

## CITIZENS, ALIENS, MEMBERSHIP AND THE CONSTITUTION

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Immigration law inhabits the backwaters of constitutional jurisprudence. Grounded in nineteenth century principles of international law and murky notions of "inherent power" and "sovereignty," it has remained outside the currents that fundamentally reshaped constitutional law in the second half of this century. For years, thoughtful commentators have suggested that immigration law could survive, and ought to be made to survive, closer constitutional scrutiny.<sup>1</sup> Why have these scholarly efforts been so singularly ineffective?

The answer does not lie in the cogency of judicial analysis of immigration questions. The modern cases make little attempt to provide a coherent theoretical structure. Nor can tradition alone be the explanation, despite Justice Frankfurter's claim that constitutional doctrine regarding the immigration power "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."<sup>2</sup> The most egregious—and still controlling—immigration decisions trace from the time of *Plessy v. Ferguson*, a case the Supreme Court wisely discarded despite its reign of half a century.

I will suggest in this essay that current constitutional norms defining the federal immigration power are shaped by a membership model of citizenship and alienage. The Constitution is understood

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1. E.g., Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-96 (1953); Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S. CT. REV. 255; Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983).

2. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

as recognizing or establishing a “national community,” and one belongs to that community by being a citizen. Immigration policy, conceived of as membership rules, is thought to lie at the core of national self-determination and self-definition. Permanently residing aliens<sup>3</sup> are seen as less than full members, and aliens outside the country are generally considered non-members.

I will argue that *if* membership is to be the guiding principle for constitutional analysis of the immigration power, then the circle of membership should include permanently residing aliens. More broadly, I will suggest that the immigration power be reconceptualized. Rather than seeing it as concerned with deep notions of “membership in a national community,” the immigration power ought to be seen as one of many powers Congress exercises in pursuit of the national welfare. Unlinking the immigration power from theories of membership will undermine the current regime of immigration exceptionalism that has left the immigration power largely immune to the constitutional norms applied to other congressional powers.

## I

The Supreme Court has repeatedly insisted that Congress has “plenary” power over immigration and naturalization. Justice Frankfurter accurately stated the Court’s view when he wrote: “[T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions. . . .”<sup>4</sup>

Congress acts essentially free from any constitutional limits when it defines the categories of aliens entitled to enter,<sup>5</sup> designates categories of excludable aliens,<sup>6</sup> establishes admission and detention procedures at the border,<sup>7</sup> mandates the deportation of aliens resid-

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3. “Permanently residing aliens” refers to those aliens authorized to remain indefinitely in the United States (provided they do not undertake conduct that renders them deportable) and generally eligible to seek naturalization. Thus, the category includes aliens who enter the U.S. on immigrant visas (such aliens are usually referred to as “lawful permanent residents” or “permanent resident aliens”), aliens granted asylum or refugee status, and aliens legalized under the Immigration Reform and Control Act of 1986. The category does not include non-immigrants (such as students or tourists), aliens paroled into the country, or aliens who entered without inspection (undocumented aliens).

4. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

5. *Fiallo v. Bell*, 430 U.S. 787 (1977).

6. *Kliendeinst v. Mandel*, 408 U.S. 753 (1972).

7. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

ing in the country,<sup>8</sup> denies resident aliens benefits<sup>9</sup> and federal employment,<sup>10</sup> permits the interdiction on the high seas of aliens seeking to come to the United States,<sup>11</sup> and defines classes of aliens ineligible for U.S. citizenship.<sup>12</sup> To be sure, the Court has applied constitutional norms of due process in deportation proceedings.<sup>13</sup> But, because deportation is held not to constitute "punishment," substantive grounds of deportation may not be challenged as cruel and unusual punishment, *ex post facto* laws, or bills of attainder.<sup>14</sup>

The Court's immigration cases bristle with language that sounds anachronistic to the modern constitutional lawyer: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>15</sup> "Congress regularly makes rules [under its immigration power] that would be unacceptable if applied to citizens."<sup>16</sup> "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"<sup>17</sup>

In other areas, the combination of harsh rules imposing serious harms on individuals and an incorrigible bureaucracy has led the Court to adopt and enforce a rights-oriented jurisprudence. What explains the persistent judicial modesty in the immigration area in the late twentieth century?

The more recent opinions do not attempt to provide a theoretical foundation for continued judicial deference. They simply report that prior cases have called for such deference. As dissenting Justices have noted from time to time,<sup>18</sup> tracing these cases to their nineteenth century origins is an embarrassment to constitutional

8. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

9. *Mathews v. Diaz*, 426 U.S. 67 (1976).

10. Although exclusion of aliens from the federal Civil Service by the Civil Service Commission was invalidated in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), lower courts had no trouble sustaining the exclusion once it was promulgated by the president. See, e.g., *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

11. *Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

12. Chinese and Japanese aliens were not eligible to naturalize until the mid-1900s. For the first few decades of this century, women who married aliens (even if they lived in the U.S.) lost U.S. citizenship. The Supreme Court had little difficulty upholding this provision. *MacKenzie v. Hare*, 239 U.S. 299 (1915).

13. *Yamataya v. Fisher*, 189 U.S. 86 (1903).

14. E.g., *Galvan v. Press*, 347 U.S. 522 (1954); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

15. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

16. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

17. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

18. E.g., *Jean v. Nelson*, 472 U.S. 846, 868-77 (1985) (Marshall, J., dissenting); *Harisiades v. Shaughnessy*, 342 U.S. 580, 599-600 (1952) (Douglas, J., dissenting).

law. The foundational decisions upheld the shameful laws that excluded and deported Chinese laborers.<sup>19</sup> Furthermore, they were based on a rationale, grounded in international law doctrine, that seems wholly inadequate to explain the modern immigration power. The early cases connected the immigration power with the foreign affairs power, viewing border regulations as necessary to protect the U.S. from the actions of foreign nations and masses of foreigners.<sup>20</sup> Some regulations of immigration may well be closely tied to the foreign policy of the United States; President Carter's order denying entry to Iranian nationals during the hostage crisis is an obvious example. But the vast bulk of the immigration code has little to do with foreign policy. Consider, for instance, provisions that create preferences for close family members, exclude persons with contagious diseases, or deport aliens who commit serious crimes.<sup>21</sup>

While "foreign policy" has provided a convenient excuse, it hardly seems to capture the deep structure of our thinking about immigration and the Constitution. This underlying structure is better explained by the model of citizenship-as-membership. In developing the model—perhaps at too great a length—it may appear that I am defending it. I am not. Rather, I am attempting to uncover, and cast in the best light, a set of assumptions that inform (or, perhaps, drive) constitutional doctrine.

Understanding citizenship as membership is deeply ingrained in constitutional thinking. In 1875, Chief Justice Waite wrote for the Court: "[Citizenship] convey[s] the idea of membership of a nation, and nothing more. There cannot be a nation without a people."<sup>22</sup> Four score years later, in a case holding that citizenship could not be lost without the consent of the citizen, Justice Black exclaimed: "[The] citizenry is the country and the country is its citizenry."<sup>23</sup>

Citizenship suggests more than mere national identification. At least since the American and French Revolutions, citizenship has defined the locus of sovereignty in a democratic nation. While not all citizens exercise sovereign power, only citizens have a respectable claim to the right to vote or rule. Indeed, most Ameri-

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19. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (Chinese Exclusion Case); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

20. See Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989).

21. See Legomsky, *supra* note 1, at 261-69.

22. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165, 166 (1874). The "nothing more" is used here by the Court to explain why excluding women—who clearly were citizens—from voting did not violate the clause of the fourteenth amendment that prohibits states from abridging the "privileges and immunities of citizens of the United States."

23. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

cans would probably recognize the possession of political rights as the most significant difference between aliens and citizens. Justice Byron White's destined-to-be-a-classic paragraph in *Cabell v. Chavez-Salido*, a case upholding a state requirement that probation officers be citizens, states this understanding of citizenship in bold terms:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are *by definition* those outside of this community.<sup>24</sup>

Citizenship is not simply a recognition that one is a part of a self-identifying group (like an ethnic or religious group). It is membership in a *national community*—one that asserts the power to rule over a geographical area and the people residing therein.<sup>25</sup> It is here that the link between citizenship and the Constitution becomes understandable. Because we generally view the Constitution as establishing our national community, it seems reasonable to understand the document as primarily concerned with the members of the national community, that is, citizens. (I will argue below that this does not logically follow.) This link is made explicit in the oath required of new citizens. To obtain naturalization, an alien does not pledge allegiance to the American people or to the land mass of the United States. Rather, she must promise to “support and defend the Constitution” and “to bear true faith and allegiance to the same.”<sup>26</sup> Becoming a citizen means joining a national political association—one founded by, dedicated to, and united around the Constitution.

A nation is organized in order to act on behalf of, and in the interests of, its members. It is self-consciously instrumental, as the Preamble to the Constitution makes clear (“in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty”). To quote Chief Justice Waite again, “The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare.”<sup>27</sup> The crucial word in this quotation is “their”; it reminds us

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24. 454 U.S. 432, 439-40 (1982) (emphasis supplied).

25. Citizenship carries other “rights,” such as the ability to obtain a U.S. passport and protection against the acts of foreign states. Perhaps the most important implication of citizenship—and one that, surprisingly, is rarely thought about—is that citizens cannot be deported from the United States.

26. Immigration and Nationality Act § 337(a), 8 U.S.C. § 1448(a) (1982).

27. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165-66 (1874).

that nations are not eleemosynary associations established for the benefit of non-members. The concept of national membership is thus doubly exclusive. It designates non-members by defining members. It also recognizes an association that is expected to exercise power in the interests of members with less concern for the interests of non-members.

Citizenship-as-membership might at first glance seem inconsistent with the premises of liberal democracy. What, after all, justifies those living in a society (largely by accident of birth) denying entrance or "equal concern and respect" to other human beings?<sup>28</sup> Liberal defenses of restricted admission can be made when the numbers get scary enough;<sup>29</sup> but, at least for the last century, American immigration laws have been far more restrictive than necessary to ensure the survival of the state. Similarly, laws excluding permanent resident aliens from political participation or government benefits are dramatically over- and under-inclusive if they are justified in terms of loyalty, competence, or identification with "American values." Alienage, in these situations, appears not to be a proxy for any other characteristic, but rather seems to provide a difference by definition. One would expect a liberal democracy to demand functional, not definitional, differences before denying persons opportunities and benefits.

The explanation, I believe, can be traced to the underlying political theory of a liberal democracy: the notion of popular sovereignty. In a monarchy, sovereignty (in the form of the King or Queen) is external to the subject and alien alike. In a sense, every alien and every citizen faces the sovereign on a one-to-one basis. But in a democracy, sovereignty is something shared by citizens and citizens alone. Without a notion of citizenship, sovereignty has no home. This is what makes Justice White's assertion in *Cabell* so compelling: "*Self-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.*"<sup>30</sup> White does not mean that aliens are not "governed" when they reside here; of course they are subject to our laws. He means that a political system in which the people rule must begin with a concept of The People. The Constitution starts precisely that way; and in so

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28. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89-95 (1980). See also Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984), which attempts to ground "classical immigration law" in nineteenth century liberalism but seems to concede that "restrictive nationalism" may be a better description than "traditional liberalism."

29. B. ACKERMAN, *supra* note 28, at 93-95.

30. 454 U.S. at 439-40 (emphasis supplied).

doing, it defines outsiders. Citizenship-as-full-membership is not the rock upon which liberal democracy founders, but rather the rock upon which it is founded.

Immigration and naturalization law reflect this model of citizenship-as-membership. From the perspective of citizenship-as-membership, immigration decisions are membership decisions, and the immigration system is a process for selecting and evaluating candidates for membership.

Immigration law serves both as a quantitative and qualitative screen. Immigrants (other than immediate relatives of U.S. citizens) are subject to an annual numerical limitation. Aliens are also denied entry if they possess any of the undesirable traits identified in the numerous exclusion provisions in the immigration code. Most important, the system does not function as a lottery or admit aliens on a first-come-first-served-basis.<sup>31</sup> An alien must either have a close family relative in the United States or a job offer that cannot be filled by a qualified U.S. worker.<sup>32</sup> Thus, our immigration laws operate to identify aliens who are likely to "fit in."<sup>33</sup>

Naturalization, in this scheme, bestows full membership. Permanent resident aliens may naturalize on fairly easy terms after living in the United States for five years, a period that citizenship-as-membership views as probationary. During this period, both the alien and the nation consider whether a long term relationship

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31. Congress has recently provided lottery-type admission programs on a temporary basis. Section 314(a) of the Immigration Control and Reform Act authorized the entry of ten thousand aliens over two years from countries adversely affected by the 1965 legislation that established the preference system. (Restoring opportunities for Irish immigration was a prime concern for several leading supporters of the provision.) The provision was extended for an additional two years and the number of visas raised to fifteen thousand per year. Pub. L. No. 100-658, § 2, 102 Stat. 3908 (1988), codified as amended at 8 U.S.C. § 1101 (1988). In 1988, Congress established a lottery for the distribution of twenty thousand immigrant visas over two years to aliens from countries that in fiscal year 1988 used less than twenty-five percent of the maximum number of immigrant visas available to them. *id.* § 3. This latter program represents a significant departure from the family reunification goals that largely drive the current immigration system. Whether such "diversity" lotteries become a permanent feature of admissions policy remains to be seen.

32. The immigration code theoretically authorizes the entry of "non-preference" aliens, but only if the family and work preferences do not use up the visas allocated each year. No non-preference visas have been available since 1978. (See the discussion in note 31 of recent legislation creating temporary programs for the entrance of aliens outside the preference system.) Proposals pending in Congress would establish a preference for "independent" aliens—i.e., those without a close family member or job in the U.S.—and visas would be granted on the basis of a point system that would assign a certain number of points for desirable traits (e.g., age, education, and occupational skills). The point system, should it be adopted, would represent the apotheosis of a method for identifying aliens likely to be beneficial to the U.S.

33. Refugees, it may be argued, constitute an exception to this generalization. American refugee programs, however, have been heavily tilted towards aliens leaving Communist nations, and generous public and private programs help refugees adjust to life in the United States.

would be appropriate; the alien remains free to go home and the government has the constitutional power to deport her. Successful completion of the probationary period entitles her to full membership. This probationary model is common enough in our society. To academics, the tenure process may spring to mind; to lawyers, partnership may seem the relevant analogy. Like citizenship, both tenure and partnership represent full membership in a community, and such membership carries with it the right to control the institution and to vote on the membership rules.

Although federal law does not require that resident aliens apply for naturalization, citizenship is clearly the intended end of the immigration process.<sup>34</sup> Given the predominant American view that most foreigners would acquire U.S. citizenship if they could, resident aliens who choose not to naturalize are subject to criticism or suspicion.<sup>35</sup>

Justice Jackson's majority opinion in *Harisiades v. Shaughnessy* illustrates this conception of immigration law. The case rejected various constitutional challenges to a federal law ordering the deportation of aliens who had been former members of the Communist Party. Jackson began his constitutional analysis with the following observations:

For over thirty years each of these aliens has enjoyed such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution he now invokes. Each was admitted to the United States, upon passing formidable exclusionary hurdles, in the hope that, after what may be called a probationary period, he would desire and be found desirable for citizenship.<sup>36</sup>

Apparently the failure of the aliens to naturalize meant that the immigration process had malfunctioned. By choosing not to become full members, the aliens had in effect placed a brand on themselves.<sup>37</sup>

Suspiciousness towards aliens who choose not to naturalize continues today. Senator Alan Simpson, perhaps Congress's leading figure on immigration matters, has argued that "the desire to

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34. And there are significant incentives to naturalize. Naturalized aliens have an easier time sponsoring the entry of close family members, are not subject for deportation grounds, and are entitled to vote, hold political office and travel on a U.S. passport.

35. Or, as Robert Post has suggested to me, an alien who refuses to take advantage of opportunities to naturalize puts the nation in the position of a spurned lover.

36. 342 U.S. 580, 585 (1952).

37. Jackson also noted the "advantages" enjoyed by a non-naturalized alien residing in the U.S.: "The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect." *Id.* at 585-86.

assimilate is often reflected by the rate at which an immigrant completes the naturalization process." He therefore finds distressing that the naturalization rates of immigrants from Mexico and South America are considerably lower than those of European and Asian immigrants.<sup>38</sup> The point here is not that we should attach the significance to naturalization rates that Senator Simpson does. In fact, I doubt that we should. Rather, it is to notice the strength of the model of immigration as the first step of a process that ends in citizenship. Aliens who get off that track are considered either ungrateful or subversive—that is, "not our kind."

The constitutional norms applied to exercises of the federal immigration power are a natural product of citizenship-as-membership thinking. Nowhere is this more apparent than in the treatment of aliens seeking initial entry to the United States—persons whom the model comfortably views as prototypical non-members. The Court states as a truism that an alien can have no constitutional right to enter.<sup>39</sup> Congress is free to grant or withhold the "privilege" of entering the United States on whatever basis it deems appropriate, and it has unconstrained authority to craft procedures for determining admissibility. In words chillingly reminiscent of the Court's most infamous designation of non-membership in *Dred Scott*,<sup>40</sup> the Eleventh Circuit has declared: "Aliens seeking admission . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress."<sup>41</sup>

Under citizenship-as-membership, merely achieving entry ought not to significantly alter the status of the non-member. Because the resident alien is simply a "guest," the host is free to revoke the invitation at will. Thus, the Court has shown almost no inclination to rethink nineteenth century doctrine giving Congress virtually unrestrained authority over deportation. Deportation grounds may have retrospective effect, applying to conduct which was not condemned at the time of entry; and they may be applied to resident aliens no matter how long they have lived in the United States or how long ago the offending conduct occurred. According to long-standing doctrine, deportation is "simply a refusal by the

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38. *U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy*, 97th Cong. 1st Sess. (1981) (Statement of U.S. Senator Allen K. Simpson), quoted in T. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 122-23 (1985).

39. *E.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

40. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

41. *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985).

Government to harbor persons whom it does not want.”<sup>42</sup> Similarly, the Court has held that Congress has nearly unreviewable power to disqualify resident aliens from federal benefits and opportunities. The Court views such statutes as regulations of immigration (i.e., defining the conditions of entry and residence), and therefore subjects them to only the scantest scrutiny.<sup>43</sup>

Constitutional law does not push the logic of citizenship-as-membership to its limits. It has never adopted the view that, as non-members, aliens are wholly beyond the purview of the Constitution. Outside the immigration context, aliens present in this country—whether or not they are in lawful status—are entitled to most of the constitutional protections afforded U.S. citizens. Aliens arrested for crimes in the United States receive the benefits of the fourth, fifth, sixth, and eighth amendments. The equal protection clause has been read to prohibit the states from denying resident aliens public benefits and opportunities, except those identified with the exercise of the sovereign power of the state. And in stark contrast to the absence of due process rights for initial entrants, the Court has been willing to scrutinize deportation procedures for aliens within the United States as well as aliens granted resident status who have left the United States and are stopped at the border seeking to return.

The Court’s immigration decisions have not attempted to develop a coherent theory of membership that can explain both congressional “plenary power” and the possession of constitutional rights by resident aliens. Citizenship-as-membership might try to account for the latter by portraying immigration as a process of growing attachment<sup>44</sup> to the United States: resident aliens may be entitled to protections not extended to aliens seeking initial entry but may not enjoy all the rights that flow from citizenship.<sup>45</sup> To

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42. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

43. See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976) (permanent resident aliens must reside in the U.S. for five years to be eligible for part B of Medicare). The Court appears determined to analyze all congressional classifications based on alienage as regulations of immigration. As Gerald Rosberg has argued, there may well be a difference. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 334-39. Consider, for example, how one ought to characterize a congressional statute disqualifying aliens from welfare and medicaid benefits that is justified solely in terms of reducing the federal deficit.

44. Supreme Court opinions reflect this model of progressing levels of membership. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (“Congress may decide that as the alien’s tie grows stronger, so does the strength of his claim to an equal share of [the government’s] munificence”); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (“The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society”).

45. For a detailed discussion of levels of membership, see Martin, *supra* note 1.

return to the analogies of tenure and partnership suggested earlier, holding an untenured appointment on a faculty or serving as an associate in a law firm counts for something. Even if there is no guarantee of accession to full membership, certainly the time spent at the institution puts an untenured teacher or an associate in a situation quite distinct from a person outside, or seeking to be hired by, the institution.

The international law doctrines that supplied the basis for the nineteenth century "plenary power" cases also recognized that aliens, once admitted, were entitled to protections normally afforded citizens of the admitting state.<sup>46</sup> Similar understandings pervade the common law. Duties of care toward guests are imposed upon landowners even though landowners have broad authority to choose their guests and to require guests to leave. Just as imposition of obligations on a host does not change the status of a guest, so too citizenship-as-membership can recognize duties of care toward resident aliens without thereby transforming them into full members.

Citizenship-as-membership therefore can incorporate the extension of constitutional protections to resident aliens outside the immigration context. But the kinds of arguments just suggested fail to explain why constitutional norms do not also apply to regulations of immigration that burden resident aliens. That is, why does the first amendment prohibit the imprisonment of resident aliens for protected speech but not prevent their deportation for such speech? Ultimately, it appears that the two lines of cases are not part of a coherent whole, but rather reflect conflicting strands in our constitutionalism: one concerned with affirming the importance of membership in a national community; the other pursuing a notion of fundamental human rights that protects individuals regardless of their status.<sup>47</sup> I will argue below that the cases recognizing constitutional protections for aliens outside the immigration context provide critical purchase for reorienting the Court's current model of membership.

I have tried to show that citizenship-as-membership provides a theoretical structure that seems to underlie the Court's recognition of wide-ranging congressional authority to regulate immigration. This is hardly to suggest that Congress has pushed its power to an anti-alien extreme. Approximately half a million aliens are admitted each year for permanent residence. Permanently residing aliens

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46. See *Fong Yue Ting v. United States*, 149 U.S. 692, 708 (1893), quoting I T. ORTOLAN, *RÈGLES INTERNATIONALES DIPLOMATIE DE LA MER* 297 (4th ed. 1864).

47. See *Aleinikoff*, *supra* note 20.

are entitled to most federal benefits, are protected against discrimination, and can naturalize on easy terms. (Such generosity may be based in large part on Congress's ability to limit entry and therefore limit the costs of benevolence.) The important point, however, is not how good a host Congress has been, but rather that it (and we) tend to adopt the "host" metaphor. Citizenship-as-membership, by making congressional admission policies acts of beneficence, renders congressional niggardliness theoretically untroubling. Moreover, if nothing is required to be given, then the host who does give is seen as generous. We can take pride in our immigration policies not only for their contribution to the national welfare but also for the image it allows us to hold of ourselves.

## II

It would not be particularly difficult, as a practical matter, to bring the Constitution to bear on immigration regulations. As commentators have repeatedly shown, the nation would hardly lose its ability to control the borders or to prevent subversion if modern constitutional conceptualizations of due process, equal protection, and fundamental rights were deemed to constrain exercises of the immigration power.<sup>48</sup> The reason these academic appeals have failed, it seems to me, is that they have been directed at the wrong level of analysis. Proposals for reform must come to grips with the underlying premises of our constitutional thinking about the immigration power. This could be accomplished in two ways. We could either work within the existing links among the immigration power, membership, and the Constitution; or we could unlink immigration and membership by reconceptualizing the immigration power. The concluding section of this essay will attempt the latter. I will argue in this section that if we are serious that "membership in the national community" should be a guiding principle in developing constitutional doctrine, then we should broaden the category of "members" to include permanently residing aliens.

Chief Justice Rehnquist has argued that "the Constitution itself recognizes a basic difference between citizens and aliens." That distinction, he asserts, "is constitutionally important in no less than 11 instances in a political document noted for its brevity."<sup>49</sup> Rehnquist relies on these data in concluding that classifications based on

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48. See, e.g., Aleinikoff, *supra* note 20; Legomsky, *supra* note 1; Martin, *supra* note 1.

49. *Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting). See Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 334 (1983) (framers "seem to have" "embodied in the Constitution the judgment that citizens and aliens are morally different and therefore may be treated differently"). *But see* A. BICKEL, *THE MORALITY*

alienage are not "suspect" (and thus should not be subjected to "strict scrutiny"). But of course the textual references to citizenship can be read two ways. Either the framers thought that their Constitution was really about citizens and therefore constantly reminded us of that; or they thought their document was primarily about persons, and therefore mentioned citizens in particular situations as a special case. Current membership theory is closer to the first approach, consigning aliens to outsidership. But much can be said for the latter.

The Bill of Rights seems to consciously avoid using the word "citizen."<sup>50</sup> In places where "citizen" or "citizens" could have been used, the amendments adopt terms like "person" or "the accused." Frequently the beneficiary of the provision is simply not identified ("Congress shall make no law . . ."; "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted"). The phrase "the people" does occur a number of times, and could be understood to mean "citizens"—particularly given the first three words of the Preamble. But it has never been suggested, nor has the Court ever held, that such enumerated rights apply only to citizens. For example, the fourth amendment states that "[t]he right of the people to be secure in their persons, houses, papers . . . shall not be violated." Yet it is well-established that aliens (even aliens who enter unlawfully) are entitled to fourth amendment protection.<sup>51</sup> Perhaps most dramatic is section one of the fourteenth amendment. It begins with a definition of citizenship, yet subsequent clauses pointedly provide protection to "persons."<sup>52</sup> Aliens also figure in other important provisions of the Constitution. Apportionment of representatives is based on the "whole number of persons"—a formulation that has forever been understood to include aliens. The definitions of the military and taxing powers conspicuously avoid limiting Congress' authority to burden noncitizens. Not surprisingly, draft and taxation measures (with certain exceptions) have

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OF CONSENT 33 (1975) ("Remarkably enough . . . the concept of citizenship plays only the most minimal role in the American constitutional scheme.")

50. See Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1508-09 (1986).

51. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

52. The fourteenth amendment was adopted against a backdrop of decades of discrimination against Chinese aliens living on the West Coast, and the 1870 Civil Rights Act was clearly intended to protect the Chinese. See McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984).

A notable exception to the general point here is the privileges or immunities clause of the fourteenth amendment. However, as John Ely has suggested, the clause could be read to offer protection to aliens if one understands "privileges and immunities of citizens of the United States" as a bundle of rights held by all persons, rather than as a designation of the beneficiaries. See J. ELY, *DEMOCRACY AND DISTRUST* 24-25 (1981).

regularly applied to resident aliens. Non-enumerated rights too—such as the “right of privacy”—have never been limited to citizens. When the Court identifies such rights, it simply seems to assume that they apply to all persons within the territorial limits of the United States.

When read in this manner, the Constitution reflects quite a different theory of membership. Rather than seeing citizens as the general case and aliens as the special case (the outsider), we can understand the document as being primarily about “persons”—a category that includes aliens and citizens as subsets.

This is not to deny that the Constitution treats citizens as special for some purposes. If citizenship plays any coherent role in our constitutional scheme, it is to designate the holders of certain political rights. The president and members of Congress must be citizens; and only citizens are protected in the amendments extending the franchise. But nothing necessarily makes possession of the franchise a test of membership. For most of our constitutional history large groups of citizens have been denied the right to vote. Moreover, in the latter half of the nineteenth century, aliens were allowed to vote in a number of states.<sup>53</sup> Of course, our polity now operates on the principles of universal (citizen) suffrage; and it is probably fair to say that today we view possession of political rights as the central significance of citizenship. But definition of a special subset of electors and elected does not entail that persons outside the subset are non-members. That is, one can understand constitutional membership as extending to all persons within the jurisdiction of the United States<sup>54</sup> even if the document privileges citizenship in certain respects.

Flipping our structural understanding of the Constitution begins to put some things in perspective. It provides a firm base for the current understanding that the Bill of Rights applies to resident aliens. It also helps us understand an aspect of our constitutional tradition. For more than a hundred years it has been accepted that children born here to aliens (even undocumented aliens) in the United States are citizens of the United States. Such a conclusion may not be surprising given the words of the fourteenth amend-

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53. See Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote*, 75 MICH. L. REV. 1092 (1977).

54. This is somewhat of a hedge, because one could understand “within the jurisdiction” of the United States as meaning either within the physical boundaries of the United States of America or subject to the power of the government of the United States, whether inside or outside the national boundaries. I am concerned at present only with aliens physically within the United States and leave for another day discussion of whether “the Constitution follows the flag.”

ment.<sup>55</sup> But it seems difficult to square with an understanding of citizenship as full membership because it gives aliens the power to "create" members.

Citizenship-as-membership is also simply out of touch with the current reality of the immigration process. If citizenship constitutes full membership, then the theory should predict a naturalization process that carefully screens candidates acceding to the inner circle. (Consider how much more seriously many faculties and law firms take tenure and partnership decisions in comparison to initial hiring.) In actual practice, however, the immigration system makes its most careful membership decision at the time of entry, not at naturalization. Gaining admission to the United States is extraordinarily difficult. Numerical quotas and detailed grounds of exclusion disqualify the vast majority of the world's population from entering the United States. But for aliens who attain admission and seek citizenship, naturalization is usually a matter of course.

Furthermore, permanently residing aliens live and function much as citizens. They hold jobs, attend churches, send their children to school, and pay taxes. Children they give birth to here are United States citizens. From this perspective, the fact that aliens are not required by law to apply for citizenship is not surprising; in day-to-day terms, permanently residing aliens and citizens are already virtually indistinguishable.

Thus, both immigration practice and the daily lives of resident aliens suggest that true "membership" in the life of the nation begins at the point of admission for permanent residence.<sup>56</sup> And the Court, in its better moments, seems to recognize this.

In *Graham v. Sugarman*,<sup>57</sup> the Court struck down statutes that excluded permanent resident aliens from state welfare programs. Justice Blackmun's majority opinion found the state laws doubly bad. By effectively denying aliens "entrance and abode," the state laws conflicted with federal immigration policy. This holding is at home in membership theory: the states cannot upset the terms of the federal government's invitation. The second ground of decision, however, ran quite counter to citizenship-as-membership. Justice Blackmun, with virtually no analysis, designated aliens "a discrete

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55. *But see* P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (arguing that fourteenth amendment need not be read to grant citizenship to children born to aliens).

56. *See* Rosberg, *supra* note 43, at 337 (identifying as "the traditional premise of the country's immigration policy" recognition that "resident aliens are virtually full-fledged members of the American community, sharing the burdens of membership as well as the benefits").

57. 403 U.S. 365 (1971).

and insular minority,” thereby triggering strict scrutiny of laws that discriminate against them. Labelling aliens “discrete and insular” is an effective way, under prevailing equal protection analysis, to invalidate unfriendly laws. But Justice Blackmun’s invocation of the phrase glides too readily past serious analytical difficulties.<sup>58</sup>

The last paragraph of his discussion of the equal protection claim, however, seems to take a different turn, one that seems to recognize admission for permanent residence as establishing membership:

We agree with the three-judge court . . . that the “justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. . . . [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state.” There can be no “special public interest” [justifying exclusion of aliens from state programs] in tax revenues to which aliens have contributed on an equal basis with the residents [*sic.*] of the State.<sup>59</sup>

Although Blackmun does not appear to recognize the tension this paragraph creates for his opinion, in these lines he actually flips the justification for invalidating discriminatory state laws. The statutes in *Graham* should be invalidated not because aliens are a defenseless group needing judicial protection, but rather because—at least from the state’s perspective—they are indistinguishable from other residents of the state. State laws excluding aliens from opportunities should be seen as no more legitimate than laws excluding red-heads. Both would be invalid, not because such groups are downtrodden but because the state can offer no legitimate reason for singling them out.

Perhaps the most dramatic example of this expanding concept of membership is a case invalidating a Texas statute that authorized

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58. The phrase originated, of course, in the famous footnote four of the *Carolene Products* case. 304 U.S. 144, 152-53 n.4 (1938). In the third paragraph of the footnote, Justice Stone suggested that “more searching judicial inquiry” might be appropriate in cases evidencing “prejudice . . . which tends seriously to curtail the operation of those political process ordinarily to be relied upon to protect minorities.” This justification, however, does not easily translate into protection for aliens, who, after all, may constitutionally be excluded from voting and office holding. See *Toll v. Moreno*, 458 U.S. 1, 39-42 (1982) (Rehnquist, J., dissenting). To be sure, discrimination against aliens has a persistent and ugly history in this country; but generally such hatred has been based on racial or ethnic backgrounds, not the fact of “alienage.” Aliens, as a class, are remarkably diverse and not particularly “insular.” *Mathews v. Diaz*, 426 U.S. 67, 78-79 (1976) (“[T]he class of aliens is . . . a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.”) To a surprising degree, aliens participate in American life on equal terms with U.S. citizens. Moreover, they are often able to find allies in the political system eager to represent their interests. (The legalization program adopted in 1986 for long-term undocumented aliens is only the most recent example.)

59. 403 U.S. at 376 (citations omitted).

local school districts to exclude the children of undocumented aliens from public schools. In *Plyler v. Doe*, the Court specifically resisted (as it had before) labelling education a "fundamental right"; rather, its analysis was grounded in the recognition that undocumented children were likely to be permanent members of American society:

This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.

.....

By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.

.....

[T]he record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.<sup>60</sup>

Although other factors appear to have carried weight in the majority opinion (including the fundamental importance of education and the unfairness of injuring children because of their parents' violation of the immigration laws), Peter Schuck is clearly correct that *Plyler* "may mark a fundamental break with classical immigration law's concept of national community and of the scope of congressional power to decide who is entitled to the benefits of membership."<sup>61</sup>

Shifting our definition of membership is not guaranteed to produce determinative results. It is, however, likely to influence our evaluation of possible constitutional arguments by making certain considerations more or less relevant or by making certain existing or argued-for doctrinal lines appear more or less arbitrary.<sup>62</sup> Con-

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60. 457 U.S. 202, 218-19, 223, 230 (1982).

61. Schuck, *supra* note 28, at 54.

Other cases suggest a broader definition of membership in the immigration context. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (applying due process protection at the border for returning resident aliens based on recognition 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"); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (narrowly construing deportation statute because "deportation is a drastic measure and at times the equivalent of banishment or exile").

62. The discussion so far might seem a curious form of constitutional argument. So let me be clear about it. The central issue I am investigating is the intellectual frame of mind with which we approach constitutional questions regarding regulations of aliens. My claim is

sider, for example, the current constitutional doctrine that permits the deportation of long-term permanent resident aliens. Under citizenship-as-membership, because such aliens have not become full members, their insecurity in the United States is not troubling. Expanding our definition of membership makes this mode of analysis less persuasive. Viewing resident aliens as members would make us wonder why we would be willing to deport them when we do not deport citizens. It allows us to see deportation, not as a self-inflicted wound (“you chose not to naturalize”), but as punishment (the same way we would understand the “banishment” of a citizen).<sup>63</sup>

A broader conception of membership would also raise questions about the current preference system, which establishes quotas for the immediate relatives of permanent resident aliens but not for those of U.S. citizens.<sup>64</sup> It would also cast grave doubt on the deportation of aliens for activities protected by the first amendment.<sup>65</sup> Similarly suspect would be government programs that provide benefits and opportunities only to citizens.

These statements are carefully hedged because, again, the assertion is not that membership theory automatically translates into

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that something other than the force of logic or precedent explains why the constitutional doctrine in this area has been so immune to persistent and powerful demands for reform. We come at constitutional questions with an assortment of understandings about our constitutional system, the role of courts, and notions of democracy and constitutionalism. These are readings of a broader text—a social text—in which constitutional law is situated. Although not usually seen as the “stuff” of constitutional argument, every good constitutional advocate appeals to these understandings by formulating doctrinal claims consistent with them. The understandings are sometimes explicit, sometimes implicit, and often contested. My suggestion, that we expand our understanding of membership to include permanently residing aliens, is not defended in traditional constitutional argumentative form—although I have used cases and the structure of the Constitution as support. Rather, it is an attempt to alter the intellectual filters through which we run our constitutional arguments.

63. This doesn't provide an answer to the constitutional question. The fact that an alien almost always has a country to return to may make us view the degree of harm inflicted by deportation as quite different from that imposed on a banished citizen (who may end up as a “person without a country”).

64. See Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253 (1988).

65. Happily, Congress has enacted a temporary suspension of such deportation grounds for non-immigrant aliens, effective through 1990. Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901 (1987), as amended by Pub. L. No. 100-461, 101 Stat. 2768 (1988): “[N]o non-immigrant alien may be . . . excluded from admission into the United States, subject to restriction or conditions on entry into the United States, or subject to deportation because of any past, current, or expected beliefs, statement, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.” Furthermore, a federal district court has recently invalidated a deportation ground mandating the removal of aliens who teach or advocate “world communism.” *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989). The government has announced it will appeal the decision. The case, therefore, could serve as an important vehicle for rethinking constitutional limits on the immigration power.

constitutional doctrine. Altering our understanding of membership would only serve to open up these issues by removing the easy thought-blocking, definitional weight that the citizenship-as-membership perspective throws up against constitutional questions.<sup>66</sup>

### III

What can be said against this broader theory of membership? The Court's concern seems to be that if we slide the membership line we will sap citizenship of any significance. The Court has justified exclusion of aliens from state political positions in part on the ground that it is important that we not "obliterate all the distinctions between citizens and aliens, and thus deprecate the historic value of citizenship."<sup>67</sup> This justification may reflect deeply held intuitions. Consider the following comment taken from a student

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66. A number of readers of this essay have wondered whether my argument means that an open border is constitutionally required. I think not. While expanding our conception of membership may put pressure on some aspects of the current preference system, see TAN 66, it would hardly invalidate all border regulations adopted in pursuit of national security and welfare. For a reformulation of due process requirements at the border, see, Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983).

The treatment of undocumented aliens residing in the U.S. is a tougher question, and will not be fully addressed here. While the Supreme Court has stated that "undocumented status is not irrelevant to any proper legislative goal," *Plyler v. Doe*, 457 U.S. 202, 220 (1982), the Court has generally assumed that undocumented aliens residing in the U.S. are entitled to basic constitutional protection. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (fourth amendment); *Wong Wing v. United States*, 163 U.S. 228 (1886) (fifth and sixth amendments). And plausible arguments can be made that the fact of domicile, not the lawfulness of residence, ought to be the issue in determining the constitutionality of state laws discriminating against aliens. See Rosberg, *Discrimination Against the "Nonresident" Alien*, 44 U. PITT. L. REV. 399 (1983). Nothing I say in this essay should be read as casting doubt on the existence of congressional authority to adopt immigration regulations (although, of course, I advocate that the exercise of the immigration power should be subjected to constitutional limits). If Congress chooses to regulate the border, aliens who enter in violation of the admission rules will be residing illegally in the United States. Accordingly, I do not think a strong claim can be made for equal treatment of lawful resident aliens and undocumented aliens (for instance, in terms of rights to family unification). At some point, however, undocumented aliens may have lived here long enough to have developed substantial ties; indeed, their day-to-day existence may be quite similar to that of lawful resident aliens and citizens. See generally Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955. It may be sensible to assimilate the status of such long-term undocumented aliens to that of permanent resident aliens. This seems to be the motivating idea behind both § 244 of the Immigration and Nationality Act (permitting the regularization of status of certain deportable aliens who have resided in the U.S. for seven years) and the legalization provisions of the 1986 Immigration Reform and Control Act.

67. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (quoting *Foley v. Connelie*, 435 U.S. 291, 295 (1978)). Actually, as long as the deportation power exists, there remains a huge difference between aliens and citizens. While expanding our concept of constitutional membership may impose limits on the power to deport, we would have to travel a lot of ground to get rid of the deportation power altogether (particularly for grounds of illegal entry).

exam of several years ago: “Ever since reading *Plyler v. Doe* I have felt that there was something attractive about the argument that states should be able to deny benefits to aliens. . . . [Otherwise], what is the significance of citizenship?”<sup>68</sup>

As an initial matter, there is something distasteful—if not unconstitutional<sup>69</sup>—about inflicting harm solely to make the non-afflicted feel special. More important, the desire to retain *legal* disabilities in order to preserve citizenship as a meaningful concept shows the bias of the lawyer. Citizenship, particularly for native-born citizens, is an aspect of identity. Identification with one’s homeland is organic, much as one’s identification with one’s ethnicity or religion. Few of us choose our citizenship, yet for most of us it is an important part of how we define ourselves in the world. Extending constitutional membership will not threaten this difference between citizens and aliens. It is unlikely that a person born a U.S. citizen will feel any less an “American”<sup>70</sup> because a Honduran in the United States is entitled to similar benefits and opportunities, nor is the Honduran likely to feel any less Honduran. Indeed, it is not inconceivable that someday we will understand citizenship as we do ethnicity and religion today—that is, as an important aspect of one’s identity but not a characteristic that the government may normally take into account in exercising power over the individual.<sup>71</sup>

A second common defense of citizenship-as-membership is that it is important to emphasize and affirm a “national community” of, and for, Americans.<sup>72</sup> Such a community may be valued for its fostering of a common culture and political system. Seeing aliens as outsiders reaffirms (and helps define) what is inside. It also helps prevent a watering down of commonalities that might occur if membership is defined broadly.

These kinds of claims have been pressed by scholars across the political spectrum. To conservatives, the project is one of assimila-

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68. See also Schauer, *supra* note 50, at 1517 (“Investing citizenship with an importance it does not now possess might provide a comparatively benign outlet for the exclusionary impulses that seem inevitably to be a part of community bonding.”)

69. Neither a “bare . . . desire to harm a politically unpopular group,” *USDA v. Moreno*, 413 U.S. 528, 534 (1973), nor an irrational prejudice, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), is a legitimate governmental objective.

70. The term “American” is used here to describe native born U.S. citizens. U.S. immigration law needs new terminology because, as we sometimes forget, people born in countries from Canada to Argentina are “Americans.”

71. Citizenship would probably retain vitality in the international sphere so long as nation-states remain.

72. See Schauer, *supra* note 50, at 1512 (“I want at least to consider the possibility that the notion of citizenship may help bind together those who are citizens, and that a stronger sense of citizenship, and a larger role for citizenship, may make those bonds stronger.”)

tion: molding immigrants to the true American identity in order to preserve American traditions and institutions. To liberals, a "national community" is a liberating concept because it overcomes the irrational, tyrannical, constricting aspects of "tribal" loyalties. "Citizenship," representing membership in the national community, is the ticket to universalism and equality; it rejects (or down-plays) group identifications and allegiances that cut individuals off from the full range of opportunities in society.<sup>73</sup>

In recent years, the idea of a "national community" has appealed to scholars critical of the liberal tradition. Liberalism has seemed inadequate on both descriptive and normative grounds. The "new communitarianism" rejects liberalism's description of human beings as "unencumbered" selves.<sup>74</sup> "Most of us," writes David Martin, "were simply born into our most basic affiliations—family, religion, nation. Those ties are not only objects of choice; to a significant extent they are constitutive of one's basic identity, anterior to choice."<sup>75</sup> By stressing the social and historical bonds that connect members of a society, communitarianism makes a normative claim that institutions should nurture feelings of attachment that transcend personal self-interest. Pursuit of community goals will promote that which makes us most human (association with others) and will help overcome the anomie and alienation symptomatic of modern life.

Recognizing that we cannot return to a lost golden age of small town life, communitarianism—like the conservative and liberal perspectives—sees great promise in the concept of a "national community." It allows us to imagine an association of human beings who feel special obligations to one another.<sup>76</sup> Once communitarianism reaches the national level, it readily turns to citizenship to demarcate the community. It seems to assume that, in a world of nation-states, citizenship is the appropriate category for the fostering of "ties that bind."<sup>77</sup>

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73. See generally R. NISBET, *THE QUEST FOR COMMUNITY* 153-88 (1953) (eighteenth and nineteenth century political theory saw idea of national community as promising salvation from economic and moral misery and foundation for liberty, equality and fraternity).

74. See Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81 (1984).

75. Martin, *Membership and Consent: Abstract or Organic?*, 11 *YALE J. INT'L L.* 278, 292 (1985 (review of P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985))).

76. See Martin, *supra* note 1; Schauer, *supra* note 50; M. WALZER, *SPHERES OF JUSTICE* 31-61 (1983).

77. Martin, *supra* note 1, at 208. Part of the allure of citizenship is no doubt based on its association with political rights. Stressing political participation in a "national community" is a way of ensuring that all persons share in communal self-determination. Thus, the communitarian perspective may favor easy terms of naturalization. Cf. M. WALZER, *supra*

Despite the powerful attractions of the communitarian vision (a vision I share), the new communitarians get off track when they begin to talk about "citizenship as membership in a national community." It is too little noted that the phrase "national community" is either an oxymoron or requires a substantial shift in our usual understanding of the term "community." "A community," writes Thomas Bender, "involves a limited number of people in a somewhat restricted social space or network held together by shared understandings and a sense of obligation. Relationships are close, often intimate, and usually face to face."<sup>78</sup> This conception of "community" poorly describes the United States whose spaciousness and diversity are matters of national pride. It is just wishful thinking to suggest that most Americans feel the kinds of obligations to other Americans that we usually associate with "community." The communitarians move too quickly to the metaphor of a "national community." They have confused *Gemeinschaft* with *Gesellschaft*.<sup>79</sup>

A communitarian might respond as follows. No one is suggesting that we can replicate at the national level intimate feelings of community. What is wrong, however, with suggesting that members of a state ought to be urged to put the interests of their fellow citizens and the nation ahead of the pursuit of their personal private interests? Did John Kennedy's "ask not . . ." set too high a goal for a civilized polity?

Certainly these are noble goals. But it is never explained why *citizenship* is the appropriate category for the development of a communitarian ethos. Why wouldn't we seek the formation of a sense of reciprocal obligations among all persons living and working within the territory of the United States? We know, as an empirical matter, that strong bonds between citizens and resident aliens exist. These ties, based on familial relationship, ethnicity, religion, race,

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note 76, at 52-61 ("No democratic state can tolerate the establishment of a fixed status between citizen and foreigner . . . . 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"). In this way, suggesting a primacy to citizenship may actually be a way to force the extension of rights, rather than simply a rationalization for the denial of rights.

78. T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 7 (1978).

79. See Bosniak, *supra* note 66, at 998-1006. This is not to deny a role for the federal government in fostering and supporting the creation of communities at a local level. John Dewey expressed this understanding of the relationship of the federal government to community many years ago: "The Great Community, in the sense of free and full intercommunication, is conceivable. But it can never possess all the qualities which mark a local community. It will do its final work in ordering the relations and enriching the experience of local associations." J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 211 (1927).

or location may be far more powerful than those that can be fostered among citizens who share nothing but American nationality.

The claim here is not that Americans do not share "something in common" with one another. It is possible that there is "an American way of life," an American culture, that most or all Americans feel a part of. And it may even be sensible to talk of a national political philosophy—an "American Creed."<sup>80</sup> Moreover, the propagation of "Americanism"—whatever it means—may be a legitimate or worthwhile governmental interest. Few would deny the value of being knowledgeable about the traditions and institutions of a country in which one resides. But the existence of commonalities does not establish community (it would be odd to speak of people who catch the same bus to work everyday as a community).<sup>81</sup> More importantly, it is quite doubtful that "citizenship" is a useful category for sorting those who do and do not share an "American Creed." What makes America attractive to immigrants are precisely those values that Americans celebrate: liberty, equality, opportunity, government under law. Indeed, those who have chosen to join us—and to give up a less happy existence elsewhere—may well feel more committed to these values than those of us who happen to have been born here.<sup>82</sup>

Finally, the concept of a national community, by defining who belongs, also defines who does not belong and what one must be in order to belong. In a nation as diverse as the United States, the risk is great that a "national community" will not be all-inviting or all-embracing.<sup>83</sup> Rather, it will reflect the norms and culture of dominant groups.<sup>84</sup> Placing emphasis on membership, in such a world,

80. S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 14 (1981): "What are the values of the American Creed? Innumerable studies have itemized them in various ways, but the same core political values appear in virtually all analyses: liberty, equality, individualism, democracy, and the rule of law under a constitution."

81. As Kathleen Sullivan notes: "To be linked in a common fate is not the same as applying collective will to a common project." Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1721 (1988). To the extent that subgroups in the population adopt different interpretations of the "American Creed," it is not even clear that such commonalities exist. For example, one might be able to talk about a societal norm of racial equality, but the affirmative action debate demonstrates that minority groups and white groups may hold different views of what the norm means.

82. See Rosberg, *supra* note 43, at 315 ("As a test of affinity, an alienage classification is seriously over- and under-inclusive.")

83. Recent academic interest in reviving "civic republicanism" has been criticized for its potentially coercive and exclusionary implications. See, e.g., Bell & Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609 (1988); Sullivan, *supra* note 81.

84. We live in post-assimilationist days. As recent scholarship by feminists and people of color has made clear, dominant liberal discourse is neither neutral nor all-inclusive. See, e.g., D. BELL, *AND WE ARE NOT SAVED* (1987); Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV.*

becomes a basis for excluding outsiders and compelling conformity from insiders. This certainly seems to be one lesson of the Court's alienage cases. As Justice White's opinion in *Cabell v. Chavez-Salido* so graphically depicts, the concepts of "membership" and "national community" are used not to affirm commonly held values but to justify discrimination against outsiders.<sup>85</sup>

#### IV

I have argued that the federal immigration power has been largely immune to serious constitutional scrutiny because of an underlying set of assumptions that privileges membership, understands immigration as a process of creating new members, and defines citizenship as full membership. And I have suggested that expanding the concept of membership to include permanently residing aliens would support the application of constitutional norms to immigration regulations.<sup>86</sup> But there may be another route to bringing the Constitution to bear on congressional regulation of aliens: reconceptualization of the immigration power.

Immigration law exceptionalism has been defended over the years in grandiose but unsatisfying terms. In the nineteenth century, the Court relied upon the concepts of "sovereignty" and "inherent power" to block constitutional review of immigration regulations. Control of the borders was seen as a necessary attribute of nationhood and national security, protecting the United States from the acts of foreign powers who might send their people to overwhelm us.<sup>87</sup> In the twentieth century, judicial non-intervention in immigration decisions has been justified by loose invocation

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C.R.-C.L. L. REV. 323 (1987); Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

85. Concern about a constitutional conception of "membership in a national community" is not an attack on the idea of nationhood *per se*. Interestingly, nationhood may be valued not for maintaining a national community, but for creating a space in which local or ethnic communities may survive. See, e.g., Miller, *The Ethical Significance of Nationality*, 98 ETHICS 647, 659 (1988).

86. Even the proposal just sketched—that the category of full member be expanded to include resident aliens—should give us pause. It still designates as non-members aliens seeking initial entry to the United States. The Supreme court demonstrated the consequences of non-membership in *Landon v. Plasencia*, a case involving procedural due process rights of aliens in exclusion proceedings. The Court held that a permanent resident alien who left the country and sought to re-enter is entitled to the protection of the due process clause at the border. The alien seeking *initial* entry, however, "requests a privilege and has no constitutional rights regarding his application." 459 U.S. 21, 32 (1982).

87. *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 604 (1889) (Chinese Exclusion Case) (power to exclude aliens is "an incident of every independent nation"; if nation could not control borders "it would be to that extent subject to the control of another power").

of the "foreign affairs power"<sup>88</sup> and the "political question" doctrine.<sup>89</sup>

Cognizant of the harsh rules that a Congress unconstrained by the Constitution is left free to adopt, recent scholarship has attempted to defend immigration law exceptionalism in more palatable communitarian terms. Michael Walzer has argued that "[t]he distribution of membership is not pervasively subject to the constraints of justice" because "[a]t stake [in choosing an admissions policy] is the shape of the community":

Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.<sup>90</sup>

Such accounts may provide a different and interesting understanding of the immigration power but they do not persuasively support the conclusion that "membership decisions are a different order of importance from most other decisions subjected to constitutional scrutiny."<sup>91</sup> Furthermore, as noted above, there are substantial risks in using the immigration power to define "ideal members" of our national community. To the extent they reflect majority preferences, membership decisions may display virulent intolerance based on race, political opinion, or life style.<sup>92</sup> The Alien and Sedition Acts and Chinese Exclusion laws, as well as ideological exclusion grounds currently in force, should serve as cautionary examples to those who would urge that the immigration power be left unconstrained by the Constitution in order to promote the maintenance of "communities of character."

Happily, "self-definition" has rarely been a central aspect of immigration regulation. The vast majority of immigration decisions are not club membership rules carefully crafted to preserve a particular group identity. They are much closer to university admission policies than they are to rules regulating religious conversions. We choose how many aliens to admit based on economic, social, and

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88. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation").

89. *E.g., Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government.")

90. WALZER, *supra* note 76, at 32.

91. Martin, *supra* note 1, at 199.

92. There may be some deep psychological need that is served here. Do we help to maintain internal tolerance by having a forum (immigration regulation) for venting our intolerance?

moral considerations, attempting to screen out individuals who are likely to threaten the public health, welfare, or security. The immigration power is thus roughly analogous to the commerce power. It is an important instrument for channeling and controlling economic and social development, and for nursing humanitarian goals (such as the admission of refugees). And, like the commerce power, it has significant implications for our relations with foreign nations. To be sure, immigration regulations reflect deep social norms and understandings. For example, family reunification policies are based on prevailing American definitions of the "nuclear family." But our immigration laws are not primarily concerned with the construction or maintenance of a particular kind of community.

We can end immigration exceptionalism by recognizing the weaknesses of earlier justifications<sup>93</sup> and by resisting the siren song of membership theory. The immigration power should be brought within the fold of other congressional powers and subjected to the constitutional limits normally applied to those powers.

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93. A number of scholars have already accomplished this task. See, e.g., Legomsky, *supra* note 1; Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983); Rosberg, *supra* note 43.