WHAT DOES EQUALITY FOR IMMIGRANTS REQUIRE?

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This essay argues that the conventional theories of equality for immigrants are wrong. Under these theories, noncitizens' claims to equal treatment should turn on either territorial presence of community affiliation. But both views have fatal shortcomings: the territorial theory prohibits many practices that are widely accepted, while the affiliation account accepts many practices that are universally condemned. In their place, we sketch an alternative account of individual equality grounded in autonomy—an account that fits better with familiar liberal theories of equality. We also question the adequacy of theories that focus exclusively on individuals and suggest that group-based theories of equality that are prevalent in other legal contexts should play a much larger role in evaluating the demands of equality for immigrants.

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INTRODUCTION

At the center of current debates about immigration reform is a seemingly simple question: when should immigrants be treated like citizens? Disagreements about the structure of any legalization program, or "amnesty," turn on how we answer this question for the 11 million unauthorized immigrants living in the United States. Debates about whether Congress should adopt a large-scale guest worker program implicate the same question—though this time applied to prospective migrants, who have not yet come to the United States.

It is impossible to answer these pressing questions about the future of immigration law, therefore, without a view about what equality for immigrants requires. If equality demands that long-term resident noncitizens be afforded access to citizenship—even if they currently lack immigration status—then the decade-long wait for citizenship required by both the Administration's and the Senate's reform proposals may be unacceptable. If equality demands that all migrants have at least a shot at citizenship, than the proposed temporary worker program may likewise be deeply problematic. But equality is a notoriously slippery concept, so how do we know what it entails for immigrants?

Legal theorists and political philosophers have coalesced around a framework for thinking about the above problems of equality. First, theorists focus on individual fairness—on what the state is obligated to afford an individual immigrant living in the state, regardless of her membership in any social group. Second, theorists derive the state's obligations to an individual immigrant either from the person's *physical presence* in the state or from her *affiliation* with the state.

In this essay, we argue that this approach to thinking about equality for immigrants is mistaken. We show that these dominant accounts of individual fairness fail on their own

terms: a person's physical presence in a state, or her affiliation with the state, are faulty foundations on which to ground the state's obligation to treat the person as a citizen. Physical presence is an implausibly strong requirement, prohibiting many practices that are widely accepted. Affiliation is, in some ways, implausibly weak, accepting as just practices that are universally condemned. To replace these theories, we briefly sketch an alternative which fits better with familiar liberal theories of equality.

Our ultimate goal, however, is not merely to replace these existing theories with a new account of individual equality. Instead, our aim is to show that this whole category of accounts fails to capture the central concerns of equality for immigrants. Equality for immigrants is fundamentally about equality *among groups*. Group-based accounts of equality dominate American constitutional law, but for some reason are often overlooked when migrants are discussed. We argue that such accounts should be central to thinking about the rights of migrants, in the same way they are central to modern thinking about equality for other groups, such as African Americans or women. We propose a new research program that shifts our focus from the treatment of individual migrants to equality among groups.

This essay proceeds in three Parts. Part I briefly describes the dominant accounts of equality for immigrants in legal theory and political philosophy. Part II explains why those accounts fail. Part III begins to sketch out a more plausible account of individual fairness for immigrants. The conclusion turns from individuals to groups, showing the centrality of group-based forms of equality to our understanding of the treatment of immigrants.

I. THE DOMINANT ACCOUNTS OF EQUALITY FOR MIGRANTS

There are certain fundamental rights which we think every citizen must be granted equally. Nearly everyone would agree that these rights include the right to vote and to

remain in the country indefinitely.[1] Many philosophers and legal theorists would also add to the list rights to education, healthcare, social security and so on.[2] These rights are owed to *individual citizens* regardless of their membership in any social group or other characteristics. Nearly all existing work by immigration theorists approaches the question of equality for immigrants from this perspective: by asking when the state incurs an obligation to treat an *individual noncitizen* as an equal member of society and thereby grant her all of the rights of full citizenship. Two views dominate the literature.

A. Simple Territorial Equality

In discussions of immigration, equality is often construed as the requirement that a state treat equally all people who are present within the territory over which its governs. There is, of course, a great deal of debate about what equal treatment requires. But many immigration scholars assume, at least implicitly, that equal treatment requires what we will call "simple territorial equality." People within a territory are treated as equals, on this view, only if each person receives the same central rights, privileges, and benefits that are provided by the state. Any deviation from this norm of equal entitlements is considered presumptively impermissible and thus demands special justification. In particular, it is presumptively impermissible for someone present within a territory to be denied the same benefits and rights as another person just because she is an immigrant. So, for instance, it is

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[1] In fact, these twin principles are also embedded in American constitutional law. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) ("the right of sufferage is a fundamental matter in a free and democratic society . . . [it] is preservative of other basic civil and political rights"); Trope v. Dulles, 356 U.S. 86, 100-02 (1958) (holding that the use of denaturalization as a punishment—which would put a citizen at risk of banishment from the territory—violates the Eighth Amendment).

[2] *See, e.g.*, Amartya Sen, *Rights and Capabilities*, in RESOURCES, VALUES AND DEVELOPMENT 307–324 (1984).

presumptively impermissible for immigrants to be granted weaker welfare entitlements, be subject to possible deportation, or be given lesser protection for their speech and religious practice.

The idea of simple territorial equality dominates much contemporary work on immigration.[3] Much of this work self-consciously traces its authority to Michael Walzer, whose account of a just system of immigration in *Spheres of Justice* is perhaps the most famous philosophical account of immigration ever penned.[4] Walzer's basic claim was that "Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does."[5] According to his argument once someone is subject to the state's authority—which happens immediately on her entry into the territory— she becomes entitled to full citizenship.[6] As Linda Bosniak states: "[The] territorial conception repudiates the notion of graduated or differential levels of inclusion because it views it as antithetical to liberal and democratic principles. It says: once someone is in the geographic territory of the state, the person must, for most basic

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[3] For a small sampling of the idea's prominence in the literature, see, for example, ALEX ALIENIKOFF ET AL, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (7th ed. 2012); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2007); GERRY NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); MICHAEL WALZER, SPHERES OF JUSTICE (1984).

[4] *See* WALZER, *supra* note 3.

[5] *See id.* at 61.

[6] Throughout, Walzer rests his arguments on the significance of territorial presence: "admission is [a] serious . . . matter. The members must be prepared to accept, as their own equals in a world of shared obligations, the men and women they admit. . . ." *Id.* At 52.

purposes, be treated as fully in."[7] As she emphasizes, on this approach it is someone's sheer presence in a territory that makes them entitled to the various rights: it takes "geographical presence in a state as a sufficient basis for core aspects of membership."[8]

There are few theorists who adhere consistently to simple territorial equality and all of its implications. Those implications are, after all, quite drastic, since the principle requires that all noncitizens within the state's borders be accorded equal rights and a full opportunity to join in the "processes of self-determination through which a democratic state shapes its internal life."[9] So Walzer and other theorists often try to temper or ignore these implications. But these efforts at moderation do nothing to diminish the centrality of the approach in their work, which typically assumes that all departures from simple territorial equality are either presumptively impermissible or represent trivial wrinkles that can safely be set aside for purposes of developing a general theory.[10] We explain below that it is a mistake

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[7] Linda Bosniak, *Ethical Territoriality and the Rights of Immigrants*, AMSTERDAM LAW FORUM 1, 3 (2008); *see also* Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES IN LAW 389 (2007); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006). For somewhat similar views, see Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy*, in DEBATING IMMIGRATION 63-81 (Carol M. Swain ed. 2007).

[8] Bosniak, *supra* note 7, at 2.

[9] WALZER, *supra* note 3, at 60.

[10] Walzer, for example, waves away the radical implications for tourists with no explanation at all. *See* WALZER, *supra* note 3, at 59. He then dismisses other short term migrants as trivial exceptions to the general rule: "It has been suggested to me that this argument doesn't plausibly apply to privileged guests: technical advisors, visiting professors, and so on. I concede the point, though I'm not sure just how to describe the category 'guest workers' so as to exclude them. But the others are not very important . . . ." *Id.* at 60.

to ignore these troubling implications.[11] For present purposes, however, we focus on the affirmative account of simple territorial equality.

Walzer's critique of Germany's guest worker system provides a nice illustration. Certainly some of Walzer's concerns seem especially pressing when we consider guest workers whose stay is very long-term, such the stigma faced by long-term residents who retain guest worker status. But it's clear that Walzer was also concerned about schemes in which workers came for only short period. For instance, he says, categorically, that "democratic citizen . . . have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labor market to get socially necessary work done."[12] That "choice" would seem to rule out having any situation intermediate between not bringing any workers and bringing workers who will be put on a track to becoming full citizens. In particular it seems rule out bringing short-term guest workers.[13]

In fact Walzer seems to have thought the limited stay of such workers exacerbates the injustice they face. It is disturbing, he claims, that "they are brought in for a fixed time period, on contract to a particular employer; if they lose their jobs, they have to leave; they have to leave in any case when their visas expire."[14] And his main arguments seem to support this rejection of short-term guest worker schemes. Walzer's central theoretical claim is that anyone subject to the state's authority must become an equal member of the political

[11] See infra text accompanying notes 31-36.

[12] *Id.* at 61.

[13] Indeed Walzer concedes that on his view even denials of the right to stay and so on to "visiting professors," and other privileged brief visitors, are on their face incompatible with equality, though he tries to give a special explanation for denying equality in these cases. See WALZER, *supra* note 3, at 57-60.

[14] *Id.* at 56-57. .

community. Since even short-term guest workers are within the state's jurisdiction, Walzer's theory implies that they too must not be denied the chance to remain, naturalize, and so on. Thus, the guest worker who is present in the country but not on that track is being treated unjustly.

Bosniak similarly relies on simple territorial equality when defending various policy proposals. For instance, in arguments about rights for unauthorized migrants, she suggests that we should rely on the importance of sheer territorial presence.[15] What matters is that "irregular migrants are HERE and hereness alone places them within the domain of rights-bearing subjects for many purposes. Being here is the right to have rights."[16] What she calls ethical territoriality demands "universalism within territory." While states may limit who may enter the state's territory, on this idea every person inside must be treated alike.[17]

As the discussion of both Walzer and Bosniak highlights, most theorists explicitly tie simple territorial equality to another commitment: the commitment of self-governance according to which a political community has the right to determine its own membership and character, control that is deemed to encompass the power to exclude outsiders from the territory.[18] Thus, theorists who support simple territorial equality generally take their task to

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[15] "I am attracted in many ways to the inclusionary ethos of the territorialist position and in current debates over policy, especially about undocumented or irregular immigration, I defend it." Bosniak, *supra* note 7, at __.

[16] *Id.* at 2 (emphasis in original).

[17] *See id.* at 4 ("[W]ith ethical territoriality you have got commitments to both universality and boundedness going simultaneously. But notice that for Walzer and many others, these values are not in conflict; they are seen as entirely complementary. The idea is that norms are divided jurisdictionally, with each applying to a different domain: universalism within territory, and boundedness at edges.").

[18] *See, e.g.*, WALZER, *supra* note 3, at 61; Adam B. Cox, *Immigration Law's Organizing Principles*, 157 PENN. L. REV. 341 (2008). Bosniak has described these twin commitments as the "'hard outside/soft inside' conception of

be to develop institutions that jointly satisfy the demands of self-governance and simple territorial equality. Roughly, their aim is to allow a good deal of discretion to the state in its decisions about who and how many people to let in, while placing strict limits on how people may be treated once they are admitted. From their perspective, the state ideally should be free to let in as few or as many people as it wishes and to set criteria for selecting those who are to be allowed in. But once those people are present within the territory, the state must grant them all the same benefits and rights that it grants existing inhabitants.

B. The Affiliation Theory

Most people—even simple territorial equality's leading proponents—think that at least sometimes, and in some ways, it is permissible to treat immigrants and citizens differently. As we will show below, this fact poses a serious problem for simple territorial equality. These problems have given rise to simple territorial equality's chief alternative: the affiliation theory. The affiliation theory focuses on *ties*. While simple territorial equality focuses on the sheer fact that someone is present in the territory, the affiliation theory emphasizes the connections that an alien typically develops to the host society over time. These connections determine what an individual alien is owed by the state. The affiliation theory thus allows for more variation in the treatment of different categories of alien, and for variation in how aliens are treated compared with citizens.

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Consider the views of Hiroshi Motomura and Joseph Carens, perhaps the leading proponents of the affiliation theory writing in law and political philosophy respectively. As Motomura has written in a number of articles and two books, "[t]he more enmeshed [noncitizens] become in the fabric of American life, the more we should treat them like citizens."[19] Carens similarly argues that "[l]iving in a society on an ongoing basis makes one a member of that society. The longer one stays, the stronger one's connections and social attachments. For the same reason, the longer one stays the stronger one's claim to be treated as a full member. At some point a threshold is reached, after which one simply is a member of society, tout court, and one should be granted all the legal rights that other full members enjoy."[20] Affiliation theory has also been alluded to by the Supreme Court in a number of cases concerning the rights of noncitizens living in the United States. In these cases the Court held that "once an alien gains admission to our country and begins to develop the *ties* that go with permanent residence, his constitutional status changes accordingly."[21] In other words, noncitizens are entitled to more rights as their "ties" to American society grow.

In one important respect, the affiliation theory takes the same approach identical to that taken by the theory of Simple Territorial Equality: it asks when individual noncitizens must be treated by the state as equal members. The difference is the triggering condition

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[19] Hiroshi Motomura, *Immigration and "We the People" After September 11*, 66 ALBANY LAW REVIEW 413, 413-429 (2003); *see also* MOTOMURA, *supra* note 3, at 80-95.

[20] Joseph Carens, *The Integration of Immigrants*, 2 JOURNAL OF MORAL PHILOSOPHY 29, 29-46 (2005); *see also* JOSEPH CARENS, IMMIGRANTS AND THE RIGHT TO STAY (2006); JOSEPH CARENS, THE ETHICS OF IMMIGRATION (*forthcoming* 2013).

[21] Landon v. Plasencia, 459 U.S. 21, 32 (1982) (emphasis added); *see also, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79 (1976); Plyler v. Doe, 457 U.S. 202 (1982).

identified by each theory. Simple territorial equality turns on territorial presence. In contrast, the affiliation theory makes *participation in civil society* the condition that triggers the state's obligations to treat a noncitizen as equal to full members of society.

The theorists give somewhat different accounts of what constitutes participation in civil society. But a familiar list includes at least some of the following: going to church, joining playgroups, working and paying taxes, participating in neighborhoods and other associations, being involved in cultural and recreational activities, and so on. The basic idea underlying the theory seems to be that the more someone participates in civil society the more they *interact* with existing citizens and the more they *identify* with existing citizens. It is that interaction and identification, affiliation theorists posit, that gives rise to obligations of equal treatment by the state.[22]

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[22] The affiliation theory, as we have described it, is sometimes conflated with a closely related but distinct theory according to which noncitizens are entitled to concern by the state to the extent that they have *contributed* to a society, rather than the extent to which they participate in civil society and identify with existing citizens. Noncitizens make these contributions by engaging in productive activities that increase economic output and by paying taxes that improve state finances. For some rights the view seems plausible. For instance, it is plausible (though controversial) to think that someone should receive social security benefits to the extent that they have paid into the program. But the view seems rather implausible when we think about other rights that citizens enjoy. We do not ordinarily think a citizens' right to stay in the country or their right to vote is conditional on their being economically productive; unlike rights to claim social security, the right to vote is not a claim to an economic benefit or service that is only made available through individual contributions. Moreover, conditioning such rights on the extent on one's contribution would suggest that those who contribute greatly become entitled to the rights of citizenship much more rapidly. For instance, the marginal contribution of a highly skilled worker working for a week is likely to be significantly higher than the marginal contribution of an unskilled worker. So the former should become entitled to the rights of citizenship much

II. The Inadequacy of Territory and Affiliation

Both simple territorial equality and the affiliation theory suffer from the same central defect: they pay insufficient attention to law and the actual relationship between migrants and the state institutions that regulate migration flows. Simple territorial equality is grounded in an implausible vision of admissions control. The affiliation theory is blind to the power that law and the institutions of the state have to facilitate or prevent the engagement of migrants in civil society. This inattentiveness to law dooms both accounts. But it also points the way toward a more plausible theory of equality for migrants—one that focuses directly on the relationship between immigrants and the state itself.

A. Control Over Immigration in the Modern State

Simple territorial equality is grounded in the idea that the state should have considerable leeway to decide whom to admit—to control admissions—but must treat equally everyone it lets in. The fatal flaw is that control over admissions cannot be squared with simple territorial equality—at least on any plausible account of what it means to have control over admissions. There are certain rules and practices that are difficult to rule out of any plausible account of what it means to control admissions. And as we will show, those rules are fundamentally incompatible with the principle of simple territorial equality.

To be sure, control over admissions is compatible with simple territorial equality if one adopts what we might call the minimalist view of territorial control: that controlling admissions means nothing more than having the *authority* to exclude any person at the border and no more. On this understanding, a state is authorized to stop a person who is

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more quickly than the later because their total contribution increases much more quickly. But our intuitions don't reflect this.

attempting to enter the state's territory. But if the state does not do so, then—regardless of the reason why the state did not do so—once the person crosses into the state's territory no action taken by the state to remove the person will be considered to be in furtherance of control over admissions.

The minimalist understanding of control over admissions is compatible with simple territorial equality. The problem is that the minimalist account is wildly implausible. And revising the understanding to make it more plausible renders it incompatible with simple territorial equality.

One central problem with the minimalist account is that it cannot accommodate the problems of unlawful migration. It either assumes perfect enforcement capacities or assumes, implausibly, that deportation is always impermissible.[23] Under the theory, if a person manages to enter the state's physical territory, the state is prohibited from treating the person any differently than its existing citizens. This means that persons who sneak across the border or otherwise enter in violation of the state's immigration laws must be treated identically to existing inhabitants. But no one who believes that states are permitted to restrict immigration would agree that states are utterly without power to remove anyone who evades the state's immigration restrictions. To be sure, immigration theorists disagree sharply about when, and to what extent, a state may treat those who enter without authorization differently than citizens. They all agree, however, that the state retains the authority to remove or otherwise subject to different treatment *at least some* unauthorized migrants—such as those who recently arrived.[24] Simple territorial equality cannot justify this differential treatment.

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[23] *See* Cox, *supra* note 18, at 370-76.

[24] *See, e.g.*, CARENS, *supra* note 21, at 27.

Even setting aside problems that arise from the limited capacity states have to police their borders, there are a number of practices people think states are allowed to engage in which would violate simple territorial equality. Moreover, these practices are not tangential aspects of immigration policy that can be relegated to the status of minor exceptions to general rules. Rather, they are central part of immigration policy for many states.

There is disagreement about exactly which practices are permissible, but most people think at least some of the following are acceptable:

Probationary periods and ex poste screening. Even when a state screens a prospective migrant at the border and agrees to her admission, states ubiquitously retain some authority to revoke the admission at a later date. These migration rules give states the ability to screen migrants a second time, after they have lived in the state for a time and the state has had a chance to learn more about the migrants.[25] Historically this power has often been misused to deport those thought to be subversive, racially undesirable, and so forth. Yet some limited authority to remove admitted noncitizens is assumed by most immigration theorists and widely considered acceptable.

Hierarchical rights. Immigrants are seldom admitted to a state and granted citizenship on the same day. Instead, even immigrants that a state admits with the intention of creating future citizens typically are given limited rights for some interim period. For instance, many states require that immigrants live in the state for several years before they acquire full access to social insurance and the franchise. And even those who criticize the interim denial of some rights accept the denial to immigrants of others. For example, while many theorists hold that every person present in the state must have an equal right to police

[25] *See* MOTOMURA, *supra* note 3, at 195-97; Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan L. Rev. 809 (2007).

protection, nearly everyone also agrees that immigrants need not be given the right to vote in national elections the day they arrive in a new state.[26] This is true even—or perhaps especially—for those who believe that states have an obligation to open their borders to all persons. For instance, many of those who think states must admit anyone who wishes to enter would agree that states do not have to give the right to someone who is planning to be in the country for only a short period.[27]

Moreover, those who accept the permissibility of (at least some) border restrictions generally think that immigrants need not be given an equal right to reside in the state from the moment of entry.[28] Because the acceptance of ex post screening is so pervasive, most agree that the state has authority to deport at least some noncitizens—such as violent criminals—during an initial probationary period. Thus, there is wide acceptance of giving immigrants a right to reside that is more limited than that accorded to citizens, who most believe should never be banished or exiled. These widespread intuitions support practices that violate simple territorial equality by authorizing the differential treatment of a person on the basis of her status as a recent immigrant and a noncitizen.

Temporary migration. Many migrants, particularly labor migrants, are admitted by states on a formally temporary basis. Migrants who are allowed to enter and work in a country for only a limited time period often face restrictions on their labor market participation—such as rules prohibiting them from working for any employer other than the one for which their visa was granted. Moreover, temporary migrants are typically prohibited

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[26] *See*, *e.g.*, Rainer Bauböc, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 FORDHAM L. REV. 2393 (2007).

[27] See CARENS, *supra* note 21.

[28] *See supra* note 25.

from seeking public assistance, from participating in politics, and so on. Temporary migration rules, often referred to as "guest worker programs," are considerably more controversial than probationary periods or hierarchical rights. There are some immigration theorists, such as Michael Walzer, who argue that there can exist no just system of temporary labor migration.[29] Nonetheless, many forms of temporary migrations are widely accepted. No one thinks it is problematic to admit tourists for only a limited time with limited rights to work, to access public assistance, to political participation and so on.[30] Similarly, there is widespread support for programs that admit some high-skilled workers on temporary visas, or that admit foreign students temporarily to attend our universities, again with limited rights to political participation and so on. Thus there is very widespread agreement that it is at least sometimes permissible to admit someone to the United States on a temporary basis and with limited rights along various dimensions.

In short, all of the above practices involve having some people present in a territory who have more limited rights than others. For this reason they all violate simple territorial equality. Yet nearly everyone thinks at least some of these practices are acceptable. Each of us may disagree with one or another, but it is hard to identify a single immigration theorist who rejects all of these practices.

This is true even for theorists who purport to adhere to simple territorial equality. These theorists struggle mightily with the radical implications of simple territorial equality.

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[29] *See supra* text accompanying notes 10-13. Cristina Rodriguez also appears to hold something close to this categorical view. *See* Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. L. FORUM 1.

[30] *See*, *e.g.*, CHRISTOPHER HEATH WELLMAN AND PHILIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 122 (2011).

As we have shown, if taken seriously simple territorial equality would prohibit a state from deporting *any immigrant* who is physically present in the state's territory, regardless of how the immigrant came to be in the country or how long she had been there. It would also prohibit the state from denying the vote to immigrants the day after they arrived in the state. Theorists try to blunt these far-reaching implications in two ways. First, they sometimes place strict limits on the permissible structure of immigration law—limits at odd with extremely widespread practices. Michael Walzer, for example, implicitly argues that the state may admit immigrants only on a permanent basis; temporary admission is prohibited.[31] Second, they sometimes try to modify subtly the idea of simple territorial equality, though without explaining what principles underlie the modification. Walzer allows for an existence of a transitional period in which new entrants can be denied some rights—such as political rights. But he does not explain what makes such a transitional period morally acceptable.[32]

The difficulty theorists have had squaring simply territorial equality with reasonable practices of control over admissions, limiting the rights of recent and short-term immigrants and so on is understandable. But rather than simply investing more effort trying to reconcile simple territorial equality with these practices, we should consider whether it is defensible on

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[31] As we noted above, Walzer does make an exception to this implicit constraint for tourists and "privileged guests," such as technical advisors and visiting professors, but his explanation of this exception is ad hoc and in seeming contradiction with his other claims. *See supra* note 10.

[32] About all Walzer says about the transitional period is this: "No democratic state can tolerate the establishment of a fixed status between citizen and foreigner (though there can be stages in the transition from one of these political identities to the other)." WALZER, *supra* note3, at 61. It is hard to understand why he thinks it is permissible to withhold citizenship rights for a time from those who are due them, given his beliefs about the requirements of political justice. *See id.* at 60.

its own terms. We think that once we consider our actual immigration practices, and consult our intuitions about them, the principle of simple territorial equality seems very implausible.

These are serious problems for simple territorial equality and yet the theory is widely relied on, *even by theorists who have noticed some of these problems*.[33] The reason for this is that simple territorial equality holds some significant attractions. To make progress we need to find a way to capture these advantages without endorsing the clearly unacceptable theory. Why are theorists so attracted to simple territorial equality and what can we take from this?

The first attraction of simple territorial equality is that it captures some plausible theoretical ideas about what individuals are owed when they are subject to a state's jurisdiction. Walzer, for instance, draws on a long tradition in political philosophy according to which the state must treat fairly those of over whom it exercises authority.[34] We will see later that these ideas can in fact support a very different kind of view, one with much more plausible implications.[35]

The second, perhaps most significant, attraction of simple territorial equality is that it can be used to criticize various clear examples of injustice in the treatment of immigrants. For instance, laws designed to exclude settled immigrants of Chinese origin from parts of the labor market clearly conflict with simple territorial equality. Progressive minded theorists also find themselves relying on simple territorial equality to justify their current policy positions, because it allows them to quickly criticize more or less any treatment of immigrants that they consider unjust: they find its "inclusionary ethos," as Bosniak calls it,

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[33] *See, e.g.*, BOSNIAK, *supra* note 3 .

[34] *See* WALZER, *supra* note3.

[35] *See infra* Part III.

appealing.[36] If you consider a practice objectionable you can quite easily show that it conflicts with simple territorial equality. All you have to do is point to *some* way in which an immigrant is being treated differently to a citizen.

But in fact simple territorial equality can neither explain widely condemned injustices nor help us resolve current controversies. It is too blunt an instrument to explain the clear cases of injustice because it forces us to lump them in with other policies that seem completely benign. Denying the vote to immigrants of Southeast European origin on the basis of race, and withholding welfare rights from visiting scholars, both involve denying some rights to some immigrants, but only one of these practices triggers universal condemnation. To explain the difference we will need a more subtle theory. Similarly, simple territorial equality is no use in resolving present controversies because it is too easy to show that a practice conflicts with it.

How can we make these important distinctions and gain better traction on our current problems? Part of the answer lies in developing a more complex theory of fairness to individual immigrants, of the sort we sketch in Part III. The other part, we argue, requires us to look beyond the fair treatment of individuals to ideals of equality that are very familiar in the law outside of the immigration context. According to these ideals, equality concerns in large part the relative treatment of *groups*. In Section IV we return to the role of groups and show how considering them can help us to make much better sense of equality for immigrants, and thus to address our current dilemmas.

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[36] *See* Bosniak, *supra* note 7.

B. Affiliation as a Self-Defeating Guarantee of Equality

Since simple territorial equality rules out too many settled practices a natural response is to adopt a theory that allows for more flexibility in denying immigrants some of the rights of citizens and, perhaps, in differentiating between different classes of alien. The affiliation theory, as explained, allows some of this sort of flexibility. Since what an alien is owed depends on her ties to a society, this theory justifies denying some rights to immigrants who lack the relevant ties.

Given this account, it should be unsurprising that much theorizing about the affiliation theory is given over to trying to figure out what constitutes participation in civil society. We want to bracket this ambiguity about the theory, however, and focus on the deeper question why participation in civil society should change what people are owed by the state. What is it about interaction and identification with existing citizens that generates these obligations?

To motivate the view a little, think about non-political contexts. Suppose someone moves to a neighborhood. A lot of people will think that the more that person interacts with their neighbors and comes to identify with local practices the more they are a member of the neighborhood and that the more they are a member of the neighborhood the more they are entitled to concern from the other neighbors. Thus, the thought goes, we should think that people become members of society as a whole by interacting and identifying with society as a whole. And the more someone is a member of a whole society the more that society owes them. So, the state should show more concern for people in so far as they interact and identify with society as a whole, which they do by participating in civil society.

The affiliation theory thus has some intuitive attraction. But the intuition obscures an important fact: the state has significant control over the opportunities migrants have to

participate in civil society. According to the affiliation theory, the state should show concern for non-citizens just to the extent that they participate in civil society. But if the extent to which they are integrated into civil society itself depends on the extent to which other citizens and the state let them integrate, then the theory can prove self-defeating.

In other, non-alienage settings, settled moral and constitutional thinking about equality suggests that it is completely inappropriate for the state to take the fact that someone is separate from the main body of civil society as justification for giving them limited political rights. Take, for instance, Jim Crow laws that tried to keep blacks separate from most of civil society or laws that attempted to keep women out of the public sphere. We would now object, as, say, the Supreme Court did in *Brown v. Board of Education*,[37] that these laws are bad for blacks or for women. But on the affiliation theory they should be self-justifying: it was probably bad for African Americans to be isolated in this way, but, on the affiliation view, the greater their isolation the less the state has to care about what's good for them. So keeping them isolated should itself create a justification for showing them less concern and having laws which are less good for them than other groups. But few now think those laws had even minimal justification.

It does not seem plausible to say that someone's lack of participation in civil society is a good justification for limiting the state's concern for them or for giving them fewer rights. In fact, we (and American constitutional law) typically give *special* scrutiny to laws that disadvantage unpopular groups. When we see that a law is, say, especially burdensome for members of an unpopular religious group or ethnic group we tend to look especially hard to see if it has a good justification.[38] This is precisely to make sure that their socially unpopular

[37] Brown v. Board of Education, 347 U.S. 483 (1954).

[38] *See infra* note 57.

status is not being translated into a lesser political status where the state shows them lesser concern.

In the alienage context, the affiliation theory also seems to justify laws that attempt to keep aliens away from mainstream civil society. For instance, German guest-worker policies of the last century used various methods to keep guest-workers separate from the rest of society.[39] This has led them to be among the most criticized of previous guest-worker policies.[40] But on the affiliation theory, those laws too were self-justifying: it was probably bad for the workers to be isolated in this way, but the greater their isolation the less the state has to care about what's good for those workers.

Perhaps it will be said that African Americans, Turkish guest-workers in Germany, and other groups who have been subject to social exclusion may not have been part of *mainstream* civil society but were all the same a part of *some* sort civil society, within their own communities, and thus were entitled to equal concern. So, for instance, African Americans were members of churches, had children and so on, they were just different churches, schools, etc. to the ones attended by the white majority. Thus, the objection goes, the affiliation theorist can say that African Americans were entitled to equal concern by virtue of their affiliation with others, even though those others were not part of the majority.

The objector's stated criterion for receiving equal concern from the state is affiliating with *some* other people, even if not with the main body of society. But this criterion is too weak. A Spanish citizen might interact and identify with a large number of other people, all of whom are in Spain. This surely doesn't entitle him to concern from the US government,

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[39] *See* ULRICH HERBERT, A HISTORY OF FOREIGN LABOR IN GERMANY, 1880-1980: SEASONAL WORKERS, FORCED LABORERS, GUEST WORKERS (1990).

[40] *See*, *e.g.,* WALZER, *supra* note 3, at 56-61.

whereas the affiliation theorist must say that the African American who affiliates with others within the territorial boundaries of the US is entitled to equal concern from the state. The affiliation theory has no explanation for why doing these things within the territorial boundaries of the state brings with it rights that doing these things outside of those boundaries does not. We need a view that explains why presence within a territory is itself morally significant even if it doesn't involve affiliating with the main body of civil society.

Can the affiliation theory be reformulated to avoid these problems? One might object that apartheid-like situations represent special cases. Perhaps they show that participation in civil society should not be a necessary condition for political equality. But maybe it still should be sufficient.

The difficulty with this approach is that it implicitly privileges people who have close affective or ideological ties with others in the polity (or perhaps with the polity itself). This highlights a fundamental problem with the affiliation theory. In many contexts, we are deeply suspicious of laws that condition rights-holding on a person forming a certain type of connection to, or identification with, a community. The history of rights to free expression is built on this skepticism.[41] So is much constitutional law concerning voting rights. Historically, states and local governments regularly tried to condition the right to vote on a person's participation in (state or local) civil society—typically through requirements that a person reside in the state or local jurisdiction for some extended period of time before acquiring the right to vote.[42] States defended these laws in part on the ground that a durational residency requirement would help ensure that the voter developed a connection to, and identification with, the community—that is, that the voter "has a common interest in

[41] *See, e.g.*, GEOF STONE ET AL., CONSTITUTIONAL LAW 1017-22 (6th ed. 2009).

[42] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

all matters pertaining to [the community's] government."[43] The Supreme Court consistently struck these laws down on the ground that it was inappropriate for these jurisdictions to demand that a person interact with local residents or identify with them before being permitted to vote in local elections.[44] These decisions are supported by the widely endorsed principle that a democratic state may not privilege some viewpoints or ways of life over others when assigning fundamental rights.

One way to try to avoid these problems is to propose very weak criteria for what counts as sufficient for membership in a society. And perhaps with an eye to something like our objections some affiliation theorists often do this. They say what matters is just *residence* in the community.[45] But if they adopt such a thin understanding of what is required for membership then they have abandoned the core of their view. The essence of the affiliation theory is that what makes someone a member of society, and thus entitled to equal concern, is their interaction and identification with its citizens. So to say that mere residence or whatever is sufficient for membership is to abandon the core of their view. On such a thin conception of affiliation, the affiliation theory collapses into Simple Territorial Equality.

Thus, we should reject the affiliation theory. But we said there was a plausible intuitive motivation for the view, so where did it go wrong? The motivation was that in general, in non-political contexts, people think that they owe others more to the extent that

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[43] *See* Gov't brief in Dunn v. Blumstein, 405 U.S. 330 (1972).

[44] *See Blumstein*, 405 U.S. at 354-56; Carrington v. Rash, 380 U.S. 89, 94 (1965).

[45] This is, in fact, what courts did in the voting rights cases described above. They held that local jurisdictions could not impose durational residency requirements—because such requirements implicitly were justified by a desire to create affective or ideological ties between the new resident and the jurisdiction—but could require *bona fide* residence. Thus, local jurisdictions could exclude from the franchise those who did not in fact reside in the community, such as property owners who lived elsewhere.

they interact and identify with them.[46] Thus, the argument goes, we should think that to the extent someone interacts and identifies with society as a whole, society as a whole owes them more. Therefore the state should show more concern for people in so far as they interact and identify with society as a whole. Before dismissing the affiliation theory we should try to explain where this motivation went wrong. There are two promising options for doing so.

Firstly, one could deny that someone's interacting and identifying with others *ever* changes what they are owed, even in the context of neighborhoods and so on. Making this case would require going into long standing debates in moral philosophy about justifications for partiality, so we won't dwell on it.

But something weaker will do. Even if a person's interaction and identification with others does affect their status in non-political contexts it is plausible to think that it still shouldn't affect their status in political contexts—that is, it should not change what the *state* owes them.

The affiliation theory has it that your interactions with individual members of society change what the state owes you. But according to much liberal thought a central function of the state is to supply what civil society does not—to protect those who are not adequately protected by civil society.[47] We think that the state ought to ensure that those who are unwilling or unable to participate in majority practices and ideologies are still able to lead good lives. We should thus reject the idea that the state's concern for someone should simply reflect their position in civil society. It is more plausible to think that what the state

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[46] For a discussion of partiality grounded in our relationship with others, see Niko Kolodny, *Which Relationships Justify Partiality? General Considerations and Problem Cases*, in BRIAN FELTHAM AND JOHN COTTINGHAM, EDS, PARTIALITY AND IMPARTIALITY: MORALITY, SPECIAL RELATIONSHIPS AND THE WIDER WORLD (2010).

[47] Many thanks to David Strauss for suggesting this formulation.

owes you should depend on your interactions with the state itself, and so in the next section we develop such a view.

The problems with the affiliation theory are also a reminder that generally when we think about equality we are concerned not simply with ensuring that individuals are treated fairly, but that members of certain groups; especially those who have been frequently mistreated, marginalized, and so on; are given special protections. The affiliation theory creates no guarantee of such protection and even, we have seen, sometimes presents reasons for denying it. A full theory of equality needs to explain why these protections are attractive and how they apply to immigrants.

III. Autonomy and Equality for Individual Migrants

Let us take stock. Simple territorial equality is far too strict, ruling out practices that are surely acceptable. The affiliation theory allows us to accept these practices, but at the price of conflict with settled thinking about equality in other contexts. Must we choose between equality and much of our settled immigration practice? Traditional social contract theory provides a promising path out of this dilemma—one that, unlike the affiliation theory, focuses directly on the interactions between an immigrant and the state itself. While developing such a theory in full is not our goal here, this section sketches the outlines of such an approach, which we will call the autonomy theory.

The autonomy theory rests on ideas about reciprocity. The state imposes certain burdens on people within its territory and has to give them something in return. What do people give up? People have the capacity for autonomy, the capacity to make decisions for

themselves about how to live and carry out those decisions.[48] The state requires people to give up some of this autonomy by accepting a degree of state control over their lives. This is because it issues directives which it demands that they follow. What do they receive in turn? The state promotes their interests—including their interest in leading an autonomous life—by providing them with protection, public goods, resources and so on.

A. Autonomy v. Contract

Before developing these ideas more fully, we should say a few words about a rejoinder that the preceding paragraph invites. If the state's obligations arise from the autonomy that noncitizens give up to reside within the state, why shouldn't the state's obligations be comprehensively defined by the contract of admission between the immigrant and the state? Migration presents a situation that might be thought to overcome many of the problems of hypothetical consent in social contract theory, because unlike most citizens migrants generally do choose to come to a state. Thus, one might think that the migrant should be free to consent to whatever treatment the state says she can expect, assuming the conditions of her stay are made clear in advance. This view is sometimes called the "autonomy theory" because it imagines that immigrants make a contract with the host state, trading admission for whatever conditions the state places on their stay. The only demand

[48] Note that in saying this we mean to remain largely agnostic about the precise form autonomy takes. Moreover, we do not mean to imply that all state impositions are strictly autonomy-reducing. Obviously state action is often a precondition for many forms of autonomy. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

an immigrant might make is that the terms of the contract not change after the immigrant's admission.[49]

This view is implausible for a range of reasons. While consent can sometimes change what someone is owed, there are a wide variety of contexts in which justice is thought to require that an individual's private "choice" or "consent" be disregarded. Sometimes it is relatively easy to explain these intuitions. For example, where low-skilled immigrants have very weak bargaining power relative to the states with which they are dealing, or where refugees face torture or death if they remain in their home countries, many will feel that a state's obligations to these migrants cannot be grounded solely in the migrants' "consent" to the terms of admission offered by the state. In other situations, intuitions about consent may be more mysterious: consider, for example, the universal invalidity of a contract selling oneself into slavery.[50] Nonetheless, the widespread nature of these intuitions outside the immigration context makes it implausible that the choices made by noncitizens should be respected under all conditions, given that certain choices (or conditions on choice) by citizens are prohibited.

B. Autonomy and Simple Territorial Equality

Putting aside the Contract View, different versions of the autonomy theory are commonly invoked to explain why a state has special obligations to its own citizens. Here,

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[49] Hiroshi Motomura discusses something akin to the contract approach, though he does not appear to identify the constraint on ex post changes to the contract. Thus what he calls the "contract" view may in fact may be closer to the view that the state has no obligations—that it can simply do whatever it wants, whenever it wants. *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 3.

[50] In other work, one of us explains how this intuition connects to the value of autonomy. See Adam Hosein, *The Fundamental Argument for Legalization* (mnsc. 2013).

for instance, is Dworkin's statement of the theory: "A political community that exercises dominion over its own citizens . . . must take up an impartial, objective attitude toward them all, and each of its citizens must vote, and its officials must enact laws and form governmental policies, with that responsibility in mind."[51] But as Dworkin's reference to "citizens" illustrates, discussions of the autonomy theory have typically not considered what the theory implies with respect to noncitizens. They have implicitly assumed that everyone within a territory bears the same relation to the state and its authority and is this entitled to the same concern from the state.[52]

If the autonomy theory is right, must everyone in the territory be given the same rights? If so, then the autonomy theory collapses into Simple Territorial Equality. And at first pass it might seem so. Everyone in the territory must follow the law, so it might seem that they all bear the same burdens and must thus get the same benefits and rights. Some people, for instance Walzer, take the autonomy theory to imply basically this: "Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does."[53] But as we

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[51] RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 6 (2000).

[52] We cannot offer here a full defence of the autonomy theory. Our aim is just to show that a version of it can be extended to provide a plausible theory of what aliens are owed. For important presentations of the theory, in addition to Dworkin's, see Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHILOSOPHY & PUBLIC AFFAIRS 257 (2001); Thomas Nagel, *The Problem of Global Justice*, 33 PHILOSOPHY & PUBLIC AFFAIRS 113 (2005). For criticisms of the autonomy theory and social contract theory in general see, for instance, MARTHA NUSSBAUM, FRONTIERS OF JUSTICE (2007); Richard Arneson, *Do Patriotic Ties Limit Global Justice Duties?*, 9 JOURNAL OF ETHICS 127 (2005).

[53] WALZER, *supra* note 3, at 61.

have seen, Simple Territorial Equality is, independently, highly implausible. If the autonomy theory reduces to simple territorial equality, therefore, we should reject it.

Properly understood, however, the autonomy theory does not entail simple territorial equality. The key point to notice is that restrictions on autonomy come in degrees. This is clear once we remind ourselves about what autonomy is. My autonomy is compromised to the extent that someone else has control over my life. And control over my life clearly comes in degrees. For instance, someone might have control over more or fewer aspects of my life and they might have control over it for a longer or shorter period of time.

A wide range of examples illustrate this. For instance, suppose that I am someone's slave. In this case my autonomy is very heavily restricted, since that person controls nearly all aspects of my life. By contrast, suppose that I live in an apartment complex and must follow the rules made by the management, such as restrictions on when music can be played and where trash can be left. I have to give up some of my autonomy to the management company, but much less than the slave gives us to their master. The master has control over much more of the slave's day and much more important aspects of her life.

Political philosophers have only tentatively considered these facts in the immigration context. It has been pointed out that there is a difference between what the state does to, and its control over, people *within* its borders versus people *outside* of its borders, who may be prevented from entering.[54] While the former have to follow the many rules the state makes about their behavior, the latter are merely restricted from entering a particular place.

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[54] *See* David Miller, *Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh*, 38 POLITICAL THEORY 116, 111-120 (2010); Michael Blake, *Immigration, Jurisdiction, and Exclusion*, 41 PHILOSOPHY AND PUBLIC AFFAIRS 103, 103-130 (2013).

Our point is that even *within* the borders of the state there can be differences between the state's relationships with different people, exerting different degrees of control over their lives. Given that restrictions on autonomy come in degrees, the autonomy theory can provide a good explanation of, for instance, what distinguishes tourists from long-term residents. Tourists, unlike long-term residents, are in the country for a very short period of time and thus the state takes very little control over their lives. Because of this the state owes much less to the tourist.

C. The Role of Residence

To see how this works more clearly we need to explain the autonomy theory in more detail. A first question is whether to adopt more "objective" or "subjective," as we might call them, interpretations of what it is to restrict someone's autonomy. On an objective interpretation, the extent to which someone's autonomy is restricted depends just on what regulations apply to them. On a subjective interpretation, the extent to which someone's autonomy is restricted depends on what regulations apply to them and also on the nature of their lifestyle and thus whether the restrictions that apply to them really affect their activities. Take, for instance, anti-sodomy laws. On the objective interpretation two people, one of whom is gay and one of whom is not, both have their autonomy restricted to the same degree by anti-sodomy laws. By contrast, on a subjective view we can say that the gay person's autonomy is restricted to a much greater degree by the anti-sodomy laws. On the subjective interpretation we can say that since anti-sodomy laws have a much greater impact on the gay person's lifestyle their autonomy is restricted to a more significant degree.

The example of anti-sodomy laws seems to indicate that the subjective interpretation is more plausible. Intuitively, the state has more control over the gay person's life.

Furthermore, this seems to fit with our fundamental ideas about what it is to give up autonomy. If giving up autonomy is giving some other person or institution control over my life then it seems that I have given up more of my autonomy to the extent that I have to actually modify my lifestyle in accordance with their decisions.

If all this is right then when we are thinking about noncitizens we will need to consider not just whether someone is in the country and subject to its laws but also the nature of that person's activities in that country. The state has more control over the life of someone who is carrying out their central life plans in the territory than someone who is engaged in relatively trivial activities. This is part of the explanation for why, for instance, we treat tourists differently from temporary workers. The former are merely engaged in leisure activities that are not central to their lives, whereas the latter are working which is more significant activity. It also provides with a reason to distinguish temporary workers from very long-term residents. The former may be in the country for a sufficiently short period that they treat their stay as merely an attempt to earn some money which they can then bring to their home country, where they will be carrying out their major life plans. But latter are in the country for a sufficiently long-period of time that we can expect them to be pursuing all their major life plans there.

More generally, we can distinguish the following different factors that should be taken into account on the autonomy theory. Firstly, we need to consider, *prospectively*, the likelihood that someone is going to remain in the country. If someone is going to be in a country for a longer period in the future then they must adjust more of the plans they are making in light of the state's regulations. If you are only going to be in a country for a short period of time, then you can defer your major plans until you return somewhere else. For instance, tourists have come from and will quickly return to their home country. If they

don't like the laws in the receiving country, they can simply defer their major plans until they return to the home country whose laws they like more. The longer someone is in the country the less this deferment is possible.

This factor also explains our different reactions to a recent immigrant who has come as a refugee and a recent immigrant who is highly skilled and mobile. We feel rather more compulsion to extend rights quickly to refugee than we do to the highly-skilled immigrant. The autonomy theory can explain this by citing the fact that we are much more confident that the refugee will be in the country in the long-term, given her lesser mobility. We can be more confident that her future plans have to be carried out in the host country.[55]

Secondly, it will also be worth considering, *retrospectively*, how much time someone has already spent in a territory. There are a couple of reasons for this. Firstly, the fact that someone has been in the country for a significant period of time is good evidence that they will continue to stay. So the retrospective inquiry is partly just a means of carrying out the prospective inquiry just mentioned. Although someone's past presence is often good evidence that they will continue to reside in the territory, it is defeasible. For instance, even though someone has been a long-term resident, the state might still deport them, thus ending their stay.

A second reason to look at previous residence is that it is good guide as to the nature of their current plans. If someone has been in the country for a significant period of time, then their current plans are likely to have been significantly shaped by the legal regime. Also, the longer someone has been in the country the more likely it is that the activities they are currently engaged in are central to their lives. Someone who is only in a place for a few

[55] Our reactions are also likely influenced by the prospect that the refugee has many fewer options than the high-skilled worker. We take up that possibility below.

weeks is likely to still have the main body of their plans focused on their previous home. By contrast, someone who has been in the country for a significant period of time is more likely to be pursuing their main life projects there.

This retrospective aspect also explains why tourists need only be offered relatively limited rights. Not only are tourist going to leave soon, they have only been in the country for a short period.[56]

D. Autonomy v. Affiliation

So what matters crucially on the autonomy theory is the amount of time someone is a country for and, perhaps, their ability to pursue their life elsewhere. Affiliation theorists often also say that time is what matter because it is a good proxy for affiliation. But on their view time matters only retrospectively. How long someone has been in the country already is a rough proxy for how affiliated they are, but how long they are going to be in the country is not. The affiliation theory also differs from the autonomy theory because it has no good explanation for why things other than time should not be considered too. The view suggests that the state's obligation of equal respect should perhaps turn on ideological or cultural tests, investigations into participation in civil society, measurements of tax contributions, and

[56] Of course, this does not mean that tourists can be denied all rights. The autonomy theory may make better sense for some sorts of rights than others, and more needs to be said about exactly which rights are the sort that should be granted to even short-term residents and which rights can be restricted to longer-term residents. For example, the autonomy theory might most obviously capture the state's obligations with respect to things like political participation, but the state may have broader obligations with respect to certain basic human rights, such as the right to be free from racial subordination. This thorny question is a focus of our future work, but we should note that we do in fact assume, in the concluding section of this essay, that protection from racial subordination is a right that even new arrivals are owed by the state.

so on. These things are good guides—sometimes much better guides than the mere passage of time—to a person's degree of affiliation. On the autonomy theory there is no reason to consider these other factors.

Consider the implications for temporary worker programs. On the autonomy theory, the duration of the guestworker's admission to the state is critical to determining what legal rules are necessary to ensure that the program does not undermine political equality. Two strategies that are consistent with the autonomy theory are open to states. First, they can strictly limit the stay of temporary workers and prohibit program structures that formally limit a migrant's stay but in practice permit repeated admission by the same migrant. Second, states can permit "temporary" workers to stay for longer periods—or to renew their temporary status repeatedly—but afford those putatively "temporary" workers greater rights over time, perhaps including an eventual right of residence and access to citizenship for those workers who have participated in the program for a sufficiently long duration.

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We should note an important limitation of the autonomy theory as we have sketched it. While traditional social contract theory has a number of well-known shortcomings, it provides a useful framework for thinking about what equality requires for recent arrivals in a state. We have assumed that these recent arrivals are people who have full membership in some other state but are now present in the state whose obligations are in question. Therefore, we do not confront the special problems that may arise for stateless persons, newborns, or others who might be seen as having no existing relationship with any state. More generally, we do not directly address an important and oft-overlooked question: should what a state owes to a person sometimes turn on what some other state owes to that person?

Our intuition is that the answer to this question is yes, but it is well beyond the scope of this paper.

IV. Conclusion

The autonomy theory provides a more plausible account of when a state is obligated to treat an individual noncitizen as an equal member. It helps show why short-term immigrants can be denied some of the rights that citizens are granted without treating anyone unfairly. The state simply owes those migrants less. Why, then, do the temporary worker programs of the past trouble us so much?

In some cases, the programs were poorly designed for reasons that the autonomy theory explains: they involved not just the denial of rights to short-term migrants but, as with Turkish workers in Germany, the denial of rights to people who were allowed to settle permanently, children who lived their whole lives in the "host" society, and so on. We can rule out these programs without adopting anything as strict as simple territorial equality. Moreover, on the autonomy theory such programs are problematic even if migrants never do develop any ties to the receiving state, as the affiliation theory would demand.

But reflecting on these examples in light of our findings also suggests that immigration theory may need to take an entirely different tack. Think about the ostracism of the Turkish guest-workers or the stigma that the Bracero program placed on all people of Mexican origin in the United States. Why was this problematic? Not simply because individual immigrants were being treated differently to citizens: the autonomy theory shows that sheer differential treatment is often compatible with fairness. To explain our reaction to these examples we may need to go beyond the conventional focus on treating individual migrants fairly.

Our remarks about the affiliation theory suggest what is needed: as with so much of our thinking about equality in other contexts, we need to emphasize the treatment of *groups*, rather than *individuals*. It is a commonplace in these other contexts, but strangely absent from much immigration theory, that equality is centrally a matter of preventing group subordination: the relegation of particular social groups to an inferior position in society.[57] The problematic immigration practices of the past often violated this requirement: in both the German and American context, the guestworker programs both created subordinated groups, such as *gasterbleiter* in Germany, and exacerbated existing racial subordination within the receiving states.

Political theorists have, on rare occasions, noted this fact. But the sporadic acknowledgement has had little effect on theorizing about equality for immigrants.[58] As we have explained, the leading theories about immigrant equality all focus on the demands of equality for individuals—on the question whether there are meaningful differences between

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[57] *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

[58] This is evident in other recent work on temporary worker programs, which takes an individualist approach to the question of equality. *See* Anna Stilz, *Guestworkers and Second-class Citizenship*, 29 POLICY AND SOCIETY 295 (2010); Valeria Ottonelli & Tiziana Torresi, *Inclusivist Egalitarian Liberalism and Temporary Migration: a Dilemma*, __ JOURNAL OF POLITICAL PHILOSOPHY __ (2010).

migrants and citizens for purposes of applying the Aristotelian principle that likes be treated alike.[59]

Moreover, even on the rare occasions when immigration theorists have considered the demands of group-based forms of equality, they have suggested that preventing subordination requires simple territorial equality. Walzer's discussion of Athenian society and the German guestworker progam of the 1970s takes this approach.[60] But it is a mistake to infer from the mere fact that some individual has more limited rights than others that there is social inequality. Consider, for instance, H-1B visas issued by the United States government to highly skilled workers to work in scientific research, medicine, engineering and so on.[61] Workers who enter the country on these visas have far more limited rights than US citizens. Their stay is limited, they have limited job mobility, they cannot vote, and they are denied access to most forms of public assistance.[62] But no one thinks issuing these visas creates problems of social inequality. These people have, if anything, high status and welfare, and certainly are not members of a stigmatized group.

The hard problem, then, will be to work out the subtleties of exactly which forms of treatment are compatible with group-based equality. The mistakes of the past suggest some things to avoid. We know the risks of stigma when temporary workers are drawn from just one ethnic group that is identifiably distinct from the majority in a society; when they are housed in segregated facilities and kept away from cities and civil society; when they are paid

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[59] ARISTOTLE, NICOMACHEAN ETHICS.

[60] *See* WALZER, *supra* note 3, at 53-62. Linda Bosniak, whose views track Walzer's, suggests this as well. *See* Bosniak, *supra* note 7, at 3.

[61] *See* 8 U.S.C. 1101(a)(15)(H).

[62] For an overview of the H-1B program, see, for example, STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 372-77 (5th ed. 2009)

substandard wages and forced to submit to demeaning "sanitation" measures.[63] It should come as no surprise that conditions like these contributed to the identification of the Braceros as an insular group with inferior status; nor should it be surprising that the stigma spilled over to other Latinos living in the U.S. south. While the past thus provides some lessons, much more work will need to be done to refine our concept of subordination and to examine the effects of different programs on social groups. Moreover, there are hard questions to be answered about the interaction between the treatment of immigrant groups and existing subordinated groups within society. We propose that this is the work immigration theorists should start focusing on.

[63] As occurred in the Bracero program. *See* MAE NGAI, IMPOSSIBLE SUBJECTS (2004).