Michigan Law Review

Volume 101 | Issue 6

2003

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SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP. By *T. Alexander Aleinikoff*. Cambridge and London: Harvard University Press. 2002. Pp. xi, 306. $45.

INTRODUCTION

These are interesting times at the constitutional margins. Questions about where the Constitution takes up and leaves off are more frequently in play; one can no longer so readily assume the Constitution to supply an authoritative metric as we confront prominent cases of nonapplication. At the same time, the increasing robustness of international norms has prompted a vigorous reconsideration of their relationship to domestic ones. Where the twentieth century was marked by deep segmentation among national legal regimes, with minimal transboundary interpenetration, recent years have seen the advent of complex, overlapping regimes: subnational, national, regional, and global, public and private. Sorting out these regimes, and finding the place of the Constitution among them, poses a foundational challenge for America's constitutional future.

These questions have until recent years also been at the margins in the academy, where they have not attracted much direct scholarly inquiry. As in related disciplines, constitutional theory has taken the state and the national community as exogenous quantities, whose edges are (in effect) assumed congruent with those of the universe. Straddling contexts have long been absent from the constitutional canon. The academic mainstream has, for instance, taken little interest in the constitutional puzzles of immigration and international law. Scholars in those and related areas have suffered a sort of stepchild status among constitutional-law theorists, their concerns dismissed as constitutional anomalies rather than studied as constitutional keys.

That sort of marginalization is a thing of the past, as major constitutional thinkers begin to map the possibilities of the new order. T. Alexander Aleinikoff's[1] *Semblances of Sovereignty* will surely count as

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an early classic of the revived interest in constitutional borderlands.[2] Not since the turn of the last century, when the nation faced the constitutional quandaries of colonial possessions, has such attention been devoted to demarcating the constitutional community. Parallel to the increasingly intensive contestedness of the place of international law in the constitutional order,[3] this work considers, as Aleinikoff puts it, "[e]xactly who We the People are" (p. 4). The debate is foregrounding those groups whose constitutional status has long been uncertain, most notably, residents of Puerto Rico and other "unincorporated" territories,[4] members of Native American tribes,[5] and aliens.[6] All three have been historically subordinated as a matter of constitutional class; that is, they have as a categorical matter been denied full constitutional protections.[7] To this day, the constitutional

2. Gerald Neuman's *Strangers to the Constitution* represents the other most important offering in the area to date. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

3. This debate has been fueled by the rise of a sovereigntist school of foreign relations law scholars who have challenged longstanding assumptions (at least in the academy) of the status of international law in the constitutional order. *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 n.16 (2002) (surveying recent foreign relations law commentary); Peter J. Spiro, *The New Sovereigntists*, FOREIGN AFF., Nov.-Dec. 2000, at 9. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1856-57 (1998), *and* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 377-80 (1997).

4. *See, e.g.*, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE] (including contributions from among others Sanford Levinson, Gerald Neuman, and Mark Tushnet); Sanford Levinson, *Why the Canon Should be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

5. *See, e.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311 (1993); Symposium, *Native Americans and the Constitution*, 5 U. PA. J. CONST. L. 219 (2003).

6. Significant scholarly attention has considered the constitutional place of aliens through the modern era, in large part because the doctrine here is so ostentatiously out of step with prevailing constitutional values. *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984). Nonetheless, as Neuman observes, "[i]mmigration law has become an isolated specialty within American law, where normal constitutional reasoning does not necessarily apply." NEUMAN, *supra* note 2, at 13; *see also* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000) (casebook devoting considerable attention to constitutional law relating to Native Americans, the territories, and aliens).

7. For a historical account of the entangled constitutional status of all three groups, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEXAS L. REV. 1 (2002).

circle has been drawn so as to qualify the inclusion of these groups. Scholars are now taking aim at these status differentials, setting the stage, perhaps, for the next chapter in the rights revolution.

Aleinikoff's work is central to this emerging discourse,[8] and *Semblances of Sovereignty* skillfully distills the doctrinal contradictions of constitutional subordination. In Aleinikoff's view, citizenship supplies both the explanation for and the answer to this subordination. Citizenship has been a powerfully equalizing force in the American constitutional tradition for those within the circle. Insofar as rights have been made contingent on citizenship status, however, those outside are left without constitutional armor. Aleinikoff suggests a reconception of citizenship, extending core constitutional status to those for whom citizenship is not a constitutional entitlement (namely, Native Americans and territorial residents) as well as to some who are not citizens at all (permanent resident aliens). Thus redrawing the line would roll back the plenary power doctrine, a strategy of constitutional avoidance under which the judiciary has demurred to political authorities in the treatment of these groups. At the same time, the new citizenship would respect self-determination norms in the constitutional recognition of such subnational groups as "sovereign" tribal and territorial communities. This vision, in the end, "figure[s] citizenship as commitment, not privilege, and view[s] sovereignty as empowerment, not domination" (p. 10).

With citizenship as a baseline, the argument is a powerful one. But one might at a more fundamental level question the continuing utility of that baseline and of citizenship as an institution. An emergent body of "postnational" scholarship is challenging citizenship and the nation-state as delimitations of human community, posing instead diasporas, social movements, and other nonstate groupings as competing locations of identity and governance. Aleinikoff brackets the postnational assault; he is seeking to transform citizenship, not transcend it (pp. 9-10). In this respect, the analysis presents more of an exercise in recentering citizenship than — as claimed — one of "decenter[ing]" it (p. 179). But the postnational challenge is unavoidably implicated in any attempt to deploy citizenship as an institutional vehicle. Even as an expansive and benign quantity, Aleinikoff's vision of citizenship may suffer the same problems as its exclusionary predecessors:

8. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENT. 9 (1990); T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197 (2000). Aleinikoff is also a major figure in the study of citizenship law and policy, heading up a multivolume study for the Carnegie Endowment for International Peace. *See* CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION (T. Alexander Aleinikoff & Douglas B. Klusmeyer eds., 2002); CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) [hereinafter CITIZENSHIP TODAY]; FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000).

however the circle is drawn, many are left out, including many with deep attachments to the national community. To the extent, on the other hand, that the circle is drawn ever more widely, the tie that citizenship is understood to represent grows ever thinner. This dynamic would seem to present an inescapable dilemma for the institution of liberal citizenship, and perhaps for liberalism itself.

I. LIBERAL NATIONALISM AND EQUALITY

The notion of equal citizenship has been central to the dominant liberal vision of America, a vision that (the label's political implication notwithstanding) spans the political mainstream.[9] Equality is the metric of constitutional policy. There is perhaps no more effective way to tar a political position than to link it with some putative "second-class citizenship." This reflex, of course, has deep roots in American constitutional tradition, back to the express constitutional prohibition on titles of nobility.[10] More recently it was a central theme in the civil rights movement. The extension of citizenship by itself, accomplished after the Civil War, meant nothing insofar as some citizens faced continuing legal subordination. But the cause remained citizenship oriented, focused on vindicating rather than reframing the equal-citizenship norm. In this account, *Brown v. Board of Education* was broadly speaking a case about citizenship (p. 39). Indeed, Aleinikoff locates citizenship at the center of Warren Court jurisprudence. Vaunted as "the right to have rights,"[11] citizenship became the vehicle for expanding constitutional entitlements. The status of citizenship was itself afforded enhanced judicial protection, as the Court constrained the government's power to terminate citizenship against an individual's will.[12] Citizenship also became a portable status, in the

9. As Aleinikoff writes elsewhere, citizenship is "a kind of neutral social glue" that appeals to both the political left and right. "The concept is identified with a set of shared values — liberty, equality, and tolerance — that stand above racial, economic, and social groups." T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1689 (2001).

10. U.S. CONST. art. 1, § 9 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."). Naturalization applicants are still required to renounce titles of nobility as a condition of acquisition of U.S. citizenship. *See* 8 U.S.C § 1448(b) (2003).

11. *See* Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

12. *See* Trop v. Dulles, 356 U.S. 1 (1958) (finding use of expatriation as punishment inconsistent with Eighth Amendment protections). Although a sharply divided Court in *Perez* upheld the government's power to expatriate citizens for undertaking various voluntary acts even where such acts were not specifically intended as renuciatory, over an agitated dissent by Chief Justice Warren, that decision was overturned a decade later in *Afroyim v. Rusk*, 387 U.S. 253 (1967).

sense that associated rights traveled with the citizen regardless of location.[13]

As others have recognized,[14] the Court's citizenship strategy succeeded in elevating the place of those who had been subordinated within the community. But almost by its terms, citizenship could not do the same work for those lacking the status. In Aleinikoff's view, this explains the Warren Court's failure to advance significantly the rights of aliens[15] — a ball moved forward only once the citizenship theme had been abandoned by the Burger Court.[16] Aleinikoff suggests that the Court's citizenship discourse may also have impeded any inclination to reverse the *Insular Cases* — under which only "fundamental" constitutional rights were held to apply in "unincorporated" territories[17] — owing to the anomalous, nonconstitutional citizenship status of those born in the territories.[18] Likewise with Native Americans, whose citizenship had also only been secured by statute;[19] "the Court may have believed that Indians would become full citizens when they cast aside their dependent status and took their place among other citizens of the United States and the states in which they resided" (p. 52). Moreover, in the Native American context, the equal-citizenship principle provided no clear answers, insofar as tribal autonomy and antisubordination norms could conflict. Where incor-

13. *See* Reid v. Covert, 354 U.S. 1 (1957) (finding Bill of Rights applicable to extraterritorial U.S. government prosecutions of U.S. citizens).

14. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Kenneth L. Karst, *The Supreme Court 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

15. *See* pp. 47-49; *see also, e.g.*, Boutilier v. INS, 387 U.S. 118, 123 (1967) (upholding immigration bar on the entry of homosexuals into the United States as against vagueness challenge; "[t]he constitutional requirement of fair warning has no applicability to standards . . . for admission of aliens to the United States").

16. The Burger Court arguably advanced the position of aliens, at least outside of the immigration context, most notably by designating alienage as a "suspect classification" that triggered heightened scrutiny of state laws as against equal protection challenges. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

17. *See* Torres v. Puerto Rico, 442 U.S. 465 (1979); Balzac v. Puerto Rico, 258 U.S. 298 (1922); Downes v. Bidwell, 182 U.S. 244 (1901); *see also* Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155 (1899) (devising the incorporated/unincorporated distinction).

18. Pp. 49-53; Jones Act, ch. 45, 39 Stat. 951 (1917) (codified at 8 U.S.C. § 1402 (2000)) (extending citizenship to persons born in Puerto Rico). Aleinikoff observes that perfecting the constitutional status of territorial residents "might well have become fertile ground for the Warren Court's citizenship project"; he speculates that the failure to plough may have owed to a "preoccup[ation] with the race question and the expansion of rights against the states." Pp. 49-53. Given the opportunity, the Warren Court failed to cut back on the *Insular Cases*. *See Covert*, 354 U.S. at 14.

19. *See* Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b) (2000)) (extending citizenship to all Native Americans born within the territorial United States); Elk v. Wilkins, 112 U.S. 94 (1884) (finding members of Native American tribes not within the Citizenship Clause of the Fourteenth Amendment).

poration of the Bill of Rights made sense as against the states, for example, it raised potentially more troublesome issues as against tribal self-government.

The result has been a sort of constitutional limbo for all three groups, the common doctrinal strand being the plenary power doctrine. Under plenary power, the courts have passed on their usual constitutional review functions, and the political branches are left free to act unchecked by anything more than the most cursory judicial oversight. Plenary power has no doubt reduced the constitutional position of these groups, for it effectively takes the Constitution off the table, at least as a judicial starting point. It also deprives them as communities of a potential institutional ally in their dealings with the political branches. In the context of rights, it means, for instance, that differential federal benefits schemes more readily withstand constitutional challenge. Puerto Ricans are denied some benefits programs altogether and face lower benefit scales in others;[20] many aliens, even legal resident aliens, remain ineligible for certain benefits even as cuts from the 1996 Welfare Reform Act have been restored.[21] Native American tribes and Puerto Rico have also faced various constraints on their self-government capacities. On this score, Aleinikoff highlights the failure to afford Native American tribes jurisdiction over tribal nonmembers present in reservation territory (pp. 99-121). Plenary power takes on perhaps its harshest guise with respect to the place of aliens in immigration proceedings. Here the Court has — at least until very recently — been baldfaced in denying its institutional competence.[22] Due process and equal protection have midget status in this jurisprudence, stuck in a late nineteenth-century analytic deeply antithetical to modern constitutional values.

Against this backdrop, Aleinikoff argues for abandoning the plenary power doctrine and for readjusting the status of these constitutionally marginalized communities and their relationship with the national government. Residents of Puerto Rico and legal resident

20. *See* p. 78. Although Aleinikoff highlights these disparities, it should be noted that differentials are also found in welfare benefits as among the states. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 494 (1999) (describing variations in welfare benefit levels).

21. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 1305 (1996) (denying noncitizens certain federal benefits); City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999) (upholding denials against due process challenge); *see also* MICHAEL FIX & JEFFREY PASSEL, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS (Urb. Inst. Discussion Paper No. 02-03, 2002) (delineating continued impact of denials notwithstanding restoration of some benefits).

22. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned."). Although permanent resident aliens have been afforded procedural due process protections, *see* Landon v. Plasencia, 459 U.S. 21 (1982), they have been denied a host of other significant rights, on the theory that deportation comprises a civil proceeding, not a punishment. *See, e.g.*, Schuck, *supra* note 6, at 24-27.

aliens should be eligible for federal benefits on par with nonterritorial citizens (p. 80). Resident aliens should enjoy expanded procedural constitutional protections in immigration proceedings; Aleinikoff suggests that substantive due process, completely absent from the immigration context, should preclude the deportation of long-term resident aliens (p. 175). As for Puerto Rico and the tribes, Aleinikoff calls for their empowerment as distinct communities, so that relevant federal decisionmaking is not a matter of diktat but rather of negotiation. In Aleinikoff's view, the compact emerges as the appropriate model for governance here, incorporating notions of mutual consent (p. 90). On the tribal side, this critically includes the granting of more completely sovereign territorial jurisdiction for tribal authorities on reservations.

On its own terms, most of this is well taken. In the immigration context, few scholars argue for the perpetuation of plenary power. Even the Court seems finally to have taken the cue, with two 2001 decisions that could mark the first signs of a serious retreat from the doctrine.[23] It is also in the immigration context that the end of plenary power would have the clearest consequences. With the participation of the judiciary, the rights of aliens would be more expansively conceived. (As Aleinikoff points out, Congress does already extend important protections to aliens, even in the absence of judicial command.) Having stayed off the playing field for so many years, the courts would no doubt take some time to regain their footing, and doctrinal instability would be the medium-term result. But there is no significant competing rights value complicating this process. Extending aliens greater rights may have to be contextualized — not every visa denial, for instance, may merit judicial review — but the workout is not so different than it is with respect to the extension of other government benefits.[24]

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23. *See* Nguyen v. INS, 533 U.S. 53 (2001) (applying standard equal protection analysis in upholding gender differential in naturalization provision); Zadvydas v. Davis, 533 U.S. 678 (2001) (interpreting Immigration Act provision as not authorizing the indefinite detention of removable aliens so as to avoid constitutional doubt); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365 (2002) [hereinafter Aleinikoff, *Detaining Plenary Power*] (describing significance of 2001 cases); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (same). The Supreme Court's more recent 5-4 decision in *Demore v. Kim*, 123 S. Ct. 1708 (2003), concededly casts doubt on this trajectory. *Demore* upheld a measure providing for the mandatory detention of certain aliens in removal proceedings, with an opinion reaffirming core premises of plenary power. *See id.* at 1717 ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."). The *Zadvydas* decision stands nonetheless as evidence that plenary power over immigration is now at least contested, in holding that the immigration power is subject to "important constitutional limitations." *See Zadvydas*, 533 U.S. at 695; *see also* Aleinikoff, *Detaining Plenary Power*, *supra*, at 366 ("[This] laconic, astonishingly casual, phrase, may represent a radical shift, a turning point" in immigration law.).

24. *Mathews v. Eldridge* would provide a starting point for such a contextualized analysis, at least with respect to procedural due process. *See* 424 U.S. 319 (1976) (balancing inter-

Not so with the territories and tribes. These contexts implicate competing community interests in self-governance. Take questions of tribal jurisdiction over nonmembers. In the name of plenary power, the Supreme Court has as a general matter recognized tribal jurisdiction over non-Native Americans only to the extent Congress has expressly extended it.[25] The Court has on this basis rejected criminal jurisdiction over nonmembers in all cases. On the one hand, this is obviously limiting of self-government, for it makes tribal law incompletely effective on tribal land, even when tribal members are implicated. On the other hand, there are nontrivial arguments against extending jurisdiction over individuals who enjoy no participation rights in the relevant polity. Whether one characterizes them as race-based polities or, more politely, as "communities of descent," individuals lacking the requisite ancestry are absolutely barred from membership.

This gives rise to what Aleinikoff acknowledges to be a possible democratic deficit, an argument that has figured in the Court's orientation on this issue.[26] But Aleinikoff ultimately argues for the full recognition of tribal territorial jurisdiction over nonmembers. He first plays the sovereignty card, to the tribes' benefit. Aleinikoff finds his title line, "semblance of sovereignty," in the current state of Native American law (p. 98). He asserts that contrary to this jurisprudence, a "common-sense notion of sovereignty" includes authority to regulate all reservation residents (p. 100); sovereignty "must at least begin with the assumption that all persons within the sovereign's borders are subject to its jurisdiction"(p. 145). Aleinikoff here draws on well-established national and international law rules of territorial jurisdiction. The Californian or Italian who visits New York is of course subject to substantive criminal jurisdiction for any conduct undertaken therein, even though she will not have participated in the formulation of the legal regime to which she is subject.

That doesn't completely answer the democratic process objection. The Californian who establishes residence in New York is afforded a political voice in New York. Aleinikoff here tries to situate tribal membership rules in the context of national citizenship rules, highlighting other countries whose citizenship operates on a descent

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ests of beneficiary and government, along with the additional accuracy resulting from additional process, in assessing procedural due process in the context of denied government benefits); Landon v. Plasencia, 459 U.S. 21 (1982) (applying *Eldridge* in limited context of returning permanent resident alien). The consequences of deploying substantive due process are less easily calculated, though one could expect the courts to be at least as restrained in applying it to immigration and alienage as they are in other contexts.

25. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

26. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 693 (1990) (denying tribal criminal jurisdiction over non-Native Americans on grounds that it would result in "trial by political bodies that do not include them").

basis. The tribes are legitimated, in this view, as just another among many "intergenerational polities" (p. 144), which "help[s] allay concerns about race-based governance" (p. 146). This ignores the fact that descent is a nonexclusive mechanism for citizenship allocation; naturalization is now possible in all countries, and there is a trend towards adoption of the *jus soli* rule under which most or all persons born in national territory become citizens by that fact alone, regardless of parentage.[27] The Italian who moves to New York as a lawful permanent resident will most likely be eligible for naturalization after a period of five years; her children born in New York will have United States citizenship at birth. Tribal membership in that important respect is unlike the citizenship practices of any state. Aleinikoff ultimately answers the democratic deficit objection by highlighting the Indian Civil Rights Act,[28] under which most of the Bill of Rights are applied to the tribes, and makes a suggestion for providing alternate channels for nonmember participation in tribal governance (p. 148). And while Aleinikoff would extend tribal territorial jurisdiction to include jurisdiction over nonmembers, he would maintain federal power over the reservations to enforce environmental protection, health, and labor standards.

This is all sustainable as a policy matter. How citizenship provides the metric is not as obvious. The resulting scheme "decenters" national citizenship to the extent that it confers a special status on some American citizens (tribal members) and refuses to adopt a "leveling" model of citizenship that denies the legitimacy of these and other differentials.[29] But this is not so much a question of decentering citizenship as one of conceiving citizenship to account for difference, an example of liberalism meeting multiculturalism halfway. In this strain, citizenship promotes cultural self-determination at the same time that it continues to provide the common bond of the national community.[30] Interpreting citizenship to facilitate group autonomy becomes a way of saving citizenship as an institution. The implication is that if citizenship does not move to accommodate group difference, it may become unstable. Aleinikoff is in this respect protective of the institution, and the exercise is a retreat from thicker, cultural conceptions of citizenship to a more defensible perimeter.

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27. *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY, *supra* note 8, at 17.

28. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2000).

29. It is in this guise, Aleinikoff argues, that citizenship has been revived by the Rehnquist Court as a vehicle for resisting multiculturalism and other group-oriented distinctions, including diversity preferences. *See* pp. 7, 66-70.

30. *See, e.g.*, Joseph Raz, *Multiculturalism: A Liberal Perspective*, DISSENT, Winter 1994, at 67.

II. INTERROGATING CITIZENSHIP

In this light, the postnational challenge becomes unavoidable.[31] Citizenship may not provide the answers; it may not even provide the starting point. The interrogation can be undertaken from inside and outside the institution, considering matters of both inclusion and exclusion. Both lines help locate the place of citizenship in the face of globalization, and point, perhaps, to the possible demotion from its primacy as a marker of human community.

On the inside, Aleinikoff takes as a given that tribal residents of the reservations and residents of Puerto Rico should remain American citizens. This assumption is an unsurprising one. It is a basic liberal tenet that a country's resident population should be more or less congruent with its citizenry.[32] Insofar as these communities have expressed a preference to remain a part of the United States, moreover, the persistence of their national citizenship is sanctioned by liberalism's autonomy values, under which individuals are extended maximum powers freely to shape their own identities. On this score, Aleinikoff is careful to highlight the apparent lack of any significant support for independence among Puerto Rican voters. As a practical and policy matter, of course, there are no serious moves to modify the regime under which Native Americans and Puerto Ricans are extended citizenship at birth.

But this premise can no longer go unexamined. There are contexts, first of all, in which the congruency thesis and autonomy norm are being put into opposition. Some Puerto Ricans have attempted to renounce their U.S. citizenship while remaining resident in Puerto Rico.[33] A serious argument is being made by Native American

31. In anthropologist Arjun Appadurai's conception, postnationalism posits the emergence of "formations for allegiance and identity" beyond the nation state; "the steady erosion of the capabilities of the nation state to monopolize loyalty will encourage the spread of national forms that are largely divorced from territorial states." ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 169 (1996); *see also* YASEMIN N. SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994) (deploying the term "postnational" to describe global context in which rights are no longer contingent on citizenship).

32. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE 62 (1983). It is this premise that points liberals to a low threshold for naturalization. *See id.* ("]E]very new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship."); *see also, e.g.*, RAINER BAUBÖCK, TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION 92 (1994) (arguing for naturalization at option of resident alien; "[t]he capacity to be a citizen of a liberal democracy must in principle be ascribed to any person who has not given strong evidence of the contrary in speech or deeds"); Joseph H. Carens, *Why Naturalization Should Be Easy: A Response to Noah Pickus*, *in* IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 141 (Noah M.J. Pickus ed., 1998).

33. *See* Lozado Colon v. United States Dep't of State, 2 F. Supp. 2d 43 (D.D.C. 1998) (refusing to review Secretary of State's failure to issue certificate of loss of nationality to individual seeking to renounce U.S. citizenship while remaining resident in Puerto Rico).

theorists that extending U.S. citizenship to tribal members at birth is destructive of Native American identity.[34] Insofar as these sentiments gain wider currency, they will test liberal theorists and policymakers. Indeed, liberalism will be hard pressed to supply a reason why individuals who no longer wish to be identified as American should not be allowed to actuate that preference. The response can't be that individuals will use a renunciation option to shirk the obligations of citizenship, because — with the minor exception of jury duty — there aren't any.[35] Nor can the argument concern rights where the individual has opted to forego them (and in any case the additional rights of citizenship are also minimal, with the exception of locational security[36]). Citizenship is distilled to an expression of identity. Given that the rejection of the national identity does not directly burden others, it is not clear on what basis an exit option could be refused.[37]

Even if few individuals were to exercise the option, the possibility puts the citizenship premise into play, creating some affirmative burden to describe and justify citizenship's content. If citizenship is about identity, a conception to which Aleinikoff assents,[38] then what is

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34. See, most notably, Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

35. Permanent resident aliens shoulder the two major historical obligations of citizenship — taxes and military service — on essentially the same basis as citizens. *See* 26 U.S.C. § 7701(a)(30) (2003) (equating citizens and residents for income tax purposes); 50 U.S.C. app. § 453 (2003) (providing that all males residing in the United States must register with Selective Service); 50 U.S.C. app. § 454(a) (2003) (providing that all persons subject to registration requirement are liable for military training and service); 26 CFR § 1.1-1(b) (2003) (income tax imposed on resident aliens).

36. That is, citizens are immune from removal from U.S. territory, where noncitizens can be subject to deportation. For most aliens, however, this is not a direct burden, insofar as the grounds for removal (and its enforcement) are limited. A lack of political power is typically also asserted as a disability of alienage, and it is true that with minor exceptions aliens lack the franchise. But this does not by any means translate into a lack of political power. Resident aliens are permitted to make campaign contributions. *See* 2 U.S.C. § 441(e) (2003) (excluding permanent resident aliens from prohibition on campaign contributions by foreign nationals). They also exercise political influence through ethnic communities, unions, corporations, and other elements of civil society. One manifestation of the power that even undocumented aliens are able to bring to bear are the periodic amnesties extended to those lacking legal immigration status. *See, e.g.*, Nancy Cleeland, *Labor Enlists Mexico as Amnesty Ally*, L.A. TIMES, July 19, 2001, at C1.

37. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 122-25 (1985) (calling for facilitated voluntary expatriation even where United States remains place of residence).

38. Aleinikoff acknowledges this implicitly by asserting that resident aliens should be entitled to almost all the rights of citizenship. *See* p. 179 (drawing "a picture of overlapping circles, one constituted by citizens who 'belong to America' and another that includes persons who are subjects of U.S. sovereign power and the beneficiaries of rights under the laws and Constitution of the United States"). As Aleinikoff writes elsewhere in attempting to reconcile multiculturalism with nationalism,

> What the *unum* has a right to ask of the *pluribus* . . . is that groups identify themselves as American. . . . [T]he central idea is that a person be committed to this country's continued

left of citizenship when the identity is abandoned? Given their group historical experience as part of the United States, Native Americans and Puerto Ricans might well not share a "sentiment of belonging to the land and people of [the American] national state," and might well not care to participate in it as "an ongoing historical project."[39] As rational actors, tribes and territories may wish to maintain their status as part of the United States, insofar as it brings net inflows of public funds and permits unrestricted access to United States territory.[40] Those instrumental group interests, however, would not seem to evidence any sentimental tie to the national community.

Of course, in the liberal perception at least, the tribes and Puerto Rico in fact sustain strong sentimental ties to the United States. One could not deny the self-assertion of such ties, as a matter of autonomous identity, and insofar as there is substantial territorial and familial intermixing, one would expect the ties to be significant. But from here one can launch the external problematization of the citizenship concept. For there are many other individuals and groups which now maintain substantial ties to the United States, also through territorial and familial intermixing.[41] And yet, of course, many of these individuals and groups are excluded from the circle of citizens, those ties notwithstanding. It is all very well to argue that residents of Puerto Rico should receive welfare benefits at the same level as residents of

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flourishing and see himself or herself as part of that ongoing project. The allegiance, the common identification, need not be exclusive, but it must be paramount.

T. Alexander Aleinikoff, *A Multicultural Nationalism?*, AM. PROSPECT, Jan.-Feb. 1998, at 80, 85.

39. P. 178. In both cases, of course, absorption into U.S. territory resulted from military conquest. A solid argument (albeit transhistorical) can be made that Native Americans were the victims of genocide on the part of U.S. authorities. *See, e.g.*, Rennard Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986). Nor was the acquisition and maintenance of U.S. control over Puerto Rico driven by benign motives. *See, e.g.*, Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 373 (describing race-based justifications for the initial terms of control and theory of "incorporation").

40. *See* Ángel Ricardo Oquendo, *Puerto Rican National Identity and United States Pluralism*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 315, 316 ("Most Puerto Ricans prefer to continue or strengthen rather than cut off their bond to the U.S. federation primarily in order to secure monetary support from and free access to the United States.").

41. As Aleinikoff points out, forty percent of all Puerto Ricans live in the mainland United States. P. 92. But similar figures can be found among other nations, significant portions of whose citizens are now found in the United States. For example, an estimated 42,000 natives of Grenada are resident in the United States. *See* U.S. Bureau of the Census, *March 2000 Current Population Survey*, *available at* http://www.census.gov/population/socdemo/foreign/ppl-145/tab03-4.pdf. Grenada itself has a population of 89,000; one can thus (inexactly) assert that a third of all Grenadians live in the United States. In the same order of magnitude, one finds for instance Guyana with more than 200,000 natives resident in the United States as against 700,000 back home, and Belize, for which the figures are 60,000 against 260,000. Almost eight percent of all Mexican natives live in the United States, *see id.*, a figure that no doubt rises substantially when calculated for certain subnational Mexican units with a large immigrant presence in the United States.

the fifty states. But why is it that Mexican citizen residents of Juarez receive nothing? They are likely to have deep connections to the United States, including multiple family ties, and they will certainly have a stake in American policymaking at all levels, local (El Paso), state (Texas), and federal. They are also likely to have "common sympathies" with the American national community, and may even have a sense of shared political antecedents, particularly as defined by U.S. citizens of Hispanic origin. They surely share a common popular culture. And yet they are denied inclusion as citizens.

This critique accepts citizenship as consequential. Rather than asking why anyone would be interested in citizenship, it asks how one can justify exclusion from citizenship's benefits. The answer, once again, is hardly obvious, although most would reflexively defend the practice of such exclusion. If an individual wants to be a part of that ongoing historical project, on what grounds can she be denied participation? It is, after all, a core tenet of the American creed that belonging is a matter of will rather than of race, culture, or religion.[42] This dominant universalist conception of American citizenship does not readily supply a basis for excluding those who would like to join.

In the past, territorial location did a lot of unheralded work in making this universalist orientation possible. America was a project that anyone could join — but first you had to get here. Otherwise a status readily acquired, the most formidable threshold to naturalization has always been residency.[43] In the old world, this limitation was justified on many fronts. In the absence of significant immigration controls, residency was not legally obstructed. In a world in

42. *See, e.g.*, Philip Gleason, *American Identity and Americanization*, *in* CONCEPTS OF ETHNICITY 57, 62 (William Petersen et al. eds., 1982) ("the universalist ideological character of American nationality meant that it was open to anyone who willed to become an American"). This universalism is stock-in-trade in American political discourse. *See, e.g.*, Inaugural Address of President George W. Bush, 37 WKLY. COMP. PRES. DOC. 209 (Jan. 26, 2001) ("The grandest of [American] ideals is an unfolding American promise that everyone belongs, that everyone deserves a chance, that no insignificant person was ever born. . . . America has never been united by blood or birth or soil. We are bound by ideals that move us beyond our backgrounds, lift us above our interests, and teach us what it means to be citizens."); Presidential Commencement Address at Portland State University, 34 WKLY. COMP. PRES. DOC. 1120, 1124 (June 13, 1998) (President Clinton asserting that regardless of where a person comes from, "if you believe in the Declaration of Independence and the Constitution, if you accept the responsibilities as well as the rights embedded in them, then you are an American").

43. This, of course, leaves aside America's glaring historical racial eligibility requirements for naturalization, not fully repealed until 1952. *See generally* IAN F. HANEY-LÓPEZ, WHITE BY LAW (1996) (describing history of racial barriers to naturalization). This also brackets elements of the citizenship regime that discriminated on the basis of gender. *See, e.g.*, CANDICE L. BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998). As Rogers Smith observes, "for over 80 percent of U.S. history, American laws declared most people in the world ineligible to become full U.S. citizens solely because of their race, original nationality, or gender." ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 15 (1997).

which democracy was an outlier, presence in the United States was a necessary condition to the assimilation of constitutional values and cultural understandings. From abroad, one could not likely participate, in any substantial way, in the affairs of the national community. In short, it would not have been possible to "belong" while somewhere other than on American soil.

Today, territorial location supplies a less effective limitation on ostensibly universalist theories of American citizenship. The costs of mobility have declined precipitously. Global travel is now within the reach of many; for most, securing passage hardly requires selling the proverbial farm. The problem is not so much getting here, for the border has become ever more porous (to illegal and legal immigrants alike), as it is establishing the necessary legal permanent residency. In contrast to prior great migrations, this leaves the quandary of substantial populations of out-of-status aliens, deprived of significant rights but also ineligible to naturalize. Nor is presence a critical premise to belonging, however defined. Democratic values are now pervasive (if not always respected), so that one can assume familiarity with their fundamentals regardless of location. Indeed, the familiarity of many nonresident noncitizens far surpasses the basic principles of American constitutionalism, to include the nitty gritty of American politics.[44] All the more so with American popular culture. American television stations are now a standard element in foreign cable packages (and not just in Europe);[45] American movies and entertainment groups dominate global box offices;[46] American iconography is near universal. In these respects, one can be an "American" without ever setting foot on United States territory. Assimilation is occurring on a nonterritorial basis.

This external acculturation is girded by other forms of connection to and stakes in the United States. Physical proximity may make Juarez the easy example, but as the notion of borderlands becomes increasingly untethered from territorial location, it is not only those at the frontiers that will have significant interests in this country. The communications and travel revolutions have spawned new diasporas. Unlike their historical precursors, which were driven by exile and despair, the new diasporas reflect the possibilities for persistent, territorially unbounded communities, ones which transcend national

44. *See, e.g.*, Barry Newman, *Foreign Legions: Lots of Noncitizens Feel Right at Home in U.S. Political Races*, WALL ST. J., OCT. 31, 1997, at A1 (noting phenomenon of "DOA" — Democrat on Arrival — among immigrants to the United States).

45. *See, e.g.*, Thomas L. Friedman, *Global Village Idiocy*, N.Y. TIMES, May 12, 2002, § 4, at 15 (reporting the Fox News is now part of the Djakarta cable television package).

46. *See, e.g.*, DAVID HELD ET AL., GLOBAL TRANSFORMATIONS 355 (1999) (statistics showing global dominance of film industry by U.S. entities); *id.* at 359-60 (same, for television industry).

borders and spatial distance.[47] As a country of continuing in-migration, these communities are of course represented in the United States. But it is not only those members who are present that will have interests here. I may be a resident of New Delhi and citizen of India, but if I have siblings, aunts, uncles, and cousins in the United States, work for an American-based company and own stock in others, and am subject to various elements of American law, I have a stake in America. I am in some sense a part of the American national community.

But that is a position that the citizenship binary cannot comprehend. Liberal nationalist attempts to prop citizenship up invariably take aim at the deprivation of rights of those territorially present. Aleinikoff's call for the extension of near-complete constitutional rights to permanent resident aliens is an example of this strategy.[48] Thus widening the circle of rights (effectively widening the circle of citizens, though not by means of the status itself[49]) will not, however, resolve the exclusionary aspects of citizenship. The approach is problematic even if one accepts locational determinism. Bringing permanent resident aliens into the fold leaves hanging, most notably, the status of undocumented immigrants, whose constitutional status Aleinikoff does not address. Some — but by no means all — undocumented aliens have been territorially present for long periods of time, and have accrued the same sort of obvious stake in continued residence as have lawful permanent resident aliens. And yet it is not easy to extend the circle to them on the basis of territorial presence; for many, the presence will be episodic or transient. Indeed, the presence of many permanent resident aliens is also episodic (as it is for an increasing number of citizens, who move abroad while retaining their citizenship status[50]). It is inconsistent with liberal paradigms of rights and democracy to leave the long-present undocumented alien without secure legal status, but it's not clear how to adjust the citizenship paradigm to address the challenge.

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47. *See, e.g.*, APPADURAI, *supra* note 31, at 158-77 (1996); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001).

48. *See* OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (1999) (calling for elimination of all social disabilities imposed on aliens within the United States); Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L. J. 1285 (2002) (posing the "citizenship of aliens"); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 208-34 (1983) (setting forth the "circles of membership" model in which resident aliens are afforded almost all rights enjoyed by citizens).

49. *See* p. 172 ("[O]ne can understand constitutional membership as extending to all persons within the jurisdiction of the United States even if the document privileges citizenship in certain respects.").

50. Short of becoming a head-of-state of another nation, as a matter of law and practice U.S. citizenship will not be terminated save where termination is specifically intended by the citizen (that is, where it is expressly renounced). *See* Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1454-55 (1977).

Nor can citizenship possibly process the status of those who do not venture into United States territory at all but who have ties to it nonetheless. It is not clear why territorial location should be determinative of rights. It is true that physical presence in the United States makes more likely the accretion of sentimental and other stakes in America, but as suggested above, one's placement relative to national frontiers no longer necessarily corresponds to the existence or magnitude of such interests. Insofar as stake and identity emerge on a nonterritorial basis, it is difficult — at least when one starts from the liberal principles — to support the denial of rights and benefits to those who just happen to be on the wrong side of the border. But of course citizenship cannot supply the answer to this challenge, for there would be no practical way of sorting out the spectrum of nonterritorial stake and of deciding at what point a nonterritorially present individual would qualify.

This poses a challenge not only to citizenship but to liberalism more generally. In the end, liberalism is premised on a society that is territorially defined, on a group of residents within a defined space who share an equal voice in their own territorially based self-government. In this sense, liberalism is contingent on the persistence of sovereignty as both a legal and social construct. Sovereignty made states all-powerful in their own realm, with correspondingly severe limitations on their capacities in the realm of others. Sovereignty, in short, made for the primacy of national boundaries, which in turn made credible liberalism's assumption of territorial closure.[51] Aleinikoff observes that "[w]ithout a notion of citizenship, sovereignty has no home" (p. 169). But the reverse proposition may be more sustainable; it may be sovereignty that gives citizenship a home. Indeed, sovereignty does a lot of work for Aleinikoff. Where he gives virtually no substantive content to citizenship, sovereignty echoes around the argument. In distinguishing Native American tribes from foreign nations, for instance, Aleinikoff asserts that the United States "has no power to impose legal rules within foreign borders" (p. 141). In justifying widening the circle of rights-holders to include resident aliens, he speaks of establishing a "political regime that . . . justly rules over the territory and inhabitants of the United States."[52] These sovereignty-based understandings quietly support an analytical framework that stops at the water's edge.

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51. Rawls, most notably, assumed a society in which entry was only through birth, exit through death. *See* JOHN RAWLS, POLITICAL LIBERALISM 12 (1993).

52. P. 183; *see also* p. 4 (defining sovereignty to "mean the supreme legal authority in a national state," and national state "to mean a political organization exercising sovereignty over a bounded territory"); p. 193 (describing citizenship as "an important joint venture, on a defined piece of territory").

But sovereignty has become at the least a more elastic proposition, if it remains useful at all, and the tenet of exclusive, delimited territorial rule is increasingly obsolete. The United States regulates a growing quantum of conduct that occurs in foreign territory, just as there are now many entities (including foreign states and international institutions) that regulate conduct in the United States.[53] Aleinikoff himself deploys "flexible" notions of sovereignty to defend his vision of self-determination for Puerto Rico, appropriately suggesting that there may be space for "autonomous" entities within the American constitutional system.[54] But sovereignty is becoming flexible at the external, global level as well. The domains of various legal regimes, including national ones, no longer coincide with national boundaries. Indeed, many regimes transcend space altogether, in the sense that they are not territorially contingent. Without sovereignty, territorially insulated self-government becomes an impossibility, at least at anything beyond the local level. In the face of spatial integration, national governance must reach beyond national borders in order to be effective.

Unless those affected by the extraterritorial extension are given a full voice in decisionmaking, the result is something other than self-government on the basis of equality. After sovereignty, equality thus appears no longer to present a viable premise for governance. Equality requires boundedness,[55] but public governance can no longer be delivered on a bounded basis. Without equality, moreover, it is difficult to sustain democracy, at least not in its standard "one person, one vote" conception.[56] That is part of the initial constitutional quandary posed by the deprivation of federal voting rights for residents of Puerto Rico and territorially present aliens.[57] There is no

53. Antitrust regulation presents an example. *See, e.g.*, Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1 (1992). The United States increasingly applies its criminal law to activities occurring outside the United States, a necessity in an era of increasingly transnational criminal networks. *See, e.g.*, Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305 (2002) (describing growing body of transnational law in various areas of law).

54. P. 93; *see also* p. 5 (arguing for "understandings of sovereignty and membership that are supple and flexible, open to new arrangements that complement the evolving nature of the modern state"); p. 186 (highlighting recent international developments as demonstrating that "sovereignty is a relative, not an absolute, concept — layered and shared and complicated").

55. As Aleinikoff observes, in the context of describing Warren Court jurisprudence, citizenship is "not just a status that guarantee[s] equality," it is "a place where equality [can] exist." P. 56.

56. For an account questioning this standard metric of democratic process, see Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. (forthcoming 2003).

57. The status of residents of the District of Columbia presents another population that falls in a constitutional "anomalous zone," to use Gerald Neuman's felicitous phrase, *see*

clear liberal answer to this challenge, either.[58] Aleinikoff, among others, stops short of advocating federal voting rights for either group.

But it is tough to justify the denial of the franchise on liberal principles, especially to long-resident aliens. As noted above, territorially present aliens shoulder all significant obligations of citizenship, and are subject to the authority of the state. As a part of the governed, liberal axioms would hold, they should have an equal voice in the government. Liberal attempts to justify this political disability are either formalistic or circular. Owen Fiss asserts, for instance, that the political exclusion of aliens rests "on the idea that the nation is a community, not just a geographically bounded territory, and, like any such voluntary organization, this community requires rules of membership and vests the power of governance in those lawfully admitted to membership."[59] As an operative principle, however, that proposition would leave membership decisions unconstrained, and (to the extent it results in the exclusion of some territorially present individuals) stands in clear tension with the bedrock of self-government, defined as authority over a particular piece of territory. For his part, Aleinikoff doesn't explain head on why aliens should be excluded from the franchise.[60] One must extrapolate from his conception of citizenship as an "idea of belonging" (p. 178) that the lack of identity and commitment justifies the denial of political rights. But, again, it's not clear how that conforms with liberal premises of equal self-government and autonomous self-identification.

Questions at the constitutional margins, then, put the entire project into doubt. Liberalism seems incapable of rationalizing constitutional exclusion. Nothing short of actual universalism would resolve the contradictions of equality and self-governance inherent in such exclusion. And yet actual universalism would represent the death of American citizenship, for citizenship has no meaning in the absence of difference. So we are left with a citizenship based on something other than liberalism. Rogers Smith has shown us that citizenship's past was

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Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197 (1996). Although extended the right to vote in presidential elections under the Twenty-Third Amendment, residents of the District continue to lack direct representation in Congress. *See, e.g.*, Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (1999).

58. *See* Mark Tushnet, *Partial Membership and Political Theory*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 209, 220 (finding status of Puerto Rican residents at least "in tension" with liberal political theory, and possibly evidencing that "liberal political theory is only one of the traditions to which the United States is committed").

59. *See* FISS, *supra* note 48, at 19-20.

60. Indeed, it is only by implication that he rejects the federal franchise for aliens. *See, e.g.*, p. 193 ("]N]either the extension of rights nor novel political arrangements at the local level pose a risk to the robustness of national U.S. sovereignty.").

hardly liberal, the mythology of inclusion notwithstanding.[61] What of its future? Perhaps we had better devise adaptations to standard liberal formulas. Indeed, Aleinikoff himself contemplates innovative strategies for overcoming issues of exclusion. He suggests, for example, that nontribal residents of Native American lands be afforded some voice in reservation governance through nonvoting representation in tribal councils, a proposal oriented more to communitarian conceptions of political justice than individualistic liberal ones. The proposed compact-based relationships with the tribes and territories presents another model deviating from standard liberal approaches, which have difficulty processing political arrangements formally undertaken on a group basis.

III. THE AMERICAN ENDING

There remains the looming question of what remains of American citizenship once it abandons its liberal foundations. At the same time that Aleinikoff purports to decenter citizenship, he assumes its viability and desirability as an organizing principle of society. "[C]itizenship does and should matter" (p. 177). Aleinikoff effectively concedes a thin version of the institution: "Citizenship does not guarantee a common culture for Americans," he observes, "it provides the common calling of being American" (p. 195). But what exactly that common calling consists of, what it means to "belong to America," is left largely unexplored. There is the standard invocation of the national project,[62] but we are given no idea, beyond historical antecedents, of what distinctively defines that project. Multiculturalism, by itself, can hardly provide a bond insofar as it celebrates difference rather than commonality.[63] Perhaps most significantly, now that constitutional democracy represents a prevalent global norm, political culture no longer sets the American nation apart from others in a way that it clearly once did.[64] Michael Lind's new American ethnicity based

61. SMITH, *supra* note 43 (challenging historical, liberal accounts of U.S. citizenship practices).

62. Such explanations of national identity date back to John Stuart Mill, the original liberal nationalist. *See* J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 427 (1991) (observing that the strongest national roots are found in the "identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with incidents of the past"); *see also, e.g.*, ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 146 (1998) ("Above all, history can give a sense of national identity."); SMITH, *supra* note 43, at 496-97 (articulating concept of the "party of America," based on the nation's "rich and distinctive" history).

63. *See* APPADURAI, *supra* note 31, at 171.

64. For liberals, at least, political culture has bound Americans together at the same time that it set them apart from others. *See, e.g.*, MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 29 ("If the manyness of America is cultural, its oneness is political."); Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141, 1160

on the Easter Bunny, Santa Claus, Abraham Lincoln, and the Statue of Liberty[65] hardly seems sufficient to sustain a primary identity.

As the identity erodes, so too does the normative basis for citizenship and its inherently exclusionary features. Citizenship is not a self-justifying practice. Insofar as it is consequential, there must be some underlying basis for membership criteria. Territorial location may no longer supply an orienting point for membership decisions. Nor can the formality of citizenship by itself sustain a national community that rests on otherwise fraying bonds.

"If there is something new as the new century begins," writes Aleinikoff, "it is the ascendancy of citizenship" (p. 72). This may not hold true on the ground; as this Review has suggested, one might on the contrary assert its increasing instability and eventual demise. But whichever proposition prevails, *Semblances of Sovereignty* attests to the serious scholarly sights now being trained on citizenship and its constitutional place.

(2000) [hereinafter Karst, *The Bonds of American Nationhood*] ("If the ideal of the American nation persists, it does so in major part by virtue of its promise of universal legal rights.").

65. MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION 266 (1995). Karst's offering of various less prosaic cultural identifiers also seems increasingly difficult to sustain in the face of globalization. Historical American understandings of family, religion, and work, along with other "understandings and folkways," *see* Karst, *The Bonds of American Nationhood*, *supra* note 64, at 1147, are being assimilated into other traditions, so that they are no longer distinctively American. Never mind Santa Claus — surely a familiar figure to many foreign children — even such distinctive American pastimes as baseball and football may yet become transnational institutions. *See, e.g.*, Eric Fisher, *Going Global: Major League Sports Poised to Expand to Overseas Markets*, WASH. TIMES, Jan. 5, 2003, at A1.