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Three Models of Political Membership: Delineating ‘The People in Question’

Alex Green*

In her timely monograph, The People in Question, Jo Shaw provides a much-needed critical comparative review of the complex interactions between citizenship and constitutional law. In this essay, I argue that, despite its emphasis upon citizenship’s essentially contested nature, Shaw’s latest work contains rich moral commitments and an important caution against uncritically eliding ‘full citizenship’ with ‘political membership’ more broadly construed. To establish these claims, I present a tripartite taxonomy of approaches to defining ‘the people’ based, respectively, upon the concepts of status, subjugation, and duty. I claim that Shaw’s incisive analysis demonstrates perfectly why we should avoid placing undue reliance upon ‘status-based’ models of community membership and conclude by advancing an original, alternative, and hybridised model of ‘the people in question’.

Keywords: Constitutional Theory, Citizenship, Legal Philosophy, Political Theory, Public International Law

1: Introduction

‘The constitutional citizen is a central figure for understanding many dimensions of and tensions within modern citizenship as well as for understanding modern constitution-based polities.’¹ This is the core claim of Jo Shaw’s ambitious and wide-ranging new monograph, *The People in Question: Citizens and Constitutions in Uncertain Times*. Adopting a comparative and sociologically informed approach,² Shaw has produced not only an essential reference text on the treatment of citizenship within different constitutional settings but also a comprehensive defence of the view that ‘citizenship is not a static concept, but one which changes by reference to changing geographical coordinates and also over time’.³ There is much here to interest the constitutional scholar, the comparative lawyer, and the legal sociologist but, as I shall argue here, Shaw’s most important contribution is an indirect one, and merits particular attention from legal and political theorists. At bottom, *The People in*

* Visiting Scholar, School of Law, University of Leeds; email: A.Green1@leeds.ac.uk

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¹ Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol UP 2020) 44.

² Ibid 29.

³ Ibid 31.

Question draws our attention to the globally contested nature of what defines a ‘people’ and (perhaps somewhat surprisingly) offers an important caution *against* uncritically eliding political membership with citizenship.

Shaw’s argument is almost daunting in its sheer scope. Beyond elucidating the concept of ‘constitutional citizenship’,⁴ canvassing how that status can be gained and lost,⁵ and exploring its connection with our fundamental rights,⁶ she also examines the tensions between constitutional citizenship and the (re)emergence of populism,⁷ as well as the connections between different national, regional, and global citizenship regimes.⁸ *The People in Question* is also exceptionally rich in its use of examples. In addition to referencing some of the constitutional frameworks with which anglophone scholars will be more familiar, Shaw spends considerable time examining citizenship within the ‘Global South’. Such inclusivity is doubly important: not only does it supply Shaw’s pluralistic account of constitutional citizenship with crucial ‘raw data’ but it also avoids the problematic Eurocentrism that afflicts a considerable volume of contemporary Western political theory.

Each of these themes merits extended review and I cannot hope to do the entire book justice here. Instead, I focus on a foundational question, central throughout *The People in Question*, but which Shaw addresses only obliquely: namely, how *should* membership within our political communities be defined, and can we rely upon concepts like ‘constitutional citizenship’ to do (at least part of) this work? At times, Shaw seems equivocal about its potential, emphasising the ‘contradictory and contested engagements with concepts of citizenship and peoplehood’ in many constitutional traditions, and the concomitant importance of ‘close contextualized and historically sensitive readings of each constitutional set-up’.⁹ At others, she seems more optimistic, arguing that the ‘modern ideal of citizenship demands a form of equality defined by reference to universal personhood’¹⁰ and that ‘the ‘dignity of the citizen’ operates as one way in which we, as humans, can assist in the realisation of ‘human dignity’’.¹¹ Such oscillation between reality and the ideal stems from Shaw’s analytical rigour and intellectual modesty, which should be commended and admired.

⁴ Ibid Chapters 2 and 3.

⁵ Ibid Chapter 4.

⁶ Ibid Chapter 5.

⁷ Ibid Chapter 6.

⁸ Ibid Chapter 7.

⁹ Ibid 97.

¹⁰ Ibid 79.

¹¹ Ibid 81.

Nonetheless, there is something frustrating here too. *The People in Question* constructs its comparative and contextual analysis upon some controversial moral assumptions, which, Shaw accepts, provide her with necessary heuristics.¹² As just indicated, these turn primarily upon the concepts of dignity and equality as grounds for citizenship as a normative ideal. Consequently, it often feels as though Shaw's contextualised account of constitutional citizenship, with its emphasis upon spatial and temporal particularity, is forced upon her by recalcitrant social reality: that *true* citizenship, understood as status-based membership within distinct political communities, is promised everywhere but actualised nowhere.

In what follows, I examine Shaw's normative vision of constitutional citizenship and interrogate its underlying assumptions about political membership. I focus predominately upon those communities constituted by contemporary states, although elements of my argument may also apply to transnational and subnational entities, like the European Union or federal states, with which *The People in Question* is also concerned. I begin by identifying three broad categories of theory that address political membership: three 'models' of peoplehood based, respectively, upon *status*, *subjugation*, and *duty*. Next, I argue that *The People in Question* rests largely upon a 'status-based' understanding of political membership, and that its articulation of constitutional citizenship should be understood primarily in those terms. In so doing, I note some difficulties faced by models of this kind, which Shaw's comparative and contextual analysis bring to the fore. Finally, I sketch an alternative, 'hybrid' view of political membership, concluding with an argument for its superiority (and logical priority) over status-based models.

2: *Three Models of Political Membership*

Before considering the normative theory implicit in Shaw's argument, a rough analytical framework must be established. Whilst 'the people' remains a contentious category, three broad modes of characterisation exist. The first, which I call 'status-based' models, hold that full membership attaches only to those individuals who possess a particular kind of standing within a political community or, to paraphrase Nagel, occupy a certain sort of 'place' within its normative landscape.¹³ The second, which I refer to as 'subjugation-based' models, deem 'the people' to be whatever set of individuals are factually subject to the coercive power of

¹² Ibid 19.

¹³ Thomas Nagel, 'Personal Rights and Public Space' (1995) 24(2) *Philosophy & Public Affairs* 83, 85.

some distinct government or governments. The third, which I name ‘duty-based’ models, understand political membership as constituted by multilateral obligations, which bind particular groups of individuals together. These approaches are not mutually exclusive: each represents just one archetypal account of political membership and, as we shall see, hybrid models are possible. However, various scholars (Shaw included) place sufficient emphasis upon one model to the exclusion of others for this analytical division to be profitable.

Status-based models of political membership correspond most naturally to the various conceptions of constitutional citizenship contemplated by Shaw. Indeed, citizenship per se provides perhaps the most intuitively accessible example of status-based membership: insofar as one is a citizen of, say, Canada, one possesses a particular kind of normative standing *vis-à-vis* that political community, which non-citizens lack. The broader set of status-based models encompasses both *subjective* and *objective* understandings of political membership. On the former, who belongs to a particular political community, and who is excluded, turns upon a shared subjective attitude. For instance, according to Arendt, collections of individuals can form political communities only by *holding* themselves to possess equal status as members.¹⁴ Crucially, there might be no basis for this attitude other than: (i) the existence of political communities is desirable; and (ii) such an attitude is instrumental to that end. Membership, on this account, is no ‘deeper’ than the choice that constitutes it, even if it might be instrumentally valuable for a host of other reasons.¹⁵ Conversely, on objective accounts, status-based membership turns on some independently ascertainable property (or role) held by the people in question. For example, whilst Dworkin emphasises the attitudes of mutual concern and respect that individuals must possess in order to form genuine political communities, he stresses that the ‘concern they require is an interpretive property of the group’s practices of asserting and acknowledging responsibilities...not a psychological property of some fixed number of the actual members’.¹⁶

Subjugation-based models are, in one sense, diametrically opposed to status-based accounts in that, rather than identifying ‘the people’ with normatively elevated individuals, they delineate in line with subjugation to coercive power. Under such models, one belongs to a particular political community if one is liable to be routinely coerced by its governing

¹⁴ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace, Jovanovich 1973) 301.

¹⁵ Many contemporary theories are foundationally subjective in this way, including: David Miller’s understanding of nations as identity-based collectives (*On Nationality* (OUP 1997) 22-25); Margret Moore’s account of ‘peoples’ as collective agents capable of undertaking joint action (*A Political Theory of Territory* (OUP 2015) 56-59); and Anna Stilz’s ‘political autonomy’ theory of collective self-determination (*Territorial Sovereignty: A Philosophical Exploration* (OUP 2019) 94).

¹⁶ Ronald Dworkin, *Law’s Empire* (Fontana Press 1986) 201.

institutions, which typically occurs through residence within the territory those institutions govern. Most scholarly accounts of this sort depart from the Weberian thesis that ‘a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory’.¹⁷ Importantly, subjugation also forms the basis upon which international law separates out territorially delineated peoples as the *populations* of distinct states.¹⁸ Shaw’s exclusive focus upon *citizenship* means that *The People in Question* omits to discuss this,¹⁹ which undermines her claim that international law lacks ‘an effective, consistent and universally applicable approach to allocating people to states’.²⁰ At the very least, Shaw’s otherwise rich discussion of nationality and statelessness would have benefitted from a critical pass at the asymmetry of international law clearly delineating different peoples for the purpose of identifying its state-subjects, whilst remaining comparatively silent on the rights those populations gain *vis-à-vis* the political communities that could not exist without them.²¹

Duty-based models characterises political communities as constituted by individuals who owe distinctly political obligations to each other, with membership being delineated along those lines. For example, according to Kant, geographically proximate individuals have a natural duty to create common institutions capable of making, applying, and enforcing law because such proximity risks creating crippling coordination problems.²² Although, for Kant, true political communities only exist when such institutions have been established, membership within them, being a matter of ‘public right’, is ultimately determined by the continued existence and implementation of the multilateral duties such institutions facilitate.²³ Notwithstanding their divergent theoretical bases, duty-based and subjugation-based models have something crucial in common. Neither being bound by a particular obligation, nor being subject to the coercive power of a given institution, necessarily entails that one will be recognised as an equal member of whatever community is built upon those foundations. Political membership, in other words, need not imply full citizenship, even if it

¹⁷ Max Weber, ‘Politics as a Vocation’ in H.H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1991).

¹⁸ *Island of Palmas (or Miangas) (The Netherlands v. United States)*, 2 *Reports of International Arbitral Awards* 829 (1928), p.831, 839-840; James Crawford, *The Creation of States in International Law* (OUP 2006) 52-53.

¹⁹ Shaw (n 1) 13-14.

²⁰ Ibid 145.

²¹ Ibid 145-148, 242-251; for more on the relationship between legal statehood and ‘permanent populations’, see Crawford (n19) 52-55.

²² Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor (ed) (CUP 1996) 89-90.

²³ Ibid 97-98; for Kant’s distinction between this larger set of polity members and full citizens, see his (somewhat objectionable) distinction between ‘active’ and ‘passive’ citizens (ibid 99-101).

would be just for those two categories to dovetail. It is this possibility that motivates my analysis in what follows. As I shall argue, Shaw's normative assumptions about constitutional citizenship indicate her commitment to a status-based model of political membership. What concerns me is that, as *The People in Question* itself so ably demonstrates, eliding political membership and (status-based) citizenship is morally hazardous. Happily, Shaw's careful use of context and comparison illustrates these dangers superbly: this, it seems to me, will constitute the book's lasting contribution.

3: *Constitutional Citizenship as Status-based*

In this section, I argue two things. First, that *The People in Question* employs a status-based conception of political membership. Second, that its most important contribution, at least insofar as legal and political theory are concerned, lies in Shaw's careful contextual demonstration that: (i) citizenship is a globally contested category; and (ii) uncritical reliance upon citizenship as *the* criterion for political membership is morally hazardous. At times, these two threads create tension. As noted above, the spatial and temporal variations that Shaw identifies between different citizenship regimes often frustrate the normative potential that she takes citizenship to represent as a constitutional ideal. However, it is in embracing and emphasising this tension that *The People in Question* truly excels and offers a long-overdue injection of realism into existing legal-theoretical debates.

A: '*We the People*'

Identifying any conception of citizenship as a normative ideal within *The People in Question* is complicated by Shaw's thesis that 'citizenship can be both a paradoxical element within constitutional settlements and also an empty box or cypher'.²⁴ The book nonetheless represents a fundamentally interpretive endeavour, which pursues conceptual trends within the contested spaces created by various national and global citizenship practices. In this subsection, I take Shaw's interpretive ambition seriously, particularly in light of her claim that 'we cannot 'interpret' the world without bringing to the fore our ethical and normative choices about what *ought* to be invested in the citizenship concept, especially when it is viewed constitutionally'.²⁵ My contention is that, although she never fully articulates it within the text, Shaw is committed to a status-based model of political membership, which

²⁴ Shaw (n 1) 175.

²⁵ Ibid.

celebrates citizenship as a means for promoting the equality and dignity of persons. This commitment forms the normative backdrop to her comparative and critical insights, underpinning much of what is excellent within *The People in Question*.

Whilst accepting many divergent conceptions of ‘peoples’ to exist,²⁶ Shaw nonetheless places both citizenship and constitutional law at the core of that contested concept. Citizenship, she claims, ‘is acknowledged to be one of the most important ties that bind communities together’.²⁷ Moreover, ‘it is practically impossible to imagine citizenship – both in the formal legal sense and especially in the wider senses of political membership and community identity – without also considering the relevance of fundamental ideas about ‘the people’’.²⁸ Finally, constitutions, which include broader principles of law and politics in addition to foundational texts,²⁹ provide spaces within which the ‘biographies’ of peoplehood develop over time.³⁰ For Shaw, these connections entail that ‘[t]he idea of constitutional citizenship demonstrates how a concept of membership can ‘sit’ within state polities’.³¹

The adoption of this conceptual framework represents an interpretive choice on Shaw’s part, rather than an empirical or logical necessity. There are, as she accepts, many other ways to understand and elucidate contemporary polities.³² On one level, the reason for this choice is clear: *The People in Question* is primarily concerned with a comparative elucidation of the relationship between citizenship and constitutional law.³³ In this respect, it neither contains, nor purports to offer, a comprehensive theory of peoplehood.³⁴ Indeed, Shaw often expresses her suspicion that such grand theories frequently mask the fact that ‘states are prepared to treat the nature of citizenship as simultaneously both constitutionally significant and yet ethically fungible’.³⁵ Nonetheless, and notwithstanding its emphasis upon context and comparison, *The People in Question* also contains rich moral commitments. It is these commitments, I suggest, that motivate Shaw’s analytical choices: she not only believes in constitutional citizenship as a normative ideal but also in its practical potential to secure certain essential elements of justice.

²⁶ Ibid 27-28.

²⁷ Ibid 5.

²⁸ Ibid 26.

²⁹ Ibid 23-26.

³⁰ Ibid 88.

³¹ Ibid 63.

³² Ibid 27.

³³ Ibid 253.

³⁴ Ibid 254.

³⁵ Ibid 97.

These elements are encapsulated in the twin principles of equality and dignity, which, for Shaw, provide the normative core of citizenship. '[T]he modern ideal of citizenship', she tells us, 'demands a form of equality defined by reference to universal personhood',³⁶ whilst 'the 'dignity of the citizen' operates as one way in which we, as humans, can assist in the realisation of 'human dignity''.³⁷ This is mirrored in her claims that '[t]he infliction of loss of dignity is one eloquent way of capturing the consequences of some state policies on the attribution and loss of citizenship'³⁸ and:

Even though the *leitmotiv* of modern citizenship is supposed to be equality, it has still been the case that struggles for citizenship rights that are simply asking for equality can endure over many decades...A good example is the struggle for female suffrage, where women 'citizens' could be excluded from full citizenship rights precisely because the law did not, in effect, recognize them as full citizens.³⁹

The notion that citizens without the vote are not 'full' citizens is illuminating, particularly in light of Shaw's emphasis upon suffrage as a means for identifying 'the internal and external limits of the 'constitutional people''.⁴⁰ *The People in Question* presents citizenship as securing dignity and equality primarily through the rights it guarantees and, though Shaw emphasises that several different citizenship regimes offer divergent protections,⁴¹ she nonetheless identifies a 'standard palette of rights specifically related to citizenship', which includes:

...those associated with presence on the territory (the right to leave and to return to one's country), those associated with protection of and by the state (diplomatic protection, military service, restrictions on extradition), those associated with democracy and the role of the body of citizens as 'the people' (the right to vote and stand for election, and to hold high office), and those that involve some sort of share in the collective resources of the country (social and economic rights)⁴²

³⁶ Ibid 79.

³⁷ Ibid 81.

³⁸ Ibid.

³⁹ Ibid 150.

⁴⁰ Ibid 165-166.

⁴¹ Ibid 152-165.

⁴² Ibid 152.

This association of citizenship with a particular subset of rights, together with the notion that, as an idealised category, it exists to secure dignity and equality, emphasises precisely the kind of ‘normative elevation’ that marks status-based models of political membership. As noted above, such models delineate ‘the people’ by parsing between individuals who possess a particular standing in relation to the relevant political community and those who do not. As the foregoing quotations evince, this is precisely what Shaw’s normative commitments *vis-à-vis* constitutional citizenship also serve to establish: only individuals with a sufficient set of rights, which serve to secure their standing within ‘the discursive space’ created by the relevant constitution, are true community members.⁴³ Putting this another way, on what we might call this ‘civic constitutional model’, genuine political membership attaches only to full *participants* within a constitutional order.⁴⁴

To this sketched vision, we must add one final element. According to Shaw, contemporary citizenship can be plural, with many individuals belonging, not to one political community (represented, say, by their ‘home’ state) but rather to various ‘citizenship constellations’.⁴⁵ According to Bauböck, whose definition Shaw endorses,⁴⁶ these constellations are ‘structure(s) in which individuals are simultaneously linked to several political entities, so that their legal rights and duties are determined not only by one political authority, but by several’.⁴⁷ They encompass transnational belonging, such as European Union citizenship,⁴⁸ as well as membership within substate communities, such as Québec or the Swiss cantons.⁴⁹ Furthermore, whilst not unequivocal on the subject,⁵⁰ Shaw passes several salutary remarks upon this contemporary plurality, contrasting it with the ‘exclusionary...techniques that the Atlantic empires endeavoured to use in relation to citizenship’.⁵¹ Moreover, the notion that citizenship ‘beyond the state’ follows from the exercise of human agency to produce these multi-layered results hints at cosmopolitan commitments within Shaw’s civic constitutionalism.⁵² Political membership may turn upon participation within a constitutional order, but since one individual can be granted

⁴³ Ibid 155.

⁴⁴ Ibid 255.

⁴⁵ Ibid 225.

⁴⁶ Ibid.

⁴⁷ Rainer Bauböck, ‘Studying citizenship constellations’ (2010) 36(5) *J of Ethnic and Migration Studies* 847, 848

⁴⁸ Shaw (n 1) 233-242.

⁴⁹ Ibid 228.

⁵⁰ Ibid 231.

⁵¹ Ibid 230.

⁵² Ibid 224.

participation within *many* such orders, the contemporary constitutional citizen may enjoy an elevated status that is both complex and transnational. It is through this intricate and evolving lattice that political equality and individual dignity stand the greatest chance of being guaranteed.⁵³ This, I suggest, is the normative vision that emerges from a holistic reading of *The People in Question*.

Shaw might resist this characterisation of her work. She warns explicitly against searching for single answers to the question of what makes a constitutional citizen, arguing instead that ‘the question should be an open one: ‘what are the elements that shape the development of the discursive space within which the citizenship/constitution interaction plays out?’⁵⁴ Nonetheless, as she acknowledges, *The People in Question*, being fundamentally an interpretive project, does not leave these elements untouched.⁵⁵

Models of political membership clearly exist that Shaw considers too restrictive. Take populist models, which are introduced in Chapter 6 as a direct challenge to constitutional citizenship.⁵⁶ Drawing upon Lacey’s definition of populism as ‘a highly moralised approach to politics that pitches a homogenous “we the people”, often conceived in ethnic or national terms’,⁵⁷ Shaw evinces, through an impressive range of case studies, ‘the dangers that populism may pose to open, equal and inclusive conceptions of membership, based on substantial deliberation among members of the polity as free political agents’.⁵⁸ But this notion of ‘equal and inclusive’ membership within a polity of ‘free political agents’ is manifestly not neutral *vis-à-vis* ‘the discursive space within which the citizenship/constitution interaction plays out’. Instead, it reveals some important and attractive beliefs about what kind of polities our world *ought* to comprise and what kind of *status* membership within those communities ought to entail. Unfortunately, as the next subsection will canvass, social reality rarely meets Shaw’s high standards. Happily, for her audience at least, it is in her incisive and wide-ranging examination of this recalcitrant reality that *The People in Question* truly excels.

B: *Imperfect Unions*

⁵³ Ibid 175.

⁵⁴ Ibid 255.

⁵⁵ Ibid 31-33, 254.

⁵⁶ Ibid 181.

⁵⁷ Nicola Lacey, ‘Populism and the rule of law’ (2019) 15(1) Annual Rev of L and Social Science 79.

⁵⁸ Shaw (n 1) 190.

‘Citizenship as an ideal continually disappoints’.⁵⁹ This is perhaps the most important insight contained within *The People in Question*. Notwithstanding Shaw’s apparent commitment to a status-based model of political membership (and to citizenship as an essential means for promoting equality and dignity) she is uncompromising in her critique of many *real* citizenship regimes. Thus, whilst fundamentally an interpretive project, *The People in Question* does not seek to obscure injustice: to use Shaw’s phrase, its analysis is ‘observational’ as well as interpretive.⁶⁰ Indeed, as I shall now argue, this critical quality represents the book’s greatest strength. Through careful comparison and contextualisation, Shaw demonstrates the hazards of uncritically eliding political membership with citizenship, offering an important moral lesson. This is that, when delineating political membership, we should never rely solely upon status-based criteria, whether we are *explaining* membership or seeking to implement some account of ‘the people’ within an institutional setting. For although status-based criteria inevitably demarcate *some* individuals as possessing normatively elevated ‘standing’ – and may well promote aspects of dignity and equality – they also frequently institutionalise injustice via unjustified exclusion.

Shaw demonstrates this truth with an impressive range of examples. When considering, for instance, comparative trends concerning the acquisition and loss of citizenship, she examines legal frameworks within, to pick just a few, the United States of America,⁶¹ as well as the Republics of Colombia,⁶² India,⁶³ Ireland,⁶⁴ and the Dominican,⁶⁵ French,⁶⁶ Hellenic,⁶⁷ and Togolese Republics.⁶⁸ Throughout, her most incisive remarks emphasise the various ways in which law governing the acquisition and loss of citizenship can be exclusionary and discriminatory, including on the basis of ethnicity,⁶⁹ gender,⁷⁰ and perceived conflicts of national allegiance.⁷¹ Drawing upon examples such as the State of Israel⁷² and the Commonwealth of Australia,⁷³ she also examines the ways in which

⁵⁹ Ibid 177.

⁶⁰ Ibid 32.

⁶¹ Ibid 104-106.

⁶² Ibid 109.

⁶³ Ibid 107.

⁶⁴ Ibid 106.

⁶⁵ Ibid 107-109.

⁶⁶ Ibid 103.

⁶⁷ Ibid 111-112.

⁶⁸ Ibid 111.

⁶⁹ Ibid 107-109, 114-115, 134-135, 140-141, 143-144.

⁷⁰ Ibid 131, 141-143, 147-148.

⁷¹ Ibid 125-130, 134-135.

⁷² Ibid 71-73.

⁷³ Ibid 76.

constitutions can conceptualise citizenship in an overly restrictive or discriminatory manner, often with reference to ethno-national criteria.⁷⁴ These examples not only reinforce the critical insights offered by *The People in Question* but also establish it as an important reference text. Particularly impressive are the lengthier examples of Canada,⁷⁵ the United States,⁷⁶ the United Kingdom,⁷⁷ Hungary,⁷⁸ and India,⁷⁹ which Shaw uses to examine tensions between constitutional citizenship and populism. Each illustrates how changing conceptions of ‘the people’ can threaten the egalitarian and dignitarian elements that she identifies with citizenship as an ideal.

In each case, Shaw’s focus upon (constitutional) citizenship as a normatively elevated status exposes a common problem with viewing political membership exclusively in those terms. We can formulate this as follows: status-based models of political membership, for all they might tell us about the equality and dignity of members, are characteristically silent on how ‘the people’ should be delineated. This issue is similar, although not identical, to the ‘democratic boundary problem’, which Shaw cites in passing as ‘the proposition that ‘the democratic legitimacy of decisions affecting the boundaries of a “demos” (ie those citizens who are eligible to participate in democratic self-government) presupposes that the demos by whom or on whose behalf a decision is taken is already composed in a way that makes its boundaries legitimate’’.⁸⁰ The distinction between these problems is that the latter concerns only the legitimacy of collective decision-making, whilst the former implicates broader questions of justice and inclusion. Nonetheless, both problems are alike in that neither the legitimacy of collective decisions, nor citizenship as a guarantor of equality and dignity, can function without more-or-less just membership criteria. Absent such criteria, no collective decision can be legitimate, and no citizenship regime can demonstrably avoid charges over or under-inclusiveness.

Unfortunately, *The People in Question* provides no firm place to stand when it comes to identifying what such criteria might entail. Like many who adopt status-based models, Shaw places too much emphasis upon what *follows* from membership, rather than beginning with what *establishes* it and proceeding from there. A useful comparison here is Dworkin,

⁷⁴ Ibid 93.

⁷⁵ Ibid 193-196.

⁷⁶ Ibid 196-199.

⁷⁷ Ibid 199-210.

⁷⁸ Ibid 210-214.

⁷⁹ Ibid 214-221.

⁸⁰ Ibid 66-67, citing Rainer Bauböck, ‘Political Membership and Democratic Boundaries’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 60-61.

whose status-based characterisation of ‘true’ communities,⁸¹ has been rightly criticised for relying upon unsubstantiated assumptions about ‘bare’ communities in order to delineate *prima facie* community membership.⁸² Although Dworkin advances an attractive argument for why polities *should* be founded upon equal concern and respect, this tells us little about membership within states that meet merely ‘the geographical or other historical conditions...*capable* of constituting a fraternal community’ (my emphasis).⁸³

This is not only a philosophical issue, however, as Shaw’s own comparative critique demonstrates. On the reasonable assumption that many actual polities fall below the high standards adopted by many normative theories of citizenship, how are we to identify those who *should* be treated as members of such communities but, as a matter of social fact, are not? Take the recent ‘Windrush scandal’ within the United Kingdom, which Shaw mentions a few times in passing.⁸⁴ Even under a simple subjugation-based model of political membership, those unjustly harangued by Theresa May’s ‘hostile environment policy’ have clear grounds for complaint. Having lived, worked, and paid taxes within the United Kingdom for the preponderance of their lives, they were manifestly subject to the coercive power of that state and so, in one important sense, belonged to its political community.⁸⁵ They shared the burdens of coercive rule and so, arguably, were as entitled to enjoy its benefits as anyone else.⁸⁶ Conversely, that many Windrush victims could not demonstrate their normatively elevated status (that is, their citizenship) *vis-à-vis* the United Kingdom was the very fact used to threaten them. This presents a cautionary tale. Relying, as most contemporary states do, upon evidence of status-based belonging may secure equality and dignity for some but it also serves to exclude, and so denigrate, others. Notwithstanding that it adopts the same basic status-based approach, *The People in Question* should be celebrated for its able demonstration of this fact.

4: *Two Political Hazards and a Hybrid Alternative*

⁸¹ Dworkin (n 16) 201.

⁸² Leslie Green, ‘Associative Obligations and the State’ in Justin Burley (ed), *Dworkin and His Critics* (Wiley-Blackwell 2004) 283.

⁸³ Dworkin (n 16) 201.

⁸⁴ Shaw (n 1) 48, 164-165, 209.

⁸⁵ Ironically, under the subjugation-based criteria adopted by the erstwhile British Empire, these individuals would have been at least nominally recognised as members of that broader community, notwithstanding the other inequalities and indignities they would no doubt have suffered (see, for example, Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Duke UP 2018) 36, 178-185).

⁸⁶ John Rawls, ‘Legal Obligation and the Duty of Fair Play’ in Sidney Hook (ed), *Law and Philosophy* (New York UP 1964) 3-18.

Given her focus upon constitutional citizenship, Shaw's examination of political membership is conducted predominantly through a status-based lens. Nonetheless, as the foregoing section argued, the major theoretical contribution of *The People in Question* lies in exposing the hazards of viewing political membership in exclusively status-based terms. In what remains of this essay I set out an alternative view of what constitutes 'the people' for political purposes. The membership model I propose is hybrid, incorporating elements from both subjugation and duty-based approaches. My aim is to show that, when we take seriously the cautionary lessons that Shaw provides, theories of membership become available that status-based discourses of citizenship, particularly in national contexts, often obscure. This model, I suggest, provides firm conceptual ground upon which to stand as we critique the various approaches to *recognising* community membership discussed within *The People in Question*.

The moral duties that provide my hybrid model of political membership with its normative core are: (i) our collective duty to avoid endemic conflict within our communities by supporting appropriate governance institutions; and (ii) our remedial duties to promote autonomy and equality within those communities. They correspond to two conditions for political membership, which I shall call the 'residence' and 'beneficiary' conditions. Together, they yield the following proposition:

Non-Voluntary Membership: any person (P) is a member of a given political community (C), where: (1) P habitually resides in the geographical area in relation to which C exists; and/or (2) P routinely benefits from the coercion of other people by the government of C.

The residence condition corresponds to our collective duty to avoid endemic conflict, whilst the beneficiary condition corresponds to our remedial duties to promote autonomy and equality. Notably, neither condition trades upon notions of citizenship nor other 'normative elevations': they are duty-based principles, not status-based differentiations.

However, as explained more fully below, *Non-Voluntary Membership* also borrows from subjugation-based models of political membership and is analytically useful in large part because of its hybrid nature. This hybridity consists in its reliance upon international legal practices of territorial delineation, which use effective governmental control to parse between different geographical units for the purposes of state creation and territorial attribution. Such practices provide *Non-Voluntary Membership* with an important reference point in social fact, whilst its constitutive duties highlight the moral importance and

complexity of coercive rule as means for delineating community membership. In what follows, I outline these two duties before more fully explaining the contribution that international law makes to its normative determinacy and critical utility.

A: The Hazards of Living Together

The ‘residence condition’ of political membership, which views habitual residence within a particular territory as sufficient for membership within the political community demarcated by that geographical area, builds upon an argument in the liberal tradition. In brief, that argument holds geographically proximate individuals to possess a collective duty to avoid lapsing into endemic conflict by supporting institutions that are conducive to civil peace.

It begins with three, partly empirical, premises. The first is that failures of coordination and collaboration amongst people making incompatible claims to limited resources can create endemic conflict.⁸⁷ The second is that endemic conflict risks creating circumstances of extreme distributive injustice,⁸⁸ whereby resources are: (i) allocated solely on the basis of violence; (ii) wasted due to high transaction costs; and (iii) insufficiently secure for reliable personal and collective use. The third premise is that this unjust situation is most likely to emerge where individuals are geographically proximate: people in physical isolation face few (if any) coordinative or collaborative challenges.⁸⁹

These premises support the following conclusions. First, because almost all individuals already live within geographically grouped social units, ‘the frequency, density, and mutual entanglement’ of potential conflict is particularly pronounced *within* those units.⁹⁰ Therefore, second, habitually living upon the territory of a particular community enhances the risk that an individual will contribute to conflict there. (That they may not have chosen to live within that community is irrelevant: the risk exists whether they chose to run it or not.) Third, on the plausible additional premise that we should avoid contributing to unjust states of affairs,⁹¹ it is thereby instrumentally important for geographically proximate collectives to prioritise relatively harmonious relations amongst themselves before turning their eyes

⁸⁷ Martin Loughlin considers this potential for conflict the conceptual core or ‘first order’ of the political (*The Idea of Public Law* (OUP 2004) 33).

⁸⁸ Kant (n 23) 89-90; Jeremy Waldron, ‘Special Ties and Natural Duties’ (1993) 22(1) *Philosophy & Public Affairs* 3, 14.

⁸⁹ Waldron (n 26) 15.

⁹⁰ Jeremy Waldron ‘Two Concepts of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 411.

⁹¹ John Rawls *A Theory of Justice* (Belknap Press 1999) 115.

further afield. On this account, it is the relative proximity of people that matters: living alongside each other creates the problem, so social organisation must provide the solution.

Averting endemic conflict within a particular territory characteristically requires some kind of legal order and a government capable of employing coercive power.⁹² Enlightenment liberal theorists, such as Kant, famously used this fact to justify moving from a ‘state of nature’ into a legally constituted polity.⁹³ However, the same considerations also provide a reason to prevent the collapse of extant governmental arrangements that avoid endemic conflict,⁹⁴ assuming that those arrangements are at least somewhat more just than the anarchic circumstances they forestall. This is entailed because any obligation to eliminate unjust circumstances implies (all other things being equal) an obligation to prevent their re-emergence. Governments can uphold civil peace in several ways and, in the ordinary course of events, possess the primary obligation to do so. However, individuals can also help to forestall endemic conflict by acting alone and in concert with others, typically by promoting, supporting, or at least tolerating, governance practices that prevent anarchy.⁹⁵

Individuals with this capacity, and who are habitually resident within a particular territory, have a special, collective obligation to secure and uphold civil peace that runs parallel to the obligation of their government to do the same. This duty is collective in the sense that, whilst the complete set of individuals concerned are obligated to secure civil peace *as a group*, no one individual amongst them is bound to forestall endemic conflict alone. It is special in the sense that it pertains only amongst the habitually resident *qua* community members and not also amongst ‘outsiders’. For example, the government and laws of France are primarily constituted to address the distribution of rights and duties within France and, as a result, speak directly to the maintenance of civil peace *amongst those who live there*. This relationship is not contingent because ‘it depends on the difference between being one of the parties in respect of whose interests...[an] institution is [sufficiently] just, and being a person who is merely capable of interfering with a [sufficiently] just institution in some way’.⁹⁶ The special nature of this duty serves to pick out habitual residents as members of a territorially grounded political community on the basis of their ongoing contribution to the potential for

⁹² Waldron (n 28) 411.

⁹³ Kant (n 23) 86.

⁹⁴ Waldron (n 26) 15-17; Waldron (n 28) 411.

⁹⁵ What this requires in terms of specific acts will depend on the circumstances. However, once our compatriots have begun this undertaking, our duty may take on an element of reciprocity. This makes fairness relevant, see: Margaret Moore, ‘Is Patriotism an Associative Duty?’ (2009) 13(4) *The Journal of Ethics* 383, 388-390.

⁹⁶ Waldron (n 23) 19.

endemic conflict within that community ('the residence condition' of membership).⁹⁷

Importantly, it performs this function *without* reference to citizenship, or any other status-based criteria for membership.

B: *The Hazards of Being Governed*

By throwing us together with other people, history creates moral hazards. Geographically proximate individuals share a collective duty to uphold civil peace within the territorial boundaries established by the institutions to which they are subject. When they succeed in securing the conditions that this special duty requires, that territorial unit yields a nascent political community. However, as Weber teaches us, this is typically achieved through state monopoly on coercive power, which makes the normative profile of such communities somewhat complex. Coercive rule is *prima facie* problematic because coercion presumptively violates both autonomy and equality. First, coercion *as such* consists in manipulating people into pursuing ends that they would not otherwise have chosen, and so violates autonomy.⁹⁸ Second, it presumptively violates equality because manipulation of this kind aims at one person becoming subject to the will of another, creating a relationship of subordination. For these reasons, political communities appear morally paradoxical: characteristically, they emerge in fulfilment of *one* collective duty by violating *other* moral precepts. For such communities to be both legitimate and just, this circle must somehow be squared, presenting what I shall call the 'autonomy and equality problem'.

Rendering coercive rule compliant with autonomy and equality is a demanding task. Not only must civil peace be maintained within the relevant territory but there must also be general compliance with fundamental human rights. Moreover, no community could truly guarantee autonomy and equality in the face of coercive rule without governance by law and genuine democracy.⁹⁹ Finally, and this is perhaps the most exacting hurdle, it is difficult to see how any community could be meaningfully egalitarian or respectful of individual autonomy unless the overwhelming majority of its laws were *substantively* conducive to implementing those values. Considering this, it seems likely that most political communities

⁹⁷ Such residence need not be uninterrupted. It turns on the empirical question of where a given person lives large portions of their life. It will include those who have a habit of residing in the territory of more than one political community but not those who are merely visiting or otherwise travelling through the territory in question. This ground yields a conception of membership quite distinct from membership in a national group: our relationship with the other members of our community is one of compatriotism, not shared identity.

⁹⁸ Robert Nozick, *Socratic Puzzles* (Harvard UP 1997) 15-44.

⁹⁹ That is, not just the presence of nominally democratic or representative institutions. On this point, see: Ronald Dworkin, *Freedom's Law* (Harvard UP 1996) 15-24.

will fail to resolve the autonomy and equality problem conclusively, such that at least *some* coercive rule within them will be morally unjustified.

What is the moral position of individuals subject to coercive rule of this kind? Certainly, their governments owe them better guarantees of autonomy and equality, but what, if anything, do they owe each other? In this subsection, I suggest that such individuals have an obligation to advance both autonomy and equality within their communities and that this obligation further underwrites their community membership, forming what I shall call the ‘beneficiary condition’ (for reasons that shall become apparent).

When our governments fail to secure autonomy and equality, we should act in pursuit of these values ourselves. We have, I contend, a *pro tanto* duty to do our fair share towards promoting autonomy and equality within our communities. There are at least two reasons for this. The first turns on the causal relationship between governments and their subjects. Not only is the need to avoid endemic conflict a possible *motivation* for the creation of governments but the habitual residents of a particular territory form an important resource with which governments support themselves. In this way, habitual residents as a set are often doubly *causally responsible* for coercive rule, in addition to being subject to it. This point should not be overstated: that I caused X, in the sense of forming part of the collectively sufficient conditions that gave rise to it,¹⁰⁰ is not sufficient to say that I am morally liable for ameliorating X. Unlike the potential for injustice that we create by living in relative proximity, coercive rule characteristically arises from the actions of those asymmetrically placed *vis-à-vis* the general population. In some cases, one or more individuals within the relevant government may be individually culpable for particular violations of autonomy or equality, and even where this is not so, the government itself may be culpable as a collective agent.¹⁰¹ However, as Miller points out, the ‘causal relationship suffices to pick [us] out from the universe of others’ potentially obligated to attempt a remedy.¹⁰² This is particularly important when no individual is morally culpable in their own right or the relevant government seems unwilling to take the appropriate steps. Causality picks out habitual residents as *special* in a relevant way (and does so, once again, without reference to citizenship).

¹⁰⁰ Hart and Honoré, developing Mill, refer to this as ‘the doctrine of plural causes’ (HLA Hart and Tony Honoré, *Causation in Law* (2nd ed, Clarendon Press 1985) 19-25).

¹⁰¹ Christian List and Philip Pettit, *Group Agency: the Possibility, Design, and Status of Corporate Agents* (OUP 2013) 153-169.

¹⁰² David Miller, *National Responsibility and Global Justice* (OUP 2007) 101-102.

The second reason why being governed often generates the special duty I am contemplating may seem more controversial. I argue that we have *remedial* reasons to promote autonomy and equality because we typically gain special benefits from the governmental coercion of those we live alongside.¹⁰³ These benefits extend beyond the forestalling of conflict between geographically proximate individuals: contemporary governments are more invasively coercive than simple peace-keepers. Consider the provision of public transportation, either through nationalisation or public procurement, or the provision of other utilities, such as public libraries and recreational space. Although these benefits are not primarily directed towards avoiding endemic conflict, they are funded by taxes that, at least ultimately, are collected via coercion. Importantly, whilst citizenship (whether constitutionally defined or otherwise) constitutes *one* benefit that coercive rule characteristically confers upon certain community members, it is not the only advantage that such rule enables. As such, whilst the total set of those who benefit from governmental coercion will almost certainly include those accepted as citizens within that community, it will not be exhausted by them.

Whether an individual experiences a *net* benefit from being governed will depend upon their circumstances. However, it seems plausible that many of us will be better off under a functioning government than we would be otherwise.¹⁰⁴ This probably cannot justify very exacting political duties, such as a duty to obey the law.¹⁰⁵ It is also insufficient to resolve the autonomy and equality problem. However, precisely because of this point, it is a plausible basis for individual duties to contribute our fair share towards *increasing* overall compliance with those values within our respective political communities.

To recap, coercion is presumptively wrong because it manipulates us into pursuing ends that we would not have otherwise chosen and subordinates us to those who should treat us as equals.¹⁰⁶ Many people benefit from such presumptive violations of autonomy and

¹⁰³ This claim has some similarities to Rawls' argument for a duty to support just institutions on the basis of fair play because of the emphasis both place upon social benefits and burdens (Rawls (n 9) 3-18). However, it differs markedly in two respects. First, it is not primarily concerned with the *distribution* of benefits and burdens so much as with the fact that various individuals benefit from the *prima facie* wrongful burdening of others *no matter how the distribution falls*. Second, at least in the first instance, it does not provide us with duties to support (just) institutions so much as duties to promote the reform of morally problematic ones.

¹⁰⁴ Strictly speaking, the duty I outline here applies even to those who are not net beneficiaries. Since compliance with autonomy and equality can be assessed one act at a time, we can arguably gain special remedial duties of the sort that concern me from the governmental perpetration of individual coercive acts.

¹⁰⁵ Dworkin (n 16) 194.

¹⁰⁶ These dimensions of wrongfulness are apposite, whilst other aspects of the presumptively inegalitarian nature of governance are not, because coercion is only problematic insofar as it is attempted in relation to particular individuals. Because power can exist *potentially* the presumptive inequality of political hierarchies is distinct from actual attempts to coerce. For instance, it creates an 'equality problem' for A to decide that B is

equality within contemporary political communities. The benefits of civil peace cannot justify coercive acts that are unnecessary for the maintenance of that peace, so governance beyond that point is presumptively problematic. A solution to the autonomy and equality problem is required for the wrongfulness of coercion to be addressed. This has at least two important implications. First, governments providing their subjects with benefits whilst *failing* in this respect are morally enjoined to remedy their failure. Second, and crucially for present purposes, if governments are either unwilling or unable to secure autonomy and equality within their communities, it falls upon those receiving the benefits of governance to do their fair share towards promoting those values. In many contemporary communities, where the benefits of governance are various and the coercive acts securing them pose the autonomy and equality problem, this will likely encompass most people who find themselves being governed.¹⁰⁷

An analogy is useful to establish the plausibility of this position. The law of unjust enrichment supposes that we can be morally *liable* for gaining at the expense of another without being morally *culpable* for doing so.¹⁰⁸ In a paradigmatic case, you are unjustly enriched at my expense when I transfer title over a sum of money to you, mistakenly believing myself to be paying off a debt.¹⁰⁹ There is no debt, so I am, as it were, unintentionally gifting you the money. You are clearly blameless, as the mistake was mine. However, you are nonetheless liable to pay me back an equal sum. Your duty to correct the unjust circumstances exists notwithstanding your lack of fault.¹¹⁰ I suggest that those routinely benefitting from morally problematic coercive rule stand in a similar position: through no immediate fault of their own they have gained at the expense of moral wrongs done to others. In circumstances where the guilty party – that is, the relevant government – is either unwilling or unable to address this, it is incumbent upon such ‘political beneficiaries’

permitted to coerce C in accordance with principle P *even if* C will never actually get coerced by B because, say, C independently desires to comply with P’s content. In this example, A has greater power than C, even though B will never have to attempt coercion in respect of C’s behaviour.

¹⁰⁷ It also holds, albeit to a lesser degree, where governments *characteristically* uphold autonomy and equality but nonetheless violate it on occasion. This follows from our ability to assess the wrongfulness of individual actions.

¹⁰⁸ Kit Barker, ‘The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora’s Box’ in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 152.

¹⁰⁹ Peter Birks, *Unjust Enrichment* (2nd ed, Clarendon Press 2005) 3-19.

¹¹⁰ *Ibid* 148-150.

to do what they can.¹¹¹ Characteristically, this will require them to put pressure upon their governments via political action.

This kind of remedial duty is special, in the sense that it pertains only amongst people connected by the bonds of political community, and so helps to define those bonds. It ties us to our burdened compatriots in a way that non-beneficiaries are not and, importantly, pertains whether or not the community-wide allocation of benefits and burdens is fair.¹¹² Indeed, it bites particularly hard when that allocation is *not* fair. Finally, and most importantly for present purposes, this duty provides the second ground for membership in a political community: we belong to a community to the extent that we routinely benefit from the coercive activity of its government (the ‘beneficiary condition’).¹¹³

C: Subjugation and Determinacy

Taken together, the (moral) hazards of living together and of being governed ground a duty-based model of political membership that can be clearly distinguished from status-based assumptions about what constitutes a ‘people’. As noted above, the residence and beneficiary conditions yielded by this model yield the following principle:

Non-Voluntary Membership: any person (P) is a member of a given political community (C), where: (1) P habitually resides in the geographical area in relation to which C exists; and/or (2) P routinely benefits from the coercion of other people by the government of C.

In the forgoing two subsections I spoke of geographical proximity in general terms and used ‘geographical area’ interchangeably with ‘territory’ and ‘territorial unit’. This deliberate elision evinces the hybrid nature of *Non-Voluntary Membership*, which, despite being a duty-based model, relies upon the social fact of coercive rule to bolster the determinacy of political membership. As noted in Section 2, international law delineates states territorially and, at

¹¹¹ Miller (n 39) 102-103, suggests this as a potential basis for ‘remedial’ obligations, although he does not make an argument for political duties along those lines.

¹¹² Where the allocation is distributively fair, and certain other conditions are met, it is also possible for compatriots to have duties of ‘fair play’ to support the existence of the distributive system, see generally: George Klosko, *The Principle of Fairness and Political Obligation* (Roman & Littlefield Publishers 2004).

¹¹³ ‘Routine benefit’ should not be confused with ‘net benefit’. The former refers to the regularity and frequency with which the benefits of coercion accrue, not to the relative value of those benefits in some consequentialist calculus. The notion of routine benefit is designed to capture the intuition that we cannot become members of a community simply by *visiting* the territory upon which it supervenes, even though we may very well benefit from the coercion of its population during our visit.

least primarily, in relation to the geographical area under the effective control of a given government. In this sense, the social fact of subjugation does not so much *correspond* to internationally recognised states as it does *establish* them for legal purposes.¹¹⁴ In this subsection, I argue that the existence of this legal practice enables *Non-Voluntary Membership* to provide determinate answers to questions of political membership. In so doing, international law provides the basis for a morally salient model of peoplehood that is totally distinct from status-based models of the sort contemplated within *The People in Question*.

The residence condition holds that we belong to a political community when we dwell habitually within its territory (that is, whether or not we are accepted as ‘citizens’ there). This proposition is grounded upon my claim that geographically proximate individuals are bound by a special and collective duty to prevent endemic conflict within the territory upon which they habitually reside. However, at least when taken in isolation, that duty leaves political membership indeterminate. Without an independent means for identifying the ‘geographical area’ in relation to which any given community exists, it remains impossible to say *who* is habitually resident within that community because *where* it exists cannot be sufficiently delineated. The subjugation-based international legal criterion of effective territorial governance provides an answer to the ‘where’ of political community, which enables *Non-Voluntary Membership* to explain the moral salience of habitual residence in duty-based terms.

This reflexive relationship between theory and practice, between morality and law, enables two things. First, the determinacy provided by factual subjugation lends boundaries to our duties to prevent endemic conflict, facilitating our compliance with them by delineating who counts as our compatriots. Second, the collective duty that grounds the residence condition explains the moral salience of international law, the contribution of which might otherwise be overlooked as merely an *ex post* endorsement of successfully exercised governmental violence.

Now consider the connection between the fact of territorial control and the beneficiary condition of *Non-Voluntary Membership*. The sorts of benefits coercive government characteristically yield almost all require the management of physical space, either directly by governments themselves, or by private individuals relying upon the stability (and other

¹¹⁴ Steven Ratner, ‘Land Feuds and Their Solutions: Finding International Law beyond the Tribunal Chamber’ (2006) 100(4) AJIL 808, 809.

opportunities) that territorial governance provides. For example, the maintenance of public highways, the running of hospitals, and the propagation of cultural and artistic practices, all require the more-or-less effective management of land. Even online interactions, which lack any direct connection to land, all rely upon a physical – and therefore territorial – infrastructure at some level. No doubt there are many instances where the beneficiaries of governance dwell outside the territory of the community whose governance benefits them: the most obvious example is that of migrant nationals living abroad, who nonetheless enjoy the benefits of, amongst other things, diplomatic protection and the right to return.¹¹⁵ However, territory matters even in such cases. The power to offer protection, not to mention somewhere to return to, is typically contingent on the sort of resources that territorial control provides.¹¹⁶

The hybrid model of political membership presented here draws attention to these important contextual elements. It not only avoids obscuring the fact that governmental subjugation remains the globally hegemonic basis upon which peoples are differentiated but also illuminates the morally complex circumstances that such subjugation produces. Furthermore, by standing outwith contemporary citizenship regimes, it offers an Archimedean point from which such regimes can be critiqued. This provides a necessary theoretical counterpoint to the comparative socio-legal work undertaken within *The People in Question* by establishing a fixed understanding of political membership in terms of which Shaw's complex and pluralistic critiques can be more fully appreciated.

5: Conclusion

The concepts of citizenship and 'peoplehood' are among the most important and controversial within legal and political theory. In the final part of this essay I introduced a hybrid conception of political membership that delineates 'the people' in terms of their habitual residence and morally complex relationship(s) with governmental coercion. My aim was to establish firm conceptual ground upon which to stand when critiquing contemporary citizenship regimes, which remain the most widespread legal means for linking private individuals to particular communities. I argued this model to possess several advantages. First, it accepts that subjugation to coercive rule remains an important means through which we are sorted into groups, and thereby tracks both social reality and international law.

¹¹⁵ Shaw (n 1) 152.

¹¹⁶ It arguably counts in favour of *Non-Voluntary Membership* that it can explain the political membership of expatriates in addition to that of current residents without having to rely upon citizenship criteria.

Second, through its use of subjugation as a supplementary sorting principle, it enables relatively clear lines to be drawn between members and non-members. Third, through its invocation of two distinctly political duties, it details some morally significant complexities that governmental coercion creates: it tells us why political membership matters; why we should care about the communities to which we belong.

Most importantly, the principle I dubbed *Non-Voluntary Membership* remains wholly independent from status-based models of peoplehood, which characteristically place the cart before the horse by focusing upon the normative *consequences* of political membership before the boundaries of the relevant polity have been established. In this respect, models of the sort developed here are logically prior to the notion that membership, once established, entails a normatively elevated status *vis-à-vis* the community in question. This theory, insofar as it lacks an account of whatever special standing *Non-Voluntary Membership* entails, is admittedly incomplete: it is a model of *membership*, not of political community in general. Nonetheless, since its ‘residence’ and ‘beneficiary’ conditions turn upon special moral duties to promote civil peace, autonomy, and equality within the relevant polity, we might conclude that they entail at least certain moral rights of political participation.¹¹⁷ In that respect, the conception of political membership advanced here is broadly concordant with Shaw’s emphasis upon the franchise as the *sine qua non* of citizenship.¹¹⁸

This brings us full circle. None of this conceptual work would be of any practical use without the kind of careful, comparative, and contextual analysis presented in books like *The People in Question*. As argued above, Shaw’s great contribution lies in her willingness to grapple with recalcitrant social reality: to demonstrate that citizenship, for all it might boast as an ideal, not only represents an essentially contested category but also the site of considerable injustice. Her most recent book, which represents a milestone step in a career devoted to illuminating these issues, is more than just an essential reference text for anyone interested in citizenship studies, comparative law, or constitutional theory. It is a broad-ranging *tour de force* that elegantly and uncompromisingly guides the reader through various battles of belonging, all waged under the auspices of constitutional law. As I have tried to show, Shaw clearly believes in the potential of constitutional citizenship to transform our polities into communities of equals. However, this vision never misleads her into confusing

¹¹⁷ This follows because, at least in these circumstances, ‘ought’ implies ‘can’. It appears incoherent for the people of a given community to have *duties* to ‘act politically’ in support of peace, autonomy, and equality without also possessing *rights* to do so. (On the limits of this logical principle, see generally: John Gardner, ‘Reasons and Abilities: Some Preliminaries’ (2013) 58(1) *The American J of Jurisprudence* 63.)

¹¹⁸ Shaw (n 1) 165-166.

reality with the ideal and it is in this regard that *The People in Question* contains an important lesson for us all.