

REVIEWS:

**THE CITIZEN AND THE ALIEN: DILEMMAS OF  
CONTEMPORARY MEMBERSHIP**

**L. Bosniak,**  
**Princeton University Press 2006,**  
**222 pages, ISBN: 987-0-691-11622-8.**

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This book adds to the already large body of scholarship, a rich analysis on the concept of citizenship and how alienage relates to this concept. Bosniak describes in her first chapter that two bodies of scholarship on the concept of citizenship exist: one that is mainly inward looking, in that it designates the nature and quality of relations among members of an already existing society. This type of scholarship presumes from the outset the existence of the nation state and the existence of boundaries (or as she states it “*presume away any world outside the nation altogether*”, (p. 2)). By doing so it can achieve, at least conceptually, an inclusionary inside, where everyone is equal before the law (indeed quite an appealing idea). The other body of scholarship focuses more on the exclusionary aspects of citizenship, so not the internal life of the community is taken as a focal point, but its edges. According to Bosniak there has been little interchange between these inward-looking and boundary-conscious strands of scholarship. She wants, through this book, to bring about a “sustained dialogue” (p. 2) between the inward-looking, inclusionary and boundary-conscious, exclusionary approaches as they are both implicated by the concept of citizenship.

Before establishing this dialogue, however, the concept of citizenship itself is defined more succinctly, since so many meanings are ascribed to it by scholars, politicians and others. Questions about citizenship can be divided into three (overlapping) categories: what is citizenship, where does it take place, and who is a citizen? After addressing these questions Bosniak considers that status, rights, political participation make up the core elements of substantive citizenship. So whereas the focus, at least for legal scholars, usually lies at status citizenship, status citizenship alone needs not necessarily lead to enjoyment of full and substantive citizenship (as inequalities in the enjoyment of citizenship rights might still exist even among formally equal citizens).

Walzer’s concept of citizenship, and his broader structural theory of ‘complex equality’ then serves as the analytical framework for the discussion of a number of Supreme Court cases. The principle of “complex equality”

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can be understood to mean in short that “*no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good.*” His theory deals with the distribution of social goods, of which Walzer views membership as one. In that respect power or even a monopoly in one sphere is not a particular concern for Walzer, it need not necessarily be unjust. However, if possession of goods in one distributive sphere entitles the possessor to goods in other spheres, a state of affairs occurs which Walzer calls ‘dominance’, which he views as an illegitimate conversion of spheres. Power, or the possession of goods, in one sphere may not, according to him, extend into power in another (so one’s financial power should not automatically lead to political power; in that respect for example Walzer would probably view Berlusconi’s possession of both media and political power as very questionable, to put it euphemistically). Separation of spheres is thus desirable, and the illegitimate conversion of those spheres is to be avoided.

According to Walzer democratic nation states are to a certain extent entitled to exclude outsiders from their community. On the other hand though, once inside, they must be treated as members of the community, as contemporary democracies, do not tolerate a caste like status for people. Government indeed possesses the power to control the borders and decides who it lets in. Furthermore, a government’s immigration powers are not confined to the borders, for it can also deport persons that have already (illegally) penetrated the borders. Some people however have lived in the country as status non-citizens for many years, and one can reasonably ask oneself to what extent the government’s immigration powers may still be exerted over them? Bosniak questions just how far into the life of the alien the government’s membership authority may legitimately extend. A key question in this respect is when may a non-citizen be treated less favourably than a citizen simply propter his lack of citizenship? The answer to this question depends to a large degree upon what relevance the government’s power to regulate immigration has for the treatment of the alien in the economic, political and social spheres.

In her discussion of - among others - Supreme Court cases she finds that aliens often are enjoying many constitutional rights on the account of their “being present”, their territorial personhood. So for example the fourteenth amendment is applicable to anyone within the jurisdiction of the United States, citizen or non-citizen. And even though the courts have held the government has plenary power in the field of immigration, it should assert it within its own domain, so for example not for denying undocumented children the right to go to school, or for using immigration regulation for what is in fact a criminal punishment. So even though this process basically entails a separation of spheres, the ongoing question remains what the legitimate borders of these spheres should be.

Is discriminatory treatment of aliens to be understood as a legitimate exercise of the government's power to regulate membership (and if so, under what conditions) or as an illegitimate violation of their rights as persons? Bosniak divides the various responses to this questions into two concepts, which she calls the separation model and the convergence model: the first urges a strict separation between the membership domain (formal citizenship) and the domains of territorial personhood (merely present on the territory), whereas the latter considers membership concerns to be a rightful part of the regulation of social relationships among *all* territorially present persons. These models are, as she acknowledges, relative, so whether an argument based on these models is to be qualified as a separation or a convergence argument depends on the starting point one takes.

The actual analysis of American case law, and any conclusions drawn from it may not easily be transferred to the European setting, but the analytic framework that is provided stands strong. It can serve as a framework to understand the current shape of citizenship debates in other countries and it urges the reader, especially those not too familiar with American constitutional law, to look for analogies in their domestic case law.

To cite just one example stemming from the Netherlands, the same questions as described above emerge if one looks at an expulsion case in the Netherlands, where the Dutch government intended to deport an imam they considered dangerous to Dutch society to Syria.<sup>1</sup> This imam had, according to the Dutch government, incited hatred against non-believers in his sermons in the mosque. The man, however, had been a status non-citizen in the Netherlands for over ten years and now risked being deported for what he had said. There were no criminal proceedings charged against him, as it was obvious this would not hold up in court, and so the imam argued that it was unfair that he was being deported for saying things that were not punishable under criminal law and that a Dutch imam saying the same things would walk free, whereas he, legally resident in the Netherlands for over ten years, would be deported for it. In other words, his alienage still haunts him inside the borders, even after a lengthy period of time and exposes him to discriminatory treatment on the sole basis of him being an alien. The court, unmoved by his statement rejected this argument (even stating, under reference to earlier case law, that Dutch citizens have the right to be territorially present and thus cannot be deported, which is also reaffirmed by Article 3 of the Fourth Protocol to the European Convention of Human Rights; as if the court actually regretted the fact that it could not deport Dutch citizens!). Stripping away the legal and factual context of this case, the same pressing issue is present: up to what point does alienage legitimately matter, or to what extent may the political community's authority to regulate immigration at the borders legitimately extend to shape and possibly constrain the lives of noncitizens already territorially present and residing

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<sup>1</sup> Rechtbank 's-Gravenhage zp Zwolle, 9 oktober 2007, *JV* 2007/509,

within that community, especially given the far reaching consequences a deportation or the threat thereof entails for an alien?

With her book, Bosniak thus offers an analytical framework, which may also be used outside the setting of the United States' constitutional (case) law. She furthermore makes its readers aware of the fact that the ambivalence embedded in the term citizenship: being exclusionary on the outside, while inclusionary on the inside and moreover sometimes even exclusionary on the inside or inclusionary on the outside. This ambivalence will not, however, be solved by splitting the bodies of scholarship, although she understands the impulse to do so as this "*holds out the promise of achieving a purely inclusionary inside – a promise that egalitarian liberals find deeply compelling*" (p. 139). Ultimately, rejecting the exclusionary commitments entirely to the geographic borders of a nation state will prove to be a fiction or even a fantasy, as she convincingly argues, as these exclusionary national boundaries are with us on the territorial inside as well. Undoubtedly the book has fulfilled its aim, stated in the first chapter, to deepen the dialogue between inward-looking and boundary-conscious approaches to citizenship.