the centre of his [or her] interests, his [or her] family ties, his [or her] participation in public life, attachment shown by him [or her] for a given country and inculcated in his [or her] children, etc." This center-of-interests test is pragmatic and social relational; it requires evidence of the establishment of a genuine connection between the individual and the political community. Such a connection need not rely on birthright; instead, it traces the attachment between the individual and the political community on the basis of factual membership and affected interests.

In the same vein, we find a string of influential U.S, court decisions emphasizing the significance of developing ties and identification with the country over time as a potential basis for bestowing citizenship and its benefits upon long-term residents.[66] This notion of *earning* entitlement reflects the center-of-interests idea: the longer the person resides in the polity, the deeper his or her ties to its society, the stronger the claim for inclusion and membership.[67] As one commentator observes, "no matter how strongly our formal laws deny it, our *conduct* [of having persons live, work and participate in a community over many years] creates the obligation."[68] This incremental process, in which one's center of life-gravity shifts, is central to the *jus nexi* principle. By focusing on a genuine connection of existence, interests, and sentiments rather than merely formal titles, *jus nexi* provides substance to the idea that real and genuine ties fostered on the ground deserve some form of legal recognition—here, by granting a path to earned citizenship based on the social connectedness that has already been established. Such an approach enables us to welcome into the *political* community those who have already become *social* members based on their actual participation in the everyday life and economy of the jurisdiction, and through their interdependence with its legal and governance structures. As Hiroshi Motomura eloquently observes, this emphasis on the ties that bind allows law to "take time into account by acknowledging and giving

---

[66] *See e.g*., *Mathews v. Diaz*, 426 U.S. 67, 80 (1976): "as the alien's tie grows stronger, so does the strength of his claim to an equal share in that munificence [the bounty that a conscientious sovereign makes available to its citizens]."

[67]This model is referred to as "citizenship as affiliation" by Motomura [AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006)]; *see also* Joseph H. Carens, *On Belonging: What We Owe People Who Stay*, 30 B. REV. (2005).

[68] *See* Gerald Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 696 (1981).

legal meaning to what has *already* occurred."[69] Instead of focusing on the initial moment of entry or asking whether a person happened to have been born in a given country, the more significant set of questions under the *jus nexi* framework would include the following: where he or she actually lives, where his or her center of interests lie, and where, as a result, to place "the legal bond [of citizenship] having as its basis the social fact of attachment."[70]

D. Democratic Accountability

The importance of real, genuine links to a community as a basis for membership entitlement and political participation is also increasingly recognized by political philosophers and democratic theorists. As Tomas Hammar observes, "[i]n affluent societies being a member of [the country's citizenry] is in itself a valuable social asset which is, however, taken for granted by those who already possess it."[71] The incredibly important property-like entitlement that we call citizenship "is distributed by [those already counting as citizens] to others, who have not got membership but who would like to get it."[72] Given this framework, the challenge is to determine the correct regulative principle for such distribution, which, as John Rawls once put it, "depends on the nature of that thing [distributed]."[73] In the context of our discussion, any new principle for bestowing citizenship needs to correspond better with the actual content associated with this legal status.

This rootedness principle recognizes the social membership of long-term residents who, as a result of their involvement and stake in the life of the polity, become part of the American community despite lacking the formal legal status of citizens. An equitable framework must therefore acknowledge this real and genuine connection in defining access to the collective good of citizenship for the individuals involved. We can no longer rely merely on transmission by birthright or ongoing exclusion based on the remote moment of entry, important and meaningful as it might be for determining the initial (lack of)

---

[69] Hiroshi Motomura, *We Asked for Workers, But Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 250 (2006). *See also* Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES IN LAW 389 (2007).

[70] *Nottebohm*, *supra* note _, at 23.

[71] TOMAS HAMMAR, DEMOCRACY AND THE NATION STATE: ALIENS, DENIZENS AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION 20 (1990).

[72] *Id*. at 20.

[73] JOHN RAWLS, A THEORY OF JUSTICE 25 (1999) [1970].

membership status.[74] Instead, any reflective principle of citizenship allotment that fulfills the ideals of democratic inclusion and accountability should take into account the interdependence that has developed over time between an individual and society.[75] This requires us to ask whether "an individual's long-term circumstances of life link her own well-being to a particular polity."[76] If the answer is affirmative, serious consideration must be given to granting her the security and dignity that comes with sharing in the collective rights and responsibilities of citizenship.

Returning to contemporary American jurisprudence, it is remarkable that we already have in operation the legal idea of "earning" membership through building actual, genuine ties to the political community. Under Section 240A of the Immigration and Nationality Act, for example, even persons subject to a formal removal order are permitted to ask the government for a waiver that would allow them to stay in the country.[77] In assessing such requests, immigration judges are instructed to consider factors such as the length of residence, family ties, evidence of value and service to the community, employment history, and the extreme hardship that might be incurred by the respondent and her family if deportation were to

---

[74] As a supplementary route to citizenship, *jus nexi* is designed to complement the traditional principles of *jus soli* and *jus sanguinis* rather than replace them. Those who have access to American citizenship by virtue of birth or standard naturalization proceedings will not need to resort to the *jus nexi* principle. A related structure of relief, which operates on a case-by-case basis, is found in Canadian immigration law which allows for "humanitarian and compassionate" grounds for cancellation of removal in those cases where the return to the home country would lead to excessive hardship. *See* Immigration and Refugee Protection Act [IRPA], S.C. 2001. c. 27, §§ 25-26 (Canada); *Ken Yhap v. Canada (Minister of Employment & Immigration)* (1990) 9 Imm.L.R. (2d) 243 (Fed T.D.) (holding that applicants are entitled to a full and fair review in the determination of humanitarian and compassionate grounds). In the United Kingdom, undocumented immigrants who have resided in the country for an extended period of time are allowed to seek an "indefinite leave to remain" by applying to the Home Office. In considering such discretionary grants, the Home Office takes account of compassionate circumstances, continuous residence, and the strength of connection to the United Kingdom. In these various jurisdictions, a criminal record almost always bars a discretionary grant to remain.

[75] *See* Rainer Bauböck, *Stakeholder Citizenship and Democratic Participation in Migration Contexts* in THE TIES THAT BIND: ACCOMMODATING COMPLEX DIVERSITY IN CANADA AND THE EUROPEAN UNION (Johanne Poirier & Paul Magnette, eds., 2009). On interdependnece, *see infra* note __-__ and the accompnaying text.

[76] *Id.*

[77] *See* Immigration and Nationality Act, 8 U.S.C. § 240A(a) (2009), which provides that, "The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." Those subject to a removal order based on an aggravated are not eligible for the waiver. A more lenient standard was in effect until 1996.

take place.[78] Related factors to be considered include the person's age, health, ability to travel, good moral character, and other "equities" that can weigh in favour of allowing long-term residents or close-family members to remain in the country and adjust their status, overcoming the specific grounds for their removal, which in certain cases may include unlawful presence in the country.[79] In situations where removal amounts to extreme hardship, the various "facts and circumstances of each case," as a leading opinion instructs, must be taken into account.[80] The ties that bind—factors sufficient to establish retrospective legal recognition—may include instances of civic engagement, such as being an active parent in a child's school, volunteering for community service, or caring for a needy relative.[81]

This kind of determination requires probing *beyond* the formal status of a person's admission into a country, looking to the actual conduct of the person in the context of her social attachments and community ties. This shift in perspective flows not just from crystallized positive legal rules and procedures, but also from the more foundational values associated with being a constitutional democracy—a regime that is committed to equality among its members and which ideally draws its legitimacy from including all those habitually affected by its laws and institutions in the decision-making body of members.[82] Categorically denying long-term residents even a chance at establishing eligibility for membership fails to serve this democratic ideal. It further risks transforming settled migrants into pariahs, thus eroding the very preservation of the society at large as a community of equals.[83] This should deeply concern not only those in the nation-of-immigrants camp, but also those who hold dear the principles of a nation of laws. We are all too familiar with the painful history of exclusion from citizenship, especially on the basis of race and gender that persisted in different forms for almost two centuries

---

[78] *See Matter of C-V-T* (1998 Board of Immigration Appeals); *Matter of Martin* (1978 Board of Immigration Appeals).

[79] These factors were listed in proposed rules issued in 1979 by the INS that sought to identify the relevant consideration for the discretion in removal matters. *See* Federal Registrar, vol. 44, 1979, 36191. These guidelines were later withdrawn, because it "is impossible to list or foresee all of the adverse or favourable factors which may be present in any given set of circumstances." Federal Registrar, vol. 46, 1981, 9119. For further discussion, *see* Maurice Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 S.D. L. REV. 144 (1975).

[80] *Matter of Cervantes-Gonzalez* (1999 Board of Immigration Appeal).

[81] *See*, *e.g.*, the case of *Maria Teresa Garcia De Nunez* (2007 Administrative Appeal Office).

[82] *See e.g.,* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 122 (1989). *See also* Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 NYU L. REV. 54 (1997) (articulating the importance of the democratic argument in justifying the United States *jus soli* principle).

[83] FISS, A COMMUNITY OF EQUALS, *supra* note _.

following the birth of the republic.[84] The United States, as American citizenship scholar Rogers Smith elucidates, now has a "potent 'obligation to include' that flows from a combination of . . . ethical commitments and [the country's] past and present roles in constituting the identities of many persons whom [it presently does] not recognize as full citizens or as members at all."[85] Just like the reliance interest in property,[86] as the interdependence deepens, and the undocumented immigrants (who have either entered without authorization or overstayed their visa) invest the communities in which they settle, the claim for moving away from today's hyper legalistic paradigm toward a *jus nexi* approach that acknowledges the social ties that have made them actual members of the polity as the basis for granting legal title, too, becomes stronger.[87] This shift is required not because of reliance on specific promises nor wrongdoing by the state, but because those who participate in a polity's daily economic and social life over a long period of time and whose aspirations and sense of self have been shaped by its laws, policies, and institutions, should be given a path to earned membership on which they can embark if they so wish. In the old jargon of private law reasoning, "in the eyes of equity," under these circumstances providing a route to membership (rather than advancing the formalistic resort to deportation) offers a more apt resolution, otherwise the more powerful party, the government, "fail[s] to do what is just."[88]

As historian Mae Ngai observes, older immigration policies that were once prevalent in American history (prior to the restrictive turn that begun in the 1920s), such as statutes of limitation that restricted the government's prerogative to deport those who have already settled in the country or various discretionary mechanisms for individuals to

---

[84] For critical historical accounts of American citizenship's racial and gendered exclusions, *see e.g.,* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440 (1998).

[85] *See* Rogers M. Smith, *The Principle of Constituted Identities and the Obligation to Include*, 1 ETHICS AND GLOBAL POL. 139, 140 (2008) [hereinafter Smith, *The Obligation to Include*].

[86] This term is drawn from Singer's influential essay with the same time, *see supra* note__.

[87] My analysis focuses on the legal basis for this claim, but others have developed moral arguments that call for restrictions (significantly broader than the ones I advance here) on the political community's authority to define its membership boundaries. *See e.g.,* RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES (2000); Joseph Carens, Doris Marie-Provine.

[88] For a comprehensive discussion of these equity doctrines, *see* STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 57-79 (2003).

adjust their status in cases of long-term residence, marriage to a citizen, or where deportation would result in hardship, served in the past as important correctives to the otherwise harsh effect of the black letter of the law and were seen at the time "as consistent with the general philosophy of the melting pot."[89] Today's democratic argument in favor of reviving such remedies relies less on the melting pot ideal and more on the view of individuals as agents who ought to be given an opportunity to participate in shaping the laws and political institutions that affect them most.[90] The point is to ensure that the government is fulfilling its obligation to include (in Smith's terminology) by providing a voice in the political process to those whose identity and life prospects have largely been constituted by its laws and institutions. This can be achieved by giving them an opportunity for equal citizenship.

Importantly, fulfilling these equitable obligations does not conflict with establishing or sustaining distinct political communities that define, uphold, and enforce membership boundaries and procedures for regulating immigration.[91] What it does demand, however, is that long-term residents who are already present in the country and have become part and parcel of its social fabric and economy are not permanently excluded from co-authorship of the laws to which they are subject. This is a variant of the oldest participatory and constructive themes of American citizenship, defining and redefining "We the People." [92] In a democracy, the beauty of the definition of the

---

[89] *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59, 60-90 (2004). Even today unauthorized migrants may qualify for discretionary relief in the form of "cancellation of removal" discussed above, although it is more difficult to obtain today than in the past due to legislative restriction of this form of relief. *See supra* notes _ - _ and accompanying text. *See* Hiroshi Motomura, *Immigration Outside the Law,* 108 COL. L. REV. 2037, 2047-2055 (2008) (describing different avenues for unauthorized migrants to qualify for lawful status: individual grants based on family relationship with U.S. citizens or permanent residents or the needs of employers, discretionary relief, and the possibility that Congress may adopt a legalization program).

[90] *See e.g.,* DAHL, DEMOCRACY AND ITS CRITICS, *Id*.; Eisgruber, *Birthright Citizenship and the Constitution*, supra note __; Joshua Cohen, *Deliberative Democracy and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17-34 (Alan Hamlin & Philip Petit eds., 1989); BENHABIB, THE RIGHTS OF OTHERS, *Id*., at 220: "democracy ... [is] a form of government based upon public autonomy, namely that those subject to the laws are also their authors."

[91] For an influential articulation of this position, *see* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-63 (1983). Even scholars who hold a more cosmopolitan position than Walzer emphasize the tension between "democratic attachments" that may criss-cross borders and membership boundaries that are defined primarily by sovereign territorial units (operating alone, or in concert, as in the EU). *See e.g.,* Seyla Benhabib, *Borders, Boundaries, and Citizenship*, 38 PS POL. SCI. & POL'Y. 673 (2005).

[92] As Smith acknowledges, however: "The US Constitution was written behind closed doors by less than five dozen white Christian men who lacked explicit authorization to do so. It nonetheless begins, "We the People of the United States . . . do ordain and establish this Constitution." This history makes it reasonable to question how far the American

people or the citizenry body is that it is never closed or fully settled, especially not in diverse societies such as the United States. This acknowledgment in part fuels the intensity and at times ferocity of the nation-of-laws *vs.* nation-of-immigrants debate. The broad conception that informs the rootedness framework emphasizes the underlying human values that property and citizenship serve and the social relations that they shape and reflect. This makes ever more pressing the need to close the gap between the social reality of membership and the legal bar against admission, especially if we wish to avoid creating the reality of a permanent pariah class of non-citizens.[93] In this way, *jus nexi* reflects the idea of democratic inclusion, according to which those who are continuously and habitually subject to the coercive powers of the state must eventually be given the opportunity to gain a hand in shaping its laws.

E. The Ties that Bind

To define membership in a manner consistent with the concept of rootedness, we can no longer focus only on the *moment of entry* as determinative of legal status. Instead, *jus nexi* demands that we focus on the "actual relationships the individual has developed with a society: a family, friends, a job, association membership, professional acquaintances, opportunities."[94] This illustrative list of factors was defined many years ago by Alexander Aleinikoff, one of America's most prominent immigration and citizenship law scholars. It can be further extended and updated to include additional connecting factors such as volunteering on school boards, providing community services, contributing to the work of religious organizations, or related activities in civil society. This more varied set of links is designed to ensure a more diverse pool of potential recipients; if, for example, only paid participation in the labor force or business ownership are counted towards proof of establishing the social fact of membership, then we run the risk of disadvantaging stay-at-home parents (particularly women) and others whose life circumstances may prevent them from fully engaging in the formal, paid marketplace. With this more

---

Constitution was genuinely constituted by the American "people"—but it undeniably played a prominent role in constituting such a 'people.'" *See* Smith, *The Obligation to Include*, *supra* note __, at 139. For a powerful account of how the Framers could claim to speak as "We the People" despite not being representative of them, *see* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 4-53 (2005); on proclaiming higher law in the name of "We the People," *see* BRUCE ACKERMAN, WE THE PEOPLE: VOL. 1 FOUNDATIONS (1991); WE THE PEOPLE: VOL. 2 TRANSFORMATIONS (1998).

[93] FISS, A COMMUNITY OF EQUALS, *supra* note _.

[94] T. Alexander Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983).

expansive definition of actual communal ties, even the severity of an initial unlawful entry may be partly diminished over time if one's status is later adjusted; the deeper the interdependence, the stronger the claim for embarking on the social-relational rootedness-based path to earned membership.[95] These examples illustrate that the logic of rootedness is already reflected (without being so named) in our legal conceptualization of membership. This is significant in defending the application of the principle of genuine connection, or *jus nexi*.

An emphasis on rootedness is important for another reason: it offers a coherent explanation for certain aspects of legal doctrine and positive law that otherwise appear sporadic and without proper conceptual basis. Consider the fact that a period of actual and continuous residence in the United States has been part of the process of acquiring post-birth citizenship in America ever since the enactment of the original Naturalization Act of 1790, one of the most significant and early statutes adopted by Congress. The 1790 Naturalization Act held that a newcomer of good moral character who was willing to take an oath to support the Constitution had to first establish that he had "resided within the limits and under the jurisdiction of the United States for the term of two years" before gaining eligibility for citizenship."[96] The residency requirement was later increased from two to five years,[97] and despite the many ups-and-downs in the history of immigration to America, this five-year requirement has proven remarkably stable and persistent.[98] It remains prescribed by U.S. naturalization law to this date.[99]

With the *jus nexi* perspective firmly in view, we can see additional indicators of the significance of actual ties in establishing eligibility to citizenship in other provisions of immigration law. For instance, the United States has already adopted what we might refer to as a rootedness requirement with respect to its citizens who live abroad. An example of this is the child born to American parents living outside of the United States who acquires citizenship at birth only if one of its

---

[95] As a supplementary route to citizenship, *jus nexi* is designed to complement the traditional principles of *jus soli* and *jus sanguinis* rather than replace them. It will not affect the legal status of those who have access to American citizenship by virtue of birth or standard naturalization rules. *See supra* notes __-__, and the accompanying text.

[96] *See* Naturalization Act of 1790, 1 Stat. 103 (1790). The 1790 Act also reflected the deeply exclusionary racial and gender barriers of the time: its benefits were restricted to "free white persons." For critical accounts, *see supra* note __ and accompanying text

[97] *See* Naturalization Act of 1795, 1 Stat. 414 (1795). This change also required a filing of a three years notice of intent to apply for citizenship.

[98] The main exception to this remarkable continuity is found in the more restrictive 1798 Act, which increased the residency requirement to 14 years in the United States and five years in a State. This more demanding standard was repealed in 1802 and the 1795 standard of 5 years of residence was restored.

[99] Immigration and Nationality Act §316; 8 U.S.C. § 1427 (2009).

parents resided in the United States at some time prior to the birth. In other words, the parent must have fulfilled the genuine-connection requirement before he or she can transfer membership title to the next generation.[100] If one of the parents is a non-citizen, then U.S. law further specifies that the citizen parent must have been physically present in the United States for at least five years preceding the birth of the child, two of which must have been after the age of fourteen.[101] This formalizes into law the requirement that a person through whom the precious entitlement of citizenship is transmitted must have experienced the lived reality of "*being* a citizen." (The emphasis on the *experience* of actual membership permits avoiding charged identity and belonging questions about what content is given, or ought to be given, to the designation of being an American.) This legal requirement is typically fulfilled by making the United States the actual place of residence for a specified number of years.[102]

This is a more balanced approach than the one recently adopted by the Canadian government through amendments to the *Citizenship Act*, which now categorically deny the option for a Canadian born abroad to pass citizenship on to his or her children if the latter were born abroad too. A *jus nexi* requirement would, on the other hand, permit the revival of the previous Canadian legal position that held that a second generation child born abroad can acquire and uphold citizenship if meaningful ties are maintained between the parent and her (ancestral) home country, as evidenced by factors such as registering as a citizen or residing in Canada for a period of at least one year immediately preceding the date of application. Other ways to demonstrate meaningful ties under the previous law included the demonstration of adequate knowledge of one of Canada's official languages or employment in the Canadian public service, whether in the country or abroad. These various activities were legally interpreted as evidence of a sufficiently strong connection between the individual born abroad and the membership-granting political community, a substantial enactment of *jus nexi* principles unfortunately abandoned by the recent changes to the law.

---

[100] Immigration and Nationality Act, 8 U.S.C. § 301(c) (2009); *Weedin v. Chin Bow*, 274 U.S. 657 (1927).

[101] Sec. 301(g) of the INA [8 U.S.C. (2009)] provides that "[a] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than five years, at least two of which were after attaining the age of fourteen years."

[102] *Citizenship Act*, R.S.C. 1985, c. C-29, s. 8 and *Citizenship Regulations* s. 16(b) (prior to the Citizenship Act's amendments on 17 April 2009).

F. Earned Citizenship

Although prolonged residence typically plays an important role in defining real and effective links, *jus nexi* takes seriously the idea that inclusive, democratic citizenship should reflect a nexus between rights and duties as well as between membership and social attachment, rather than one that immediately ties long-term settlement with an interest in becoming a citizen. This last point distinguishes the principle of *jus nexi* from *ex lege*, or automatic naturalization for anyone whose presence in a polity is deemed permanent.[103] Like the *ex lege* idea, the *jus nexi* principle is normatively designed to shrink the gap between partaking in actual membership and gaining political voice; it views every long-term resident as a citizen-in-the-making. By contrast, *jus nexi* does not force membership upon anyone; it requires long-term residents to display both intent and effort to join the collective if they choose to embark on the path of earned citizenship. The rootedness principle creates a *presumption of inclusion* on behalf of those whose life-center has already shifted, but it requires individuals to act in order for this eligibility to affect their citizenship status. What is required here is not mere physical presence on the territory, but also the expression of will to become a full member. In this way, *jus nexi* differs from a conception of membership that makes territorial presence the all-or-nothing criterion.[104] It thus escapes the autonomy-diminishing aspect of an automatic, *ex lege* incorporation of individuals into the polity based on the sheer passage of time.[105]

In this respect, *jus nexi* allows both democratic accountability and political equality for those whose well being is directly affected by the legal authority of the polity—namely, those who are regularly subject to the full extent of its coercive powers. Related processes of gradual incorporation through participation in the life of the polity are familiar

---

[103] *See* RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES (2000) (arguing in favour or automatic incorporation into the polity after the passage of a fixed number of years). *See also* DORA KOSTAKOPOULOU, THE FUTURE GOVERNANCE OF CITIZENSHIP (2008) (offering a foundation for citizenship that relies on legal concepts of domicile).

[104] The rootedness approach, unlike the extreme versions of the nation-of-immigrants argument, does not assume that merely "landing" in the territory is sufficient for gaining access to membership. Presence in the territory importantly triggers extensive rights and recognition, but it does not automatically entail access to citizenship, which is more demanding than mere presence and residence, embodying a deeper bond and an experience of *becoming* a member. For an illuminating discussion of the importance of a person's "hereness," *see* Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQ. L. 389, 391 (2007).

[105] On this latter point, *see* Bauböck, *Stakeholder Citizenship and Democratic Participation in Migration Contexts*, *supra* note _. Another concern is that automatic formal "imposition" of citizenship title by the country of residence may potentially harm the status of the emigrant in the country of origin if the latter objects to dual nationality.

to us from the naturalization procedure, which typically requires a newcomer to fulfill a five-year mandatory residence requirement before she can apply for citizenship. The focus here is on the *experience* of membership, for which, in the words of one official report on citizenship, "there can be no substitute."[106] What *jus nexi* demands, then, is a closer correlation between democratic voice, factual membership, and citizenship entitlement. It offers a path for those whose lives have already become deeply entwined with the bounded community in which they have settled to enjoy full legal rights and protections, allowing them to earn the title of full and equal members.[107] Having explained how *jus nexi* operates in theory, I will now provide concrete examples of the principle at work.

III. APPLICATION AND INSTITUTIONAL DESIGN

We have already witnessed the profound human toll created by the current stalemate.[108] Instead of raising our arms in despair, the adoption of a *jus nexi* principle could assist in overcoming the core objection against earned citizenship: namely, the argument that we must revert back to an *initial* act of unlawful admission or overstay as if it conclusively prohibits the eventual acquisition of legitimate title. This is not always the case in the domain of private property; neither should it be the answer when dealing with the public task of allotting entitlement to citizenship in the political community itself, with the accompanying protections and obligations of full membership.

A. *Undocumented Students: Opening the Golden Gate for Members of the 1.5 Generation*

The previous sections have emphasized the importance of establishing links to the political community as the basis for making claims for legal membership by those who are otherwise barred from admission. These concerns are particularly evident in regard to young persons who were brought to the country as children by their parents or guardians in breach of US immigration laws.

---

[106] *See* Canada *Report of the Standing Committee on Citizenship and Immigration* 1994, 12.

[107] Note that membership here is not automatically bestowed on the person as in a "*jus domicili*" regime. *See* KOSTAKOPOULOU, THE FUTURE GOVERNANCE OF CITIZENSHIP, *supra* note _, at 113-126. Instead, as in naturalization, the stakeholder resident must apply for citizenship and comply with its requirements. In this, it differs from the analysis offered by "territorial inclusion" scholars in the context of regularizing unauthorized immigrants' status. *See*, *e.g.,* RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE, *supra* note _.

[108] *See infra* text accompanying notes _ -_.

Each year, approximately 65,000 undocumented students who reside in the United States without legal status graduate from high school in similar circumstances: they have lived in the country for at least five years and have received much of their primary and secondary education here.[109] They were young babies or toddlers when brought to the United States by a parent entering without permission or by a family overstaying the time-limited period of a valid entry visa. In either case, the children, through no choice or fault of their own, become categorized as unlawful or undocumented migrants. The scholarly literature refers to these individuals as members of the "1.5 generation": "[t]hey are not the first generation because they did not choose to migrate, but neither do they belong to the second generation because they were born and spent [a brief] part of their childhood outside the United States."[110] Under current immigration law, there is no path to regularize their status.[111] Many members of the 1.5 generation "have been in this country almost their entire lives and attended most of their K-12 education here."[112] Yet, because they are in the country without legal status, "their day-to-day lives are severely restricted and their futures are uncertain. They cannot legally drive, vote, or work. Moreover, at any time, these young men and women can be, and sometimes are, deported to countries they barely know." [113]

The stalemate that surrounds comprehensive immigration reform, with its focus on the *initial* moment of entry, has not spared these "'innocent young people'," as one congressman put it, "who came to America by no choice of their own as children and [now] want to succeed in school and make better lives for themselves and their families."[114] Under current immigration law and policy, they are, categorically, excluded from citizenship. Adding a *jus nexi* route to citizenship that emphasizes rootedness as the basis for legal membership offers the most principled and practical hope for resolving their plight. Unlike adults who entered without permission, the case of the 1.5 generation—those who were brought into the country as children—is in principle easier to address because they never breached the law of their own volition. In today's poisoned environment, however, the hardliners in the nation-of-laws camp

---

[109] *See* Jeffrey S. Passel, *Further Demographic Information Relating to the DREAM Act* 1 (Urban Institute, Oct. 21, 2003); Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Migrants* 1 (Immigration Policy Center, October 2007).

[110] *See* Gonzales, *Wasted Talent and Broken Dreams*, *supra* note _, at 2.

[111] Legal proposals to address this situation have received bipartisan support since 2001 but have nevertheless repeatedly failed in Congress. *See infra* notes --.

[112] *See* Gonzales, *Wasted Talent and Broken Dreams*, *supra* note _, at 2.

[113] *Id.*

[114] *See* Stephen Wall, *Baca Bill Offers Path to Citizenship*, SAN BERNARDINO SUN, July 4, 2009 (quoting Rep. Joe Baca D-San Bernardino).

oppose the regularization of status even for this particular group, saying that it is "just another amnesty reward for lawbreaking."[115] The twist here is that children are being forced to pay the consequences of their parents' actions.

Consider the case of Alan:

> Back in the concrete suburbs of Los Angeles where he grew up, they call him 'Harvard'. He is the pride of the neighbourhood of children who grew up just as he did, bouncing from one crowded apartment to the next, sleeping on sofa cushions on the floor, wired to the constant threat of violence. Alan was not just a street-smart kid in a baseball cap but a gifted student who breezed through math problems and quoted Milton and Dante. He was a voracious reader, the high school salutatorian, and last month, he graduated from Harvard with a degree in humanities. But now Alan hit a dead end, because one night 19 years ago his mother led him across the Mexican border into California, making him an illegal immigrant.[116]

Alan is not alone. Juan Gomez has lived in this country since he was two years old, when his parents brought him and his three-year-old brother Alex from Colombia. They entered in 1990 with a valid six-month visa, but when it expired the family did not return to its war-torn country of origin.[117] Once in the US, the family filed for political asylum. Their case languished for years. After various appeals, the final decision came down in 2003: the asylum request was denied. By then, the brothers were 14 and 15.[118] Juan excelled at school. When his parents enrolled him at high school, no question were asked about his legal status thanks to the Supreme Court's 1982 landmark decision in *Plyer v. Doe*, which holds that public schools, both primary and secondary, cannot deny education to a student due to his or her immigration legal status (or lack thereof).[119] As an honors student, Juan earned close to two years of college credit through advanced-

---

[115] *See* Tim Padgett, *Can Two Kids Alter Immigration Law?* TIME MAGAZINE, August 2, 2007.

[116] *See* Maria Sacchetti, *Illegal Status Gives Harvard Grad Few Options*, THE BOSTON GLOBE, July 27, 2009.

[117] *Id.*

[118] *See* Phuong Ly, *The Outsider*, WASHINGTON POST, Feb. 22, 2009.

[119] *See Plyer v. Doe*, 457 U.S. 202 (1982) (holding that undocumented children cannot be excluded from access to state-provided public education). For commentary, *see* BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note _, at 64-*See also* OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (1999); WILLIAM PEREZ, WE ARE AMERICANS: UNDOCUMENTED STUDENTS PURSUING THE AMERICAN DREAM (2009).

placement courses, and achieved top marks on the SAT test. He was living the American dream. Then the family's immigration status caught up with him. On July 25, 2007, near the end of Juan's senior high school year, the two brothers and their parents were picked up from the family home, handcuffed, and taken to a deportation center.[120]

In an unlikely turn of events, Juan's high school friends and supporters managed to make his case a *cause célèbre* in Washington D.C.: they organized through social networks and arrived at Capitol Hill "to show [Congress] the flaws in the system."[121] The story hit a chord; as congressman Lincoln Diaz-Balart (R-Fla.) put it, "[t]hese brothers are just exceptional kids … it was an awesome sight to see all those friends and neighbours here and lobbying with intensity, concern and love."[122] Beyond the lobbying, there was something deeper still. It puzzled people to learn that a child like Juan – who had arrived in this country at the age of two, had never lived elsewhere, had managed to fully immerse in American society and through exceptional talent and effort had made himself a model student – had no legal avenue open to regularize his immigration status and become an American citizen. And not only that, without a path to legalization, the sword of deportation to Colombia, a dangerous country he barely knew and certainly did not wish to return to, hung over his head. Thanks to his schoolmates' efforts, Juan's predicament received massive media attention. He and his brother Alex then benefited from a rare privilege: lawmakers temporary halted their deportation. (The parents were summarily expelled to Colombia.) This temporary status permitted Juan a chance to enrol at Georgetown. His ascent to the top echelons of America's higher education is as remarkable as it is fragile. Without a permanent status or right to stay in the United States, his future looks bleak once he graduates from college.

Since he was not born in the United States, Juan, like Alan, cannot benefit from the generous *jus soli* principle embodied in the 14th Amendment's mandate that anyone born in U.S. territory—irrespective of the immigration status of their parents—receives the lifelong good of American citizenship.[123] This leaves Alan, Juan, and the tens of thousands of other young people who were brought to the country not

---

[120] They were placed in the Broward Transitional Center in Pompano Beach, Florida.

[121] Padgett, *Can Two Kids Alter Immigration Law? supra* note _(quoting Scott Elfenbien, one of Juan's schoolmates who organized the teen lobbying effort to stop Juan's deportation).

[122] Ly, *The Outsider*, *supra* note _.

[123] *See* U.S. Const. amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that children born in the United States to Chinese resident aliens were, by virtue of the Fourteenth Amendment, citizens of the United States).

of their choosing, trapped in a legal limbo. They have grown up "American" in every possible way, speaking English and setting roots in the communities to which they belong, but there is presently no legal route open to them that provides *legal* recognition of the process of social immersion that has already occurred. As the authors of a leading study on comparative citizenship law and policy observe, U.S. immigration rules make citizenship "impossible for this class of children."[124] Although grounded and rooted in the country in which they grow up, their lack of legal status means that they have no right to remain. At any time they face the real risk of being detained and eventually deported. They are pawns in the rancorous battles over immigration reform.

Recognition of this situation has led to repeated attempts to respond to the hardships faced by individuals like Alan and Juan in the form of legislation that encapsulates the core idea of rootedness as the basis for legal title. This proposed legislation, the DREAM Act, [125] consists of several cumulative provisions that would permit undocumented students to gain conditional permanent resident status if they arrived in the country before the age of sixteen, have been in the country continuously for at least five years, and are of good moral character.[126] The DREAM Act is designed to overcome the difficult situation that these individuals face under current immigration law, which provides them no route to establish citizenship in their new home country irrespective of how well they fulfill the American Dream's mantra of working hard and tirelessly to realize their talent through merit and effort. They are the quintessential innocent victims of the stalemate; they had no knowledge or choice in shaping their parents' decisions to bring them into the country without legal status. Their only hope to escape an uncertain future and the fear of deportation depends on resolving the gridlock between the nation-of-laws and nation-of-immigrants policy perspectives.

---

[124] *See* T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSMEYER, CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION 14 (2002).

[125] The Development, Relief, and Education for Alien Minors Act ("DREAM Act") was first introduced in 2001. *See* DREAM Act, S. 1291, 107th Congress (2001-2002). It has twice passed the Senate Judiciary Committee in bipartisan fashion, by a 16-3 vote in the 108th Congress and again in 2006 by a voice vote without dissent as an amendment to the comprehensive immigration reform bill. On October 24, 2007, in a 52-44 vote in the Senate, the DREAM Act (S. 2205) fell just 8 votes shy — with four senators absent for the vote — of the 60 votes necessary to proceed with debate on the bill. Most recently, the DREAM Act (S. 729 and H.R. 1451) was attached as an amendment to the National Defense Authorization Bill for Fiscal Year 2011 (S. 3454) 111th Cong. (2010), which failed on cloture vote (Sept. 21, 2010). A new version of the DREAM Act was re-introduced on Sept. 22, 2010 (S. 3827) 111th Cong. (2010).

[126] The analysis is based on the provisions found in the American Dream Act, S. 729 and H. R. 1751 respectively, 111th Cong. (2009). The Dream Act of 2010, S. 3827, *Id.*, has slightly different eligibility provisions set out in sections 4(1)(c)(i)-(ii).

The reason is as simple as it is powerful: under current immigration law, if a child is brought into the country undocumented (or falls out of status while in the country), there is no legal method available to overcome the initial illegality of her entrance if her parents themselves are not granted legal status. Put differently, members of the 1.5 generation are ineligible to gain access to American citizenship by themselves. As long as their parents are in the country without permission, so, derivatively, and through no fault of their own, are children who were born outside the U.S. The interest in seeing the DREAM Act pass is therefore not limited to its potential beneficiaries, individuals like Alan and Juan. The larger political community, too, has an interest in avoiding the creation of a permanent underclass of long-term residents who are by definition excluded from membership, an outcome that would betray the nation's hopes for democratic accountability and the promise of equal opportunity.

The proposed DREAM Act interestingly asks for more than mere residence and passage of time. Instead, its provisions make the acquisition of permanent membership status dependent upon the recipients' *actual decisions and actions.* A young person applying for adjustment of status would have to demonstrate that he or she "has been admitted to an institution of higher education in the United States, or has earned a high school diploma or [equivalent]." Note the striking language: the Act recognizes that despite the almost inevitable hardships that undocumented students have endured, they have managed to earn a diploma. To address the concerns of the nation-of-laws camp, those seeking to gain the security that comes with lawful permanent resident status are asked to contribute to the political community that now extends a welcoming hand to them. This process of "giving back" essentially requires the beneficiaries to commit to preparing themselves for jobs in the 21st century economy through education.[127] Another, more controversial route to "earn" membership, which has appeared in several versions of the proposed legislation, focuses on military service for a period of at least two years of service.[128] Technically, once either path has been pursued—education

[127] The relevant provisions of the American Dream Act, *supra* note __ would require the completion of a two year program of study at a publicly subsidized community college or equivalent institution, whereas other proposals, such as the Dream Act of 2010, *supra* note __, only require a high school diploma.

[128] A historical note: The willingness to take arms for the nation and put oneself in harm's way is perhaps the ultimate, indeed potentially life threatening, indication of a willingness to tie one's fortunes with that of the admitting nation to which he or she wishes to belong as a full member. It is also the oldest method for earning citizenship title, dating back to the solider-warriors of ancient Greece. In today's reality, there are also more practical reasons for emphasizing military service as a basis for citizenship, namely, the need to draw new recruits to the fight the wars in Iraq and Afghanistan. This policy is also reflected in the government's decision to fast-track to U.S. citizenship approximately 55,000

or military service—the beneficiary qualifies for having the conditional component of their adjustment of status removed. In other words, the transition from an unauthorized migrant who has *no right to remain* into a *lawful permanent member* will be complete.

This structure of conditional status that becomes permanent based upon the actual behavior of the recipient places emphasis on combined factors such as the length of residence and age of arrival to the country, as well as expressions of individual agency and responsibility, thus countering the "free lunch" argument raised against such a path to earned citizenship by strict nation-of-laws advocates. It provides access to membership to undocumented students who, under today's rules, graduate from high school into the legal limbo of *non*-membership in the only country they know as home.[129] Members of the 1.5 generation without doubt represent the most compelling case for applying *jus nexi*, matching these individuals' legal realities to social transformations that have already occurred on the ground and putting right a series of wrongs that are not of these young people's making.

For members of the 1.5 generation trapped in the midst of the nation-of-laws and nation-of-immigrants stalemate, the rootedness path to earned citizenship offers a "lifeline."[130] It can spell the difference between a bright future, filled with opportunity, or the grim reality of a detention center and a pending deportation order. Gaining access to citizenship is no free lunch under the proposed rootedness principle.[131] Nevertheless it overcomes the core deficiencies of the present situation by making access to full membership reflective of human agency and actual behavior, in lieu of the fixed, predetermined,

---

immigrants who have served in the armed forces since the 9/11 attacks; this recent changes is reflected in amendments to sec. 328 and 329 of the INA [8 U.S.S. 1103, 1440, 1443].

[129] Such a call for change also finds support in the *Plyer* decision, in which the U.S. Supreme Court ruled that undocumented children cannot be denied access public schools by the state, reasoning that these children "can affect neither their parents' conduct nor their own legal status. … legislation directing the onus of a parent's misconduct against the children does not comport with fundamental conceptions of justice." *See Plyer v. Doe*, *supra* note __, at 220. For those bent on a cost-benefit analysis, the present situation is objectionable because it means that the communities that have invested in these students' public education (as required by the *Plyer* decision) will never fully reap the benefits of their talents and abilities. Their potential will go unfulfilled and wasted. *See* Gonzales, *Wasted Talent and Broken Dreams, supra* note _.

[130] This term was used by Harvard President Drew Faust to describe the DREAM Act, in a statement following the detention of Eric Balderas, a sophomore student at Harvard, who was raised and educated in the United States but had no legal status after having been brought into the country at the age of four. He was detained for being unlawfully present in the country but later released on deferred action after his arrest triggered an international outcry. See Xi Yu, *Faust, Balderas, Thank Senator for Sponsoring the Dream Act*, THE HARVARD CRIMSON, Sept. 15, 2010.

[131] *See infra* notes _-_ and accompanying text.

and irrevocable refusal that is all that the law currently offers these young people. Such denial of opportunity due to circumstances that are beyond our control (where or to whom we are born, or under what conditions we are brought into another country at infancy) goes against basic liberal and democratic notions of fairness. It punishes children for the deeds of their parents, lacks proportionality and human compassion, and is blind to processes of immersion and changed expectations that have already occurred. Instead of a chance to fulfill the American dream, these young people face deportation and life-long banishment from the United States. As Holmes pointed out, many years before Alan arrived in the United States, when the roots have grown to a certain size, [they] cannot be displaced without cutting at [the person's] life."

B. Unauthorized Migrants: Overcoming the "Original Sin" of Unlawful Entry

Lawful admission is generally viewed as a necessary step towards the acquisition of citizenship by those without hereditary membership entitlement. But what happens if this initial condition of authorized admission is violated? Perhaps nowhere is the debate between the nation-of-laws and nation-of-immigrants camps as vexing and contentious as it is around the question of how to treat long-term resident non-citizens who have entered the country as adults in a clandestine fashion or have overstayed a temporary visa.[132] Unlike children who had no control over their parents' decision to cross the border, or those who initially followed the official admission process, the legal status of undocumented adults is "assumed to be a result of

[132] For different modes of entry of unauthorized migrants living in the United States, *see* the statistics by Pew Hispanic Center (Pew Hispanic Center 2006). *See also* BROOKINGS-DUKE IMMIGRATION POLICY ROUNDTABLE, BREAKING THE IMMIGRATION STALEMATE: FROM DEEP DISAGREEMENTS TO CONSTRUCTIVE PROPOSALS 4 (2009). The circumstances of admission may prove significant in assessing the government's obligation to include. As Stephen Legomsky explains: "A slight majority of the twelve million undocumented immigrants in the United States entered the United States without inspection, therefore committing misdemeanors. They are 'lawbreakers' by definition. Those who became undocumented by overstaying lawful temporary visas have not committed criminal acts, but they too have violated the immigration laws and are subject to removal on that ground." *See* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 143-144 (2009). Hiroshi Motomura similarly probes the meaning of unlawful presence, but from a societal rather than a legalistic perspective, leading him to conclude that "[b]road tolerance of immigration outside the law prevails today, even if enforcement puts a strong public face and frequently results in harsh practices that visit severe hardships on the particular migrants who are targeted at the border and in the interior." *See* Motomura, *Immigration Outside the Law*, *supra* note _ , at 2053.

their own, voluntary, action."[133] As such, they are perceived to be responsible, at least in part, for the predicament they currently face as "irregular," undocumented non-citizens. Yet opinions diverge significantly about the implications of this initial conduct of unlawful entry or stay. As legal scholar Linda Bosniak eloquently observes, there is "a persistent uncertainty about who really is at fault when it comes to undocumented immigration, and who should properly bear its associated costs."[134]

Advocates of the nation-of-laws position have adopted an absolutist stance in response to this question. They firmly hold that unauthorized migrants should be *barred* from admission to the rights and privileges of membership as a result of their "original sin": they broke the law by entering without permission and must therefore be barred from any path that could enable them to regularize their status. Some even go a step further and argue that unauthorized migrants should be deported back to their countries of origin, irrespective of any hardships that such removal may cause or the web of relationships that they have established in the new polity. By contrast, proponents of a nation-of-immigrants vision emphasize that this country offers its new arrivals the chance of a fresh beginning. They further quibble with the categorization of undocumented entrants as "illegal aliens," arguing that, on moral grounds, human beings cannot be defined as illegal.[135] This sentiment is well captured in slogans such as "no-one is illegal," or advocacy calls for granting "status for all." In a rebuttal, however, a sophisticated nation-of-laws backer might point out that it is not the *person* who is deemed "illegal," but rather the *act* of entering the country that was unlawful; a point, which, at least technically, is valid in a world of regulated migration like our own. In today's political climate, however, this answer does not stand up to scrutiny. Consider the fact that lawmakers in the United States passed a draft of *The*

---

[133] *See* BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note _, at 66.

[134] *Id.*, at 67 (re-examining the *Plyer* decision to demonstrate the ambivalence toward undocumented adults' "culpability"). As the Court wrote: "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants – numbering in the millions – within our borders. This situation raises the spectre of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful permanent residents." *See Plyer v. Doe*, *supra* note __, at 218-219 (footnotes omitted).

[135] As used throughout this essay, the preferred term is undocumented or unauthorized immigrant. In *Mohawk Industries v. Carpenter* (No. 08-678), Dec. 8 2009, Justice Sotomayor's opinion marked the first use of the term "undocumented immigrant," according to a legal database; whereas the term "illegal immigrant" has appeared in a dozen decisions. *See* Adam Liptik, *Sotomayor Draws Retort from a Fellow Justice,* The New York Times, Dec. 9, 2009.

Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2006 (which in the end did not pass) that defined illegal *presence* in the country as a felony, blurring the line between action and status, and making unauthorized migration a category of criminal culpability.[136] [Analysis of Arizona's new immigration law and its relevance for this discussion is omitted for space consideration]

The debate between these two competing camps is, as we have already seen, not easily resolved. Instead of re-entering the fray, I again draw upon the comparison to property law and explore the operation of several equitable remedies in order to develop the alternative *jus nexi*, or rootedness-centered, response to the problem of initial entry without permission. The results are surprising. Consider the property doctrine of "adverse possession," which dates back to the early years of the English common law. It also finds expression in current American, Canadian and most other common-law countries' statutory provisions. This long-standing rule of law holds that "one who … possesses property belonging to another for a sufficient period of time *without* the owner's permission acquires title to the property."[137] Adverse possession thus offers a "startling means of acquiring property."[138] Startling because it holds that a trespasser—that is, a person who entered without permission—may obtain full title to the property into which he or she initially entered *un*lawfully.[139] To establish lawful title in this way, however, certain conditions must apply. The most significant of them is that the entrant must have resided on the territory in actual possession for an extended period of time. The precise period of continued occupancy in actual possession in the context of property differs from one jurisdiction to another.

Regardless of the specific period of occupancy applied, the effect of the doctrine of adverse possession remains the same: it dramatically *limits* owners' rights to exclude outsiders if they sleep on their rights and take no action after actual or constructive notice that an uninvited occupant has visibly resided on their territory for a long time. Under such circumstances, the law of property recognizes that relationships

---

[136] *See* The Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). This proposed law would have mandated a felony charge against any undocumented person found to be residing in the United States, and would have barred undocumented residents from ever gaining legal status. In other words, unlike the current legal situation, the proposed Act would have made mere unlawful residence in the United States a federal *criminal* offense. It further defined any relative, lawyer, employer, coworkers, clergyman, or friend who in some way interacted with an undocumented migrant as an "alien smuggler"—even if they acted innocently and in good faith, assisting the unauthorized migrant.

[137] Singer, *Paradoxes of Property*, *supra* note __, at 45.

[138] DWYER & MENELL, PROPERTY LAW AND POLICY, *supra* note __, at 76.

[139] HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 55 (5th ed. 2001).

and expectations may change over time. Another illuminating angle on adverse possession is provided by Joseph Singer, who argues that once "*both* parties have acted in ways inconsistent with the formal property rights," it is unfair to turn against the adverse possessor armed with the formalities of title.[140] Instead, we can understand the parties' acquiescence in their informal arrangements as effectively creating an "informal transfer" of entitlement.[141] The right of the entrant to acquire title through adverse possession is not automatic; it is treated as a remedy that becomes operable only after the statute of limitations for recovery has expired. This legal protection guards the interests of the "true" owner as against the uninvited occupant, manifesting the right to exclude. This by itself is not unexpected. What is surprising, and radically so, is that once that period of time has passed (i.e., once the statute of limitations for recovery has expired), the original owner is barred from removing the adverse possessor from the property—despite the fact that the owner never granted permission for such admission in the first place.

If this is true in the context of real property, where we are dealing with private owners who typically have a strong claim to their rights *in rem*, then it arguably applies at least with equal force when dealing with a public entitlement such as citizenship.[142] We can think here of the adverse possession example as methodologically representing the "most difficult case": if it can be proven that such equitable remedies apply in the highly-protected realm of property, then the argument in favor of creating a legal route for regularization in the context of citizenship becomes easier to establish and justify. Recall that political membership is bestowed by an act of the sovereign (acting on behalf of the democratic citizenry body), thus bearing more stringent requirements of public accountability, responsibility, and an obligation to include.[143] If the government (operating here as a "trustee" for the political community) has tacitly acquiesced to the peaceful, productive and continuous residence by millions of unauthorized migrants who have settled within its territory, then there must be a point in time when it is estopped by its own inaction.[144] In such circumstances, the unauthorized entrants ought to gain certain immunity from deportation and removal, in addition to being offered an eventual

---

[140] Singer, *Paradoxes of Property*, *supra* note __, at 46 (emphasis added).

[141] *Id.*, at 46.

[142] *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005) (explaining the logic and use of the "most difficult case" methodology).

[143] *See* Smith, *supra* note __.

[144] There is no technical difficulty in envisioning such an option. We saw earlier that the government's power to remove aliens was in the past restricted by a statute of limitation that applied to deportation. *See supra* notes __-__ and the accompanying text.

route to regularizing their status. The reasons for such a "duty to include" in the American context (to draw on Smith's terminology) stems from democratic theory in general and this country's history in particular.

Critically, the duty to include also is informed by the familiar legal distinction—in property and citizenship law—between *initial entry*, which any state is permitted to regulate, and the subsequent decision of how to treat long-term settled noncitizens who already reside on the territory, participate in the economy, and are subject to the effects of the nation's law. The nation-of-laws position consistently blurs the latter with the former, as if the initial admission must ultimately and unarguably control the so-called "second admission." [145] This locks undocumented immigrants residing in an otherwise democratic country into "an inferior position that is also an anomalous situation: they are outcasts in a society that has no caste norms, *metics* [resident aliens barred from membership in ancient Greece] in a society where *metics* have no comprehensible, protected, and dignified place."[146] The denial of a legal path to citizenship for this long-settled population relies on blindness to any and all ties or connections established *after* the initial entry. The consequences of such a policy are potentially far reaching not only for the undocumented migrants but for the receiving society as well. For, as Michael Walzer tellingly asserts, if we persistently disallow those who are living among us, those who "do socially necessary work, and are deeply enmeshed in the legal system of the country to which they have come" [147] an option to become equal members, we run the risk, as he puts it, of becoming a band of citizen-tyrants.[148]

These moral and political considerations are important. So is the recognition that equitable remedies—from laches to statutes of limitations to estoppels—have long been part of our conception of the rule of law, providing a response in equity that supplements strict legal directives where the latter's application would operate harshly or produce unjust results.[149] Equitable remedies typically involve injunctions or decrees, rather than monetary awards or damages, devoting significant attention to the *actual* conduct, actions, statements, admissions, failures to act, or acquiescence of the parties. Estoppel, for example, explores the conduct of the person, and based

---

[145] *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 59 (1983) (distinguishing between initial entry and second admission); HAMMAR, DEMOCRACY AND THE NATION, *supra* note __ (identifying different "entry gates" on the road to membership).

[146] WALZER, SPHERES OF JUSTICE, *supra* note __, at 59 (emphasis added).

[147] *Id.* at 60.

[148] *Id.* at 58.

[149] *See generally* FREDERIC P. MILLER ET. AL, EQUITY (2010).

on that conduct, as Lord Denning memorably put it, "[s]omeone is stopped from saying something or other, or doing something or other, or contesting something or other."[150] Statutes of limitations define specific time limits for legal action to be undertaken; the doctrine of laches operates in a roughly similar manner, although no pre-proscribed periods are defined. [151] In each of these instantiations, the consequences are far reaching; they can bar or prejudice the party that failed to assert a right or a claim within a "proper" time framework.

Unlike the absolutist claim of the nation-of-laws, holding that the law does *not* permit alterations to one's status and situation based on the combination of conduct and passage of time, there is a wide range of equitable remedies that do just that. Instead of fixating legal analysis only on the initial moment in time, equitable principles supplement and respond to the effect of use, time lapse, and actual conduct, with the potential to alter the rights and obligations of related parties. This counters the image of an unforgiveable "original sin" (here, overstaying a temporary visa or entering into the country without authorization) that is dear to many who resist the idea of providing a regulated path to earned citizenship. Their claim is that nothing can overturn or mitigate the initial breach of the country's immigration law, which is, nonetheless, a civil, not a criminal, public statute. Yet examples drawn from many fields of law demonstrate that painstaking consideration is paid to changed factors and expectations that evolve over time, sometimes even ripening to legal title under certain circumstances. This is crucial for our argument, for it offers a legally and historically established counter to the "absolute dominion" stance proclaimed by the hardliners of the nation-of-laws camp.

The doctrine of adverse possession, as we have just seen, represents an extreme illustration of this pattern at work, countering the formalistic claim that we must *always* refer back to the *initial* point in time. Although the current American approach emphasizes instrumental considerations to reject this position (e.g., encouraging efficient takeovers from absentee title holders, respecting the expectations of third parties who have relied on appearances),[152] other

---

[150] *McIlkenny* v. *Chief Constable of West Midlands* [1980] 1 QB 283, at 317, CA [England].

[151] This raises a host of complex legal questions in the citizenship context. For instance, is lax enforcement of immigration law by the government at the external border or in the interior analogous to not taking action within a prescribed period prior to the expiry of a statute of limitation? Can it, therefore, not be held against the applicant seeking earned membership? The exact answers and considerations to take in to account would have to be either settled generally through legislation as part of the carving out of a compromise between the nation of laws and nation of immigrants, or left to a case-by-case analysis by administrative tribunals.

[152] *See e.g.,* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U.L.REV 1122 (1984-1985); Lee Anne Fennel, *Efficient Trespass: The Case for 'Bad Faith' Adverse Possession*, 100 NW. U.L.REV. 1037 (2006); Richard A. Epstein, *One Step Beyond*

common law jurisdictions, most notably England, have taken a more procedural approach, focusing on the technical aspects of possession and the passage of time.[153] As Larissa Katz observes, the English approach is concerned primarily with whether the original owner has failed to act on her rights within the statute of limitations period: "Nothing more is needed: no intent to own, no conflict with the owner, no 'adversity,' in other words."[154] In contemplating the idea of overcoming the initial act of unauthorized entry in the context of immigration law by way of peaceful, productive, and continuous residence in the country, there is an advantage to following in the footsteps of the English model because of its highly procedural nature. Under this scheme, a person's actual conduct and her compliance with a statutory relief structure would play a key role toward fulfilling the requirements of earned citizenship.

What makes the rootedness logic particularly compelling for our discussion is the fact that it cannot be easily dismissed as insignificant or implausible as a remedy. It has been part of legal theory and doctrine for centuries, dating back to the earliest days of the English common law. If the "original sin" of unlawful admission can be forgiven in the context of property, where the titleholder is presumed to have "sole and despotic dominion … in total exclusion of the right of any other individual in the universe"—to evoke Blackstone's magisterial words—then surely a similar logic can apply with equal force to the relations between democratic governments and those who have already established long-term and productive residence in their prosperous territories. This permits a way to finally "dismantle" the gridlock by providing a foundation for reform that can appeal not only to those in the nation-of-immigrants camp, but also to adherents of the nation-of-laws position, especially given that in the context of citizenship the inclusion of newcomers does not "dispossess" the existing participants or titleholders of *their* rights and protections.

As with the argument from democratic inclusion, the acquisition of earned membership status would not be open to anyone; happenstance presence in the country, for example, would not qualify a person for the relief of earned citizenship. Ultimately, it is not the mere act of entering into the territory that counts. Rather, "the ties that non-citizens develop *over time*" are what matter.[155] This fits flawlessly with the logic of *jus nexi*, providing a remedy only *after* expectations to stay

---

Nozick's Miminal State: The Role of Forced Exchanges in Political Theory, 22 SOC. PHIL. & POLICY 286 (2005).

[153] *See* Larissa Katz, *The Moral Paradox of Adverse Possession Resolved: Sovereignty and Revolution in Property Law*, MCGILL L. J. (2010).

[154] *Id*.

[155] *See* Motomura, *We Asked for Workers*, *supra* note __, at 246.

have been established—a process that requires settlement and the passage of a significant amount of time. According to the immigration laws of the vast majority of the world's countries, a predefined minimum residence period must be fulfilled for a waiver to become a relevant option.[156] The time period is typically referred to as "not less than five years," a baseline benchmark that is already familiar to us from the American naturalization context.[157] Here, however, this benchmark period refers to the time of residence out of status, *after* which a temporary or permanent relief can be granted.[158] Unlike the more extreme positions held by some on the nation-of-immigrants camp,[159] *jus nexi* would not grant almost automatic relief to *anyone* who managed to cross the border. Rather, it would permit regularizing the status of long-term noncitizen residents who have, in effect, "taken root" in the community and whose continued presence in the country was, as the case law has it, "generally known and talked of by the public."[160]

Under current immigration law, none of these real, continuous, and genuine links to the country matter. It is the initial moment of unlawful entry alone that counts, making those who have entered without permission or overstayed their visas members of an underclass that lives alongside, but not in the legal company of, citizens. They are long-term residents who are by definition excluded from membership. Unauthorized migrants are often aware of the legislative debates around plans to introduce an earned path to citizenship. As one of them put it: "They could change the law like that . . . You start with a permit to work, and then if don't get in any trouble,

---

[156] *See e.g.,* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17-35 (T. Alexander Aleinikoff & Douglas Klusmeyer, eds., 2001); ACQUISITION AND LOSS OF NATIONALITY: POLICIES AND TRENDS IN 15 EUROPEAN STATES (Rainer Baubock et al. eds., 2006).

[157] *See supra* note __. Comparatively, the conditions and periods of residence for naturalization still differ per country; this implies that so will the benchmark periods for regularizing status, which will have to comply with each country's overall membership regime.

[158] In the United States the period would likely rise to seven years to fit with the historical precedent of waivers from deportation, or cancelation of removal provisions, that are traced back to the Immigration Act of 1917, ch. 29, § 3, 7th proviso, 39 Stat. 874, 878 (Feb. 5, 1917).). On the historical background, *see* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 84-88 (2004).

[159] *See e.g.,* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (2007).

[160] *See* U.S. *Adams v. Slattery* (1956). Interestingly, the 2006 Comprehensive Immigration Reform bill reflected just this notion: it envisioned an ascending scale that was sensitive to individualized factors. For instance, two to five years of residency were generally seen as providing a weaker claim for establishing a conditional status, in comparison with the situation of those who have already resided in the country for at least five years. People with less than two years of residence were assumed to have not yet "taken root," barring extreme hardship cases that would provoke discretionary relief.

they give the citizenship to stay here and go in and out of America legally."[161] Yet, "[t]here are a lot of people who don't like us to be here, but the thing is, we are here."

The last factor is crucial. As a recent non-partisan immigration policy roundtable report states:

> The best estimates suggest that approximately 11.9 million immigrants are in the United States illegally. Some of these individuals have been here for many years with steady employment histories and roots in local communities. Their continued presence is a result of our failures to devise and implement effective immigration policies. These individuals are also here, however, because of choices they made and chances they took to live here without papers. So what do we do now?
>
> Even if sending 12 million people home were feasible, it would a catastrophic choice—enormously expensive, diplomatically disastrous, and hugely costly in human terms. Neighborhoods would be torn apart, families would be separated, and a new and sorry chapter in American race relations would be written.[162]

Rootedness offers a brighter future. It permits a forward-looking exoneration as dictated by the narrative of a welcoming nation of immigrants. Still, we need to adequately address the nation-of-laws claim that there are strong policy considerations that favor signalling dissatisfaction with the initial unlawful entry or visa overstay. All the major legislative proposals for comprehensive immigration reform in recent years have acknowledged this concern. This finds expression in the demand to enforce tougher border controls prospectively while retrospectively imposing mandatory fines on the beneficiaries of any such earned-citizenship legalization. These are often conceptualized as "redemption dues" owed to the admitting society, recognizing the initial illegality of entry as the nation-of-laws view commands. As Stephen Legomsky pointedly observes, placing a fine of several thousand dollars on low-income immigrant families is anything but trivial; "it's a serious punishment," but it holds the promise of a new beginning.[163] What is more, because nothing is swept under the rug, legalization of this kind expresses the view that once the person has

---

[161] Immigrant X, *My Life as an Illegal*, *Texas Monthly* 102 (July 2006) [emphasis removed].

[162] BROOKINGS-DUKE IMMIGRATION POLICY ROUNDTABLE, BREAKING THE IMMIGRATION STALEMATE: FROM DEEP DISAGREEMENTS TO CONSTRUCTIVE PROPOSALS, *supra* note __, at 9.

[163] Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. __ (2009).

been publically reprimanded, it is possible to overcome "previous transgression[s]" and to "start again with a clean slate."[164]

Other concerns still remain. If we think of membership as a new property-like title issued and governed exclusively by the state, those who have acquired a right to remain may nevertheless be rightly asked to fulfill a condition that demands "moving back to the end of the line" before permanent status is established. This kind of a condition assumes a limited ceiling or quota of admissions per year. In such a scenario, it is fair to protect the expectation and reliability interests of immigrants who did follow the rules. They should not be disadvantaged or asked to bear the brunt of any regularization process affecting those who entered without permission. There are two possible solutions here: first, since long-term undocumented residents are already part and parcel of the actual society and economy, special provisions could be made through legislation to increase the number of allotted lawful permanent residence permits for the fixed legalization period. This would not create a larger "wave" of new immigrants because those entitled to benefit from the *jus nexi* principle are by definition residents that already live here (although without legal status) and, in most cases, have lived here for a long time. Second, if an annual quota is set for adjustment of status, then the solution of moving to the back of the line is plausible so long as a *temporary* visa is issued to those who qualify according to the rootedness principle. This would eventually be upgraded to a green card (or *permanent* residence status).[165] Such a two-step process serves as a springboard to citizenship for those who wish to apply for it in compliance with standard naturalization procedures. This structure of gradual and growing inclusion into the circle of members (from temporary or conditional status to permanent residence) is familiar. We already explored this structure in our discussion of the DREAM Act. Likewise, it is applied as a matter of course to various classes of entrants in contemporary US immigration law, from finances to spouses to investor category entrants.[166]

Moving beyond reasons of pure compassion and humanitarian considerations that are abundant amongst nation-of-immigrants advocates (in themselves providing powerful and sufficiently compelling platforms for reform action), the *jus nexi* framework developed here enables us to engage in conversation with, and ideally convince, those who otherwise declare that the host country should

---

[164] *Id.*

[165] The period of required post-adjustment residence might range anywhere from five to seven years, based on comparative and past practice. *See* Meissner, *supra* note _.

[166] Cite k-visa provisions for fiancés and the two years conditional for spouses and EB-5 visa holders (investors).

never authorize a reform that permits a benefit to those whose first entry into its territory broke the law. Here, the best answer is to turn to the rootedness narrative of earned title. If "regularizing" title and allowing access to the benefits of protected status is permitted in the ultra-protective context of property law, where there is only so much land and the new owner displaces the former, then the weaker claim defended in this essay—namely, providing a path to legal citizenship to those who have already become social members, *without* dislocating the membership status of prior titleholders—can be powerfully vindicated.[167]

CONCLUSION

To be sure, the adoption of the rootedness framework would not offer a full resolution to the intense nation-of-laws *vs.* nation-of-immigrants debate. It is part of a larger renegotiation of the borders and boundaries of membership in the twenty-first century.[168] These changes are taking place already, reversing many years of relatively lax immigration enforcement that arguably contributed to, or at least turned a blind eye to, the presence of a huge population of undocumented migrants. In the post-9/11 era, the argument for legalization also finds support from various regulatory and law-and-order agencies at the national, state, and local levels. This reflects a "seeing like a state" preference to dealing with registered and visible citizens in lieu of an underground or shadow population that is not part of official counts and emergency contingency planning, a situation that is generally not healthy for any democratic, rule of law society.[169]

These combined prudential and principled considerations point in the same direction, bringing us back to Holmes: "when the roots have grown to a certain size, [they] cannot be displaced without cutting at [the person's] life." For the long-term residents present in the country

---

[167] The core *political* rights of citizenship such as gaining an equal voice in the country's democratic processes are public entitlements that are non-transferable. *See* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985) (on inalienability). The more typical concern relates to access to social benefits such as education or health care that are understood by political economists as potentially rivalry, whereby the consumption by one person can be seen as diminishing entitlement for another.

[168] Such a reform would also likely require those on the nation-of-immigrants side to make concessions, such as accepting the nation-of-laws' demand of greater enforcement of border control and stepped-up labour sanctions, possibly including tighter employment and employee identification and verification systems. For an illuminating overview, *see* Benjamin Marquez and John F. Witte, *Immigration Reform: Strategies for Legislative Action*, 7 FORUM, tab. 1 (2009)

[169] JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION FAILED (1998).

without papers, the focus on taking root as captured by the proposed *jus nexi* principle offers an equitable remedy and lifeline where standard routes to citizenship prove foreclosed. This is where the lessons of property theory and practice prove most helpful. As we saw earlier, part of the explanation for upholding adverse possession's unusual method of acquiring title is that although legal formalities matter greatly in defining title, so does the lived experience that constitutes this Article's vision of rootedness. Such a comprehensive approach to understanding the distribution of entitlements fits perfectly with the *jus nexi* rationale.

In this essay, I have recommended the adoption of a *jus nexi*, or rootedness, principle as a route to earned citizenship open to those who cannot claim access to membership based on the traditional *jus soli* and *jus sanguinis* tenants of citizenship law. This proposed genuine-connection principle offers a more nuanced and grounded way in which to address the question of boundary-making, based as it is on actual membership and social attachment rather than mere reliance on the lottery of birthright entitlement or the "original sin" of the unlawfulness of entry. I have supported this proposal by looking to legal and moral rationales previously used to justify the earning of legitimate title in the context of private property by those who initially entered without permission. I have also emphasized that these responses recognize the web of relations and expectations informing the social fact of membership. This in turn permits greater democratic accountability, given that all those who reside in the jurisdiction and are regularly affected by the state's authority and coercive legal powers gain the right not to be excluded, and with it, gain a hand in shaping and deploying its participatory self-governance.

In creating a closer tie between actual membership and access to permanent residence status, the rootedness framework permits us to draw upon concepts of ascending scales of title acquisition; it also sheds light upon the possibility of regularizing the status of unauthorized migrants based on the unexpected and surprising source of the oldest and most persistent property doctrine: adverse possession. These insights, along with changing definitions of membership at both the local and international levels, have informed the defense of the *jus nexi* principle as a way to overcome the stalemate between the nation-of-laws and nation-of-immigration camps. An equitable path to earned citizenship for those who currently remain forever titleless, excluded from the circle of members would, ultimately, benefit the adoptive countries too as it provides a more grounded conception of membership that befits a world of growing mobility.